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How to Steal a Trillion: The Uses of Laws about Lawmaking in 2001

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I. INTRODUCTION: LAWS DIRECTING LAWMAKING IN 2001

Regular congressional lawmaking processes require a bill not only to obtain bare majorities in the House and Senate, but also to complete various deliberative steps along the way. These steps can complicate, delay, and sometimes totally block a bill’s enactment. Such deliberative steps include the amending process on the House and Senate floor, and the process of conference after initial House and Senate consideration, which requires the conference product to pass both chambers. Especially in the last quarter-century, a common expectation is that major controversial bills of a non-consensus basis will face Senate filibuster. The filibuster threat forces these bills to garner supermajority support in the form of sixty votes for cloture in order to achieve passage. These deliberative steps have forced countless bills to moderate their positions toward consensus in order to achieve passage, or to fail to pass if not so moderated.

Recently, a new development has come to the forefront that undermines some of the checks and balances of the deliberative process: the rise of structural laws that facilitate the enactment of otherwise controversial non-consensus bills by sparing them from some of the

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4 Of course, in early 2001 Congress moved major education and energy legislation which the President supported vigorously, as well as campaign finance reform and patients’ bill of rights legislation which he somewhat supported. Like the tax cut, they involved strongly contested substantive issues. However, these bills were not moving through Congress so much on the
deliberative steps described above. The most important example of this phenomenon was President Bush's movement of a trillion-dollar controversial tax cut through Congress in early 2001. This measure passed without taking a consensus shape and without having the sixty Senate votes for cloture required to overcome determined resistance. The tax cut passed by the special means of invoking a law that facilitates the enactment process, over strong objections that such facilitation was not properly available for a bare tax cut.\(^5\) Similarly, also in 2001, the House moved to renew the major facilitating statute by which laws designed to implement future trade deals would receive "fast track" treatment.\(^6\) A final example from 2001 occurred when Congress disapproved a new workplace ergonomics rule, by invocation of a third such law for facilitating enactment of laws. That law facilitated the lawmaking process by making it much easier for Congress to disapprove a regulatory rule than would otherwise be the case.\(^7\)

In sum, each of three high-stakes struggles of 2001—budget, trade, and rulemaking review—occurred in the new cockpit of American lawmaking: laws about making laws. Hence, 2001 marked the epiphany of laws about lawmaking, culminating a quarter-century evolution that the author has been privileged to observe as former Solicitor of the House of Representatives and as the author of the treatise on congressional procedure.\(^8\) These laws about lawmaking now amount to a sub-constitutional structure by which Congress adjusts the process of lawmaking and thereby fine-tunes the overall operation of our legislative democracy. This article uses a generalizing perspective about these laws

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to decipher the mysteries of the actions of 2001 and to suggest reforms for improvement in the laws governing congressional deliberation.

Specifically, the article focuses on certain particular controversies of the highest interest, primarily the facilitation of the trillion-dollar tax bill. The tax-cut controversy turned on whether the facilitating law—the Budget Act's reconciliation provision—could properly be used only to facilitate deficit control legislation, or whether it could also be used to facilitate a mammoth bare tax cut. That dispute had been five years in the making, and it was so intense that once the bill's proponents had won, they angrily fired the Senate Parliamentarian for his expression of cautionary views on the subject. It was the first time that the umpire of congressional procedure had ever been sacked for one of his calls. The dispute has major continuing significance, for Congress may well use the same reconciliation system again for major controversial tax bills in future years.

Accordingly, Part II of this article starts with the background on the laws about lawmaking. Since the 1970s, Congress has created multi-
stage budget, trade, and rulemaking review processes to manage its major responsibilities without wholesale delegation or abdication of authority to the Executive Branch.\textsuperscript{13} In doing so, Congress had to stay within the lines marked by the Supreme Court’s decisions about the constitutional limits of laws modifying the lawmaking process, particularly \textit{Chadha} (1983)\textsuperscript{14} and \textit{City of New York} (1997).\textsuperscript{15} This article does not contend that either the ordinary, or the facilitated, procedures of Congress are unconstitutional; yet, while the struggles in 2001 were not over the constitutionality of the facilitation laws, this background of the history and jurisprudence in this area helps explain the path that was followed.\textsuperscript{16}

Parts III through V analyze, and propose reforms regarding, the pertinent developments in 2001 regarding the laws about lawmaking for budget, trade, and rulemaking review, respectively. These parts assess how laws about lawmaking operate on the levels of power, structure of congressional deliberation, and meaningful symbolism. Part III describes the largest fiscal lawmaking event of our time: the passage of the Economic Growth and Taxpayer Relief Reconciliation Act of 2001 ("EGTRRA"). This part details the dispute over whether the Budget Act’s reconciliation process, traditionally seen as machinery for facilitating deficit control, could be used to enact mammoth tax cuts.\textsuperscript{17} It analyzes closely the specific events related to the bill’s passage through

\textsuperscript{13} LOUIS FISHER, \textit{CONGRESSIONAL ABDICATION ON WAR & SPENDING} (2000).


the key last week of truncated conference processes in May 2001.\textsuperscript{18} It was at this point that reconciliation facilitated enormous and skewed tax cuts by a device that an observer termed “outright fraud.”\textsuperscript{19} In short, this part describes how to steal a trillion. It then discusses why the Senate should reform budget reconciliation to prevent what may otherwise be an inevitable recurrence of 2001’s excesses.

Part IV examines trade fast track developments of the past thirty years. In contrast to the purely domestic lawmakers exemplified by the Budget Act, the trade fast track facilities the implementation of trade agreements with other countries, serving as a necessary part of the two-level game in this context of international deal making.\textsuperscript{20} From 1974 to the present, the fast track has evolved as part of the process used by Congress to approve international agreements: from more reliance upon approval by Senate treaty-ratification to more reliance upon approval by enactment (by the House and Senate) of implementation laws. Specifically, the fast track statute facilitates the passage of such implementation laws.\textsuperscript{21} The fast track statute expired in 1994 without being renewed. In the ensuing half-dozen years, a high-stakes debate


\textsuperscript{20} For the classic paradigm in this context, see \textit{DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS} (Peter B. Evans et al. eds. 1993); Robert D. Putnam, \textit{Diplomacy and Domestic Politics: The Logic of Two-Level Games}, 42 INT’L ORG. 427 (1988).

raged between enthusiasts and skeptics over what form renewal should take. Year 2001, however, brought new developments. New reasons for renewal came from the global economic downturn and the September 2001 terrorist attack. While these events encouraged Congress in 2001-2002 to pass a fast track bill to boost trade negotiations, the theoretical issues about the proper design of the renewed fast track mechanism remained unresolved. Part IV draws on the sometimes-overlooked procedural background in this context to explore how Congress may combine some aspects of fast track treatment with some retained capacity to exercise, within limits, its own deliberative responsibilities over legislating. It is an unusually creative opportunity in which Congress can craft its own future processes, almost as if the Constitution’s Treaty Clause expired and Congress had to devise a new process of advice and consent to treaties.

Part V turns toward special mechanisms in which laws direct lawmaking on particular issues. During 2001, the Congressional Review Act (CRA) exemplified the importance of laws about lawmaking by facilitating the nullification of the just-issued regulatory rule by OSHA for workplace ergonomics. The issue of rulemaking review again received emphasis in 2001 when the Supreme Court declined to revive the alternative rulemaking restraint of the nondelegation doctrine. The diverse workings of the laws about lawmaking for particular issues can

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further be illuminated by examining the law for military base-closing.\(^{27}\) This law, which was expounded by the Supreme Court not long ago,\(^ {28}\) contains its own provision for specifying the process by which congressional enactments can nullify just-issued regulatory rules. Drawing on the examples of the CRA and base-closing, Part V speculates about whether, in theory, a special lawmakers mechanism could negate a potential problem with campaign finance reform legislation, that is, the problem of facilitating the enactment of statutory revisions after the Supreme Court had selectively struck down certain provisions of a campaign finance bill.\(^ {29}\)

Finally, the Conclusion contains speculation on whether and how laws about lawmakers can serve, in general, the discourse of the civic body. While some of 2001’s events show the downside of laws about lawmakers, on the whole, laws about lawmakers constitute a development in legislative mechanisms that already has yielded significant benefits.

II. BACKGROUND: FROM THE RULEMAKING CLAUSE TO CHADHA AND CITY OF NEW YORK

A. The Barriers to Enactment

Article I, section 7, clause 2 of the Constitution lays down a lean minimum lawmaking process. The Framers, in the Great Compromise, set up a Congress with two chambers: a House apportioned by population and a Senate with equal suffrage for each State. All legislation would require bicameral approval.\(^ {30}\) The Framers also gave the President a veto power, subject to supermajority requirement of two-thirds of each chamber to override. Constitutional bicameralism and supermajority veto-override requirements operate as barriers to

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\(^ {30}\) For a recent critique of the Senate’s effects, see Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997).
enactment. More closely examined, bicameralism creates two barriers: (1) the requirement of majorities willing to vote for enactment in two differently apportioned chambers; and (2) the coordination requirement, which requires that the two chambers attain exact concordance on all the details of a single bill, notwithstanding the pitfalls exacerbated by the two chambers’ separate operations. Other than that, the Rulemaking Clause of the Constitution provides that “Each House may determine the Rules of its Proceedings...” From one perspective, barriers that slow down new legislation provide protection from precipitate or lobby-pushed action by fostering deliberation and achievement of consensus. From another perspective, they impede the will of the majority, and thereby produce gridlock.

As congressional procedure evolved, it has come to include other major aspects that create or affect barriers in the path of enactment. First, the system of political parties produces majority and minority parties organizing the House and Senate. This has increasingly meant a government divided between Presidents of one party and chambers of Congress organized by a majority of the other, as in 1981-92, 1995-2000, and after the first six months of 2001. Second, the Senate developed a procedure of filibusters—extended delays by debate and amending—

31 See Levmore, supra note 1, at 155.
32 See id. at 153.
33 For the purposes here, the different procedures for constitutional amendments, treaties, nominations, expulsions, and impeachments, and the few legislative process specifics of Article I, like the Quorum Clause, the Voting Clause, and the Origination Clause, are not especially material.
34 U.S. CONST. art. I, § 5, cl. 2.
35 These various barriers, or veto gates, slow down the enactment of some new legislation that potential bare majorities on the House and Senate floors might vote for and enact.
36 For the last fifty years, the government has usually been divided. That is, the President has much more often than hitherto faced an opposition party in the majority in one or both chambers of Congress. See CHARLES TIEFEL, THE SEMI-SOVEREIGN PRESIDENCY 25 (1994) (observing that Republican presidents faced Democratic chambers of Congress in the thirty-eight years from 1955 to 1992 a total of twenty-six years or 68 percent of the time, almost five times the rate of divided government from 1897 to 1954). Between 1992 and 2000, the government was divided 75 percent of the years (Democratic president, Republican chambers in 1995-2000). The Senate switch in June 2001 suggested that for President Bush’s first Congress (2001-2002) the figure would again be about 75 percent.
37 In the past two or three decades, the two parties in Congress have become somewhat more homogeneous internally and somewhat stronger in their internal unity, including unity in defeating, when vote-counts make this feasible, proposals of Presidents of the opposite party. See generally KEITH KREHBIEL, PIVOTAL POLITICS (1998); DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990 (1991) (analyzing whether gridlock results more from divided government or from some other cause).
which often can be overcome only by a supermajority vote of sixty for cloture. This has increasingly meant that it takes sixty unified votes in the Senate for action, not fifty-one.\textsuperscript{38} The sixty-vote requirement may potently operate as a barrier to controversial domestic legislation even when the government is not divided, as in 1977-80, 1993-94 and in the first six months of 2001. Even in May 2001, a trillion-dollar controversial bill would need sixty Senate votes unless its supporters would make the compromises to gain it consensus acceptability, or, unless it could move through the Senate by a lawmaking system substitute for cloture.

Third, each chamber organizes itself by both a system of standing committees and a floor control system for bills reported out of committee. The committee and floor agenda system organizes the movement—including the holding back—of bills, and structures the processes of discourse, such as hearings, meetings, reporting, floor debates, and floor amending.\textsuperscript{39} This system also underlies the conference committee's method for the resolution of House-Senate differences necessitated by Article I's bicameral coordination requirement. When the two chambers have different majority parties, as in 1981-86 (Democratic House, Republican Senate), and again after June 2001 (Democratic Senate, Republican House), each chamber's majority party can operate its agenda system differently, which is an

\textsuperscript{38} See Sarah A. Binder & Steven S. Smith, Politics or Principle? Filibustering in the United States Senate (1997); Fisk & Chemerinsky, supra note 3. In the last quarter-century since this pattern truly solidified, the need to obtain cloture or to compromise away the opposition party's ability to filibuster has become an increasingly general requirement to enact any major controversial legislation, albeit not a universal one. From 1917 to 1975, it required two-thirds of the Senate, or 67 when 100 Senators were present, for cloture. From 1937 to the mid-1960s, filibusters occurred only on selective issues, above all civil rights. It was not really until after 1975 that the current pattern began to jell: cloture's availability with 60 votes, coupled with a frequent need for cloture on a wide range of issues. See Congressional Procedure, supra note 2, at 696-706. Even today, by no means are all issues likely to be filibustered and to require cloture. The determination of what is subject to filibuster—for example, whether a campaign finance bill will be filibustered to death by its opponents (as by minority Republicans during post-conference Senate consideration in 1994) or not during initial Senate consideration in 2001, involves a complex Senate discourse.

\textsuperscript{39} The floor and committee agenda system facilitates enactment for the bills favored by that chamber's majority party, and, conversely, impedes disfavored bills, particularly in the House and to some degree also in the Senate. Quantitative political scientists actively study and debate just how much the agenda system changes outcomes. The literature is voluminous and sometimes highly technical. See, e.g., Krehbiel, supra note 37.
especially effective tool against controversial legislation favored by the other party—subject, again, to the coordination of lawmaking systems.\(^{40}\)

Congressional rules or laws that affect enactment procedure—such as the laws about lawmaking studied in this article—not only lower the extra-constitutional procedural barriers to enactment, but they also even can slightly alleviate some of the constitutional strictures. For example,\(^{41}\) bicameralism requires not just majorities in each chamber, but timely coordination on all details. The stringency of this requirement is somewhat alleviated, however, by the conference committee method. Laws about lawmaking further alleviate that coordination problem by either expediting post-conference consideration, as Budget Act reconciliation does, or establishing channels on which there will be no differences on details between chambers, as the CRA does.\(^{42}\) And, the laws about lawmaking can preclude Senate filibusters and thus obviate the need for sixty votes for cloture, before and after conference. Conversely, laws about lawmaking can raise, rather than lower, extra-constitutional barriers to lawmaking. In this way, they are similar to some aspects of the budget process, such as the "PAYGO" system that deters deficit-increasing spending or tax cuts. The impeding of legal change is often described as the "entrenchment" effect.\(^{43}\)

To illustrate concretely in 2001, the Senate passed its version of the tax cut bill on May 23 with major differences from the House's version.

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\(^{40}\) In these situations, the party influence on the agenda system creates an additional barrier because it accentuates the likelihood of operation of the bicameralism barrier. With the two chambers organized by opposing parties, for any particular bill, one chamber or the other is more likely either not to pass a bill or not to achieve timely coordination of a final version with the other chamber.

\(^{41}\) For another example, lawmaking by omnibus legislation—combining large bills together for processing through bicameral consideration and presentment—may sometimes produce standoffs, but it also sometimes facilitates bargains involving multiple major items together getting through the various veto gates, especially the constitutional one of presidential presentment. See Charles M. Cameron, Veto Bargaining: Presidents and the Politics of Negative Power 240-42 (2000) (describing the successful effect of packaging and repackaging on veto bargaining).

\(^{42}\) For example, normally opponents of a conference committee report can try to filibuster it to death in the Senate, as Senate Republicans did to campaign finance reform in 1994. However, a law about lawmaking can preclude such a filibuster, as the Budget Act precludes filibusters for reconciliation bills. See Binder & Smith, supra note 38, at 192-94. The 2001 tax cut reconciliation bill went to conference on May 23, finished conference on May 25, was passed by the House that day, and by the Senate the next. See infra notes 152-55 and accompanying text.

The differences concerned the allocation among different types of tax cuts of literally hundreds of billions of dollars.\(^44\) Notwithstanding contemporaneous turmoil,\(^45\) by treating the bill as appropriate for the reconciliation procedure, the Senate hastened through with virtually no deliberation a conference product involving the allocation of mind-boggling sums by May 26, only three days later. By invoking a law about lawmaking, Congress skipped the ordinary issues of bicameral coordination on controversial matters and enacted a huge tax cut in the blink of the nation’s eye.

B. Delegation and its Discontent\(^{46}\)

Sometimes Congress can accomplish in one step the creation of a body of law, requiring no further work necessary to make the law operative, such as delegation or its alternative.\(^47\) In contrast, from the New Deal in the 1930s through the major domestic enactments of the 1960s and early 1970s, major categories of enactments depended more than ever upon delegation for the creation of implementing bodies of law.\(^48\) The 2001 Supreme Court decision in \textit{Whitman v. American Trucking Associations},\(^49\) reversing a D.C. Circuit revival of the nondelegation doctrine, serves as a recent reminder that delegation remains both significant and necessary.

Congressional manifestation of some discontent with delegation started, as explored in \textit{INS v. Chadha},\(^50\) with legislative vetoes—provisions that typically allow one or both chambers of Congress to veto

\(^{44}\) The events in this paragraph are discussed in Part III-A-3. See infra notes 152-55 and accompanying text.

\(^{45}\) On May 24, Senator Jim Jeffords (R-Vt.) announced he was leaving the Republican Party, changing Senate majority control, and throwing previous procedural arrangements into potential turmoil.

\(^{46}\) This title has been used before. See Harold J. Krent, \textit{Delegation and Its Discontents}, 94 COLUM. L. REV. 710 (1994).

\(^{47}\) For example, the enactment of narrowly-worded criminal laws typically accomplishes all or most of the requisite creation of that particular body of law. Thereafter, courts and parties may have to interpret the enactment, but the enactment itself suffices, without a need for a successor enactment or the promulgation of regulations to effectuate the initial lawmaking impulse.

\(^{48}\) When Congress told the President to negotiate reciprocal tariff reduction agreements with other countries, told OSHA to make rules about workplace hazards, or told the states they could receive federal assistance to provide Medicaid to the indigent, large further bodies of law would come into existence in ensuing decades without the absolute necessity, and sometimes without any need at all, for follow-up congressional action.


\(^{50}\) 462 U.S. 919 (1983).
presidential or agency actions taken pursuant to delegated authority.51 In 1939, the first statute with an enactment-facilitating procedure was also the first, effectively, to launch the legislative veto.52 Numerous other provisions like this followed.53

By the mid-1970s, the congressional mood subtly suggested reservations against going further in terms of reliance upon delegation. Concerned about excessive executive power,54 Congress now sought to maintain its core responsibilities, such as establishing fiscal policy and implementing trade agreements.55 It felt some discontent with accumulated delegations of regulatory authority.56 In trade affairs, Congress had struggled with the Johnson and Nixon administrations, withholding from them renewed authority to make trade agreements57 until the Trade Act of 1974.

Most important, in fiscal affairs, 1974 saw the culmination of a battle58 over what commentators call the "Fiscal Constitution"59 in Congress'.

51 See id. at 969 (White, J., dissenting).
52 In 1939, President Roosevelt received authority to reorganize the government's agencies subject to disapproval by resolutions of the Houses of Congress that could be enacted after a limited Senate debate, the first statute to provide an enactment-facilitating procedure. See BINDER & SMITH, supra note 38, at 185-86. The 1939 act was foreshadowed by similar provisions a decade earlier, under President Hoover, but those provisions did not facilitate the enactment of vetoes. See also Chadha, 462 U.S. at 969 (White, J., dissenting).
53 See Chadha, 462 U.S. at 969-70 (White, J., dissenting).
54 This was captured in the complaint about the "Imperial Presidency." See ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973). This was partly in terms independent of party—for example, as to war powers, it involved a complaint that the (Democratic) Johnson Administration had lured the (Democratic) Congress into authorizing the Vietnam War by passing the Tonkin Gulf Resolution on bogus information. There was also an element relating to party: divided government, a phenomenon that had been quite the exception before 1947 and had again been the exception in the 1960s, now seemed a recurring phenomenon, so that a Congress which delegated or abdicated vast powers took its chances with their use by an Administration of the other party. See generally FISHER, supra note 13, at 115-122.
56 This was partly business's approach to fight back against accumulated health, labor, and environmental statutory mandates. The cause for nondelegation also received support through the broad push for deregulation of pricing in competitive sectors like transportation or energy supply.
57 The rest of this paragraph is based on DESTLER, supra note 6, at 71-73, and BINDER & SMITH, supra note 38, at 185-86, 189-90. The details are discussed further infra in Section IV.
58 See FISHER, supra 13, at 115-122.
59 The fiscal constitution may be considered the implementation structure regarding spending and taxing in the Constitution, statutes, and rules of the budget process. See Kenneth Dam, The American Fiscal Constitution, 44 U. CHI. L. REV. 271 (1977); Elizabeth Garrett & Adrian Vermeule, Institutional Design of a Thayerian Congress, 50 DUKE L.J. 1277, 1299 (2001).
passage of the Congressional Budget Act ("Budget Act") of 1974.\textsuperscript{60} Pursuant to the Budget Act, Congress would set its annual budget goals in a budget resolution, which was then passed by a facilitated process.\textsuperscript{61} In various ways the Budget Act assured that Congress would be informed about how proposed appropriations and legislation would fit the budget. The Act also impeded budget-violating actions by points of order. Not initially, but more often in later years, the 1974 Act's provision for "reconciliation" procedures came into play, particularly when the budget resolution contained "reconciliation instructions" that could procedurally facilitate the enactment of a deficit-reducing bill.\textsuperscript{62} When Congress enacted the Budget Act in 1974, it did not envision reconciliation as an effective procedure even for spending cuts, less for tax increases, and not at all for changes in the opposite direction from deficit reduction, such as for bare large tax cuts such as the one that was made in 2001.\textsuperscript{63}

These facilitative laws came to be joined by various other laws about lawmaking, here grouped together simply as the category of special mechanisms consisting mostly of either approval or disapproval mechanisms.\textsuperscript{64} In 1983, the Supreme Court ruled that a legislative veto lacking bicameralism and presentment to the President was unconstitutional in \textit{INS v. Chadha}.\textsuperscript{65} While curbing provisions for legislative review, \textit{Chadha} did not, of course, affect enactment-


\textsuperscript{61} The congressional budget process is described in ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 105-240 (rev. ed. 2000); CONGRESSIONAL PROCEDURE, supra note 2, at 849-1010. See also BINDER & SMITH, supra note 38, at 192-93 (describing the enactment of the expediting procedure of the budget process).

