Winter 2011

Read-the-Bill Rule for Congress, A

Hanah Metchis Volokh

Follow this and additional works at: http://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Hanah Metchis Volokh, Read-the-Bill Rule for Congress, A, 76 Mo. L. Rev. (2011)
Available at: http://scholarship.law.missouri.edu/mlr/vol76/iss1/5

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.
A Read-the-Bill Rule for Congress

Hanah Metchis Volokh*

ABSTRACT

In response to recent high-profile instances of rushed legislation, a political movement has formed to urge legislators to read bills before voting on them. In this Article, I argue that legislators have a duty to read the text of proposed legislation before voting to enact it. Putting aside partisan concerns, a rushed legislative process creates real problems because it forces legislators to vote on bills without having time to properly evaluate the new legal rules that are being imposed on citizens. If a rule or norm of reading the bill can slow the legislative process enough to provide for thorough consideration of proposed legislation, it will bring a substantial benefit in the form of better laws. The rule will also draw the attention of legislators to their primary, fundamental role of making good law.

I. INTRODUCTION

On June 26, 2009, the House of Representatives passed the American Clean Energy and Security Act of 2009,1 better known as the Waxman-Markey cap-and-trade bill, by a vote of 219 to 212.2 As the closeness of the vote shows, the bill was highly controversial. Nearly as controversial as the substance was the form in which the bill was brought to a vote. On the evening of Monday, June 22, 2009, Democratic leaders replaced the 1,000-page text of the bill that had emerged from the House Energy and Commerce Committee with a different 1,200-page text that included new measures designed to help the bill pass.3 Still worried about whether the bill had enough votes, the Democratic leaders added another 300 pages of amendments at 3 a.m. on Friday, just before the debate and vote.4 Last-minute amendments,
even long ones, are not uncommon in Congress. But shockingly, even by the
time the vote occurred, there was no complete copy of the Waxman-Markey
bill in existence anywhere. One commentator explained the situation:

When Waxman-Markey finally hit the floor, there was no actual
bill. Not one single copy of the full legislation that would, hours
later, be subject to a final vote was available to members of the
House. The text made available to some members of Congress still
had “placeholders” – blank provisions to be filled in by subsequent
language – including one for the regulation of climate derivatives.
The last-minute amendments, too, had yet to be incorporated.
Even the House Clerk’s office lacked a complete copy of the legis-
lation, and was forced to place a copy of the 1,200-page draft side
by side with the 300-page amendments.\footnote{Id.}

Without a copy of the bill to examine, how could the Representatives
understand what they were voting on? All they had to go on were assurances
– from party leaders, from lobbyists for interest groups who had negotiated
the bill and amendments, and from staffers who had been frantically reading
the parts of the legislation that were available. Even if a Representative had
managed to read through all 1,500 pages of text and amendments during the
single day before the vote, there would not have been time to even begin to
understand the implications of the proposed law and its interaction with sta-
tutes already on the books. In the words of Representative John Conyers –
who does not himself favor reading the text of bills but understands what
such an effort would entail – “What good is reading the bill if it’s a thousand
pages and you don’t have two days and two lawyers to find out what it means
after you read the bill?”\footnote{Nicholas Ballasy, \textit{Conyers Sees No Point in Members Reading 1,000-Page
Health Care Bill – Unless They Have 2 Lawyers to Interpret It for Them}, CNS NEWS,

In the wake of the Waxman-Markey vote and other recent instances of
rushed legislation, a grass-roots Read the Bill movement emerged.\footnote{Long and complex legislation being rushed through Congress with inade-
quate time for legislators to read it is not a new problem. \textit{See}, e.g., Dan Greenberg,
\textit{Chaos Theory in Congress}, N.Y. TIMES, Sept. 2, 1993, at A23 (complaining that the
text of a 3,000 page budget bill was not available until the morning of the vote). The
issue had not previously received much popular attention, however.}
Critics of
proposed legislation, particularly of the health care reform bill passed in
119 (2010).} have rallied around a call for Members of Congress to literally read
each entire bill before voting on it. At least three different online petitions
urged legislators to do just that, and the idea repeatedly appears in blogs and op-eds, as well as at Senators’ and Representatives’ town hall meetings with constituents. The idea even made its way into the Republican Party’s “Pledge to America” in the 2010 midterm elections, and when Republicans gained control of the House of Representatives after those elections, they amended the House Rules to require that a bill be available to Members of Congress and to the public for three days before the House can hold a vote on it.

Rushed legislation is not a partisan problem. Many of the examples given by proponents of the Read the Bill movement portray Democrats engaging in bad behavior while Republicans decry it, but this is simply a func-

---

9. Read To Vote urges members of Congress to “pledge to read every word of every bill before casting [their] vote[s].” Read To Vote, http://readtovote.org/site/ (last visited Nov. 4, 2010). Read the Bill endorses a statute or internal rule in the House and Senate “to require that non-emergency legislation and conference reports be posted on the Internet for 72 hours before debate begins.” Read the Bill, http://readthebill.org/ (last visited Nov. 4, 2010). This would give Members of Congress the opportunity to read the bill but would not require that they do so. The Responsible Health Care Reform Pledge asked Members of Congress to pledge not to vote for health care reform without personally reading the entire bill and giving the public access to the text of the bill for seventy-two hours. Let Freedom Ring: Promoting Constitutional, Government, Economic Freedom & Traditional Values, The Responsible Healthcare Reform Pledge, http://www.letfreedomringusa.com/pledge-to-read (last visited Nov. 4, 2010). The Pledge collected over 120 signatures from Senators, Representatives, and congressional candidates. Id.

10. See, e.g., Victoria McGrane, Read the Bill? It Might Not Help, POLITICO, Sept. 8, 2009, http://www.politico.com/news/stories/0909/26846.html (“Across the country, ‘Read the bill!’ has become a rallying cry of the health care debate. People are shouting it at town halls. Local newspapers teem with editorials and readers’ letters demanding that lawmakers do it. Bloggers and their commenters say the same. Politicians of both parties are taunting their foes across the aisle with it.”); Ian Urbina, Beyond Beltway, Health Debate Turns Hostile, N.Y. TIMES, Aug. 8, 2009, at A1 (“Parts of [Rep. Castor’s] remarks were drowned out by chants of ‘read the bill, read the bill’ and ‘tyranny’ . . . .”).


12. See H.R. Res. 5, 112th Congress §2(b) (2011) (amending House Rule XXI to read, “It shall not be in order to consider a bill or joint resolution which has not been reported by committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which such measure has been available to Members, Delegates, and the Resident Commissioner.”).

13. For example, Democratic Senator Chris Dodd was unaware that a bill he authored and sponsored created an “interim appointment power.” See Brian Beutler, Dodd Unaware of Interim Appointment Power for Warren?, TALKING POINTS MEMO,
tion of the fact that the Democrats have recently controlled both houses of Congress and as a result have set the agenda and moved bills forward. Republicans have been equally guilty of using rush tactics when in power. The PATRIOT Act, for example, was passed by a Republican-controlled Congress in an extremely rushed format, just six weeks after the September 11 attacks. The time frame probably did not allow a full reading by Members of Congress, and public debate about the wisdom of the PATRIOT Act's provisions continued long after the bill was enacted.

