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## Law Within Congress

**ABSTRACT.** Procedure has long shaped how Congress operates. Procedural battles have been central to legislative contestation about civil rights, the welfare state, tax policy, and presidential impeachments. In these instances and many others, procedural disputes often turn not on written rules but on parliamentary precedents. These precedents constitute a hidden system of law that has received little scholarly attention, despite being critical to shaping what goes on in Congress.

This Article explores parliamentary precedent in Congress. Parliamentary precedent mostly resembles judicial precedent: both are common-law systems that rely on the arguments of adversarial parties. But the two systems differ in key respects. Parliamentary decision-making employs an especially strong form of *stare decisis*, is minimalist in the extreme, and relies freely on legislative purpose and legislative history as tools of interpretation.

These seemingly legal dynamics play out in the shadow of congressional politics. Understanding parliamentary precedent requires understanding the institutional positions of the parliamentarians, the nonpartisan officials who resolve procedural disputes. The parliamentarians' distinctive jurisprudence reflects their tenuous positions—namely, that they can be removed, overruled, or circumvented by the majority party. Drawing on novel interviews with parliamentarians and the legislative staffers who work closely with them, this Article illuminates the intersection of law and politics in the making of parliamentary precedent.

A better understanding of parliamentary precedent contributes to our understanding of how Congress operates and the fault lines that emerge in an age of polarization and hardball. These dynamics also hold lessons for public law more broadly. First, the parliamentarians' efforts to protect themselves from the political fray shed light on efforts by other governmental decision-makers (in all three branches) to do the same. Second, the development of parliamentary precedent provides insight into the relationships between positive law and common law and between law and politics. Third, understanding parliamentary precedent, like understanding other elements of Congress's internal workings, can inform statutory interpretation.



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**INTRODUCTION**

Legislative procedure shapes what happens in Congress. During recent attempts to repeal the Affordable Care Act, budget rules limited which provisions could be included in the repeal bills. Those budget rules have also required that tax cuts include sunset provisions and have shaped federal policy on topics ranging from education to abortion to firearms regulation.<sup>1</sup> An interpretation of the House's amendment rules prevented the impeachment resolution against President Clinton from being changed to a censure resolution instead.<sup>2</sup> And procedure in both chambers helped save landmark civil-rights legislation in the 1960s from dying in committees chaired by segregationists.<sup>3</sup> Time and again, parliamentary procedure shapes outcomes in Congress.

Most observers associate legislative procedure with written rules, such as the Senate's supermajority cloture requirement.<sup>4</sup> But Congress's written rules are merely the tip of an iceberg. Many of the rules and statutes that govern legislative procedure are open-ended and fail to provide much guidance in practice. What is and is not permitted in Congress therefore often turns on parliamentary precedents, a robust body of common law that addresses the many issues that rules and statutes leave open. Those precedents are made and applied by nonpartisan quasi-judicial figures in each chamber: the House and Senate parliamentarians. When a procedural question arises in Congress — such as whether a bill, amendment, or provision is permissible in a given circumstance — the parliamentarians typically determine the outcome.

In each chamber, the parliamentarian's office consists of a parliamentarian and several deputies, assistants, and other staff. Each chamber's parliamentarian is appointed by the majority party leadership, though in practice the role is filled by succession: new parliamentarians have always been former deputies or assis-

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1. See BILL HENIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 20-33 (2016), <https://fas.org/sgp/crs/misc/RL30862.pdf> [<https://perma.cc/C4KJ-RG2Y>]; Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99 (2018).
  2. See WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY 509 (2010); see also CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 562 (2017) [hereinafter HOUSE PRACTICE].
  3. See *infra* notes 98-99 and accompanying text.
  4. See STANDING RULES OF THE SENATE r. XXII(2), S. DOC. NO. 113-18 (2013) [hereinafter SENATE RULES], <https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/PAN5-376Q>].

tants. Collectively, the parliamentarians and their staffs serve as procedural referees,<sup>5</sup> resolving disputes in light of their understandings of relevant rules and precedents.<sup>6</sup> The parliamentarians preside over a common-law system, with each new decision becoming a precedent to guide future cases.

In making and applying parliamentary precedent, the parliamentarians face questions familiar to any observer of the judiciary. What sources should be used to interpret ambiguous legal provisions? How should one reason from prior precedents? When is it appropriate to overrule a precedent? Should decisions be minimalist, deciding only the present controversy, or broader, creating general rules to apply in the future? And what approaches to decision-making will enhance rather than undermine the decision-maker's legitimacy in the eyes of relevant audiences?

This Article examines how parliamentary precedent approaches these questions. In many respects, parliamentary decision-making mirrors its judicial counterpart. The parliamentarians decide procedural disputes based on their best reading of relevant rules, precedents, and other legal materials. But the parliamentarians have forged their own path in several key ways.

The distinctive features of how the parliamentarians operate result directly from their institutional positions within Congress. One senator has noted, in response to an unfavorable ruling, that you cannot “fir[e] the judge if you disagree with his ruling.”<sup>7</sup> As a formal matter, however, the majority party *can* fire, overrule, or ignore the parliamentarian at any time. As a result, the parliamentarians “play a daily game of chicken”<sup>8</sup> with the majority party. They face a difficult task: maintaining autonomy in a highly partisan atmosphere.<sup>9</sup>

Parliamentary precedent, in other words, develops in the shadow of politics. Though the parliamentarians deploy familiar legal concepts and earnestly see themselves as neutral legal technicians, their work is inexorably tied to congressional politics. New precedents often emerge when legislators push boundaries

5. See, e.g., Sheryl Gay Stolberg, *Parliamentarian in Role as Health Bill Referee*, N.Y. TIMES (Mar. 13, 2010), <https://nytimes.com/2010/03/14/us/politics/14rules.html> [<https://perma.cc/VB2-5B5Y>].

6. See VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE (2018), <https://senate.gov/CRSPubs/3000ff02-fb09-450c-acec-a407a19c424a.pdf> [<https://perma.cc/LDT3-VH3M>].

7. Niels Lesniewski, *Cruz: Senate Umpire Works for Us*, ROLL CALL (Oct. 22, 2015, 4:54 PM), <https://rollcall.com/news/obamacare-ted-cruz-parliamentarian> [<https://perma.cc/KTA5-97YY>] (quoting Sen. John Cornyn (R-TX)).

8. Interview with Senate Parliamentarian. This is especially true in the Senate, for reasons discussed *infra* Section IV.D.

9. See *infra* Part III. By autonomy, I mean James Q. Wilson's definition of “relatively undisputed jurisdiction” over a specific domain of decisions. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 183 n.\* (1989).

and the parliamentarians either bless or condemn that boundary-pushing. Just as importantly, the decisional methods that the parliamentarians employ, while legalistic in character, serve to secure their autonomy in the face of threats from political majorities. So, too, nearly every aspect of the parliamentarians' work reflects their need to bolster their perceived legitimacy in the eyes of legislators, especially members of the majority.

This Article's exploration of parliamentary precedent is important as a practical matter because legislative procedure, including parliamentary precedent, can shape legislative outcomes. Legislative procedure is particularly consequential in the contemporary Congress, given the prevalence of intense legislative polarization, narrow margins between majorities and minorities, recurrent changes in party control, and a rise in constitutional hardball. Recent years have witnessed several high-stakes procedural battles in Congress, with more likely to come in the future.<sup>10</sup> One House Speaker even quipped that the most powerful person in the Senate wasn't a senator but was instead the Senate's parliamentarian, whose role in interpreting the rules, especially rules relating to the budget process, gave her enormous power over legislative outcomes.<sup>11</sup>

An examination of parliamentary precedent also contributes to three areas of public-law scholarship. First, it adds to a growing body of work that opens the black box of *how Congress operates*. Although legal scholarship has historically neglected the details of Congress's internal workings, recent scholarship has argued that Congress's internal workings are relevant to statutory interpretation,<sup>12</sup> separation of powers,<sup>13</sup> legislative institutional design,<sup>14</sup> and legislators' normative obligations.<sup>15</sup> This Article similarly provides a more textured picture of how

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10. See *infra* Section IV.D.

11. See BENJAMIN GINSBERG & KATHRYN WAGNER HILL, *CONGRESS: THE FIRST BRANCH* 132 (2019).

12. See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* (2016); VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* (2016); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

13. See, e.g., JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017).

14. See, e.g., Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001); Edward L. Rubin, *Statutory Design as Policy Analysis*, 55 HARV. J. ON LEGIS. 143 (2018); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004).

15. See, e.g., Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. (forthcoming 2021); see also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27

Congress operates in our era of “unorthodox lawmaking.”<sup>16</sup> Such a picture has broad implications for how we understand the legislative process and the statutes that result from it.

Second, this Article illuminates the role of *norms and conventions* in governance, with particular attention to those concerning neutrality, expertise, and political insulation. Unlike federal judges, the parliamentarians report directly to politicians, who can remove them at will. Despite this fact, the parliamentarians have come to be seen as neutral experts, even as they operate in a highly partisan institution without any formal protection from removal. And, in recent years, even as so many other governance norms have frayed,<sup>17</sup> norms around parliamentary neutrality and autonomy have mostly persisted. The parliamentarians thus illustrate “the role of conventions in creating and protecting . . . independence.”<sup>18</sup> For them, as for other institutional actors, “[I]legally enforceable for-cause tenure protection is neither necessary nor sufficient for operational independence.”<sup>19</sup> The independence of the parliamentarians depends in significant part on their active efforts to foster reputations for neutral expertise in the eye of a partisan storm. During this age of constitutional hardball, their successes and failures hold more general lessons for sustaining norms of independence in other institutions.

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STAN. L. REV. 585 (1975); Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018).

16. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012); see also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015). On parliamentary precedent and unorthodox lawmaking, see *infra* Section I.C.
17. On fraying of norms, see, for example, Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 190-203 (2018); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004); and Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481 (2018). On Congress in particular, see, for example, THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 50 (2012), which argues that since 1994, “the set of rules, practices, and norms designed to ensure a reasonable level of deliberation and fair play in committee, on the floor, and in conference [] was often sacrificed for political expediency.”
18. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013).
19. *Id.*; see also *id.* at 1165 (“There are many important agencies that are conventionally treated as independent, yet whose heads lack for-cause tenure protection.”).



Third, this Article considers the operation of *common law and precedent* in a new institutional setting, with implications for how we think about the relationship between law and politics. There is extensive scholarship on precedent in courts.<sup>20</sup> Less has been written on precedent in other settings, but important contributions include work on precedent in the Office of Legal Counsel<sup>21</sup> and in international tribunals.<sup>22</sup> The dynamics around precedent in Congress raise issues parallel to those considered by scholarship on these other settings. Not only can other institutional settings provide insight into parliamentary precedent, but a close look at parliamentary precedent can also shed light on how precedent operates elsewhere. In particular, this Article's examination of parliamentary precedent highlights dynamics around how external pressures shape common-law decision-making. It is unlikely that the parliamentarians are the only adjudicators whose decision-making is shaped by external pressures, and understanding how those pressures operate can hold lessons for other actors.

In addressing these topics, this Article relies not only on published materials but also on interviews with those involved in making parliamentary precedent. I interviewed nearly two dozen parliamentarians, staffers in the parliamentarians' offices (deputies and assistants), and legislative staffers from both parties who have worked closely with the parliamentarians. Interviewees were drawn from the two chambers in roughly equal numbers. Around half are currently

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20. General treatments include NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* (2008); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); and Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012). Discussions focused on U.S. courts include BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016); MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); and Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990). Empirical studies of whether and how precedent constrains the Supreme Court include THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006); and Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996).
  21. See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).
  22. International courts typically give precedent either no decisional weight or less weight than do most domestic courts. See Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 548-49 (2014) (discussing precedent in the International Court of Justice, the European Court of Justice, and the European Court of Human Rights). On nonjudicial precedent, see GERHARDT, *supra* note 20, at 111-46; and Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

working in the parliamentarians' offices or elsewhere in Congress, while the remainder are either retired or employed outside of Congress. Given the dearth of scholarship and journalism about parliamentary precedent, these interviews are important supplements to existing sources.<sup>23</sup>

By focusing on parliamentary precedent, parliamentary decision-making, and the institutional position of the parliamentarians, this Article fills a void in the public-law literature. Existing legal scholarship on parliamentary precedent largely focuses on specific disputes,<sup>24</sup> while work by political scientists focuses

23. All interviews were conducted in 2018, after an Institutional Review Board approved the study design. Most interviews ranged from sixty to ninety minutes in length. Most were conducted in person, though a few were conducted by telephone. In some cases, I corresponded by email with interviewees following our conversations.

I contacted all six living House and Senate Parliamentarians, current and former, and interviewed the four who agreed to speak with me. I also attempted to contact every living assistant or deputy parliamentarian, current and former, and I interviewed all those who were willing to speak with me. In addition, I interviewed leadership and committee staffers from both parties who were recommended to me as having relevant experience. Cf. Patrick Bieracki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981) (describing the benefits of this approach, often called "snowball sampling"). In conducting interviews, I followed best practices for elite interviewing in political science research. See, e.g., KRISTIN LUKER, *SALSA DANCING INTO THE SOCIAL SCIENCES* 167-87 (2008); Beth L. Leech, *Asking Questions: Techniques for Semistructured Interviews*, 35 PS 665 (2002); Darren G. Lilleker, *Interviewing the Political Elite: Navigating a Potential Minefield*, 23 POL. 207 (2003); David Richards, *Elite Interviewing: Approaches and Pitfalls*, 16 POL. 199 (1996).

Interviewees were granted anonymity to promote candor. Citations refer to institutional affiliation only, defined loosely to prevent identification given the small number of people who have held the relevant positions. ("Interview with House Parliamentarian," for example, may refer to a parliamentarian or to a deputy or assistant, and may refer to either a current or a former member of the office.)

24. See, e.g., William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 648-51 (2016) (discussing the Senate parliamentarian and cloture rules); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 307-15, 336-39 (2013) (discussing the Senate parliamentarian's role in the budget-reconciliation process); Joan V. O'Hara et al., *Turf Wars: How a Jurisdictional Quagmire in Congress Compromises Homeland Security*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2015) (discussing committee jurisdiction over homeland security issues); Donald B. Tobin, *Less Is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 132-36, 141-45 (1996) (discussing the Senate parliamentarian's role in the budget-reconciliation process). A more systematic discussion is contained in CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE* (1989).

on the incentives facing legislators with respect to Congress's rules and precedents.<sup>25</sup> This Article seeks to broaden the lens in two respects: by focusing on parliamentary precedent as its own body of law, and by considering what the parliamentary process can teach about public law writ large.

The Article proceeds in four Parts. Part I introduces legislative procedure and the work of the parliamentarians in interpreting the rules governing Congress. It also sets out the various types of parliamentary precedent, each arising from a different aspect of the parliamentarians' work. Parliamentary precedent consists of formal responses to points of order on the floor; informal advice to legislators and legislative staff about possible future actions; bureaucratic decisions, such as determinations of which committees have jurisdiction over which bills; and adjudications away from the floor.

Part II considers how the parliamentarians make parliamentary precedent in Congress. It focuses on the interpretive tools and sources that they use when making decisions, with special attention to the development of a common-law system and the centrality of *stare decisis*. It shows how parliamentary decision-making looks (and in many respects is) lawlike in character.

Part III introduces politics to the conversation. It argues that a central fact about parliamentary decision-making is the vulnerability of the parliamentarians to partisan legislative majorities. It thus considers how the parliamentarians have actively guarded their autonomy by fostering reputations for neutrality and expertise. Much of what happens in the parliamentarians' offices—from their decision-making processes to their staffing practices to their informal interactions with legislators—helps bolster their reputations in the eyes of legislators.

Part IV turns to lessons and implications. It begins by arguing that the ways in which the parliamentarians have sought to sustain their autonomy provide insight into the practices of institutions as diverse as the Supreme Court, the Federal Bureau of Investigation, and the Congressional Budget Office. It then draws out several other lessons of the Article's analysis of parliamentary precedent, including lessons about the relationship between positive law and common law, the role of parliamentary precedent in statutory interpretation, and the resilience of governance norms in a partisan age.

One possible challenge to this Article's focus on legislative procedure is the argument that procedure simply does not matter, at least on the most important

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25. See, e.g., C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEGIS. STUD. Q. 605 (1999); Eric D. Lawrence, *The Publication of Precedents and Its Effect on Legislative Behavior*, 38 LEGIS. STUD. Q. 31 (2013); James I. Wallner, *Parliamentary Rule: The US Senate Parliamentarian and Institutional Constraints on Legislator Behaviour*, 20 J. LEGIS. STUD. 380 (2014).

policy questions.<sup>26</sup> Because legislative majorities have the power to change procedure, it might seem that majorities should not allow rules or precedents to thwart their agendas. If the parliamentarian attempts to block a unified and determined majority from achieving its goals, the majority can vote to change the underlying procedural rule.<sup>27</sup> Or the majority could circumvent an adverse ruling through firing, overruling, or ignoring the parliamentarian. Strikingly, majorities have only occasionally availed themselves of these options.<sup>28</sup> It seems puzzling that majorities would *ever* allow procedure to block them from achieving their goals.<sup>29</sup>

But, time and again, legislative procedure matters. One reason is that changing procedural rules can be costly for a majority: rule changes can consume valuable plenary time, provoke obstruction from minorities, and engender public backlash.<sup>30</sup> Procedural rules enforced by independent parliamentarians may at

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26. See Jacobi & VanDam, *supra* note 24, at 268 (contending that the Senate parliamentarian “does not offer a meaningful check on the majority” because the majority can remove the parliamentarian); George K. Yin, *How the Byrd Rule Might Have Killed the 2017 Tax Bill . . . and Why It Didn't*, 37 ABA TAX TIMES 16 (Aug., 2018) (arguing in the context of 2017 tax-reform legislation that the Byrd rule did not meaningfully check the majority).
27. Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2135-36 (2013) (providing examples from the budget-reconciliation context).
28. On majorities removing the parliamentarian, see *infra* notes 266-273 and accompanying text. On majorities overruling the parliamentarian, see *infra* notes 125-134 and accompanying text. On majorities ignoring the parliamentarian, see *infra* note 70 and accompanying text.
29. Scholars have explored a similar puzzle in considering why the political branches allow for an independent judiciary. See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349 (1993); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446 (2003).
30. See Jonathan S. Gould & Kenneth A. Shepsle, *Procedural Conflict in Congress: Majority Power Confronts Minority Obstruction* (unpublished manuscript) (on file with author). A majority party may calculate that acquiescing to the parliamentarian, at least when decisions fall within a relevant tolerance interval, is the least costly course of action. This point is analogous to an explanation that some scholars give for why political actors acquiesce in judicial constraints on their authority. See, e.g., Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC. REV. 117, 130 (2001) (“For policies falling within their tolerance interval, the actors have calculated that the benefits of acquiescing to the Court’s decision override the cost of an attack . . .”).

times actually serve majorities by allowing them to hold disparate coalitions together or avoid blame for unpopular decisions.<sup>31</sup> Perhaps most of all, majorities have incentives to retain rules that protect minority rights, given that today's majority might well be tomorrow's minority.<sup>32</sup> To be sure, in exceptional cases majorities view it as worthwhile to change procedural rules, as when a Democratic majority in 2013 and a Republican majority in 2017 each modified Senate cloture rules.<sup>33</sup> Far more typically, though, majorities are willing to leave an agenda item on the table rather than change procedural rules. This means that, in the ordinary course of business, Congress's procedural rules – and the parliamentarians' interpretations of those rules – are as good as binding.<sup>34</sup> With the importance of legislative procedure in mind, we can turn now to how it operates.

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31. See, e.g., Interview with Senate Parliamentarian (arguing that “both sides really want a neutral referee,” because it “suits their purposes because it takes away from them the whole realm of difficult decisions,” especially on referrals and germaneness questions). For an analogous discussion of blame avoidance in the judicial-review context, see Salzberger, *supra* note 29, at 361-63. For a more general treatment, see R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371 (1986).
32. See Gould & Shepsle, *supra* note 30 (providing examples and illustrating this dynamic through a game-theoretic model). This explanation is especially potent today: not since the late nineteenth century has the United States experienced today's level of instability in who controls Congress, as measured by the frequency of changes in party control. See MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 10 (2017) (“[B]eginning in 1992, twelve elections have produced six different patterns of majority control of our three national elective institutions . . . . The United States did not experience any comparable period of majoritarian instability in the entire twentieth century.”). On the wide-ranging implications of this instability, see generally *id.*; and FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016).

The idea that the parties may acquiesce in the rulings of the parliamentarians out of uncertainty about the future has parallels in the literature on judicial independence. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 30-31 (2003) (“Other things being equal, uncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty, it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change.”); Stephenson, *supra* note 29, at 72-73 (“[I]n order for judicial independence to be sustained, political competition needs to be at some intermediate level. If the system becomes too favorable to either party, that party will abandon its support for the [judicial independence] equilibrium. We can conclude that, in general, systems that exhibit a high degree of political competition and alternation in power are more likely to exhibit judicial independence than those in which one party has a virtual lock on government authority.”).

33. See *infra* note 249 and accompanying text.
34. Some also believe that a system of rules that is transparent and consistently applied holds benefits for Congress as a whole. See, e.g., 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, at v (1936) [hereinafter CANNON'S

## I. FOUNDATIONS OF PARLIAMENTARY PRECEDENT

The parliamentarians are the primary interpreters of the rules governing Congress. Those rules, like any rules, can give rise to ambiguities. The parliamentarians are called upon to resolve those ambiguities, sometimes through a formal adjudicatory process and sometimes through more informal means. This Part introduces the rules governing Congress, provides a brief history of the parliamentarians, discusses various types of parliamentary precedent, and explains the legal underpinnings of the parliamentarians' authority.

### A. *The Rules Governing Congress and the Need for Interpretation*

Congress operates in accordance with formal, written rules. Article I of the Constitution authorizes each chamber to “determine the Rules of its Proceedings.”<sup>35</sup> Since the First Congress, both the House and Senate have done exactly that.<sup>36</sup> The chambers have extremely broad latitude in setting their own rules: “[T]he legislative rules of Congress are essentially endogenous – matters for the House and Senate to decide for themselves and by themselves.”<sup>37</sup> They may not “ignore constitutional restraints or violate fundamental rights,”<sup>38</sup> but otherwise have a free hand to make their own rules.<sup>39</sup> Courts are wary about any possible infringement on Congress's rulemaking authority: “Article I clearly reserves to each House of Congress the authority to make its own rules, and judicial interpretation of an ambiguous House [or Senate] Rule runs the risk of the court

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PRECEDENTS] (citing parliamentary precedent as indirectly contributing to Congress's “prestige as a branch of the Government”); 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, at iv (1907) [hereinafter HINDS' PRECEDENTS] (“If the prerogatives of the House are [well] understood, other branches of the Government are less likely to encroach on them; and if there be encroachment, it is more likely to be met with promptness, intelligence, and firmness.”); CHAFETZ, *supra* note 13, at 2 (arguing that a range of Congress's internal features “are potent, giving Congress the ability to assert itself vigorously against the other branches”).

35. U.S. CONST. art. I, § 5, cl. 2.

36. See CHAFETZ, *supra* note 13, at 267–301.

37. Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731; see also *id.* (“The few exogenous, constitutionally-based rules are subject to interpretation and application by each house, and all of its rules of procedure are largely immune from review and veto by any other person or institution.”).

38. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

39. See *id.* (“[I]t is no impeachment of [a cameral] rule to say that some other way would be better, more accurate or even more just.”).

intruding into the sphere of influence reserved to the legislative branch under the Constitution.”<sup>40</sup>

Nearly all of the rules governing Congress come from one of two sources: cameral rules and framework statutes.<sup>41</sup> Each chamber promulgates detailed cameral rules establishing how the chamber is to operate.<sup>42</sup> These rules set out the roles of the various actors involved in the legislative process (including parties, leadership, and committees) and the precise path of a bill through Congress (including committee consideration, amendment procedures, floor consideration, and conference committee consideration), among other topics. Framework statutes supplement cameral rules.<sup>43</sup> Although some framework statutes are general in character,<sup>44</sup> many govern specific policy domains: framework statutes

40. *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995); *see also United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981) (“[W]e are loathe to give the [statute] an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that Congress . . . invited [us] to assume the role of political overseer of the other branches of Government.”). Courts occasionally must construe cameral rules, but such instances are the exception rather than the norm. *See, e.g., Trump v. Mazars USA*, 940 F.3d 710, 742-44 (D.C. Cir. 2019) (holding that a subpoena issued by the House Committee on Oversight and Reform was validly issued under House Rules). The lack of judicial enforcement for most rules of legislative procedure in most instances does not detract from legislative procedure’s character as law. *See* H.L.A. HART, *THE CONCEPT OF LAW* 95-96 (3d ed. 2012) (defining “rules of change” in a legal system); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1259-61 (2017) (discussing internal agency rules as law).
41. A third source of rules of legislative procedure is the Constitution, which sets out a small number of procedural rules. *See, e.g.,* U.S. CONST. art. I, § 7, cl. 1 (origination requirement for revenue-raising bills); *id.* art. I, § 7, cl. 2-3 (supermajority requirement for presidential veto override); *id.* art. II, § 2, cl. 2 (supermajority requirement for treaty ratification); *see also* Vermeule, *supra* note 14 (discussing these and other constitutional rules of legislative procedure). These examples are the exceptions, however, and the Constitution is silent on nearly all issues of legislative procedure.
42. *See* RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 113-181 (2015) [hereinafter HOUSE RULES]; SENATE RULES, *supra* note 4.
43. *See* HOUSE PRACTICE, *supra* note 2, at 376 (“Many ‘legislative procedure’ statutes prescribe special procedures for the House to follow . . . . These procedures technically are rules of the House, enacted expressly or implicitly as an exercise of the House’s rulemaking authority.”); *see also* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (discussing statute-prescribed rules generally); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 718 (2005) (defining the term framework legislation as “legislation [that] creates rules that structure congressional lawmaking”).
44. *See, e.g.,* Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C. (2018)); Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 2 U.S.C. (2018)).

create special procedures governing the budget process,<sup>45</sup> congressional approval of trade agreements,<sup>46</sup> and congressional responses to the President's use of military force.<sup>47</sup>

Cameral rules and framework statutes implicate a wide range of questions about how Congress governs itself. One key feature of both types of rules is that they can give rise to interpretive disputes. The rules governing Congress, like any set of legal rules, are not always clear, either on their face or in their application to particular cases. Consider the following examples:

- Senate rules require a supermajority vote to close debate on legislation.<sup>48</sup> Budget reconciliation rules, however, require only a simple majority to close debate, a fact that makes reconciliation a powerful tool for Senate majorities. But not all content can be passed through reconciliation. The Byrd rule enumerates six categories of “extraneous” provisions not permitted under reconciliation.<sup>49</sup> One of these categories provides that “a provision shall be considered extraneous if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision.”<sup>50</sup> What constitutes a “merely incidental” change in outlays or revenues? When, for example, does a modification to a social-welfare program constitute a budgetary change, and when does it have a “merely incidental” budgetary impact?

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45. See, e.g., Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 2 U.S.C. (2018)); Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601–55 (2018)); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 71038 (codified as amended at 2 U.S.C. §§ 900–907d, 922 (2018)); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 2 U.S.C. (2018)); see also WILLIAM G. DAUSTER, *BUDGET PROCESS LAW ANNOTATED* (1993 ed.); ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* (3d ed. 2007).

46. See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, *TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY* (2015).

47. See 50 U.S.C. §§ 1544–1546 (2018) (setting out legislative procedures under the War Powers Resolution).

48. See SENATE RULES, *supra* note 4, r. XXII(2).

49. See 2 U.S.C. § 644(b)(1) (2018); see also HENIFF, *supra* note 1; Aprill & Hemel, *supra* note 1.

50. 2 U.S.C. § 644(b)(1)(D). Former Senate Parliamentarian Alan Frumin has described the Byrd rule as “subjective and the most difficult for parliamentarians and congressional staff to apply.” See Melissa Attias, *Health Law Repeal not a Shoo-in Under Reconciliation*, THE COMMONWEALTH FUND (Aug. 19, 2015), <https://commonwealthfund.org/publications/newsletter-article/2015/aug/health-law-mandate-repeal-not-shoo-under-reconciliation> [https://perma.cc/GQP3-DD48].



- The House’s germaneness rule is a single sentence: “No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”<sup>51</sup> What does “a subject different from that under consideration” mean? That term could be construed either broadly or narrowly along several different axes. Suppose a bill regulates private health insurance markets. Should a proposed amendment be considered germane if it relates to health insurance subsidies? If it relates to private health-care provision more broadly? If it relates to Medicare or Medicaid?
- When the House and Senate pass different versions of a bill, a conference committee must craft a single final version. Conference committees may not add content falling outside the “scope of the differences” of the two chambers’ bills.<sup>52</sup> But it can be hard to discern what provisions meet this standard. Suppose one chamber’s bill seeks to empower the Environmental Protection Agency to regulate greenhouse gas emissions, while the other chamber’s bill calls for a carbon tax implemented by the Treasury Department.<sup>53</sup> What sorts of policies fall between these two approaches?

In none of these instances does the text of the underlying rule provide clear guidance. Given the limitless variety of possible legislation, it would be difficult to imagine how any rule, even a highly detailed one, could address every possible Byrd rule, germaneness, or scope-of-the-differences scenario that might arise. While the rules governing Congress could be written to provide more guidance than they do at present, no set of rules could address every possible scenario that legislators might face.

The ambiguities that inevitably arise in the rules governing Congress parallel the ambiguities that inevitably arise in substantive statutory provisions. Some statutory provisions are obviously open to varying interpretations, such as the

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51. HOUSE RULES, *supra* note 42, r. XVI(7); *see also* HOUSE PRACTICE, *supra* note 2, at 543–602.

52. The two chambers’ rules on this point read slightly differently. *See* HOUSE RULES, *supra* note 42, r. XXII(9) (“[A] conference report may not include matter not committed to the conference committee by either House and may not include a modification of specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific matter as committed to the conference committee.”); SENATE RULES, *supra* note 4, r. XXVIII(3)(a) (“Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.”).

53. *See* KENNETH A. SHEPSLE, RULE BREAKING AND POLITICAL IMAGINATION 78 (2017) (providing this example).

Sherman Act's prohibition on economic arrangements "in restraint of trade."<sup>54</sup> But even statutory provisions that may appear straightforward can raise difficult questions when applied. The Supreme Court has divided, for example, on whether a person "uses . . . a firearm"<sup>55</sup> if he barter it in exchange for drugs,<sup>56</sup> and whether a person is guilty of concealing a "record, document, or tangible object"<sup>57</sup> if he throws fish overboard to avoid detection.<sup>58</sup> The statutory provisions giving rise to these disagreements provide at least as much specificity as do many of the rules governing Congress. It is no surprise, then, that ambiguities often arise in the rules governing Congress.

### B. Modes of Parliamentary Precedent

Ambiguities in Congress's rules can give rise to disagreements within Congress about how those rules apply to particular bills, amendments, or motions under consideration. In the modern era, the House and Senate parliamentarians have been the primary officials responsible for resolving these disagreements. The House and Senate established the positions of parliamentarian in 1927 and 1935, respectively.<sup>59</sup> In the House, the move toward a professionalized and independent parliamentarian was part of members' revolt against the centralization of power by House Speaker Joseph Cannon (R-IL).<sup>60</sup> In the Senate, similar concerns about concentration of power existed,<sup>61</sup> coupled with the increased volume

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54. 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

55. 18 U.S.C. § 924(c)(1)(A) (2018).

56. See *Smith v. United States*, 508 U.S. 223, 224-25 (1993).

57. 18 U.S.C. § 1519 (2018).

58. See *Yates v. United States*, 135 S. Ct. 1074 (2015).

59. See HEITSHUSEN, *supra* note 6, at 1. Both chambers previously had officers who played similar roles: a "Clerk at the Speaker's Table" in the House and a "journal clerk" in the Senate. See *Parliamentarians of the House*, OFF. HOUSE HISTORIAN, <https://history.house.gov/People/Office/Parliamentarians> [<https://perma.cc/U47A-AWGP>]; *A Parliamentary Ruler: Charles Lee Watkins*, N.Y. TIMES (Mar. 7, 1960), <https://nytimes.com/1960/03/07/archives/a-parliamentary-ruler-charles-lee-watkins.html> [<https://perma.cc/B7SA-RV6B>].

60. See DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 87 (1997).

61. See Timothy Noah, *Romancing the Parliamentarian*, SLATE (Sept. 2, 2009, 7:10 PM), <https://slate.com/news-and-politics/2009/09/romancing-alan-frumin-the-senate-parliamentarian.html> [<https://perma.cc/3Z9E-FCHN>] (citing dissatisfaction with the parliamentary rulings of Vice President John Nance Garner as a motivation for the creation of a Senate parliamentarian).

of New Deal legislation which “expanded opportunities for procedural confusion and legislative mischief.”<sup>62</sup> The proliferation of committees meant that legislators began to spend less time on the floor, and, consequently, they developed less individual knowledge of parliamentary procedure.<sup>63</sup> For these reasons, the modern parliamentarians were born. The emergence of the parliamentarians reduced members’ uncertainty regarding procedural matters by introducing quasi-judicial figures into the two chambers.<sup>64</sup>

Precedent plays a dominant role in shaping the operations of the House and Senate. Many precedents address ambiguities of the sort described in the last Section. In other instances, precedents create procedural rules where the written rules are silent.<sup>65</sup> Precedent can even override written rules in some circumstances.<sup>66</sup> Regardless of whether a given precedent resolves an ambiguity, fills a gap, or even deviates from a written rule, all precedents play an important role in the operation of Congress.<sup>67</sup>

There are four distinctive ways in which the parliamentarians make and apply precedent in Congress. The first and most public of these happens on the chamber floors, through responses to points of order made by legislators. But most parliamentary precedent is made and applied in various behind-the-scenes contexts: an advisory context, in which parliamentarians advise legislators and legislative staff on prospective legislation; a bureaucratic context, through referrals of legislation to committees; and an adjudicatory context, which includes

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62. RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES, 1787 TO 2002, at 143 (2006).

63. See Wallner, *supra* note 25, at 388.

64. Michael S. Lynch & Anthony J. Madonna, *Procedural Uncertainty, the Parliamentarian, and Questions of Order in the United States Senate*, 100 SOC. SCI. Q. 1343 (making this point with respect to the Senate).

65. See Bach, *supra* note 37, at 733 (giving the example of the “amendment trees” in the Senate, which are wholly a creation of precedent).

66. See *id.* at 733-34 (noting that the Senate Majority and Minority Leaders have priority of recognition over other senators, a principle that runs directly counter to the text of Senate rules, which expressly provide that “the Presiding Officer shall recognize the Senator who shall first address him” (quoting SENATE RULES, *supra* note 4, r. XIX(1)(a))). Anomalous as this might seem, the priority of precedents over written text is pervasive in constitutional law. See David A. Strauss, *The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015) (“If we read the text of the Constitution in a straightforward way, American constitutional law ‘contradicts’ the text of the Constitution more often than one might think. Adhering to the text would require us to relinquish many of the most important and well-established principles of constitutional law.”); *id.* (providing examples).

67. See, e.g., John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 511 (2004) (“In the Senate, as I found during my years as a Committee General Counsel, traditions and parliamentary precedents are much more important than written rules.”).

adjudication of Byrd-rule disputes in the Senate. This Section considers each means of making parliamentary precedent in turn.

### 1. *Floor Proceedings*

Rulings on points of order on the House or Senate floor constitute the most formal means of making parliamentary precedent. This process follows a careful choreography. When a legislator believes that a rule or precedent has been violated or is about to be violated, that legislator can make a point of order specifying the alleged violation. Legislators from each party may (but need not) argue as to why the point of order should be sustained or overruled. The parliamentarian or the assistant on duty recommends a ruling to the legislator sitting as chair, and the chair then repeats the recommended ruling, typically verbatim.<sup>68</sup> The recommendation becomes the ruling of the chair, so much so that legislators at times refer to “the parliamentarian’s rulings.”<sup>69</sup> (The chair is formally free to disregard the recommendation, but doing so is extraordinarily rare.<sup>70</sup>) Chairs’

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68. See BILL BRADLEY, *TIME PRESENT, TIME PAST: A MEMOIR* 74 (1996) (“[Y]ou sit in the chair on the dais and do little more than repeat the rulings that the parliamentarian whispers to you.”); Steve Israel, *Democrats Enter Brave New World with House Majority in Trump Era*, HILL (Jan. 9, 2019, 12:00 PM EST), <https://thehill.com/opinion/campaign/424524-democrats-enter-brave-new-world-with-house-majority-in-trump-era> [<https://perma.cc/4HVM-58MC>] (“Next to me was the House parliamentarian, whispering into my ear the answer to an arcane point of inquiry, which I would mimic with all the credibility of a wooden doll sitting on the lap of a ventriloquist.”). Formally, though, it is the chair, not the parliamentarian, who rules on points of order. See HOUSE RULES, *supra* note 42, r. I(5); FLOYD M. RIDDICK & ALAN S. FRUMIN, *RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES*, S. DOC. NO. 101-28, at 989 (Alan S. Frumin ed., 1992) [hereinafter RIDDICK’S SENATE PROCEDURE].

As a general matter, the chair rules on all points of order. The exception is that when a legislator raises a point of order alleging a violation of the Constitution, the chair does not rule but instead defers the question to a vote of the full chamber. See LEWIS DESCHLER, 15 *DESCHLER’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* ch. 31, § 13.1, at 12,389-91 (1994) [hereinafter DESCHLER’S PRECEDENTS]; RIDDICK’S SENATE PROCEDURE, *supra* at 1491.

69. E.g., Sheryl Gay Stolberg, *For Senate Parliamentarian, Great Power but a Sensitive Constituency*, N.Y. TIMES (May 31, 2003), <https://nytimes.com/2003/05/31/us/for-senate-parliamentarian-great-power-but-a-sensitive-constituency.html> [<https://perma.cc/XHW5-S4WF>] (quoting Senator Byron Dorgan (D-ND)).

70. No House interviewee could recall an instance in which the chair ignored a parliamentarian’s recommendation, including in high-stakes situations. One parliamentarian noted that the only time he witnessed a legislator serving as chair reluctant to follow his recommendation, that legislator was replaced as chair. Interview with House Parliamentarian. Another noted a small number of instances in which chairs inserted some of their own language in issuing a ruling but still acted consistently with the parliamentarian’s bottom-line recommendation. Interview with House Parliamentarian. One did note, however, that “sometimes there’s a

rulings do not resemble judicial opinions, but instead resolve points of order either with only a brief explanation or none at all.<sup>71</sup>

Parliamentary process on the floor roughly mirrors the judicial process. A legislator's point of order, like a plaintiff's complaint, formally specifies an alleged violation. Legislators, like litigants, may make adversarial arguments before a purportedly neutral decision-maker. Legislators' arguments rely on a combination of positive law (cameral rules or framework statutes) and common law (parliamentary precedents), just as litigants' arguments rely on a combination of positive law (constitutional provisions, statutes, or regulations) and common law (judicial precedents).

Legislators may appeal rulings of the chair to the full chamber, and each chamber's rules allow a majority vote on the floor to reverse a chair's ruling.<sup>72</sup> When this occurs, the outcome of the floor vote constitutes a new precedent.<sup>73</sup>

jump ball, and we tell the chair it's a jump ball, and the chair makes the call." Interview with House Parliamentarian.

In the Senate, the chair generally "relies upon the Senate Parliamentarian for assistance and reflects the Parliamentarian's views in his or her ruling." See Jacobi & VanDam, *supra* note 24, at 307. Instances of the chair ignoring the Senate parliamentarian's advice exist, but they are extremely rare. See, e.g., 133 CONG. REC. S2,996-97 (daily ed. Feb. 5, 1987) (statement of Sen. Byrd) (recounting such an instance); RICHARD A. ARENBERG & ROBERT B. DOVE, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* 25-26 (2012) (recounting another such instance); Interview by Donald A. Ritchie, Senate Historical Office, with Floyd M. Riddick, Parliamentarian of the U.S. Senate (July 12, 1978), at 90, [https://senate.gov/artandhistory/history/resources/pdf/Riddick\\_interview\\_3.pdf](https://senate.gov/artandhistory/history/resources/pdf/Riddick_interview_3.pdf) [<https://perma.cc/NT9W-ZGBF>] [hereinafter Riddick Interview #3] (noting that in a quarter century, "[t]he Chair never failed to follow my [Riddick's] advice except in one instance").

The chair is similarly reliant on the parliamentarian when that chair is the Chief Justice presiding over an impeachment trial. See, e.g., Michael F. Williams, *Rehnquist's Renunciation? The Chief Justice's Constitutional Duty to Preside Over Impeachment Trials*, 104 W. VA. L. REV. 457, 483 (2002) (noting that "the Senate transcript [of President Clinton's impeachment trial] is rife with unfortunate references in which the Chief Justice unabashedly describes his abject reliance on the Senate Parliamentarian for guidance in resolving procedural questions"); see also Darren Samuelsohn, *John Roberts May Be Leading the Senate Impeachment Trial, But This Woman is Shaping It*, POLITICO (Jan. 13, 2020, 5:10 AM EST), <https://politico.com/news/2020/01/13/john-roberts-senate-impeachment-whisperer-098050> [<https://perma.cc/A96A-K2L5>].

71. See *infra* Section II.C.

72. See HOUSE RULES, *supra* note 42, r. I(5) ("The Speaker shall decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner."); SENATE RULES, *supra* note 4, r. XX(1) ("[U]nless submitted to the Senate, [questions of order] shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate.").

73. See Stanley Bach, *Rules, Rulings, and the Rule of Law in Congress* 17 (Apr. 1997), <https://stanistan.org/docs/1/17.pdf> [<https://perma.cc/RN6S-U578>] (noting that a successful appeal "establish[es] a precedent that future Presiding Officers can be expected to respect because it

Barring an appeal, though, the chair's ruling itself becomes a precedent, which is recorded and guides future decision-making. The House published its first volume of precedents in 1899.<sup>74</sup> The Senate published a compilation of precedents in 1914 but did not publish a comprehensive volume until 1958.<sup>75</sup> New volumes of precedents are published periodically.<sup>76</sup>

## 2. *Parliamentary Advice*

Many precedents arise not from floor proceedings but instead from informal advice that the parliamentarians give to legislators and legislative staff. The parliamentarians' offices keep careful records of past advice and draw on those records in deciding questions that are not squarely resolved by formal precedents. The parliamentarians' advisory roles sharply distinguish them from federal judges, who are prohibited from issuing advisory opinions<sup>77</sup> and from engaging in nearly all forms of *ex parte* contact with litigants.<sup>78</sup>

Legislators and their staffers frequently ask their chamber's parliamentarian whether rules and precedents permit a contemplated course of action. There are strong incentives to solicit and follow the parliamentarians' advice. Not doing so would lead legislators and legislative staff to invest time and political capital in measures that might later be found out of order. These incentives result in much of the parliamentarians' time being spent answering questions from legislators and legislative staff. In this way, the parliamentarians play a key role in shaping

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was created by vote of the [chamber] itself, which is the ultimate constitutional arbiter of its rules").

74. Lawrence, *supra* note 25, at 31.

75. *Id.* at 48.

76. For the most recent published versions of precedents, see 1 CHARLES W. JOHNSON ET AL., PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES (2017) [hereinafter 1 HOUSE PRECEDENTS], <https://govinfo.gov/content/pkg/gpo-hprec-precedents-v1/pdf/gpo-hprec-precedents-v1.pdf> [<https://perma.cc/7HT7-8YK8>]; and RIDDICK'S SENATE PROCEDURE, *supra* note 68.

77. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52-58 (7th ed. 2015). Many states similarly bar judges from issuing advisory opinions, and those that permit judges to do so have strict rules regulating the practice. See, e.g., Answer of the Justices to the Governor, 829 N.E.2d 1111, 1113-15 (Mass. 2005) (outlining narrow circumstances in which advisory opinions are permissible); Opinion to the Governor, 284 A.2d 295, 296 (R.I. 1971) (treating advisory opinions as nonbinding).

78. See MODEL RULES OF PROF'L CONDUCT r. 2.9(A) (AM. BAR ASS'N 2014), [https://americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_9expartecommunications](https://americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications) [<https://perma.cc/B8KM-9YAY>].

the legislative agenda.<sup>79</sup> “My main job,” said one Senate parliamentarian, “is to advise senators from both sides of the aisle how to either accomplish some goal that they have, or to block another senator from accomplishing a goal.”<sup>80</sup> Another noted the “tremendous amount of work that goes into hearing arguments, analyzing briefs, analyzing emails, looking at statutes, [and] dealing with issues that never see the light of day.”<sup>81</sup> And one House parliamentarian described their role as “really advisory,” because “we spend most of our time interacting with participants informally.”<sup>82</sup> At times the parliamentarians break new legal ground through informal advice.<sup>83</sup> Responses to informal questions are “very carefully done,” since they serve as important precedents on a variety of matters, especially budget matters that are typically resolved in committee rather than on the floor.<sup>84</sup>

The advisory role resembles an attorney-client relationship. The parliamentarians offer advice not only on whether a proposed action is permitted but also on how legislators and legislative staff can best achieve their desired outcomes

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79. For a recent example, see Burgess Everett & John Bresnahan, *GOP Running Out of Options on Trump's Border Emergency*, POLITICO (Mar. 12, 2019, 3:14 PM EDT), <https://politico.com/story/2019/03/12/senate-disapproval-border-emergency-1218135> [<https://perma.cc/6HLE-ZNDE>] (discussing the Senate parliamentarian's advice on whether the Senate may, under germaneness rules, amend a House-passed resolution overturning a President's national emergency declaration).
80. Interview by Brian Lamb with Robert Dove, *Parliamentarian of the U.S. Senate* (C-SPAN television broadcast Mar. 7, 1986), at 0:35, <https://c-span.org/video/?126087-1/senate-parliamentarian> [<https://perma.cc/K2WR-NGZN>].
81. Interview with Senate Parliamentarian. This advisory role is particularly robust during the budget process, during which the parliamentarians assist relevant committees in complying with complex budget rules.
82. Interview with House Parliamentarian. Several House parliamentarians noted a long-term decline in the number of formal precedents, in part because of members availing themselves of parliamentary advice.
83. A prominent example is Senate Parliamentarian Alan Frumin's decision to limit the number of reconciliation bills that a single budget resolution could generate. That decision, the substance of which is discussed *infra* Section II.D.1, arose through Frumin advising Senate staff of his position and staff beginning to draft reconciliation instructions consistent with Frumin's position. A more recent example, from 2019, involved the Senate majority consulting with the parliamentarian on the novel question of whether the Senate was permitted to amend a House resolution to block a presidential emergency declaration. See Emily Cochrane, *Senate Has Votes to Overturn Trump's Emergency Declaration*, N.Y. TIMES (Mar. 5, 2019), <https://nytimes.com/2019/03/04/us/politics/senate-emergency-declaration-trump.html> [<https://perma.cc/7ULM-42TB>].
84. See Interview with Senate Staffer.

in a manner consistent with applicable rules and precedents.<sup>85</sup> The parliamentarians advise both political parties, and they may find themselves simultaneously advising one party on how to pass a bill and the other party on how to defeat it.<sup>86</sup> Although conflict-of-interest rules prevent attorneys from advising adversary parties,<sup>87</sup> it is widely accepted that the parliamentarians serve as (confidential<sup>88</sup>) advisors to both political parties.