\textsuperscript{62} Reconciliation in the Senate is covered by section 310(e) of the CBA, 2 U.S.C. § 641 (e). See infra notes 88-95 and accompanying text.

\textsuperscript{63} These are collected in the section, "Congressional Disapproval" Provisions Contained in Public Laws, in CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, 105th Cong., 2d Sess. §1130 (1999). The trade fast track itself could be considered a complex approval mechanism, since the presidential proposal for trade agreement implementation is submitted for congressional approval by a facilitated process. An approval mechanism consisted of a statute providing that a specific kind of proposal, when subsequently made, could be put into effect by an enactment-facilitated congressional action. In contrast with the trade fast track, which put implementation bills of considerable length and sophistication before Congress, an approval mechanism could be quite simple, even specifying the form of a joint resolution of approval as but a single laconic sentence sanctioning a proposal.

\textsuperscript{64} 462 U.S. 919 (1983).

\textsuperscript{65} The legislative veto was only curbed, by no means ended. See Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 LAW & CONTEMP. PROBS. 273 (1993).
facilitation systems that still required complete bicameralism and presentment. Thus, Chadha left Congress with limited options to pass legislation on subjects that require further major implementation decisions over future years (other than delegating power away), and made the remaining constitutional approach—facilitative laws about future lawmaking—even more important.

The evolution during the Reagan, Bush, and Clinton administrations of the Budget Act and Trade Act procedures will be discussed in Parts II and III; it suffices here to say that important laws were passed via the special procedures provided by those two acts. In 1995-96, Congress enacted the Congressional Review Act, which operated as a disapproval mechanism for agency rules. The following year, in 1996, Congress enacted a bill taking a different approach to the legislative process—the line item veto. In 1998, in City of New York, the Supreme Court struck down the line item veto, finding the President's unconstrained item-cancellation power to be invalid as an impermissible delegation of lawmaking authority. Like Chadha, by narrowing Congress's options for multi-stage processes, City of New York increased the importance of the constitutional mechanism of laws about making laws.

67 Congress retained the option of one-step all-encompassing initial enactments, but too often this was ill-suited for making laws over time in light of external developments, political reactions, and the difficulty of resolving all impasses about all the possibilities that might later arise. Congress could just act initially and hope to act again at a later time if necessary, but given the many veto gates in the ordinary enactment process—highly visible in the 1980s and 1990s eras of divided government and frequent filibuster—this was not a confidence-building approach.

68 Unlike legislative vetoes, such laws satisfied Chadha because the later congressional process must, and would, obey the constitutional minimum requirements of lawmaking—bicameralism and presentment to the President.

69 When agencies proposed major rules, they were required to provide notice to Congress, which then had a limited period to enact a joint resolution of disapproval. If not disapproved, the rules became effective. The mechanism drew its efficacy from how it channeled the consideration of disapproval of a major rule. A disapproval mechanism closely resembled a legislative veto, and often replaced such a veto after Chadha. In 1990, Congress enacted the military base-closure act discussed below, which operated by a disapproval mechanism. Typically a disapproval mechanism statute provided that after an executive action, Congress had a period of time to enact a joint resolution which would disapprove, that is, kill, the action.


The five years prior to 2001 set the stage for the enactments of that year largely by bequeathing unresolved legislative issues to the next administration. In 1997, President Clinton sought a renewal of trade fast track authority, but disputes over labor and environmental issues stood in the way of his being granted such authority by the Congress. In these years, the Republican congressional majority developed a tax, trade, and regulation-restraining agenda, awaiting a period when its efforts might not face a presidential veto. However, even then, such measures would still need a path over the other enactment barriers in Congress, particularly those in the Senate.

C. Power, Discourse, and Symbolism

The rise of laws about lawmaking creates a need to identify the general categories in which facilitation of lawmaking works. Three broad categories of how such laws facilitate enactments warrant identification: the laws' effects on power, the structure of discourse, and meaningful symbolism. First and foremost, lawmaking laws affect power. Specifically, they can create enhanced power to enact, by easing the way over barriers in the enactment process that arise from the combination of the constitutional minimum for lawmaking and the additional deliberative aspects of congressional procedure. For example, instead of needing sixty Senate votes for cloture in the absence of consensus, even a controversial reconciliation bill or CRA disapproval resolution needs only fifty-one because the law itself provides the equivalent of cloture. Laws about lawmaking also shape congressional discourse and serve a meaningful symbolic role. For example, committees create a universe of congressional discourse by their hearings and meetings on bill amending. Senate floor procedure creates another context of significant discourse by allowing bills to pass only when discussion,
sometimes extended in duration, has brought about sufficient consensus for the bills to escape death by filibuster. Conversely, lawmaking procedural arrangements have meaningful symbolic effects in holding out long-term prospects for ultimately achieving objectives that might not be reached or effectuated any time soon. Delegations to agencies affect power, deliberation, and symbolism by facilitating the creation of new law, changing the way it gets debated, and holding out prospects of eventual, if not near-term, action. To sum up by analogy, so do laws about lawmaking.

III. FACILITATING THE CONTROVERSIAL 2001 $1.3 TRILLION TAX CUT

President Bush faced a large challenge in moving EGTRRA, his tax cut bill, through the Senate. Since the Republican Party had lost more Senate seats than it gained in the 2000 elections, Bush found only fifty Senators in his party when he took office, a sharp drop from the previous year. Initially, this led to an unprecedented Senate power-sharing arrangement by the fifty-fifty parties, and, after six months, to a change of majority party. While public polls did not show antagonism to tax cuts, they did show more support for devoting surpluses to other needs. Although the country could not anticipate the terrorist attack of September 11, 2001, those other needs, even in early 2001, included more funds for defense.

76 Some commentators associate the term “symbolic” as to law or politics with merely imaginary distractions. See Murray Edelman, The Symbolic Uses of Politics 16-18 (1964) (associating the term with the functions of myth and ritual). Here, the concept is of meaningful symbolism in stepwise government action, which holds out the vision or hope of ultimate success when concrete realization cannot occur in the initial step. The first great essay on symbolism in modern government memorably discussed how new institutions or processes could, by comforting traditional symbolism, bridge the time until results. Thurman Arnold, The Symbols of Government (1935). For a sophisticated contemporary treatment of symbolism as effective political focal points, see Eric A. Posner, Symbols, Signals, and Social Norms in Politics and the Law, 27 J. Legal Stud. 765 (1998).

77 See, e.g., Dana Milbank, Bush Lacks the Ability to Force Action on Hill, WASH. POST, July 26, 2001, at A1. Because the chief focus on this point is the tax cut’s passage, this paragraph adapts Sheldon D. Pollack, Republican Antitax Policy, 91 Tax Notes 289, 295 (Apr. 9, 2001): “Ironically, the future of the antitax wing of the Republican party became considerably more uncertain following the November 2000 elections . . . . [T]he electoral outcome could hardly be interpreted as a victory for Republicans or the antitax movement—or even for Bush himself . . . .” Id.

78 Andrew Taylor, Tax Fight Energizes Democrats, 59 Cong. Q. Wkly. Rep. 465, 466 (Mar. 3, 2001) (discussing “polls that appear to show only soft public support for tax cuts . . . only 22 percent of those polled said tax cuts were their highest priority for the budget surplus, ahead of education, health care and strengthening the Social Security System”).
To be sure, the President had won election after campaigning on his clear call for a tax cut, and Congressional Budget Office (CBO) projections of budget surpluses continued to support that call. However, the ultimate CBO budget scoring cost of EGTRRA, $1.3 trillion, large enough on its own terms, was an underestimate. After setting aside the distortions of its scoring method, such as its omission of interest costs on continuing debt, the tax cut could cost the Treasury anywhere from $1.8 trillion to over $2 trillion in its first decade.79 Sober international observers put the figure at $2.5 trillion.80 If extended thereafter, analysts estimated the costs "would balloon to $4.3 trillion in the following 10 years."81 Moreover, CBO projections of surpluses employed rosy economic scenarios that were in the process, even at the time, of being reduced due to the economic downturn.82 It subsequently became clear that the tax cut bill promised a decade of deficits to follow.83

The President's tax cut proposals, particularly the phasing-out of the estate tax's top rate and the marked reduction of the top two income tax brackets, involved forfeiting the progressive ability-to-pay principle.84 The controversy over the effects of the cut suggested that the bill would

80 In its annual report on the U.S. economy, the IMF warned that "the actual budget effect of President George Bush's proposed tax cuts would be at least $US2,500 billion." Luke Collins et al., IMF Warning Rallies US Dollar, AUSTL. FIN. REV., Aug. 16, 2001, at 1.
have a difficult time obtaining Senate passage. This was borne out later by the ties or near-ties in actual Senate voting on key amendments discussed below. The voting pattern on key amendments indicates that regular procedures, which require a Senate consensus rather than a bare majority for controversial measures, would have compelled the tax bill to undergo major changes, if not a complete overhaul, in order to garner the votes necessary to pass the Senate. The bill, however, was able to pass through a facilitated path created by the use of budget reconciliation.

A. Reconciliation Tax Cutting in 2001

Because the explanation for the tax cut's passage depends on the key role of Budget Act reconciliation, this part first discusses the role of reconciliation from 1974 to 2000. It then shifts to the procedural details and substantive results in 2001.

1. 1974 through 2000: Reconciliation for Deficit Control

Congress enacted the 1974 Budget Act in response to a preceding seven-year budget war in which congressional failure to control budget deficits had armed Presidents to criticize Congress.\(^{85}\) The Act established a system to adopt annual budget resolutions with targets and to control deficits primarily by holding down appropriated and entitlement spending to meet those targets.\(^{86}\) In 1974, Congress had a great deal of recent experience with needing deficit control through facilitating spending reduction, not much experience with needing deficit control through tax increases, and absolutely no experience whatsoever with needing to facilitate spending increases or tax cuts.\(^{87}\)

\(^{85}\) This is the fundamental starting point for all analysis of the Budget Act's intent. ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING (1980) [hereinafter CONGRESS AND MONEY]; CONGRESSIONAL PROCEDURE, supra note 2, at 856-58; Garrett, Rethinking the Structures of Decisionmaking in the Federal Budget Process, supra note 12, at 391-92.

\(^{86}\) For the Budget Act procedures, see SCHICK, CONGRESS AND MONEY, supra note 85, at 168-412 and CONGRESSIONAL PROCEDURE, supra note 2.

\(^{87}\) From World War II to the mid-1970s, the progressive income tax rates had the effect, whether in growth or inflationary periods, of producing large tax revenue increases without further changes. Congress did not need to enact tax increases except during the Korean War, and when it wanted to enact either various tax reform bills, or the stimulative tax cuts in 1962, 1964 and 1971, it did not need facilitating procedures. For more on the dynamic of this period, see MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX 16-25, 111-19 (1997); C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 13-38 (1992).
The original Act contained its little-noticed reconciliation procedure in section 310. While "reconciliation" was a somewhat cryptic term, it had been used to describe the procedure used by the President's budget bureau for forcing down spending proposals. This procedure begins when "reconciliation instructions" are placed in a budget resolution. These instructions call for a "reconciliation bill" to be voted upon by the House and Senate under procedures that facilitate the bill's enactment. The reconciliation bill is then used as the means by which the actual budget is brought into line with pre-established goals. One author noted that reconciliation only contemplated "spending cuts or tax increases," not spending increases or tax cuts. Its design suggested it was barely suitable to control deficits by spending cuts, even less intended to control deficits by tax increases, and simply not intended

88 The text of section 310 uses the word "reconciliation" cryptically, with no definition. The word itself has this derivation: "In its narrow sense, reconciliation is the method used to balance a personal checking account, and this connotation is indeed the sense of the Budget Act procedure with respect to bringing the parts of the budget into a proper relationship to the whole." HOWARD E. SHUMAN, POLITICS AND THE BUDGET: THE STRUGGLE BETWEEN THE PRESIDENT AND THE CONGRESS 242 (3d ed. 1992). However, one cannot attribute to Congress the silent intent to favor the overcoming of prized Senate procedures by reconciliation in the form of facilitating spending increases or tax cuts. The rule on filibuster and cloture, Senate Rule XX, is perhaps the most salient and sensitive of all the Senate rules. Any large exception would be highly controversial. A large exception for the opposite of deficit reduction—for spending increases or tax cuts—would have been particularly controversial. Congress did not silently intend such a particularly large controversial exception. As Justice O'Connor said recently in another context (that of enactments affecting Congress itself), it is especially difficult to impute to Congress the intent silently to "fundamentally change" a process that "would profoundly affect Congress" itself. Department of Commerce v. United States House of Representatives, 525 U.S. 316, 342-43 (1999) (plurality opinion).

89 This procedure was proposed by Charles Schultze in testimony before the House Rules Committee. It is borrowed from the Budget Bureau itself, which uses similar directions from the president to the various bureaus and agencies to bring the parts of the president's budget in line with the agreed-on totals before it is sent to the Congress. SHUMAN, supra note 88, at 241 (citing Schultze's testimony in "JSC, Improving Congressional Budget Control Hearings, 93-1 [1973], 18 Jan. 1973, pp. 2-17; and House Rules Committee, Budget Control Act of 1973 Hearing on H.R. 7130, 93-1 [1973], pp. 311-396).

90 See Krishnakumar, supra note 12, at 617 (quoting former House Budget Committee Chairman Leon Panetta). Originally designed in the 1974 Budget Act, reconciliation was the means by which the House and Senate could instruct their committees at the end of the budget procedures to come up with spending cuts or tax increases to bring into balance the spending proposals of individual committees and the overall binding targets of the second budget resolution. See SHUMAN, supra note 88, at 242.

91 Not only would the 1974 Act not have intended reconciliation for other than deficit control, but the 1974 Act as a whole also did not act much upon tax legislation, even for that purpose. "For
to facilitate bills unrelated to deficit reduction, such as bare spending increases or tax cuts.\textsuperscript{92} Other provisions,\textsuperscript{93} as well as the budget process's first years from 1975 through 1980, confirmed this intent.\textsuperscript{94} In other words, the 1974 Budget Act as a general targeting mechanism was policy-neutral, allowing for "higher or lower spending [or taxes], bigger or smaller deficits."\textsuperscript{95} However, the Act's reconciliation procedure was designed and intended only to facilitate deficit control, not to diminish the Senate's consensus requirements for controversial bills such as spending increases or tax cuts.

In 1981, the White House changed party hands, and President Reagan pushed through two major bills: an omnibus budget reconciliation act (OBRA) containing large spending cuts (both real and various reasons, the 1974 Budget Act lacked the tools regarding taxes that it had for spending . . . . Referring back to the legislative history of the 1974 act . . . . tools to control tax legislation were not proposed by the Joint Study Committee; they were proposed by the Senate Governmental Affairs Committee, but were dropped in the Senate Rules Committee." CONGRESSIONAL PROCEDURE, \textit{supra} note 2, at 901 \& n.145.

\textsuperscript{92} The design, purpose, and background of the original Budget Act do not reflect a congressional intent to create a filibuster-proof way of pushing through spending increases or tax cuts having nothing to do with deficit reduction. That act provided for two annual budget resolutions, one in the fall, one in the spring, with reconciliation instructions on the second. \textit{See} WILDAVSKY \& CAIDEN, \textit{supra} note 9, at 79. Reconciliation obviously was not intended in 1974 as guidance for the year's major legislating, for the design of the 1974 Act provided for reconciliation to come late—only on the second resolution. The second resolution created, in general, the possibility of enforcing what might have been ignored in the first resolution or responding to radical changes since then, but was too late in the year to be a blueprint for the year's major legislating. Reconciliation was just a part of the second resolution's late-adjustment role, and so reconciliation was not itself, in general, viewed as significant. "Surprisingly, the framers of the 1974 Act did not foresee the rise of reconciliation acts . . . ." Garrett, \textit{The Congressional Budget Process: Strengthening the Party-in-Government}, \textit{supra} note 9, at 718. Reconciliation could only be expected, at that late point in the year, as a last-ditch mechanism to address a problem that had arisen since the first resolution, namely, that the anticipated deficit for the next fiscal year had grown. CONGRESSIONAL PROCEDURE, \textit{supra} note 2, at 857, 884.

\textsuperscript{93} One of the Act's original provisions forgotten today, section 301(b)'s deferred enrollment provision, underlines the connection of reconciliation to the prior spending bills of the year. It kept appropriations and new spending bills from being enrolled until reconciliation and set up the clearly-intended possibility that a reconciliation resolution—rather than a bill—would cut those not-yet-enrolled spending bills. CONGRESSIONAL PROCEDURE, \textit{supra} note 2, at 884 n.95. The whole machinery of deferred enrollment and reconciliation resolutions focused upon the cutting of spending.

\textsuperscript{94} \textit{See} CONGRESS AND MONEY, \textit{supra} note 85, at 321, 326, 589-90. Congress used reconciliation on spending in 1980, when it made the innovation, notwithstanding the 1974 Act, to have the reconciliation instructions for spending cuts on the first budget resolution rather than the second. CONGRESSIONAL PROCEDURE, \textit{supra} note 2, at 885 \& nn.98-99, and authorities cited.

\textsuperscript{95} Garrett, \textit{Tax Legislative Process}, \textit{supra} note 10, at 508 (quoting SCHICK, CONGRESS AND MONEY, \textit{supra} note 85, at 73).
and illusory), followed by a large tax cut bill. That year, reconciliation evolved dramatically, facilitating the spending cut OBRA through a reengineered two-step budget process – a spring budget resolution with reconciliation instructions followed by a deficit control OBRA. Even with such evolution, however, the bare tax cut bill enacted after the OBRA was not itself in any way, shape or form a reconciliation bill. While 1981 established the flexibility of reconciliation to facilitate deficit control spending cut bills, in no way did it support what occurred in 2001, that is, facilitation, by reconciliation, of a bare tax cut bill itself.

In a different vein, the 1981 spending-cut OBRA came to the Senate floor containing major sections unrelated to budget savings. Then-Minority Leader Byrd (D-W. Va.) vigorously criticized this, and the Senate later adopted and strengthened a rule forbidding such extraneous provisions in reconciliation bills – the Byrd Rule. The Byrd Rule serves as a great model of reform for reconciliation, specifically for reform in reaction to the excesses of 2001.

After 1981, the unpaid-for tax cut resulted in an exploding national debt, so Congress enacted a series of deficit-reducing reconciliation

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96 For discussions of reconciliation in 1981, see Joyce, supra note 9 and sources cited in note 9.
97 As Senator Robert Byrd (D-W. Va.) pointed out in 2001, the Senate devoted a full twelve days in 1981 to debating that tax cut bill, with no procedural constraints, and had the bill not achieved consensus status due to the prior spending cuts paying for it, the minority party could readily have filibustered it and insisted it receive 60 votes for cloture. 147 CONG. REC. S1555 (daily ed. Feb. 15, 2001) (statement of Sen. Byrd). As a practical matter, reconciliation for the spending cut bill indirectly facilitated the tax bill, since it was argued that the spending cut bill paid for a tax cut. However, there is no comparison between 1981, where a reconciliation spending bill assertedly paid for a non-reconciliation tax cut bill, and 2001, where the tax cut bill itself was given the reconciliation procedure.
98 See Joyce, supra note 9, at 319. Controversial legislation without the backing of reconciliation could not easily get past enactment barriers. This was shown by how anti-busing legislation was effectively filibustered for eight months from 1981 to 1982 and, despite much support, never became law. CONGRESSIONAL PROCEDURE, supra note 2, at 738-40.
99 For these, "extraneous provisions" was the technical description, but "sweeteners" was the vernacular term. See, e.g., Charles E. McClure, Jr., The Budget Process and Tax Simplification/Complication, 45 TAX L. REV. 25, 76. These helped get the reconciliation bill adopted, even with its unpalatable cuts in spending programs like health care for indigent children, by the lobbying support for those "sweeteners." See 1981 CONG. Q. ALMANAC 262-63 (describing the bill's "so-called 'sweeteners'—additional funding for popular programs such as the Export-Import Bank and educational impact aid").
acts.\textsuperscript{101} Congress also enacted the Gramm-Rudman-Hollings Act, and, the major and revenue-neutral Tax Reform Act of 1986.\textsuperscript{102} In 1990, the first Bush administration joined Congress in a bipartisan package of tax increases, spending cuts, and tough budget enforcement procedures known as the Budget Enforcement Act.\textsuperscript{103} This launched bipartisan, real deficit control, in part through requirements that spending increases and tax cuts be paid-for, known as the “PAYGO” system.\textsuperscript{104} The Budget Act’s evolving reconciliation procedure involved much flexibility, but still confirmed that all of reconciliation’s potent facilitation applied to deficit control, not unpaid-for tax cuts or spending increases.\textsuperscript{105}

In 1993, the White House again changed party hands. During the next Congress, the Republicans successfully\textsuperscript{106} filibustered and thereby defeated numerous controversial bills sought by the President, although the Democrats held both the White House and a majority of each

\textsuperscript{101} See STEUERLE, supra note 87, at 57-172. “As Congress struggled to reduce the federal deficit in the 1980s and 1990s, [Senate] debate limits were continued as a vital part of mechanisms designed to enforce spending and deficit limits.” BINDER & SMITH, supra note 38, at 192.


\textsuperscript{103} See STEUERLE, supra note 87, at 173-84.


\textsuperscript{106} Health care reform, telecommunications reform, lobbying reform, and other measures were affected by Republican obstructionism, but, the Republicans believed, the Democrats and President Bill Clinton would be blamed for their failure to fashion legislation that could survive the legislative process even if Republican tactics were the immediate cause for the death of the measures. As it turned out, the ineffectual Democrats did seem to be blamed for the “mess in Washington” in the 1994 elections, in which they lost control of both houses.

BINDER & SMITH, supra note 38, at 148.
chamber of Congress.\textsuperscript{107} Specifically, the Republican filibustering defeated President Clinton's opening agenda item: a fiscal stimulus bill.\textsuperscript{108} This was possible because in 1993—as in 1981, as throughout the 1980s, but unlike in 2001—no one envisioned reconciliation to facilitate fiscal bills unrelated to deficit control.\textsuperscript{109}

To reduce the deficit, President Clinton did push through a controversial tax rate increase for top tax brackets, with support solely from his own party.\textsuperscript{110} Professor Krehbiel, a leading quantitative political scientist, discusses in his seminal 1998 study how controversial legislation in Congress moves notwithstanding long periods of gridlock. A change in the White House party as in 1981, 1993, and 2001 removes one supermajority barrier, the veto,\textsuperscript{111} but some other mechanism—for these purposes, reconciliation in 1981, 1993, and 2001—must deal with

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\textsuperscript{107} The measures killed by the Senate minority party filibuster included bills on striker replacement, campaign finance reform, and lobbying disclosure. See Binder & Smith, supra note 38, at 135; Fisk & Chemerinsky, supra note 3.