Nor is providing enough time to read the bill a partisan idea. During Barack Obama's campaign for President, he made a pledge, which he called Sunlight Before Signing: "Too often bills are rushed through Congress and to the president before the public has the opportunity to review them. As President, Obama will not sign any non-emergency bill without giving the American public an opportunity to review and comment on the White House website for five days." The Read the Bill movement focuses on giving Members of Congress time to read the bill before voting, whereas Sunlight Before Signing imposes a waiting period between congressional passage and the President signing the bill into law. The ideas are not identical, but are related. Both would provide participants in the legislative process, along with


16. See ELECTRONIC FRONTIER FOUNDATION, EFF ANALYSIS OF THE PROVISIONS OF THE USA PATRIOT ACT, available at http://w2.eff.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php ("[I]t seems clear that the vast majority of the sections included were not carefully studied by Congress . . . .").


20. Compare Read the Bill, supra note 9, with Organizing for America, supra note 19.
ordinary Americans, an opportunity to examine the actual text of a bill before it becomes law.

The issue of sufficient time to read a bill is a procedural one, based in political theory and good governance concepts, not in party politics, though legislators and others can seize on it to score political points. This Article attempts to move beyond the partisan political aspects of the current debate and discuss the deeper principles behind it. The fundamental concern is that leaders in Congress sometimes rush big, important bills through the legislative process without providing an opportunity for all Members to properly review the bill and consider its effects and implications.22

In this Article, I argue that a Read the Bill norm, coupled with a norm of writing bills in readable and understandable language, could improve the legislative process. Lawmaking is the most primary, fundamental part of a legislator's job. Congress is the governmental body that writes laws that everyone else in the nation must follow.23 Members of Congress need to take that responsibility seriously if the United States is to be governed by reasonable, effective laws.24

This Article's focus on advocating constitutional and prudential rules for Congress to follow may seem unusual to some readers. Legal scholars have historically neglected Congress as an institution.25 Despite hundreds of years of developing theories about jurisprudence – the way judges should behave – little attention has been given to theories of legisprudence – the way legisla-

21. See Jeremy Waldron, Principles of Legislation, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 15, 23 (Richard W. Bauman & Tsvi Kahana eds., 2006) ("In view of the inherent importance of law and the interests and liberties that are at stake in their decision making, lawmakers have a duty to take care when they are legislating.").


23. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); id. at art. I, § 8, cl. 1, 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any other Department or Officer thereof."); id. at art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").


tors should behave.26 This Article fits within a nascent legisprudence literature that has begun to spring up among scholars such as Jeremy Waldron and Adrian Vermeule.27 I do not attempt to provide a grand theory of legisprudence, but rather to explore the merits of legislators reading bills as a particular principle that could fit within a variety of legisprudential theories.

In Part II, I explain the importance of legislators thoroughly understanding a bill from both a policy and a legal standpoint. I argue that reading the bill is crucial to performing their duty as responsible lawmakers. Part III turns to questions of how to put a Read the Bill rule into practice. My proposal is to implement it as a norm, not a statutory requirement. This Part also sketches the beginnings of a practical proposal for what a legislator should read and understand at each stage of the legislative process, including committee votes, floor amendments, the floor vote, and the final vote after conference committee, and proposes some drafting reforms that could make it easier for legislators to read and understand bills. In Part IV, I consider whether the duty to read the text also applies to the President before he signs a bill into law. I conclude that the constitutional evidence for a presidential duty to read the bill is much weaker than for a congressional duty.

II. THE IMPORTANCE OF READING THE BILL

A. Making Policy vs. Making Law

Requiring legislators to read the text of a bill before voting on it would focus their attention on the lawmaking aspect of their jobs,28 which is now

26. My use of the term “legisprudence” is different from that of William Eskridge, who uses the word to refer to the subset of jurisprudence that deals with the way judges should interpret statutes (i.e. statutory interpretation). See William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 587-88 (4th ed. 2007). I use the term to refer to theories about how legislators should make law.


28. Cf. Sheppard, supra note 24, at 168-69 (“At a minimum, moral obligations within the legal system require a duty to carry out one’s defined legal obligations in the office one holds… Within that obligation is an obligation to use one’s best efforts to carry out one’s duties, even if such an obligation might meet the resistance of bureaucratic inertia.”).
almost ignored in favor of policymaking and other aspects. Reading a bill may not be necessary to an understanding of the policy motivating a proposed law, but it is necessary to understand what the proposed law is and what effects it will have in the real world. A responsible legislator must learn both.

Reading the bill, alone, usually will not provide legislators with a sophisticated understanding of the bill and the policy it implements. Anyone who has read the text of a bill knows how mind-numbingly boring it is. A bill lays out a list of rules, one after another, without context or explanation of why they are important. It may include a findings section to provide some background on the problems the bill attempts to solve. Usually this background material is very general, and it is placed in an introductory section rather than intermingled with the rules. This format makes sense from the perspective of what a statute is meant to do in the real world, once it is enacted. A private individual or corporation wanting to take a particular action needs to know whether that action is prohibited or regulated. A statute is a set of rules to follow, and wordy explanations would only get in the way. A long discussion of purposes and expected applications could be useful in later interpretation, but it could just as easily lead to more confusion. This effect can be seen when judges look for explanations in legislative history, but the confusion would be much the same if wordy explanations were enacted directly into law.

While these conventions of bill drafting are useful for later interpreters, they do not make the law easy to analyze from the ex ante perspective of a legislator. A judge is presented with a set of facts that have occurred and turns to the statutory rules to determine whether any of them have been broken or to discern whether a party has the right or duty claimed. Conversely, a legislator must perform the much more difficult task of looking at a set of facts that have not occurred and determine the likely future consequences of breaking any of them.

29. See Waldron, supra note 21, at 24 ("It is easy for [legislators] to regard lawmaking as a distraction. . . . For [this] reason[, we need to place particular emphasis on the duty of care that is associated with the lawmaking part of a legislator's business."); see also Ann Seidman & Robert B. Seidman, ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change, 89 B.U. L. REV. 435, 437-38 (2009) ("[S]cholars tend to ignore the drafter's crucial role in the [lawmaking] process.").

