

ARTICLES

Gramm-Rudman and the Capacity of Congress to Control the Future

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Introduction

The Balanced Budget and Emergency Deficit Control Act of 1985,¹ popularly known as Gramm-Rudman, raises formidable constitutional issues. Among the issues raised by the Act, one has not received adequate attention. That issue is the unique temporal aspect of Gramm-Rudman: the attempt of one Congress to constrain future Congresses.

Although the constitutional arguments raised by the litigants have been partially successful thus far, there is a disjunction between the formal constitutional arguments and the substantive concern with the Act among both politicians and the public.² Neither the nondelegation doctrine nor the separation of powers doctrine—the main grounds on which the Act has been attacked—touches the substantive problems that the Act has created.

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1. Public Debt Limit—Balanced Budget and Emergency Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1986) [hereinafter cited as Balanced Budget Act].

2. Gramm-Rudman was challenged in the United States District Court for the District of Columbia on the very day it was signed by the President. *Synar v. United States*, No. 85-3945 (D.D.C. filed Dec. 12, 1985). Subsequently, an additional suit raising identical issues was filed and consolidated with *Synar*. *National Treasury Employees Union v. United States*, No. 85-4106 (D.D.C. filed Dec. 31, 1985). On February 7, 1986, a special three-judge court, the jurisdiction of which is established in the Balanced Budget Act, § 274(a)(5), Pub. L. No. 99-177, 99 Stat. 1037, 1098, held the Act unconstitutional on separation of powers grounds because “it vests executive power in the Comptroller General, an official removable by Congress.” Order of February 7, 1986 at 2, *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986). Notice of Appeal to the Supreme Court was filed, and on February 24, the Court noted probable jurisdiction and granted an expeditious briefing schedule and argument date, promising a decision before the end of the Term. 54 U.S.L.W. 3561 (Feb. 25, 1986).

The nondelegation issue suggests that Congress has not adequately determined legislative policy, when the real problem with the Act is that Congress has decided too much.³ Similarly, the separation of powers problem suggests only that Congress has chosen the wrong official to carry out some of the functions created by the Act. But those who worry that the Act, or future Acts like it, could be a prescription for economic and military disaster are hardly reassured by an argument that it gives the General Accounting Office a role that should properly belong to the Office of Management and Budget.

If constitutional law is to capture the real issues raised by Gramm-Rudman, it must look at the Act straight on and not through the prism of doctrine created to deal with traditional legislation. For Gramm-Rudman is not traditional; it is trying to do something new. It is trying to avoid hard decisions in the present by deciding now for the future. Controlling future legislative behavior is the essence of the Act. The purpose of this Article is to assess the constitutionality of this attempt at control.

This discussion is tied to a larger discussion now taking place in economic and psychological literature, a discussion about self-referential rules, or as a recent article by Thomas Schelling puts it, "enforcing rules on oneself."⁴ Schelling describes his topic this way:

People resolve on courses of action and abstinence that they are apprehensive they may not fulfill; they want to constrain their own behavior at future moments in time when their preferences (or whatever impulses, temptations, phobias, fears, and passions control their choices) determine acts that are different from what they *now* prefer to do *then*.⁵

With a change in the subject—from "people" to "Congress"—this passage describes precisely Congress' behavior in passing Gramm-Rudman.

Even Schelling's description of personal strategies for enforcing self-referential promises about future behavior can be applied to Congress' behavior in enacting Gramm-Rudman. According to Schelling, enforcement rules must "make [a] violation unattractive through the attachment

3. "What is significant about this case, and what distinguishes it from other cases in which delegation has been upheld, is that the *only* discretion conferred is the ascertainment of facts and the prediction of facts. The Comptroller General is not made responsible for a single *policy* judgment . . ." *Synar v. United States*, No. 85-3945, slip op. at 24-25 (D.D.C. Feb. 7, 1986).

4. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985). See T. SCHELLING, *CHOICE AND CONSEQUENCE* (1984); Elster, *Ulysses and the Sirens: A Theory of Imperfect Rationality*, 16 SOC. SCI. INFORMATION 469; Winston, *The Reasons for Being of Two Minds: A Comment on Schelling's 'Enforcing Rules on Oneself'*, 1 J.L. ECON. & ORG. 375 (1985); C. Sunstein, *Legal Interference With Private Preferences* (paper delivered at Yale Legal Theory Workshop (Feb. 20, 1986)).

5. Schelling, *supra* note 4, at 358 (emphasis in original).

of credible penalties [and simultaneously] keep [a] violation from causing the whole enterprise to collapse.”⁶ Congress has set a rule for itself—incur no deficit beyond the stipulated maximum—and to enforce it has adopted a strategy for dealing with violations that sets a penalty—the automatic, across-the-board spending reduction—which is both unattractive and simultaneously keeps the enterprise of deficit reduction from collapsing.

Schelling’s whole enterprise, however, as Robert Burt has argued in response, cuts “against an additional norm—a cultural ideal of individual free will. . . . [T]he person who embraces the proposition that he is always free to choose between discarding and reaffirming his past commitments, that he is able and willing to reconsider past preferences in the light of present knowledge and values.”⁷ I will argue that this is not just a norm of personal conduct, but a constitutional norm of legislative action as well. Legislative power is sovereign power and as such it must be “always free to choose between discarding and reaffirming [its] past commitments.” Gramm-Rudman is profoundly offensive to this norm, by which we understand ourselves as a free and self-governing community.⁸

My plan in this Article is first to set forth the basic features of the Act that raise this problem. Then I shall explain the significance of these features by comparing them to the traditional framework for reconciliation and adjustment of legislative products enacted at different times. This will be followed by an assessment of the unique burden on future legislative action created by the Act, which in turn, will require the development of a model of the legislative function. After demonstrating that Gramm-Rudman burdens the constitutional function of legislating, I shall then turn to the issue of whether the burden is, nevertheless, acceptable. To answer this question I shall look at the broader issue of the constitutional appropriateness of attempts by each branch of government to control its own future behavior.

I conclude that the intent to control is appropriate only within a structure of hierarchy, but that the relationship between past and future

6. *Id.* at 372.

7. Burt, *Commentary on Schelling’s “Enforcing Rules on Oneself,”* 1 J.L. ECON. & ORG. 381 (1985).

8. As will become clear below, the Schelling-Burt dispute does not capture one critical aspect of Gramm-Rudman, which makes even more prominent the problems of time and change. We confront not just the problem of an individual imposing rules on *himself* to guide *his* future behavior, but also a problem of institutional identity that itself changes over time. Gramm-Rudman binds not just this Congress and this electorate, but future Congresses and future electorates as well. By speaking of the institutions as abstractions—the Congress and the electorate—we mask the fact that temporal change will reach into the very identity of the institutions.

Congresses is not that of superior to subordinate legislative authorities. The kind of control of the legislative function that Gramm-Rudman intends can only be accomplished constitutionally through the amendment process, not by statute.

I. Gramm-Rudman and Control of the Future

Gramm-Rudman was designed to achieve a phased reduction in the budget deficit, eliminating it entirely at the end of five years. It establishes for each of the six fiscal years (1986-1991) "maximum deficit amounts," starting at approximately \$172 million and ending at zero.⁹ To this end, Part A of the Act sets forth substantial amendments to the Congressional Budget and Impoundment Control Act of 1974 (hereinafter Budget Act of 1974), intended to prevent Congress from considering overall budget resolutions and particular appropriations measures that would result in deficits larger than the maximum stipulated amount. Simultaneously, Part B sets forth a procedure for Executive submission of the annual budget, which is designed to ensure that the submission will not exceed the annual maximum deficit amounts.

Recognizing that neither the congressional nor the executive prescriptions will necessarily result in the intended effect—budget deficits within decreasing annual limits—Part C of the Act establishes an alternative, compulsory system to meet these targets. In the absence of an authoritative enforcement mechanism, Congress and the President remain free not to comply with the stipulated procedures and budget requirements of Parts A and B. Nevertheless, a legislative program that fails to meet the deficit targets will be automatically reduced, as a matter of law, pursuant to the directives of Part C of Gramm-Rudman.¹⁰ This system purports to regulate directly and unavoidably, in the absence of repeal, the legislative product of a future Congress.

Under this system, the annual "maximum deficit amounts" function as targets: If the projected deficit in each fiscal year exceeds the target, then a system of automatic spending cuts is triggered, guaranteeing a level of total spending within the maximum deficit amount. The procedure for projecting the likely deficit in each fiscal year is specified in both institutional detail—the directors of the Office of Management and

9. Balanced Budget Act, Pub. L. No. 99-177, § 201(a)(7), 99 Stat. 1037, 1039.

10. Although the automatic reductions are put into effect by a presidential sequester order, *see infra* notes 18-19 and accompanying text, the President has no discretion in drafting and issuing that order, Balanced Budget Act, Pub. L. No. 99-177, § 252(a)(3), 99 Stat. 1037, 1074, and a failure by the President to comply is subject to judicial review, Balanced Budget Act, Pub. L. No. 99-177, § 274(d), 99 Stat. 1037, 1099.

Budget (OMB) and the Congressional Budget Office (CBO), and the Comptroller General are all involved¹¹—and substantive detail—assumptions concerning appropriations and revenues are stipulated.¹²

The Act establishes program by program, across the whole range of federal spending, the manner in which reductions are to be calculated if the projected deficit exceeds the target in any fiscal year. Some programs are exempted entirely,¹³ some are subject to maximum reductions,¹⁴ but most are subject to an across-the-board, uniform percentage reduction within two general categories: defense and nondefense programs.¹⁵ Half of the deficit reduction is to come from each category. Because the total in each category is different, the percentage reduction will vary between the two categories.¹⁶

The reductions are put into effect through several steps, starting with reports on “necessary” reductions submitted to the Comptroller General by the directors of OMB and CBO,¹⁷ and ending with the President’s execution of a “sequester order” that will “eliminate the full amount of the deficit excess” by requiring the program-by-program reductions in spending stipulated in the Act.¹⁸ Before the final presidential order goes into effect, Congress is “given” several opportunities to pass legislation that would eliminate the necessity of the sequester order.¹⁹ It can only do that, however, by making comparable reductions in the overall budget and thereby meeting the maximum deficit amount.²⁰

11. Balanced Budget Act, Pub. L. No. 99-177, § 251(a), 99 Stat. 1037, 1063-68 (responsibilities of the directors of OMB and CBO); Balanced Budget Act, Pub. L. No. 99-177, § 251(b), 99 Stat. 1037, 1068 (responsibilities of the Comptroller General).

12. Balanced Budget Act, Pub. L. No. 99-177, § 251(a)(5), 99 Stat. 1037, 1067.

13. Balanced Budget Act, Pub. L. No. 99-177, § 255, 99 Stat. 1037, 1082-86 (e.g., social security, food stamps, aid to families with dependent children).

14. Sections 256(d) and (k) of Gramm-Rudman, for example, limit reductions in certain health programs, including Medicare, to one percent in fiscal 1986 and two percent in subsequent years.

15. Balanced Budget Act, Pub. L. No. 99-177, § 251(a)(3)(B), 99 Stat. 1037, 1064.

16. Balanced Budget Act, Pub. L. No. 99-177, § 251(a)(3), 99 Stat. 1037, 1064-66.

17. Balanced Budget Act, Pub. L. No. 99-177, § 251(a)(2), 99 Stat. 1037, 1064.

18. Balanced Budget Act, Pub. L. No. 99-177, § 252(a)(1), 99 Stat. 1037, 1072-73. The steps and their timing are somewhat different for fiscal year 1986 (*Id.* §§ 251(a)(2), 252(a)(1), (b)(1); and 253), but are uniform thereafter. The discussion that follows addresses the uniform rules that come into effect in fiscal year 1987.

19. Apart from fiscal year 1986 for which there are special rules, the President issues an initial order on September 1 (Balanced Budget Act, Pub. L. No. 99-177, § 252(a)(1), 99 Stat. 1037, 1072-73), with an effective date of October 1 (Balanced Budget Act, Pub. L. No. 99-177, § 252(a)(6)(B), 99 Stat. 1037, 1075), and a final order on October 15 (Balanced Budget Act, Pub. L. No. 99-177, § 252(b)(1), 99 Stat. 1037, 1076-77). This multistage process is designed to allow Congress opportunities to take alternative action. *See also* Balanced Budget Act, Pub. L. No. 99-177, § 254(b)(1), 99 Stat. 1037, 1080-82.

20. Balanced Budget Act, Pub. L. No. 99-177, § 254(b)(1)(C), 99 Stat. 1037, 1081.

Abstracting from the details of calculation and the complex division of institutional responsibility, we find that the Act has a unique form.²¹ A present Congress has enacted a statute directed specifically at the legislative product—or the effects of the legislative product—of future Congresses. A present Congress is stipulating limits on what that future Congress can do in the absence of repeal.²² It is not only setting global limits on future congressional policy, which would itself be problematic, but stipulating in extraordinary detail an administrative apparatus to ensure that its policies, and not those of the future Congress, are effected in each program area.

The trigger mechanism, coupled with the automatic spending reductions, is a response not to some future factual contingency, but to future legislation. The scheme of automatic reductions is constructed on the assumption that a future Congress will enact a legislative program of which this Congress disapproves. What Gramm-Rudman regulates, then, is future legislation.²³

II. The Temporal Dimension of Legislation

A. The Distinction Between First- and Second-Order Rules

Most statutes are a means of controlling the future. Most often they have the form of structuring future behavior in perpetuity. They do not normally carry a sunset provision;²⁴ they set forth a rule of conduct for

21. The details of calculation and institutional responsibility are the issues on which the challenge to the Act has been litigated. The former is at issue in the delegation argument; the latter, in the separation of powers argument.