\textsuperscript{108} The vigorous assertion of filibuster rights in that Congress dates from the killing of President Clinton's economic stimulus bill by a March 31, 1993 "letter signed by all 43 Republicans pledging to oppose the bill." Richard E. Cohen, Changing Course in Washington: Clinton and the New Congress 128 (1994).

\textsuperscript{109} Apart from the compromise of 1997, scholarly commentary now recognized that "reconciliation often reflects the preferences of the majority party leadership and can produce radical, uncompromising proposals which boast the support of only the barest congressional majorities." Krishnakumar, supra note 12, at 620 (a perceptive study applying both congressional procedure and median voter theory to reconciliation).

\textsuperscript{110} Attributing this to reconciliation may sound like it slights President Clinton's enormous political effort and majority party discipline in 1993, just like attributing the 1981 spending cut bill or the 2001 tax cut bill to reconciliation may sound like slighting President Reagan's and President George W. Bush's enormous political efforts and the discipline of their parties. Political efforts and discipline will put together a majority of Senate votes for non-consensus legislation, but it will not put together the 60 votes needed for cloture. Only reconciliation overcomes organized Senate minority party resistance to non-consensus measures absent 60 votes in support.

\textsuperscript{111} Pivot point analysis describes this in terms of mapping the preferences of the Members of Congress, and the vetoing President, onto a linear scale, with the supermajority requirement for override creating a very wide expanse on that scale marking stability or gridlock. In terms of pivot point analysis, this situation might be mapped on the spectrum as that President Clinton had a preference to the left of the median legislator in 1995-2000. Since it would take a two-thirds supermajority to overcome a Clinton veto, action could occur only in two situations. Either existing law must be so far to the right that a majority of the legislators, although they are more rightist than the President, themselves want to change the law to the left (very unlikely) or existing law must be so far to the left that two-thirds of the legislators will vote for a change, overcoming his veto (almost as unlikely). Otherwise, existing law falls in the very wide expanse between the preference of the median legislator and the preference of the President (the veto pivot), and stability or gridlock occurs. See Krehbiel, supra note 37, at 118-44.
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the Senate filibuster barrier. He concludes that reconciliation’s "simple-majority parliamentary situation was a key to Democrats’ hard-fought victory in the 1993 budget process," as it was to the Republicans’ spending cut victory in 1981 and to their tax cut victory in 2001. His conclusion rests on his belief that, in 1993, opposition “Republicans undoubtedly would have filibustered the Clinton-Democratic reconciliation bill if they had been permitted to do so. But they weren’t, so they didn’t.” In other words, President Clinton had no unlimited exemption from filibusters for fiscal bills; his fiscal stimulus bill fell to Senate filibuster; his tax increase passed, because, as a bill for deficit control, it could be facilitated by reconciliation.

After Republicans won the 1994 congressional elections and became the majority party in the House and Senate, the new majority sought in the next three Congresses to use the channel of reconciliation bills for tax cuts either within, or without, the rubric of deficit reduction. The Republican Senate majority of 1996 sought reconciliation-facilitated tax cut bills, and obtained a ruling of the Senate Parliamentarian in favor of flexible use of reconciliation for tax cuts; as will be seen, this ruling, opposed as contrary to the Budget Act and barely upheld by a party-line vote, was not treated in 2001 as one to be followed. That same majority, in 1999-2000, now supported by projections of surplus that

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112 The cloture rule creates a wide expanse on the preference spectrum marking stability or gridlock. This occurs between the preference of the median voter and the preference of the last needed legislator to make up a 60-vote majority for cloture, called the filibuster pivot. When existing law falls in the wide in-between space between the preference of the median legislator and the preference of the filibuster pivot, no change will get enacted, and stability occurs. See id. at 93-117. Ordinarily, that would give some stability to fiscal policy swings, even during changes in the White House party such as those in 1981, 1993, and 2001. However, reconciliation eliminated the cloture pivot, and hence, eliminated the stability.

113 Id. at 204 n.25. Professor Sinclair makes the same point: “[T]he president’s program [in 1993] would never have passed were it not for the special procedures . . . . Most important, of course, was the budget process . . . . Budget rules [gave] the budget resolution and the reconciliation bill protection against a filibuster and amendments in the Senate that is enormously advantageous.” SINCLAIR, supra note 1, at 182-83.

114 President Clinton signed into law in 1997 a compromise package reflecting reconciliation’s flexibility within the broad rubric of deficit control, which used major spending cuts to pay for a cut in the capital gains tax. 1997 CONG. Q. ALMANAC 2-30. For accounts of the act, see DANIEL J. PALAZZOLI, DONE DEAL?: THE POLITICS OF THE 1997 BUDGET AGREEMENT (1999); SINCLAIR, supra note 1, 204-13; Robert D. Reischauer, Light at the End of the Tunnel or Another Illusion? The 1997 Budget Deal, 51 NAT’L TAX.


relaxed the PAYGO discipline,117 passed reconciliation tax cut bills that President Clinton vetoed but that served as models for the following Congress.118 By the end of this period, the availability *vel non* of reconciliation had become the all-important procedural consideration in passage of tax cuts potentially approaching the trillion-dollar range. On the one hand, the Budget Act had only intended reconciliation for deficit or debt119 reduction, and in twenty-five years, only deficit reduction had been enacted by it.120 On the other hand, Senate Republicans had developed over a course of years the argument for tax cut reconciliation.

117 For a description of PAYGO discipline as to tax cuts, see Garrett, *Tax Legislative Process*, supra note 10. PAYGO discipline relaxed with the entry into the era of projected budget surpluses for several reasons. First, President Clinton proved willing to end-run PAYGO, signing acts for both fiscal 2000 and fiscal 2001 that discarded PAYGO rules against spending increases. *Eskridge, Jr., Frickey & Garrett*, supra note 9, at 441-42; Victoria Allred, *PAYGO Goes by Wayside*, 59 CONG. Q. WKLY. REP. 96 (Jan. 13, 2001). Second, the PAYGO statute's text speaks of itself only as a barrier against enactment of deficit increases, 2 U.S.C. § 902, although that may leave ambiguities in practice. Unlike Budget Act aspects enforced by Congress, PAYGO is enforced by the Office of Management and Budget's anticipated sequesters of certain vulnerable spending programs if the PAYGO-scored new spending or tax cuts were enacted. To the extent that PAYGO has ambiguities regarding its application, President Clinton was willing to invoke it to restrain across-the-board tax cut proposals even in the face of optimistic predictions of budget surpluses; President Bush would not be so willing. *See Schick, The Federal Budget*, supra note 61, at 69-70, 140, 153. So, at the time of President Bush's election, the talk of PAYGO restraint on tax cut bills virtually stopped.


119 This article uses the shorthand of "deficit reduction" for what the Budget Act intended as the sole purpose of reconciliation. For this article's purposes, "deficit reduction" also includes the situation of spending cuts or tax increases that occur during a time of surplus and, hence, technically do not have a deficit year to affect, but do reduce the national debt accumulated by the deficits of past years. Looking overall at the 1974 Act, it could be argued that the tools of spending cuts or tax increases apply not just to reducing the debt during deficit years, but during surplus years as well. That is nothing like the stretch involved in using reconciliation for the opposite purpose, of ending up with a larger debt than otherwise by forcing through spending increases or tax cuts. The debate over whether reconciliation can be used for debt reduction in time of surplus is reminiscent of the debate over whether PAYGO might still impede unpaid-for spending increases or tax cuts even in time of surplus. Some thought so, but the Bush Administration did not view PAYGO as impeding the 2001 tax cut. *See Schick, The Federal Budget*, supra note 61, at 153-54 (expressing the view that such spending increases or tax cuts may be impeded by PAYGO).

120 Congress had enacted reconciliation deficit reduction in 1981 followed by tax cuts, and had enacted packages of reconciliation spending cuts and reconciliation tax cuts in 1997. The two houses had passed tax cut bills in the late 1990s only to see them vetoed, but never had an unpaid-for tax cut become law by the facilitation of reconciliation.
2. 2001: Reconciliation Outside Deficit Control

As discussed, EGTRRA was going to be controversial. The following examination of the enactment process in 2001 shows how EGTRRA became law through the use of reconciliation, and the nature of the product that resulted.

The tax legislating process of 2001 began with a general debate in January and February as President Bush's campaign proposal for a large tax cut developed into a budget and tax proposal that was expected, in a vague way, to be attempted through reconciliation. At the early date of February 15, Senator Byrd reacted with a detailed, powerful address to the Senate disputing strongly the propriety of reconciliation. As Senator Byrd noted, in 1974 he personally "was deeply involved in the preparation of the Senate version" of the Budget Act, among his other uniquely strong credentials for expounding the Act's original and evolved intent. Senator Byrd declared that "there is no reason whatever to consider the President's tax cut proposal as a reconciliation bill," and "what I believe most Senators [feel] in their hearts ... [is that] forcing deficit reduction on committees ... should be the sole reason for using the highly restricted vehicle called reconciliation."

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123 This included his successful leading of the Senate to impose the rule against extraneous material in reconciliation bills which bears his name, the "Byrd Rule." His February 15 address recites the Byrd Rule's background. See 147 CONG. REC. S1552. His role as major reviser of what became the 1974 Act was exactly the way he described it in 2001, and had long been noted for just how extraordinary an episode it was in the history of congressional procedure. See CONGRESSIONAL PROCEDURE, supra note 2, at 857-58 & nn.24-25. "The debate limits established in 1974 ... were the handiwork of Senator Robert Byrd, who has been the Senate's leading champion of minority rights under Rule 22 [the cloture rule] in recent decades." BINDER & SMITH, supra note 38, at 192. The details of Senator Byrd's action are discussed in SCHICK, CONGRESS AND MONEY, supra note 85, at 67-70. Reconciliation was entirely the product of the bill's revision in a special subcommittee of the Senate Committee on Rules and Administration chaired by Senator Byrd and operating under his personal direction. "Rules and Administration converted the first budget resolution to a target and added an optional reconciliation procedure to the second resolution." Id. at 69 (emphasis added). It must also be recalled that of all the Senators of the period from the 1970s to the 2000s, Senator Byrd easily had the deepest and strongest interest in Senate procedure, so that more than any other Senator, he could rightly say that he personally knew the intent in the drafting of a provision which had thus been incorporated under his personal direction. In other contexts, such claims as to intent may be discounted. In Senate procedure, they are credible—just as, per the discussion below, Chairman Domenici's arguments on the other side have added credibility from his own long history of relationship to the budget process.

Senator Byrd’s disquisition was a grand treatment of the crucial 2001 issue. He cited and quoted extensively from the primary record of congressional lawmaking and from respected secondary sources. This included his insider account of controversial presidential fiscally-impacting lawmaking initiatives of the past, notably President Reagan’s 1981 (successful) tax cut and President Clinton’s (unsuccessful) 1994 health care bill, neither of which received reconciliation facilitation. Byrd rebutted the assertion that the 1996 Parliamentarian ruling and ensuing tax cut bills justified what was now, in 2001, being proposed.125 In terms of Senate procedure, the next steps after Senator Byrd’s shot across the bow of reconciliation involved the presentation of his procedural case, and bill proponents’ presentation of their opposing case about reconciliation’s availability, to the Senate Parliamentarian.126 Quietly, that is what ensued in the following month.

Meanwhile, President Bush’s more detailed proposal in late February not only failed to make consensus-seeking concessions about the bill’s scale or allocations, but it also clarified one major issue in a way that increased the bill’s controversial nature and ultimately bequeathed a large issue to future legislators. As the tax policy world knew, the burdensomely-complex individual Alternative Minimum Tax (AMT)127 will increasingly hit an expanding class of millions of middle income taxpayers found predominantly in certain high-tax states with literally hundreds of billions of dollars of unanticipated, arguably unfair, and complexly-administered tax liability.128 President’s Bush proposal as refined in February, and enacted in May, exacerbated the expanding

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125 The reasoning is expounded below. Senator Byrd’s illumination of history was that in 1994 “President Clinton also pressed me to allow his massive health care bill to be insulated by reconciliation’s protections . . . . I said to the President . . . . ‘I cannot in good conscience allow the rule to be abused.’ [M]y view prevailed . . . . It is time for this abuse of the reconciliation process to cease.” 147 CONG. REC. S1535 (daily ed. Feb. 15, 2001).

126 For a full description of how the Senate Parliamentarian advises the Senate Chair in its rulings on procedural issues, see CONGRESSIONAL PROCEDURE, supra note 2, at 503-13. The Senate Parliamentarian’s role in the 2001 reconciliation issue is discussed below.

127 For an introduction to the AMT’s complexities, see Daniel Shaviro, Tax Simplification and the Alternative Minimum Tax, 91 TAX NOTES 1455 (2001).

128 Some key AMT floors, unlike those of the regular income tax, are not indexed for inflation, so that taxpayers with nominally increasing but actually static middle incomes will increasingly come under the AMT in years to come. In addition, cutting the rates for the regular individual income tax, but not the cutting the AMT, intensifies the biased way the AMT hits middle income taxpayers in some states while not hitting higher income taxpayers in other states. All this was reported from the beginning by sophisticated observers. See Warren Rojas, Washington Scrutinizes Bush Tax Plan, 90 TAX NOTES 1438 (2001).
scope and unfairness of the AMT's impending impact, which was something the bill's proponents downplayed.129

Following the President's budget proposal, the House enacted the main130 proposed legislation to cut top bracket rates, using a highly restrictive procedure, and following the irregular practice of passing the bill before a budget resolution.131 On March 28, the House adopted a budget resolution, providing for $1.6 trillion in tax cuts over ten years, the sum President Bush had proposed.132

In the Senate, the chair of the Senate Budget Committee, Senator Pete Domenici (R-N.M.), brought his party's version of the budget resolution directly to the Senate floor without giving the minority party the committee meeting it requested, as he saw no benefit in convening

129 See Martin A. Sullivan, Economic Analysis—Like Gasoline on a Fire, House Bill Fuels AMT's Problems, 90 TAX NOTES 1443 (2001). As Treasury Secretary O'Neill testified when confronted with the AMT problem, "I'm leaving that to you,' O'Neill told lawmakers. 'I have not provided for [it] . . . ." Warren Rojas, O'Neill Faces Off Against Democrats on Budget, Tax Cuts, 90 TAX NOTES 1279 (2001).

130 The House enacted other tax cut bills later with marriage benefits and pension changes, but proponents of the President's bill, having devoted so much of the projected surplus to the top bracket cuts, argued successfully that they must fend off attempts at progressivity in those aspects on grounds of necessary economy. For later enactment of other pieces, see Lori Nitschke, Alleviation of "Marriage Penalty" Hits Bipartisan High Note in House, 59 CONG. Q. WKLY. REP. 709 (Mar. 31, 2001) (describing passage of H.R. 6 on March 29). The various piecemeal measures could not possibly fit within the administration budget. See id. (noting also that President Bush proposed a tax break for double-income couples, while the House bill, reflecting the attitude of "social conservatives," would distribute the tax break to single-income couples). For a discussion of how pension proposals of the kind enacted subsidize the well-off and undermine pension equitability, see Medill, supra note 19, at 32-36.

131 As this bill illustrated, regular House procedure, unlike regular Senate procedure, allows the majority party to impose tight floor procedural controls without (or in this instance, prior to) reconciliation instructions, which is why this article, in focusing upon reconciliation, focuses on the Senate. However, even for the House's procedure, it was striking that the bill let the minority party offer only a single amendment to the massive-scale bill, and that "[t]he House passed the President's $1.6 trillion tax cut . . . pretty much intact on March 8, long before there was even a budget resolution on which it was supposed to be based." Drew, supra note 19, at 52; 147 CONG. REC. H809 (daily ed. Mar. 8, 2001) (adoption of Economic Growth and Tax Relief Act of 2001, H.R. 3, 107th Cong. (2001)—this was not a reconciliation bill, as reflected by a bill title without the word "reconciliation" in it); Heidi Glenn, Patti Mohr, & Warren Rojas, Rate Cut Bill Clears House as Bipartisanship Dissolves, 90 TAX NOTES 1431 (2001).

his completely polarized committee. On the Senate floor, when the key substantive amendment was offered, four Republican moderates, including Senator Jim Jeffords (R-Vt.), provided the winning votes to reduce the size of the tax cut target by $448 billion, down to $1.187 trillion, with half the difference for debt reduction, and half for increased education spending. Since Senate Democrats had proposed a tax cut target of $900 billion, that floor amendment "nearly splits the difference between what Bush wants and what Senate Democrats have proposed."  

Meanwhile, following the all-important quiet discussions about whether reconciliation was available for tax cut bills, it had become known that Senate Parliamentarian Robert Dove "had raised some questions as to whether or not a tax bill was eligible for reconciliation." More precisely, Senator Byrd's critique apparently convinced the Parliamentarian as a matter of parliamentary law. This meant that the Senate Chair, who rules as the Parliamentarian advises, would not be able to declare reconciliation instructions in order for the tax cut. The Senate Parliamentarian, who had considered more deeply the implications of his 1996 ruling now that these had become tangible, did not regard it as a precedent to follow in 2001.

133 See Warren Rojas, A Fork in the Budget Road, 90 TAX NOTES 1741 (Mar. 26, 2001).
134 147 CONG. REC. D313 (Apr. 4, 2001) (relating the amendment making a reduction "in the share of tax relief given to the wealthiest one percent of Americans"); Heidi Glenn, Patti Mohr, & Warren Rojas, The Real Game Begins: Senate Clears § 1.187 Trillion Tax Cut, 91 TAX NOTES 183 (2001).
137 "It appears [the Parliamentarian] reflected very carefully on what Sen. Byrd has said and came to a conclusion," [Senator] Nickles' chief of staff, Eric Ueland, said of Dove. "The legislative history as interpreted by Bob [Dove] is that you can only give reconciliation protection to a bill or bills that increase taxes, decrease mandatory spending or make changes in the public debt." Andrew Taylor, Law Designed for Curbing Deficits Becomes GOP Tool for Cutting Taxes, 59 CONG. Q. WKLY. REP. 770, 771 (Apr. 7, 2001).
138 The Senate Parliamentarian "indicated" that if a point of order had been made against Senator Domenici's proposal for reconciliation instructions for multiple tax cut bills, he would have "declined to rule and asked the Senate to decide." Id.
139 This drove Chairman Domenici to contemplate such eccentricities as moving the House budget resolution through the Senate instead of a Senate resolution. 2001 TAX NOTES TODAY 65-1, Apr. 2, 2001, at 3, LEXIS, Fedtax Library, TNT file; 2001 TAX NOTES TODAY 64-1 (Apr. 3, 2001) at 2, LEXIS, Fedtax Library, TNT file ("A Republican Senate Budget Committee aide said Dove had
Not wanting the Senate Chair to rule as the Parliamentarian would advise, Chairman Domenici essentially walked away from the 1996 precedent and the late 1990s tax cut bills by leaving reconciliation instructions out of the budget resolution he placed before the Senate initially. With both parties' tacit cooperation, he steered a course that avoided an ugly open display of sheer partisan muscle overcoming procedural regularity. He offered such instructions as an amendment, thereby incorporating tax cut reconciliation instructions by a route that did not cause the Senate Chair expressly to disconfirm the applicability of precedent. Senator Byrd reiterated his opposition to reconciliation tax cuts in a debate with Chairman Domenici, but neither he nor anyone else made a point of order. The reconciliation instructions were incorporated on a 51-49 vote virtually on party lines, with Senator Jeffords (R-Vt.) feeling obliged with some misgivings to give his procedural vote to his party, even though a bill decidedly not shaped to his liking could now pass in the Senate with just a bare majority.

indicated that he might oppose extending reconciliation protections for the $1.6 trillion tax cut to a Senate bill but that his authority did not cover the House's rules governing reconciliation. The Senate does not question the procedural validity of provisions placed by the House in one of its vehicles. Hence, the allusion is to the kind of step taken in extremis as a shield from expected undesired rulings about a Senate (rather than House) measure by the Senate Chair.

140 Taylor, supra note 137, at 771. "Fearing that Senate Parliamentarian Bob Dove would rule against it, Domenici said his budget does not include reconciliation instructions for the president's tax bill, although he expects to introduce an amendment addressing reconciliation during the budget debate." Senate Kicks Off Budget Debate, 2001 TAX NOTES TODAY 64-1, Apr. 3, 2001, LEXIS, Fedtax Library, TNT file. "Domenici was forced to pursue this auxiliary course on reconciliation after the Senate parliamentarian took notice of a Democratic challenge to the use of limited protections for Bush's $1.6 trillion tax cut and threatened to rule against Republicans." 2001 TAX NOTES TODAY 67-1, Apr. 6, 2001, LEXIS, Fedtax Library, TNT file.

141 As the press noted after interviewing the principals, "[bly declining to force a futile party-line vote, Byrd spared his party from squarely establishing a precedent about reconciliation in favor of Republican tax cutters." Taylor, supra note 137, at 771. The highlight of the debate on the Domenici amendment for reconciliation instructions consisted of the speeches by Chairman Domenici, 147 CONG. REC. S3499-3501 (daily ed. Apr. 5, 2001), and by Senator Byrd, id. S2502-04. The Senate adopted the budget resolution the next day. 147 CONG. REC. S3696 (daily ed. Apr. 6, 2001) (adopting H.R. Con. Res. 83, 107th Cong. as amended).

142 Senator Jeffords had criticized the tax cut's size, wanting instead a fund for special education, which the White House rejected. See Senate Kicks Off Budget Debate, 2001 TAX NOTES TODAY 64-1, Apr. 3, 2001, LEXIS, Fedtax Library, TNT file, at 5. That may have been the decisive moment in the Senate's changing hands at the close of passage of the tax bill. On the Domenici amendment, fifty Republicans and Senator Zell Miller (D-Ga.) voted for it, and forty-nine Democrats voted against it, avoiding the need for the Vice President to break a tie. 147 CONG. REC. S3516 (daily ed. Apr. 5, 2001); For the Record: Senate Vote 75, 59 CONG. Q. Wkly. Rep. 799 (Apr. 7, 2001). Proponents did drop much-criticized plans to move other tax provisions, such as tax breaks for small businesses, in a second reconciliation bill, which apparently would have exceeded the Senate's
The conference on the budget resolution specified the final tax cut total of $1.35 trillion, which the two chambers adopted.\textsuperscript{143} In an extraordinary action, Senate Majority Leader Trent Lott (R-Miss.) discharged the Senate Parliamentarian, apparently due primarily to his refusal to support reconciliation for the tax cut bill, although other lesser budget procedures were mentioned as well.\textsuperscript{144} The Parliamentarian had previously not been considered subject to partisan dismissal by dint of his office, his distinguished career spanning decades, and his long record of demonstrating ample previous sensitivity to Republican concerns.\textsuperscript{145} Ironically, Majority Leader Lott was "not likely to have better luck with [his successor as Parliamentarian, Alan] Frumin, who associates say is more skeptical of reconciliation-related shortcuts than was Dove."\textsuperscript{146} Although the floor action on the budget resolution and the discharge of the Parliamentarian were public acts, few outside the Senate really understood them, for Senate budget procedure can be, frankly, arcane. However, within the Senate, what had happened was understood. Notwithstanding the shared view of the former Parliamentarian and Senator Byrd, that the reconciliation precedents should not be followed for EGTRRA, the bill would now receive reconciliation treatment and could move by only fifty-one votes, not sixty. What remained was to see what legislative product would result from this.