### 3. *Committee Referrals*

Committee referrals constitute a third type of parliamentary precedent, less formal than responses to points of order but more formal than *ex parte* advice. When new bills are proposed, both chambers' rules provide for those bills to be referred to committees, with different committees having jurisdiction over different subject-matter areas.<sup>89</sup> “[R]eferrals establish binding precedents for all future bills on the same subjects, thereby resolving jurisdictional ambiguities.”<sup>90</sup>

The parliamentarians' offices play the lead roles in making committee referrals in both chambers. They must process all of the new bills that are introduced, totaling roughly ten thousand in each Congress.<sup>91</sup> Given this volume, the referral

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85. See, e.g., Interview with House Parliamentarian (“[M]embers’ offices or committee staff who want to know where we think that bill might be referred if it’s introduced in that form, they may send it to us ahead of time for an advisory opinion,” and the parliamentarian’s office at times asks “substantive questions or language questions or say[s], ‘well this is borderline . . . are you looking to get one committee or another committee?’ . . . ‘We know you’re trying to avoid X committee; this comes very close if not over the line. You may want to rework a certain thing.’”).
86. Members of parliamentarians’ offices in both chambers emphasized that they provide advice on equal terms to both the majority and minority parties.
87. See MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2018).
88. Without assurances of confidentiality, legislators and legislative staff would quickly stop seeking advice from the parliamentarians. See Interview with Senate Staffer; Riddick Interview #3, *supra* note 70, at 82-85. Only one parliamentarian noted the complications arising from strict confidentiality. See Interview with Senate Parliamentarian (“I developed the M.O. . . . of telling people that I can’t give you an answer until I’ve been able to . . . vet it from all possible sides. And that M.O. conflicted with a basic principle in that office that senators and staff come to the parliamentarian in confidence. . . . [W]e would encourage staff to in essence strip the veil of confidence . . . when we believed that that input was necessary from potentially adverse parties.”).
89. See HOUSE RULES, *supra* note 42, r. XII; SENATE RULES, *supra* note 4, r. XVII.
90. David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48, 49 (1994).
91. See *Statistics and Historical Comparison: Bills by Final Status*, GOVTRACK, <https://govtrack.us/congress/bills/statistics> [<https://perma.cc/NS5G-QX5R>].



role is bureaucratic in character, requiring efficiency and routinized structure. Bill referrals nevertheless consume a large share of the parliamentarians' time in both chambers.<sup>92</sup>

For many bills, referrals are straightforward: the bill's subject matter may fall squarely within the jurisdiction of a single committee, or the bill might be sufficiently similar to an earlier bill that a previous referral serves as a clear precedent. Referrals are less straightforward when a bill lies somewhere between the jurisdiction of multiple committees and is not obviously analogous to an earlier bill.<sup>93</sup> In such cases, the parliamentarians generally make referrals based on the "weight of the bill" principle: jurisdictionally ambiguous bills are referred to the committee with the "closest" jurisdiction.<sup>94</sup>

Referral decisions rely heavily on precedent. The parliamentarians' offices maintain extensive files on past referrals,<sup>95</sup> which they draw upon when new issues arise. Precedent can at times lead to seemingly counterintuitive referrals. Bills concerning internet access in rural areas, for example, are referred not only to the House Energy and Commerce Committee, which has jurisdiction over most internet-related issues, but also jointly to the Agriculture Committee. This anomaly arises from New Deal-era referrals of rural electrification legislation to the Agriculture Committee.<sup>96</sup> Similarly, the House Education and Labor committee has long claimed jurisdiction over juvenile delinquency, even though that issue seems to be at least as close to the Judiciary Committee's jurisdiction.<sup>97</sup>

Referrals are usually invisible to the public, but they can be highly consequential. Among the most important referrals of the past century involved the Civil Rights Act of 1964.<sup>98</sup> The bill was carefully drafted to ensure that it would be referred to specific committees—the Senate Commerce Committee and the

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92. See Interview with House Parliamentarian; Interview with Senate Parliamentarian. The parliamentarians encounter most referral questions for the first time when bills are introduced, but they encounter some earlier, through the advisory process. See Interview with House Parliamentarian.

93. KING, *supra* note 60, at 17-19.

94. *Id.* at 29. *But see id.* at 98-100 (noting narrow exceptions to the weight of the bill principle in the House, including Rules Committee jurisdiction over all proposed changes to cameral rules and Ways and Means jurisdiction over all tax-related matters).

95. MARTIN GOLD ET AL, THE BOOK ON CONGRESS: PROCESS, PROCEDURE, AND STRUCTURE 64 (1992).

96. See Interview with House Parliamentarian (discussing The New Deal Rural Broadband Act of 2017, H.R. 800, 115th Cong. (2017), <https://congress.gov/115/bills/hr800/BILLS-115hr800iuh.pdf> [<https://perma.cc/RS9A-WALR>]).

97. See KING, *supra* note 60, at 49.

98. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 & 42 U.S.C.).

House Judiciary Committee – and avoid other committees (in both chambers) led by Southern chairmen hostile to civil rights.<sup>99</sup> More recently, committee referrals have shaped the legislative process on a host of issues, from regulatory policy to public works projects.<sup>100</sup>

#### 4. *Adjudication off the Floor*

Recall that the Byrd rule dictates what content is and is not permitted under budget reconciliation procedures.<sup>101</sup> Challenges under the Byrd rule, which are a central part of contemporary parliamentary practice in the Senate, typically play out in a quasi-judicial proceeding colloquially called a “Byrd bath.” During a Byrd bath, staff from both parties “go through the legislation with [the] Senate parliamentarian . . . and make their arguments about which provisions violate the Byrd Rule and which ones don’t.”<sup>102</sup> No cameral rule or statutory provision mentions the Byrd bath; it is strictly a creation of the parliamentarians. Nonetheless, a standard set of practices has evolved dictating how a Byrd bath is run, with strong parallels to the judicial process.<sup>103</sup>

The Byrd bath process begins with the majority party working through draft bill text with the parliamentarian, who flags potential Byrd-rule issues and gives the majority the opportunity to revise the bill accordingly.<sup>104</sup> The majority then

99. See KING, *supra* note 60, at 16.

100. See *id.* at 17.

101. See *supra* notes 48–50 and accompanying text.

102. Dylan Scott, *The Senate Republican Health Care Bill Must Survive this Obscure Senate Rule*, VOX (July 21, 2017, 9:35 AM), <https://vox.com/policy-and-politics/2017/5/22/15629974/senate-byrd-rule-obamacare-repeal> [<https://perma.cc/2CDG-CNZJ>]; see also Aprill & Hemel, *supra* note 1, at 107; Sarah Ferris, *Senate Plans Vote on Partial ObamaCare Repeal Next Month*, HILL (Oct. 28, 2015, 4:28 PM), <https://thehill.com/policy/healthcare/258422-senate-plans-vote-on-partial-obamacare-repeal-before-thanksgiving> [<https://perma.cc/HD3A-BUM6>] (describing the Byrd bath as “a close examination of budget bills by the chamber’s parliamentarian to ensure that each provision relates to the budget”).

103. Unless otherwise noted, the narrative in the following paragraphs draws from interviews with two Senate parliamentarians and three Senate committee staffers, all of whom have extensive Byrd bath experience.

104. Historically, the Senate Budget Committee has compiled a list of provisions that potentially violate the Byrd rule early in the process. See 2 U.S.C. § 644(c) (2018) (requiring such a list). The Budget Committee’s list is strictly advisory but plays an important agenda-setting role, highlighting the provisions most likely to be challenged under the Byrd rule. See *id.* (“The inclusion or exclusion of a provision [on the list] shall not constitute a determination of extraneousness by the Presiding Officer of the Senate.”); HENIFF, *supra* note 1, at 4 (discussing the practice of assembling the lists). In recent years lists have been assembled later in the budget process and have therefore diminished in importance. See Interview with Senate Staffer.

presents a draft bill to the minority party. After careful review and deliberation, minority committee and leadership staff notify the parliamentarian's office of the provisions they intend to challenge under the Byrd rule.

Next, both parties prepare memoranda addressing the challenged provisions. Those memoranda closely resemble legal briefs: they provide factual background; present arguments; draw analogies to supportive precedents, including past advice and the results of past Byrd baths; and distinguish unsupportive precedents. Memoranda also draw on Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) projections, given the central importance of budgetary impact to determining whether a provision is permissible under the Byrd rule. After receiving memoranda from both parties, the parliamentarian meets with the minority party alone, in what one staffer called the "motion to dismiss" stage of the process, to determine which challenges should proceed to the Byrd bath.

The Byrd bath itself resembles an appellate argument. The parliamentarian and their staff sit at the head of a large table, with representatives from the two parties on either side. Each party acts as a zealous advocate, having prepared through moot-court-style exercises to present their arguments and answer questions. Questions focus on relevant precedents and on details of proposed policy. The latter is especially important, given that it is the area in which the parties possess specialized knowledge that the parliamentarian's office lacks.<sup>105</sup> The parties may also question each other directly, although the parliamentarian attempts to maintain a structured discussion. After a Byrd bath, the parliamentarian's office deliberates, seeking to reach internal consensus about each contested provision. When the office has reached a decision, it communicates its conclusions to both parties by email.<sup>106</sup>

Consider a notable recent Byrd bath, from Republican attempts to repeal the Affordable Care Act in 2017. After Republicans drafted a repeal bill to be considered under reconciliation, Democrats contended that various provisions of the bill violated the Byrd rule, while Republicans defended those provisions as compliant. The parties' arguments focused on precedents—namely, the results of

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105. See Interview with Senate Parliamentarian ("[W]e really need to have the . . . parties explain to us what's going on substantively in order [for us] to make . . . the best procedural decision.").

106. While the office does not publicly disclose the results of a Byrd bath, legislators or legislative staff may do so. See, e.g., Senate Budget Committee Minority Staff, Background on the Byrd Rule Decisions (July 25, 2017), [https://budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions\\_7.21%5B1%5D.pdf](https://budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions_7.21%5B1%5D.pdf) [<https://perma.cc/MNN5-J829>] (providing a public summary of Byrd bath decisions during 2017 debate over Affordable Care Act repeal, made public by Senate Democrats).

past Byrd-rule disputes. The parties submitted memoranda to the parliamentarian and participated in three days of oral argument. The parliamentarian concluded that a half-dozen key provisions of the repeal bill were extraneous and so could not be passed through reconciliation.<sup>107</sup> The extraneous provisions were removed from the repeal bill, which was later voted upon (and failed to pass) on the floor.

The Byrd bath is best understood as a hybrid role for the Senate parliamentarian.<sup>108</sup> It is adjudicatory in structure, and it more closely resembles judicial proceedings than any other activity in which either chamber's parliamentarian is involved. But it is advisory in substance: any conclusions about a provision's compliance with the Byrd rule are, at least formally, merely determinations of how the parliamentarian would advise the chair if the matter were to later arise on the floor.

### C. *Unorthodox Lawmaking and Parliamentary Precedent*

The structures of the parliamentarians' offices and the parliamentarians' core functions—adjudication on the floor, advice to legislators and legislative staff, and bill referrals—have remained fairly constant for nearly a century. The parliamentarians' roles have evolved, however, to reflect changes in how Congress operates. Changes in both rules and norms have made the contemporary legislative process “varied and complex,” as compared to a comparatively more “predictable and linear” process in the mid-twentieth century.<sup>109</sup> Barbara Sinclair has

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107. *See id.* (noting the parliamentarian's determination that the following provisions violated the Byrd rule: a six-month waiting period on individuals seeking insurance who cannot prove that they have had continuous coverage; the defunding of Planned Parenthood; restrictions on using tax credits to purchase insurance plans that cover abortion; a permission for states to set permissible medical-loss ratios (ratios of care-related expenses to other expenses, such as overhead and profits); and the so-called “Buffalo Bailout” (shifting cost burdens from New York counties to the state government)). This Byrd bath is one of the few that received significant press coverage. *See, e.g.,* Margot Sanger-Katz, *Byrd Bath: Seven Provisions that Could Disappear from the Senate Health Bill*, N.Y. TIMES (July 21, 2017), <https://nytimes.com/2017/07/21/upshot/byrd-bath-seven-provisions-that-could-disappear-from-the-senate-health-bill.html> [<https://perma.cc/CC4J-YR8Q>]; Dylan Scott, *Senate's Budget Rules Invalidate Key Provisions in Republican Health Care Bill*, VOX (July 21, 2017, 6:05 PM EDT), <https://vox.com/policy-and-politics/2017/7/21/16012950/senate-health-care-bill-byrd-rule-rulings> [<https://perma.cc/JY5W-872L>].

108. The Byrd bath is not the only situation in which the parliamentarians hold quasi-adjudicatory proceedings with adversarial parties present, but it is the most common and the most consequential. *See* Interview with Senate Parliamentarian.

109. SINCLAIR, *supra* note 16, at 10.

called this transformation the rise of “unorthodox lawmaking,”<sup>110</sup> and Abbe Gluck has persuasively argued that legal scholars should devote greater attention to the rise of unorthodox lawmaking.<sup>111</sup> Unorthodox lawmaking has, unsurprisingly, shaped the role of the parliamentarians in making and applying parliamentary precedent.

One clear trend in the contemporary Congress is the frontloading of the legislative process, which has shifted parliamentary decision-making away from the floor and toward the advisory process. In the House, where the majority-party leadership carefully plans out floor proceedings in advance, leadership solicits parliamentary advice and works through any possible roadblocks well before legislation reaches the floor.<sup>112</sup> The House Rules Committee uses closed or structured rules – which ban or restrict amending activity – to avoid most procedural disputes over amendments.<sup>113</sup> Indeed, the House parliamentarian’s office advises the House Rules Committee in the writing of closed and structured rules.<sup>114</sup> The effects of frontloading in the House have been so significant that one parliamentarian describes points of order on the floor as “somewhat archaic.”<sup>115</sup>

Trends toward frontloading also exist in the Senate, though they are somewhat less pronounced.<sup>116</sup> Frontloading in the Senate arises in part from an inter-

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110. *Id.*

111. See, e.g., Gluck, *supra* note 16; Gluck et al., *supra* note 16.

112. House rules authorize standing committees to adopt written rules governing their procedures for specific legislation so long as those rules are consistent with cameral rules. See HOUSE RULES, *supra* note 42, r. XI.2(a)(1); see also Interview with House Parliamentarian (describing the House leadership’s frontloading processes).

113. See 1 HOUSE PRECEDENTS, *supra* note 76, at iv (2017) (“Among the most fundamental [recent] developments has been the expanding role of ad hoc special orders of business reported by the Committee on Rules.”); Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1366-67 (2010) (“House managers now bring most [consequential] measures to the floor under a closed rule or, failing that, under a special rule that so tightly limits amending activity as to have nearly the same effect as a closed rule.”).

114. Email from House Counsel to author.

115. Interview with House Parliamentarian. A different House parliamentarian noted that a more active Rules Committee has moved business in the House from “much more spontaneous and unpredictable” to a system in which “most rules [from the Rules Committee] virtually eliminate all those uncertainties.” *Procedural Change in Congress* (C-SPAN Television Broadcast Aug. 8, 2012), at 49:00, <https://c-span.org/video/?307498-1/procedural-congress&start=2951> [<https://perma.cc/6WPL-Y5LR>] (remarks of former House Parliamentarian Charles Johnson).

116. This is the case both because the Senate lacks an equivalent to the House Rules Committee and because Senate rules afford greater privileges to individual senators. The closest Senate equivalent to closed or structured rules is the unanimous consent agreement (UCA), which

section of cameral rules, budget rules, and polarization. Senate Rule XXII requires supermajority support to close debate on ordinary legislation, a requirement that enables the filibuster.<sup>117</sup> On major legislation, the majority party will rarely have enough support for a bill to overcome a filibuster, given sharp increases in party polarization in Congress in recent decades.<sup>118</sup> As a result, in the past generation, several major pieces of legislation—including the 1996 welfare reform law,<sup>119</sup> the companion bill to the Affordable Care Act (ACA) in 2010,<sup>120</sup> and multiple major tax laws<sup>121</sup>—have passed through reconciliation. The shift toward policy-making through reconciliation has dramatically increased the importance of the Byrd rule.<sup>122</sup> This, in turn, has amplified the importance of the Senate parliamentarian as the official responsible for interpreting and applying that rule.<sup>123</sup>

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can govern time for debate and amendment activity. See MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 11–13 (4th ed. 2018). The Senate parliamentarian advises on UCAs, Email from House Counsel to author, though UCAs have become less common as the contemporary Senate has become ever more contentious, see SINCLAIR, *supra* note 16, at 57–58.

117. SENATE RULES, *supra* note 4, r. XXII(2).
118. On polarization in Congress, see, for example, POLITICAL POLARIZATION IN AMERICAN POLITICS (Daniel J. Hopkins & John Sides eds., 2015); SAM ROSENFELD, *THE POLARIZERS: POST-WAR ARCHITECTS OF OUR PARTISAN ERA* (2017); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006); and SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008).
119. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).
120. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
121. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Jobs and Growth Tax Relief Reconciliation Act, Pub. L. No. 108-27, 117 Stat. 752 (2003); Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, 115 Stat. 38 (2001).
122. Many Byrd-rule matters arise either through the advisory process or through Byrd baths, though Byrd-rule issues do at times arise on the floor.
123. Most recently, the Senate parliamentarian played a significant role in policing what could and could not be included in ACA repeal bills, see *supra* note 107 and accompanying text, and in the 2017 tax bill, see, e.g., Brandon Carter & Naomi Jagoda, *Senate Parliamentarian Strikes Language Allowing Churches to Endorse Candidates from Tax Bill*, HILL (Dec. 14, 2017, 9:25 PM EST), <https://thehill.com/policy/finance/365047-tax-bill-no-longer-includes-johnson-amendment-repeal-report> [<https://perma.cc/W9Z4-XPW6>] (finding that repeal of the Johnson Amendment would violate the Byrd rule); Ryan McCrimmon, *GOP Searching for New Tax Tweak After Senate Parliamentarian Guidance*, ROLL CALL (Nov. 30, 2017, 6:10 PM), <https://rollcall.com/news/policy/tax-increase-trigger-would-violate-rules-perdue-says> [<https://perma.cc/3CEF-BMJC>] (finding that inclusion of automatic triggers would violate the Byrd rule).

The parliamentarians also judge what provisions are permitted under other sorts of special procedures, besides reconciliation. When Congress considers resolutions under the War Powers Act, for example, those resolutions have privileged status in Congress. The Senate

The centrality of reconciliation to the contemporary legislative process has also significantly increased the political pressure that Senate parliamentarians face. In enforcing limits on the reconciliation process, the Senate parliamentarian can prevent a majority from achieving its policy goals. The House parliamentarian rarely plays this majority-constraining role, given the more majoritarian nature of House rules. One consequence of this difference between the chambers is that the parliamentarian's status has been more tenuous in the Senate than in the House. No House parliamentarian has ever been removed from their position. In the Senate, by contrast, majority parties removed the parliamentarian several times between 1981 and 2001.<sup>124</sup> The Senate parliamentarian's role in enforcing majority-constraining rules, coupled with a rise in polarization, has resulted in Senate parliamentarians holding a less secure position than their House counterparts.

A final contemporary development is the use of appeals as a backdoor way of changing Senate rules.<sup>125</sup> Unlike House rules, Senate rules carry over from one Congress to the next<sup>126</sup> and a two-thirds supermajority is required to close debate on Senate rule changes.<sup>127</sup> Appeals provide a way around this supermajority requirement. When a senator appeals a ruling of the chair, a simple majority is sufficient to reverse that ruling.<sup>128</sup> The process is as follows. First, a senator

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parliamentarian has concluded that unrelated amendments strip resolutions of that privileged status. See, e.g., Clare Foran & Haley Byrd, *House Votes to Limit Trump's Military Action Against Iran Without Congressional Approval*, CNN (Jan. 9, 2020, 6:54 PM ET), <https://cnn.com/2020/01/09/politics/house-vote-war-powers-resolution-iran/index.html> [https://perma.cc/WRX4-3W9H] (concluding that an amendment condemning anti-Semitism would strip a resolution of its privileged status).

124. See *infra* notes 266-273 and accompanying text.

125. Appeals exist in the House, but they are marginal to parliamentary practice: no House appeal in the modern era has resulted in the reversal of a chair's ruling. See Interview with House Parliamentarian. Despite the lack of successful appeals, the House has found ways to subvert rulings of the chair. See, e.g., 165 CONG. REC. H5,852 (daily ed. Jul. 16, 2019) (noting a chair ruling that the Speaker's criticisms of the President were out of order, but a majority of the House rejecting a resolution moving that her statements be stricken from the record).

126. See SENATE RULES, *supra* note 4, r. V(2) ("[T]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed."). This carryover has led to the characterization of the Senate as a "continuing body." For a critical evaluation of this characterization, see, for example, Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010).

127. See SENATE RULES, *supra* note 4, r. XXII(2).

128. RIDDICK'S SENATE PROCEDURE, *supra* note 68, at 146. Despite the simple-majority threshold to reverse a ruling of the chair, most appeals from rulings of the Chair are debatable, so the party lodging the appeal may have to overcome a filibuster for their appeal to succeed. In addition, a three-fifths vote is required to overturn some ruling of the chair under fast-track statutes, most notably under the Budget Act. See VALERIE HEITSHUSEN, CONG. RESEARCH

makes a point of order, knowing that the point of order will fail under current rules. Next, the point of order fails, as expected. Finally, the senator appeals to the full Senate and a simple majority reverses the decision of the chair, thereby creating a new precedent.<sup>129</sup> Formally, this process represents merely a new interpretation of Senate rules, but in practice it changes the rules.<sup>130</sup> In such appeals, “the Senate [is] not making procedural rulings at all; it [is] making policy decisions in the guise of procedural ones.”<sup>131</sup> Appeals can therefore generate “precedents that are fundamentally incompatible with the rules, leaving the rules in question as empty shells.”<sup>132</sup> The appeals process thus allows a simple majority “to shrug off one of [the Senate’s] rules as an unwelcome obstacle blocking its ability to do what it wants to do.”<sup>133</sup> This has become much more common in our age of polarization, given that a single party will almost never have a sufficiently large majority to invoke cloture on a rule change.<sup>134</sup>

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SERV., 98-306, POINTS OF ORDER, RULINGS, AND APPEALS IN THE SENATE 2 & n.14 (Nov. 18, 2018), <https://senate.gov/CRSpubs/f34838c9-bac5-400a-b4f2-76a9bea085b9.pdf> [<https://perma.cc/VB34-K3R6>]. The majority leader can, however, leverage a nondebatable motion (such as a motion to table) to prevent a minority from filibustering an appeal.

129. For descriptions of this process and examples of its use, see MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE 23-24 (2017); Dauster, *supra* note 24, at 649-56; and Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 209 (2004).
130. The most well-known examples of this are changes to the Senate cloture rule, see VALERIE HEITSHUSEN, CONG. RESEARCH SERV., R44819, SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS: IN BRIEF (Apr. 14, 2017), <https://fas.org/sgp/crs/misc/R44819.pdf> [<https://perma.cc/NJH6-UPS2>]; Dauster, *supra* note 24, at 649-56, but appeals have been used to change rules in other domains as well, see, e.g., Bach, *supra* note 73, at 16-24 (discussing appeals relating to legislation on appropriations and the scope-of-the-differences requirements).
131. See Bach, *supra* note 73, at 26.
132. *Id.*
133. *Id.* at 27.
134. The Senate used the appeals process to functionally change its rules by simple majority vote at least eighteen times from 1977 to 2013. See Dauster, *supra* note 24, at 653 (citing 159 CONG. REC. S8,414 (daily ed. Nov. 21, 2013)); see also STANLEY BACH, CONG. RESEARCH SERV., 89-69 RCO, POINTS OF ORDER AND APPEALS IN THE SENATE 11-90 (Jan. 27, 1989) (on file with author) (compiling information on points of order and appeals on which the Senate acted by rollcall votes between 1965 and 1986).