22. In case of recession, the Act specifies procedures for a partial, or temporary, repeal for the remainder of the current or following fiscal year, or both, through the passage of a joint resolution. Balanced Budget Act, Pub. L. No. 99-177, § 254(a), 99 Stat. 1037, 1078-80. This simply emphasizes the need to repeal the Act directly, if Congress intends to act in ways contrary to its requirements.

23. The structure of Gramm-Rudman should be carefully distinguished from the normal two-part process of authorization and appropriation, by which Congress funds most programs. Although under internal House and Senate rules an appropriation is not to be made in the absence of an authorization, (*see* H.R. DOC. NO. 277, 98th Cong., 2d Sess. Rule XXI(2)(a) (1983); S. DOC. NO. 1, 98th Cong., 2d Sess. Rule 16.2 (1984)), these rules are not binding. Appropriations passed in the absence of a prior authorization are effective. *See* A. SCHICK, CONGRESS AND MONEY 170-71 (1980). Unlike the Gramm-Rudman regime, Congress' last act—the appropriation—controls, even if inconsistent with a prior authorization. The same is true of any inconsistency between the Budget Resolution, passed pursuant to the Congressional Budget Act of 1974, and a subsequent appropriation.

24. *But see, e.g.*, Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1975) (codified at 42 U.S.C. § 2210 (1976) (expiration after ten years in absence of reenactment)); Dep't of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (1977) (codified at 42 U.S.C. §§ 7351-52 (1982) (sunset provision calling for comprehensive review after five years)).

government and/or private actors that will remain the rule until it is replaced or repealed.

So the fact that Gramm-Rudman is forward looking, the fact that its key provisions come into effect only in the future, is not in itself unusual or problematic.²⁵ But rules can structure future behavior in two different ways: They may directly address behavior or they may address other rules. I shall call the former "first-order rules" and the latter "second-order rules."²⁶ The Constitution contains numerous second-order rules: the Ex Post Facto Clause, the Contract Clause, the Habeas Corpus Clause, to name a few. Each constrains legislative rule-making authority. But when the legislature itself adopts second-order rules directed at its own future rule-making authority, distinct constitutional issues arise.

Gramm-Rudman is a second-order rule. It does not attach to otherwise unregulated conduct; rather, it specifies the permissible character of Congress' future rule-making activity.²⁷ The Gramm-Rudman trigger mechanism assumes that a future Congress has enacted a set of financial measures that fail to meet the deficit targets.²⁸ Thus, it assumes an inconsistency between the legislative product of future Congresses and the

25. Although most of the provisions of Gramm-Rudman come into effect in fiscal year 1987 and beyond, some provisions do apply to fiscal year 1986. *See supra* note 18 and accompanying text. Thus, the President issued an initial sequester order on February 1, 1986 to take effect on March 1, 1986. The District Court declared that order "without legal force and effect," Order of February 7, 1986 at 2, *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986), but stayed its judgment pending appeal. Application of the Act by this Congress to itself has the same formal structure as the "fall-back" provision in the Act, by which Congress, if the Act is declared unconstitutional, would in each fiscal year have the responsibility of applying the reduction policies of Gramm-Rudman to itself. Balanced Budget Act, Pub. L. No. 99-177, § 274(f), 99 Stat. 1037, 1100. It does so, however, through a joint resolution, *i.e.*, by virtue of an exercise of its law-making authority. Neither the fall-back provision nor the application of Gramm-Rudman by the current Congress to the current fiscal year is subject to the constitutional criticism put forth in this Article.

26. The latter are also known, in some systems of jurisprudence, as "basic" laws (*e.g.*, Israel, *see Bergman v. Minister of Fin. and State Comptroller*, (I) 23 P.D. 693 (1969) (English translation in 4 ISRAELI L. REV. 559 (1969))) or constitutional norms (*e.g.*, commonly used in international law, *see International Status of South West Africa*, 1950 I.C.J. 128, 189 Advisory Opinions (separate opinion of de Visscher, J., referring to the "interpretation of a great international constitutional instrument"))).

27. Just as a constitutional rule like the Ex Post Facto Clause could be called a first-order rule for the conduct of judges, it might be contended that Gramm-Rudman is a first-order rule for presidential conduct. In both cases the authority created by the rule could be described as a "contingent delegation." But in both cases, the contingency upon which authority is assumed is the passage of legislation of a certain quality. What is important in both instances is that the rule regulates the content of other rules. That it is made effective through the conduct of one particular official who might not otherwise be called upon to act is not relevant.

28. I use the term "financial measure" to refer to all revenue and spending measures that must be considered by OMB, CBO, and GAO in determining whether the targets of Gramm-Rudman have been met.

policy preferences of the present Congress, set forth in the stipulated target deficits. This policy contradiction is the essence of Gramm-Rudman: The future Congress' duly enacted laws direct government agents and agencies to take action that this Congress—a past Congress—intends to prohibit.

In the face of this policy contradiction, Gramm-Rudman provides an administrative—and judicial—enforcement mechanism to assure that the first rule—that of the past Congress—wins. If Gramm-Rudman is described as a “contingent delegation” to the President to issue a sequester order upon the occurrence of certain facts, its unique aspect is that the contemplated contingency is itself the passage of new law. This action on law itself makes it a second-order rule.

That there should be a constitutional concern with such second-order rules follows from their very definition: These rules act as constraints on future legislative authority. Examples of such rules that would raise immediate and obvious constitutional concerns are easy to conceive: a rule that prohibited future Congresses from providing funds for programs particularly disfavored by a current Congress (e.g., bussing for purposes of integration, or abortion). Second-order rules directed at future Congresses necessarily raise the question of what it is that Congress can do by statute and what must be done by constitutional amendment.²⁹ More specifically, when Congress attempts to control future congressional behavior, must it act by constitutional amendment?

The constitutional legitimacy of imposing burdens on a constitutionally assigned function is not uniquely tied to the problem of self-imposed second-order rules. Assessing constraints on the performance of constitutionally assigned functions is a critical issue, for example, in the jurisprudence of both the nondelegation and the separation of powers doctrines.

The nondelegation doctrine reflects a constitutional interest in ensuring that the legislature itself perform the legislative function: Congress cannot relieve itself of its constitutionally assigned responsibilities.³⁰ Similarly, the separation of powers problem raised by

29. The question of the place of the constitutional amendment process is particularly relevant here, given that the purpose and end of Gramm-Rudman—a balanced budget—is the subject of a proposed constitutional amendment for which 34 of the necessary 36 states have petitioned for a constitutional convention. Gramm-Rudman is a statutory alternative to such an amendment.

30. *See, e.g.,* *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-88 (1980) (Rehnquist, J., concurring in the judgment); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

executive/legislative conflicts is not limited to a possible confusion of constitutionally assigned roles; rather, it includes the burden imposed on the constitutionally assigned functions.³¹ Thus, one of the classic tests for a separation of powers problem looks directly to this burden: “[T]he proper inquiry focuses on the extent to which [an Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions.”³² That such burdens are self-inflicted should not remove the concern.³³ This is especially true when the institutional identity is itself subject to change: The future Congress that bears the burden is not the same as that which created the burden.³⁴

In arguing that Gramm-Rudman is properly conceived of as a second-order rule, I have implicitly rejected two alternative characterizations of the nature and function of the Act: one challenges my characterization of second-order rules; the other challenges my characterization of Gramm-Rudman. Neither alternative, however, convincingly resolves the identified problem with Gramm-Rudman.

Instead of drawing a substantive distinction between first and second-order rules, one could draw a procedural distinction. On this view, the difference between a statute and a constitutional restriction on legislative authority is not the object of each, but rather the method by which each was enacted and may be changed. A first-order rule, then, is any rule of conduct that can be changed through the normal legislative process. Gramm-Rudman would only be a second-order rule if it stated that it could not be repealed or that it could be repealed only through some extraordinary procedure.

31. For example, the debate over the War Powers Resolution has largely focused on the claim that the President's constitutional authority as Commander-in-Chief and his responsibility for the conduct of foreign affairs act as a second-order rule constraining legislative activity. The Resolution, it is asserted, violates this second-order constraint. *See, e.g.,* President Nixon's message vetoing H.J.R. 542 (October 24, 1973), 1973 PUB. PAPERS 893; Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 209-13 (1975); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972).

32. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977).

33. To take an extreme example, Congress presumably could not simply pass a law prohibiting all future legislation until the national debt had been eliminated. Nor does presidential approval of a bill that unconstitutionally intrudes upon executive functions insulate that measure from constitutional challenge by that President or his successors. *See* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 946 n.13 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979); *National League of Cities v. Usery*, 426 U.S. 833, 841-42 n.12 (1976).

34. In *Gojack v. United States*, 384 U.S. 702, 707 n.4 (1966), the Court stated: “Neither the House of Representatives nor its committees are continuing bodies.” In *Powell v. McCormack*, 395 U.S. 486 (1969), both the majority, *id.* at 495 n.6, and the dissent, *id.* at 560 n.2 (Stewart, J., dissenting), referred to this proposition.

This would of course be an easy case, but for reasons of substance, not procedure. A law that purports on its face to create an exception to normal legislative procedure is unconstitutional by virtue of its conflict with Article I, sections 1 and 7, which constitutionalize bicameralism and presentment to the President.³⁵ That it is a rule about rules is irrelevant; it fails for the same reason that a law violating the Due Process Clause or Free Press Clause fails. If there is a problem with congressional enactment of second-order rules, it is not captured in this procedural point. That Congress cannot violate the explicit terms of the Constitution does not yet tell us whether Congress has the authority to create second-order rules not otherwise in conflict with the explicit second-order rules contained in the Constitution.³⁶

Alternatively, instead of characterizing Gramm-Rudman as an attempt by one Congress to “bind” another Congress, one could characterize it as a directive by each succeeding Congress to interpret all of its spending decisions—until and unless it is repealed—in light of the overall limits on the federal deficit, and the measures to be taken to reach those limits, set forth in Gramm-Rudman. This characterization appeals to a model of an “implied rider.” It converts Gramm-Rudman back into a first-order rule not by pointing to the procedure for repeal, but by arguing that until it is repealed, it is constantly, though implicitly, reaffirmed in every congressional act creating or affirming spending authority. The absence of repeal is taken as a contemporary affirmation of the law.³⁷

It is neither plausible nor realistic, however, to equate a failure to repeal with an explicit legislative directive. The burden of taking action always has some effect on the process of translating majority sentiment into an actual program. Indeed, this asymmetry was a central reason for

35. *See* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto on the grounds that it constitutes “legislative action” that failed to meet the presentment and bicameralism requirements of the Constitution).

36. Of course, I ultimately suggest that the Constitution contains, as a substantive rule, the second-order rule that Congress may not itself enact self-referential, second-order rules.

37. The Court has on occasion found a constitutionally relevant legislative intention in the decision not to repeal, rather than in the original decision to enact. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (election scheme originally enacted for a nondiscriminatory purpose was maintained for a discriminatory purpose). Locating a positive legislative decision in inaction, however, is problematic, given the usual wealth of alternative explanations for legislative inertia. *See* G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing for an active judicial role to respond to legislative obsolescence); G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977) (“One of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions.”); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1381-1401 (1958) (unpublished manuscript).

adopting Gramm-Rudman: the burden of repeal will ensure future compliance even when there would not otherwise be a majority sentiment in favor of its positive program.³⁸

This asymmetry is precisely the reason the “fall-back” provision of the Act—yearly legislative enactment of the across-the-board reductions³⁹—is just that, a fall-back provision. The political reality is that if Congress must act to put into effect the reductions, then there is a substantial likelihood that the program actually enacted each year will not be the same as that which the Act would implement “automatically.” This is reflected in the history of the budget “reconciliation” process, enacted in section 310 of the Budget Act of 1974, under which Congress is to achieve programmatic changes that cut spending or raise revenues to meet levels set in the concurrent budget resolution. Except for the Reagan administration’s successful use of reconciliation in 1981, while the “popular mandate” of the new administration was still extremely high, reconciliation has never achieved its aim.⁴⁰ Indeed, until 1980 it was not even implemented; and in fiscal 1983 the reconciliation bill included a number of nonbudget items.⁴¹ Reconciliation necessarily becomes entangled in the legislative priorities and policy choices of the legislative body that must vote. Regardless of what the 1974 Act may have intended, the nature of the legislative process is to respond to current exigencies and not to those of the past.

The problem of legislative inertia has been well canvassed in recent literature.⁴² The starting point of such studies has been the realization that “because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today.”⁴³ Transient political majorities may achieve enactment of statutes that cannot subsequently claim the legitimacy of majority support, yet nevertheless are

38. An interesting discussion and illustration of this possibility of asymmetrical majorities is found in the Senate debate on Gramm-Rudman. Senator Bradley introduced an amendment calling for a five percent reduction in defense spending in fiscal year 1987. 131 CONG. REC. S13048 (daily ed. Oct. 10, 1985). Fully expecting the amendment to be defeated, he sought to demonstrate that the automatic reductions would have effects that could not in themselves gather majority support. *Id.* at S13025. But while he thought this might lead to partial repeal of Gramm-Rudman, especially in defense areas, Senator Goldwater, arguing for pro-defense interests, stated: “We know it is going to hurt defense. I am willing to take my chances.” *Id.*

39. Balanced Budget Act, Pub. L. No. 99-177, § 274(f), 99 Stat. 1037, 1100.

40. See the discussion of reconciliation from 1974 to 1981 in A. SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 3-7 (1981).