30. See, e.g., Babbitt v. Sweet Home Chapter of Cmty's. for a Great Or., 515 U.S. 687, 704-08 (1995) (using legislative history to show that habitat destruction is a form of "taking" an animal); id. at 726-29 (Scalia, J., dissenting) (using legislative history, including some of the same documents relied upon by the majority, to show the opposite); see also Griggs v. Duke Power Co., 420 F.2d 1225, 1235 (4th Cir. 1970) (relying on a paragraph in the Clark-Case memo to interpret Title VII as allowing general intelligence tests for employment), rev'd, 401 U.S. 424 (1971); id. at 1242, 1244 (Sobeloff, J., dissenting) (relying on the exact same paragraph of the memo to interpret Title VII as allowing only strictly relevant tests of job qualifications for employment).

proposed rules and imagining the sorts of fact situations that will arise and be judged under them.\textsuperscript{32} He must also have an understanding of how existing legal rules will interact with the proposed new rules. Additionally, he must attempt to imagine how people will behave to avoid application of the rules—for instance, if cigarettes are taxed more heavily, how many people will pay the tax, how many will give up smoking, how many will switch to chewing tobacco, and how many will buy cigarettes on the black market?\textsuperscript{33}

These are extraordinarily difficult legal, policy, and economic problems, which require considerable background information and expertise to analyze. Very few legislators, if any, have the necessary skills and information to fully analyze the merits of proposed legislation on their own, just by reading a bill. Thus, some commentators argue that reading a bill is a waste of time.\textsuperscript{34} Members of Congress are extraordinarily busy, with many competing demands on their time, and they each must prioritize the time they spend on various job-related tasks.\textsuperscript{35} They are faced with thousands of bills introduced each year.\textsuperscript{36} Each Member is a part of several committees and subcommittees, all of which hold meetings and hearings.\textsuperscript{37} Members may be asked to meet with the President and White House staff and with leaders in their own party to discuss pending legislation and other matters. Members also perform constituent services. They travel to and around their home districts, meeting

\textsuperscript{32} See id. at 435-36 ("[Legislatures] look ahead to the applications of the laws that they make but are unable to anticipate each and every fact situation.").

\textsuperscript{33} Cf. Jon D. Hanson & Kyle D. Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 YALE L.J. 1163 (1998) (analyzing the probable effects of different types of regulation on the cigarette industry).

\textsuperscript{34} See, e.g., Posting of Eric Posner to The Volokh Conspiracy, "Should legislators read bills?", http://volokh.com/2009/09/24/should-legislators-read-bills/ (Sept. 24, 2009, 11:14 CST) ("[P]olitical institutions are highly complex organizations that have evolved in response to needs and pressures, and that simple-sounding rules rarely do any good in complex settings. . . . [A]ll legislatures have found it necessary to divide labor, form committees, hire staff, expect particular legislators to become experts and leaders in particular domains, and, indeed, delegate many functions to unelected expert regulators. This means that, for virtually any law, only a handful of people can possibly have a sophisticated understanding of the bill in question.").


\textsuperscript{36} See GO\textsuperscript{V}T PRINTING OFFICE, CONGRESSIONAL BILLS: 110TH CONGRESS CATALOG, http://frwebgate.access.gpo.gov/cgibin/BillBrowse.cgi?dbname=110_cong_bills&wrapperTemplate=all110bills_wrapper.html&billtype=all (listing all the bills considered by the 110th Congress in 2007-08).

with constituents about issues and problems, as well as campaigning for re-election. Perhaps, given the many important tasks of a Member of Congress and the limited information obtained through sitting down and reading a bill, most Members should be excused from this task. Perhaps only the legislators who are primarily responsible for a bill – sponsors and members of committees that analyze the bill – should read the text in its entirety. Or perhaps only their staff members, hired for expertise in a subject matter area, need to read the text of the bill. According to these commentators, summary reports and discussions with expert members and staff are not only a much more efficient use of legislators' time, but also an affirmatively better way to learn about the effects of the bill.

This argument is based on a view of Congress as policymaker. Members of Congress are tasked with making good policy for the nation. To do so, they need to learn about the problems a bill addresses and how the legal changes embodied in the bill will affect the real-world landscape. Gaining this understanding requires a great deal of expert knowledge in a huge variety of fields – industry, agriculture, finance, foreign affairs, public health, and many more – that Members cannot be expected to acquire on their own. To make policy effectively, they have no choice but to rely on experts, both inside and outside government, for summaries and analyses of proposed legislation.

38. See Michael J. Malbin, Unelected Representatives: Congressional Staff and the Future of Representative Government 5 (1980) ("The reason for committee staffs, and the source of their influence, is an extension of the reason for having committees: the idea that Congress is best served if members become specialists, with the vast majority accepting the expertise of a few on most issues. Committee staffs grew when it became apparent that even specialized committee members needed help if Congress was to get the information required for making informed decisions."); Margolis, supra note 37, at 302 ("Committee and personal staff helped members fulfill these obligations [of becoming informed about legislation and performing casework] and, in the process, became essential parts of the institution.").

39. See Posner, supra note 34 ("I would say a half hour conversation with a credible expert would be vastly more useful than reading the [Bankruptcy] Code . . . .").

40. Congress is, of course, not the only legitimate policymaker in our constitutional system. See Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405, 428 (2008) ("One need not subscribe to an extreme version of legal realism to recognize that judges make policy when they interpret vague, ambiguous, or gap-filled statutes, just as agencies do."); Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2141-42 (2004) (summarizing the debate over whether Congress or the executive branch is a more accountable policymaker). But Congress is the primary policymaker, since the statutes it enacts create the opportunity for agencies and courts to fill in the policy gaps. See John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 241 ("All legislation necessarily leaves some measure of policy-making discretion to those who implement it.").
The argument, as just stated, is entirely true. And yet it omits the primary function of a legislature. Congress’s role is not just to make good policy, it is to make good law.\footnote{1} Laws are what transform policy from an abstract idea into concrete rules functioning in the real world.\footnote{2}

Lawmaking is the primary job of a legislator, and the task of lawmaking is primarily assigned to Congress.\footnote{3} As Jeremy Waldron put it, “[A] legislature is an institution \textit{publicly dedicated to making and changing law}.\footnote{4}{44} The word “legislator” itself demonstrates this; the roots are \textit{lex}, meaning “law,” and \textit{lator} (from the verb \textit{ferre}), meaning “to bear, carry, bring.”\footnote{5} A legislator is thus a law-bringer or law-giver. The Oxford English Dictionary defines a legislator as “[o]ne who makes laws (for a people or nation); a lawgiver; a member of a legislative body.”\footnote{6} Merriam-Webster agrees, defining a legislator as “one that makes laws especially for a political unit.”\footnote{7}

The primary power granted to Congress in the Constitution is the making of laws. Aside from various self-regulatory powers\footnote{8} and the impeach-

\footnote{1}{See Waldron, \textit{Representative Lawmaking}, supra note 27, at 336 (“[A] legislature is an institution publicly dedicated to making and changing law.”).}

\footnote{2}{See Seidman & Seidman, supra note 29, at 445 (“The drafter chooses the words of the bill’s provisions that, to implement the policy, specify who will do what.”); Waldron, \textit{Representative Lawmaking}, supra note 27, at 344 (“Principles may be in the background, but each piece of legislation must be framed so that technical provisions, with their attendant definitions, procedures, exceptions, and administrative clauses will actually have the effect of promoting the principles the public thinks are morally important.”).}