Having received its marching orders from the budget resolution to produce a tax cut of $1.35 trillion over ten years, the Senate Finance Committee soon reported its tax cut bill with the support of the ranking minority member, Senator Max Baucus (D-Mont.),\textsuperscript{147} and faced acute


\textsuperscript{144} See Charles Tiefer, \textit{Out of Order: The Abrupt Dismissal of the Parliamentarian Threatens to Rip Apart the Fragile Fabric of Senate Procedure}, supra note 11 (discussing the discharge).

\textsuperscript{145} See id.


\textsuperscript{147} Senate Finance Chairman Charles Grassley (R-Iowa) devised the bill ratified afterwards in a committee markup in negotiations with Senator Max Baucus (D-Mont.), who did not, despite his ranking position, have his party's backing. Lori Nitschke & Bill Swindell, \textit{Grassley-Baucus Tax}}
pressure for change on the floor from almost the entire minority plus several moderate majority party members. President Bush's supporters used fully the procedural clout of reconciliation at this point. This allowed them to maximize the benefits going to the very highest brackets, and avoid seeking consensus with Senate moderates, as they must for non-reconciliation controversial bills. Among other key amendment votes, Senator John McCain (R-Ariz.) moved for the top 39.6 percent bracket's relief to be reduced by 1 percentage point and to use the proceeds for more middle-income taxpayers to receive the reduced 15 percent rate. Four Republican moderate defectors joined him, and dramatically, his amendment failed on successive days by the tie votes of 49-49 and 50-50. That is, the bill's backers were, and could be, perfectly content with a bare 50 supporters in key amendment test votes excluding even so prominent a Senator of the President's own party. Reconciliation reduced the role of such Senate moderates, and the bill passed the Senate and went to conference on March 23.


148 The Presidents' supporters' dependence upon the procedures of reconciliation showed when they faced what they termed, and some observers characterized as, "what amounted to a Democratic filibuster." Heidi Glenn, Conference Race to Complete Tax Bill, 91 TAX NOTES 1475 (2001). Reconciliation limits debate time and limits the amendments in order to germane ones, but does not limit the number of germane amendments, and does not limit the total amount of time spent on roll calls, at fifteen minutes apiece, for those amendments. "[A]fter five hours of voting on stacked amendments" on May 21, when backers thought the work on the bill done, "Democrats returned the next day offering amendment after amendment with no end in sight.... Lott called it 'filibuster by amendment.'" Id. at 1476-77. Absent reconciliation, there could clearly have been a genuine filibuster which only the stricter rules against dilatory tactics after 60 votes for cloture would have ended.

149 In one key test vote, Senator Jean Carnahan (D-Mo.) offered an amendment to shift some tax reduction to middle-income taxpayers, losing by only 48-50. 147 CONG. REC. S5218-20, S5249 (daily ed. May 21, 2001).


151 147 CONG. REC. S5522 (daily ed. May 23, 2001). As for Senate moderate influence, see 1995-1996 Budget Battles, supra note 9 at 437; id. at n.98. The handful of Senate Democrats, notably Senators Baucus and John Breaux (D-La.), who supported the tax cut bill did so in return for $100 billion in benefits starting at the lowest income levels that became advance refund checks mailed out in 2001. A bloc of moderate majority party members, Senator Olympia Snowe (R-Me.) prominent among them, sought successfully to make the child tax credit refundable, so that families with children who filed income tax returns could fully receive it. For the moderates' key pre-
Reconciliation not only freed bill supporters to sail ahead by a bare Senate floor majority and hence to yield during Senate passage on few points toward consensus, but it also let them take back some of those few points by dint of a startling conference product. As to "how to steal a trillion," May 23-26 was an all-important period: the conference and enactment of its product. Scholars have noted and criticized the dangerous way reconciliation truncates the Senate debate on potentially momentous conference reports, anticipation of which unleashes the conference to an extraordinary extent. After the Senate finished floor consideration, it could appoint a stacked conference committee to push the bill in extraordinary directions, because even a 50-50 Senate with equal party memberships on standing committees could, and did, stack a reconciliation conference committee.

The stacked conference committee operated in a procedurally abnormal way at incredible speed, finishing in two days and placing its conference letter, see Senate Passes $1.35 Trillion Reconciliation Tax Bill, 2001 TAX NOTES TODAY 101-1, May 24, 2001, LEXIS, Fedtax Library, TNT file.

Of all the restrictions on debate over parts of the budgetary process, the ten-hour debate limit for conference reports on reconciliation strikes us as unduly restrictive of the rights of the minority. Given the likelihood that a reconciliation bill can differ significantly when it emerges from a House-Senate conference and that it can include legislation (as well as budgetary) decisions, limiting debate to ten hours fails to give the minority a reasonable amount of time in which to raise flags about the majority-adopted decisions of the conference report.

Although the power-sharing 50-50 Senate had equal representation on standing committees, "[I]ooking ahead to conference, [Majority Leader] Lott said Republicans would enjoy a one-seat majority in the House-Senate budget conference. [Minority Leader] Daschle said that because of budget rules favoring the majority, the conference split would be four Republicans to three Democrats." Senate OKs $1.2 Trillion Tax Cut, Sets Up Budget Standoff, 2001 TAX NOTES TODAY 68-1, Apr. 9, 2001, LEXIS, Fedtax Library, TNT file. That is, ordinarily, the fifty Senators in the minority could enforce their rights to equal representation on all committees by filibustering the floor motions relating to bills, and this would be true of the motions for going to and from conference. However, reconciliation treatment meant such motions as to a reconciliation conference did not face this threat.

That conference did not hold formal meetings, only informal ones made up of a few Members. The ranking minority member of House Ways and Means, Rep. Charles Rangel (D-N.Y.) complained that he was left out of those meetings. See Heidi Glenn, Both Praised and Criticized, Tax Bill Awaits Bush's Signature, 91 TAX NOTES 1643, 1646 (June 4, 2001). As with the foregoing of other steps during the 2001 budget process, it was evident that reconciliation's potency meant the bill's fate in no way depended upon such deliberation-promoting steps as letting all members participate in the meetings.
conference report before the House for adoption on May 25. The report was before the Senate, under the juggernaut of reconciliation procedures limiting debate to ten hours, the next day.\footnote{For passage of the conference report, see 147 Cong Rec. H2844 (daily ed. May 25, 2001); \textit{id.} at S5796 (daily ed. May 26, 2001).} The stacked conference and post-conference of May 23-26 must have set records for the speed of distribution of each billion dollar sum to top bracket individuals, the enormous amount of money so distributed, and the exclusiveness of the small number of Members making these decisions. The entire process occurred in violation of the Budget Act's intent that reconciliation only be used for deficit control bills.

Reconciliation allowed the conference committee to resolve the bill's substantive issues in a one-way direction. Tension arose because, on one hand, President Bush had not relented on what he had hoped to do with \$1.6 trillion in cuts. On the other hand, to garner even a bare majority of the Senate to vote for the budget resolution required that the tax cut be capped at \$1.3 trillion. Moreover, to get that bare majority to defeat amendments had required concessions that would benefit taxpayers below the top bracket. After all, the previous year, when tax cutters actually had more Senate voting strength, the Senate had passed a version much more moderate than what the President now sought.\footnote{See Lori Nitschke, \textit{Reconciliation Bill: Last Chance for a GOP Tax Victory?}, 58 CONG. Q. WRKY. REP. 2073 (Sept. 9, 2000).} The conference committee resolved this tension wholly toward benefits for top-bracket taxpayers, by a series of steps substantively in a class by themselves, and made procedurally possible only by reconciliation.

First, the conference simply helped itself to ten percent greater tax cuts than the budget resolution or the Senate bill had approved, by an obscure scheme. All the figures in the budget resolution and the corresponding Senate tax bill had involved ten years through 2011, since the budget process and reconciliation use a ten-year window.\footnote{For the Byrd Rule's requirement of 60 votes to alter revenue beyond a 10-year period, see 2 U.S.C. §644 (2002) ("[A] provision shall be considered to be extraneous if . . . it decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by such reconciliation bill.").} However, the conference committee took ten years' cuts in nine years. It "wrote in sunset language that would repeal the entire bill in 2010, allowing a somewhat deeper rate cut than the Senate bill while still
staying under the overall ceiling . . . ."158 In other words, the tax cut nominally met its ten-year ceiling of $1.3 trillion, but took an extra $130 billion or so over the first nine years and then seemingly let rates zoom all the way back to pre-legislation levels for that tenth year. This is like a dieter who contends he is obeying a rigorous schedule when having dessert at every meal for nine days by postulating that the tenth day will be calorie-free. Given that the budget resolution and the Senate bill had in no way contemplated the fiction that the year 2011 would be a time zone warp of pre-EGTRRA rates, even jaded and cynical observers expressed amazement about this "outright fraud[]."159 Unlike some budget maneuvers, the cliff-like sunset provision involved not merely a debatable justification of what the House and Senate agreed upon, but an additional loss of a real $130 billion by the Treasury on a scale beyond what even a bare majority of Congress had agreed.

Second, the conference phased out the bill’s limited relief for the ultra-complex AMT the year after the 2004 election.160 Because the AMT will soon sweep in middle class taxpayers on a grand scale, it will lead to a skewed geopolitical distribution of tax cut benefits. This imbalance may be beyond repair without resort to another 2001-style facilitation of enormous Treasury-loss tax cutting.161 Since more than half of what the AMT renders newly taxable consists of deductible state and local taxes, the AMT disproportionately applies in the high tax

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159 A long-time Washington commentator who is a self-declared sympathizer for deep tax cutting commented: A whole series of outright frauds have been employed to massage the figures . . . . (When I first read that the arithmetic had been done this way, I assumed I had missed something. Whatever the conference had done, it could not have done that). . . . Presto: The cost of 10 or fewer years’ worth of tax cuts is spread over 11 years, at a savings (entirely imaginary) of hundreds of billions of dollars. The imaginary savings is then spent on extra cuts. Amazing. Clive Crook, How to Take a Flawed Tax Bill and Turn It Into a Joke, 33 NAT’L J. 1707, 1708 (June 9, 2001) (emphasis added).


161 See Warren Rojas, Long-Term AMT Reform Looks Highly Unlikely, 91 TAX NOTES 1823 (June 11, 2001) (explaining that it will be difficult to pass any change in the AMT). See also Lee A. Sheppard, News Analysis—No Tax Cuts for the Gore States, 91 TAX NOTES 1480, 1482-85 (May 28, 2001) (describing the disparate geographical impact of the AMT).
states like California, New York, and other states that voted against Governor Bush in the 2000 presidential election. A tax commentator calculated how the conference’s phase-out of AMT relief would nullify tax cuts in certain states, under the acerbic but astute title, “No Tax Cuts for the Gore States.” The Senate, with its sensitivity to the states’ balance, would normally resist such skewing through the conference mechanism—for example, by Senators from California and New York and other high-tax states exercising their post-conference rights to debate the final version at length—but reconciliation procedures precluded this.

Third, the conference committee resolved the tension between President Bush’s desires regarding the allocation of tax cuts and what the Senate had voted by phasing in some cuts late and by phasing out some early. Fair adherence to what the Senate had voted on in 2001 would have balanced the effects of phasing in and phasing out between the top brackets and the other brackets. Instead, a commentator readily concluded that “[a] timeline of the 10-year window suggests the new law retains tax cuts for those at the upper end of the income spectrum while phasing in or phasing out the other tax cuts targeted to those generally in the lower brackets.” To paraphrase an old saying, as the result of conference, the rich got richer, and the rest got phased in or out. The conference phased in early estate and gift tax relief ($138 billion) targeted to the very richest and $420 billion in income tax rate reductions solely (not primarily, but solely) to the top brackets.

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162 Sheppard, supra note 161, at 1480.
163 The bill as reported by the Senate Finance Committee had phased out the AMT relief on December 31, 2006. Tax Cut Mark Takes Hits from Both Sides, Clears Finance, 2001 TAX NOTES TODAY 95-1, May 16, 2001, LEXIS, Fedtax Library, TNT file. Thus, the conference had phased out AMT relief (for middle-class taxpayers in high tax states) a year earlier than the Senate, to pay for even more benefits for top-bracket taxpayers.
164 Heidi Glenn, Both Praised and Criticized, Tax Bill Awaits Bush’s Signature, 91 TAX NOTES 1643, 1646 (June 4, 2001).
165 Starting in 2002, reductions in the top tax rate on gifts and estates would begin phasing in, going to the wealthiest, besides other provisions for increasing exemptions to $1.5 million and higher, some of which helps only the estates of multi-millionaires. See Victoria Allred, Tax Package’s Timetable, 59 CONG. Q. WKLY. REP. 1306, 1307 (June 2, 2001) (year-by-year changes); Heidi Glenn, Both Praised and Criticized, Tax Bill Awaits Bush’s Signature, 91 TAX NOTES 1643, 1646 (June 4, 2001) (year-by-year changes). These provisions are §§ 511, 521 of EGTRRA, Pub. L. No. 107-16, 115 Stat. 70-72 (2001) (codified at 26 U.S.C. §§2001, 2010).
166 The marginal tax rate cuts—the 39.6 percent bracket to 35 percent, the 36 percent bracket to 33 percent, the 31 percent bracket to 28 percent, and the 28 percent bracket to 25 percent—phase in by 2006. Glenn, supra note 164, at 1646.
Meanwhile, it cut back concessions to middle-income taxpayers. For example, the higher education deduction phases out in 2005 for a total cost under $10 billion.167 It phased in slowly the married taxpayer benefits, diluting further that relatively meager relief, which had been drawn in any event the way conservatives sought,168 rather than reducing the marriage penalty for middle- and low-income two-earner families.169

A sudden development distracted public attention, so that just as few observers had followed the triumph of reconciliation and the Parliamentarian’s discharge, few paid full attention to what happened in conference. On May 23 and 24, as reconciliation sped the tax bill off the Senate floor and through conference, Senator Jeffords announced that he would leave the Republican Party, causing it to lose Senate majority control. Of course, many factors went into Jeffords’s party change, but it is no exaggeration to pay specific attention to the tensions of the massive tax cut reconciliation launched in early April as the Senator began contemplating his move.170 As he explained publicly,171

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168 “...which helps more middle-income taxpayers...will cost just $63.3 billion in the next decade, 5 percent of the total.” Daniel J. Parks with Bill Swindell, Tax Debate Assured a Long Life As Bush, GOP Press for New Cuts, 59 CONG. Q. Wkly. Rep. 1304, 1309 (June 2, 2001). The bill provided some relief to married couples with a single very high earner not experiencing an actual tax rate penalty by getting married, and correspondingly provided even less to couples with two moderate-earners who were experiencing such an actual penalty. The provisions are §§301-02 of EGTRRA, Pub. L. No. 107-16, 115 Stat. 53-54 (2001) (codified at 26 U.S.C. §§ 1, 63).


170 “...It was during the tax debate that Daschle and Minority Whip Harry Reid, D-Nev., opened conversations with Jeffords.” Mike Christensen, Anguished Transformation from Maverick to Outcast, 59 CONG. Q. Wkly. Rep. 1242, 1246 (May 26, 2001).

171 Senator Jeffords explained his party change in the form of a televised address in Vermont, amplified by a brief press conference. In the short address, he devoted this paragraph to the tension between agenda loyalty and the substantive budget:

[It is only natural to expect that people like myself, who have been honored with positions of leadership, will largely support the president’s agenda . . . . Those who don’t know me may have thought I took pleasure in resisting the president’s budget or that I enjoyed the limelight. Nothing could be further from the truth. I had serious substantive reservations about that budget, as you all know, and the decisions it set in place for the future.]
How to Steal a Trillion

the tension on the budget between his substantive views and his party
loyalty\(^{172}\) caused him to change parties. Tax cut reconciliation
procedure thus had the dramatic side effect of contributing to the
Republicans’ loss of Senate control.

B. After the 2001 Tax Cut: Reforming Budget Act Reconciliation

This section begins with the reasons why it is still timely to reform
Budget Act reconciliation. It then turns to the debate over the uses of
reconciliation and how to make reforms.

1. The Coming Pressure for Further Tax Cuts by Reconciliation

At first glance, budget reforms after the events of 2001 might seem
like taping up the barn door after not only the farm animals, but also
everything else that might be there, present and future, have been
taken. The tax cuts pushed through by reconciliation were scored as
$1.3 trillion, and, as noted above, will in reality have a much larger effect
on the Treasury.\(^{173}\) With realistic economic projections, and an
economic downturn combined with the response to the terrorist attack,
previous imaginings of persistent surpluses must now be deemed

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\(^{172}\) On the budget resolution and the tax bill, Senator Jeffords joined repeatedly, on substantive
amendment votes such as the McCain and Carnahan amendments, with the minority. Yet, so long
as he stayed in his party, he considered himself obliged out of party loyalty to vote with it on
procedural questions—above all, in this period, as to using reconciliation. “On party-line votes this
year, Jeffords has sided with a majority of voting Republicans . . . . Many of those votes came on the
tax cut package (H.R. 1836) and the fiscal year 2002 budget resolution (H.R. Con. Res. 83)—despite
his disagreements with portions of both measures.” Jeffords’ Switch Unlikely to Mean A Change in Voting

\(^{173}\) Senator Kent Conrad (D-N.D.), the new Chairman of the Senate Budget Committee, stated
in the debate on the tax cut conference report the “estimate that this bill, when combined with the
real budget reflecting what will actually be spent over the next 10 years, will be raiding the Medicare
trust fund by $311 billion and raiding the Social Security trust fund by $234 billion.” 147 CONG.
implausible. Discussing the reform of the reconciliation procedure for tax cuts may seem so late as not to be worth bothering about, particularly as it might be years before Senate reforms could actually occur.

If undertaken, however, such reform could be significant in upcoming years. EGTRRA's striking schedule of phase-outs, omissions, and sunsets will create powerful drives in the 2000s to renew tax cut reconciliation, so much so that even cool neutral observers anticipate such cuts.\textsuperscript{174} EGTRRA's limited AMT relief phases out at the end of 2005. That in itself will boost the AMT-paying taxpayer population from 5.3 million to 13 million, with a projected increase by the decade's end to nearly thirty-six million largely middle-class families.\textsuperscript{175} This large and influential bloc will likely demand relief from a new tax burden that is not only unwelcome, biased in some weird ways, and geographically skewed, but also contains a level of complexity never intended for the middle class.\textsuperscript{176} The 2001 tax cut accomplished almost no tax simplification agenda. Moreover, when the 2001 tax cut also built in a cliff-like sunset provision for the entire bill after nine years, it created a veritable magnet for more tax cut reconciliation proposals. Tax cut proponents predicted annual efforts "to pass a new 10-year budget reconciliation resolution that would clear the way for an extension of the tax bill beyond 2010."\textsuperscript{177} Those who want tax cuts—from Democrats representing high-tax states facing a large AMT load to Republicans from conservative states vowing to renew expiring tax cuts—will want to push reconciliation to its procedural limit so that they can accomplish

\textsuperscript{174} In their annual report on the U.S. economy, the IMF's directors said the actual cost [of EGTRRA] was likely to be larger than the headline figure. The higher figure was likely because Congress would probably be forced to extend some tax reductions that are formally due to expire within the next 10 years and spending would also probably exceed the limits. Gerard Baker, \textit{IMF Calls for Rethink over Bush Tax Cut}, \textit{FIN. TIMES}, Aug. 15, 2001, at 1.

\textsuperscript{175} Daniel J. Parks with Bill Swindell, \textit{Tax Debate Assured a Long Life As Bush, GOP Press for New Cuts}, 59 CONG. Q. WKLY. REP. 1304, 1305 (June 2, 2001)

\textsuperscript{176} For discussions of the AMT's complexity, see \textit{supra} notes 127-29. As an example of the AMT's peculiar bias, it particularly affects families with many children because of what it does regarding personal exemptions. It will not make much sense that California or New York middle income families with the financial burdens of raising many children should receive no tax relief while high income Texas individuals or couples with no children receive a great deal, but that is the projected effect in a few years because of how the AMT treats families depending on their state income taxes and the number of their personal exemptions.

\textsuperscript{177} Patti Mohr, \textit{The Tax Bill—Sunset Provision Leaves Tax Bill on Insecure Footing After 2010}, 91 TAX NOTES 1648 (June 4, 2001) (citing the manager for legislative affairs at the National Federation of Independent Business).
their objectives with a bare majority, as in 2001, rather than needing Senate consensus or 60 votes. Reforming reconciliation, late, even very late, could prove historically to be much better than never.

2. Why and How to Reform

Reconciliation should occur only for deficit control (including, in times of surplus, debt reduction). This section starts with the arguments on both sides as to existing law, that is, the arguments about whether reconciliation was abused in 2001. It then develops further arguments about what Congress should do henceforth by way of reform.

First, as to the existing law leading up to 2001, Congress neither intended the 1974 Budget Act to have, nor did it find a persuasive reason in 1981 or at any other time in the quarter-century thereafter validly to institute, reconciliation for any reason other than deficit

178 Reform is needed as much as it was after 1981, when, in reaction to the reconciliation excesses on the spending bill, Senator Byrd persuaded the Senate to adopt the Byrd Rule, forbidding the use of reconciliation as a vehicle for extraneous provisions. The Senate has retained it despite how much harder it has made it for both parties to get their cherished projects passed. See supra note 157. Notably, the Senate retained the Byrd Rule even though it painfully constrained Democrats in various projects, including attempting to pass health care reform as a reconciliation bill. It constrained Republicans in an equally painful way from getting through projects in the mid-1990s and from tax cuts in 2001 beyond ten years' duration. For a description of the use of the Byrd Rule through 1996, see 1995-1996 Budget Battle, supra note 9, at 437-38. Similarly, in the BEA of 1990, President Bush made a bipartisan deal for PAYGO procedural reforms constraining new spending and tax cuts, responding with courage to the decade of exploding debt by putting the budget on a route out of deep deficits. See WILDAVSKY & CAIDEN, supra note 9, at 150. The nation should indeed account itself fortunate that leaders of quite divergent substantive views propounded, and stood by, those previous rounds of reconciliation procedure reforms.