41. See S. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET, FISCAL 1986 EDITION 53-56 (1985).

42. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 12-29 (1980); and *supra* note 37 and works cited therein.

43. G. CALABRESI, *supra* note 37, at 2.

protected from repeal by the problems of overcoming legislative inertia. Inertia is built into a system that requires agreement among a number of institutions—ranging from each house of Congress, to the relevant subcommittees—to take action.

While this argument does not suggest that Gramm-Rudman is unique in raising an issue of legislative inertia, it does undermine the “implied rider” interpretation of the Act. There is simply no ground, either in general or as reflected specifically in the structure of this Act, to dismiss the legislative contradiction between past and present legislative policy that is built into the automatic reduction provision, by appealing to a broader, reconciling legislative intent. Inaction is too weak a foundation from which to derive such an intent.

Both of these alternative interpretations of the Act focus on one undeniable fact about Gramm-Rudman: a future Congress is free to repeal it. Both assume that this feature adequately preserves the constitutionally required freedom of action of a future Congress. But this feature cannot do all the work required of it: It fails to cure all constitutional concerns with the temporal dimension of the law.⁴⁴

B. The Significance of Freedom to Repeal

All laws leave future Congresses free to repeal them, but only Gramm-Rudman builds into its operative structure the fact of a “failure to repeal.” Gramm-Rudman provides a unique significance to the failure, while other laws simply assume it as a precondition for their continued validity.

The Gramm-Rudman trigger assumes a contradiction between a future legislative scheme and the rule established by Gramm-Rudman itself. Under this scenario, it is merely tautological to note that Congress is free to repeal Gramm-Rudman. The scenario Gramm-Rudman envi-

44. A third characterization of Gramm-Rudman, *see supra* note 27, would describe it as a contingent delegation. The contingency specified in the Act is future legislation. This makes it unique, but also raises the problems of conflict between past and future legislation discussed *infra* notes 45-65 and accompanying text. The District Court in *Synar*, without explanation, rejected any relevant distinction between a factual and a legislative contingency:

The instant Act is no more than a form of contingent legislation. Throughout the Act, Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required deficits. Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

Synar v. United States, No. 85-3945, slip op. at 20 (D.D.C. Feb. 7, 1986). This entirely fails to address the difference between an administrative determination of a fact outside the legislative process and an administrative determination of the character of a congressional enactment.

sions is one in which no repeal has occurred, but in which there is nevertheless a contradiction between the financial directives of the future Congress and those set forth by a past Congress. Gramm-Rudman resolves that contradiction in precisely the opposite way from what normally would occur. Under Gramm-Rudman, the past rule wins; under the traditional doctrine, the new rule wins. The traditional rule is embodied, of course, in the doctrine of implied repeal.

Implied repeal appears first of all as a doctrine of statutory interpretation.⁴⁵ Because, as the courts have often stated, “implied repeals are disfavored,”⁴⁶ courts will strive to “reconcile” earlier and later legislative acts, that is, they will strive to interpret the statutory scheme to give effect to both acts. As a doctrine of statutory interpretation, this rule could be displaced by the opposite rule—favoring implied repeals—without raising constitutional objections.

The judicial doctrine that implied repeals are disfavored is founded on a principle of respect for the work of a coequal branch. Statutes should be upheld except under compelling circumstances: When reconciliation is possible, the circumstances are not “compelling.”⁴⁷ Respect thus leads to a cumulative approach: accept as much as possible, without choosing among legislative priorities.⁴⁸ Choice among legislative priorities remains with Congress.

Another dimension of the doctrine is evident, however, when a court is faced with a situation in which it cannot reconcile two legislative

45. *See, e.g.*, H. BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 351-56 (1911); T. SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 123-28 (1857).

46. *See, e.g.*, *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968); *Amell v. United States*, 384 U.S. 158, 165-66 (1966); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *United States v. Claffin*, 97 U.S. 546, 548-53 (1878).

47. One of the earliest Supreme Court explanations of the doctrine of implied repeal refers to repeal by “necessary implication,” explaining that “it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by [an earlier law]; for they may be merely affirmative, or cumulative or auxiliary.” *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842).

48. There are, however, exceptions to the rule of accumulation. *See, e.g.*, *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870) (“[E]ven where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act . . .”); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (“There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict . . . and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate . . . as a repeal of the earlier act . . .”); *Davies v. Fairbairn*, 44 U.S. (3 How.) 636, 646 (1845); H. BLACK, *supra* note 45, at 355-56; T. SEDGWICK, *supra* note 45, at 126.

actions, when the exercise of interpretation must give way to that of choice. What may a court do when it must choose between two mutually contradictory rules?

The principle of respect for a coequal branch does not indicate which of two genuinely contradictory rules to follow. Either choice would respect the will of "a" Congress.⁴⁹ The choice of the later Congress is compelled not by a doctrine of statutory interpretation but by a "meta-doctrine" concerning the place of statutory interpretation in adjudication: Only by giving effect to the rule of the later Congress can the choice be explained as statutory interpretation at all. The court explains that the later Congress "must have meant to repeal" the earlier rule. The language of statutory interpretation would entirely fail were a court to try to explain a decision to give effect to the earlier rule.⁵⁰ Nevertheless,

49. In practice this question of which Congress rules has been answered in favor of the last-in-time Congress, but neither the treatises on statutory interpretation nor the case law explains this choice. Certain Congresses have been given particular deference by the Supreme Court: for example, the first Congress, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-02 (1819) (discussing respect due that Congress' judgment on constitutionality of national bank) and the 39th Congress, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 430, 439-40 (1968) (discussing respect due that Congress' understanding of the 13th Amendment). One might expect, accordingly, that a theory could have developed in which particular Congresses, even if earlier, would have been preferred over other Congresses in situations of conflict.

Bruce Ackerman locates the problem of judicial review in just such an "intertemporal difficulty": "Courts are generally expected to follow the last word enacted into law. Judicial review, however, requires the Supreme Court to reverse this rule It is this reversal of the ordinary temporal priority that lies at the core of the charge of 'deviance.'" Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1046 (1984). In response, he develops a theory that explains why certain popular majorities, even if earlier in time, are to be constitutionally favored.

A starting point for discussing this preference for the later legislature is Blackstone's maxim: "Acts of Parliament derogatory from the power of subsequent Parliaments bind not." 1 W. BLACKSTONE, COMMENTARIES *90. In his HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS, Black states that this rule cannot be applied uniformly to all acts of Congress or of state legislatures, "but there is a presumption that no legislative body intends to fetter the hands of its successors by enactment of laws which cannot be repealed or modified by them." H. BLACK, *supra* note 45, at 136. Notably, the one case Black cites to support this "presumption" also supports the rule that one legislature cannot "bind a future legislature to a particular mode of repeal." *Id.* at 137. In *Kellogg v. City of Oshkosh*, 14 Wis. 678 (1861), the state supreme court held that the state's general tax laws repealed by implication provisions contained in the city charter, despite the charter's requirement that repealing legislation "should expressly set forth" the intent to repeal. *Id.* at 682; see H. BLACK, *supra* note 45, at 136-37.

Crawford states the rule broadly: "nor can the legislature, as a general rule, enact legislation that is irrevocable, or even limit or abridge the power of succeeding legislatures to repeal legislation." E. CRAWFORD, THE CONSTRUCTION OF STATUTES 193 (1940).

50. Perhaps a court could say that "Congress did not mean to do what it did." This would strain intolerably the principle of respect for a coequal branch. The early cases explicitly recognize that "rationality" requires the last-in-time rule for statutory construction:

this choice is not itself based on a rule of statutory interpretation. This is evident from the fact that the rule cannot be reversed without raising severe constitutional problems.⁵¹

This substantive aspect of the implied repeal doctrine reflects the temporal dimension of legislative authority: that authority exists always in the present. This concept of legislative authority is based ultimately on the principle that popular sovereignty remains constant through time.⁵² This principle, in turn, is based on a two-fold relationship of popular sovereignty to time and change.

First, the very concept of "popular sovereignty" is fluid: The populace itself changes constantly. Not only do its interests change, as reflected in new majorities displacing earlier ones, but the constituents themselves change. New entrants, whether by virtue of age or immigration, are in no sense "second-class" citizens. This fluidity is reflected in constitutional structure in the amendment process of Article V: Not only are statutes always open to revision, but so is the Constitution itself.

Second, apart from changes in the character and interests of the sovereign body, the circumstances to which that sovereign must respond are themselves constantly changing. Freedom to respond to changing circumstances, to reorder priorities in light of these changes, is a critical aspect of self-government. To change one's mind in light of new information and subsequent events is a prerogative of self-government.

The legislature as delegatee of popular sovereignty has, accordingly, at every moment exactly the same freedom to act on its idea of the public good. Hamilton, in *The Federalist* No. 78, expressed this point quite precisely:

It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part In such a case, it is the province of the courts to liquidate and fix their meaning and operation The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be

If two inconsistent acts [are] passed at different times [and one] is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.

Dean of Ely v. Bliss, 5 Beavan 374 (1874), *quoted in* T. SEDGWICK, *supra* note 45, at 104.

51. For an example of these problems, see the discussion of binding future legislatures under the Contract Clause, *infra* notes 119-139 and accompanying text.

52. See J. ROUSSEAU, *THE SOCIAL CONTRACT* 29 (C. Sherover trans. NAL ed. 1974) ("The Sovereign, for the simple reason that it is so, is always everything that it ought to be.").

preferred to the first It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves as consonant to truth and propriety They thought it reasonable, that between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference.⁵³

Although Hamilton calls this a “rule of construction,” he goes on to indicate that it is not one “derived from any positive law,” but rather from “the nature and reason of the thing.”⁵⁴ Thus, the “nature,” “truth,” “reason,” and “propriety” of legislative action all demand this rule.

This substantive aspect of the implied repeal doctrine can be better understood by comparing it to the federal preemption doctrine. The new Congress stands to the old Congress as the federal government stands to the state governments. Both are “superior” authorities that may displace the rules of the subordinate authority. In both cases, implied displacements of an alternative regulatory scheme squarely within the jurisdiction of the other policy-making body are disfavored.⁵⁵ Yet the rule requires displacement by a superior authority when the two schemes of regulation cannot be reconciled in a sensible fashion.⁵⁶

The rule of construction applied in each case is based upon the superior rule-making authority of one of the two legislative authorities. State governments generate rules all the time that bind the federal government, until and unless the federal government invokes its power of preemption. Yet that invocation need hardly be express; it would be beyond the power of a state to formulate a rule of express repeal. Similarly, Congress continually generates rules that bind future Congresses until and unless they are repealed. But just as state regulation can place an impermissible burden on federal rule-making authority, congressional regulation can place an impermissible burden on future congressional rule-making author-

53. THE FEDERALIST No. 78, at 468 (A. Hamilton) (NAL ed. 1961).

54. *Id.*

55. The classic statement of federal preemption in this context is found in the often repeated statement of the court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations omitted).

56. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), illustrates both aspects of this relationship. While the Court held that a state tax on the Bank of the United States was invalid because inconsistent with federal “supremacy which the constitution has declared,” it also stated that its ruling did “not extend to a tax paid by the real property of the bank, in common with the other real property within the state.” *Id.* at 436. The holding is an example of federal preemption in the absence of an explicit, preempting statute; the dicta is an example of a state rule binding the federal government until and unless it is explicitly preempted.

ity.⁵⁷ There is no reason to believe that in either instance the permissible limits on the burden are met in every case by preserving the possibility of express repeal.

Gramm-Rudman, in its very structure, upsets the normal order between past and future Congresses. But Gramm-Rudman is not alone among statutes in being protected by a rule of express repeal. A past Congress has on occasion imposed a rule of express repeal on future Congresses.

There are two prominent examples of Congress adopting a rule of express repeal.⁵⁸ First, the Administrative Procedure Act (APA) contains a clause that limits any future congressional restrictions of the Act's provisions—e.g., the right to judicial review of administrative determinations—to an “express repeal.”⁵⁹ Second, the National Emergencies Act (NEA) protects with a rule of express repeal the congressional delegation to the President of authority to exercise extraordinary powers during a

57. The analogue to the *McCulloch* question appears here as follows: Are some self-referential rules respecting future legislative conduct impermissible because of the burden they place upon the capacity of the superior authority—the future legislature—to pursue its own objectives?

58. Congress has also adopted certain general rules of statutory interpretation that might be characterized as second-order rules, but which need to be carefully distinguished from the character of the rule at issue in Gramm-Rudman. Unlike Gramm-Rudman, these are not rules about the permissible content of future legislation. For example, 1 U.S.C. § 108 (1982), states that whenever an Act is repealed, which itself repealed a former Act, the former Act will not be revived, unless it is expressly so provided. *See also* 1 U.S.C. § 109 (1982) (effect of repeal on existing liabilities). From the outset, courts have interpreted this rule exclusively as one of statutory construction. It provides no substantive constraint or bar to future legislation, but simply ensures that in passing amending legislation Congress will be “clear and manifest” in its intention. *See, e.g.,* *Jacksonville P. & M.R. R.R. Co. v. United States*, 21 Ct. Cl 155, *aff'd*, 118 U.S. 626 (1886). The analysis of this provision, therefore, is indistinguishable from that of the Administrative Procedure Act, 5 U.S.C. § 559 (1982), described below. *See* *Leitz v. Flemming*, 264 F.2d 311 (6th Cir. 1959).