### D. Legal Authority

Why do the parliamentarians have the authority to decide disputes and make precedent? The legal authority of the parliamentarians is, at first glance, somewhat mysterious. Conventional legal materials reveal few references to the parliamentarians and no express grant of authority. Each chamber's cameral rules mention a parliamentarian only in passing, without any discussion of the office's role or powers.<sup>135</sup> The U.S. Code provides no further details about the parliamentarian's core functions of making and applying precedent.<sup>136</sup> Nor does the Constitution, which makes no mention of the parliamentarians. The most obvious possible sources of legal authority, in short, provide little help.

The parliamentarians' legal authority is best understood in terms of the authority delegated by the chambers and their respective leaders. Article I's grant of authority to each chamber to "determine the Rules of its Proceedings"<sup>137</sup> encompasses not only the power to make rules but also the power to apply them. The chambers exercise rulemaking power through promulgating cameral rules or passing framework statutes. Each chamber's rules delegate to the chair the authority to apply rules by deciding points of order on the floor.<sup>138</sup> The parliamentarians merely help the chairs perform the duties that the chambers as a whole have authorized the chairs to perform. Although a system in which the

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135. The only mention of the parliamentarian in either chamber's rules concerns the peripheral issue of admission privileges onto the chamber's floor. See HOUSE RULES, *supra* note 42, r. IV(2)(a)(6), (15); SENATE RULES, *supra* note 4, r. XXIII(1); *id.* r. XXIX(2).

136. Statutory provisions establish the office of the House parliamentarian, provide for staffing and compensation, and require the compilation and dissemination of precedents, see 2 U.S.C. §§ 28, 287-287d (2018), but do not discuss the parliamentarian's core functions. The U.S. Code says even less about the Senate parliamentarian, mentioning the office only in passing. See *id.* § 288g(a)(5) (noting that the Senate legal counsel shall "advise, consult, and cooperate with" various officials, including the Senate parliamentarian).

137. U.S. CONST. art. I, § 5, cl. 2.

138. See *supra* note 68. Principles of acquiescence provide an additional source of authority for a chair's decision on a point of order. Because rulings on points of order are appealable to the full chamber, a majority can be understood as acquiescing in a chair's ruling by virtue of not reversing the ruling on appeal. This argument is analogous to approaches to congressional acquiescence to executive-branch actions or to judicial interpretations of statutes. *Cf., e.g.,* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 432-47 (2012) (discussing legislative acquiescence to executive-branch practices); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67 (1988) (noting a "longstanding debate" over whether a judicial "interpretation must be accepted because Congress has acquiesced in it by not overruling it, has ratified it by reenacting the statute, or at some point was presented with a formal bill or amendment embodying an alternative interpretation and rejected it").

parliamentarians had formal decision-making authority might raise concerns about legal authority, no such concerns exist when, at least formally, the parliamentarians merely make recommendations to the chairs.

The authority for the parliamentarians' committee referrals similarly rests on delegated power. Cameral rules authorize the House speaker<sup>139</sup> and Senate presiding officer<sup>140</sup> to make referrals. Longstanding practice has been for those officials to delegate referral authority to their respective chamber's parliamentarian.<sup>141</sup> The parliamentarians lack independent authority to make referrals, but they do so as the agents of those who do have that authority, and who have the formal authority to reclaim it should they wish to.

The parliamentarians' various advisory roles do not obviously implicate concerns about legal authority, given that the parliamentarians do not exercise any sort of binding legal authority in advising legislators and legislative staff. Parliamentary advice about whether a given course of action is permitted is, formally, merely a statement of what the parliamentarian would recommend to the chair if a point of order were to arise on the floor. Parliamentary advice cannot prevent a member from taking an action; instead, that advice is simply fair notice that, if a point of order were to be raised against the action, the parliamentarian would recommend that the chair sustain it. In this respect, parliamentary advice is simply a prediction of how an authoritative decision-maker (the chair) will decide future cases.<sup>142</sup> Parliamentary advice, as a prediction of what would come to pass if a legislator were to pursue a given action, is not binding in its own right. It is useful, though, as a highly reliable assessment of how the chair would act if a formal challenge were to arise.

## II. PARLIAMENTARY DECISION-MAKING

The parliamentarians consciously attempt "mimicry of ordinary jurisprudential techniques of the appellate courts."<sup>143</sup> But they diverge from their judicial counterparts in several key respects. This Part first shows how parliamentary

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139. HOUSE RULES, *supra* note 42, r. XII(2).

140. SENATE RULES, *supra* note 4, r. XVII(3).

141. See KING, *supra* note 60, at 84 (House); RIDDICK'S SENATE PROCEDURE, *supra* note 68, at 1150-51 (Senate).

142. Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (describing law as a "body of dogma or systematized prediction" and contending that "a legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court").

143. Interview with House Parliamentarian.

precedent resembles other common-law systems. It then highlights three distinctive features of parliamentary decision-making: the parliamentarians embrace a strong form of stare decisis, offer extremely minimalist rulings, and freely look to legislative purpose and legislative history to interpret statutes.

### A. *Parliamentary Precedent as Common Law*

The most basic feature of parliamentary law is that it is a common-law system. Parliamentary decision-making relies heavily on precedent. “In looking to precedents to resolve a point of order or other procedural question,” former House Parliamentarian Lewis Deschler wrote, Congress “appl[ies] a doctrine familiarly known to appellate courts as ‘stare decisis,’ under which a judge in making a decision will look to earlier cases involving the same question of law.”<sup>144</sup> The idea of parliamentary precedent or practice is an old one, dating back nearly as far as the common law itself.<sup>145</sup> In the modern day, most of the methods employed by the House and Senate parliamentarians mirror those employed by judges in common-law systems.

In the parliamentary context, as in the judicial context, the easiest cases are those in which a provision of positive law speaks directly to the case at hand. The parliamentarians can then simply apply the relevant provision without reference to precedent.<sup>146</sup> These cases are rare, however. “Most of the points of order,” former Senate parliamentarian Floyd Riddick noted, “involve precedents as opposed to the specific rules themselves.”<sup>147</sup> The Byrd rule, germaneness, and scope-of-the-differences examples that opened the last Part all illustrate that a relevant legal provision alone will typically be insufficient to resolve a dispute. The parliamentarians have to “fill out the gaps of general instructions or general rules that are maybe ambiguous or maybe not detailed enough, which almost

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144. 1 DESCHLER’S PRECEDENTS, *supra* note 68, at vi.

145. See MODUS TENENDI PARLIAMENTUM: AN ANCIENT TREATISE ON THE MODE OF HOLDING THE PARLIAMENT IN ENGLAND (Thomas Duffus Hardy ed., 1846) (a collection of parliamentary practices dating to the late thirteenth or early fourteenth century).

146. Interview with House Parliamentarian.

147. Riddick Interview #3, *supra* note 70, at 76; see also Interview by Donald A. Ritchie, Senate Historical Office, with Floyd M. Riddick, Parliamentarian of the U.S. Senate 425 (Nov. 21, 1978) [hereinafter Riddick Interview #9], [https://senate.gov/artandhistory/history/resources/pdf/Riddick\\_interview\\_9.pdf](https://senate.gov/artandhistory/history/resources/pdf/Riddick_interview_9.pdf) [<https://perma.cc/K7Q2-C7B9>] (“The precedents of the Senate are just as significant as the rules of the Senate. The rules are very vague in some regards . . .”).

certainly could not, when they were drafted, be anticipated enough to take care of every possible situation.”<sup>148</sup>

For these reasons, parliamentary decision-making nearly always requires looking to past decisions on similar questions. Although a single precedent can resolve some questions,<sup>149</sup> the parliamentarians usually must reason by analogy from multiple precedents, none of which are precisely on all fours with a current controversy. This process of reasoning by analogy, which is central to resolving the vast majority of parliamentary disputes,<sup>150</sup> mirrors the sort of analogical reasoning used in judicial decision-making.<sup>151</sup>

As in the judicial context, the process of reasoning by analogy from parliamentary precedents is far from straightforward in practice. Competing precedents, each one analogous in some respects but not in others, may point toward different conclusions.<sup>152</sup> Advocacy from legislative staffers seeks to draw analogies to favorable precedents while distinguishing unfavorable ones, and the two parties may argue for competing analogies and disanalogies.<sup>153</sup> The parliamentarians face the sometimes-difficult task of determining which precedents are most instructive. As in the judicial system, this task requires examining a question in light of the facts, contexts, and holdings of relevant precedents.<sup>154</sup>

A disclaimer is in order on the common-law nature of parliamentary precedent, and it comes by way of the legal realist tradition. The parliamentarians recognize that, as a practical matter, it will sometimes be difficult to apply law to facts. In some cases, they acknowledge, rules and precedents might not resolve a

148. Riddick Interview #9, *supra* note 147, at 426.

149. See Interview with House Parliamentarian; Interview with Senate Parliamentarian.

150. Interviews with House Parliamentarians.

151. See, e.g., GARNER ET AL., *supra* note 20 at 105-14; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

152. One House parliamentarian, for example, discussed the frequency of such situations and emphasized the need to “triangulate” multiple precedents. Interview with House Parliamentarian. Cf. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 1 (2009) (“In the 1920s and 1930s, building upon the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo, the legal realists . . . demonstrat[ed] that the law is filled with gaps and contractions . . . and that legal principles and precedents can support different results.”).

153. The memoranda submitted to the Senate parliamentarian’s office during the Byrd-bath process, for example, devote significant attention to the process of drawing analogies and disanalogies to past Byrd-rule decisions.

154. Interviews with House Parliamentarians.

given dispute, resulting in a “jump ball.”<sup>155</sup> But in describing themselves as legal technicians in a common-law system, they do not expressly acknowledge the legal realist insight that a common-law system necessarily bestows significant discretion on the decision-maker. As Karl Llewellyn wrote, there “exist side by side” two approaches to precedent: “one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful.”<sup>156</sup> The parliamentarians would answer that terms like “troublesome” and “helpful” are inapt, given that they do not have desired policy outcomes. But the parliamentarians *are* committed to a system of precedent-based decision-making, in which they preserve the integrity of parliamentary law in the face of partisan forces more concerned with policy outcomes. I consider this dynamic in detail in the subsequent Part, after first exploring in greater depth how parliamentary precedent plays out in practice.

### B. Strong Stare Decisis

Both parliamentarians and judges reason from precedents, but they take different approaches to whether and when they should overrule precedents. The parliamentarians employ an especially strong form of stare decisis, applying any precedents that are on point and declining to overrule earlier precedents except in the rarest of circumstances.<sup>157</sup> They have consistently reaffirmed the centrality of strong stare decisis to the system of parliamentary precedent,<sup>158</sup> both for decisions on points of order<sup>159</sup> and in more informal settings.<sup>160</sup>

This strict adherence to precedent contrasts with the range of tools that judges can use to avoid applying a precedent. Courts can and do overrule precedent, and the Supreme Court has developed “a series of prudential and pragmatic considerations designed to . . . gauge the respective costs of reaffirming

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155. See *supra* note 70; *infra* note 183.

156. See, e.g., K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 68 (Oceana, 2d ed. 1951) (1930).

157. *Id.*

158. Interview with House Parliamentarian; Interview with Senate Parliamentarian.

159. When serving as chair in 1931, House Speaker Nicholas Longworth (R-OH) once felt compelled by precedent to render a ruling that he found “illogical and unreasonable,” though he did encourage the full House to reverse his decision on appeal. Bach, *supra* note 73, at 25 (citing 74 CONG. REC. 5,644-49 (Feb. 21, 1931)).

160. See KING, *supra* note 60, at 115-16 (quoting a House committee staff director’s view that “[i]f you lose [a referral with the parliamentarians], [y]ou’ve lost forever”).

and overruling a prior case.”<sup>161</sup> Even short of overruling a precedent, a court can narrow an unfavorable precedent or decline to apply it in a particular case or class of cases.<sup>162</sup>

The parliamentarians eschew these approaches. In nearly all cases, if an issue is squarely presented and a precedent is on point, the parliamentarians apply the precedent. Even in scenarios that might lead courts to overrule a precedent, the parliamentarians do not do so. Indeed, as the next Part discusses, the rare instances in which the parliamentarians have reversed their prior positions have engendered significant backlash.<sup>163</sup>

Debates over federal funding for abortion exemplifies the parliamentarians’ strong commitments to stare decisis. In the early 1990s, abortion opponents inserted language into a House appropriations bill to prohibit the use of federal funding for abortion except in cases of rape or incest, or to save the life of the pregnant woman.<sup>164</sup> This provision seemed to violate a House rule that forbids including substantive legislative proposals in appropriations bills, a practice known as “legislating on appropriations.”<sup>165</sup> But proponents of the funding restriction drew support from a 1908 precedent that created a loophole in the legislating-on-appropriations bar if amendments employ specific language. By using language sanctioned by the precedent, antiabortion legislators were able to circumvent the bar.<sup>166</sup> The House parliamentarian treated the 1908 precedent as binding, despite several factors that might well have led a similarly situated court to take a different approach: the precedent had not been relied upon for many

161. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also *id.* at 854-55 (setting out four factors for when reversing a precedent may be appropriate).

162. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1452-57 (2017).

163. See *infra* notes 225-232 and accompanying text.

164. See *Limited Change Made to Abortion Policy*, CQ ALMANAC (1993), <https://library.cqpress.com/cqalmanac/cqal93-1105872> [<https://perma.cc/7AXM-MZMD>] (discussing this provision, which is commonly referred to as the Hyde Amendment); Kevin Merida, *Hyde Abortion Curb Survives Bitter Debate*, WASH. POST (July 1, 1993), <https://washingtonpost.com/archive/politics/1993/07/01/hyde-abortion-curb-survives-bitter-debate/9d0d2e6a-52d6-435d-9a67-1806debaaa67> [<https://perma.cc/Y8YP-VJJR>].

165. See HOUSE RULES, *supra* note 42, r. XXI (2). While a categorical ban on federal funding for abortion would not have qualified as legislating on appropriations under House precedents, the various exceptions would have. See *Limited Change Made to Abortion Policy*, *supra* note 164.

166. See *Limited Change Made to Abortion Policy*, *supra* note 164. While this maneuver was consistent with precedent, it was condemned by some legislators. See, e.g., 139 CONG. REC. 14,887 (1993) (statement of Rep. Waxman) (“That is a very arcane way of putting the issue. He only hopes to get by [i.e. circumvent] the parliamentary procedure . . .”).

decades, it ran counter to the purpose of the legislating-on-appropriations bar, and it was arguably poorly reasoned in the first instance.<sup>167</sup> Nonetheless, the parliamentarian treated adherence to precedent as trumping other considerations.

### C. *Decisional Minimalism*

Another distinctive feature of parliamentary precedent is its extreme decisional minimalism. Minimalists say “no more than necessary to justify an outcome, and leav[e] as much as possible undecided,”<sup>168</sup> while maximalists “decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes.”<sup>169</sup> Although courts (especially high courts) at times issue sweeping decisions,<sup>170</sup> the parliamentarians nearly always act as minimalists.

In ruling on points of order, the parliamentarians “try to decide cases rather than to set down broad rules.”<sup>171</sup> At times, especially in the Senate, the chair rules without any explanation at all.<sup>172</sup> When an explanation is provided, it may be as short as a single sentence.<sup>173</sup> House parliamentarians typically provide somewhat more explanation, but decisions are still rarely more than a few sentences. The House parliamentarian’s office prepares written decisions for the chair to read aloud in response to points of order but seeks to write rulings as concisely and as narrowly as possible.<sup>174</sup> One House parliamentarian described a “default position of minimalism,” noting that the office “is very hesitant about adding

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167. See Interview with House Parliamentarian (noting that some of those in the House parliamentarian’s office at the time of the controversy viewed the 1908 precedent as poorly reasoned).

168. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-7 (1996).

169. *Id.* at 15.

170. *Id.* at 23, 40 (providing examples of maximalist Supreme Court decisions).

171. *Id.* at 15.

172. See Interview with Senate Parliamentarian.

173. See, e.g., 141 CONG. REC. 30,413 (1995) (statement by the presiding officer) (“The Chair is informed that the provisions in the act cited are not applicable to this instance and that the point of order is not well taken.”); see also *id.* at 30,413-14 (a number of parliamentary inquiries seeking to clarify that brief ruling).

174. See Interview with House Parliamentarian; Interview with Senate Parliamentarian. Rulings are typically up to several sentences long, and they briefly state a holding with minimal explanation. A representative example is the following ruling, on whether an amendment concerning wages for domestic agricultural workers is germane under House rules to a bill concerning agricultural workers from Mexico: “The amendment proposes to bring in a new class [of workers] not contemplated in the bill. Therefore the Chair sustains the point of order.” 10 DESCHLER’S PRECEDENTS, *supra* note 68, ch. 28, § 13.17, at 8173.

dicta, even if it could be clarifying.”<sup>175</sup> Another noted the office’s reluctance to engage with hypotheticals or issues otherwise not directly presented.<sup>176</sup>

The parliamentarians also act as minimalists in their work away from the floor. They provide somewhat more explanation in their advisory capacities than they do on the floor, but minimalist values still shape the advisory role. In giving advice, the parliamentarians respond to specific questions and rarely issue broad pronouncements.<sup>177</sup> They also at times wait to render advice, declining to express views on the permissibility of a provision or course of action until it is clear that the issue is squarely presented.<sup>178</sup> The parliamentarians generally do not explain their committee-referral decisions in writing. And published volumes of precedents take care not to say more than necessary to accurately report precedents.<sup>179</sup> In each of these respects, the parliamentarians act consistently with principles of decisional minimalism.

This extreme minimalism poses a challenge: if decisions are made with little or no explanation, how can they serve as precedents in future cases? It is not clear

175. Interview with House Parliamentarian. Dicta can slip in, one House parliamentarian noted, either because of an error by the parliamentarian or because of the chair ignoring the precise wording that the parliamentarian provided. Interview with House Parliamentarian. A Senate parliamentarian noted that “frequently presiding officers would not repeat [verbatim] what we had told them to say . . . because they felt a more folksy delivery would be better,” and as a result the presiding officer could “imprecisely state either the predicate of the issue or our conclusion, in which case the Congressional Record would be muddled.” Interview with Senate Parliamentarian.

176. Interview with House Parliamentarian.

177. See Interview with Senate Parliamentarian; Interview with Senate Staffer; see also Sheryl Gay Stolberg, *For Senate Parliamentarian, Great Power but a Sensitive Constituency*, N.Y. TIMES (May 31, 2003), <https://nytimes.com/2003/05/31/us/for-senate-parliamentarian-great-power-but-a-sensitive-constituency.html> [<https://perma.cc/W7XX-2FCD>] (“I only answered the questions they asked me. I never volunteered anything.” (quoting Floyd Riddick)); Riddick Interview #3, *supra* note 70, at 85-86 (elaborating on this approach). There have been rare departures from parliamentary minimalism in advice-giving, but parliamentarians have restricted such exceptions to issues of high institutional importance. See Letter from Alan S. Frumin, Senate Parliamentarian, to John Cornyn, United States Senator 1-2 (May 1, 2008) (on file with author) (providing guidance on what sorts of proposals would be “corrosive” or “fatal” to the privileged nature of legislation considered under special procedures, but noting that it was “either impractical or inappropriate” to provide a letter of that sort except “on a very few rare occasions where the issues carried significant institutional implications”).

178. See, e.g., Interview with Senate Staffer (describing an example of this in the Byrd-bath context); Burgess Everett & John Bresnahan, *Senate and John Roberts Face Possibility of Epic Tie on Witnesses*, POLITICO (Jan. 29, 2020, 6:25 PM EST), <https://politico.com/news/2020/01/29/john-roberts-trump-impeachment-trial-109109> [<https://perma.cc/HD7H-QZ2E>] (noting that the Senate parliamentarian declined to advise on issues of first impression in the run-up to President Trump’s impeachment trial).

179. See Interview with House Parliamentarian.



how a precedent should apply when that precedent fails to set out a decision rule or provide enough background to aid future decision-makers seeking to reason by analogy.<sup>180</sup> There may be multiple plausible rationales for a decision, but if that decision is minimalist in character it will not be clear which rationale was relevant or decisive. A later-in-time decision-maker can never be certain whether a precedent is in fact analogous or instructive to a case at hand if that precedent does not state its rationale expressly.<sup>181</sup>

The federal courts avoid this challenge by limiting the precedential weight of decisions rendered without published opinions.<sup>182</sup> The parliamentarians give precedential weight even to extremely minimalist decisions, perhaps because they are institutionally suited to doing so. Unlike in a multitier judicial system, the parliamentarians' offices make precedent only for themselves. Supreme courts and other appellate courts provide the reasoning behind their decisions in part to guide other courts that must apply their precedents. Because the parliamentarians do not make precedent for any outside decision-makers, their burden of explanation is lessened. Moreover, because the parliamentarians and their staffs generally serve for long tenures, the precedents that they apply are often their own earlier decisions. In such instances, no guesswork or inferences are necessary; a parliamentarian can simply recall their rationale from an earlier matter and apply that same rationale in the matter at hand.

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180. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17-19, 29-30 (1989) (discussing these two models of precedent).

181. Consider a hypothetical example from the domain of education policy: a ruling that an amendment concerning funding for school lunches is not germane to a bill regulating school curricula. One might infer either of two underlying rationales for that ruling: perhaps the amendment is not germane because it concerns a different area of policy (curricula versus school lunches), or perhaps the amendment is not germane because of the different mechanisms employed (regulation versus funding). These two rationales would yield the same result in the initial ruling, but they would have different implications for future cases. Without explanation, a decision-maker would not know how the ruling should guide future cases.

182. See *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("A summary disposition affirms only the judgment of the court below and no more may be read into our action than was essential to sustain that judgment." (citation omitted)); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1236 n.9 (2004) (citing circuit rules stating that unpublished opinions are not binding precedent). Some have argued that rendering judicial decisions without precedential effect is unconstitutional. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.) (Arnold, J.), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000).

### D. Interpretive Tools: Legislative Purpose and Legislative History

Despite the centrality of precedent to parliamentary decision-making, instances do arise in which precedent is of little help.<sup>183</sup> When precedent does not resolve a question, the parliamentarians turn to legislative purpose and legislative history. They do so in two contexts. First, they consider the purpose and history of the framework statutes and cameral rules that govern how Congress operates. Second, they consider the purpose and history of substantive bills under consideration when those bills become the objects of procedural contestation. In considering both purpose and history, the parliamentarians have none of the hesitations around those tools that some contemporary judges do. Instead, the parliamentarians view purpose and history as key tools to aid in the understanding of ambiguous rules and legislation.

#### 1. Purpose

The parliamentarians consider both the overriding, general purposes of the chamber's system of procedural rules and the specific purposes of particular rules or statutory provisions. With respect to general purpose, each chamber's parliamentarians understand their chamber's rules as having a clear purpose. In the House, the precedents have an "overriding function" of "enabl[ing] the Members to govern themselves democratically and fairly and at the same time executing the will of the majority."<sup>184</sup> This majoritarianism contrasts with the Senate's protection of minority rights: the Senate parliamentarian safeguards "the unique nature of the Senate as the only institution in the federal government that gives some power to those out of power."<sup>185</sup> Though these statements of general purpose do not provide decision rules for particular cases, they do recognize that chambers' systems of rules serve overriding purposes – of enabling or limiting

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183. Framework statutes, such as those governing the budget process and trade policy-making, are especially likely to implicate novel issues about which precedent is absent. Interview with Senate Parliamentarian (noting that, in such cases, "precedent is only marginally useful," and decisions may be "not guided by precedent but [instead] the result of judgment calls"); Interview with Senate Parliamentarian (noting that the passage of new framework statutes required the parliamentarians to make a large number of highly influential decisions in the absence of precedent). In the ACA Byrd bath discussed above, for example, issues around the minimum-coverage requirement and Planned Parenthood funding had arisen before, but other issues were ones of first impression. Interview with Senate Staffer.