179 Congress decided in 1974 only that end-of-year deficit reduction by way of spending cuts or tax increases deserved that authorization. See supra notes 90-92 and accompanying text. An argument on the other side raised in the debate preceding the 1996 precedent, was an asserted 1975 precedent, when Senator Long, Chairman of the Senate Finance Committee, adverted to reconciliation for a tax cutting bill. See 142 CONG. REC. S5416 (daily ed. May 21, 1996) (statement of Sen. Domenici). Several Senators who had actually been present in 1975, or in 1980 when the first real use of reconciliation occurred, knocked down the purported precedent. It did not involve actual reconciliation instructions or a bill actually entitled and dealt with as a reconciliation bill, but only a unanimous-consent verbalization by Chairman Long, whose verbalizations relating to the budget process could often be unserious. Id. at S5419 (statement of Sen. Hollings); id. at S5420 (statement of Sen. Exon). Neither Allen Schick's book-length overall treatment of late 1970s budget process, SCHICK, CONGRESS AND MONEY, supra note 85, nor the shorter but procedurally-focused treatment in CONGRESSIONAL PROCEDURE, supra note 2, mention even the thinnest corroboration for the 1975 bill to be a reconciliation precedent. It is a myth.

180 While the extraordinary evolution of reconciliation in 1981 confirms reconciliation's great flexibility for deficit control, the Senate majority's decision in 1981 to use reconciliation only for the spending cut bill and not for the tax cut bill strongly confirmed the boundary between proper and improper use of reconciliation. See supra notes 96-100 and accompanying text.
control or debt reduction. Reconciliation constitutes a powerful incursion into regular Senate procedure, such that the Senate would not countenance it without an express consensus-based decision. For the quarter-century after 1974, Congress never enacted into law a reconciliation package other than one fitting the deficit control rubric. 181

The precedent upon which Senate Republicans relied for their interpretation of the Budget Act, a 1996 ruling by the Chair in favor of broad use of reconciliation that was upheld by a party-line vote, 182 did not warrant following in 2001. Senator Byrd's analysis on this point has merit. The 1996 ruling, on which later actions were built, 183 occurred long after the practices of the 1974 Act had already been established, and it was distinguishable on its facts. 184 Moreover, it had indicia of a precedent that should not be followed, such as firm and unyielding rejection along party lines, lack of contemporary visibility or a parliamentary pedigree, 185 and, above all, inconsistency with the fabric of Senate procedure. 186

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181 As described above, Congress had enacted reconciliation deficit reduction followed by tax cuts in 1981. See supra note 96 and accompanying text. It had also enacted, in 1997, packages of reconciliation spending cuts and reconciliation tax cuts. See supra note 114. Congress, however, had never enacted only tax cuts without any deficit reduction.

182 The ruling is discussed in BINDER & SMITH, supra note 38, at 193.

183 The Senate passed reconciliation tax cut bills in 1999 and 2000 that were not part of deficit or debt control. These bills were not enacted because of vetoes by President Clinton, and they did not even receive distinct rulings or discussion about reconciliation, being viewed by both sides as coming in the wake of the 1996 ruling. Senator Byrd acknowledged their existence but dismissed their procedural propriety. 147 CONG. REC. S1534.

184 Although broad statements were made on the Senate floor, in fact the 1996 tax cut reconciliation instruction was coupled with spending cuts in an overall deficit reduction package—unlike 2001. The 1996 tax cut bill is discussed in 1996 CONG. Q. ALMANAC 2-21. It was part of a repeated but fruitless effort in 1995-96 by the newly elected Republican congressional majority to enact a large-scale upper-bracket tax cut.

185 Proponents of tax cut reconciliation also pointed to 1999, when a tax cut bill passed the Senate pursuant to reconciliation instructions, before being vetoed by President Clinton. See supra note 118 and accompanying text. However, the 1999 incident did not involve a ruling of the Chair and amounted simply to an extension of the 1996 ruling.

186 The 1996 incident contrasts in this regard with the switch in 1980-81 to the use of reconciliation on the first budget resolution. When President Reagan's spending cut program went through Congress in 1981 on the basis of reconciliation, it was an enormous, even revolutionary, procedural innovation. See supra note 96 and accompanying text. There were aspects of it that were recognized as procedural abuses, and were overruled over time, such as by the Byrd Rule. However, the core step of using reconciliation on the first resolution to push very large legislative packages through Congress of spending action (in 1981) and, later, either tax increases or contemporaneously paid-for tax cuts, did survive and establish itself firmly as a precedent. That core
In 2001, Senate Parliamentarian Dove stood rightly against following it.\textsuperscript{187} The combination of the majority’s avoidance on April 5, 2001, of actually invoking the 1996 precedent, and the Senate’s party-line adoption of the 2001 reconciliation instructions, tacitly cautioned against treating the 1996 precedent as one to be followed. Then, the abrupt, uncustomary, and inappropriate termination of the Parliamentarian, soon followed by the change of party control in the Senate, suggests that the events of 2001 not only failed to reinforce those of 1996 as supporting such use of reconciliation, but also warrants viewing such use of reconciliation henceforth as unsupported by precedent.\textsuperscript{188}

Some may doubt the legal importance of parsing the Budget Act’s intent or the Senate’s precedents in this way. Apart from general and, for this article’s purposes, uninteresting contentions that analysis of statutory application is a waste of time absent judicial involvement because politics excludes law,\textsuperscript{189} it could be argued that this particular area of law contains such irresistible power politics as to negate analysis of rules.\textsuperscript{190} Nevertheless, the Senate has hitherto treated budget processes, for all their high stakes and partisan polarization, as worthy of

\textsuperscript{187} As noted, the successor Parliamentarian is not known as a believer in extension of reconciliation. See supra note 146. He is held in high regard by both parties, and his view thus credibly further undermines the argument for broadened reconciliation. See Helen Dewar, Successor to Ousted Senate Parliamentarian Named, WASH. POST, May 9, 2001, at A23.

\textsuperscript{188} One side might say that 2001 did establish a further precedent to add to 1996 or 1999. The other might say that not only were these abuses of reconciliation, but also that the party change in 2001, attributable in part to this overextension of a procedure, amounts to a repudiation. A balanced judgment would regard the use of reconciliation in this context as signaling the need for reform like the Byrd Rule rather than a tug-of-war of views about how the precedents now stand.

\textsuperscript{189} Many observers may question whether it makes any sense to analyze something like the Budget Act at all outside of court decisions. If this article paused to discuss the general jurisprudential question about the meaning of analysis of legal questions outside the courts, it could spend as much or as little time as felt useful on that eternal question. Numerous previously cited books and articles regarding the processes of lawmaking, including the author’s thousand-page treatise on congressional procedure, reflect the meaningfulness of the subject in general. See CONGRESSIONAL PROCEDURE, supra note 2.

\textsuperscript{190} That is, if tax cutters with fifty-one votes could use reconciliation in 2001 outside deficit control, then tax cutters could use reconciliation again the same way when next they have fifty-one votes. Even if the Senate followed Senator Byrd’s position as long as it had a Democratic majority, then, when the chamber next changes party control, the new majority could repeat 2001. It is possible, then, that what happened in 2001 would ultimately become accepted as Senate procedure.
having effective rules that are followed. Frankly, making budget process reform work in the future may require some accommodation of the intense commitment of many Senators to tax rate cutting by combining a clarification of reconciliation's use only for deficit or debt reduction with a tolerant concept of how "deficit reduction" packages can include paid-for AMT relief and other tax rate cuts.

First, however, must come the analysis of why to clarify reconciliation's use only for deficit or debt reduction. Two lines of argument exist in support of tax cut reconciliation outside of deficit reduction: (1) the "special worthiness" argument, which deems tax cuts especially worthy of facilitation; and, (2) the "even-handed" argument, which treats reconciliation for tax cuts as symmetric with reconciliation for tax increases within the Budget Act's flexibility and policy-neutrality and flexibility. The special worthiness argument employs familiar antitax themes: that facilitating by reconciliation the will of even a bare Senate majority to cut taxes is democratic, naturally right, and economically sound.191 Only by reconciliation tax cuts, this argument goes, can the taxpayers keep their money rather than have Congress dissipate it through spending.192

The second, "even-handedness" line of argument notes how the majority can use reconciliation for tax increases, and seeks procedural symmetry for tax cuts, based upon the flexibility and policy neutrality of the budget process.193 No a priori reason exists in the Budget Act to

191 The following discussion is adapted loosely from the articles by McGinnis and Rappaport, supra note 17, and the sources they cite. These articles expound the view that structural problems with government generally, and with the current American federal government particularly, allow special interest groups to have an excessive capability to keep government too large, spending too high, and therefore taxes too high.

192 The arguments go roughly like this: Nothing could be less democratic than frustrating the will of the majority (that is, by denying the facilitation of reconciliation) in order to keep taxpayers surrendering more of their own income or property to the government. Economic models may demonstrate that income tax cuts would boost the nation's system of enterprise and hence rebound to the welfare of all. This is particularly true of cutting the top income tax brackets or finalizing the end of the estate tax, both of these being leveling taxes focused on relatively small numbers of relatively productive individuals. In contrast, leave the money in the Treasury, and organized special interests will take it out in spending as a form of rent-seeking that uses their excess political power. Moreover, the larger spending means a needlessly larger, more intrusive federal government.

193 Senator Domenici unveiled this line of argument in 1996 and reiterated it in early 2001, both times as Chairman of the Budget Committee and as a long-standing budget proceduralist. Domenici served as the counter-point to Senator Byrd in the procedural debate on this issue. The following discussion is adapted loosely from Senator Domenici's statements in 1996 and 2001. 147 CONG. REC. S3499-501 (daily ed. Apr. 5, 2001); 142 CONG. REC. S5415-16 (daily ed. May 21, 1996).
privilege tax lawmaking in one direction over the other; in a representative democracy, the majority prevails on such questions. Concretely, if a reconciliation tax increase on a bare party-line majority was sauce for the goose after the election of 1992, such a reconciliation tax cut was sauce for the gander after that of 2000—and would be sauce for the gander henceforth.  

The counterarguments to allowing reconciliation outside of deficit or debt control proceed as follows. First, the asserted “special worthiness” argument appeals narrowly to those with particular ideological anti-tax premises. Tax cuts by themselves do not sufficiently induce steps to pay for themselves. Historically, for example, after 1981, tax cuts did not bring about spending control. Moreover, tax cuts that simply distribute the contents of the Treasury without inducing any compensating economies are hardly distinguishable from spending.

The more interesting line of argument is the second, assertedly for “even-handedness” between tax increase reconciliation and tax cut reconciliation. Fundamentally, this mistakes the procedural difference between the Budget Act’s flexibility and policy neutrality as to targets, and the restrictive circumstances under which one can resort to various potent procedures, from points of order to reconciliation. The Budget Act is flexible and policy neutral only about its merely aspirational

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194 As for the pattern of the past, Congress may have enacted only reconciliation deficit-control packages into law from 1980 to 2000, but that was during an era of deficits. In an era of impending surpluses in 1996-2000, the Senate did pass reconciliation tax cuts (that these were vetoed proves nothing).

195 The experience during and after 1981, when a massive tax cut led to a decade of exploding public debt, illustrates the limits of the procedural premises for facilitating tax cutting first and then hoping for thrifty policy to follow thereafter. This plan is akin to deciding to eat double desserts early in the day and hoping for a calorie-free dinner-time. In 1981, no attempt was made to use reconciliation for the most enormous of all tax cuts; even the arch-proponents of tax cuts in 1981 sought compensating spending cuts prior to voting for tax cuts. They did not suggest that it was the role of reconciliation first to speed through tax cuts and then to hope afterwards for spending control.

196 The counter-argument is loosely drawn from Garrett, A Fiscal Constitution with Supermajority Voting Rules, supra note 17, at 496-502 (criticizing a proposed budgetary definition of spending that does not include tax expenditures). Notwithstanding the rhetoric that tax rate cuts let (high-bracket) taxpayers just keep “their” money, while spending causes “their” money to go to others, either way, the fisc has less, and the high-bracket beneficiaries of the legislation have more. U.S. tax levels are low by world standards, and the progressive income tax, for all its critics, has not yet struck the population as inferior to whatever alternative Congress would enact to pay for government. Since the debacle of 1980s supply-side economics, economists confine their case for tax cuts to a discussion of particular cuts in a particular economy, eschewing the suggestion that all tax cuts, especially those paid for piling up more federal debt, are good for the economy.
targets, while frequently reserving its binding intervention into floor procedure for certain types of legislation such as disfavored bills for new entitlement spending. Congress may rightly trust its fallible mechanisms for projecting surpluses, with their artificial scoring and rosy scenarios, for the low-impact step of setting annual targets, but not for the high-impact step of forcing through, by reconciliation, fiscal lawmaking by bare majorities.\textsuperscript{197} Only boosting the Treasury, not draining it, has won consensus acceptance as a goal.\textsuperscript{198} Moreover, Budget Act reconciliation recognizes the dysfunctional asymmetry in congressional action preferences. Namely, Congress prefers changes that result, through spending or tax cuts, in more rather than less debt. To counteract that asymmetry, the Budget Act provides procedures that facilitate deficit and debt reduction, not the opposite. This collective action asymmetry in preferences\textsuperscript{199} supports the Budget Act's procedural restraints on appropriated and new entitlement spending, and on tax cuts as well.\textsuperscript{200} These go through by reconciliation only when coupled with measures to pay for them, harnessing opposing action preferences.

Having explained why Congress should hold the line against reconciliation outside deficit or debt control, there are reasons to define broadly what deficit control is, as a way toward a consensus procedural

\begin{footnotesize}
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  \item Surplus projections may justify some mild encouragement of action, but they do not warrant harnessing the potent engine of reconciliation to push through spending increases or tax cuts. They simply do not justify the skipping of deliberative mechanisms that can subject optimistic projections to skeptical scrutiny.\textsuperscript{197}
  \item Congress can set any targets in the budget process to which a majority aspires each year. Its long-term goals, however, do not take the profound step of annually rearranging its structural channels for lawmaking, such as the Senate’s requiring consensus or cloture for fiscal lawmaking. The Senate has not released legislation from its regular consensus requirements for any long-term goal other than debt reduction. This was clearest in the deficit era of the 1980s and 1990s, the era of Gramm-Rudman-Hollings and PAYGO, when Congress created additional impediments to spending increases and tax cuts. In times of surplus, the rigid PAYGO disciplines enforced by sequestration arguably do not apply. So, tax cut bills may face no additional barriers such as threatened sequestration or points of order. However, Congress has not affirmatively facilitated reconciliation for tax bills.\textsuperscript{198}

\item There is obvious asymmetry in collective expression of preferences: those who would benefit from spending or tax cut enactments, and the Senators who represent them, will apply themselves more intensely to political action in their favor, while those who simply do not benefit, and some of the centrist Senators who decide on the basis of the balance of collective preferences, do not apply themselves with the same intensity to resisting spending increases or tax cuts.\textsuperscript{199}

\item The top bracket concretely received enormous benefits from the 2001 tax cut and provided the majority party’s drive for moving the law. While most of the population may have received little benefit from it, and may ultimately experience adverse indirect effects of the Treasury loss, the 2001 law did not directly, concretely, and immediately cost them anything, and they did not much resist.\textsuperscript{200}
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First, practical reform, to be effective, must define deficit control broadly enough to facilitate occasional rate cuts as part of a package, or else complete Republican opposition will preclude much chance of reform at all. The Republican Party has made tax rate cutting its cynosure, and the budget process has become the foremost party-defining arena. Budget process reform that is perceived as providing no hope for tax rate cuts may not prove possible to adopt and maintain. Conversely, Republicans joined in pushing through major tax laws in 1986 and 1997 that cut tax rates for upper-bracket taxpayers, while maintaining revenue-neutrality in 1986 and providing deficit reduction in 1997.

So, while the first principle of tax cut reconciliation after 2001 requires that it occur only in the context of deficit reduction, the deficit reduction can occur by a mixture of spending cuts and revenue changes. As past bills suggest, especially the 1986 Act, a vehicle like a deficit reduction package could serve for tax simplification or reform, and the spending cuts that go into the mix could include reduced appropriations.

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201 See Garrett, *Tax Legislative Process*, supra note 10, at 514-26 (evaluating the benefit of budgetary PAYGO requirements for proponents of rate cuts to put forth offsetting spending decreases or tax expenditure decreases).


203 The budget process has evolved since 1974 to become the foremost party-distinguishing system for legislating in the Congress, with party members voting loyally on budget votes and the public obtaining clarity and responsibility from the parties' differentiated positions. See Krebs, supra note 37, at 186-224. See generally Garrett, *Congressional Budget Process*, supra note 9.

204 By contrast, the Byrd Rule treated a particular excessive misuse of reconciliation in 1981; the rule made reconciliation harder to pass, but not too much harder; both parties, not just one party, could see that the rule produced its great beneficial effect through some frustration of whichever party used reconciliation; so, as budget process reform, it serves as the great model. In particular, for those who might consider Senator Byrd's commitment to limited use of reconciliation no more than a convenient partisan stance, in 1993 his position that the Byrd Rule precluded using reconciliation to move health care reform—his President's central agenda item—amounted to an incalculable vexation to his own party. After 2001, both parties must agree to future vexations to reap some reconciliation reforms that make sense.

205 For discussions of these two bills, see supra notes 102, 114.

206 As long as the total or net would result in less debt than otherwise, that can include tax cuts and, specifically, tax rate cuts. Tax rate changes like those of 1986 and 1997 could occur again. Understandably, the most intensely anti-tax Senators would not trade in the use of reconciliation for these harder routes to tax rate cutting. Reform does not depend on a complete lack of opposition, as much as on support from the responsible center.

207 If Congress has enacted all its appropriations for the year, and these reflect real savings, that justifies with some confidence a corresponding amount of tax rate cuts. It might be possible to fold
The probability of enacting such reforms depends upon what the Senate allows by reconciliation, that is, whether it allows a bare, often-partisan majority to override the usual structural barriers to passage of a bill. Some tax cut proponents may think that their proposal is so appealing that it will achieve consensus without making up the cost with either spending cuts or revenue increases elsewhere. This could be true, for example, for an extension of the end-of-2005 expiration date for AMT reductions. Getting a consensus to extend that expiration date may prove easier than obtaining fifty votes to identify compensating spending cuts or tax increases. If so, and assuming that no other budget disciplines apply, proponents of such measures should push through their tax cuts the old-fashioned way—without reconciliation.

IV. TRADE FAST TRACK RENEWAL: LAWS ABOUT TWO-LEVEL LAWMAKING

President Bush came to office in 2001 facing the challenge his predecessor had attempted to resolve as to the central machinery of international economic affairs, namely, needing a renewal of the expired trade agreement negotiating authority. Whereas the Budget Act of 1974 remained in full effect when President Bush took office, the fast track provisions of the Trade Act of 1974, which facilitated the implementation of trade agreements, had expired in 1994 without renewal.

Congress considers a renewal law pursuant to its general lawmaking procedures, without facilitation. Trade fast track renewal in 2001-2002, for example, had nothing in the way of facilitating rules or laws to help it pass the Senate; indeed, it faced the somewhat daunting situation that control of the Senate agenda processes lay in the hands of potentially unsympathetic Senate Democrats beginning in June 2001. On the other

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208 PAYGO is scheduled to expire in 2001. If renewed, it would presumably apply, as it did in 2001, to allow new tax cut measures in the event of surpluses. If PAYGO is renewed and the tax cut proposals exceed the applicable near-term surpluses, then tax cut proponents would have to come up with compensating spending cuts or tax increases anyway to the extent needed to satisfy PAYGO disciplines, regardless of whether they seek reconciliation treatment. However, that does not obviate the significance of reforming the availability of reconciliation. As the years beyond 2011 come into the Budget Act's ten-year window, the projected surpluses for those years, which could not be tapped in the 2001 exercise, will tempt many to use reconciliation, if not reformed, in the form of reconciliation bills containing long-term tax cuts.
hand, President Bush could draw strength for the renewal effort simply from the example of the previous history of the Trade Act, even if the expired act had no parliamentary power to facilitate. History reflected a degree of congressional acceptance of fast track's distinctive character. And, after the terrorist attack of September 2001, the need for bipartisan compromise on international economic measures further supported renewal.

Previous work has discussed the trade fast track as an approach to the two-level game United States leaders must play, with domestic enactment processes at one level and interaction with foreign nations at the other level. Fast track channels the process of congressional approval and implementation of trade agreements, so the President can negotiate with other countries that might otherwise balk if implementation faced a completely unchanneled congressional process with unrestricted amending. The first subsection of this part addresses the background and issues of the 2001 fast track renewal debate. The second discusses the less-well-known procedural alternatives to the law about lawmaking in the trade context.

A. The Quest in 2001 for Fast Track Renewal

1. Background

In 1967-74, the President's previously-delegated authority to negotiate tariff-lowering agreements not only lapsed but also reached the limit of its usefulness. Congress applied its general distrust of unchecked delegation to the Executive Branch's domestic implementation of agreements lowering nontariff barriers. To break the stalemate, Congress enacted the 1974 Trade Act as a law about the lawmaking of trade agreement implementation. In the Trade Act, Congress granted for a limited period, and could periodically renew, a delegation to the President of authority to negotiate trade agreements in consultation with Congress. After negotiation, the President would submit to Congress implementing bills, which the House and Senate would consider without amendments or delays, in single up-or-down votes.210

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209 From 1934 to 1967, Congress delegated authority to the President to negotiate tariff-reduction agreements with other countries. During this time, the President established, with congressional approval, the postwar framework of international trade agreements under the General Agreement on Trade and Tariffs ("GATT"). This paragraph is a summary of the fuller background in Tiefer, "Alongside the Fast Track, supra note 22, at 335-38.