Arguably 1 U.S.C. §§ 101-05 (1982) are second-order rules: They dictate the form and language of legislation—requiring, for example, enacting clauses, numbered sections, and resolving clauses. But these rules are distinguishable from Gramm-Rudman precisely because they are formal and not substantive. Although their effect has never been litigated, as explained below, there is substantial reason to doubt that such internal rules, even if given statutory form, are of any binding effect. Thus, duly enacted legislation that failed to take the stipulated form would nevertheless be given force and effect. *See* *Field v. Clark*, 143 U.S. 649, 672 (1892) (signing of enrolled bill by Speaker of the House and President of the Senate is “an official attestation by the two houses of such bill as one that passed Congress” and may not be challenged on the ground that it failed to so pass, regardless of errors that may appear in the Congressional Record).

59. 5 U.S.C. § 559 (1982) provides in relevant part: “[A] subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.”

national emergency.⁶⁰

The quality of the analogy to Gramm-Rudman is strained immediately by virtue of the dramatically different significance of the express repeal character in these statutes compared to that in Gramm-Rudman. In each of the other cases, the basic content of the rule exists, or has its primary operative force, apart from the situation of conflict. The second-order character is itself incidental to a first-order rule of conduct: the variety of administrative rules and judicial review provisions of the APA, or the right to exercise emergency powers in the NEA. But Gramm-Rudman only survives, at the very moment when it is to become operational, by virtue of such an express repeal requirement.⁶¹ That requirement is in no sense incidental to the primary purpose of the Act.⁶²

The APA and NEA provisions are somewhat different in effect. The APA provision is nothing more than a "clear statement rule": It does not require express self-reference in a future Act, but only that that Act be clear.⁶³ The NEA provision goes further, requiring not just a clear

60. 50 U.S.C. § 1621(b) provides in relevant part: "No law enacted after September 14, 1976 shall supersede this subchapter unless it does so in specific terms, referring to this subchapter and declaring that the new law supersedes the provisions of this subchapter."

61. This is curiously demonstrated by the fact that Gramm-Rudman's express repeal rule is itself "implicit": It is a necessary consequence of the structure of the Act, not a discrete provision of the Act.

62. In fact, all of the internal directives to the Congress on the budget process contained in Gramm-Rudman are ultimately ineffective as second-order restraints on the legislative process. See *infra* notes 141-158 and accompanying text. Accordingly, the only part of Gramm-Rudman that can have any binding, restraining effect on Congress is that part that is triggered by a conflict with a future legislative scheme.

63. Although the constitutionality of the express repeal provision has never been litigated, the Supreme Court has reviewed its operation. In *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), the Court considered whether the 1952 Immigration Act, which provided that in deportation cases all orders of the Attorney General should be "final," was an express, partial repeal of the judicial review provided in section 10 of the APA. Holding that the finality provision was not such an express repeal, the Court interpreted the express repeal requirement essentially as a rule of statutory construction—a clear statement rule: "It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review." *Id.* at 51.

Later in the same Term, the Court had another occasion to consider this express repeal provision. Holding that in deportation cases the hearing provisions of the 1952 Immigration Act superseded the hearing provisions of the APA, the Court again underscored that although the express repeal requirement mandated that "exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed," neither was Congress required "to employ magical passwords in order to effectuate an exemption from the [Act]." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Congress' clear intent, irrespective of the APA itself, was sufficient to supersede the APA's judicial review procedures. See also *Brownell v. We Shung*, 352 U.S. 180 (1956) (extending the *Pedreiro* rule to exclusion as well as deportation); *vonLusch v. Hoffmaster*, 253 F. Supp. 633 (D. Md. 1966) (holding that the provisions of the Small Business Act

statement of intent, but that a future Congress clearly address, in so many words, the prior Act itself. Neither of these rules, however, provides an appropriate analogy to Gramm-Rudman.

The APA provision is genuinely a rule of statutory construction. It addresses situations of real ambiguity: If the statute is clear, then the APA provision has no effect. An act contrary to the substantive rule can be accomplished simply by doing it directly; Congress need not address the rule itself, it need only specify clearly the rule of conduct. In a situation of clear conflict, therefore, the later legislative act controls. Unlike Gramm-Rudman, the APA rule does not purport to regulate the permissible content of legislative actions.

The analysis of Gramm-Rudman, on the other hand, is not advanced at all by labeling it a rule of statutory construction. Gramm-Rudman is a rule about the permissible content and effect of legislative action. It presumes that the rule of future legislation is clear, that an agency is otherwise bound by that rule, yet declares it ineffective.⁶⁴ It requires that a future Congress intending a different effect not simply do it directly, but first address Gramm-Rudman itself.

The NEA, however, shares some of these characteristics.⁶⁵ Conceivably, Congress could pass new legislation inconsistent with the emergency powers granted to the President in the NEA, yet fail to meet the express repeal requirement. A court might then face the same issue of choosing between past and future legislative actions that Gramm-Rudman presents. One difference, of course, is that this is not likely to happen, while the trigger of Gramm-Rudman is very likely to go off.

Apart from this practical difference, there is a substantial theoretical difference between the two Acts. Under the NEA, Congress is granting authority to the President to exercise extraordinary power and discretion in times of crisis. Presumably, the intent of the incidental restriction on future Congresses is to make presidential power in future emergencies absolutely clear. The legislative intent of Gramm-Rudman, on the other hand, is not to be clear, but to constrain options. Again, it confuses the

limiting judicial remedies in claims against the Small Business Administration supersede the judicial review provisions of the APA).

64. The relevant question about Gramm-Rudman will never be "did Congress intend to repeal it?" Rather, it will always be whether the fact that Congress could not repeal it places an unconstitutional burden on the legislative process.

65. There has been no litigation at all under the NEA. Accordingly, the constitutionality of second-order legislative rules does not receive support from the NEA. For reasons made clear in the text, I do not mean to suggest that if Gramm-Rudman were held to be unconstitutional on the grounds that I describe, it would necessarily follow that the express repeal provision of the NEA would also be unconstitutional.

issue to try to force Gramm-Rudman into the model of a rule about statutory construction.

Thus, although there is a structural similarity between the express repeal provision of the NEA and Gramm-Rudman, there are significant differences between the two Acts, both in the character of the practical burden placed on future Congresses and in Congress' reasons for establishing the second-order rule. Assessing the practical burden and intent of Gramm-Rudman will provide the key to the constitutionality of the Act.

III. Assessing the Burdens Created by Gramm-Rudman

A. The Reality of Political Burdens on Political Acts

Gramm-Rudman alters the qualitative character of the legislative action required to enact or preserve future spending policies. Prior to Gramm-Rudman, spending decisions were made by enacting first-order rules; after Gramm-Rudman, in order to escape the limits it sets, Congress must pass a second-order rule. Congress can no longer simply enact substantive appropriations measures. Rather, it must also address Gramm-Rudman itself—it must direct that the rule of Gramm-Rudman be repealed in whole or part.⁶⁶

As a predictive matter, a court can only rely on Congress' own judgment that the effect of this qualitative change in the focus and level of decision-making will be to produce a substantial difference in the outcome of the legislative process. Gramm-Rudman is based on the political judgment that it will be far more difficult to repeal Gramm-Rudman than it would be to appropriate funds beyond the deficit targets. That judgment is founded on the recognition that in a future Congress there is likely simultaneously to be a majority in favor of spending more than the target deficits and yet no majority in favor of repealing Gramm-Rudman. This is precisely the reason that Gramm-Rudman was passed.⁶⁷ Understanding the reasons for this apparent inconsistency will illuminate the burden on future Congresses created by the Act.

The reasons this judgment regarding future congressional behavior is likely to be correct are not hard to identify. First, the character of legislation is likely to shift dramatically if, instead of focusing on substantive program decisions, Congress must at each moment take up the balanced budget debate. This is not simply a consequence of increased

66. This is simply another way of stating that a second-order rule can only be repealed by another second-order rule.

67. *See supra* note 38.

knowledge of the effect of each spending decision on the overall deficit. Gramm-Rudman cannot be justified as an effort to create a broader awareness of the "larger picture," the total deficit, in the context of individual appropriation decisions. That purpose was already accomplished by the 1974 Budget Act.⁶⁸ Rather, the purpose of Gramm-Rudman is to put a political burden on future Congresses: Any deviation from the Gramm-Rudman regime will impose substantial political risks.

Forcing Congress to act in the full glare of the balanced budget debate may or may not be a good way of forcing financial responsibility upon Congress. My purpose is not to judge the merits of the proposal—that of course depends upon how serious a problem one believes the deficit to be—but rather to suggest that the effect of Gramm-Rudman on future legislative policy is likely to be great. To force Congress to address the deficit problem each time it makes a spending decision will very likely cause it to make different decisions. A future Congress can only buy the political peace that comes with silence on this divisive issue by accepting a range of policy choices made for it by a past Congress.

Second, by changing the effect of legislative inertia, Gramm-Rudman substantially insulates its own policy priorities from possible shifts in legislative judgment. Repeal of Gramm-Rudman can be blocked by a minority within the legislative process, e.g., a majority of either house or even a minority in the face of an executive veto. While minorities are always empowered by the reality of legislative inertia,⁶⁹ the problem takes on a peculiarly dramatic dimension here. Gramm-Rudman does not address itself to a narrow subject matter or policy concern; rather, virtually the whole of national domestic and security policy falls within the boundaries of the Act. To empower a minority here is to give it

68. See A. SCHICK, CONGRESS AND MONEY 76 (1980), describing the informational purposes of the 1974 Budget Act as follows:

In the course of developing the budget reform legislation, Congress opted for outlay information in committee reports in lieu of statutory limitations. Thus, Section 308 also directs the Congressional Budget Office (CBO) to issue periodic scorekeeping reports on the status of the congressional budget. Other provisions of the Budget Act provide for reports on how the functional amounts in each budget resolution are to be distributed among congressional committees and subcommittees (Section 302), a House Appropriations Committee summary report on tax expenditure legislation (Section 308), and CBO reports on authorizing legislation (Section 403).

The purpose of this avalanche of budget information is to assure that Congress is aware of what it is doing whenever it takes an action that impacts on the budget. In line with the assumption that it is futile to try to stop Congress from doing what it wants to do, the Budget Act strives to make Congress responsible for its actions.

69. See G. CALABRESI, *supra* note 37, at 6.

control across-the-board.⁷⁰ That future minority is nothing more than a place-holder for a past, transient majority that set the policy for future Congresses.

More importantly, there is no reason to believe that the minority capable of and interested in blocking repeal of Gramm-Rudman would have the same interest or capability of blocking legislative action on particular programs. Repeal, in part or in whole, of Gramm-Rudman raises a different political question than would a series of program-specific spending proposals. The compromises and coalitions that would form around the former are not the same as those that would form around the latter. Gramm-Rudman effectively empowers a "balanced budget" minority in future Congresses, one that had not previously been able to assert its political objectives.

Finally, Gramm-Rudman subjects the entire legislative process to a high degree of uncertainty. By linking every spending decision to every other spending decision, the Act creates a situation in which nothing can ever be settled as long as the budget process remains open. Any particular appropriation can disturb every other decision already made or to be made. Any compromise struck, any policies set, may be displaced by future actions tied to that policy only by virtue of the second-order rule embodied in Gramm-Rudman.⁷¹

Under Gramm-Rudman, the apparent final act no longer controls. While I shall discuss this aspect more fully below, here the point is that the Act will lead to an "apparent" legislative program that is no real majority's program. That is, it is in the nature of the legislative dynamic created by the Act to generate precisely the contradiction between first-order spending decisions and the second-order rule that triggers the automatic reduction.

This character of the Act's burden on future Congresses distinguishes it from the burden created by normal legislation. Only Gramm-Rudman distorts the legislative product of future Congresses. This is a likely effect of a rule about the effectiveness of future legislative rules: It relieves those future rules of the necessity of accurately reflecting the reality of a legislative program.

70. The significance of this control of future policy is marked by the fact that estimates of the size of the automatic budget reductions required by Gramm-Rudman in the next fiscal year alone are as high as 25 percent. 44 CONG. Q. WEEKLY REP., Jan. 25, 1986, at 138.

71. The only way to escape this risk is to take each appropriation decision out of the reach of Gramm-Rudman, once a congressional policy is set. But this just repeats the whole process of analysis of the burden. Under the regime of Gramm-Rudman it will not be the case that every appropriation decision that has majority support will also command majority support for repealing, as applied to it, the rule of Gramm-Rudman.

We have every reason to think, therefore, that the decisions Congress would make on a series of first-order rules regarding spending would not be the same as those decisions that will be made if, to reach the same end, Congress must also pass a second-order rule. This is exactly the situation that triggers Gramm-Rudman's automatic spending reductions; it is exactly the reason that the trigger mechanism was created. A court should not close its eyes to the obvious political reality upon which the operation of the Act is predicated.