\footnote{3}{See Roger H. Davidson, \textit{The Lawmaking Congress}, 56 \textit{LAW \& CONTEMP. PROBS.} 99, 99 (1993) (“Congress’s primacy as lawmaker is mandated by the Constitution and validated by historical experience.”); Paul A. Diller, \textit{When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006}, 61 \textit{SMU L. REV.} 281, 286 (2008) (“[T]he Constitution rests the affirmative power to make law most clearly with Congress.”). The President, of course, has an important role to play through the veto and recommendation powers, see generally Davidson, supra, at 99 (“[T]oday’s chief executives are expected to present legislative agendas to Congress and to provide Capitol Hill allies with guidance and leadership.”); Vasan Kesavan & J. Gregory Sidak, \textit{The Legislator-In-Chief}, 44 \textit{WM. \& MARY L. REV.} 1 (2002), but his legislative powers pale in importance compared to those of Congress.}

\footnote{4}{Waldron, \textit{Representative Lawmaking}, supra note 27, at 336 (emphasis added); see also Waldron, supra note 21, at 22 (“The idea of legislation is the idea of making or changing law \textit{explicitly, through a process and in an institution publicly dedicated to that task}.”).}

\footnote{5}{8 \textit{OXFORD ENGLISH DICTIONARY} 810 (2d ed. 1989).}

\footnote{6}{Id.}

\footnote{7}{\textit{MERRIAM-WEBSTER ONLINE DICTIONARY}, \url{http://www.merriam-webster.com/dictionary/legislator} (last visited Nov. 5, 2010).}

\footnote{8}{See U.S. \textit{CONST.} art. I, § 5, cls. 1-2 (“Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).}
ment process, all of Congress’s powers are executed through the enactment of laws. When Congress “makes policy that binds the Nation,” its only legitimate method of proceeding is to pass a law.

Thus, making law is the most fundamental role of a legislator. It is what Members of Congress are elected to do. Lawmaking is the primary lens through which we evaluate the legislative process and the performance of individual legislators. Though each Member of Congress can only become a policy expert in a few areas (usually those covered by the committees he or she is appointed to), all of them should become experts, to the extent possible, in translating policy into law. Unlike policy expertise, understanding the interaction of legal rules does not usually require extensive knowledge of the fields being regulated. Information about the underlying fields is certainly helpful, but legal analysis of proposed legislation is a single skill that remains constant regardless of the subject matter of the bill. This skill is crucial to every part of the lawmaking endeavor.

The difference between policy and law can be illustrated with an example from the 2010 health care bill, known as the Patient Protection and Affordable Care Act (PPACA). The text of PPACA changed rapidly in the

49. See id. at art. I, § 2 (House impeachment powers); id. at art. I, § 3 (Senate impeachment powers).

50. See id. at art. I, § 8 (“The Congress shall have Power . . . []to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).


52. See Waldron, Representative Lawmaking, supra note 27, at 337-38.

53. See id. at 344 (“The task of converting principles to statutory provisions is not easy.”). Members with law degrees and professional experience as lawyers will have an easier time translating policy into law than others. However, it is not something that requires a law degree. Statute drafting is not even a skill emphasized at law schools; most law students graduate without ever studying the subject. See Dakota S. Rudesill, Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress, 87 WASH. U. L. REV. 699, 706-08 (2010) (noting that legislative-branch experience among lawyers and law professors is dramatically less common than judicial and executive-branch experience); Seidman & Seidman, supra note 29, at 438 (“If they study legislation at all, legal academics typically focus on examining how courts interpret legislation.”). Nor is analysis of legislation from an ex ante perspective frequently taught; statutes are interpreted in light of particular fact patterns that arise in real or hypothetical cases. See Ethan J. Leib, Adding Legislation Courses to the First-Year Curriculum, 58 J. LEGAL EDUC. 166, 170 (2008) (“[T]he first-year slate of courses tends to be dominated by a judge-centered perspective on the law, in which all legal questions are answered by people in black robes – and generally black-robed people at the appellate level.”).

days before the final vote, but the major policy choices behind the bill had been clear for a long time. Members of Congress were certainly aware that the new exchanges for purchasing individual health care coverage would not be operational until 2014, since the debate over the exchanges was a major part of the policy discussion over PPACA. They probably also knew about the fines imposed on employers who drop their existing insurance plans. Many of them were probably aware of a provision requiring Members of Congress and congressional staff to purchase their own health insurance on the exchanges, so that they would have the same health care coverage that is available to ordinary Americans. All of these are policy considerations.

The implementation of these policies through legal rules, however, led to real-world consequences that nobody noticed prior to the passage of the bill. A few weeks after the bill was enacted, the Congressional Research Service issued a report that pointed out a major flaw: The exchanges will not exist until 2014, but the prohibition on Members of Congress and their staff holding insurance other than through the exchanges arguably takes effect immediately. This was because of a simple drafting error that could have been caught if more people had read and paid attention to the text of the bill. The section requiring legislators and staff to purchase insurance through the exchanges states that it will become effective “after the effective date of this subtitle.” However, that subtitle does not include an effective date. The default rule of statutory interpretation is that when no effective date is stated, the new statute takes effect immediately.

57. See Memorandum from Jennifer A Staman et al., Cong. Research Serv., Analysis of § 1312(d)(3)(D) of Pub. L. No. 111-148, The Patient Protection and Affordable Care Act, and its Potential Impact on Members of Congress and Congressional Staff 3-5 (April 2, 2010). The memorandum also suggests arguments that could be made for a later effective date of the congressional health coverage provision. Id. at 3. However, the U.S. Office of Personnel Management disagreed with the CRS interpretation of these provisions. See Letter from John Berry, Director, U.S. Office of Personnel Mgmt., to The Honorable Nancy Pelosi, Speaker of the House of Representatives and the Honorable Harry Reid, Majority Leader of the Senate (Apr. 16, 2010), available at http://media.npr.org/assets/blogs/health/images/2010/04/Pelosi-Reid%20on%20FEHB%20coverage.pdf.
58. Staman et al., supra note 57, at 4.
60. Id.
61. See Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."); 2 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 33:6 (7th ed. 2007) ("A statute takes effect from the date of its pas-
Following the CRS interpretation of these provisions could create yet another unintended legal consequence. If Congress is forced to drop employees from its existing health insurance plan, it could be fined up to $50 million per year under the provision that forbids employers to withdraw existing plans.\(^{62}\) The statute imposes a fine on Congress for something the statute requires Congress to do. These are legal issues, not policy ones. They are a result, not of nefarious policy intent, but of lack of attention to how the legal rules work together. The problems are apparent from a reading and analysis of the text of the statute but not from understanding only the policy behind the law. This is the type of real-world consequence that a careful legislative process, including reading the bill, could prevent.