184. 1 DESCHLER'S PRECEDENTS, *supra* note 68, at viii.

185. Email from Senate Parliamentarian to author.

majority rule, respectively. The parliamentarians seek to interpret ambiguous rules in light of those purposes.

The role of general purpose in parliamentary decision-making is illustrated by debates in the 1980s over how many reconciliation bills a single budget resolution could generate. No statutory provision, cameral rule, or parliamentary precedent provided clear guidance. The Senate parliamentarian relied on the countermajoritarian character of the Senate in deciding to limit each budget resolution to generating at most one reconciliation bill affecting revenues, one affecting outlays, and one affecting the debt limit.<sup>186</sup> Without such limits, “[t]he potential for abuse was unlimited,” with the majority able to pass a “theoretically unlimited number of bills that couldn’t be filibustered whose content was largely beyond scrutiny.”<sup>187</sup> Failing to impose limits would have been inconsistent with a major purpose of Senate rules: protecting the rights of the minority party.

In reaching this conclusion, the parliamentarian also considered the specific purpose of relevant budget rules. The reconciliation process is an exception to the Senate’s general (supermajority) cloture requirement. The Byrd rule was passed to remedy “the Pandora’s box which has been opened to the abuse of the reconciliation process,” given the widespread use of reconciliation as a vehicle for policy-making prior to the Byrd rule’s passage.<sup>188</sup> During floor consideration of what would become the Byrd rule, leaders of both parties made clear that the purpose of budget-reconciliation rules was not to eliminate the general minority-protective character of Senate rules. The majority leader expressed concern that a majority could “just wait for the reconciliation bill to come up every year and put anything on reconciliation,” a tactic that is “[o]bviously” inconsistent with “the purpose of the Budget Act.”<sup>189</sup> The minority leader concurred, noting that nobody foresaw that the Budget Act would be used to subvert cloture requirements and arguing that “if we are going to preserve the deliberative process in this U.S. Senate . . . action must be taken now to stop this abuse of the budget process.”<sup>190</sup> The parliamentarian discerned from statements like these that the purpose of the reconciliation process was to create a narrow exception to the

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186. *Id.*; see also William G. Dauster, *The Congressional Budget Process*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 26-28 (Elizabeth Garrett et al. eds., 2008).

187. Email from Senate Parliamentarian to author.

188. 131 CONG. REC. 28,968 (1985) (statement of Sen. Byrd).

189. See *id.* at 28,973 (statement of Sen. Dole).

190. See *id.* at 28,968 (statement of Sen. Byrd); see also STAFF OF S. COMM. ON THE BUDGET, 103D CONG., *BUDGET PROCESS LAW ANNOTATED* 230-46 (Comm. Print 1993) (annotated by William G. Dauster) (discussing relevant legislative history).

Senate's general supermajority operating procedures. He then concluded that allowing an unlimited number of reconciliation bills would be inconsistent with reconciliation's purpose.<sup>191</sup> This conclusion has a textual basis,<sup>192</sup> but it is strengthened considerably by accounting for the purpose of budget reconciliation rules.

## 2. *Legislative History*

The parliamentarians are trained as attorneys and work within a stone's throw of the Supreme Court. One might expect that they would have absorbed some degree of the contemporary Court's skepticism of legislative history.<sup>193</sup> Instead, both chambers' parliamentarians freely draw on legislative history as an interpretive tool, and no interviewee expressed any concern about the appropriateness or reliability of doing so.

Examples abound of the parliamentarians looking to legislative history. The Senate parliamentarian's most significant judgments about how the reconciliation process may be used have turned on the legislative history of relevant budget provisions.<sup>194</sup> In the House, "[t]o resolve an ambiguity when ruling on a point of order," it is permissible both to "examine legislative history established during

191. Email from Senate Parliamentarian.

192. The textual argument relies on the Budget Act's requirement that budget resolutions "specify the total amount" of changes to spending, entitlements, and revenues. 2 U.S.C. § 641(a)(1)-(a)(2) (2018). A single bill per reconcilable category could effectively reconcile the total amount for that category, while multiple bills would each reconcile some amount but none would reconcile the total amount. And, if some bills passed and others did not, the total reconciliation target would not be met. The inclusion of the phrase "total amount," the reasoning goes, therefore favors limiting the number of reconciliation bills.

193. One sitting Justice has contended that "we're all textualists now in a way that . . . was not remotely true" prior to the 1980s. See Harvard Law Sch., *The Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 17, 2015), <https://youtube.com/watch?v=dpEtszFToTg> [<https://perma.cc/XK6A-88X6>] (quoting Justice Elena Kagan). Despite the prominence of statutory textualism, many judges still rely upon legislative history. See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324 (2018) ("Every judge we spoke with, except for one, told us he or she uses legislative history.").

194. See, e.g., *supra* notes 188-191 and accompanying text (showing parliamentary reliance on legislative history in limiting the number of reconciliation bills); see also Andrew Taylor, *Law Designed for Curbing Deficits Becomes GOP Tool for Cutting Taxes*, CQ WKLY., Apr. 7, 2001, at 770 (describing former Senate parliamentarian Robert Dove's reliance on legislative history in determining whether tax cuts may be passed through the reconciliation process).

debate on an amendment against which a point of order has been reserved”<sup>195</sup> and to “examine the accompanying report to determine the intent of the section.”<sup>196</sup> The volumes of parliamentary precedents are rife with invocations of legislative history in rulings on points of order.<sup>197</sup> In evaluating an appropriation, “[t]he legislative history of the law in question may be considered to determine whether sufficient authorization for the project exists.”<sup>198</sup> And several precedents setting out default principles for interpreting resolutions reported by the House Rules Committee constrain those defaults to apply only “in the absence of legislative history establishing a contrary intent by that committee.”<sup>199</sup>

The parliamentarians’ use of legislative history extends even to types of legislative history that judges and legal scholars have characterized as comparatively unreliable.<sup>200</sup> The Senate parliamentarian’s interpretation of a 2007 law restricting earmarks is illustrative. A statutory provision allowed senators to “raise a

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195. THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 114-192, at 875 (2017) [hereinafter HOUSE MANUAL] (citing 124 CONG. REC. 17,651 (1978)).

196. *Id.* (citing 150 CONG. REC. 14,181 (2004)).

197. *See, e.g.*, 8 DESCHLER’S PRECEDENTS, *supra* note 68, ch. 26, § 32.21, at 5797 (noting that “the Chair has examined the legislative history . . . in an effort to understand congressional intent” in interpreting an appropriations act); *id.* § 28.3, at 5724 (considering the legislative history of the Federal Aid Highway Act in determining whether the statute covered a proposed appropriation); *id.* § 3.15, at 5277 (noting that when the House adopted a resolution waiving a rule in particular circumstances, the Chair relied on legislative history to discern the scope of those circumstances); 7 DESCHLER’S PRECEDENTS, *supra* note 68, at ch. 25, § 2.7, at 4990 (noting that “[t]he Chair has examined the legislative history” in interpreting an appropriations act).

198. HOUSE PRACTICE, *supra* note 2, at 84 (citing 7 DESCHLER’S PRECEDENTS, *supra* note 68, at ch. 25, § 2.7, at 4988).

199. The precedents use this language on at least three occasions. *See* 9 DESCHLER’S PRECEDENTS, *supra* note 68, at ch. 27, § 3.68, at 6653; *id.* § 4.3, at 6678; *id.* § 32.4, at 7267–68. In addition, a parliamentarian’s note in *Deschler’s Precedents* indicates that “[w]hen called upon to interpret the provisions of a special rule adopted by the House, the Speaker may examine the legislative history of that resolution, including debate and statements of members of the Committee on Rules during its consideration.” 6 DESCHLER’S PRECEDENTS, *supra* note 68, at ch. 21, § 19.1, 4108.

200. Committee reports are often treated as an especially authoritative form of legislative history, while statements by individual legislators and postenactment legislative history are viewed as comparatively unreliable. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990). Some have criticized this conventional hierarchy of legislative history, arguing either that it fails to reflect how Congress actually functions, *see, e.g.*, NOURSE, *supra* note 12, at 69, or that it is undertheorized, *see, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1880 (1998).

point of order against one or more provisions of a conference report if they constitute new directed spending provisions.”<sup>201</sup> Shortly after passage, the question arose whether this provision applied to earmarks added to authorization bills during conference committee negotiations.<sup>202</sup> In ruling on the matter, the parliamentarian was willing to take “into serious consideration” the postenactment views of Senator Harry Reid (D-NV), who had been the majority leader when the statute passed.<sup>203</sup> The parliamentarian’s willingness to consider the postenactment statements of a single legislator, even a party leader, demonstrates openness to a wide range of extra-textual sources.

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This Part has shown the ways in which the parliamentarians do and do not mimic judicial decision-making. It might at first seem that little meaning can be found in the similarities and differences between the two systems of law. But internal congressional dynamics provide an explanation for why parliamentary decision-making looks the way that it does. The fact that majority parties in Congress hold the power to overrule, ignore, or even remove the parliamentarian exerts a gravitational pull on the parliamentarians’ jurisprudence. Knowing that their positions are precarious, the parliamentarians seek to bolster their autonomy. The next Part shows how the decision-making approaches just described, along with other aspects of how the parliamentarians work, help safeguard their autonomy.

### III. PRESERVING AUTONOMY IN THE SHADOW OF POLITICS

While the last Part described how parliamentary decision-making operates, this Part seeks to explain it. Why has the body of parliamentary precedent developed in the way that it has? The answer lies in the intersection of politics and law, in the form of the relationship between legislators and the parliamentarians.

It is critical to the parliamentarians’ continued autonomy that legislators view their rulings as legitimate. If a parliamentarian alienates the majority party, that majority can circumvent the parliamentarian by removing, overruling, or ignoring them. But if a parliamentarian is biased toward the current majority, then when party control changes the new majority would remove, overrule, or

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201. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 763 (adding SENATE RULES, *supra* note 4, r. XLIV(8)(a)).

202. Alexander Bolton, *Senate Rules Referee Is Put on the Hot Seat*, HILL (Sept. 21, 2007, 7:23 PM), <https://thehill.com/homenews/news/13099-senate-rules-referee-is-put-on-the-hot-seat> [<https://perma.cc/EB99-G8NG>].

203. *Id.*

ignore the parliamentarian. Long-term parliamentary autonomy therefore depends on the parliamentarians' decisions retaining the respect of legislators from both parties. This question whether a person or institution's authority is perceived as "deserving of respect or obedience"<sup>204</sup> is sometimes characterized as a question of sociological legitimacy.<sup>205</sup>

There are two main aspects of the parliamentarians' legitimacy in the eyes of legislators. The first is legislators' perceptions of the parliamentarians' *neutrality*. Every parliamentarian interviewed, regardless of the chamber and time period in which they served, assiduously maintained that they had never acted on anything other than their best view of the rules and precedents. All emphasized that neither external pressures nor personal policy preferences ever shaped their judgments. A Senate parliamentarian has noted that the parliamentarian "is the one person who is paid to represent and defend the procedural integrity of the body," while "[e]verybody else . . . is paid to advance a partisan agenda."<sup>206</sup> A House parliamentarian described making decisions that ran contrary to their personal policy views but were "correct" from the standpoint of precedent.<sup>207</sup> "[O]ver time," that interviewee noted, "that reputation adheres, and I think that's why [the parliamentarians] have a solid relationship on both sides of the aisle."<sup>208</sup>

Legislative staff appear to view the parliamentarians as neutrals: interviewees largely agreed about the basic fairness and neutrality of the House parliamentarians over the past many decades and of the Senate parliamentarians since 2001.<sup>209</sup> There have, however, been periodic allegations of parliamentary bias in the Senate. The Senate parliamentarian was perceived as too close to the majority

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204. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790-91 (2005). For an early and influential account of sociological legitimacy, see MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947).

205. References to legitimacy in this Part are to sociological legitimacy, as opposed to moral or legal legitimacy. See Fallon, *supra* note 204, at 1795-96.

206. Amanda Michelle Gomez, *The Senate's Referee-in-Chief Will Have a Key Role in the Fate of Trumpcare*, THINKPROGRESS (July 14, 2017, 4:04 PM), <https://thinkprogress.org/alan-frumin-bcra-485f4f7e63f5> [<https://perma.cc/QL2D-BYM3>] (quoting Alan Frumin).

207. Interview with House Parliamentarian.

208. *Id.* As another House parliamentarian put it: "[W]e just wanted to get it right. . . . Technically right. Not right from policy standpoint, but a precedent standpoint. . . . [T]hat was really what was motivating us." Interview with House Parliamentarian.

209. See Interviews with Senate Staffers; see also, e.g., Debbie Siegelbaum, *House Parliamentarian John Sullivan to Retire*, HILL (Feb. 28, 2012, 8:54 PM), <https://thehill.com/homenews/house/213097-house-parliamentarian-john-sullivan-to-retire> [<https://perma.cc/T9U5-C8BD>] (noting praise for House parliamentarian John Sullivan from both parties' leaders).

party in the late 1970s and again in late 1990s.<sup>210</sup> Both parties heavily criticized the Senate parliamentarian for his handling of Budget Act matters in 2001.<sup>211</sup> And on several occasions a Senate majority leader has implicitly or explicitly threatened to replace the parliamentarian with a more partisan actor, backing down only when the incumbent parliamentarian gave advice consistent with the leader's preferences.<sup>212</sup> Despite these episodes, all House parliamentarians and the last two Senate parliamentarians have been perceived as honest brokers.

The particular history and features of the parliamentarians are contingent, but there is something more fundamental about the existence of some official who serves as a neutral interpreter and enforcer of a legislative body's procedural rules. To be accepted as legitimate by partisans, the system for interpreting and applying rules must be seen as outside of ordinary politics. Congress achieves this through the selection of parliamentarians who lack partisan backgrounds, while the British House of Commons elects a speaker from among its members but then requires that speaker to "drop his party affiliation and remain neutral on matters of policy."<sup>213</sup> Regardless of institutional particulars, for a system of procedure to appear legitimate to legislators, there must be some sort of impartial mode of enforcement.

The other key component of the parliamentarians' legitimacy is the perception of their *expertise*. Parliamentary practice is complex. Tens of thousands of precedents, both formal and informal, together form systems of law in the House and Senate with little connection to the broader legal system that exists outside

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210. See Email from Senate Staffer to author (discussing Parliamentarian Robert Dove and the Republican majority in the 1990s); *infra* notes 268, 287 (discussing Parliamentarian Murray Zweben and the Democratic majority in the 1970s); see also 104 CONG. REC. 11,943 (1996) (statement of Sen. Exon) ("[T]he Parliamentarian, of course, is appointed by the party in the majority, and when we were in the majority we had our Parliamentarian. Now that the Republicans are in the majority, they are entitled to and have their Parliamentarian. We like to keep the Parliamentarians as nonpartisan as possible, but I must admit that over the years I have been here I have seen our Parliamentarian rule in our favor, and while I cannot prove it, I happen to feel that today's Parliamentarian rules in favor of the people that appointed him.").

211. See *infra* notes 225-232 and accompanying text.

212. Email from Senate Staffer to author.

213. Ellen Barry, *John Bercow, Shouting for 'Order' Amid Chaos, Is Brexit's Surprise Star and Villain*, N.Y. TIMES (Jan. 20, 2019), <https://nytimes.com/2019/01/19/world/europe/brexit-speaker-john-bercow.html> [https://perma.cc/37F6-97DA]; see also MCKAY & JOHNSON, *supra* note 2, at 36-37, 42. The role of the Speaker of the House of Commons at times gives rise to considerable controversy. See, e.g., Barry, *supra* (discussing Speaker John Bercow's role in parliamentary debates over Great Britain's exit from the European Union).



of Congress.<sup>214</sup> By developing highly specialized knowledge that others lack, the parliamentarians have gained strong reputations for holding unique expertise.

This Part examines how the parliamentarians have actively fostered their reputations for neutrality and expertise and how these reputations have safeguarded their autonomy. Section III.A shows how the various decision-making processes discussed in the previous Part strengthen the parliamentarians' reputations for neutrality by limiting their discretion. Section III.B shows how the parliamentarians' approach to personnel enhances their reputations as neutral experts. Section III.C shows how the parliamentarians have used their advisory roles to build relationships and credibility with legislators from both parties. Section III.D shows how the parliamentarians' low public profiles and the inaccessibility of many precedents benefit the parliamentarians.

### A. *Decision-Making Approaches*

The core features of parliamentary decision-making can all be understood as preserving and enhancing the parliamentarians' reputations. Those methods of parliamentary decision-making restrict the parliamentarians' discretion, underscore their nonpartisan neutrality, and show respect for the judgments of elected majorities.

#### 1. *Strong Stare Decisis*

The tenuous institutional positions of the parliamentarians help explain their strict adherence to stare decisis. To do otherwise would risk frustrating legislators, giving rise to accusations of bias, and making the endeavor of parliamentary decision-making appear less lawlike.

The parliamentarians themselves acknowledge the link between strong stare decisis and legitimacy. “[F]idelity to precedent,” the current House Parliamentarian writes, “promotes analytic consistency and procedural predictability and thereby fosters legitimacy in parliamentary practice.”<sup>215</sup> These reasons closely track the justifications that courts and scholars give for abiding by stare decisis

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214. There are occasional points of intersection, such as the Constitution's Origination Clause, U.S. CONST. art. I, § 7, cl. 1. See Michael W. Evans, “A Source of Frequent and Obstinate Altercations”: *The History and Application of the Origination Clause*, 105 TAX NOTES 1215, 1232 (2004).

215. *Parliamentarian of the House*, U.S. HOUSE REPRESENTATIVES, <https://house.gov/the-house-explained/officers-and-organizations/parliamentarian-of-the-house> [https://perma.cc/7T9K-3DWC].

in the judicial context.<sup>216</sup> In that context, *stare decisis* promotes both fairness and the perception of fairness in adjudication.<sup>217</sup> Judicial *stare decisis* also “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”<sup>218</sup> Because “internal consistency strengthens external credibility,” Frederick Schauer has argued, “minimizing internal inconsistency by standardizing decisions within a decision-making environment may generally strengthen that decision-making environment as an institution.”<sup>219</sup>

Concerns about fairness are particularly acute in Congress. The legislators and legislative staff who interact with the parliamentarians are sophisticated repeat players.<sup>220</sup> They are highly attuned to the possibility of bias. The parliamentarians, especially when issuing controversial rulings, are susceptible to allegations of political bias. This is most true when parliamentarians issue decisions favoring the majority party: the minority party might believe that the parliamentarian was compelled to favor the majority to avoid being overruled, ignored, or even removed.

A system of strong *stare decisis* provides the parliamentarians with a powerful rejoinder to any accusations of bias: that precedent compels their conclusions. Accusations of bias are only plausible if the parliamentarians exercise discretion, since that discretion could be used to benefit one party or the other. By embracing strong *stare decisis*, parliamentarians minimize their discretion—and, even more importantly, their perceived discretion in the eyes of partisans. If the parliamentarians’ decisions are seen as compelled by precedent, they cannot credibly be accused of being biased. For these reasons, the parliamentarians have long

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216. See Schauer, *supra* note 20. They also track the reasons that Trevor Morrison has given for abiding by *stare decisis* principles at the Office of Legal Counsel. See Morrison, *supra* note 21, at 1494–97.

217. Schauer, *supra* note 20, at 595–96 (“To fail to treat similar cases similarly, it is argued, is arbitrary, and consequently unjust or unfair.”).

218. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986); see also, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377, at 350 (1833) (“A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions. . . .”); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1–16, at 82 (3d ed. 2000) (“In the American legal system, given its common law character, the principle of *stare decisis* has been at the very heart of the rule of law.”).

219. Schauer, *supra* note 20, at 600 (citing Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972)).

220. Cf. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (distinguishing repeat players from those who make only occasional recourse to a legal system).

described precedent as a key means of protecting their reputations for neutrality.<sup>221</sup>

Stare decisis is especially important in Congress given that legislators plan their future actions with the knowledge that those actions might face procedural objections.<sup>222</sup> Adherence to precedent gives legislators fair notice of how the parliamentarians' offices will respond to many issues. Parliamentarians have stressed that "questions must be resolved by established procedures, with all Members knowing what to expect."<sup>223</sup> If the parliamentarians regularly rendered opinions that surprised legislators, legislators would be unable to plan strategy and would quickly become frustrated. Consistency in decision-making, embodied by the use of strong stare decisis, helps reassure legislators that procedural surprises will not derail legislative plans.<sup>224</sup>

The instances in which parliamentarians have departed from precedent or acted erratically show the importance of consistency in parliamentary practice. The events of 2001, culminating in the most recent removal of a Senate parliamentarian, featured both parties citing departures from precedent as evidence of bias. Democrats' criticisms stemmed from the relationship between the budget reconciliation process and tax cuts. From the birth of reconciliation through the 1990s, reconciliation had not been used to enact tax cuts.<sup>225</sup> When Republicans passed their 2001 tax cuts through the reconciliation process, Parliamentarian

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221. See Interview with House Parliamentarian ("[T]he reason you follow . . . [precedent is that] it is the real source of legitimacy in [the] practices of the House."); see also 1 DESCHLER'S PRECEDENTS, *supra* note 68, at vi ("On the theory that a government of laws is preferable to a government of men, the House has repeatedly recognized the importance of following its precedents and obeying its well-established procedural rules.").

222. Cf. Schauer, *supra* note 20, at 597-98.

223. 1 DESCHLER'S PRECEDENTS, *supra* note 68, at vi; see also 1 HOUSE PRECEDENTS, *supra* note 76, at iii (noting the importance of "procedural predictability").

224. Adherence to stare decisis also has important efficiency benefits. When treating cases as ones of first impression would yield the same result as deciding based on precedent, relying on precedent saves decision-makers from having to redo legal analysis in each case, only to come to the same result each time. See Schauer, *supra* note 20, at 599; Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1339-40 (2008). Given the small size and high workloads of the parliamentarians' offices, the efficiency benefits of relying on precedent in decision-making are significant. See CANNON'S PRECEDENTS, *supra* note 34, at v (1935); Interview with Senate Staffer (describing workload demands in the contemporary parliamentarians' offices).

225. Kysar, *supra* note 27, at 2135. Budget resolutions in 1999 and 2000 instructed the relevant House and Senate committees to reduce revenues without any mention of changes to spending—implying that revenue reductions would come through tax cuts—but in both years reconciliation measures cutting taxes were vetoed by President Clinton. See REYNOLDS, *supra* note 129, at 87.

Robert Dove blessed this novel use of reconciliation.<sup>226</sup> Democrats were “infuriated”<sup>227</sup> and criticized Dove for this departure from past practice.<sup>228</sup> (The fact that Dove had previously worked for Republican leadership reinforced Democratic concerns that his novel position on tax cuts resulted from partisan or ideological bias.<sup>229</sup>)

Republican leadership, meanwhile, had other criticisms of Dove. That same year, they removed Dove from office based on his rulings on a different Budget Act dispute.<sup>230</sup> Republican leadership’s stated reason for removing Dove was not the substance of his rulings (though this no doubt played a role), but rather his lack of consistency. Republicans charged that this lack of consistency prevented them from planning a floor strategy.<sup>231</sup> As one Republican leadership staffer argued, “[I]f you cannot expect consistency from the parliamentarian, which is so critical to the functioning of the Senate, it creates a serious number of difficulties in managing the Senate.”<sup>232</sup>

Since Dove’s removal, his two successors have each taken special care to follow precedent and issue consistent rulings and advice.<sup>233</sup> They both survived changes to party control in part because of the more consistent manner in which they applied Senate rules and precedents.<sup>234</sup>

226. Aprill & Hemel, *supra* note 1, at 114. “Dove did not formally rule on the use of reconciliation for tax cuts [in 2001] because the Democrats refrained from raising a point of order, fearing that an adverse ruling would establish a precedent for future reconciliation bills.” SCHICK, *supra* note 45, at 149. Later rulings confirmed, however, that reconciliation could be used for tax cuts.