B. A Framework for Assessing the Significance of the Burden on Future Legislatures

Gramm-Rudman has changed the legislative context in ways that are likely to affect the policy outcomes for future Congresses. Of course, this is only to say that Gramm-Rudman, if it survives constitutional challenge, is likely to be effective. To determine the significance of this burden on legislative choice requires some standard. And if the burden is found to be significant, we still need to determine whether it should nevertheless be borne. I accomplish the first task by examining the effect of the burden on the legislative function; the latter, by looking to the constitutional appropriateness of a legislative intent to reject future legislative policy choices.

Performance of the legislative function cannot be measured by the substantive product: a court is in no position to measure good and bad legislation, except when that legislation itself intrudes on constitutionally protected interests. Thus, a court cannot properly conclude that Gramm-Rudman is likely to result in "poor" legislation by future Congresses. But the constitutional quality of legislating as an activity of governance can nevertheless be spoken of coherently.⁷²

72. The separation of powers cases fail to provide a useful model of the legislative function, because in those cases the issue is always to distinguish legislative from executive authority. The Court has never been able to do this in a definitive manner. Once one accepts the proposition that the Constitution does not require a "hermetic sealing off of the three branches of Government from one another," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976), or "that the separation of powers were not intended to operate with absolute independence," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), some measure of acceptable "interaction" is required. This, in turn, requires some standard or criterion of the limit beyond which the "essential" functions of a branch are displaced. Such a limit has never been found in the constitutional function itself—executive, legislative, judicial—but only in the constitutionally established forms of pursuing these functions.

No such standard could be found because the lines separating the functions of the different branches are not themselves subject to clear articulation. *Compare* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. at 953 n.16 (1983) (executive action pursuant to delegated legislative authority is "presumptively" an exercise of art. II authority) *with* 462 U.S. at 988-89 (White, J., dissenting) (executive decision to deport aliens pursuant to congressionally dele-

A constitutional measure of the legislative function can be found in the two traditional concepts of a legislator's role: Legislators are both "agents of" and "trustees for" their constituents.⁷³ As agents, they are vehicles for the presentation of their constituents' views and interests in the legislative forum. As trustees, they are asked to exercise their best judgment with respect to the requirements of the public good.⁷⁴ Both functions are tied to the present in the ways described above:⁷⁵ the principals to whom the agent responds are a fluid majority; the best judgment required of a trustee must respond to present, not past, circumstances. Gramm-Rudman significantly affects both of these legislative functions by building into the legislative process a preference for past policy choices over those of the future.

Gramm-Rudman subverts the "agency" role of a legislator by undermining the relationship between a legislator and his constituents. That relationship is necessarily undermined when the legislative process is rendered opaque to the constituents. Gramm-Rudman is likely to have this effect for two reasons.

First, it is likely to render legislative behavior overwhelmingly "strategic." As the possibility of exceeding the deficit target increases, the necessity to secure actual, current congressional intent against the automatic cuts must be factored into every decision. Gramm-Rudman institutionalizes a principle of diminishing returns in legislative action. Thus, to appropriate effectively a certain sum to a particular program will re-

gated authority is "itself a legislative act," relying on *Mahler v. Eby*, 264 U.S. 32, 40 (1924)). Separation of powers analysis required a model of "legislative" as opposed to "executive" functions, but the reality is that the two functions always overlap. Executive rule-making—the executive qua legislator—and legislative application of rules to particular facts—Congress qua executive—are simply extremes on a continuum.

73. The most systematic account of these two different views of the legislative function is found in H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). See also J.S. Mill, *Considerations on Representative Government*, ch. XII, in *THREE ESSAYS* (1975).

74. These two functions are obviously in tension, one never fully resolved in political theory. The agent may feel compelled to act in ways that are against the trustee's "better judgment"; the trustee may fail to give voice to his constituency's views. John Stuart Mill, speaking of just this tension, suggested the following reconciliation:

These considerations and counterconsiderations are so intimately interwoven with one another; it is so important that the electors should choose as their representatives wiser men than themselves, and should consent to be governed according to that superior wisdom, while it is impossible that conformity to their own opinions . . . should not enter largely into their judgment as to who possesses the wisdom . . . that it seems quite impracticable to lay down for the elector any positive rule of duty: and the result will depend, less on any exact prescription or authoritative doctrine of political morality, than on the general tone of the mind of the electoral body, in respect to the important requisite of deference to mental superiority.

Mill, *supra* note 73, at 328.

75. See *supra* notes 52-54 and accompanying text.

quire a prediction about the likely automatic percentage reduction and a corresponding compensation. Actual appropriations above a certain point will, in effect, only count for a percentage of their apparent value.

Furthermore, by linking virtually all appropriation actions through the automatic percentage reduction, Gramm-Rudman will create strong incentives for legislative "defensive" actions. Gramm-Rudman does not just establish a principle of diminishing returns; it sets up certain principles of cross-subsidization. Globally, an increase in defense spending that causes a deficit excess would be "financed" in part by a proportionate decrease in domestic spending. Thus, in order to "defend" domestic appropriations, any defense increase is likely to trigger a proportionate domestic increase—and vice versa. Gramm-Rudman will force legislative actions that can themselves be explained only by reference to Gramm-Rudman: But for the second-order rule, the behavior would appear irrational.⁷⁶

Second, Gramm-Rudman displaces legislative accountability: The present Congress shifts its action to the future, so it will not be held accountable now; the future Congress can assign responsibility to the actions of the past Congress, so it too will not be held accountable. The legislator is "disconnected" from the direct consequences of his behavior. But if he is not responsible, then his constituents cannot assess whether he has adequately represented their particular views in the legislative forum.

The combination of legislative strategy and legislative posturing that Gramm-Rudman encourages may make deciphering the correlation between legislative acts and legislative intent virtually impossible. The constituents (the principal) cannot assess, and hence cannot control, the act of the representative (the agent) under such a regime. The principal/agent relationship is necessarily undermined when there is no shared framework between the two within which policy issues appear.

Perhaps more importantly, Gramm-Rudman subverts the "trustee" function of the legislator by placing a burden, as described above, on the accomplishment of the first-order policy preferences of future legislators. It substantially undermines the only constitutionally sanctioned expression of legislative judgment regarding the public good, the actual legislation passed by a future Congress. Only if nonrepeal could be understood

76. This recreates at the level of legislation an analogue to the practice of executive departments, particularly defense, of presenting yearly budgets greater than they believe Congress will approve. They build in a space for negotiation. See A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 23 (4th ed. 1984). But while negotiation may be an appropriate model for the executive-legislative relationship, it is not an appropriate model for the relationship between future and past legislation. It takes two to negotiate.

as the equivalent of positive affirmance of a policy would this function remain unaffected. The greater the gap between these two, the larger the burden. That gap, I have argued, may be very great here.

Gramm-Rudman gives priority to the policy choices of a past legislature over those of future legislatures. It does this not only through the automatic reductions if the trigger is set off, but also through the actions that Congress may take to avoid the "penalty" of the trigger. The latter actions, just like the former, can only be explained by referring to the past policy preferences embodied in Gramm-Rudman.

But the fact that a choice was approved once by a legislative majority does not continue to provide it legitimacy, if we have reason to believe that the Act would not be reenacted. The question of reenactment is by no means the same as that of repeal. There is ample reason to believe that Gramm-Rudman would fail the former test, but not the latter. Addressing this same problem in a different context, Dean Calabresi has written:

Is there, in a democracy, a special significance that ought to attach to a law because it was once passed by a majoritarian body? If enough time or other circumstances have intervened, undercutting a presumption that the same majority persists, I do not understand why any great significance should attach to a majoritarian origin.⁷⁷

Here, there may be temporal proximity, but there are sufficient "other circumstances" to raise the question of legitimacy.

As we have seen, the future political reality is likely to include two "contradictory" legislative sentiments: A majority to spend more than the target deficits and simultaneously a majority not to repeal Gramm-Rudman.⁷⁸ The inconsistency can be sustained because the latter decision will have to respond to a variety of factors not included in the former. Those factors will, not insignificantly, include the politics of deficit reduction: A political issue that has a life of its own, entirely apart from the rationality of program decisions and the likely public benefits of fiscal and monetary policy.⁷⁹

That Gramm-Rudman burdens future legislatures in constitutionally relevant ways is clear. It does not follow from this, however, that it is unconstitutional. The substantial question remains whether it is appropriate for one Congress radically to shift, in the ways described above, the terms of the debate within which future Congresses must consider

77. G. CALABRESI, *supra* note 37 at 102.

78. Again, first- and second-order rules will not be treated the same. *See supra* text accompanying notes 67-71.

79. Compare, for example, the political disputes over the proposed balanced budget constitutional amendment. *See* A. WILDAVSKY, *supra* note 76, at 258-66.

and set legislative policies. Under traditional doctrine, at this point a court must look to the “benefits” of the controverted legislation.⁸⁰ The constitutional question cannot be answered here, however, by pretending that the burden can be weighed against the importance of the public end. For one thing, both the benefits and the burdens occur in the future, but it is precisely the legislative freedom of future Congresses to balance them that Gramm-Rudman undermines. Furthermore, the importance of the end, as well as the alternative ways of meeting it, require policy judgments not subject to judicial measurement.

Instead of looking to the particular end in view, then, we must look to the broader goal of Congress in passing Gramm-Rudman and ask whether that intent is constitutionally appropriate. That goal is to assert control over the rule-making of future Congresses.

IV. The Place of Self-Referential Second-Order Rules in Binding the Future

Controlling the future is the purpose of most legislation. But the problem of controlling the future takes on unique characteristics when it is self-referential, that is, when the future that is to be bound is that of the rule-making authority itself.⁸¹ In common law terms, this is the problem of enforcement of promises.⁸² Each branch of government makes such “promises” on occasion.

Examining the different ways in which this same problem appears in each branch will provide a perspective from which to judge the constitutionality of Gramm-Rudman’s form of congressional self-constraint.

A. The Executive

The executive branch can bind itself through the promulgation of rules. It can do precisely what I have described as most problematic about Gramm-Rudman: It can promulgate rules which limit the future

80. The weighing of the costs of infringement of a constitutionally protected interest against the intended public benefits occurs both in cases involving issues of constitutional structure and in those involving constitutionally protected private rights. The silent Commerce Clause cases, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest . . . it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”), are a good example of the former; the abortion cases are a good example of the latter, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (balancing mother’s privacy interests against state interest in health of mother and potential life).

81. See Schelling, *Enforcing Rules on Oneself*, *supra* note 4, at 358-59.

82. “Promise” suggests a promisee as well as a promisor. I do not mean to suggest that there is a promisee, who is the beneficiary, in each instance of self-referential second-order rules, although when present, this may significantly affect the analysis.

ability of executive agencies or officials to act as they might otherwise judge appropriate and as otherwise would fall within their authority.

The classic example of this is *Accardi v. Shaughnessy*.⁸³ Petitioner in that case was a deportable alien who had applied for suspension of deportation. Discretionary authority to suspend deportation had been granted to the Attorney General pursuant to section 19(c) of the Immigration Act of 1917. The Attorney General, pursuant to the statute, had promulgated regulations setting forth the procedures to be followed in processing such applications for suspension. Those regulations called for a series of determinations to be made by administrative officers below the level of the Attorney General, followed by a discretionary review by the Attorney General.⁸⁴

On denial of his request for suspension, petitioner filed a habeas petition alleging that the Attorney General had improperly influenced the decision of the lower administrative officials in his case by including his name on a list of "unsavory characters" whom the Attorney General wanted deported. The Court agreed, holding that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."⁸⁵

There was no claim that the Attorney General had violated any other second-order rule of action—for example, the Due Process Clause—in publishing the list. Nor was there any suggestion that, but for the promulgation of the previous rules, the Attorney General would not have had authority to publish the list. Rather, the only claim was that having established a set of rules, he could no longer act contrary to those rules without first directly repealing the rules. The regulations effectively acted as second-order rules, limiting the validity of subsequent acts that otherwise would have fallen within his authority.

A striking example of the *Accardi* rule is found in *Service v. Dulles*,⁸⁶ in which the Court held that the Secretary of State, when discharging a foreign service officer for suspect loyalty, must follow the department regulations, even though Congress had granted the Secretary "absolute discretion" to "terminate the employment of any officer . . . of the Foreign Service . . . whenever he shall deem such termination necessary or advisable in the interests of the United States."⁸⁷ Again, the Court failed to articulate a rationale for binding the Secretary to voluntarily imposed

83. 347 U.S. 260 (1954).

84. Not all cases came before the Attorney General, but he had the authority to direct that any case be referred to him for final decision. *Id.* at 266.

85. *Id.* at 267.

86. 354 U.S. 363 (1957).