Legislators have a duty to perform their jobs with care and take responsibility for the results.\(^{63}\) Senators and Representatives take the same oath of office as does every other government officer or employee (aside from the President, who has a constitutionally prescribed oath of office).\(^{64}\) The oath requires legislators to swear or affirm

\[\text{T]hat I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.}\(^{65}\)

It is the final clause, the promise to “well and faithfully discharge the duties of the office,” that is relevant to the discussion here.\(^{66}\) Framed this


\(^{63}\) See Waldron, supra note 21, at 23 (“The general duty of care in this regard means that those who [are] in a position to modify the law have a responsibility to arrive at a sound view about what makes a legal change a good change or a bad change.”).

\(^{64}\) See U.S. CONST. art. II, § 1, cl. 7 (oath of office for the President); 5 U.S.C. § 3331 (2006) (oath of office for elected and appointed officials).

\(^{65}\) 5 U.S.C. § 3331.

\(^{66}\) Id. The duties to support, defend, and bear allegiance to the Constitution also have relevance to the legislative process when proposed legislation may violate a constitutional provision. See Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 587 (1975). In that situation, Members of Congress may also have a duty to exercise their best judgment about whether the proposed law is constitutional and, if not, to vote against it. Id. at 586, 588. A full analysis of such a duty is beyond the scope of this Article. For more on
way, the question is: Must a Member of Congress read the text of each bill before voting on it, if he or she is to "well and faithfully discharge the duties of" his or her office?

When voting on proposed legislation, a Member of Congress cannot perform well and faithfully unless she has a deep understanding of what the bill will do, both from a policy standpoint and a legal standpoint. Gaining that understanding is her duty. This is an onerous requirement, which involves a great deal of reading, discussions with staff and experts, and study. Reading the bill may provide little information about its policy effects, but it is essential to an understanding of its legal effects. Laws are the rules that implement a policy, taking that policy from idea to reality.67 If the bill does not make good law — if the provisions are internally inconsistent, clash with existing law, do not focus on the real-world cause of the problem, are too vague, or suffer from other drafting problems — it will also be ineffective at realizing policy.68

B. Text Matters

The importance of reading a bill arises out of the fact that the text of a bill is important. The text is what becomes the law, not the reports, briefing books, or explanations.

Some might argue, based on the flexibility accorded to later interpreters, that the text of a law is not very important for determining its meaning. If that is so, legislators need not pay attention to the text of the bill, since law is made in ways other than enacting specific statutory text. The literal text of a statute does not matter because the executive branch and courts will interpret the text away if it differs from their favored policy outcomes.69 Text imposes some constraints on interpreters, but mostly in the form of extra work. The interpreters will have to spend time and effort justifying their decision to move away from what a literal reading of the text requires,70 but they will

68. See id. at 438 n.9 ("[A] law does not "work" if it either does not induce its prescribed behaviors, or if those behaviors, although induced, do not help to resolve the targeted social problem." (emphasis added)); Waldron, supra note 21, at 23 ("We want our laws to be efficient devices for promoting the general good . . . .").
almost always succeed in ignoring the text and implementing their favored outcomes.

To take a classic example, a statute stating "No vehicles are allowed in the park" may eventually be interpreted to mean "All vehicles are allowed in the park at all times." But the new rule comes into being through plausible interpretive steps, always beginning with the text and taking it into account. No judge would issue an opinion blatantly stating, "The statute says 'no vehicles are allowed in the park,' and therefore the defendant did not violate the law when he drove his car through the park." Very strong norms of good governance require that a judge justify his decision based on an interpretation of the law, not just make something up. Various interpretive methods are widely accepted as legitimate, but all of them put at least some importance on the meaning of the words used in the statute, either as a primary or secondary source of meaning.

It is certainly true that interpreters have latitude to change the meaning of a statute. That proposition is the entire reason for the study of statutory interpretation -- when a statute is vague or ambiguous, the interpreter may decide that it has one meaning or another. The legislature, however, remains in final control of what the law is. If interpreters depart too far from what the legislature wants, it can pass a law overriding the disfavored interpretation. But what prevents the courts from continuing to impose their preferences even after a legislative overruling? The legislature writes the override using more specific text, laying out the new legal rules as clearly as possible. With less vagueness on the part of the legislature, judges have less

72. See id. at 337-38.
73. See Volokh, supra note 70, at 781 ("Due to current social understandings -- the widespread belief that democratic, constitutional, or procedural considerations are relevant -- judges feel constrained to justify their decisions as being 'fair' interpretations of the statute, meaning that there must be a theory of statutory interpretation underlying them.")
75. See, e.g., Eskridge, supra note 69.
76. See id.
77. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 332 (1991). This is not easy to accomplish, but it can be done and often is. Id. at 367.
flexibility to craft their own rules departing from the literal text. This is true not just of overriding court decisions, but of all statutes. The more clear and specific a statute is, the less ability interpreters have to alter its meaning. The text is not determinative, but it is undeniably important.

Statutory text is crucially important because it is what goes through the constitutional process of enactment into law. The text of a statute is the only thing that is voted on and enacted under the formal Article I, Section 7 process, not the legislative history, the intent of the legislators, or any other information. The text, therefore, is the law. All interpretive methods, other than a reading of the plain meaning of text, seek to discover not what the law is, but additional tools to help understand what the law means. Textualists make the strongest claim for the importance of statutory text in determining what the law is, arguing that attempts to base the meaning of a statute on something other than its text undermine the legal system. But even for non-textualists, the power of the text as enacted law should play an important role.

Congress, as the governmental body responsible for making statutory law, has a responsibility to pay close attention to the actual law it is enacting – the text of the statute. The signatures of the Speaker of the House and the President of the Senate on the enrolled bill certify that identical text was passed in both Houses and that all other constitutionally required procedures were followed. Courts will not second-guess this judgment, even in the face of evidence from the congressional record that different texts were passed in the two Houses. The courts can impart meaning to the text and require that lower courts follow precedent, and they can declare a statute unenforceable

79. See id. at 561-65.
80. U.S. CONST. art. I, § 7; see also Frank H. Easterbrook, What Does Legislative History Tell Us?, 66 CHI.-KENT L. REV. 441, 445 (1990) ("What distinguishes laws from the results of opinion polls . . . is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President’s signature.” (emphasis added)).
81. U.S. CONST. art. I, § 7. Congress has, in fact, passed a law recognizing that only enacted text is law. See 1 U.S.C. § 204 (2006) (stating that the Code of Laws of the United States is only prima facie evidence of what the laws of the United States are, but “whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained”).
83. See Waldron, supra note 21, at 28-29 (arguing that the legislative process should remain focused on text, not on legislative history for its own sake).
84. Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) (“The signing by the speaker of the house of representatives, and by the president of the senate . . . of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress.”).
due to a conflict with the Constitution, but Congress is the only branch of government that (acting together with the President or over his veto) can actually enact, repeal, or amend the text of a statute. 86

Thus, Congress is the branch of government that has responsibility for the text of the statute – for what the law is. Each Senator and Representative should take that responsibility seriously.