210 19 U.S.C. § 2191(f), (g).
This would reassure negotiating partners that the two houses of Congress would not throw their agreements open to floor amending and thereby largely undo the negotiations.211

Congress renewed the trade fast track authority several times from the Trade Act's passage in 1974 through 1994, making a number of procedural adjustments.212 The Trade Act and the Budget Act stand in a class by themselves as far as their multi-decade, multi-stage evolution and the actual use of their procedures for the enactment of legislation of the highest significance. From the 1970s to the early 1990s, the trade fast track provided the basis for the negotiation and implementation of the Tokyo Round of the GATT, agreements with Israel and Canada, the North American Free Trade Agreement ("NAFTA") with Mexico and Canada, and the Uruguay Round that replaced the GATT with the World Trade Organization ("WTO").213 After obtaining congressional approval of NAFTA and the Uruguay Round in 1993-94,214 President Clinton faced major challenges on trade agreements twice in his second term. The first was his unsuccessful quest for fast track renewal in November 1997. The second was his successful quest to approve what

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211 In contrast to budget reconciliation, which Congress did not, in 1974, envision as mattering much, the 1974 fast track emerged from Congressional-Executive discussions and a Congress that clearly envisioned facilitating a controversial implementation bill at the end of the contemporary global trade talks, the Tokyo Round. The express background of the fast track Congressional-Executive negotiations over the 1974 legislation is discussed in DESTLER, supra note 6, at 72-74; see also 4 MICHAEL J. GLENNON, THOMAS M. FRANCK, & ROBERT C. CASSIDYJR., UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS 1-38 (1984).

212 This paragraph is summarized from the fuller background in Tiefer, "Alongside" the Fast Track, supra note 22, at 338-40. Renewals of the fast track are discussed in DESTLER, supra note 6, at 75 (renewal in the Trade Agreements Act of 1979 to 1988), 92-96 (renewal in the Omnibus Trade and Competitiveness Act of 1988), 100-103 (extension from 1991 to 1993 by presidential request and congressional defeat of disapproval), and 221 (renewal from 1993 to 1994 for the Uruguay Round agreements).

213 Authorization or approval of implementation bills for these agreements is discussed in DESTLER, supra note 6, at 73-76 (1979 approval of the Tokyo Round agreements), 86 (1984 special authority for the Israel agreement), 97 (1989 implementation bill for the Canada agreement), 227 (1993 implementation bill for NAFTA), and 254 (1994 implementation bill for the Uruguay Round agreements). NAFTA, especially, posed very serious challenges for obtaining congressional approval. President George H.W. Bush negotiated NAFTA but simply could not obtain approval on its original terms.

was necessary for China’s accession to the WTO in 2000. The November 1997 defeat in particular, by prolonging the lapse in authority that began in 1994 and that President Bush inherited in 2001, underlines the difficulty of developing a fast track mechanism acceptable to Congress for increasingly controversial trade agreements.

2. 2001-2002

In 2001-02, President Bush sought trade fast track renewal with two chief sets of negotiations in contemplation. For some time, the worldwide participants in the WTO had discussed holding a new negotiating round, which would be the first since the Uruguay Round agreements that Congress implemented in 1994. After the new round was not launched at the Seattle meeting in 1999, it was slated for launch at a meeting in Qatar in November 2001. The other set of negotiations concerned a Free Trade Agreement of the Americas ("FTAA"), which might, from the U.S. perspective, expand the NAFTA trade connection with Mexico to a hemispheric arrangement. President Bush gave this proposal strong support in 2001 at the Quebec summit of chiefs of state that set an FTAA negotiating schedule. The September

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216 Other negotiations are also important, such as those with the Asian nations, but the culmination of Asian negotiations is so far off, as to set FTAA and the next WTO round of negotiations in a class by themselves.

217 There had been some anticipation that the meeting in Seattle in 2000 would launch that round, but in Seattle a consensus for initiation eluded the negotiators. See Lori Nitschke, Trade Winds From Seattle Will Soon Sweep Capitol Hill, 57 Cong. Q. Wkly. Rep. 2983 (Dec. 11, 1999). On the United States’s part, President Clinton was not at that time going to relinquish his position as to the necessary place of labor and environmental issues in the talks—though this is by no means the only problem faced at the time in launching the round. See Lori Nitschke, The Street Politics of Trade, 57 Cong. Q. Wkly. Rep. 2924, 2925 (Dec. 4, 1999).

218 See Summit of Americas Affirms Negotiating Schedule for FTAA, 18 Int’l Trade Rep. (BNA) 666 (Apr. 26, 2001). Even President Clinton had supported preliminary negotiations towards a FTAA. President Bush’s strong support accorded both with the general leanings of Presidents, and of his
2001 terrorist attack strengthened the President's interest in trade agreement authority, since he believed that the United States would have a leadership role in international economic policymaking and might eventually bolster the sagging global trade system, albeit not necessarily in time to directly affect the global economic downturn.

Domestically, in 2001, fast track renewal faced a difficult challenge that served as the background to this article's analysis of fast track alternatives. The election of 2000 did not boost prospects for congressional renewal of fast track authority. Furthermore, the economic downturn of 2001 raised the traditional specter that the vulnerable constituencies in the nation would be less willing to give away their chance to check trade rule changes that could visit hardships unevenly upon them. To achieve the authority renewal that had been defeated in 1997, President Bush and his party's congressional leadership in 2001 had alternative approaches to the central political question: whether to make lesser, or greater, concessions to agreement-skeptics on the key substantive issues of environmental and labor concerns. The alternative of starting the campaign for fast track renewal with lesser concessions appealed to Republican circles unsympathetic to particular labor and environmental causes.

219 The Senate election results, ultimately leading to a Democratic majority Senate in June 2001, raised new complications for fast track renewal. Meanwhile, the blocs of House members whose skepticism had defeated fast track renewal in the previous two Congresses lost no ground. The 2000 elections mirrored the 1998 elections in this regard, in which "[t]here was not even a trace of a Republican gain on the trade issue." Eric M. Uslaner, The Democratic Party and Free Trade: An Old Romance Restored, 6 NAFTA: L. & Bus. Rev. Am. 347, 360 (2000).

220 The centrality of these issues in the 1997 defeat, and their continuing centrality, is discussed in Tiefer, "Alongside the Fast Track, supra note 22, at 346-49.

221 Accordingly, in May 2001, after hearing the concerns publicly articulated by Senator Grassley, the senior Republican on the Senate Finance Committee, the Administration released an annual trade agenda downgrading labor and environmental concerns as merely an option, rather than with specific support. See President Sends Trade Goals to Congress, Proposes "Toolbox" for Labor, Environment, 18 INT'L TRADE REP. (BNA) 767 (May 17, 2001). And, in summer 2001, the House Republican leadership introduced a fast track trade renewal bill stripped of the limited concessions on labor and environmental issues that had been made in 1997-98, but had at that time been insufficient for renewal. See House Republican Leaders Unveil TPA Trade Legislation for President Bush, 18 INT'L TRADE REP. (BNA) 920 (June 14, 2001).

222 Business had taken a hard-line stance in 1994 against concessions on labor and environmental issues which undermined at that time the effort to renew fast track. See Destler, supra note 6, at 245. After the 1994 election produced congressional Republican majorities, a similar hard-line stance in 1995-96 by the majority party leaderships at that time had again
On the other hand, President Bush knew he must ultimately reach Members whose support for trade fast track would depend upon procedural concessions to Congress.\textsuperscript{223} With the flip from Democratic president and Republican Senate in 1995-2000 to the opposite after June 2001, the new Senate majority, if they renewed fast track authority, would be ceding their legitimate agenda control rights to a President of the other party who could use those rights to promote the goals of his own party's interest group constituencies.\textsuperscript{224} The new Senate majority party manifested coolness towards no-concessions fast track by postponing committee reporting on trade fast track renewal, and in the first committee hearing on the subject.\textsuperscript{225} That new majority would have the opportunity, denied their party in either chamber in the previous three Congresses, to afford a hearing to the arguments regarding the inadequacy of labor and environmental concessions.

After the terrorist attack, the administration's desire to move a fast track bill through Congress led to a House version initially circulated on September 25 in the House by Chairman Bill Thomas (R-Cal.) of the House Ways and Means Committee. The bill circulated by Rep. Thomas, by its very limited but concrete procedural concessions, undermined an attempt to renew fast track. Tiefer, "Alongside the Fast Track, supra note 22, at 343-46. It was the relaxation of that stance that allowed the 1997 attempt at renewal to nearly succeed. See id. at 346-49. Starting in 2001, Republicans could expect more unity within their own party. The factor of partisan distrust of President Clinton as an agreement negotiator was no longer an obstacle, as now the agreement negotiation would be by President Bush.

\textsuperscript{223} In the House, the Democratic Leader, Rep. Dick Gephardt (D-Mo.), had given President Clinton key support or at least neutrality in his trade agreement efforts that had sufficed for approval of the Uruguay Round and China WTO access, and for coming close, although without success, in the 1997 fast track renewal attempt. Eric Schmitt, \textit{Gephardt Says China Trade Bill Will Erode U.S. Influence}, N.Y. TIMES, Apr. 20, 2000, at A10 ("Mr. Gephardt . . . will not make the China trade vote a litmus test of party loyalty or lobby his colleagues."); Tiefer, "Alongside the Fast Track, supra note 22, at 347-48 (listing past Gephardt stances). Such centrist leadership would no longer have the argument to make to its own members that they would be entrusting the authority to a President of their own party who presumably could be counted upon to use such authority without forgetting their environmental and labor concerns.

\textsuperscript{224} Other countries may be wary of making difficult concessions in negotiating if they have to be concerned about the threat of Congress amending the agreement to provide for even greater concessions from those countries. International negotiating dynamics in which U.S. representatives do not have real authority to reach deals fall somewhere between highly problematic and completely unworkable, especially when the negotiations become multilateral, as in the rounds of WTO and FTAA talks.

\textsuperscript{225} See \textit{Trade Promotion Authority May "Slip" into Next Year, Senate Finance Chair Says}, 18 INT'L TRADE REP. (BNA) 883 (June 7, 2001).
clarified the issues. This House version renewed trade fast track for agreements until 2005 and created a bipartisan Congressional Oversight Group suggesting the congressional majority and minority would perhaps have some consultative role (although creating a group in itself guarantees very little). This version also enunciated some objectives having to do with labor and environmental issues and enforcement, albeit not particularly strong ones. It had one procedural mechanism, a crude derailing mechanism that would allow the House and Senate by disapproval resolution to preclude facilitation of an agreement implementation bill. The issues surrounding such terms of renewal are not the same as those regarding EGTRRA, insofar as they concern the terms of renewal of an expired law, not action pursuant to a still-operative one. Nonetheless, once again, these issues raise interesting questions of analyzing the terms of operation of a law about lawmaking.

In December, the House passed that fast track renewal bill, by the razor-thin vote of 215-214. The bill was quickly reported out of committee, although in 2002, Senate Democrats sought to link its consideration to revival of trade adjustment assistance. The weak support for the bill in the House, coupled with continuing skepticism about the trade agreements for which the authority would be used, suggested that passage of the fast track renewal bill would yet leave room for controversy and change in years to come. In particular, Congress might revisit the terms for fast track treatment of bills to implement future trade agreements.

B. Possibilities for Compromise About the Process of Fast Track Lawmaking

With the above background, the arguments follow straightforwardly about the trade fast track procedure as a process that at least modifies, if not completely overcomes, the congressional procedures of agenda control, debate, and amendment. Proponents of trade fast track emphasize that the benefits of trade agreements distinguish those agreements from normal legislation, for which the political process appropriately declines to relax its structures of deliberation over the

228 John Maggs, Back From the Dead, 34 Nat’l J. 304 (Feb. 2, 2002).
content of controversial bills.\textsuperscript{230} Since the enactment of the 1974 Trade
Act, the strongest argument in favor of the trade fast track has been the
unacceptability to other nations of Congress taking up approval of
implementation with open-ended amending. As far as alterations in
trade fast track that further bring in labor and environmental subjects,
those urging limited concessions in the September proposal emphasize
how both foreign nations, and American businesses, object to excessive
attending to labor and environmental issues.\textsuperscript{231}

Those skeptical of renewing fast track without greater concessions on
labor and environmental issues emphasize the large risks of such trade
agreements. A fast track blank check turns over power, including the
distribution of patronage to favored groups and interests and the
imposition of burdens upon of disfavored ones, from Congress to the
President. Trade agreements and their implementation domestically
can have a considerably adverse effect, as well as a major foregone
opportunity for beneficial effect, on environmental and labor concerns.
Skeptics also argue that such agreements can inflict concentrated harms
upon certain vulnerable economic sectors, such as less-educated workers
who are localized in particular American manufacturing regions that
face assertedly unfair overseas competition. This is an argument to
which Senators and Representatives will pay attention, even while the
President emphasizes diffuse trade-based benefits to the rest of the
nation.\textsuperscript{232} Perhaps most importantly, skeptics can look at the history of
fast track and argue that there is room to structure the fast track
deliberations such that fast track will neither give the President a blank

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\textsuperscript{230} For a strong account, see \textit{Raj Bhala, International Trade Law: Cases and Materials} 5-46 (1996). By the economic theory of comparative advantage, the previous facilitation of trade may
deserve part of the credit for the United States's economic boom with low inflation of the past
decade, and further facilitation of trade would help continue this. Moreover, the United States has
run a very large trade deficit during that boom, creating world economic dependence on American
trade, and agreements to continue facilitating that trade may avoid the world-class problem of its
deceleration.

\textsuperscript{231} Part of the objection comes simply from political and economic arguments on the United
States's own business side not to go too far to burden the trade process with such issues. \textit{See supra}
note 222 and accompanying text. The other part of the objection comes from the hostile reaction
of other countries, particularly the developing countries that fully predominate in the FTAA talks
and that have a large role in another WTO round, which strongly oppose the United States
excessively pushing these subjects.

\textsuperscript{232} A balanced voting analysis of the reasons for approval of NAFTA and defeat of fast track
renewal attributed that defeat to the fear of Representatives of loss of jobs in "districts with a high
proportion of individuals with just a high school education" absent "better safeguard procedures
and positive domestic adjustment devices . . . ." \textit{Baldwin & Magee, supra} note 215, at 42.
check regarding a given treaty implementation bill, nor involve such open-ended amending of agreements as to cause negotiating partners to walk away from talks.

1. Power, Discourse, and Meaningful Symbolism: Lessons from Fast Track’s History

The specific procedural arrangements for fast track had their origins in adverse congressional reaction to Johnson Administration trade negotiations. The Nixon Administration revival of trade agreement negotiating authority in 1974 came by the formulation through Executive-Congressional discussions of procedural terms for facilitated consideration of fast track implementation bill approval. In 1979, the Carter Administration won a renewal to implement the GATT Tokyo Round and then first used fast track authority for the Tokyo Round implementation bill by informally using elaborate procedures deferring to Congress. Specifically, the House and Senate committees responsible for trade legislation held “nonmarkup” sessions on a draft implementation bill, as they would hold markup sessions for a regular bill, and composed their differences in a “nonconference” session as they would hold conference sessions for a regular bill. Then, President Carter submitted an implementing bill almost identical to what had come out of the nonmarkup and nonconference sessions. The 1984 and 1988 renewals further enhanced congressional procedural rights by implementing such measures as a “reverse fast track” procedure by which the two chambers, on the impetus of committee chairs or ranking members, could terminate the availability of the fast

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233 This section makes use of the fullest study of how fast track enhanced Congress’ oversight role of trade negotiations, without preventing successful outcomes, for the Canadian-United States Free Trade Agreement and for NAFTA. See O’HALLORAN, supra note 214, at 139-75 (1994).

234 In the late 1960s, President Johnson triggered the lapsing of trade agreement negotiating authority by slighting the Senate’s expressions of its procedural prerogatives. When the Senate gave non-binding indications of its concerns about the course of trade negotiating, the President went ahead anyway. See Carrier, supra note 24, at 699-700; Koh, Congressional Controls, supra note 24, at 1199-1200.

235 See Carrier, supra note 24, at 701-03.

236 See id. at 706-07.

237 In 1984, Congress renewed the fast track in anticipation of agreements with Israel and Canada, devising different procedures for those two countries, and this time formalizing the procedures for committee action. See Koh, Trade Policy, supra note 6, at 148-49. At one point, the Senate Finance Committee threatened to invoke authority to derail the Canadian agreement, forcing presidential concessions. See Koh, Congressional Controls, supra note 24, at 1211-18.
track approval procedure. This procedure was exploited in the late stages of the Canadian agreement talks.\(^{238}\) The reverse fast track is like the derailing provision of the September 2001 proposal, but more capable of triggering a meaningful consultation with Congress.

During NAFTA and GATT Uruguay Round talks, first President Bush in 1991 and then President Clinton in 1993, needed fast track extensions. The grant of each extension involved procedural concessions, including presidential commitments on environmental and labor issues, and a new subsection tailored solely to the Uruguay Round.\(^{239}\) Since the lapse of fast track authority in 1994, the debate over renewal has often centered upon the extent to which the renewal will bring enforceable provisions about labor and environmental issues into international negotiations.\(^{240}\)

Overall, the historic working of fast track could be sorted out in categories of power, discourse, and symbolism, focusing on what they mean to the decisive middle group in Congress. This middle group, called the "mild agreement skeptics," has held the balance of power during many important, close votes.\(^{241}\) Regarding the effect on power, a fast track mechanism without concessions to Congress relinquishes the Senate's supermajority requirement because it removes the need for sixty votes for cloture. It also, by constraining amendments, has additional effects discussed separately below. As to the structure of discourse, to the extent that the President's implementation bill receives a single up-or-down vote, fast track takes away many of skeptics' opportunities to voice their issues and to engage in give-and-take at meaningful committee hearings and meetings. Fast track also diminishes skeptics' opportunities in the abbreviated floor proceedings.

\(^{238}\) See Carrier, supra note 24, at 708-10; Koh, \textit{Trade Policy}, supra note 6, at 151-52 (describing how the maritime industry sought a Senate resolution denying fast track treatment, leading to eliminating the maritime provisions from the agreement).

\(^{239}\) See Carrier, supra note 24, at 711-14; Koh, \textit{Trade Policy}, supra note 6, at 153-56. The actual implementing bills for the Uruguay Round included sophisticated provisions to finesse the sensitive issue of pre-emptive effect on state laws. See Tiefer, \textit{Free Trade Agreements}, supra note 6, at 63-72.


\(^{241}\) These are Members who generally tolerate free trade agreements enough that they might provide the needed votes in support, but also express concerns either about labor and environmental issues, or about adverse sectoral impacts, particularly on industries in their states or districts. These concerns can affect their votes.
and the accompanying discussions in the media and elsewhere. Thus, skeptics lose much of their opportunity to make their cases, and virtually all of their opportunity to obtain satisfaction short of the often-remote possibility of killing the agreement in toto. Finally, fast track and its variations have meaningful symbolic effects, mediating substantive disputes by translating them into procedural balances and future opportunities for both sides.

Thus, history and analysis provide an answer to the issue of the effect of building congressional procedural rights into fast track renewals. The Executive Branch may protest that such procedural encumbrances either defer completion and implementation of agreements or lead to the dropping of whole subjects from them. Yet, each of the five

242 Agreement supporters include well-organized business groups that have sufficient combined funds to pay for advertising and lobbying. Such groups are thus comparatively advantaged vis-à-vis their less affluent opponents by the reduction in congressional and press forums.

243 Commentators find that much or most of congressional deliberation occurs in, or accompanies, committee hearings and meetings. See Joseph M. Bessette, The Mild Voice of Reason: Deliberative Democracy and American National Government 157-60 (1994).

244 Any form of authorization, however weighted down with deference to Congress, powerfully promotes the progress of trade agreement talks. This offers tangible prospects of an implemented agreement. A sequence like that from 1974 to 1994, in which Congress coupled extensions of authorization with assurances of congressional influence, allows both sides symbolically some share of victory. The multiple stages mean the Executive Branch, and agreement supporters, receive credit from the pro-agreement constituencies, particularly business with prospects of benefiting from international trade, as progress occurs toward ultimate agreement achievement and approval, and the making of substantive concessions and acceptance of procedural encumbrances may reduce this credit but not eliminate it. This is particularly visible for agreements such as NAFTA and the Uruguay Round, for which first the Bush Administration received credit for negotiating, and then the Clinton Administration received credit for obtaining their approval by Congress. Baldwin & Magee, supra note 215, at 6-7.

agreements approved pursuant to, or by arrangements involving, fast track—Tokyo Round, Israel, Canada, NAFTA, and Uruguay Round—occurred after adjustments strengthening procedural rights. So, procedural arrangements provide a means to bridge the domestic divide without rendering impossible the bridging of the international one.

2. Agreement-Specific Authorization and Its Principles

A position regarding renewal of general fast track authority that lies between that of the strong proponents and that of the strong skeptics might envisage the authorization of fast track on different terms for different agreements. To some extent, this approach was followed in the past. Different trade talks raise different issues. For example, regional accords like the FTAA raise the kinds of concerns that arose over NAFTA and Mexican trucking. The authorization to negotiate a regional accord should rightly give special attention to enforceable labor and environmental issue provisions.

246 Agreement enthusiasts would prefer uniformly-broad long-term authorization for an array of agreements. Broad authorizations draw on the overall economic case for trade agreement negotiation and bring the whole process closer to the model of delegations to the Executive in recognition of the nature of negotiating with foreign countries. Conversely, intense agreement skeptics might prefer no authorization or short-term authorization for only noncontroversial agreements. That would bring the process closer to the model of treaty-making, where the President has no guarantee of ratification during the negotiations. The middle ground, of differentiated authorization, brings the process closer to the model of implementation bills standing on their own like regular proposed bills, in recognition of the legislative nature of domestic implementation lawmaking.

247 As noted previously, the history of fast track offers such examples as the authorization distinctions of the fast track legislation in the mid-1980s between the Israel and Canada agreements, and in the early 1990s between the Uruguay Round and NAFTA agreements. See supra notes 213, 237 and accompanying text.

248 For example, regional integration agreements like NAFTA and the FTAA between the United States and developing countries have distinctive controversy. This is partly because the economic gulf between the parties seems to threaten an undermining of environmental and labor standards of the developed partner—the United States—in a way that trade between the EU and the United States, which somewhat more readily reach some kind of comparable standards, does not. Also, a regional integration agreement that does not address sufficiently environmental and labor standards creates a greater sense of lost opportunity, because the defeat of environmental and labor causes concerns neighbor nations within the hemisphere. Environmental groups have experienced much disillusion since the approval of the NAFTA implementation bill in 1993, because they experience intensely the shortcomings of the hoped-for progress in the environmental standards of a neighboring country. On the other hand, business may see more opportunity from a regional trade agreement like the FTAA than in another WTO round. For background on FTAA, see Tiefer, "Alongside" the Fast Track, supra note 22, at 349-51.

249 What is said in authorization legislation affects subsequent trade negotiation, both by influencing the extent of executive consultation with Congress and by affecting the ultimate
3. Revising the Implementation Bill, Especially by Way of Amendment

The issue of the terms for consideration of a fast track implementation bill, and particularly whether amending can occur, has special interest in the analysis of laws about lawmaking. In what can be called the form with no concessions at all, the trade fast track seemed perhaps the most restrictive enactment procedure imaginable in the Congress because it barred the offering of any amendments in either chamber to the implementing bill. As described above, the rise of the laws about lawmaking began with the enactment of legislative vetoes that typically precluded amending the measure by which Congress nullified a presidential or agency action.\(^{250}\) In fact, all forms of fast track retain in some way a rule against amendments that would alter the previously negotiated agreement. This brings up the issue of whether legislative right to amend an implementation bill for a foreign agreement is fundamental, which is a question of real interest to theorists of parliamentary law.