87. *Id.* at 370 (citing 60 Stat. 458 (1946)).

limitations on his congressionally conferred “absolute discretion;” again, the court invoked no second-order rule except the regulations themselves: “While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.”⁸⁸

These cases were relied upon in *United States v. Nixon*,⁸⁹ involving President Nixon’s assertion of executive authority in response to a subpoena from the Watergate special prosecutor. As in *Accardi*, there was no claim that this assertion of executive privilege was not within the competence of the President. The limit on this assertion of authority was again a prior assertion of authority by the Executive Branch: the delegation of authority to the special prosecutor pursuant to regulation. Nixon claimed that this prior act could not limit his present authority, and therefore, this was nothing but an intrabranched dispute within which the President’s present decision must be determinative.⁹⁰

The Court held against Nixon. Relying on regulations creating the office of special prosecutor, it stated: “So long as this regulation is extant it has the force of law.”⁹¹ But the regulation was not any type of “law”; rather, the Court chose to treat the regulation as “second-order” law. As a “first-order” rule, the regulation would have had to yield to a subsequent, inconsistent exercise of the “rulemaking” authority of the President. Thus, the Court required an explicit repeal of the prior rule, before it would give effect to a subsequent rule: “Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regu-

88. *Id.* at 388. See also *Vitarelli v. Seaton*, 359 U.S. 535 (1959), in which the Court further extended the binding power of agency regulations. Vitarelli was an Interior Department employee subject to summary dismissal at any time, for any reason, or for no reason at all. In September 1954, the Department issued a “Notification of Personnel Action” dismissing Vitarelli for national security reasons. After filing suit in federal district court, Vitarelli received a second notification identical to the first except that the reasons for dismissal were omitted. Despite the fact that had the Department sent the second notification first, Vitarelli would have had no cause of action, the Court ruled that “[h]aving chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.” *Id.* at 539-40. Not a word appears about the ground for this second-order procedural rule except in the dissent, which concurred with the majority to this extent: “He that takes the procedural sword shall perish with that sword.” *Id.* at 547 (Frankfurter, J., dissenting).

89. 418 U.S. 683, 695-96 (1974).

90. *Id.* at 692. Nixon’s position was basically that both acts must be understood as first-order rules and, accordingly, the later in time must govern.

91. *Id.* at 695.

lation defining the Special Prosecutor's authority. But he has not done so."⁹²

Nixon differs from the *Accardi* line of cases in that it does not involve the assertion of a private interest in the existing regulatory scheme. A reasonable summary of the principle of the *Accardi* line of cases, prior to *Nixon*, would have been that when executive action creates private interests in particular procedures, those private interests cannot be terminated arbitrarily. A rule requiring explicit regulatory change prevents arbitrary executive action directed at a single party.⁹³ There were, then, substantial, if unexpressed, due process concerns standing behind the *Accardi* rule.⁹⁴

No such due process concerns were involved in *Nixon*: No private party had a cognizable interest in the litigation. Unless one wants to argue that *Nixon* was wrongly decided on this point,⁹⁵ one must search for a foundation of the doctrine in the structural character of the executive branch. *Nixon* suggests such a foundation.

Nixon focuses attention on the relationship between the exercise of regulatory authority and the statutory basis for that regulatory act.

92. *Id.* at 696. The Court's reliance on the "second-order" character of the prior rule is interestingly contrasted with the analysis of the intra-branch character of the dispute set forth by Alexander Bickel prior to the Court's ruling. Bickel, *The Tapes, Cox. Nixon*, THE NEW REPUBLIC, Sept. 29, 1973, at 13. Bickel had argued that the only way to avoid the conclusion that this was a nonjusticiable, "contrived" controversy would be to find that the case presented a controversy between the grand jury and the President, an argument that Bickel thought problematic at best. *Id.*

93. The notice and process, in this instance, would not be individualized. Nevertheless, the process of promulgating new regulations assures a broader consideration of, as well as the possibility of participation by, the parties who stand to be affected.

94. The Due Process Clause is not relied upon in the decision, nor in the line of cases that developed after *Accardi*. The grounds of the decision are not at all clear, leading the dissent to characterize the decision as "proof of the adage that hard cases make bad law." 347 U.S. at 268 (Jackson, J., dissenting). The decisions seem to suggest that one can have a protected interest in a procedure without having a protected property or liberty interest in the outcome of that procedure.

Explicit consideration of the Due Process Clause is found in *Flemming v. Nestor*, 363 U.S. 603 (1960), a somewhat analogous case, but one that involves congressional and not executive termination of an interest in a governmental benefit. In *Flemming*, the Court upheld against a due process challenge and an ex post facto challenge a statutory change in the social security program. Under that change, respondent was denied benefits that otherwise would have accrued to him, because he had been deported for having been a member of the Communist Party years before. The due process standard the Court applied was as follows: "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611.

95. See Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 82-83 (1974). Cf. J. CHOPER, *supra* note 42, at 340 (speaking of *Nixon's* reliance on the *Accardi* line of cases, Choper writes: "The unanswered question is the constitutional basis for this conclusion.") (emphasis in original).

“Under the authority of Art. II, sec. 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties.”⁹⁶ This exercise of regulatory authority by the Executive, then, was itself rooted in Congressional authority, that is, in the prior, statutory delegation of authority to the Attorney General. Congress, of course, has substantial authority to structure the executive branch and to stipulate the manner in which executive actions will take place.⁹⁷ *Nixon* suggests that the first exercise of regulatory authority should be understood as an extension of the rule-making authority of Congress: Congress has delegated part of its rule-making authority to the executive. That “rule” will literally be treated as if “it has the force of law.”⁹⁸

Thus, at least some executive rules can be treated as second-order rules precisely because of their “quasi-legislative” character—the fact that they are based on delegations of legislative authority. Congress can create second-order rules that constrain the exercise of executive authority.⁹⁹ But Congressional rules structuring executive authority are not self-referential second-order rules; rather, they are second-order rules for a subordinate regulatory regime.¹⁰⁰

96. 418 U.S. at 694 (citations omitted).

97. Congressional authority to structure the executive branch generally arises from the concluding phrase of the Necessary and Proper Clause, referring to “[p]owers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.” U.S. CONST. art. I, § 8, cl. 18.

98. 418 U.S. at 695. This argument that explains the binding nature of executive regulations by referring to a hierarchical source is compatible with the *Accardi* line of cases, although the judicial motive in those cases obviously arose from the procedural fairness concerns described above. Indeed, the precedents relied on in *Accardi* expressly link the limiting power of regulations to the original grant of power from Congress to the Executive. *See, e.g.,* *Bridges v. Wixon*, 326 U.S. 135, 153 (1945) (“[O]ne under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.” (citing *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923))). In *Accardi* itself, the Court emphasized that Congress had reenacted, without comment, the discretionary authority given the Secretary of State, after it had been made aware of the regulations promulgated by the Secretary. 354 U.S. at 380. This too suggests a legislative source for the binding character of administrative rules.

99. This was established as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which the Court held that the Secretary of State could be assigned ministerial duties by Congress with which the President could not interfere.

100. This is not to say that there are no limits on Congress’ ability to structure the rule-making authority of the Executive: These limits are at issue in each separation of powers case asserting congressional intrusion on executive authority. *See, e.g.,* *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

The limit on the Executive's ability to constrain itself through second-order rules should, accordingly, also coincide with the limit on congressional ability to constrain the Executive. This is, in fact, implied in *Nixon*, when the Court suggested that were the President's assertion of first-order authority—in that case, the claim of executive privilege—essentially tied to his responsibilities as Commander-in-Chief, the second-order rule would have to yield.¹⁰¹ The Court has recognized this principle in those instances in which it has held that the fact that the President has signed a bill does not preclude a subsequent constitutional challenge to the Act either by that President or his successor.¹⁰²

Thus, the fact that second-order rules can exist within the executive branch reflects the fact that executive authority is not an undifferentiated whole. Executive authority is not simply the authority of the President as specified in the Constitution, but also includes an aggregate of executive authority created by Congress. Congress' ability to create rules for a "subordinate" institution provides the foundation for executive second-order rules.¹⁰³

B. The Judiciary

The scope and operation of second-order rules within the judiciary is analogous to what was described above with respect to the executive branch.¹⁰⁴ The place for such rules is limited to the hierarchical order within the judicial branch.

Courts do not directly promulgate general rules. Every judicial decision, however, becomes a precedent, that is, a case understood as generating a rule. These rules must be understood as simultaneously first-order and second-order rules. A precedent is a second-order rule for all lower courts; it remains a first-order rule for the court that made the decision.¹⁰⁵

101. 418 U.S. at 706. Although the issue has not been settled, presidential authority unilaterally to terminate treaties is a good example of an area in which second-order rules—the prior treaty—even though agreed to by the President, may not act as a constraint on first-order authority. *See Goldwater v Carter*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

102. *See cases cited supra* note 33.

103. I am, of course, only talking about self-referential second-order rules. A superior executive authority can create a second-order rule for a subordinate authority. The cases discussed raise the issue only in situations in which such an executive hierarchy is not apparent.

104. In some sense, every statute is a second-order rule for judicial decision-making: It constrains first-order judicial rules or rulings. Dean Calabresi argues that this is an inaccurate way of speaking of the task of adjudication under statutory norms. G. CALABRESI, *supra* note 37, at 31-43. I am concerned here, however, only with second-order rules that are self-imposed.

105. *See Wise, The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1043-44 (1975) ("[The] central components [of the doctrine of stare decisis] concern (1) the respect which

Thus, a higher court's decision binds all lower courts, until and unless the decision is overruled.¹⁰⁶ To be binding here means to provide an enforceable rule constraining future conduct. A lower court that fails to comply with the direction of that second-order rule will be reversed. But a higher court's failure to comply with a prior precedent will not invoke an "enforcement" response from either of the other branches.¹⁰⁷

This is not to say that a lower court cannot try to distinguish the case before it from the precedent. But *its* ability to distinguish is not what matters. Rather, the distinction is successful only if, and to the degree that, it is accepted by the higher court.¹⁰⁸ For example, immediately after *Brown v. Board of Education*,¹⁰⁹ a number of lower federal courts attempted to distinguish cases challenging public discrimination outside of the classroom. In a series of per curiam decisions, the Supreme Court made clear that the distinctions would not stand and that *Brown* was controlling.¹¹⁰

The problem of interpreting the scope of a precedent does not, then, affect the fundamental structure of authority: within the authoritative interpretation of its scope, a precedent provides a second-order rule for decision-making by lower courts.

Precedent looks entirely different from the perspective of the higher court that is the source of the precedent. In this instance, it is not the fact of the prior decision that provides a rule of action, but the reasons

lower court judges are supposed to pay to the pertinent decisions of their superiors and (2) the respect which appellate judges are expected to pay to their own decisions and those of their predecessors.") (footnote omitted); Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967).

106. See, e.g., Kelman, *supra* note 105, at 4 ("The second principle of precedent . . . concerns the effect which the lower courts are expected to give to appellate decisions on the same or similar points: there is an *absolute* duty to apply the law as last pronounced by superior judicial authority.").

107. On occasion, Congress may choose to amend the relevant law in response to a decision overruling a precedent. The 1982 amendments to the Voting Rights Act were in part a response to *Mobile v. Bolden*, 446 U.S. 55 (1980), which seemed to overrule prior decisions on the need for a finding of discriminatory intent in assessing the constitutionality of multi-member voting schemes. But Congress' response cannot be interpreted as enforcing a self-referential second-order rule. Rather, it was simply a change in the law, causally linked to the Court's conduct.

108. Administrative rules may mean that there is no appellate review in certain instances. Consider, for example, the Supreme Court's certiorari practice. That, however, does not affect the analysis. Rather, in those instances the lower court becomes itself the superior court, subject only to its own first-order rules of decision.

109. 347 U.S. 483 (1954).

110. See, e.g., *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954), *rev'd sub nom. Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955) (per curiam) (public beaches and swimming pools); *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir. 1954), *vacated*, 350 U.S. 879 (1955) (per curiam) (public parks and golf courses).

for that decision.¹¹¹ Whatever decision the court makes will have operative effect, regardless of its consistency with prior decisions. In the face of contradiction, the rule of action is to honor the present decision over the past.¹¹²

Thus, for the higher court a precedent serves as a marker: it announces that good reasons existed for a particular rule of action. The precedent remains, however, transparent to its reasons. This has, in particular, been the rule with respect to constitutional decisions, in which the legislature cannot normally formulate a rule of decision-making for the court.¹¹³ But even a passing familiarity with Llewellyn's list of sixty-four different "impeccable techniques" by which an appellate court can deal with a precedent should suggest that in an appellate court's relation to all precedents, constitutional or not, "there swirls a constant current of creation."¹¹⁴

A classic expression of the Supreme Court's relationship to its own precedents is found in *Hertz v. Woodman*:¹¹⁵ "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question *entirely within the discretion* of the court, which is again called upon to consider a question once decided." In cases involving constitutional is-

111. A court may also consider reasons that have developed after the decision was made—e.g., reliance—but those are simply additional reasons for not overruling; they do not change the quality of the considerations. Such considerations are analogous to those that Congress may give to the value of continuity in evaluating the question of whether to repeal or modify an existing program.

112. There are, of course, techniques for establishing a new rule short of explicitly overruling a prior decision. Most prominent is that of limiting a prior case "to its facts." See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION* 87 (1960) and cases cited therein.

113. The difference in the attitudes of the United States Supreme Court and the highest court of England toward the rule of *stare decisis* has been explained in light of this difference: "Parliament is free to correct any judicial error," while Congress cannot "correct" constitutional decisions of the Supreme Court. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932) (Brandeis, J., dissenting); see also Wise, *supra* note 105, at 1045-46.

The difference between the Court's attitude toward constitutional and statutory cases provides a remarkable parallel to the differences I noted in the analysis of the executive branch. Just as an administrative regulation can provide a second-order rule to the extent that the rule has a statutory base, so too can a precedent provide a second-order rule to the extent that it has a statutory ground. Similarly, just as executive functions beyond the reach of Congress do not provide second-order, self-referential rules, judicial decisions on constitutional law do not form second-order rules for the Supreme Court. In each instance, the pure constitutional function is not subject to self-imposed restraints because the function is itself an expression of delegated sovereign authority. The delegate—or agent—cannot impose a restriction on the effective, continuing performance of the principal's—or sovereign's—will. This is precisely the pattern of authority I shall defend in the legislative branch. See *infra* notes 133-158 and accompanying text.