Some statutes serve primarily as delegations of power to administrative agencies or courts to make legal and policy decisions. Nonetheless, the text of the statute is still important and should be read by legislators before enactment. Delegations of power are constrained by the statutory text granting that delegation. The first question in a case of agency interpretation is whether the statute unambiguously answers the question. 87 And in fact, courts find clear statutory text that controls an agency's action quite often. 88 Courts also require Congress to include in the statute an "intelligible principle" to guide the agency's policymaking. 89 The text of the statute thus plays an important role in determining an agency's authority and discretion. Even when a bill delegates power or is written to be deliberately vague, 90 legislators should examine the text to ensure that the scope of the delegation or vagueness is properly written.

Perhaps the most troubling critique of the importance of text comes from a practical understanding of what Members of Congress actually do when analyzing legislation. In general, they spend little time wading through the text of bills, at least when they are not on the committees charged with the

86. See U.S. CONST. art. I, § 7; see also Clinton v. City of New York, 524 U.S. 417, 447 (1998) (holding the Line Item Veto Act unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

87. See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

88. See Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 YALE J. ON REG. 1, 30-31, 47 (1998) (finding that, when courts apply the Chevron two-step test, 38% of cases are resolved at step one, an unambiguous statute).


90. See, e.g., Randy E. Barnett, Foreword: Judicial Conservatism v. A Principled Judicial Activism, 10 HARV. J.L. & PUB. POL'Y 273, 288 (1987) ("The statutes are deliberately rendered vague to enable politicians to support particular legislation that pleases certain constituencies without alienating others. This deliberate vagueness shifts the battle over a statute's meaning away from the legislature into the administrative process and the courts.").
policy area that the particular bill falls into. Instead, they look at summary reports and at the coalitions of interests that support or oppose the bill. A legislator might have a general understanding of the policy embodied in a bill from reading a committee report and discussing it with her staff. She knows which party (or which factions within each party) supports and opposes the bill. She knows who is sponsoring the bill and most likely has a detailed understanding of the sponsors’ political and ideological motivations. She has heard from lobbyists representing a variety of interest groups in support of and in opposition to the bill. She watches, and possibly participates in, the political and procedural wrangling over passage of the bill as it occurs. In sum, she has a deep understanding of the legislative history of the bill but not much familiarity with the text (or even none at all, if she is not on the committee that did the markup).

Some scholars view this reality as a reason to favor the use of legislative history over text in the interpretation of a statute. A court, they argue, should give effect to the intent of Congress, and Congress’s intent is better expressed in the legislative history (which all Members know and understand) than in the text of the bill (which is read by only a handful of Members, if any).

This is not, strictly speaking, an argument against legislators reading a bill. Instead, it is an argument that because legislators do not read a bill in real life, courts should not pay attention to the text of the law either. But just because a court chooses to accommodate a particular legislative practice does not mean that the practice is normatively or constitutionally proper. If this description of legislative behavior is true, legislators are not living up to their constitutional responsibility to pay attention to the laws they enact. When a court decides to facilitate that improper behavior by implementing what the legislature “meant to do” instead of what it actually did, the court ignores, instead of interprets, the supreme law of the land.

92. See id.
95. Id. at 972-73.
But some might argue, further, that this common method of becoming informed about legislation through reports, instead of literally reading the text, is necessary because of the lack of time available to legislators. If all the important legislation is to be passed, legislators cannot spend their time reading through the text; they are much too busy.

America has a long history of controlling state and federal legislators through restrictions on time, however. Many state legislatures work only part time. More than half of the states fix the length of the legislative session in their state constitutions. State courts have been known to strike down legislation that was passed after the mandated end of a session. Some commentators have even advocated making Congress into a part-time legislature to cut down on the length and complexity of federal legislation.

Time constraints may well cut down on the amount of legislation that can be considered and passed. But they do not excuse legislators from doing their duty—passing new laws in a responsible and informed manner. As makers of law, which consists of statutory text, legislators should read each bill before voting to enact it.

These arguments about the primacy of text will be more convincing to textualists than to adherents of other schools of statutory interpretation. However, one need not be a textualist to agree that the text of a statute matters. It constrains interpreters and sets the parameters within which they can find meanings. Because the text is a crucial part of any inquiry into what the law is, legislators should take care to know what text they are enacting into law.

C. Is the Duty Delegable?

Reading the bill is necessary to gain a complete understanding of the proposed legislation as law. But perhaps a Member of Congress can delegate the step of literally reading the text to someone else—a member of his own staff, a member of a committee’s staff, or another legislator such as the sponsor of the bill—and rely on that person’s executive summary when making

98. See id.
99. See, e.g., Wells v. Riviere, 599 S.W.2d 375, 381 (Ark. 1980) (holding that legislature could not pass state constitutional amendments during an unlawfully extended legislative session); State ex rel. Heck’s Disc. Ctrs., Inc. v. Winters, 132 S.E.2d 374, 376-78 (W. Va. 1963) (striking down a statute passed in the early morning hours after the mandated end of a legislative session).
his decision about whether to vote for the bill. I argue that while many of a legislator's tasks are delegable, reading the bill is not. Reading and understanding the words of a proposed law is a personal responsibility of each individual member of Congress.101

Surprisingly little has been written by legal scholars about the authority of a Member of Congress to delegate tasks to others.102 The United States Supreme Court has strictly limited the ability of Congress as a whole to delegate its legislative tasks to congressional officers and committees.103 But it has not weighed in on the question of which tasks must be performed by an individual Senator or Representative himself and which can be delegated. One suspects that the Court would treat this issue as a political question to be resolved internally by Congress.104 Even if the question never receives a judicial resolution, it is one that Congress can and should analyze for itself.105

1. Delegation and Privilege

The Court has peered into the internal organization of congressional staff in cases involving the Speech or Debate Clause. This clause of the Constitution protects Members of Congress from being "questioned in any other Place" for their legislative activities.106 In Gravel v. United States, the Court

101. See Sheppard, supra note 24, at 239 ("[E]ach official must develop a personal knowledge [of the applicable law], for the official who does not will depend on others to the peril of the independence of office.").

102. More analysis of the role of congressional staff has been done by political scientists. See, e.g., Malbin, supra note 38, at 239-51 (arguing that legislators should not delegate tasks integral to the deliberative process, including negotiations between members with opposing views, to staff); David Whiteman, Communication in Congress: Members, Staff, and the Search for Information (1995).


104. See Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."); see also Jesse H. Choper, The Political Question Doctrine: Suggested Criteria, 54 Duke L.J. 1457 (2005) (prescribing criteria for examining constitutional issues considered political questions).

105. See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978) (arguing that Congress has a responsibility to analyze constitutional questions the Supreme Court sidesteps for institutional reasons).

held that the privilege extends to a Member's staff, at least to the extent that
the aides act as "alter egos" of the Member. 107 "[F]or the purpose of construing
the privilege a Member and his aide are to be treated as one." 108 At
first glance, one might think that an aide who acts as an "alter ego" can be a
delegee for all sorts of legislative tasks.