227. David E. Rosenbaum, *Rules Keeper Is Dismissed by Senate, Official Says*, N.Y. TIMES (May 8, 2001), <https://nytimes.com/2001/05/08/us/rules-keeper-is-dismissed-by-senate-official-says.html> [<https://perma.cc/9FNP-53G8>].

228. See, e.g., SCHICK, *supra* note 45, at 149 (“It would be a perversion of the reconciliation process to use it for spending or for tax cuts. That is not deficit reduction . . . . That is for what reconciliation ought to be reserved. Everything else ought to be under the regular order of the Senate . . . .” (quoting Senator Kent Conrad (D-N.D.))).

229. See *infra* note 265.

230. See, e.g., SCHICK, *supra* note 45, at 149.

231. Andrew Taylor, *Senate’s Agenda to Rest on Rulings of Referee Schooled by Democrats*, 59 CONG. Q. WKLY. REP. 1063, 1064 (May 12, 2001), <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport107-000000251494> [<https://perma.cc/F4C2-QNA3>] (“It was Dove’s inconsistent rulings on the critical budget process that led to his dismissal.”).

232. *Id.*; see also Rosenbaum, *supra* note 227 (quoting a Senate Republican staff assistant saying that Dove’s advice made it “hard for the leadership to plot a strategy” on tax cut legislation).

233. Interview with Senate Parliamentarian.

234. As in the United States, procedural referees in other legislative systems overrule or modify precedent at their own peril. During debates about Great Britain’s exit from the European Union, for example, Speaker of the House of Commons John Bercow came under intense

## 2. *Decisional Minimalism*

Decisional minimalism likewise enhances the parliamentarians' reputations for neutrality by constraining their discretion, at least in the short term. By rendering minimalist decisions, the parliamentarians avoid dilemmas of how narrowly or broadly to decide a given question and, if deciding it broadly, which rule to set out. Instead, minimalism gives the parliamentarians fewer choices as to how to resolve each controversy. For any given matter, the parliamentarians face a binary decision: to permit or forbid a proposed legislative action.

Decisional minimalism, and the lack of discretion that comes with it, gives legislators and legislative staff fewer grounds for objecting to a parliamentary ruling. One longtime Senate staffer summarized the strategic reasons for the parliamentarians' minimalism in simple terms: "[T]he more they say, the more problems they make for themselves."<sup>235</sup> Minimalism is one way in which the parliamentarians can perform modesty, thereby helping them avoid criticism and sanction from the majority party.<sup>236</sup>

This explanation for parliamentary minimalism finds further support in the fact that the other standard reasons for judicial minimalism do not apply to parliamentary decision-making. Minimalism is particularly appropriate in scenarios that implicate either changing technology or changing social norms, since a broad rule could quickly become anachronistic.<sup>237</sup> Interpretations of cameral rules and framework statutes do not implicate rapid changes of those sorts. Judicial minimalism may also have democratic benefits: it may "allow[] the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives."<sup>238</sup> This rationale carries less weight in the context of low-salience issues of parliamentary procedure. Finally, judicial minimalism may be a practical necessity to garner

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criticism, in part because of his willingness to depart from precedent: "I understand the importance of precedent, but precedent does not completely bind, for one very simple reason," he said. "If we were guided only by precedent, manifestly nothing in our procedures would ever change. Things do change." See Barry, *supra* note 213.

235. Interview with Senate Staffer.

236. There is a sense in which minimalism in a present case (of the sort the parliamentarians practice) may increase discretion in the future. Laying down a clear rule in the present can be constraining in future cases, whereas a minimalist decision in the present can leave greater latitude in the future. No parliamentarian or legislative staffer articulated the issue in those terms. Instead, interviewees described minimalism as discretion-constraining and as a means for the parliamentarians to avoid the sort of criticism lodged against courts that render overly broad decisions.

237. See Sunstein, *supra* note 168, at 17.

238. *Id.* at 19.

sufficient votes for a single opinion on a multi-member court,<sup>239</sup> but that too is not a factor in the parliamentarians' offices. Given that these alternative reasons for decisional minimalism seem not to apply to the parliamentarians, the most convincing explanation for parliamentary minimalism remains the strategic rationale.<sup>240</sup>

### 3. *Hierarchy of Precedents*

In common-law systems, hierarchies of precedents emerge.<sup>241</sup> The hierarchy of parliamentary precedents reveals how the parliamentarians see their authority in relation to that of legislative majorities. Because the parliamentarians exercise only delegated authority and serve at the pleasure of majority-party leadership, they are in a clear position of subservience relative to elected majorities. This gives them little choice but to defer to legislative majorities when those majorities speak clearly and definitively on questions of procedure.

The importance of majority power is reflected in the hierarchy of precedents that the parliamentarians have developed.<sup>242</sup> From strongest to weakest, that hierarchy proceeds as follows: (1) an authoritative interpretation of a rule by a majority, through a vote on an appeal;<sup>243</sup> (2) a decision of the chair in response to a point of order; (3) a chair's answer (not subject to appeal) to a parliamentary inquiry;<sup>244</sup> (4) advice away from the floor, including informal correspondence

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239. *See id.* at 17.

240. There are also pragmatic reasons for minimalism: the parliamentarians lack the capacity to write lengthy opinions of the sort that are commonplace in the judicial context. Most parliamentary decisions (formal and informal alike) must be made quickly. This requirement of speed, coupled with the small size and large workload in the parliamentarians' offices, is incompatible with producing detailed opinions.

241. *See, e.g.,* GARNER ET AL., *supra* note 20, at 164-72. In the federal judicial context, for example, Supreme Court decisions trump circuit court decisions, and some types of decisions (such as out-of-circuit decisions, district court decisions, and unpublished decisions) are not binding precedents but instead constitute merely persuasive authority.

242. *See* Bach, *supra* note 37, at 734.

243. Interview with House Parliamentarian.

244. RIDDICK'S SENATE PROCEDURE, *supra* note 68, at 145 (noting that responses to parliamentary inquiries are of "lower probative value than are rulings of the Chair or votes . . . on an appeal" but still provide guidance in the "absence of a stronger precedent to the contrary").

and the results of Byrd baths.<sup>245</sup> If different types of precedents point toward opposing conclusions, this hierarchy determines which should prevail.<sup>246</sup>

This hierarchy rests on a majoritarian foundation: precedents with stronger majoritarian pedigrees trump those with weaker ones. A majority of the House or Senate speaks most clearly when an appeal is taken and a majority of the chamber votes on a procedural matter. A decision of the chair in response to a point of order does not enjoy the same express majority support, but a majority can be understood as acquiescing in a chair's ruling by declining to reverse it on appeal.<sup>247</sup> The forms of precedent that carry the least precedential weight—responses to parliamentary inquiries and advice away from the floor—are least weighty because they are shielded from appeal and therefore not directly subject to majority power. The fact that the parliamentarians work in the shadows of chamber majorities effectively explains the hierarchy of parliamentary precedent.

Only a focus on majority power can explain why votes on appeals carry the highest weight. Votes on appeals may at first appear lawlike, since appeals from points of order on the floor are the culmination of a formal adjudicatory process. But appeals are not lawlike in a more important sense. In the Senate—the only chamber to witness successful appeals in the modern era—appeals are often used not to correct a chair's interpretive error but instead as a backdoor way of functionally changing chamber rules.<sup>248</sup> Consider the so-called “nuclear option,” which used appeals from rulings of the chair to eliminate the Senate's sixty-vote

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245. See Interview with Senate Staffer. Longstanding practices may also serve as precedents in the sense that they may come to serve as markers through which future actions are judged as either permissible or impermissible. See, e.g., 1 DESCHLER'S PRECEDENTS, *supra* note 68, at xi (1977) (describing “precedents *sub silentio*—that is, practices or procedures of the House which are never specifically ruled on”). Such practices more closely resemble conventions or norms than precedents, however, since they do not entail an authoritative decision-maker applying law to facts. This Article restricts its focus to precedents, as opposed to conventions or norms.

246. In practice, these conflicts arise only in domains with multiple types of precedents. For example: there are some Byrd-rule precedents arising from points of order. See RIDDICK'S SENATE PROCEDURE, *supra* note 68, at 625-26. But most consist of informal advice or the results of Byrd bath adjudications. In other domains, the hierarchy is less relevant because all relevant precedents are from the same source. Nearly any germaneness question in the House can be resolved with reference to precedents arising from points of order. See HOUSE PRACTICE, *supra* note 2, at 543-602. Committee referral precedents, meanwhile, consist of internal records of past referrals.

247. See RIDDICK'S SENATE PROCEDURE, *supra* note 68, at 145 (“If no appeal is taken, the ruling of the Chair stands as the judgment of the Senate and becomes a precedent for the guidance of the Senate in the future.”).

248. See Dauster, *supra* note 24, at 649-56 (citing 159 CONG. REC. S8,414-18 (daily ed. Nov. 21, 2013)); see also Gold & Gupta, *supra* note 129, at 209.

cloture threshold for nominees—first for executive-branch and most judicial nominees in 2013, and then for Supreme Court nominees in 2017.<sup>249</sup> The Senate majorities that reversed the chair on appeal did so not because they believed that the chair misapplied any rule or precedent. To the contrary, the chair correctly applied precedent as it existed at the time. Instead, majorities overruled the chair as a backdoor means of changing Senate rules.<sup>250</sup> In this sense, a vote on an appeal is best understood not as part of a common-law process but rather as an expression of majority will external to that process.

#### 4. Interpretive Tools

The parliamentarians' use of legislative purpose and legislative history as tools of interpretation is also consistent with the parliamentarians' institutional positions. Those tools have two benefits for the parliamentarians: they telegraph deference to legislative majorities and they limit the parliamentarians' discretion.

First, taking account of legislative purpose and legislative history is a way for the parliamentarians to show deference to legislators, especially majorities and leadership. As Chief Judge Robert Katzmann has argued, “[R]espect for Congress . . . means using the interpretive materials the legislative branch thinks important to understanding its work.”<sup>251</sup> A parliamentarian's invocation of Senator Byrd's understanding of his eponymous rule<sup>252</sup> or deference to Senator Reid's understanding of the Senate earmark ban<sup>253</sup> can each be understood as a way to show respect for the legislators who drafted bills and shepherded them through Congress. The parliamentarians have little interest in academic debates over whether legislative intent is a conceptual fiction.<sup>254</sup> Instead, they believe that bill

249. See Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/52K4-B9H2>]; Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <https://nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> [<https://perma.cc/6L8Z-UU5E>].

250. Most recently, a similar maneuver was used to change the amount of time allocated for post-cloture debate on nominees. See 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019) (recording the decision of the chair and vote to reverse on appeal); Carl Hulse, *In Altering Debate Time, Senate Steadily Hands Reins to Majority Party*, N.Y. TIMES (Apr. 4, 2019), <https://nytimes.com/2019/04/04/us/politics/senate-nuclear-option.html> [<https://perma.cc/C589-6HDB>].

251. KATZMANN, *supra* note 12, at 29.

252. See *supra* note 190 and accompanying text.

253. See *supra* note 203 and accompanying text.

254. The modern version of this intent-skepticism argument is rooted in public-choice theory, see, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 & n.20 (1983), but



sponsors and party leaders have intents, that bills themselves have purposes, and that they should seek to uncover those intents and purposes. Legislative history is a tool for doing so. This approach is consistent with legislators' own perceptions of the legislative process.<sup>255</sup> It is no surprise that the parliamentarians, who work for elected legislators, cannot ignore legislative purpose and legislative history when legislators view both as important.<sup>256</sup>

Second, legislative purpose and legislative history serve as useful constraints on the parliamentarians' discretion. The parliamentarians' general posture, exemplified by their approaches to *stare decisis* and decisional minimalism, is to adopt the most discretion-constraining decision-making methods available. Their approach to legislative purpose and legislative history can likewise be understood in this vein. By relying on these tools, the parliamentarians constrain their discretion because they must interpret contested provisions in light of their understanding of legislators' expectations, rather than their own goals or purposes.

This understanding of why the parliamentarians embrace legislative purpose and legislative history provides a new perspective on a longstanding debate in the statutory interpretation literature. "Given the volume and diversity of available legislative history," one leading textualist has written, "textualists fear that

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intent skepticism dates to at least the early twentieth-century legal realists, *see, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). A primary counterweight to intent skepticism is the claim—most associated with the legal-process school—that courts should assume that a "legislature [is] made up of reasonable persons pursuing reasonable purposes reasonably." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

255. *See, e.g.*, Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1156 (1992) ("[L]egislators view the legislative 'intent' as the policies represented in the statutory text and explained by the legislative leaders for any particular bill. In this sense, legislative 'intent' is an objective manifestation of policy."); Gluck & Bressman, *supra* note 12 at 975 (summarizing an empirical study of legislative staffers in which respondents emphasized the utility of legislative history).
256. *Cf.* Email from Senate Staffer to author (contending that the "[p]arliamentarians have no . . . bias against the legislative branch" that would lead them to "reject statutory history so as to maximize their ability to make up the law as they wish").

its use gives judges too much discretion to push their own preferred outcomes.”<sup>257</sup> Others have contended that the use of legislative purpose and legislative history in fact *limits* judicial discretion.<sup>258</sup> The parliamentarians’ approaches to legislative purpose and legislative history do not settle this debate, but they do provide an important data point. The parliamentarians—far more so than life-tenured federal judges—have strong incentives to choose the most discretion-constraining approach to interpretation available. The fact that they freely embrace legislative purpose and legislative history as interpretive tools provides evidence, albeit indirect, that those tools constrain decision-makers’ discretion. It would be strange for the parliamentarians to embrace discretion-constraining methods in other domains (notably *stare decisis* and minimalism) but to embrace a discretion-enhancing approach to legislative purpose and legislative history. It is far more logical, given the institutional incentives for the parliamentarians to deploy discretion-constraining methods of interpretation, to understand the use of legislative purpose and legislative history as discretion constraining.<sup>259</sup>

Parliamentarians are well equipped to understand legislative purpose and legislative history, more so than perhaps any other institutional actor. Some critics of the use of legislative history in statutory interpretation charge that judges are ill equipped to interpret legislative history, discern which sources are reliable,

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257. John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1925 (2015); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997) (elaborating this concern).

258. See, e.g., Eskridge, *supra* note 200, at 674-75 (“[I]t is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the judicial process), and statutory precedents (also generated by the judicial process), leaves the court with *more* discretion than an approach that just considers the latter three sources.”); Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 554 (2017) (“Adding sources tends to reduce the chance of discretion using a simple model of interpretation.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430-31 (1989) (“Without reference to the [legislative] history, interpretation sometimes becomes far less bounded . . .”).

259. Or, at the very least, as neutral with respect to discretion. Cf. Eskridge, *supra* note 200, at 675 (“[A] result-oriented jurist will refuse to be constrained under any approach, and a modest and diligent jurist will be constrained under either the new textualism or the traditional approach.”).

and apply sources to specific interpretive disputes.<sup>260</sup> The same may be true of legislative purpose: generalist judges may not be confident in their abilities to discern how legislative purpose bears on specific interpretive controversies, especially when those controversies involve complex budget or regulatory statutes. These criticisms do not apply to the parliamentarians, who are experts in the legislative process, including complex budget statutes. The parliamentarians are significantly more likely than generalist judges to understand how Congress actually operates. Of course, those skeptical of the use of extratextual tools in statutory interpretation have critiques beyond judicial competence.<sup>261</sup> But to the extent that concerns about judicial competence motivate skepticism of extratextual interpretive tools, the parliamentarians have specific expertise that equips them well to use those tools. This expertise allows them to account for legislative purpose and legislative history, thereby showing respect for Congress and limiting their own discretion.

### B. Personnel Policies

The parliamentarians' staffing practices play an important role in safeguarding their reputations for neutrality and expertise. There is a strong norm against parliamentarians or parliamentary staff holding partisan positions, either before entering the office or after leaving it. "Obviously you couldn't have a revolving door," one House parliamentarian has noted, because "it would make the office look bad."<sup>262</sup> Staffers in the parliamentarians' offices are typically hired when they are young and nearly always lack any partisan experience.<sup>263</sup> When parliamentarians or parliamentary staff leave the offices, they nearly always either retire or take jobs in nonpartisan settings.<sup>264</sup> There is only one example of a parliamentarian taking a partisan job after leaving the office, but that move was

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260. See, e.g., Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1140 (2011) ("[T]he most persuasive point made by textualists is that legislative history is simply too hard to find, to decipher, and to understand . . .").

261. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) ("First, textualist judges argue that a 535-member legislature has no 'genuine' collective intent with respect to matters left ambiguous by the statute itself. . . . Second, textualists contend that giving decisive weight to legislative history assigns dispositive effect to texts that never cleared the constitutionally mandated process of bicameralism and presentment." (footnotes omitted)).

262. Interview with House Parliamentarian; see also Riddick Interview #3, *supra* note 70, at 83 ("I knew that if I took that job that I had to go into a nonpolitical, nonopinionated career.").

263. Interview with House Parliamentarian.

264. See *id.*

widely condemned and thereby served to reinforce the norm against parliamentarians playing partisan roles.<sup>265</sup>

Relatedly, a strict norm dictates that parliamentarians are always promoted from within. This norm has helped maintain the perception of the parliamentarians as neutral rather than partisan. In the House, succession has been clean and straightforward: no parliamentarian has ever been removed, and retiring parliamentarians have always been replaced by their deputies.<sup>266</sup> The story in the Senate is more complex. Senate parliamentarians have been removed several times,<sup>267</sup> but in each instance they were replaced by someone with prior experience in the office. The emergence of this norm was far from preordained, however. The first removal occurred when the Republicans retook the Senate in 1981, after more than a quarter century in the minority. New Majority Leader Howard Baker (R-TN) dismissed Parliamentarian Murray Zweben, whom Baker perceived as too close to the Democratic leadership.<sup>268</sup> Baker offered the position to a political aide, Martin Gold, but Gold declined the position in part because Gold did not want to “be a partisan parliamentarian or be perceived to be one” and thought that his appointment would lead to the office being “corrupted by overt

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265. After being removed as Senate parliamentarian for the first time in 1987, Robert Dove served as a senior advisor to Senate Minority Leader Robert Dole (R-KS). Parliamentarians from both chambers strongly disapproved of Dove’s partisan work, and subsequent parliamentarians and parliamentary staffers have avoided taking partisan roles after leaving office. See Interview with House Parliamentarian; Interview with Senate Parliamentarian. In this respect, we can understand Dove’s partisan work as anticanonical in nature, “map[ping] out the land mines of the American constitutional order, and thereby help[ing] to constitute that order.” Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011); see also Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

266. Interview with House Parliamentarian.

267. See, e.g., Rosenbaum, *supra* note 227 (describing Senate Parliamentarian Robert Dove’s 2001 removal); *Parliamentarians on the Line*, CQ ALMANAC (43d ed. 1988), <https://library.cqpress.com/cqalmanac/cqal87-1143790> [<https://perma.cc/XK38-2YMW>] (describing Senate Parliamentarian Murray Zweben’s 1981 removal).

268. Interview with Senate Parliamentarian; Interview with Senate Staffer. In addition to concerns about Zweben’s close relationships with Senate Democrats, Republicans objected to Zweben submitting an affidavit in the litigation that culminated in *Goldwater v. Carter*, 444 U.S. 996 (1979), concerning whether the President could nullify a treaty without Senate approval. Zweben filed his affidavit, which described the status of a Senate resolution regarding treaty termination, in consultation with the Carter State Department and Senate Democrats, but without notice to Senate Republicans. See *Parliamentarians on the Line*, *supra* note 267.

partisanship.”<sup>269</sup> Baker then promoted Robert Dove, the assistant parliamentarian who had served under Zweben.<sup>270</sup>

This incident set an important norm: although removals of the parliamentarian have at times been partisan in nature, appointments have always been promotions from within the office or restorations to office of past parliamentarians, rather than installations of an outside party loyalist.<sup>271</sup> Upon retaking the Senate in 1987, Democrats removed Dove and replaced him with his assistant parliamentarian, Alan Frumin.<sup>272</sup> Republicans reinstalled Dove as parliamentarian when they gained a Senate majority in 1995. But they urged Frumin to remain in the office, and Frumin remained as senior assistant parliamentarian.<sup>273</sup> Dove was again removed in 2001, this time by Republicans – the only removal not concurrent with a change in party control. A norm of nonpartisanship then reemerged: Frumin again became parliamentarian, this time promoted by the Republicans, and he survived two subsequent changes in party control. Upon Frumin’s retirement, he was replaced by assistant parliamentarian Elizabeth MacDonough, who herself subsequently survived a change in party control. The twenty-first century has thus seen a return to parliamentary continuity in the Senate. At least as importantly, even during the tumult of several removals, neither party installed a parliamentarian who lacked previous experience in the parliamentarian’s office.

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269. Interview by Donald A. Ritchie, Associate Historian, Senate Historical Office, with Martin B. Gold, Counsel to the Senate Republican Leader, 1979–1982, 2003–2004 (Dec. 9, 2003) (on file with author).

270. *Parliamentarians on the Line*, *supra* note 267.

271. See Brian Palmer, *So, You Want to Be a Parliamentarian? How to Become the Senate’s Referee*, SLATE (Mar. 18, 2010, 5:58 PM), [https://slate.com/articles/news\\_and\\_politics/explainer/2010/03/so\\_you\\_want\\_to\\_be\\_a\\_parliamentarian.html](https://slate.com/articles/news_and_politics/explainer/2010/03/so_you_want_to_be_a_parliamentarian.html) [<https://perma.cc/3TNB-JD86>]. The nonpartisan character of parliamentary hiring (in fact, promotion) has been tenuous at times. In addition to when Gold was offered the position in 1981, the parliamentarian’s job has been offered to party loyalists at least two other times – at least once in the Senate and at least once in the House – only to be declined each time. On the House, see *infra* note 278 and accompanying text (on when Speaker Newt Gingrich (R-GA) considered installing a senior Republican staff member as parliamentarian in 1995). On the Senate, see Interview with Senate Staffer (on Gold again being offered the Senate parliamentarian’s job after Dove’s 2001 removal); and Andrew Taylor, *Senate’s Agenda to Rest on Rulings of Referee Schooled by Democrats*, 59 CONG. Q. WKLY. REP. 1063, 1064 (May 12, 2001) (“A Senate GOP officer would say only that [in 2001] Frumin was not Lott’s first choice but that he was the only real option under the circumstances.”).

272. Wayne King & Warren Weaver Jr., *Of Rules and Prayer*, N.Y. TIMES (Jan. 1, 1987), <https://nytimes.com/1987/01/01/us/washington-talk-briefing-of-rules-and-prayer.html> [<https://perma.cc/WX64-L56G>].

273. Interview with Senate Parliamentarian.

Promotion from within reinforces not only a reputation for neutrality, but also for expertise. Every parliamentarian, in both chambers, had previously served a long tenure as a more junior member of the office before ultimately being elevated. By the time a parliamentarian retires (or is removed), long-serving members of the office have developed extensive expertise in parliamentary practice, far more so than any possible external candidate. The widespread understanding is that “[h]iring an outsider is out of the question; no one coming in from the cold could possibly grasp the . . . procedural machinery, which depends almost entirely on precedent.”<sup>274</sup> In this way, the parliamentarians’ hiring practices buttress their expertise – and, just as importantly, the perception of their expertise.