114. K. LLEWELLYN, *supra* note 112, at 116.

115. 218 U.S. 205, 212 (1910) (emphasis added).

sues, Justice Brandeis characterized the Court's relation to precedent as follows: "The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."¹¹⁶

To support this position, Brandeis explicitly relied upon earlier expressions of opinion on the role of *stare decisis* in the highest court by Chief Justice Taney and Justice Field. Chief Justice Taney had written in *The Passengers Cases*:

After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is *always open to discussion* when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the *force of the reasoning by which it is supported*.¹¹⁷

Justice Field had come out in just the same place on the respective roles of precedent and reason in the Court's jurisprudence: "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."¹¹⁸

An appellate court, in sum, stands in a very different relationship to precedent than a lower court. For the latter, it is the fact that there is a precedent, not the reasons for that decision, that provides the rule of action. For the former, it is the reasons that control adherence. Just as with the executive branch, a second-order rule requires a hierarchical structure of institutional authority. Where that does not exist, what appears initially as a second-order rule can be dissolved into a reason.

C. The Congress

The examination of the place of second-order rules in the executive branch and the judiciary points toward a common proposition: Second-order rules require a hierarchical structure. In the courts, that structure is clear—higher to lower courts—while in the Executive that structure must be explained in light of executive authority and its constitutional

116. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

117. 48 U.S. (7 How.) 283, 470 (1849) (emphasis added).

118. *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 322 (1894).

dependence, in part, on the legislature. This necessity for hierarchy is confirmed by an examination of two areas in which Congress has attempted to bind its future. Both instances suggest the same result: the relationship of present to future is not that of higher to lower.

1. *The Contract Clause*

Legislatures have rarely tried to bind themselves directly by enacting statutes that operate as second-order rules for future legislation.¹¹⁹ Legislatures have, however, attempted to bind future legislatures by entering into contractual arrangements with private parties.¹²⁰ Through the operation of the Contract Clause, which states, "No state shall . . . pass any . . . Law impairing the obligation of contracts,"¹²¹ such contracts can restrict the freedom of future legislatures to take action inconsistent with the established obligation.¹²² Having held that the Contract Clause does apply to contracts between the state and private parties, the Court had to face the question of whether, or to what degree, one legislature's contracts could limit a future legislature's freedom to act for the public welfare as that future legislature might judge necessary and appropriate.¹²³

The Court's response to this problem is interesting, not simply in its insistence that popular sovereignty not suffer the binding weight of its past, but more importantly because it took this position despite the presence of an explicit constitutional source for this second-order rule. It

119. See discussion of the APA and the NEA *supra* notes 58-65 and accompanying text. A bill introduced in the 92d Congress, S. 215, (92d Cong., 1st Sess. (1971)), dealing with the procedures to be followed on state applications for a national constitutional convention pursuant to Article V of the Constitution, would have required each House "to agree to a concurrent resolution calling for the convening of a Federal constitutional convention" whenever that House determined that valid applications had been filed by two-thirds of the states. *Id.* at Sec. 6(a). Of this required vote, Charles Black has written: "The most obvious thing that is generally wrong with the bill is that it attempts to bind successor Congresses to vote in a certain way on controverted questions of constitutionality and policy, a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do." Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).

120. Although the Contract Clause applies only to state action, similar limitations are imposed on federal authority under the Due Process Clause of the Fifth Amendment. See *Perry v. United States*, 294 U.S. 330, 352-53 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

121. U.S. CONST. art. I, § 10, cl. 1.

122. Although it seems clear that the Contract Clause was intended originally only as a second-order rule limiting legislative interference with private contracts, its application to public contracts was established at an early date. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

123. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 135-36.

was not, after all, the past legislature that alone bound future legislatures; rather, it was the constitutional rule that attached to the legislative act. Second-order rules of constitutional origin are wholly unexceptional; some of those rules, for instance the Takings Clause and the Due Process Clause, do attach to legislative acts in precisely the same way that the Contract Clause does.¹²⁴

The Court's response to the Contract Clause problem has been progressively to narrow the scope of its operation, or, correspondingly, to expand the sphere of legislative power that is not subject to this second-order rule. Successively, the Court has released from the operation of the clause laws affecting contractual remedies,¹²⁵ laws affecting future contracts,¹²⁶ laws exercising the power of eminent domain,¹²⁷ and, most importantly, laws exercising the police power for the public health and welfare.¹²⁸

Reviewing this history, the Court has recently written:

This doctrine [Contract Clause jurisprudence] requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an *essential attribute of its sovereignty*.¹²⁹

The Court further held that even where it finds that a controverted exercise of state authority does not fall within one of the "essential attributes of sovereignty", there must still be an assessment of whether the action was "reasonable and necessary to serve an important public purpose."¹³⁰ If it was, then the Contract Clause does not constitute a bar.

Thus, within the areas of "essential attributes of sovereignty," no balance is required: Legislative authority in those areas simply cannot be

124. The Takings Clause, for example, assumes a system of first-order rules that structure property rights within the state; the Due Process Clause looks, in the first instance, to first-order rules for the creation of the property or liberty interests to which the constitutional requirement of due process then attaches. The difference between these provisions and the Contract Clause is largely one of degree: The Contract Clause seems to forbid legislative action, while the Due Process Clause only requires that the state follow certain procedures in obtaining its ends, and the Takings Clause only requires that the state assign to the general public the burdens that would otherwise fall on a particular party. On the underlying unity of purpose of these constitutional provisions, see Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

125. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

126. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

127. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848).

128. *Stone v. Mississippi*, 101 U.S. 814, 817 (1880).

129. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977) (emphasis added).

130. *Id.* at 25.

alienated. Outside of those areas, legislative authority is still paramount whenever reasonably necessary to reach an "important public purpose."

There is, of course, nothing in the text or history of the Contract Clause that would suggest this approach.¹³¹ The Contract Clause itself suggests no less a general rule than, for example, the Free Speech or Due Process Clauses. There are not certain categories of "important" legislative action that are per se protected from the reach of the second-order rules embodied in the First or Fifth Amendments.¹³²

Contract Clause jurisprudence has taken this shape because it has presented in stark form an example of a past legislature binding a future legislature. Typical of the Court's concern with precisely this problem is *Stone v. Mississippi*, involving a state grant of a corporate charter to run a lottery for twenty-five years:

The question is . . . whether . . . the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.¹³³

The Court went on to emphasize the link between exercise of a "trust" and the need to preserve discretion: "These several agencies [of government] . . . cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'"¹³⁴

The themes struck here are common.¹³⁵ The concept of legislative

131. On the history of the Clause, see *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

132. A "clear and present danger" is hardly the equivalent of the "police power." Only the former requires a particularized consideration of individual circumstances. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

133. 101 U.S. at 819.

134. *Id.* at 820.

135. See, e.g., *Newton v. Commissioners*, 100 U.S. 548, 559 (1880) ("Every succeeding Legislature possesses the same jurisdiction and power with respect to [public interest and public laws] as its predecessors. . . . All occupy . . . a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require."); *Ohio Life Ins. and Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853) ("The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good;

authority in these cases is linked essentially to that of popular sovereignty. A legislative measure that purports to bind future legislatures is, accordingly, an illogical or inappropriate attempt by the agent of the sovereign to bind the principal. But this is not just a question of the formal agent/principal relationship; rather, it undermines the particular task assigned to this particular agent, the legislature. That task, legislating, requires "discretion." Discretion is time bound: It requires the capacity to respond to changing circumstances. Thus, in speaking of "legislative acts concerning public interests," the Supreme Court has specifically stated that:

every succeeding legislature possesses the same jurisdiction and power as its predecessor . . . that all occupy in this respect a footing of perfect equality; that this is necessary in the nature of things; that it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.¹³⁶

The Contract Clause cases, accordingly, link a cluster of ideas—discretion, sovereignty, agency, public good, and temporal change—that characterize legislative authority. Measures that intrude upon the interrelation of these factors in legislative authority are not constitutionally protected by the Contract Clause. Indeed, attempts to limit the continuing ability of the legislature to respond to "varying circumstances" as the public interest requires must themselves be constitutionally suspect.

The Court, in these cases, has not engaged in any "balancing" of the importance of the legislative ends against the private contractual interest. Nor has it considered alternative means of reaching the same end. In fact, alternative means of reaching a general public purpose are almost always available: Most obviously, the contract right could be bought out.¹³⁷ Instead, the need to protect legislative sovereignty has acted as a normative constraint on the interpretation of the permissible scope of the second-order constitutional rule, not just in its application to the exceptional case, but in *every* case. In short, despite the constitutionally

and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body."); *East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 535 (1850) ("This case appears to settle the principle that a legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require.").

136. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 459 (1892).

137. For just this reason, the differences between the Contract Clause and the Takings Clause are not as great as they might at first seem. Nevertheless, the difference in their *prima facie* appearance has led the Court to be particularly concerned with legislative sovereignty in the former instance.

founded second-order rule, legislative power—at least the essential attributes of sovereignty—must remain whole or complete at every moment. It is, as the Court said, “necessarily so in the nature of things.”¹³⁸

These Contract Clause cases, which establish a limit on the burden that may be imposed on legislative sovereignty, can be interestingly compared to the *Accardi* line of cases discussed above.¹³⁹ Both involve the place of second-order rules where governmental action has created a reasonable expectation that government will continue to act in a particular manner.¹⁴⁰ The outcomes, however, are entirely different. Although the Executive was bound, even when raising claims of national security, the private claim on governmental consistency has no weight when it intrudes on “essential” legislative attributes. The difference can be explained, at least in part, by reference to the place of hierarchical structure in the two institutions. Self-referential, executive, second-order rules, I argue, rest ultimately on a hierarchical, statutory/regulatory structure. Exactly that structure is missing in the domain of legislative authority.

Of course, restrictions on legislative authority are a pervasive feature of the constitutional structure. In the context of this discussion of the Contract Clause one has to consider not only constitutional rules per se, but also federal statutes that preempt state legislative authority. In all of these cases, however, the second-order character of the rules is explicitly linked to a constitutionally established hierarchy. The Contract Clause cases suggest exactly what we saw with respect to the executive and judicial branches: as the hierarchical structure becomes attenuated, the capacity for establishing second-order rules becomes similarly attenuated.

The Court’s insistence on limiting the reach of the constitutional rule of the Contract Clause demonstrates the significance of preserving freedom of action for future legislatures. It supports my argument that this is a structural principle of constitutional law—like separation of powers or federalism—within which the specific constitutional rules must be interpreted. It is fundamental to the concept of “legislative authority.” As such, it is both a central aspect of the legislative power defined and created by Article I, and a principle by which state authority under the Contract Clause will be interpreted.

138. *Illinois Cent. R.R.*, 146 U.S. at 459.

139. See *supra* notes 83-94 and accompanying text.

140. In a number of cases the Supreme Court indicated that it would read public contracts with private parties narrowly to avoid when possible a construction under which the private party was reasonably entitled to expect a continued course of governmental behavior. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837) (“[A]ny ambiguity in the terms of the contract must operate against the adventurers and in favor of the public.”) (citing *Proprietors of the Stourbridge Canal v. Wheely*, 2 Barn. & Adol. 793).

2. *Congressional Efforts to Establish Hierarchies*

The Contract Clause cases demonstrate the constitutional difficulty of one Congress taking measures that directly limit the discretion of a future Congress, even when those measures could otherwise be interpreted as creating private interests. This difficulty was linked to the refusal of the Court to recognize a hierarchical relationship between prior and subsequent Congresses. Consideration of the place of hierarchies in legislative attempts to formulate self-referential, second-order rules is again at issue when Congress chooses to do by "legislation" what it could otherwise do by single-house rules. Can each house of Congress bind itself by enacting in a statutory form its procedural rules? Does the statute create a hierarchical order that can support such a second-order rule?¹⁴¹

The Constitution grants each house explicit power to "determine the rules of its proceedings."¹⁴² Thus, each house is free to set its own rules, without regard to, or the participation of, the other. Most importantly, each house may enact rules internally, that is, the rule-making authority is not subject to the requirements of the legislative process.¹⁴³ Neither the other house nor the executive has a cognizable interest, as a constitutional matter, in the procedural rules of a house.¹⁴⁴

The Supreme Court, in an early consideration of house authority over internal procedures, described that authority in classic first-order rule language:

[A]ll matters of method are open to the determination of the house It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.¹⁴⁵

Despite the fact that rule-making authority is not constitutionally subject to the legislative process, Congress has enacted such rules

141. The proposed analogy between this structure and that of administrative agencies is clear: agency regulations stand to organic statutes as house rules stand to these procedural statutes.

142. U.S. CONST. art. I, § 5, cl. 2.

143. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 954 n.16 (1983).

144. *See United States v. Eilberg*, 507 F. Supp. 267, 276 (E.D. Pa. 1980) (government conceded that "[e]nforcement of a purely internal House rule by the executive and the courts would be an encroachment on the powers of the House, a violation of the separation of powers, and a violation of the textual commitment clause").

145. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The limitations suggested were as follows: A house "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding . . . and the result which is sought." *Id.*

through statutes.¹⁴⁶ This raised the question of whether such actions by statute limited the future rule-making authority of each house.¹⁴⁷ That is, having passed a statute, was each house now bound to follow the procedures so enacted, until and unless the statute was repealed? The concern with this possibility led to the practice—followed in Gramm-Rudman itself—of including in such statutes provisions that specifically reserve to each house the right to disregard statutorily created procedures for the conduct of the legislative process.¹⁴⁸

Even apart from such explicit reservations, the House has taken the position that it is free to abandon statutory provisions that purport to regulate internal House procedures.¹⁴⁹ That is, the statute does not serve

146. The First Congress promulgated procedures for the enrollment and presentment of bills through a joint resolution, not presented to the President. *See* S. REP. NO. 1335, 54th Cong., 2d Sess. 3 (1897) (describing action of First Congress). But the First Congress also passed a statute that set forth the procedures for the houses to follow at the opening of each Congress, before the houses could adopt rules. *See* CONG. GLOBE, 36th Cong., 1st Sess. 655 (1860) (discussing law of 1789 requiring House to elect a Clerk before entering on any other business). *See also* Act of Feb. 21, 1871, sec. 34, 17 Stat. 419, 426 (statute gave delegate from District of Columbia a seat on House Committee for the District); *cf. infra* note 149 (discussing procedures for taking testimony in contested elections).

147. *See, e.g.*, H.R. REP. NO. 102, 36th Cong., 2d Sess. (1861) (House Committee on Judiciary decided that Congress could not prescribe by statute procedures for the organization of the House at the assembling of Congress, because such statute would interfere with the rule-making authority of the new house); 5 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 6766, at 889 (1907) (conflict between statute giving delegate from District of Columbia seat on House committee and House rule resolved by passing new rule expressly giving delegate a seat).

148. *See* *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282 (D.C. Cir. 1982), discussing a similar provision in the Alaska Natural Gas Transportation Act, 15 U.S.C. § 719f(d)(1) (1982), and describing the House's understanding of its procedural rules as "binding upon it only by its own choice." 675 F.2d at 1288. The court held that whether this interpretation of the House rules was valid posed a nonjusticiable political question. *Id.* at 1287-88. A similar provision is found in the Trade Act of 1974 § 151, 19 U.S.C. § 2191 (1980), because that Act creates a set of procedural rules for expeditious consideration by each house of trade agreements negotiated by the President.

149. This applies equally to other matters constitutionally committed to a single house's responsibility, *e.g.*, determining the outcome of disputed elections. When Congress passed in 1797 a statute designed to regulate disputed elections, members in the House objected to the statute as an infringement on each house's rules powers. *See* 7 ANNALS OF CONG. 683-84 (1797) (statement of Rep. Sitgreaves). The statute was defended as legitimate because it did not prescribe rules for the House but rather procedures binding on the general public, outside of Congress. *See* 1 *American State Papers* Class 10 (miscellaneous), No. 99, 5th Cong., 2d Sess. 159-60 (1797). The House later adopted the position that no power constitutionally committed to one House by the Constitution could be abridged by an earlier statute. *See* 36 CONG. REC. 231-35 (1902) (contested election statute); CONG. GLOBE, 35th Cong., 1st Sess. 725-34 (1858) (same). *See also* W. Brown, *Procedure in the United States House of Representatives, 97th Congress*, ch. 5, § 2.5, at 36 ("each House may make and change the rules governing its proceedings and is not precluded from changing or waiving rules enacted as statutory provisions").

as a second-order rule for any future exercise of the rules' power: Action inconsistent with such rules, if otherwise valid, is not subject to challenge because of this inconsistency. This has been the position of the House Parliamentarian since the middle of the Nineteenth Century.¹⁵⁰ It is the position explicitly articulated in Gramm-Rudman itself:

The provisions of this title, other than those relating to the activities of the executive and judicial branches of the Government, are enacted by the Congress—

1. as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, . . .

2. with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.¹⁵¹

The insistence on the unbounded quality of legislative authority reflects the same position we saw in the Contract Clause cases. A prior, self-referential, second-order rule does not operate as a restraint on future legislative action. Each house can continue to do whatever its predecessors could do and can do so directly, without first passing a statute repealing the prior statute.

So far, I have discussed only attempts to create hierarchical structures above each house. The opposite problem is raised in a consideration of the relation of the congressional committee to the whole house. As one would expect from the discussion of the other branches, second-order rules are given effect within this structure.

The issue has been litigated a number of times in the context of perjury prosecutions. Because the perjury statutes require that the false statement be made before a "competent tribunal,"¹⁵² the question of the competency of congressional committees may be raised. To measure the competency of such committees, the courts have regularly turned to the resolution or statute establishing the committee and/or setting forth the procedures the committee is to follow.

For example, in *Christoffel v. United States*,¹⁵³ the Court held that allegedly false testimony before a House committee could not support a perjury conviction because there was evidence, which the jury had been

150. See 1 A. HINDS, *supra* note 147 (in 1860, House disregarded law of 1789 requiring it to adopt rules before choosing a clerk).

151. Balanced Budget Act, Pub. L. No. 99-177, § 271(c), 99 Stat. 1037, 1094. Thus, none of the measures designed to prevent the trigger from taking effect—the specification of budgeting procedures in each house—are enforceable if either house should choose to ignore them.

152. See, e.g., *Christoffel v. United States*, 338 U.S. 84, 85 n.2 (1949) (citing D.C. CODE ANN. § 22-2501).

153. 338 U.S. 84 (1949).

instructed not to consider, that at the time of the testimony there had not been a quorum of the committee present. The standard for a quorum of the committee was established in the Legislative Reorganization Act of 1946.¹⁵⁴ The rule to which the Court held the committee was, accordingly, of precisely the character that would not have bound the House had it chosen to act contrary to the rule.¹⁵⁵ Thus, while holding the committee to the rule, the Court stated that the *House*, not the committee, “of course has the power to define what tribunal is competent to exact testimony and the conditions that establish its competency to do so.”¹⁵⁶

The District of Columbia Circuit followed *Christoffel* when it held that a quorum rule that was otherwise within the authority of a Senate committee to establish was, nevertheless, not valid when that committee had failed to publish it in the Congressional Record.¹⁵⁷ The publication requirement was itself established in the Legislative Reorganization Act of 1970.¹⁵⁸

Congress, then, exhibits the same general structural relationship to second-order rules that we found in the executive and judiciary: Only to the extent that a hierarchical structure exists are second-order rules appropriately created. An intent to control future legislative authority is, therefore, profoundly problematic as a matter of the constitutional structure of legislative authority.

154. *See id.* at 87-88.

155. *See Field v. Clark*, 143 U.S. 649 (1892) (discussed *supra* note 58).

156. 338 U.S. at 89.

157. *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir. 1975).

158. 2 U.S.C. § 190(a-2) (1970). *See also Shelton v. United States*, 327 F.2d 601 (D.C. Cir. 1963), relying on the Senate resolution establishing the relevant subcommittee to reverse a conviction for failing to testify. The court held that the subpoena pursuant to which the defendant had been called had not been authorized by the full subcommittee, and accordingly it failed to satisfy the rule established by the Senate resolution. That resolution stated that “[t]he committee, or any duly authorized subcommittee thereof, is authorized . . . to require by subpoenas . . . attendance of such witness . . . as it deems advisable.” *Id.* at 606.

These cases, relying on a rule established by a hierarchical authority, must be distinguished from *Yellin v. United States*, 374 U.S. 109 (1963) (reversing a conviction for contempt of Congress because of a failure of a committee to follow *its own* rule). The majority cited as its sole support the rule for administrative agencies established in *Accardi*. *Id.* at 120-21. Clearly, in both *Yellin* and *Accardi*, some “fairness” notion is operative, that is, notice and nonarbitrary action; but in neither case does the Court rely explicitly on constitutional due process requirements. I argued above that *Accardi* could be better understood as based on the delegation of legislative authority. No similar argument is available for *Yellin*, suggesting that the decision is substantially without foundation. Even if *Yellin* were correct, however, the absence of analogous private interests in procedural regularity under Gramm-Rudman makes *Yellin* of limited use in constructing an argument to support Gramm-Rudman.

Conclusion: The Constitutional Balance of Legislative Control and Discretion

I have argued that Gramm-Rudman is a strange statute and that its odd qualities raise interesting new constitutional problems. While I admit the difficulty of grasping, analyzing, and assessing the constitutional significance of the features of the Act I have identified, the arguments I have marshalled should at least give a court serious reason to question the constitutionality of such an attempt to control the future.

The thrust of my argument has been twofold. First, the simple proposition that “it can always be repealed” is not sufficient because there is substantial reason to believe that irreconcilable majorities will arise in a future Congress acting under the Gramm-Rudman regime—both a majority to enact an overall federal program inconsistent with the Act’s requirements and an absence of a majority to repeal. While I have argued that the best evidence of this is Congress’ own evaluation of political reality that is built into the structure of the Act—the trigger mechanism—I have also suggested that there are other reasons to believe that the Act will create a substantial burden on the ability of a future legislature to carry out its own legislative agenda. The kinds of burdens created are burdens with which we should be particularly concerned because they undermine the traditional model of the constitutionally assigned legislative function.

Second, having demonstrated a constitutionally significant burden, I turned to the legislative intent to determine whether Congress’ purpose could serve as a counter-balance to that burden. Here, I argued that Gramm-Rudman is directed at an inappropriate goal: One Congress cannot try to control the legislative product of a future Congress by directly regulating its rule-making authority. Although Gramm-Rudman tries to do somewhat less effectively what would be clearly prohibited if done directly—it burdens instead of binds a future Congress—this does not itself remove the constitutional problem. When the purpose is wrong, the Act cannot be saved by claiming that it is only a partially effective means of reaching the end. The burden that Gramm-Rudman places on future legislatures cannot be justified by the benefits it creates, because those benefits are not themselves constitutionally appropriate.¹⁵⁹

159. I have declined to speak of the congressional purpose behind Gramm-Rudman as “balancing the budget” because that would simply shift the issue to whether the means Congress had adopted—controlling future legislation—is constitutionally appropriate. Of course, Congress can have as its purpose achieving a balanced budget, but Congress faces a multiplicity of choices in considering how to achieve this end. It can raise taxes, reduce spending, or even propose a constitutional amendment. The issue presented by Gramm-Rudman is con-

Although I have argued that Gramm-Rudman represents an attempt to control future legislation, a supporter of the Act might contend that the trigger mechanism is rather a means of granting discretion to future Congresses. The device of the trigger allows a future Congress the first opportunity to set policy choices in light of changed circumstances: It allows budgetary discretion under a general rule of control.

Gramm-Rudman, in this view, is a peculiar response to a much more general problem: the problem of change. Change has long been recognized as a source of irrationality in legislative schemes.¹⁶⁰ It has, for example, been a particularly troubling source of unconstitutionality of state apportionment plans: A failure to review and revise those plans over a period of time leads to gross disproportion in the size of legislative districts.¹⁶¹

But apportionment problems are just a dramatic instance of a constant problem: the facts upon which a legislative scheme is predicated can change and thereby render irrational or ineffective the legislative plan. Congress cannot, however, continually monitor the present rationality of previously enacted rules.

Thus, a responsible legislature will build a regulatory scheme with an awareness of the possibility of change.¹⁶² Gramm-Rudman represents a new way of dealing with change. Instead of making the substantive financial decisions that will themselves lead to desired deficit goals, Congress has left the particular policy choices—in the first instance—to future Congresses.

The problem with Gramm-Rudman, then, is not that it is an irrational response to the problem of change. Rather, the problem is that this particular response is incompatible with the constitutional function of legislating. What might be a legitimate pattern when dealing with an

fused, not clarified, if the goal of a balanced budget is emphasized as the purpose, rather than the narrow purpose of achieving this goal through control of the future legislative program.

160. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938) (“the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist”). See also Bennett, “*Mere*” *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1066 (1979); Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 217-18 (1976).

161. See *Reynolds v. Sims*, 377 U.S. 533, 569-70 (1964) (failure to reapportion in 60 years); *Roman v. Sincock*, 377 U.S. 695, 704-05 (1964) (failure to reapportion in over 65 years).

162. The common devices for building in a means for responding to change include more or less specific delegations to expert agencies or administrators, and contingent delegations. Under the former, specific agencies and officials are made responsible for performing the monitoring and correcting function; under the latter, a range of factual contingencies are built into the legislative scheme itself.

administrative agency,¹⁶³ becomes deeply problematic when applied to the legislature itself. This Article has attempted, by looking at a wide variety of sources, to explain what it is about the structure and character of the legislative function that generates this problem.

In essence, the Constitution itself strikes the balance between control and discretion that is appropriate for the legislature. The legislature acts under a series of constitutional second-order rules that provide control, while allowing substantial discretion in meeting policy objectives and responding to changing circumstances.

More importantly, the constitutional function of legislating contains an implicit standard marking the proper boundary of control and discretion. Legislatures may build a history with which the future must deal, but they may not try directly to control future legislatures. To do so is to assert authority where there is none. It is to transgress on the shadowy concept of popular sovereignty which remains always inalienable and complete. "Whatever the objective attainability of this freedom from past constraint, the subjective belief in such freedom is widespread and widely prized in our society."¹⁶⁴ Gramm-Rudman challenges this fundamental belief in freedom through self-government.

There is a constitutional way to assert control over future Congresses: passage of a constitutional amendment. There should be no statutory short-cuts.

163. One can imagine a law that required an agency to cut its budget by a certain percentage or suffer across the board reductions in all of its programs in order to reach the same spending level.

164. Burt, *supra* note 7, at 382.