We should be cautious, however, about extending the Court's reasoning
from the privilege context to the issue of delegation. In the executive branch,
there is a clear difference. The President may delegate almost all executive
tasks to his subordinates in the White House and agencies. 109 Only a handful
of presidential functions are understood to be nondelegable. A 1981 Office
of Legal Counsel memorandum listed seven tasks that the President cannot
delegate to his subordinates: (1) nominating and appointing officers, (2) ap-
proving or vetoing legislation, (3) making treaties, (4) granting pardons, (5)
removing officers, (6) issuing executive orders, and (7) exercising the com-
mander-in-chief power. 110 Almost all of these are constitutionally assigned
functions found explicitly in the text of the Constitution. 111 The removal
power, not mentioned in the Constitution, is inferred from the constitutionally
assigned appointment power. 112 And the power to issue executive orders
stems from the President's role as head of the executive branch.

Yet while the President may delegate all sorts of tasks to his "alter egos"
and lower-ranking subordinates, 113 his executive privilege does not extend to
cover them in the same way it covers him. In the aftermath of Watergate, the
Supreme Court declined to extend executive privilege to the President's staff

108. Id. at 616 (internal quotation marks omitted).
    Legal Counsel 91, 94-95 (1981).
111. See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in
    Chief of the Army and Navy of the United States, and of the Militia of the several
    States, when called into the actual Service of the United States . . . ."); id. at cl. 2 ("He
    shall have Power, by and with the Advice and Consent of the Senate, to make Treat-
    ies, provided two thirds of the Senators present concur; and he shall nominate, and by
    and with the Advice and Consent of the Senate, shall appoint Ambassadors, other
    public Ministers and Consuls, Judges of the supreme Court, and all other Officers of
    the United States, whose Appointments are not herein otherwise provided for, and
    which shall be established by Law . . . ."); id. at cl. 1 ("He shall have Power to grant
    Reprieves and Pardons for Offenses against the United States, except in Cases of
    Impeachment."); see also id. at art. I, § 7 ("Every Bill which shall have passed
    the House of Representatives and the Senate, shall, before it become a Law, be presented
    to the President of the United States; If he approve he shall sign it, but if not he shall
    return it, with his Objections to that House in which it shall have originated . . . .").
113. See, e.g., id. at 132-33 ("Each head of a department is and must be the Presi-
    dent's alter ego in the matters of that department where the President is required by
    law to exercise authority.").
in the way the congressional privilege had been extended. Nonetheless, the executive branch continues to believe that the President’s executive privilege extends to aides who serve as alter egos.

Executive privilege remains a hotly contested issue of constitutional law, but it is apparent that delegation and privilege are not necessarily co-extensive. In the executive branch, the ability to delegate extends further than the privilege. In the legislature, the rule may well be the opposite – staffers are privileged to the extent that they assist a Member, but Members have limited ability to delegate their constitutionally assigned tasks.

2. Delegation of Decisional vs. Ministerial Tasks

A closer look at the President’s list of nondelegable powers reveals a curious difference between the executive-branch and legislative-branch practices of delegation. In 2005, the Office of Legal Counsel (OLC) provided an excellent illustration by addressing the question “Whether the President May Sign a Bill by Directing that His Signature be Affixed to It.” If the President is away from Washington during the time an enrolled bill is presented for his signature, may he direct a subordinate to sign the bill for him using an autopen device? OLC’s answer is yes. The opinion draws an important distinction between making the decision to sign the bill into law and the physical act of signing the document. “We emphasize that we are not suggesting that the President may delegate the decision to approve and sign a bill, only that, having made this decision, he may direct a subordinate to affix the President’s signature to the bill.” The President may delegate the ministerial formality of a signature but not the decision of whether the bill should become law.

The practice in Congress has been almost exactly the opposite. Members of Congress register their decisions by voting, ultimately on the floor of each chamber and, before that, in committees. The same questions arise as

114. See Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (refusing absolute immunity to former aides of President Nixon); see also id. at 822 (Burger, C.J., dissenting) (“I am at a loss . . . . to reconcile [the majority’s] conclusion with our holding in Gravel v. United States.”) (citation omitted)).

115. See, e.g., Immunity of Former Counsel to the President from Compelled Congressional Testimony, Op. Off. Legal Counsel (2007), 2007 WL 5038035, *1 (“Since at least the 1940s, Administrations of both political parties have taken the position that ‘the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.’”).


118. See id.

119. Id. at *1.

120. Id.
for the President signing laws: (1) Must a Senator or Representative cast the vote herself, or is it sufficient to delegate the mechanical casting of the vote to another person (i.e., casting a proxy vote) and (2) Must a Senator or Representative make the decision of how to vote on her own?

Proxy voting has never been permitted on the floor of either chamber of Congress. It was permitted in congressional committees until 1970, when the Legislative Reorganization Act placed strict limits on committee proxy votes. The practice continues only in some Senate committees and conference committees, not in the House of Representatives. Some scholars argue that the limit on floor voting by proxy is not constitutionally mandated and that proxy voting could be permitted by a change in the chamber rules. This proposition has never been tested in Congress or the courts and has received very little scholarly attention. Both chambers of Congress continue to tightly control the casting of votes on legislation by requiring that it be done in person on the floor, and almost always in person in committees as well.

By contrast, there appear to be no rules, nor even any published constitutional analysis, about what a Member of Congress may or may not delegate to subordinates during the decisional process. Seemingly, nothing prohibits a Member of Congress from walking into a floor vote with a marked ballot prepared by his staff, without any input by the legislator herself, and entering those votes without a modicum of personal judgment.

Yet this cannot be proper. Surely a legislator's decision about whether to vote for or against a bill must be based on her own judgment, just as the President's decision of whether to sign or veto a bill cannot be delegated. This is the very job the legislator was elected to perform, and the very task the Constitution entrusts to her. The President and the Member of Congress

121. A proxy vote might be cast by the Member's staff or by another Member.
122. Vermeule, supra note 27, at 407.
124. See Margolis, supra note 37, at 288-89.
125. Senate R. XXVI, § 7(a)(3), available at http://rules.senate.gov/public/index.cfm?p=RuleXXVI (allowing Senators to vote by proxy in committee meetings when: (1) the rules of the particular committee allow it, (2) the absent Senator has "been informed of the matter on which he is being recorded," and (3) has affirmatively requested that his proxy vote be recorded); House Rep. R. XI, § 1, available at http://www.rules.house.gov/ruleprec/110th.pdf (banning proxy voting in committees); Vermeule, supra note 27, at 407.
126. See John C. Roberts, Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process, 52 Case W. Res. L. Rev. 489, 525 (2001) ("[V]oting by proxy, though not now allowed on the floor of the House and Senate, could be done on regular legislation if a majority chose to adopt it by rule.").
127. See Malbin, supra note 38, at 6 ("[T]here can be no doubt that precisely what staffs do and how they do it are matters that relate to the basic principles underlying representative government – the very principles that give members, and through them their staffs, their reason for being.").
need not make the decisions entirely alone, without relying on input from others. Receiving expert advice, listening to the opinions of others, engaging in debate, even giving a certain amount of deference to experts – all of these are appropriate aids to reaching a considered judgment. But that judgment, in the end, belongs to the constitutionally recognized actor, not to a subordinate. It must be personally exercised by the President and the Member of Congress.128