### C. *The Advisory Role*

The parliamentarians’ advisory roles also help to bolster the perception that they are neutral rather than partisan. As noted in Part I, the parliamentarians work closely with party leaders, committee chairs, and rank-and-file legislators in both parties as those legislators craft bills and strategies.<sup>275</sup> This advisory role has been instrumental in helping the parliamentarians build trust with key members of both parties. In response to rising partisanship and the removal of several Senate parliamentarians, one Senate parliamentarian described the importance of the advisory role to his relationships with members: “I needed to be available and be perceived to be available,” he said. “I will talk to anybody. I will reserve judgment on any procedural question until I’ve heard from everybody. And I thought that that M.O. gave me the best chance to . . . be an honest broker and appear to be an honest broker.”<sup>276</sup>

This engagement with both parties is critical to maintaining the parliamentarians’ autonomy in two respects. First, it improves their standing with current majorities. The parliamentarian becomes a valued advisor to the majority party’s leader and committee chairs (and their respective staffs), who are attempting to pass a legislative agenda. The parliamentarians hold expertise that the majority party needs if it hopes to have a productive legislative session. By spending significant time advising majorities, the parliamentarians make themselves indispensable to the smooth functioning of their respective chambers.

Second, the advisory role safeguards the parliamentarians’ future autonomy by enabling them to build relationships with key members of the minority party.

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274. Stolberg, *supra* note 69.

275. See *supra* Section I.B.2.

276. Interview with Senate Parliamentarian.

The modern era has witnessed more changes in party control than any time in over a century.<sup>277</sup> When party control changes, an incoming majority will already have a working relationship with its chamber's parliamentarian and will not (the parliamentarian hopes) view the parliamentarian as too closely tied to the outgoing majority.

The aftermath of the 1994 midterm elections illustrates the importance of the parliamentarians' engagement with legislative minorities. Incoming Speaker Newt Gingrich (R-GA) wanted to replace House Parliamentarian Charles Johnson with a Republican staffer, Billy Pitts, but Pitts and other senior Republican staffers advocated that the position be kept nonpartisan.<sup>278</sup> They did so in part because, during their years in the minority, they had built trust through frequent consultations with Johnson and with others in his office.<sup>279</sup> This example shows how the advisory role can support the parliamentarians' reputations as neutral brokers who treat both parties fairly. It can also serve as an important insurance policy for the parliamentarians in the event that party control changes.

The advisory role has one other advantage for the parliamentarians: it reduces the number of successful appeals, thereby promoting the orderly development of precedent. By consulting with the parliamentarian before taking legislative action, a majority party can reduce the number of adverse rulings that it faces on the floor. This, in turn, reduces the frequency with which the majority will seek to overturn a ruling on appeal. Given the political character of the appeals process, too many successful appeals would undermine the common-law character of parliamentary precedent. Minimizing appeals, by contrast, helps preserve parliamentary precedent as a common-law system.

#### *D. Publicity and Transparency*

The parliamentarians keep low public profiles. They rarely speak to the press and they seek to avoid becoming public figures. If the work of the offices were more public, legislators might be more likely to agitate for replacing or circumventing uncooperative parliamentarians, interest groups might seek to lobby or otherwise influence the parliamentary process, and partisan media outlets might

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277. See *supra* note 32.

278. See Jonathan E. Kaplan, *Billy Pitts: Master of the House*, HILL (May 17, 2005, 12:00 AM), <https://thehill.com/business-a-lobbying/2824-billy-pitts-master-of-the-house> [<https://perma.cc/6B5M-GWEE>].

279. See Interviews with House Parliamentarians; Interview with Senate Parliamentarian; see also King, *supra* note 90, at 50 ("It is also common for members of the minority party to praise the parliamentarians as nonpartisan, which one would not expect if they were simply doing the Speaker's handiwork.").

blame the parliamentarians for unfavorable legislative outcomes. Any of these developments could threaten the autonomy of the offices. Instead, the parliamentarians best maintain their autonomy by keeping a low public profile.

This aversion to attention is helped by the opacity of most parliamentary precedent. Many precedents are not made available to legislators, legislative staff, or the public. The parliamentarians publish volumes containing cameral rules annotated with selected precedents,<sup>280</sup> but these volumes include only a small share of total parliamentary precedents. By contrast, the parliamentarians' offices in both chambers keep detailed internal records of earlier parliamentary advice and recommendations, both formal and informal.<sup>281</sup> The issue of access to precedents is most acute in the Senate, where precedents have not been published since a single volume in 1992.<sup>282</sup> One Senate staffer described the published precedents as "incredibly unhelpful."<sup>283</sup> Others have resorted to colorful analogies: one said that he felt like an "English common-law lawyer in 1670,"<sup>284</sup> and another described parliamentary process as being "as opaque as if I told you it was happening at the National People's Congress."<sup>285</sup>

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280. See HOUSE MANUAL, *supra* note 195; SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 113-1 (2014) [hereinafter SENATE MANUAL].

281. The House parliamentarian's office keeps detailed internal "scrapbooks" of formal and informal advice. See Interviews with House Parliamentarians; HOUSE PRACTICE, *supra* note 2, at iii. The Senate parliamentarian's office maintains an electronic system organized along two tracks: formal precedents (such as responses to points of order or parliamentary inquiries) and informal precedents (such as emails or other communication from the advisory process). See Interview with Senate Parliamentarian. Some committee staffs have attempted to build their own collections of precedents, but those collections are invariably less thorough than the larger collection held by the parliamentarian. See Interview with Senate Staffer.

282. See RIDDICK'S SENATE PROCEDURE, *supra* note 68. The House, by contrast, publishes its precedents in longstanding multivolume collections. See *The Legislative Process*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <https://clerk.house.gov/legislative/legprocess.aspx> [<https://perma.cc/4XFY-V6J7>] (containing links to *Hinds' Precedents*, *Cannon's Precedents*, and *Deschler's Precedents*). Staff in the House parliamentarian's office regularly review events on the floor, extract notable parliamentary incidents, and organize them into narratives that concisely state the applicable parliamentary principles at issue. 1 HOUSE PRECEDENTS, *supra* note 76, at iii; see also Interview with House Parliamentarian (describing the process). An internal database contains over 20,000 electronically searchable precedents, the most important of which are eventually published. 1 HOUSE PRECEDENTS, *supra* note 76, at iv. Assembling the precedents is the full-time job of several House employees. Interview with House Parliamentarian.

283. Interview with Senate Staffer.

284. Interview with Senate Staffer.

285. Interview with Senate Staffer.



The lack of transparency in parliamentary precedents is troubling as a normative matter.<sup>286</sup> But from the parliamentarians' perspectives, there is a clear benefit to that lack of transparency: it provides them with informational advantages, which reinforces their reputations for expertise. In earlier eras, parliamentarians were at times perceived as limiting publication in order to maximize their own power. Longtime House Parliamentarian Lewis Deschler "favored having [precedents] hidden in scrapbooks in the office . . . because it was such a concentration of power."<sup>287</sup> Contemporary shortfalls in publishing precedents do not appear to be strategic. Indeed, today's parliamentarians extol the benefits of publication. Publication can make legislative business more efficient, give legislators the tools necessary to be more effective, and reduce power inequalities between junior and senior legislators arising from differential knowledge of precedent.<sup>288</sup> The fact that precedents are not published more regularly or more thoroughly is predominately attributable to staffing limitations in the contemporary parliamentarians' offices.<sup>289</sup> Even so, the inaccessibility of precedents helps to preserve the parliamentarians' status as indispensable, since they hold access to unique information.

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286. A large literature details the harms that result from secret law, including but not limited to concerns about due process, the rule of law, consistency of application, abuse of government power, and democratic legitimacy. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 51 (rev. ed. 1969); David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154, 177-82 (Robert E. Goodin ed., 1996); Christopher Kutz, *The Repugnance of Secret Law* (unpublished manuscript) (on file with author). The nonpublication of some parliamentary precedent is far from ideal. It does not, however, implicate the core concerns highlighted by critics of secret law: parliamentary precedent does not regulate the conduct of private parties, give rise to prosecutorial discretion, or otherwise empower government to restrict individual liberty. Moreover, the precedents with the highest precedential weight—responses to points of order and parliamentary inquiries—appear in the Congressional Record and are therefore public, even if not well organized or easily searchable. Transparency is not a binary, and parliamentary precedent exists in the "vast space between total public disclosure and maximal internal stealth." David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 339 (2010).

287. Interview with Senate Parliamentarian; see also Interview with Senate Parliamentarian (noting that Republican grievances against Senate Parliamentarian Murray Zweben included his office's lack of transparency).

288. See 1 DESCHLER'S PRECEDENTS, *supra* note 68, at ix-x; 1 HINDS' PRECEDENTS, *supra* note 34, at iii.

289. The *Riddick's* publication process imposed a significant burden on the Senate parliamentarian's office, which, unlike its counterpart in the House, has no staff dedicated exclusively to assembling precedents. Interview with Senate Parliamentarian; Interview with Senate Staffer.

#### IV. LESSONS FOR PUBLIC LAW

The system of parliamentary procedure is largely disconnected from the rest of U.S. law. This Article's analysis can nonetheless inform public law beyond Congress. This Part considers the lessons and possible reforms that stem from the descriptive and analytical discussions in the previous Parts. Section IV.A considers how the parliamentarians' methods for protecting their autonomy apply to other institutions. Section IV.B briefly considers what the development of parliamentary procedure teaches about the development of law (especially common law) more generally. Section IV.C shows how this Article's analysis can bear on statutory interpretation. Section IV.D considers the future of parliamentary procedure in a partisan age.

##### A. *Fostering Legitimacy and Autonomy*

The parliamentarians' offices have mostly maintained their reputations as honest brokers on Capitol Hill, despite being surrounded by intense partisanship. The last Part showed how their approaches to decision-making, staffing practices, and publicity have contributed to their reputations in the eyes of legislators, and thus to their autonomy. Each of these features holds lessons for other institutions.

##### 1. *Legal Decision-Making and Legitimacy*

As the previous Part demonstrated, the parliamentarians bolster their reputations as neutral legal technicians by mimicking key features of the judicial process. In so doing, the parliamentarians are implicitly drawing on public understandings of legal decision-making as a distinctive and apolitical mode of reasoning. "Lawyers and judges, so the argument goes, have been trained to make analogical arguments, especially in common-law environments, and thus the class of lawyers and judges is characterized by a special expertise in analogical reasoning not possessed by those without legal training."<sup>290</sup>

The example of the parliamentarians can help clarify the relationship between legitimacy and decision-making in other legal institutions. Much of this Article has considered how courts can help us understand the parliamentarians, but the reverse is true as well. The parliamentarians have maintained legitimacy in the eyes of legislators by following a strict form of *stare decisis* and acting as minimalists. Contrasting their approach with that of the Supreme Court sheds

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290. Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 261 (2017).

light on how the Court's decision-making can enhance or undermine its legitimacy in the eyes of the public.

One way that the Supreme Court seeks to justify its authority is by reference to its decision-making processes. The Court itself has noted that its “power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”<sup>291</sup> Erwin Chemerinsky has argued that “[t]he processes the judiciary follows – arguments and reasoned decisions – [] accord it legitimacy, even when people disagree with particular rulings.”<sup>292</sup> The importance of decisional processes to legitimacy extends to both *stare decisis* and minimalism. The Court has justified *stare decisis* by noting that “[t]he legitimacy of the Court would fade with the frequency of its vacillation.”<sup>293</sup> So too, Alexander Bickel advocated for judicial minimalism as a means of securing the Court’s legitimacy in the face of the countermajoritarian difficulty.<sup>294</sup> The Court, like the parliamentarians, can deploy decisional processes that enhance the perceptions of its legitimacy.

The Supreme Court, however, departs from the strict *stare decisis* and minimalism that characterize parliamentary decision-making. The Court narrows and overrules its earlier decisions.<sup>295</sup> It can “reach[] out beyond the cases that were put before it by litigants to decide issues that were not in dispute between the parties.”<sup>296</sup> Even if these practices can be justified in particular cases, on the whole they can be taken as evidence that the Court’s decision-making is driven by something other than a strictly neutral application of legal principles (to the extent that such a strictly neutral application can exist).

The Court’s willingness to risk its legitimacy in this way almost certainly reflects its institutional features. As this Article has emphasized, the parliamentarians know that they exercise power in the shadow of congressional politics, and

291. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

292. Erwin Chemerinsky, *Further Thoughts*, 54 OKLA. L. REV. 59, 63 (2001).

293. *Casey*, 505 U.S. at 866; *see also id.* at 865 (noting that departing from *stare decisis* “would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law”).

294. *See* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); *see also* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1457 (2000) (“Bickel’s project might be described as juricentric – it counseled minimalism chiefly as a method of protecting the judiciary’s own place in the constitutional system . . . .” (emphasis omitted)).

295. *See supra* notes 161–162 and accompanying text.

296. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 161 (2011); *see also id.* at 174–202 (discussing four case studies).

they act accordingly. The Court is far more insulated from political forces. Of course, the Court cannot escape such forces entirely,<sup>297</sup> and political scientists have shown that the Court is responsive to public opinion, even if the mechanisms driving that responsiveness are unclear.<sup>298</sup> The majoritarian influences on the Court are much more attenuated, however, than the sword of Damocles that hangs over the heads of the parliamentarians. As a result, the Court is considerably more willing than the parliamentarians to bear the potential legitimacy costs imposed by departures from strict minimalism and *stare decisis*.

Outside of the courts, the Justice Department's Office of Legal Counsel (OLC) provides an additional data point. Although the OLC sits within the executive branch, it has sought to forge a distinctive role that roughly parallels that of the parliamentarians: "In rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives."<sup>299</sup> The OLC's reputation rests in part on its perceived judge-like neutrality and expertise, as compared to other executive-branch lawyers.<sup>300</sup> The OLC has

297. Most obviously, elected Presidents and elected Senators appoint and confirm Justices, respectively. The hope or fear of a particular appointment can also shape campaign messaging and voter decision-making. See, e.g., Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—And it Paid Off*, WASH. POST (June 26, 2018, 3:23 PM EDT), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off> [<https://perma.cc/ZM4F-ERP7>] (reporting from 2016 exit polls that "26 percent of Trump voters told pollsters that Supreme Court nominees were the most important factor in their voting, compared with only 18 percent of Hillary Clinton voters who said the same").

298. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 265–67 tbl.1 (2010) (reviewing relevant literature).

299. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <https://justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/RBP3-KU8G>]; see also *id.* ("OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers.").

300. See, e.g., Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1306 (2000) (noting that on one view "the executive branch lawyer acts more as a judge than as an advocate" and "shuns consideration of his client's desired policy goals and acts instead with complete impartiality"); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 726 (2005) (noting a view of OLC attorneys as "neutral, dispassionate advisor[s], interpreting the law more as a judge would than as a lawyer for a private client").

benefited from norms that insulate it from direct political control.<sup>301</sup> But OLC lawyers, like the parliamentarians, face risks if their legal interpretations prevent policy-makers from achieving their goals. The White House or agencies may decline to consult with the OLC before making policy,<sup>302</sup> or the OLC may even be expressly overridden by the Attorney General.<sup>303</sup> Whether the possibility of being circumvented or overruled shapes OLC decision-making, as it does for the parliamentarian, warrants further exploration.<sup>304</sup>

All legal decision-makers must be concerned with their legitimacy in the eyes of relevant audiences, although different decision-makers of course face different audiences. For the parliamentarian, the primary audience is legislators and legislative staff; for the OLC, it is senior officials within the executive branch; for the Supreme Court, it includes the polity as a whole. This Article's analysis of parliamentary precedent operates in parallel to the literature on legitimacy and judicial review, providing a window into how concerns about legitimacy can be a potent force in shaping legal decision-making across contexts.

## 2. *Personnel and Neutrality*

The parliamentarians maintain their reputations for neutrality in part by populating their offices with staffers who lack any partisan background. This hiring rule provides a useful contrast that helps clarify why other institutions have been vulnerable to critiques of partisanship, while the parliamentarians have mostly escaped those critiques.

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301. See Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 125 (2014) (“[T]he Department of Justice is structurally accountable to presidential power to direct and fire officials, and yet it has developed strong norms of professional independence, despite episodes of presidential intervention . . .”).

302. Jack Goldsmith has argued that the OLC declined in importance in the Obama Administration, as compared to past administrations of both parties. See Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015, 6:11 PM), <https://lawfareblog.com/decline-olc> [<https://perma.cc/K7Z3-KZ5Q>]. The White House consulted with various agency lawyers, for example, but not with OLC, in assessing the legality of the 2011 raid on Osama bin Laden's compound. See Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), <https://nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html> [<https://perma.cc/WMC4-NZX4>].

303. See, e.g., Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASH. POST (Apr. 1, 2009), <https://washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html> [<https://perma.cc/E5A5-3XHC>] (discussing the Attorney General rejecting OLC's view that a D.C. voting rights bill was unconstitutional).

304. See Morrison, *supra* note 21, at 1511-18.

The Supreme Court is, again, the most striking example. In a rare public statement, the Chief Justice in 2018 asserted that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>305</sup> Yet the pre-judicial experiences of the current Justices significantly undermine this argument: three worked at the White House; five served as political appointees in federal agencies (four at DOJ and one elsewhere); two held partisan jobs in the Senate; and two participated in investigations of sitting presidents.<sup>306</sup> These backgrounds make it wholly reasonable to suspect that Justices come to the Court not only with ideological commitments but also with partisan ones.<sup>307</sup> The Justices recognize that this perception is harmful to the Court because it undermines the perception of neutrality.<sup>308</sup> The Chief Justice deemed this threat so severe that he broke from his usual abstention from press statements to expressly rebut it. The parliamentarians avoid similar concerns about neutrality by having an extremely strict set of appointment criteria that prioritizes nonpartisan neutrality above all else. One could imagine a similar approach in the federal judiciary but demanding nonpartisanship in the selection of federal judges, especially on the Supreme Court and appellate courts, would require a dramatic change from longstanding practice that is virtually certain not to take place.

Perceptions of partisanship can similarly give rise to concerns in the bureaucratic context. The political identities of federal employees have at times been points of contention in public discourse. In recent years, for example, some Re-

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305. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/929W-EJBS>].

306. See *Current Members*, SUP. CT. OF THE U.S., <https://supremecourt.gov/about/biographies.aspx> [<https://perma.cc/65W3-2HPS>].

307. Despite these partisan experiences, the contemporary Supreme Court has a veneer of nonpartisan neutrality that was absent for much of the Court’s history. See generally NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES (2010) (profiling Justices Hugo Black, William Douglas, Felix Frankfurter, and Robert Jackson).

308. See Christine Wang, *Supreme Court Must Stay Out of Partisan Politics to Preserve Its Legitimacy, Kagan and Sotomayor Say*, CNBC (Oct. 6 2018, 2:39 PM EDT), <https://cnbc.com/2018/10/06/supreme-courts-elena-kagan-sonia-sotomayor-avoid-partisan-politics.html> [<https://perma.cc/HUS4-DTU3>].

publicans have criticized the partisan or ideological leanings of federal employees.<sup>309</sup> The laws regulating the political activities of federal employees serve several important functions,<sup>310</sup> one of which is to guard against perceptions that those employees are partisans of one side or the other. The Supreme Court has put the issue plainly: “[I]t is not only important that the Government and its employees in fact avoid practicing political [activities], but it is also critical that they *appear to the public* to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.”<sup>311</sup> For the civil service, as for the parliamentarians, abstention from partisan and electoral activities can safeguard reputations for expertise and neutrality.

The parliamentarians’ staffing practices contrast, however, with the revolving-door dynamics that exist in the bureaucracy. The norm against parliamentarians serving in partisan roles either before or after serving in the office safeguards the office’s reputation for neutrality.<sup>312</sup> Parallel rules and norms are weak for both leaders of and employees of the bureaucracy.<sup>313</sup> A robust literature documents the revolving door between regulators and regulated entities,<sup>314</sup> which can affect not only policy outcomes but also perceptions of whether agencies in

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309. The most recent example is the debate around the 2018-19 partial government shutdown. See, e.g., Christopher Kutz, *Does Trump’s Shutdown Illegally Target Democratic Federal Workers?*, SLATE (Jan. 18, 2019, 6:52 PM), <https://slate.com/news-and-politics/2019/01/trump-shutdown-targets-democratic-workers-illegal.html> [<https://perma.cc/8L22-URZQ>]; Tom Shoop, *Trump: Most Furloughed Employees Are Democrats*, GOV’T EXECUTIVE (Dec. 27, 2018), <https://govexec.com/management/2018/12/trump-most-furloughed-employees-are-democrats/153811> [<https://perma.cc/5FZQ-2NAG>].

310. See U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 564-67 (1973) (discussing reasons for passage of the Hatch Act and related reforms); see also *id.* at 564 (“[T]he judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.”).

311. *Id.* at 565 (emphasis added).

312. See *supra* Section III.B.

313. See, e.g., JACK MASKELL, CONG. RESEARCH SERV., R42728, POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL 3-6 (Jan. 7, 2014), <https://fas.org/sgp/crs/misc/R42728.pdf> [<https://perma.cc/8NJR-BQDN>] (discussing relevant restrictions on executive branch employees).

314. See, e.g., PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 214-15 (2006); Barry M. Mitnick, *Capturing “Capture”: Definition and Mechanisms*, in HANDBOOK ON THE POLITICS OF REGULATION 34, 41 (David Levi-Faur ed., 2011).

fact serve the public interest. Personnel policies, in sum, can shape perceptions of institutional legitimacy across government.

### 3. *Obscurity and Self-Protection*

The relative obscurity of the parliamentarians' offices likely contributes to their autonomy. This is one instance of a broader phenomenon: when an institution's autonomy depends on its neutrality, there are benefits to keeping the institution's work low-profile or even outright hidden from public view. The parliamentarians have recognized that having a public presence or even making public statements may provide partisans with grounds on which to accuse them of bias. The same principle applies to other institutions. The Federal Bureau of Investigation (FBI) has recently been criticized as partisan by Democrats and Republicans alike, and "[t]he result of th[is] FBI-as-political-football narrative is nothing but bad for the Bureau."<sup>315</sup> To prevent these sorts of criticisms, the FBI typically operates in accordance with a robust set of protocols intended to preserve its neutrality. One such protocol bars public statements about uncharged conduct.<sup>316</sup> Indeed, Democrats,<sup>317</sup> Republicans,<sup>318</sup> and the Inspector General<sup>319</sup> all fiercely criticized then-Director James Comey's public statements about uncharged conduct in the run-up to the 2016 presidential election. The reasons for the FBI's norm against making such statements closely echoes the

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315. Chris Cillizza, *The FBI Controversy Is the Latest Example of How We Don't Believe in Anything Anymore*, WASH. POST (Nov. 3, 2016), <https://washingtonpost.com/news/the-fix/wp/2016/11/03/the-fbi-controversy-is-the-latest-example-of-how-we-dont-believe-in-anything-anymore> [https://perma.cc/RB7W-FV4X].

316. See Office of the Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, U.S. DEP'T JUST. vi, 240, 246-47 (June 2018) [hereinafter *OIG Report*], <https://justice.gov/file/1071991/download> [https://perma.cc/W8H3-R40K].

317. See, e.g., David Weigel, *Forgive and Forget? No, Say Clinton Backers Who Still Blame Comey for Presidential Loss*, WASH. POST (Apr. 17, 2018), [https://washingtonpost.com/powerpost/forgive-and-forget-no-say-clinton-backers-who-still-blame-comey-for-loss-of-presidency/2018/04/17/10d607ac-419e-11e8-bba2-0976a82b05a2\\_story.html](https://washingtonpost.com/powerpost/forgive-and-forget-no-say-clinton-backers-who-still-blame-comey-for-loss-of-presidency/2018/04/17/10d607ac-419e-11e8-bba2-0976a82b05a2_story.html) [https://perma.cc/EK2E-7ZUQ].