In the two centuries since the Framers wrote the Constitution,\(^{251}\) the Senate and House have taken somewhat different courses. The Senate has jealously protected its amending procedures in general, and, in particular, has not treated the approval of treaties negotiated with foreign countries as a process incompatible with amending by reservation.\(^{252}\) While this might seem to disable treaty ratification,


\(^{251}\) By the Framers' time, amending was a natural, though not inevitable, part of determining the legislative will on subjects in general. When the Framers provided in the Origination Clause, U.S. CONST. art. I, § 7, cl. 1, that when the House could originate bills to raise revenues, "the Senate may propose or concur with Amendments as on other Bills," they reflected the practical understanding of the Framers as legislators. This also was being articulated in the works of the great legislative procedural thinkers of the era, notably Thomas Jefferson in the United States and Jeremy Bentham in England. On the other hand, the Framers could imagine procedures making matters selectively unamendable to avoid disabling the legislative process, as Congress still can; notably, this includes conference committee reports, which were not then, and are not now, generally amendable.

\(^{252}\) When Presidents submitted treaties to the Senate for its advice and consent, the Senate always considered itself to have the power to condition its ratification upon amendments or reservations. Naturally, the other country had the option, if it found such reservations unacceptable, to deem the treaty unratified. In history's most famous example, the Treaty of Versailles following World War I would have brought the United States into the League of Nations.
Presidents have persuaded the Senate to ratify many treaties nonetheless,\textsuperscript{253} although some have gone unratified.\textsuperscript{254} In contrast to the Senate, the House has machinery for regularly channeling or limiting floor amendments. When the trade fast track precludes any amendments, it constrains\textsuperscript{255} the House's consideration even beyond the constraint normally faced under the House's standard procedures, and in doing so, arguably distorts the body's preferences.\textsuperscript{256}

There are several possible concessions one could make in the direction of congressional skeptics' preferences on the subject of amending trade agreements; these possibilities are adumbrated in the

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The treaty's opponent, Senator Lodge, knew he did not have the votes to defeat it outright. However, he had the freedom to offer reservations, and once the Senate began approving these, President Wilson stubbornly refused to accept Senator Lodge's handiwork. Therefore, the Treaty went unratified. This culminated the era in which the Senate became known, for this reason among others, as the graveyard of treaties. See \textit{CONGRESSIONAL PROCEDURE}, \textit{supra} note 2, at 616-21.

\textsuperscript{253} This includes even such extremely controversial treaties as the Panama Canal Treaty. The Senate will add just the reservations to which the other country will not balk.

\textsuperscript{254} The most recent example is the Kyoto Treaty on global warming countermeasures. Cloture could be used somewhat to constrain treaty amending. See Floyd M. Riddick & Alan S. Frumin, \textit{Riddick's Senate Procedure} 1296 (1992) (section entitled "Cloture Rule, Applicable to Treaty"). While available, however, cloture has generally not been so used. Cloture would not assist much on a controversial treaty because the treaty requires a two-thirds vote for ratification. Sixty Senators could use cloture to cut off debate and restrict the offering of nongermane amendments, but, by doing so, if they alienated the other forty senators, then by a final vote of 60 in favor and 40 against, the treaty would fail. The necessary last contingent of Senate votes to reach the magic two-thirds must be wooed, if necessary by incorporating their reservations.

\textsuperscript{255} For a particular bill the House can adopt a closed rule, which today tends to limit the minority party to testing a bill by offering its own single preferred germane alteration or alternative. Ironically, the most important early use of the closed rule was for the bills to increase tariff barriers, the opposite of the trade fast track's use today to lower trade barriers. See \textit{CONGRESSIONAL PROCEDURE}, \textit{supra} note 2, at 292 n.89. However, even a closed rule has typically allowed the minority the prerogative to offer a motion to recommit with instructions, constrained by the requirement that what the minority offers be germane. When the Republican Party became the House majority in 1995, it expressed its disdance for the occasions it had been denied this by enshrining the right to that motion in a revised House Rule. Although the change prevents the Rules Committee from taking away the minority's right, the germaneness rule still remains a constraint. In a recent attention-getting example, after the House impeached President Clinton on a near party-line vote, the Chair held that germaneness precluded the Democrats from offering, as an alternative, to censure him. See \textit{CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES}, \textit{supra} note 64, at §857 (1995 revision in House Rule XII(3)(c)(2) as to recommittal instructions) and §933 (nongermaness of 1998 censure amendment).

\textsuperscript{256} Legal and political theorists have recognized how the complete preclusion of alternatives distorts the body's preferences. See Saul Levmore, \textit{Parliamentary Law, Majority Decision Making, and the Voting Paradox}, 75 VA. L. REV. 971, 988 (1989) (applying Arrow's Theorem). For a sophisticated treatment of whether having only two alternatives is democratic, see William Riker, \textit{Liberalism Against Populism} 66 (1982).
history of fast track legislation. One consists of arrangements that effectively let the congressional committees, specifically House Ways and Means and Senate Finance, influence strongly the content of the implementation bill submitted by the President.\footnote{The fast track authorization legislation can provide for an interval before submission of the implementation bill, can formalize the procedure for the nonmarkups and nonconferences, and can police these by "reverse fast track," i.e., derailing, in the absence of compliance. See Edmund W. Sim, Derailing the Fast Track for International Trade Agreements, 5 FLA. Int'l L.J. 471 (1990).} Moreover, as a new point of interest from 2001 on, the fast track authorization bill can expand the subjects for inclusion in the implementation bill, thereby creating a substantive field for amendments.\footnote{The technical issue consists of how a right of the House minority party to amend would be defined. Most generously, it would derive not only from the scope of the agreement and the Administration's initial draft implementation bill, but also from something broader, perhaps the fast track renewal law. The right might be exercised as part of the committee nonmarkups, and the minority's right to recommit might expand to fast track.} Implementation bills could include subjects appealing to mild agreement skeptics without breaching or requiring renegotiation of the agreement. Prime examples of such implementation bills include reforms of the United States's own sometimes inadequate unilateral policies on environmental and labor matters. Such an improvement of policy not only would be less confrontational to international negotiating partners than tough insistence or renegotiation, but also would often advance the goals of international environmental and labor policy as well or better than if terms were added to the agreements.\footnote{Indeed, academics have pointed out that in some ways, such an improvement in unilateral policies on environmental and labor matters makes the most sense when one considers how to approve and to implement international trade agreements while addressing important issues. A previous article discussed how the implementation bills for NAFTA and the Uruguay Round subtly resolved the tension between foreign agreements, and American federalism, by what was explained as "weak" preemption. Tiefer, Free Trade Agreements, supra note 214, at 63-72. One recent article discussed how the United States could employ extraterritorial environmental enforcement against companies with sufficient United States linkage; this might be considered for enactment along with an implementation bill, without the bill falling afoul of trade agreements. Garvey, supra note 23. Another recent article discussed the relevance of the United States's own continuing deficiency in commitment to the international labor rights regime, such as its failure to subscribe to two of the four core rights in International Labor Organization conventions; some approaches bringing the United States into the international labor rights regime might be shaped without remotely falling afoul of trade agreements. Gregory Shaffer, WTO Blue-Green Blues: The Impact of U.S. Domestic Policies on Trade-Labor, Trade-Environment Linkages for the WTO's Future, 24 Fordham Int'l L.J. 608 (2000).} Congress's action in 2000 regarding the agreement on China's accession to the WTO illustrates
this approach,\textsuperscript{260} as the implementation bill in that instance dealt with the human rights issue without amending the agreement's terms.\textsuperscript{261}

Generalizing about fast track renewal thus parallels tax cut reconciliation reform. A law about lawmaking should facilitate lawmaking about controversial matters by limiting deliberation only when two criteria are met. First, the limitations on deliberation must serve consensus goals, such as deficit or debt control or trade agreement implementation with some consideration of environmental and labor concerns. Second, the limitations must not completely frustrate either political party, or the executive or legislature, in its pursuit of consensus goals. Congress can legitimately insist upon procedures that reserve any procedural facilitation for particular types of consensus bills, such as deficit control and authorized trade agreements. Such procedures should not be used to facilitate non-consensus tax cutting or giving the President a blank check to push through domestic implementing legislation that does not adequately address labor and environmental concerns.

V. THE ERGONOMICS RULE'S DISAPPROVAL IN 2001: USES OF SPECIAL LAWMAKING MECHANISMS

In contrast to the wide-scale budget and trade lawmaking systems, a number of special lawmaking mechanisms deal with relatively narrow issues. One of the special mechanisms, namely, the Congressional Review Act (CRA), allowed the lightning-fast disapproval of the ergonomics rule in March 2001. While some oversight mechanisms involve congressional fora for discourse, this particular law about lawmaking facilitated the triumph of self-interested lobbying by circumventing the usual channels of discourse. The law was used by business lobbies in a way at odds with the ordinary congressional oversight mechanisms that depend on hearings, reports, and media attention. In contrast, a different special lawmaking mechanism that in the 1990s had much significance and was even at issue in a Supreme Court case, the military base closing law, shows the publicly beneficial uses of such mechanisms. As an exercise in generalizing, this part closes

\textsuperscript{260} This paragraph is based on the discussion in Tiefer, Sino 301, supra note 215.

with the discussion of a special lawmaking mechanism about revising campaign finance law after a possible partial Supreme Court invalidation.

A. The Ergonomics Rule's Disapproval in 2001

1. The CRA as Special Lawmaking Mechanism

In the 1994 election, House Republicans committed themselves to a Contract with America that included general opposition to regulation. Their attempts in 1995-96 to enact strong review mechanisms of health, safety, and environmental regulations ran into an effective Senate filibuster with firm public support. Only a modest program was enacted in Title II of the Contract with America Advancement Act of 1996. In pertinent part, the Congressional Review Act (CRA) provided those opposed to regulation a procedure for disapproving a newly promulgated major rule.

Pursuant to the CRA, a joint resolution of disapproval may be introduced in the House and Senate, which then refer it to the committees of jurisdiction. In the Senate, if the committee has not acted within twenty days, a written petition filed by thirty Senators discharges the committee. Once a motion to proceed brings the resolution from the Senate calendar to the floor, debate is limited to ten hours, thereby precluding a filibuster and avoiding the need to obtain the sixty votes required for cloture. Moreover, when Congress

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262 For these origins of the CRA, see James T. O'Reilly, EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?, 3 ENVTL. LAW. 1, 3 (1996).
263 See id. See also Sunstein, supra note 25 at 277-82, 284.
266 A "major rule" is defined as any rule likely to have an effect of $100 million or more on the economy, to increase costs or process for consumers, industries, or state and local governments, or to have significant adverse effects on the economy. 5 U.S.C. § 804(2)(A)-(C) (2000).
268 There is no particular procedure prescribed for the House. That provides a subtle way for the House Republican leadership, which controls House floor procedure, to keep power in its own hands. See Rosenberg, supra note 25, at 1063.
270 From the calendar, the Senate can take up the resolution on a motion to proceed. 5 U.S.C. § 802(d)(1) (2000). This is another subtle device, for the motion to proceed is a prerogative of the Senate majority, again keeping the power in party leadership's hands.
disapproves a rule, the CRA specifies that the agency cannot again act on the same subject. 272

Looking at the CRA’s machinery as a congressional procedure, it contrasts interestingly with ordinary oversight mechanisms. 273 Congress oversees regulatory actions mostly through committee proceedings, such as hearings, reports, and legislative proposals that are crafted to be voted out of committee. 274 The CRA creates a mechanism that can depend on the majority party leadership in each chamber, not the committee; that does not require hearings, reports, or crafted legislation; and, that surmounts the barrier of the Senate filibuster. 275 However, even the CRA has the weakness that after the two chambers adopt a resolution of disapproval, the President can veto it, 276 which has created doubt that the CRA would ever see serious use. Before 2001, the CRA was invoked tentatively, 277 but no agency regulation was ever formally disapproved pursuant to CRA procedures.

That was until the ergonomics rule. The Occupational Safety and Health Administration (OSHA) propounds workplace safety and health standards pursuant to a 1970 statute. 278 After the first Bush Administration directed OSHA to act upon the problem of cumulative trauma and musculoskeletal disorders (MSD) caused by repetitive

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272 This aspect was characterized by the chair of the American Bar Association Section on Administrative Law and Regulatory Practice as a “blunderbuss approach” that was “too severe.” Congressional Review Act: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong. 134 (1997) (testimony of Peter L. Strauss, section chair).

273 For a largely favorable review of the CRA’s potential, see id. at 144 (testimony of Professor Richard J. Pierce, Jr.).


275 See supra notes 268, 270-71.

276 See supra note 25, at 1063.

277 In the years after the CRA’s enactment, in one instance, a disapproval resolution’s sponsor succeeded in effecting a compromise by which OSHA provided compliance assistance for the rule. A disapproval resolution was introduced regarding an Occupational Health and Safety Administration (OSHA) rule on exposure limits for methylene chloride, a paint stripper used in industry. Id. at 1058. In another instance, strong support for a disapproval resolution caused an agency to suspend a rule indefinitely. The Health Care Finance Administration (HCFA) put forth a rule requiring home health agencies to obtain surety bonds. Once the disapproval resolution garnered fifty-two Senate sponsors, the agency suspended the rule. Id. at 1059; ESKRIDGE, JR., FRICKEY & GARRETT, supra note 9, at 492.

workplace tasks, OSHA spent a decade in study, punctuated by calls from industry and, from 1995 on, the congressional majority party to stop its investigation. On November 14, 2000, OSHA promulgated the final rule for an Ergonomics Program Standard to limit injury exposure for about 27 million workers. OSHA estimated the standard would cost employers $4.2 billion annually and save them $9 billion a year in lost productivity, though industry estimates of costs were higher. In 2000, the ergonomics rule had already received congressional majority leadership attention, and working to overturn it was one of the main reasons Congress reconvened after the election for a lame-duck session. Rule-opponents can argue that the timing allowed for a period of some months for congressional and public deliberation.

In 2001, the congressional majority leadership, working closely with business lobbyists, ran an extraordinary campaign against the rule. The business opponents organized a powerful but initially quiet lobbying campaign. The campaign helped to solidify congressional support for disapproval (particularly in the Senate) in February 2001, without even enough public discussion for the rule supporters to learn

281 See Benton, supra note 279, at 401. The standard principally required employers to supply employees with basic information, to investigate employee reports of MSDs, and if its jobs produce multiple MSDs not susceptible to a "quick fix," to implement an ergonomics program involving hazard analysis and control, training, relieving injured workers, and record-keeping. See Edwin G. Foulke, Jr., & Robert M. Wood, An Introduction to the New OSHA Ergonomics Program Standard, 12 S.C. LAW., Mar.-Apr. 2001, at 26-28.
282 Prior to adjourning for the election, House Republicans had almost compromised with President Clinton about an appropriation rider to suspend the rule until the next presidency, before deferring the issue for the post-election session. See James C. Benton, Bipartisan Deal Falls Through on OSHA Ergonomics Rules, 58 CONG. Q. WKLY. REP. 2589 (Nov. 4, 2000). In any event, after Governor Bush's victory, congressional Republicans quietly decided not to make defeating the rule his problem. They dropped all references to the proposed ergonomics measure from the final appropriations bill. See Daniel J. Parks, Omnibus Spending Deal Clears As White House Settles for Less, 58 CONG. Q. WKLY. REP. 2857, 2859 (Dec. 16, 2000).
283 It ignored a January study by the National Academy of Sciences that Congress had specifically requested, which provided strong scientific support for the rule. The NAS study of ergonomics injuries "suggested that a million American workers are hurt on the job annually at a cost to American industry to $54 billion in lost wages, decreased productivity and medical benefits." Talk of the Nation: Workplace Rules and Ergonomics (NPR radio broadcast, Mar. 7, 2001).
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that the issue would come up soon, rather than in May, as expected.284
The backbone of the campaign in Congress was Senate Assistant
Majority Leader Don Nickles, and not committee-level Members.285
Once the Senate leadership was ready, Senator Nickles bypassed the
Senate Labor Committee with a disapproval resolution having the
requisite signatures for discharge on March 1, and brought it to a
lightning fast 56-44 victory on the Senate floor on March 6, followed by a
House floor victory the next day.286

There is a large literature, primarily in political science287 but also in
law,288 about congressional oversight of agency action, but it addresses
congressional oversight in the context of the ordinary enactment
process that occurs without a law that facilitates lawmaking. In contrast,
the CRA is a law about lawmaking that made possible an extraordinary
event. The disapproval effort took a statutorily-eased route289 in
discharging the matter from the Senate Labor Committee, cutting short
the committee’s normal—though not universal290—role of conducting

284 See Deirdre Davidson & Tatiana Boncompagni, The Swift Demise of OSHA Rules, LEGAL TIMES,
Mar. 12, 2001, at 1, 13, 14.
285 Id. at 13. “Nickles was an animal on this,” says David Rehr, president of the National Beer
Wholesalers Association.” Id.
286 147 CONG. REC. S1887-88 (daily ed. Mar. 6, 2001); 147 CONG. REC. H707-08 (daily ed. Mar. 7,
2001).
287 See, e.g., JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL
Oversight (1990); Balla, supra note 25; Kathleen Bawn, Choosing Strategies to Control the Bureaucracy:
Statutory Constraints, Oversight, and the Committee System, 13 J.L. ECON. & POL. 101 (1997); Arthur
Lupia & Matthew D. McCubbins, Learning from Oversight: Fire Alarms and Police Patrols Reconstructed,
288 See, e.g., Jonathan R. Macey, Separated Powers and Positive Political Theory: The Tug of War Over
Administrative Agencies, 80 GEO. L.J. 671 (1992); Matthew D. McCubbins, Roget G. Noll & Barry R.
Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of
Agencies, 75 VA. L. REV. 431 (1989); Charles Tiefer, Congressional Oversight, supra note 274.
289 The fact that a majority of Senators ultimately voted for the disapproval resolution should
not lead to minimizing the significance of the CRA mechanism for a thirty-signature discharge
petition. Because of norms of reciprocal respect about committees, there is ordinarily some
reluctance in both chambers to discharge a committee. This deferential position is no longer the
norm after discharge occurs when the issue is simply whether to vote for or against a resolution.
So, the CRA eases the route of the disapproval resolution by requiring only thirty strongly determined,
nondeferential Senators to discharge it onto the Senate floor, and by then requiring only fifty-one
mildly approving Senators to pass it.
290 Senate floor procedure does provide ways for a floor vote to occur without the oversight
committee preliminarily reporting it. In fact, the most common way, by an appropriation limitation
amendment, was used as to the ergonomics rule itself at the end of 2000. See Tamara Loomis, OSHA
About to Finalize Workplace Regulations, N.Y.L.J., Nov. 2, 2000, at 5. Another way would be a
nongermaine amendment on an unrelated bill. CONGRESSIONAL PROCEDURE, supra note 2, at 584-
hearings and considering legislative proposals on the matter.\textsuperscript{291} Also, the disapproval effort did not face the requirement of sixty votes for cloture, which would have impeded a mostly party-line effort that mustered only fifty-six Senate votes for passage.

Effectively, the disapproval effort bypassed the normal discourse system for congressional action,\textsuperscript{292} although, admittedly, the ergonomics rule had received some congressional and public attention in previous years.\textsuperscript{293} Ordinarily, the OSHA rule would be given a presumption in its favor due to OSHA's accumulated scientific and regulatory experience.\textsuperscript{294} The CRA disapproval route did not require committee hearings, meetings, or reports to overcome that presumption.\textsuperscript{295}

A particularly striking feature of resort to the CRA remains its disabling of the agency from promulgating another rule on the same subject. This amounts to a partial repeal of the agency's authorizing statute, although the Labor Secretary suggested she would still consider doing something. As the ergonomics rule exemplifies, a major rule
responds to a major need, and a congressional vote to disapprove the rule does not make the need underlying the agency’s authorizing statute go away. There is a stark contrast between how the CRA works, and how its nearest parallel works, namely, an appropriation limitation rider telling an agency it cannot proceed for a year. When Congress desires to adopt, by floor votes without committee deliberations, a strong but limited message to the agency, a year’s moratorium sends that message in power, discourse, and symbolic terms. The CRA’s provision precluding the agency from adopting another rule on that subject goes far beyond that.

It remains to be seen how the disapproval of the ergonomics rule will affect future invocation of the CRA. One possibility is that the CRA will rarely be used again, because ordinarily an administration will only promulgate rules that the President supports, and if the House and Senate adopt a disapproval resolution, the President could veto that resolution. That did not happen in 2001 because of the unique sequence of events.

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296 To accord with congressional rules, such a rider applies only within the boundaries of its underlying appropriation bill, that is, it applies only for a single year. An agency with a major new rule that brings down the wrath of Congress may well face a year’s moratorium in its effort. Congress is further empowered by the ability to renew the measure a year later on the successor appropriation.

297 The agency, in consultation with the supporters of the rule, has a year to reconsider, compromise, surrender, just wait out the storm, or win support to go ahead either from Congress or from the President (who can bargain with Congress). See CONGRESSIONAL PROCEDURE, supra note 2, at 977-94 (discussing the working of diverse appropriation limitations). Such choices, and the accompanying processes, stimulate the interaction of reason and politics.


299 On the other hand, as 2001 went on, other rules promulgated at the end of the Clinton Administration survived. Rebecca Adams, GOP, Business Rewrite the Regulatory Playbook, 59 CONG. Q. WKLY. REP. 990, 995 (May 5, 2001) (discussing “decisions to uphold Clinton rules restricting wetlands development and . . . [regarding] lead emissions”); Adriel Bettelheim, Patient Privacy Regulations Green-Lighted, 59 CONG. Q. WKLY. REP. 846 (April 14, 2001). That the ergonomics rule did not survive, illustrated a number of tactical advantages from invoking a law about lawmaking. The same or different advantages might reawaken the CRA again.