318. See, e.g., Jake Gibson & Judson Berger, *Comey Edits Revealed: Remarks on Clinton Probe Were Watered Down, Documents Show*, FOX NEWS (Dec. 15, 2017), <https://foxnews.com/politics/comey-edits-revealed-remarks-on-clinton-probe-were-watered-down-documents-show> [https://perma.cc/5QQR-5ZWD].

319. See *OIG Report*, *supra* note 316, at vi, 240, 246-47.



reasons for the parliamentarians' low profiles, and the fallout from Comey's public statements demonstrates the risks that excessive public exposure poses to perceptions of neutrality.

Similar dynamics apply at the Congressional Budget Office (CBO). "The CBO has emerged over its history as a neutral analyst of congressional budgets and cost estimates for proposed legislation."<sup>320</sup> The ways in which the CBO retains this reputation parallel approaches taken by the parliamentarians. The CBO seeks to avoid the spotlight, though during consideration of major legislation it "inevitably gets thrust into a spotlight that [it] does not crave."<sup>321</sup> The CBO provides only analysis, assiduously avoiding any statements that could be construed as policy recommendations.<sup>322</sup> Moreover, even when the CBO is subject to partisan criticism, it declines to enter the partisan fray itself.<sup>323</sup> These examples show that the parliamentarian is far from alone in viewing a low profile as a key safeguard of their autonomy.

#### 4. Norms and Institutions

Many norms have frayed in this era of constitutional hardball,<sup>324</sup> but the autonomy of the parliamentarians has (mostly) survived. This Article's account of the parliamentarians suggests a hypothesis as to why some norms are more persistent than others: norms that concern a particular office that is able to guard

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320. Sarah Binder, *This Is Why the Congressional Budget Office Will Likely Survive Republican Attacks*, WASH. POST (Mar. 15, 2017), <https://washingtonpost.com/news/monkey-cage/wp/2017/03/15/this-is-why-the-congressional-budget-office-will-likely-survive-republican-attacks> [<https://perma.cc/N3NK-DBDN>].

321. Alan Rappaport, *C.B.O. Head, Who Prizes Nonpartisanship, Finds Work Under G.O.P. Attack*, N.Y. TIMES (June 19, 2017), <https://nytimes.com/2017/06/19/us/politics/cbo-congressional-budget-office.html> [<https://perma.cc/WVD8-CGMG>].

322. *See 10 Things to Know About CBO*, CONG. BUDGET OFF. (Feb. 2019), <https://cbo.gov/about/10-things-to-know> [<https://perma.cc/34EK-9M4Z>].

323. The CBO declines to directly engage with criticisms in the press. When one party attacks the CBO for unfavorable estimates or projections, someone else – typically either former CBO directors or the other party in Congress – generally comes to the CBO's defense. *See, e.g.*, Tara Golshan, *Top Republicans Have Waged War on the CBO. Now Former CBO Directors Are Fighting Back*, VOX (July 21, 2017, 11:50 AM EDT), <https://vox.com/policy-and-politics/2017/7/21/16008512/cbo-directors-letter-gop-attacks> [<https://perma.cc/Y7T2-4MAG>]; *GOP Attacks Nonpartisan CBO in Anticipation of Learning Millions Will Lose Coverage*, NANCY PELOSI: SPEAKER OF THE HOUSE (Mar. 13, 2017), <https://speaker.gov/newsroom/3132017-2> [<https://perma.cc/2YE4-5STK>].

324. *See* Fishkin & Pozen, *supra* note 17, at 929-37 (providing extensive examples of constitutional hardball, both inside and outside of Congress, in the last quarter century).

its autonomy and turf might fare better than those that concern exclusively interparty or interbranch relations.

Many of the norms that have frayed in the contemporary federal government concern how Democrats and Republicans relate to each other, either within Congress or across branches. Frayed norms around government shutdowns, the Senate confirmation process, and debt-ceiling brinksmanship are all illustrative.<sup>325</sup> The norms that governed in each of those domains rested on forbearance by and reciprocity between elected officials from the two parties.

Norms relating to autonomy are different. Violating those norms requires taking action against specific individuals who have the ability to act strategically. Norms around parliamentary autonomy certainly fall into this category, as do norms surrounding the independence of the CBO from the majority party in Congress,<sup>326</sup> the independence of federal law enforcement's investigatory activities,<sup>327</sup> and the independence of the Federal Reserve from the President.<sup>328</sup> Each of these sets of norms has recently come under pressure,<sup>329</sup> but each has had more staying power than strictly interparty or interbranch norms.

One reason for the persistence of independent or nonpartisan institutions in a partisan age is that those institutions can act strategically to counteract external

325. See, e.g., *id.* at 963 (government shutdowns); *id.* at 917 n.4 (judicial confirmations); *id.* at 947 n.123 (debt ceiling). For additional examples, see MANN & ORNSTEIN, *supra* note 17, at 50; Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and "Judicial Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503, 514-32 (2003).

326. On the character and extent of CBO independence, see PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING* (2011).

327. See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207-15 (2018).

328. Recent scholarship has somewhat complicated the conventional picture of Federal Reserve independence. See, e.g., SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* (2017) (discussing the Federal Reserve's relationship with Congress); PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (2016) (discussing the Federal Reserve's relationships with the President and Congress, among other institutional actors).

329. See, e.g., Dylan Matthews, *The Republican War on the CBO, Explained*, VOX (July 19, 2017, 9:00 AM EDT), <https://vox.com/policy-and-politics/2017/7/19/15967224/congressional-budget-office-cbo-war-explained> [<https://perma.cc/KS79-NEHU>]; Mark Mazzetti et al., *Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, N.Y. TIMES (Feb. 19, 2019), <https://nytimes.com/2019/02/19/us/politics/trump-investigations.html> [<https://perma.cc/S6YZ-ESKP>]; Emily Stewart, *Trump Makes Last-Ditch Effort to Pressure the Fed Ahead of Interest Rate Meeting*, VOX (Dec. 18, 2018, 8:42 AM EST), <https://vox.com/policy-and-politics/2018/12/17/18144497/trump-tweet-fed-reserve-jay-powell> [<https://perma.cc/X2NC-VBXR>].

pressures.<sup>330</sup> In game-theoretic terms, independent or nonpartisan institutions like the parliamentarians can act in ways that raise the cost that partisans would bear by infringing on those institutions' autonomy. Raising costs in this way makes infringements on autonomy less likely. (Conversely, independent or nonpartisan institutions that show bias or otherwise act improperly might lower the cost of partisan infringements on their autonomy, thereby making such infringements more likely.) This Article's case study of the parliamentarians points toward an institutions-focused hypothesis for why some norms may be more resilient than others.

### *B. Dynamics of Legal Change*

Parliamentary practice also illuminates the relationship between positive law and common law as a general matter. The more difficult it is to change positive law, the more important common law will be. There is a functional supermajority requirement for formally amending Senate rules,<sup>331</sup> making formal rule changes difficult in the Senate. House rules, by contrast, can be made and changed by a simple majority. The relative difficulty of changing Senate rules explains why appeals from rulings of the chair play a far greater role there than in the House. The more entrenched a set of legal rules is, the more likely it is that institutional actors will devise alternative ways of changing or circumventing them.

This dynamic exists in other contexts as well. The difficulty of revising statutes has led agencies, rather than Congress, to take the lead in making some social and regulatory policy. The difficulty of passing major legislation "leav[es] agencies to deal with new policy problems using old and aging statutory mandates."<sup>332</sup> This is especially true in light of increasing congressional polarization, which makes it nearly impossible to pass legislation on controversial subjects except when the same party holds the White House, a majority in the House, and a majority (or supermajority) in the Senate.<sup>333</sup> The result is a shift of authority

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330. Another set of reasons rests on the incentives that those in power might have to allow these institutions to maintain some measure of autonomy or independence. The various reasons why the majority party in Congress might defer to the parliamentarians even in the face of unfavorable rulings may also help explain why the majority in Congress might defer to the CBO or why the President might respect the autonomy of the FBI or Federal Reserve. See *supra* notes 30-34 and accompanying text.

331. See SENATE RULES, *supra* note 4, r. XXII(2) (establishing a two-thirds supermajority requirement to close debate on any Senate rule change).

332. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 6 (2014).

333. See *supra* note 118 and accompanying text.

over policy problems from Congress to the executive branch, given the ability of the White House and agencies to circumvent the veto points that prevent law-making in Congress.<sup>334</sup> This pattern parallels the increased prevalence of appeals in the Senate. In both instances, the difficulty of using traditional tools to make law or rules leads to expanded use of other tools.

Similar analysis explains the common-law character of most constitutional law. Formally amending the Constitution is exceptionally difficult.<sup>335</sup> A consequence of that difficulty is that nearly every constitutional change of the past century has come through the common-law process of judicial decision-making. David Strauss has documented how “formal constitutional amendments of the kind Article V envisions [have] become incidental to the main processes of constitutional change.”<sup>336</sup> Bruce Ackerman has similarly concluded that “[i]t is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change marked out by the living Constitution.”<sup>337</sup> History confirms these assessments: from the “switch in time” of 1937 to the Warren Court revolution of the 1950s and 1960s to the conservative retrenchment of the 1970s to the present, the near impossibility of constitutional amendment means that even major constitutional change takes place through a common-law process. In each of these three contexts—parliamentary, statutory, and constitutional—the difficulty of changing positive law has led governmental actors to find other ways to change the law.

### C. *Informing Statutory Interpretation*

A deeper understanding of how parliamentary precedent operates can also inform how courts interpret statutes. Victoria Nourse has noted that “[i]f courts must respect Congress, as all statutory interpreters agree, then judges should

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334. For an example, consider President Barack Obama’s 2014 statement, in response to obstruction by the Republican Congress: “I’ve got a pen to take executive actions where Congress won’t.” Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NAT’L PUB. RADIO (Jan. 20, 2014, 3:36 AM ET), <https://npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone> [<https://perma.cc/MC33-2ME6>].

335. See U.S. CONST. art. V (requiring that constitutional amendments be ratified by three-fourths of the states after first being proposed either by two-thirds of Congress or by a constitutional convention).

336. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1461 (2001).

337. Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007).

interpret the meaning of [terms] in the same way that Congress would.”<sup>338</sup> A parliamentarian’s rulings and advice can be valuable aids to doing just that. Because legislators vote on bills in light of the parliamentarians’ judgments and advice, one way of knowing how legislators understood a given statutory term is to see how a parliamentarian understood it. Courts can thus look to parliamentary precedent—especially rulings of the chair<sup>339</sup>—to help them interpret ambiguous statutory provisions.

Such an approach would operate as follows: when there is an ambiguous statutory provision that survived a point of order or other challenge, courts would interpret the provision in a manner consistent with procedural rules and precedents. When a parliamentarian allows for the inclusion of a given provision in the face of a challenge, and that provision later becomes law, a court can reasonably infer that legislators understood the provision to have the meaning that would render it consistent with applicable rules or precedents. To return to the examples in Part I, courts could reasonably make inferences about statutory meaning from the fact that a provision survived a Byrd rule, germaneness, or scope-of-the-differences challenge.

This approach is narrower than approaches proposed by some other scholars. Nourse, for example, has proposed that “when faced with a difficult case of ambiguity, courts . . . may give language the legal effect demanded by the congressional rules, in some cases obviating difficult interpretive decisions.”<sup>340</sup> This sort of rule-based approach rests on significant assumptions about legislators’ knowledge. In particular, for a rule-based approach to reflect legislative intent, legislators must be familiar with not only their chamber’s rules and precedents but also with specific statutory provisions under consideration and, most of all, with the intersection of how those provisions’ meanings are shaped by the chamber’s rules and precedents. Legislators will almost never have this knowledge unless a procedural question expressly arises during consideration of a bill, as occurs when there is a point of order on the floor. In such a case, it would be reasonable to assume that legislators in fact understood a provision’s meaning in light of procedural rules and precedents.<sup>341</sup>

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338. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 96-97 (2012).

339. Unlike other forms of parliamentary precedent, rulings of the chair are publicly available in the Congressional Record. As a result, courts can look to rulings of the chair in the course of interpreting statutes. The same is not true for other forms of precedent, such as the parliamentarians’ advice or the outcomes of Byrd baths.

340. *Id.* at 96 n.103.

341. A possible application arose in *Bankamerica Corp. v. United States*, 462 U.S. 122 (1983), which concerned the meaning of an ambiguous provision of the Clayton Act. In *Bankamerica Corp.*,

The rationale for drawing on rulings of the chair in interpreting statutes is that those rulings inform how legislators understand statutory provisions under consideration. Drawing on rulings of the chair in the course of interpretation is consistent with Nourse's call to interpret statutes based on Congress's internal rules<sup>342</sup> and Gluck's work deriving new canons of interpretation based on how Congress operates in practice.<sup>343</sup> Gluck has proposed that ambiguous statutory provisions be read in light of committee drafting practices<sup>344</sup> and CBO calculations of budgetary impacts,<sup>345</sup> among other features of legislative procedure and organization. Looking to rulings of the chair would, alongside these other principles, help bring statutory interpretation more in line with how Congress operates.

A virtue of looking to rulings of the chair in the course of interpreting statutes is that doing so avoids two concerns that critics argue beset the use of other forms of legislative history: judicial discretion and legislative gamesmanship.

With respect to judicial discretion, critics of the use of legislative history have long charged that doing so increases judicial discretion.<sup>346</sup> This concern is captured by Judge Harold Leventhal's quip that using legislative history is akin to "looking over a crowd and picking out your friends."<sup>347</sup> It stems from worries about judges selectively choosing from among many different sources of legislative history (such as statements from different legislators) that may contradict one another. Looking to rulings of the chair avoids this problem, however, as the chair expresses only a single view about any given question. Asking judges to look to a ruling on a single point of order will not open up a vast range of new

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both the majority and the dissent cited an exchange on the House floor that culminated in a point of order as evidence for their preferred reading. *Compare id.* at 137-39 (majority opinion), *with id.* at 143-45 (White, J., dissenting).

342. See, e.g., Nourse, *supra* note 338.

343. See Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 208 (2017) (noting that "there is an entire underbelly of Congress that barely has attracted any attention" in the statutory interpretation literature).

344. *Id.* at 203 (proposing that courts resolve ambiguities about which agency is the intended recipient of delegated authority by considering which congressional committee took the lead in legislative drafting); *id.* at 204 (proposing that courts relax the presumption of consistent usage when interpreting an omnibus law or a statute drafted by multiple committees).

345. *Id.* at 209.

346. See *supra* note 257 and accompanying text.

347. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (internal quotation marks omitted) (quoting Judge Leventhal).

extratextual sources but will instead point judges toward a specific and concise part of a bill's legislative history.

Criticism that courts' use of legislative history may lead to legislative gamesmanship also does not apply well to rulings of the chair. Scholars and judges have worried that the use of legislative history "may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."<sup>348</sup> This concern arises when legislators or others seek to influence legislative history in order to later achieve through the judicial process what they could not achieve through the legislative process. The presence of a parliamentarian—and a chair who follows the parliamentarian's recommendations—obviates this concern. Judges looking to rulings of the chair are taking account of the judgments of neutral experts rather than the statements of legislators pursuing policy agendas.

#### *D. Parliamentary Precedent in a Partisan Age*

Two defining features of the contemporary Congress—polarization and hardball—call the future of the parliamentarians into question. The parties in Congress are well sorted and highly ideologically distinct from one another,<sup>349</sup> and Congress has witnessed ever-increasing hardball between the parties since the Republican Revolution of 1994.<sup>350</sup> These dynamics shape the work of the parliamentarians' offices and cast doubt on whether their autonomy is sustainable in the long term.

In an age of polarization and hardball, the parliamentarians are under the greatest strain when acting to protect the interests of the minority party. This happens frequently in the Senate but very rarely in the House. In particular, the parliamentarian plays a major role in defining the scope of what Molly Reynolds calls the Senate's "majoritarian exceptions": rules that exempt certain types of legislation from the Senate's general supermajority cloture requirement.<sup>351</sup> The most prominent of these majoritarian exceptions is the budget reconciliation

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348. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); see also Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 642-43 (1995) (noting Justice Scalia's view that "legislative history is a vehicle for egregious legislative misbehavior").

349. See *supra* note 118 (citing sources).

350. See MANN & ORNSTEIN, *supra* note 17; JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* (2020).

351. See REYNOLDS, *supra* note 129, at 87.

process. When Senate parliamentarians limit the scope of the reconciliation process they protect the minority party at the expense of the majority. Senate parliamentarians have, unsurprisingly, faced significant pressure from Senate majorities around the reconciliation process.<sup>352</sup> So long as the Senate retains the legislative filibuster, which channels majorities into legislating through reconciliation, the Senate parliamentarians will hold the powerful but highly precarious role of policing what content the majority can and cannot pass through reconciliation.

The Senate parliamentarians will come under particular strain during periods of unified party control. Under these conditions, the Senate parliamentarian must enforce rules that impede a legislative agenda that could otherwise become law—because it is shared by the White House, a House majority, and a majority (but not supermajority) in the Senate. The Senate parliamentarian survived the last such situation, the period of unified Republican control in 2017–18. But the Republican Senate majority was razor-thin for much of that time, and some members of the caucus did not have the appetite for significant changes to Senate rules. There is no guarantee that the parliamentarian would survive the next period of unified Republican control, especially if Republicans garner a larger or more cohesive majority. Likewise, if Democrats were to hold unified control in the foreseeable future, they would come to power with an enormously ambitious agenda, which would likely include addressing climate change, health care, immigration, civil rights, and a host of other matters that would almost certainly fail to garner Republican support. Many Democrats would be loath to allow Senate supermajority requirements, enforced by the Senate parliamentarian, to limit their ability to enact major legislation.<sup>353</sup> Either party may well, under a future period of unified control, circumvent the Senate parliamentarian or change the supermajority rules that give the Senate parliamentarian so much of their current power.

These changes are certainly possible, but they are not guaranteed. Senate parliamentarians will continue to guard their autonomy by any means that they can. And, as noted in the Introduction, there are good reasons why majorities might want independent parliamentarians enforcing minority-protective procedural rules. Minority-protective procedural rules can be costly to change, can

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352. See *supra* notes 225–232 and accompanying text.

353. See Burgess Everett & Marianne Levine, “*Everything Stays on the Table*”: 2020 Dems Weigh Killing the Filibuster, *POLITICO* (Jan. 31, 2019, 7:25 PM EST), <https://politico.com/story/2019/01/31/dems-filibuster-rules-1140921> [<https://perma.cc/7KK8-KXAW>]; David Roberts, *Democratic Hopes for Climate Policy May Come Down to this One Weird Senate Trick*, *VOX* (May 28, 2019, 10:10 AM EDT), <https://vox.com/energy-and-environment/2019/5/28/18636759/climate-change-budget-reconciliation-democrats> [<https://perma.cc/N2VR-YGZC>].



serve the majority party leadership, and can serve as a sort of insurance policy for a majority party that anticipates it might someday be in the minority.<sup>354</sup> These dynamics help explain why the current rules and parliamentary independence have persisted in the Senate for as long as they have, and they may yet hold. But, given the ever-increasing levels of partisanship and hardball, it would be foolish to assume that norms and equilibria of the past will persist forever.

If a future majority party were to attempt to do away with the supermajoritarian rules that currently shape so much of life in the Senate, there would be two possible paths forward for the Senate parliamentarians and for Senate procedure generally. In one scenario, the Senate would come to resemble the House. The Senate majority, in this scenario, would change cloture rules for ordinary legislation without installing a partisan parliamentarian, as they did for the cloture rule for nominations in 2013 and 2017.<sup>355</sup> Senate parliamentarians would remain nonpartisan and would, like the House parliamentarian, face fewer pressures. They would gain the stability that has characterized the House parliamentarians for decades, but they would lose much of their current influence, which derives from their enforcement of minority-protective rules. If the rules are to change, this outcome has much to recommend it.

Another possibility would be far more destabilizing: the installation of a partisan parliamentarian. The installation of a partisan parliamentarian in the Senate would undermine the office's neutrality in the eyes of the minority party, would lead to a new parliamentarian with each change in party control, and would open the door to partisan conflict over all manner of parliamentary rulings. The Senate should consider ways to prevent this, whether through formally

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354. See *supra* notes 30-34 and accompanying text.

355. See *supra* note 249 and accompanying text.

protecting the parliamentarian from removal<sup>356</sup> or through creating succession rules that prevent the majority from hiring a party loyalist.<sup>357</sup>

Given the Senate's history, it is easy to conflate minority-protective rules with the existence of a neutral or autonomous parliamentarian. But the two are distinct. These two ways forward for reform in the Senate reflect two different approaches: changing the rules and changing the identity of those who apply and enforce the rules. In Congress, as in sports, it is easy to gripe about those who apply and enforce the rules. Such gripes often reflect frustration with the underlying rules themselves, not with their application. There are good reasons for the Senate to do away with its traditional minority-protective rules.<sup>358</sup> Even if this comes to pass, it would still be possible and advisable to maintain the institution of a neutral parliamentarian.

## CONCLUSION

The system of parliamentary precedent in Congress is a rare thing: a legal system that has received virtually no systematic attention from legal scholars. This neglect has been unwarranted. As this Article has demonstrated, the system of parliamentary precedent provides a window into how Congress functions in practice. It is an important example of how law is made and applied outside the

356. Protection from removal might entail a requirement that both parties consent to removal, or it might entail for-cause protection of the sort that exists for civil servants or for the heads of so-called independent agencies. See, e.g., 5 U.S.C. § 7543 (2018) (civil service protection); 12 U.S.C. § 5491(c)(3) (2018) (protection for the Consumer Financial Protection Bureau Director). There is no legal impediment to Congress granting the parliamentarians for-cause protection; the arguments against for-cause protection in the agency context are grounded in separation of powers and therefore do not apply in a strictly intracongressional context. Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”); *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (“The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”).

357. Possibilities on this score include an automatic succession rule, as in the Federal Vacancies Reform Act, 5 U.S.C. § 3345(a) (2018), or a rule giving the minority party a hand in appointments, as has been tried in at least one state legislature, see, for example, Brandon Waltens, *Bonnen Appoints Committee to Find New Parliamentarian*, TEX. SCORECARD (Nov. 14, 2018), <https://texasscorecard.com/state/bonnen-appoints-committee-to-find-new-parliamentarian> [<https://perma.cc/73SB-Y6R5>].

358. The large scholarly literature includes, for example, Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467 (2011) (arguing against the notion that the Framers intended to allow Senate minorities to exercise a veto power over legislation), and Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041 (2011) (documenting the pernicious effects of Senate supermajority requirements).

courts. And it offers broader lessons about how politics shapes legal decision-making, the relationship between positive law and common law, how courts should read statutes, and why some norms persist while others fray.

The future of the parliamentarians' offices remains uncertain in our partisan age. The offices' autonomy rests on a delicate foundation. Yet the parliamentarians have used a wide range of tools to maintain their reputations for expertise and neutrality in the eyes of legislators, which, in turn, has allowed them to maintain their autonomy. Part of the reason that the parliamentarians' efforts have usually been successful in this regard is that Congress and its constituent parts — party leaders, committee chairs, and rank-and-file members — have benefited from the continued autonomy of the parliamentarians. Rules do not interpret and apply themselves, and the parliamentarians have strategically positioned themselves to play a critical role as Congress's internal referees.

This account enriches our understanding of governance, both in Congress and more broadly. Legislative procedure shapes what happens in Congress, and precedent is a central aspect of procedure. Beyond Capitol Hill, the ways in which the parliamentarians have sought to safeguard their own autonomy should cause us to look anew at other institutions of government — at legislative, executive, and judicial actors, at both the national and subnational levels — who are doing the same. The parliamentarians and the system of parliamentary precedent over which they preside may at first seem idiosyncratic, but understanding law within Congress holds broader lessons for public law.