300 This was a rule promulgated at the very end of President Clinton’s term. It thus was promulgated when there was a new President who was willing to sign the disapproval resolution, yet would prefer not to undertake suspending and revoking the rule as an internal administrative project. See Eskridge, Jr., Frickey, & Garrett, supra note 9, at 492. On the other hand, Presidents weigh many factors in exercising the veto. A President who might hesitate in the future to take sole responsibility for killing a politically popular rule through the veto might yet sign a disapproval resolution for which the rule’s opponents in Congress take the main responsibility.
B. A Contrasting Special Lawmaking Mechanism: Base-Closing and Dalton v. Specter

In contrast to the detrimental uses of lawmaking mechanisms described above, a different special lawmaking mechanism that in the 1990s was highly significant and even the subject of a Supreme Court case, the military base closing law, demonstrates the beneficial uses of such mechanisms.\(^{301}\) Moreover, the military base closing law took on particular importance when Congress agreed upon a renewed round of closings, to begin in 2005, pursuant to that law.\(^{302}\)

As the Cold War drew to an end in the late 1980s, obsolete military bases wasted billions of dollars.\(^{303}\) After major successful enactment struggles, Congress enacted the Base Closure and Realignment Act of 1988,\(^{304}\) followed by the Defense Base Closure and Realignment Act of 1990.\(^{305}\) Each set up base closing commissions, which would produce proposals for closing bases. After consideration by the Secretary of Defense and/or the President, these proposal packages would go before the House and the Senate for possible disapproval as a whole. Pursuant to these laws, four base closing commissions, in 1989, 1991, 1993, and 1995, produced base closing packages, none of which was ultimately disapproved by Congress.\(^{306}\) The procedural mechanism for a congressional disapproval resolution\(^ {307}\) resembles that of the CRA.\(^ {308}\)

\(^{301}\) For a useful overview of the military base closing system, see Hanlon, supra note 27.

\(^{302}\) See Pat Towell, Congress Compromises on Base Closings, Delaying Pain—and Savings—Several Years, 59 CONG. Q. WKLY. REP. 2990 (Dec. 15, 2001).

\(^{303}\) Dick Armey, Base Maneuvers, POL’Y REV., Winter 1988, at 70.


\(^{307}\) It provides little time or opportunity for committee hearings, meetings, or reports, or for media attention to opponents of disapproval. For both, the supporters of the proposal rely on respect for the consideration given to it by its originating bodies—OSHA or the military base closing commissions—neither of which are bastions of political strength.

\(^{308}\) The 1990 base closure statute provided that both chambers of Congress must pass a disapproval resolution within forty-five days of the President’s approval of a commission’s recommendations to prevent its becoming final. Pub. L. No. 101-510, § 2904(b), 104 Stat. 1813 (1990). Disapproval resolutions, once introduced, would be referred to the armed services committees and then to the floor within twenty days of the President’s approval. Pub. L. No. 101-510, § 2908(b), (c) 104 Stat. 1817 (1990). After a three-day layover, the resolution could be considered, with debate limited to two hours. Pub. L. No. 101-510, § 2908(d), 104 Stat. 1817 (1990).
The base closing mechanism was discussed in the interesting Supreme Court opinion, *Dalton v. Specter*, which considered but rejected a challenge to the 1991 base closing round. A particularly illuminating concurring opinion by Justice Souter, joined by three other justices, explained how Congress saw the overwhelming problem for a military base closing legislative package as opponents' ability to undo particular base closings, a maneuver called "cherry-picking." The confining focus of the resolution of disapproval suppressed this maneuver, forcing the debate to concern the base closing package as a whole, thereby allowing the budgetary sense of the package as a whole to carry the day if meritorious. In contrast, the confining aspects of the CRA's disapproval mechanism did not suppress, but rather amplified, the lobbying and partisan maneuver to undo the ergonomics standard. The architects of such a system must have confidence that facilitated actions seek goals with strong intrinsic merit, and, they should have reason to expect a disapproval mechanism will not be used by the

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311 Justice Souter's opinion explains:

The point that judicial review was probably not intended emerges again upon considering the linchpin of this unusual statutory scheme, which is its all-or-nothing feature. The President and Congress must accept or reject the biennial base-closing recommendations as a single package. See §§ 2903(e)(2), (e)(3), (e)(4) (as to the President); §§ 2908(a)(2) and (d)(2) (as to Congress). Neither the President nor Congress may add a base to the list or "cherry pick" one from it. This mandate for prompt acceptance or rejection of the entire package of base closings can only represent a considered allocation of authority between the Executive and Legislative Branches to enable each to reach important, but politically difficult, objectives.
511 U.S. at 481.
312 The ergonomics-disapproval maneuver—using the CRA to undo a regulatory health, safety or environmental rule—consists of a swift, concentrated lobbying campaign by interests powerful enough on a national scale to reach a majority of the House and Senate. The CRA's displacing of the committee discourse system and the Senate's cloture requirements enabled this concentrated lobbying campaign to succeed before public support for a rule potentially aiding 27 million employees could mobilize. By the CRA mechanism, party leaderships filled the vacuum created by displacing the normal lawmaking system and worked with lobbying networks on a powerful push for disapproval.
potent combination of benefited-interest lobbies and a single party. Base closing fit both these criteria.

C. Campaign Finance Reform After a Partial Supreme Court Overturn

The special review mechanisms discussed above provide a basis for analyzing the use of such a mechanism for a particularly arresting problem in legislative-judicial interaction. Congress at times must enact statutory reform in a context. This phenomenon is exemplified by campaign finance reform, which is fraught with potential for constitutional challenges to particular provisions. Traditionally, Congress has simply taken its chances with what will be left after the Supreme Court finishes, trusting its own processes for enacting any necessary responses to the judicial outcome. Leaving the response to the Court's rulings to chance and to later free-standing enactments poses risks. Above all, the veto gates against enactment that the initial enactment surmounted, such as the Senate filibuster or disagreements between party leaderships in the two chambers, may not be surmounted by a post-Court-decision revision right away or on other than watered-down terms.

313 Most on point, after the Court invalidated the first version of the Federal Election Commission in *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress had to enact a change to a system for appointing the commissioners constitutionally, which it did. *After Chadha*, for example, Congress had to make a number of changes in statutes, replacing invalidated legislative veto provisions with valid legislating mechanisms. After the Court invalidated the first version of the Gramm-Rudman-Hollings mechanism in *Bush v. Sunar*, 478 U.S. 714 (1976), Congress had to enact a change from dependence upon the Comptroller General to dependence upon the Director of the Office of Management and Budget. See *Louis Fisher, Constitutional Conflicts Between Congress and the President* 31 (4th ed. 1997).

314 The risks of invalidation mean, at the time of the initial enacting Congress, a prospect that may induce caution about enacting a strong statute that, without timely or adequate post-Court-decision revision, would operate in an unbalanced form.

315 For example, *after Chadha*, 462 U.S. 919 (1983), Congress did not act to modify the one-House veto of spending deferrals in the Impoundment Control Act, but the D.C. Circuit held that the pre-*Chadha* deferral authority was no longer available to the President. *See City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). To this day, Congress has still not done anything to restore the mechanism, unless the failing effort to enact some sort of line item veto measure is considered an attempt at restoration.

316 For example, in *United States v. Morrison*, 529 U.S. 598, 627 (2000), the Court struck down the federal private cause of action in the Violence Against Women Act. *See generally Charles Tiefer, After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 ENVTL. L. REP. 10888 (2000). Congress passed some mild funding provisions, but did not seek to enact a strong substitute statute, such as an incentive system to bolster women's rights to sue in state courts.
A concrete example from the campaign finance reform efforts of 2001-02 illustrates the possibilities of a law about lawmaking to address the problem of preserving constitutionally borderline legislative efforts. Specifically, in March 2001, the Senate passed the McCain-Feingold campaign finance reform bill, which contained several limits on campaign expenditures, and attempted to draw the fine line between unregulated issue advertising and regulated electioneering expenditure.\(^{317}\) As reported to the Senate, the bill, in one of its strongest aspects, drew the line by a sixty-day blackout rule.\(^{318}\) Although the Supreme Court's 2001 decision in *Colorado Republican\(^{319}\)* showed a 5-4 majority of the Court to have a bit more sympathy to campaign finance regulation than in the past, it still cannot be known whether the Court would uphold this line as constitutional.\(^{320}\) Interestingly, the Senate thought the issue so worrisome that, by a vote of 82-17, it adopted an alternative back-up definition to apply in the event that the Court struck down the first definition.\(^{321}\) Another provision in the bill also poses this issue, the so-called "millionaire's amendment."\(^{322}\) This sequence

\(^{317}\) See generally Briffault, *supra* note 29 (discussing the constitutional problem of drawing a line between issue advocacy and campaign financing).

\(^{318}\) An advertisement referring to a candidate within 60 days of a general election counted as a regulated "electioneering communication" rather than mere unregulated issue advertising. *S.27, 107th Cong. § 201 (2001).* The definition is used as part of a ban on corporate and union soft money. The blackout period is also for 30 days before a primary.


\(^{320}\) It would make an interesting article, but far beyond what can be done here, to discuss this question itself. Briefly, *Colorado Republican* upheld limits on party coordinated expenditures. See *id.* The five-Justice majority expressed its willingness to find "a serious threat of abuse from the unlimited coordinated party spending," *id.* at 2366. To uphold a blackout rule for independent expenditures involves some of the same willingness, but a good deal more of it, than was required for coordinated party expenditures. Further discussion here about just how likely a fall-back position is to be invoked is unnecessary to the analysis here of how such a fall-back would work.


\(^{322}\) See Elizabeth A. Palmer, *Vigorous Court Challenges Ahead Despite Non-Sl!Uerability's Defeat,* 59 CONG. Q. WKLY. REP. 701 (2001). The amendment would allow those running against rich self-financed candidates to receive larger contributions from individuals, invalidation of which would leave non-rich candidate Davids in even worse shape than they are now to take on self-financed millionaire candidate Goliaths. That the Senate adopted an amendment with a back-up definition showed both the needs and vulnerabilities of fall-backs, and the limits of what can be done without a lawmaking. Without knowing what the Court will say, the back-up definition necessarily does not take advantage of the precise tolerances of the Court. Furthermore, it only backs up the risk of invalidation of a single definition provision, not the more complex risk of invalidation of a mechanism—the millionaire's amendment—which could not be backed up simply by an alternative definition, but would need a more complex revision.
illustrates the Senate's extraordinary need to anticipate, and to prepare for, the possibility of a partial overturning of legislation by the Supreme Court. As the Congress enacted, in 2002, its campaign finance bill, and the cases commenced to challenge its constitutionality, the prospect of such a Supreme Court case loomed even larger.

A lawmaking mechanism could work in several ways, drawing on the models of the CRA, the base closing law, and others. The mechanism could provide that a conference committee shall reconvene after a Court decision invalidating provisions of the bill, and report revising provisions to replace the invalidated ones. That conference

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323 When proponents of such a bill imagine having to enact a revising statute after such a Court decision, they may worry that the congressional veto gates that fended off campaign finance reform legislation for decades, would either prevent, slow down, or water down a revising enactment. In the course of initial enactment, these prospects may induce caution lest the result be an unbalanced statute.

324 Other provisions might also be challenged, although the contemporary commentary about the Senate debate deemed this particular point "perhaps the most serious challenge." Palmer, supra note 322. "The questions surrounding the constitutionality of parts of McCain-Feingold" figured significantly in the defeat of "an amendment to add a non-severability clause." Id.


326 This supposes that the final version of the campaign finance reform bill emerged from a conference committee with a particular membership, with Senators like McCain and Feingold prominent, with the same or similar committee to be reconvened after a partial invalidation. This is modeled on the Trade Act's nonconference mechanism for having the trade agreement implementation bill be prepared for fast track treatment by the House and Senate committees.

An enactment mechanism might well provide for a decent interval of time after the Court decision and require open hearings, meetings, and a report with specified content, as a way of furthering the discourse—in contrast to what happened pursuant to the CRA for the ergonomics rule.

327 This kind of mechanism serves a special function when the revising legislation might require going to lengths that seem sensible only after the Court has knocked down easier ones. For example, opponents of campaign finance reform are very reluctant to support any kind of public financing system, direct or indirect. Writing such a system into the law in advance of action by the Court increases the opposition and undermines the strength of the case for enacting the law. In contrast, suppose the Court strikes down the millionaire's amendment. If the conference committee considers a revising statute focused solely on what to do in the narrow situation for which the millionaire's amendment was the intended cure, it can consider tailoring some kind of indirect fallback public financing system for that particular problem, without undermining the case that justified the whole rest of the law. The campaign finance system for presidential races already worked in 2000 with the winning candidate, Governor Bush, not wanting the limits that went with public financing while other candidates in the primaries and the general election accepted those limits. While Congress does not want to copy that system for all the House and Senate races, it might see the need to do it just for challengers of self-financed millionaires if and when the Court rules in a way that eliminates alternatives.
committee report, and perhaps limited substitutes, could receive consideration pursuant to procedures assuring a swift up-or-down vote in both chambers. Campaign finance reform poses the need to create discourse channels in which reform proponents can tap the diffuse but broad public desire for reform aided by the media— the model followed during the base-closing controversy. This would likely bring a more socially desirable resolution than if the issue were resolved by some combination of party leaders and lobbyists, as happened during the debate, or lack thereof, over ergonomics.

VI. CONCLUSION: LAWMAKING LAWS, AND THE BALANCE OF POWER AND REASON

Based on the analysis in this article, the year 2001 revealed both the great impact of laws about making laws and some contemporary concerns about this impact. Absent the ability to use such laws, controversial tax cut legislation could go through the Senate only on a consensus basis. Reconciliation allowed the controversial EGTRRA, easily the largest fiscal law in the past eight years and arguably the largest in the past twenty, to pass on one party's terms. The lightning-fast disapproval of the ergonomics rule pursuant to the procedures of the CRA involved, again, narrow party-line action, but on a much smaller scale.

The results arguably raised serious concerns on several levels. EGTRRA's enactment did not occur pursuant to what the Budget Act intended as the consensus goal for reconciliation or what Congress had previously enacted by reconciliation, namely, deficit reduction. And, the results are poor in comparison with what Congress may have enacted on a normal or consensus Senate basis. Without reconciliation, the bill

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328 Substitutes for the conference committee report, if either the committee cannot reach agreement or a sufficiently large group in either chamber prefers an alternative, could be made in order by a petition with sufficient signatures. See 5 U.S.C. § 802(c) (2000) (thirty signature discharge petition for CRA), discussed in text accompanying supra note 269.

329 As always, there is the risk of presidential veto. The risk may be deemed manageable if the President is consulted during the initial enactment and makes acceptable pledges. If for some reason the risk is not deemed manageable, back-up alternatives can be specified in the bill that goes into effect if no revising legislation is approved. A President who vetoed revising legislation would not only suffer opprobrium for obstructionism but would do so for the dubious satisfaction of putting those back-up provisions into effect. Especially considering that the committee writing the revising legislation would consult with the President in developing it, a veto would not be likely in such circumstances.
would have needed to assemble a sixty-vote coalition for cloture or to have attained a level of consensus needed to avoid a Senate filibuster. Instead, by a facilitating procedure, the initial pre-conference Senate floor proceeding reduced tax revenues perhaps several hundred billion dollars past the consensus point. Then, the stacked and expedited two-day conference committee and the extraordinarily truncated post-conference consideration by themselves added another ten percent on top of what a bare majority of the Senate had been willing to accept. This was accomplished by using a bogus device that takes ten years' worth of cuts in nine years. The distribution and type of cuts also veered far from what a consensus would sustain, concentrating them much more intensely upon the top brackets and producing a regional skewing. The reconciliation procedure fundamentally frustrated the Senate's function of slowing down temporary bare majorities bent upon controversially advancing the interests of one set of states at the expense of another.

Looking more broadly, the scale and speed with which the use of laws about making laws could pay off interest groups by a process less deliberative than regular lawmaking raised issues about how laws facilitate lawmaking. Such laws seemed justifiable because they worked, after all, by allowing majority will to triumph over gridlock in areas selected for the special favorable value of action. However, with reconciliation, a determined party can cross the intended boundary lines and enact the opposite of the consensus goal. A mechanism intended for pulling the Treasury out of the red could facilitate the opposite, pushing the Treasury toward the red. In that light, the seeming propriety of majority will's triumphing over gridlock becomes something quite different, the kind of action for which mechanisms of deliberation and procedural restraint are intended. The effort by laws about lawmaking to facilitate difficult movement in a positive direction can turn into the busting of holes in the only bulwarks for sound legislating. As to the CRA, of the various purposes spelled out by Congress, none specifically consisted of helping interest group lobbies

\footnote{\textsuperscript{330} To be sure, in the Senate's consideration of the budget resolution, and its initial passage of the tax bill, there had been hearings, floor speeches, and large numbers of amendments offered and voted upon. It is comparatively easy to say that reconciliation changes power relations by allowing the equivalent of cloture by 51 votes, while it is hard to make so definite a case about how reconciliation decreases—rather than merely transforms—pre-conference discourse and deliberation. Conference and post-conference discourse did clearly suffer.}
gain leverage effectively to repeal, in part, agency efforts to grapple with major problems.

Recalling the trio of power, structure of deliberation, and meaningful symbolism, concerns about each of these were raised in 2001. Reconciliation produced an extraordinary truncation of the structure of deliberation in which the Senate had virtually no post-conference opportunity to deliberate over multi-hundred-billion-dollar decisions. As to the disapproval of the ergonomics rule, what made that a triumph for disapproval proponents consisted precisely of the avoidance of a structure of deliberation characterized by hearings, committee meetings, markups, reports, and floor debate, with options of compromise. Lobbying and a harsh, rigid outcome took the place of that entire structure of deliberation. Finally, the laws about making laws should provide the symbolic link between specific broadly shared objectives and their ultimate realization. Instead, they provided the link between the controversial tax-cutting agenda matured in the late 1990s and the enactment of EGTRRA in 2001, and between the 1996 CRA and the rendering of ergonomics potentially unregulable. Neither of these developments could be considered, in any way, the realization of a consensus goal.

For all that, this article has not advocated repeal of the Budget Act or the CRA, and it has opposed a flat refusal to reauthorize the trade fast track. In fact, with regard to the trade fast track, it has offered qualified support. After the September 2001 terrorist attack, the need was clearer than ever to find a compromise formula for renewing the fast track mechanism that has been an engine for world trade negotiation. On several grounds, even with the concerns of 2001 in mind, the answers consist of a reformed and more nuanced resort to laws about lawmaking, not their wholesale rejection. First, although 2001 displayed the power of laws about lawmaking beyond what had been seen before, these laws do have a much longer track record than just that one year, and over a span of years they have accomplished much, including much good. It took almost two decades for the country to extract itself from the deficit hole dug in the 1980s, in significant part by resorting repeatedly to the Budget Act’s deficit-control reconciliation, such as in President Bush’s BEA of 1990 and President Clinton’s program in 1993. The trade fast track has facilitated the implementation of the Kennedy Round, deals with Israel and Canada, NAFTA, and the Uruguay Round. Controversial as some individual steps may have been, the record as a
whole reflects a record of favorably-viewed enactments.\footnote{The exception is the CRA, which had never produced an enacted disapproval resolution before 2001. See supra note 279 and accompanying text.} In this, laws about lawmaking resemble the principal mechanism they supplement, that of delegation. Multi-stage approaches to solving problems go too far or not far enough at particular times. But, on many subjects, there is no alternative to multi-stage approaches. So, the question becomes, not whether, but when and how, to arrange these.

Second, other observers might legitimately offer a less dour view of 2001. The view taken in this article has accepted, as an appropriate baseline of congressional activity, the Senate's practice of typically requiring controversial measures either to move on a consensus basis or to obtain sixty votes for cloture. Some debate whether the Senate's procedure for defeating legislation amounts to an unfortunate formula for gridlock that has produced more bad than good.\footnote{Compare Binder & Smith, supra note 38 (finding little to praise in the filibuster) with Fisk & Chemerinsky, supra note 3 (taking a balanced view, and focusing criticism upon the relatively narrow issue of the rule that purports to bar the Senate from periodically changing its cloture rule).} Some would argue that, especially in fiscal matters, bare partisan majorities ought to be able to act without Senate minority consensus, regardless of whether this increases national debt wholesale, because the party that does so can be held publicly accountable. Some have analyzed congressional budget procedure on a more elaborate basis than undertaken in this article, studying, \textit{inter alia}, its subtler dynamics and informational mechanisms, such as the system of offsets in PAYGO.\footnote{Garrett, \textit{Tax Legislative Process}, supra note 10.} And, some might view the laws about lawmaking as just one part of the large picture of "unorthodox lawmaking"\footnote{Sinclair, supra note 1.}--the contemporary pattern in which bill passage depends upon complex, often party leadership-shaped processes more complex than the traditional committee-dependent, often open-floor-amendment, non-filibustered, less complex processes that were more prevalent before the 1970s. All these limitations suggest taking the observations presented here as quite preliminary and limited. From one of these other viewpoints, some might just rate EGTRRA's process as more or less par for the course.

Third, even this article has suggested that reforms and new approaches may produce a record of laws about lawmaking better than what transpired in 2001. Just as rulemaking delegations can evolve over time, with fixes on substantive, procedural, or overall-coordination
levels, so too these lawmaking mechanisms can evolve over time. Congress has obeyed the improvements in budget reconciliation after the excesses of 1981, notably the Byrd Rule. It also made improvements in the budget process in the Budget Enforcement Act of 1990, which helped get ready for the big step forward in 1993 and, via PAYGO, helped preserve for the following decade the gains made both in 1990 and in 1993. The trade fast track started with some sophistication in 1974, advanced in 1979, and advanced further in 1988. Since reforms can work, the problems of 2001 should serve, not as a reason for giving up, but as a summons to do better.

Finally, as this article has pointed out, the country has other problems in which current or potential impasses suggest a law about lawmaking. This article has used the example of provisions in campaign finance legislation possibly facing partial Supreme Court invalidation. Any number of other examples could occur. The Supreme Court's Chadha and City of New York decisions have greatly confined the possible approaches available to the political branches that are either unconstitutional or blank-check delegation. That plenitude of problems and shortage of alternatives again reminds why the approach of laws about lawmaking cannot be foregone.

Creating and reforming even a portion of a lawmaking system involves wrestling with the primal elements of the formation of law, the interplay of power and reason. The Constitution works too well, fortunately, for each generation to be obliged to experience again the wide-open opportunity and challenge of the Framers as they initially designed an entire system of government. But, in certain select contexts, each generation still does experience its own version of that opportunity, and given the vastly larger scale of the government's operations today than two centuries ago, even that version amounts to a great challenge. To solve problems, political processes must work their will, being neither wildly uncontrolled so that bare and temporary partisan majorities can do too much, nor so frustrated and stalemated as to render the majority sentiment of the public enfeebled and helpless. To solve problems, reason must speak in the counsels of government, yet no single mechanism alone, however tuned, assuredly picks up that voice. In this generation, the laws about lawmaking provide one of the main devices to bring power, with reason, to bear upon the nation's problems. Let the uses of those laws in 2001 spur hopeful consideration of the best ways forward.