An analogy to the judicial context can also be made. Many judges have their clerks draft opinions.129 The judge nonetheless makes the actual decision in the case. He cannot delegate the judicial role entirely to his clerk. The judge personally hears arguments in the case and will generally instruct his clerk on the outcome and the reasoning behind it. Only then does the clerk write the opinion. If the judge did not read and agree with the opinion before approving it, he would commit a serious neglect of his duty.130 The judge is the primary decision-maker, and the clerk is there to assist in gathering information, looking up precedent, and putting words down on the page. Reading the opinion, if not writing it himself, is necessary for a judge to accurately understand the law that is being made in his name. Reading the words of the opinion is necessary for him to make a considered judgment about what the law is, which is the job he was appointed to do.131

Similarly, a senior partner who signs his name to an appellate brief must read and understand the arguments made in the brief, even if it is well known that the work of writing the brief is actually done by lower-level associates.132 By signing it, the senior partner takes responsibility for the content and be-

128. See id. at 247-48 (expressing dismay at the tendency of legislators to delegate tasks involving judgment to staff); SHEPPARD, supra note 24, at 246 (“Certain decisions must be delegated; that is the nature of bureaucracy. On the other hand, some decisions are inherent in the nature of office and cannot be delegated to another person in good faith.”).


130. See Oldfather, supra note 129, at 1325 (arguing that when opinion writing helps the decision-making process, the judge, not the clerk, should do the actual drafting of the opinion).

131. See Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

132. Posting of Jonathan Adler to The Volokh Conspiracy, http://volokh.com/2009/09/23/read-the-bill-a-response-to-orin (Sept. 23, 2009, 20:23 EST) (“Think of the legislator like a senior partner. It’s perfectly appropriate for the senior partner to rely upon associates to conduct research, draft documents, review documents, and so on. But if the partner is going to sign his or her name to a legal brief, he or she better have read it. It is simply inappropriate for the partner to simply sign a document or brief on an associate’s say-so. By the same token, when the legislator is prepared to enact legislation, he or she should have read the bill.”).
comes subject to sanctions for improper content. Like the President, and like judges, legislators should undertake the decisional aspects of their jobs themselves. Each Senator and Representative must make an independent decision about whether to vote for a bill or against it. And that decision should be made in an informed manner. Reading the text of a bill is a crucial step in making the decision to enact that bill into law.

Legislators need not write the bills themselves. There are several hundred members of Congress and not all of them can possibly participate in the writing of each and every bill. Due simply to the size of the legislative body, legislators primarily evaluate bills written by others rather than writing bills themselves. A bill can be a perfectly good one even if no legislators participate in the drafting of it at all, just as a brilliant judicial opinion may be written entirely by a clerk. The source of a law is much less important than its content. The point of reading a bill is for a legislator to evaluate the bill’s content for herself, rather than relying on the assurances of the drafter or another proponent about what it will do.

Legislators vote on whether to subject the American public to new binding rules of law. They must personally exercise judgment about whether to enact those rules. In other contexts, people performing legal roles are expected to read and understand the documents they sign their names to. The expectation should be no different for Members of Congress. Part of the process of educating themselves about a bill is reading and understanding the actual text of the statute, as discussed in the next section.

III. IMPLEMENTING A READ THE BILL RULE

Implementing a Read the Bill rule is not an easy matter. Three main problems arise. First, how should the rule be enforced? In light of constitutional and practical difficulties with any statutory rule requiring legislators to
read bills, I argue for a strong norm enforced by a legislator's own colleagues and ultimately by the electorate. Second, bills are dynamic, not static. They can change significantly between introduction and a final vote. Which version(s) must a legislator read? The answer depends on each member's committee assignments, expertise, and level of involvement on each particular issue. Third, bills are not easy to understand. Certain bill drafting reforms could ease the task of reading a bill.

A. "Read the Bill" as a Norm

1. Problems with a Penalty-Enforced Rule

For the most egregious legislative misbehavior, such as bribery and treason, society imposes punishment through criminal law banning the activity. Other behavior is not as inherently bad, but can still create abuses of the legislative process. Thus, lobbying, campaign fundraising, and spending are regulated through complex disclosure and reporting requirements, bans on certain practices, and criminal penalties for violations.

Similar laws might be devised to require Members of Congress to read bills before voting. Enthusiastic blog commenters have suggested such methods as requiring that each legislator pass a quiz on the contents of a bill before being allowed to vote on it or sign a statement certifying that he or

135. See SHEPPARD, supra note 24, at 6 ("Other officials, or (less likely) the citizenry, may condemn an immoral official like any bad person, and one tool that is out of fashion is shame, which is more important but less likely now than offense.").


137. See 2 U.S.C. §§ 1601-1614 (2006 & Supp. 2010) (disclosure of lobbying activities); id. § 1606 (providing civil and criminal penalties for violations of lobbying rules); 2 U.S.C. §§ 431-457 (regulation of federal election campaigns); id. § 437g (providing for administrative, civil, and criminal enforcement of violations of campaign finance rules).

138. See Comment of Hank Bowman to Posting of David Post to The Volokh Conspiracy, http://volokh.com/2009/09/23/should-lawmakers-um-read-the-laws-theyre-voting-on/#comment-662428 (Sept. 23, 2009, 15:08 CST) (comment two, suggesting voters "should be able to quiz any legislator on what the bill said"); Comment of Postman to Posting of Uncle Dave to Dvorak Uncensored, http://www.dvorak.org/blog/2009/07/10/congress-read-a-bill-fully-before-voting-on-it-hahaha/ (July 10, 2009, 4:41 CST) (comment four, suggesting a constitutional amendment requiring congressional members to "pass a quiz on the content of the bill before they are allowed to vote on it"). This solution poses several additional practical problems. Who would write the quiz? How would they prevent the contents from being leaked to legislators? What if the questions were written in the form, "Would this bill require X?" and legislators honestly disagreed about the answers? What if the quiz was written (or alleged to be written) to make it easier for supporters to pass than opponents, or vice versa? In addition, passing this sort of quiz might require
she has read and understood the bill. These ideas are, frankly, a bit silly and undignified. It is difficult to imagine Congress subjecting itself to any such thing by statute or by including it in the House and Senate Rules.

There are also constitutional concerns implicated in limiting a Member’s right to vote on proposed legislation. If the statute imposes civil or criminal penalties for Senators or Representatives who vote without having read the bill, it may run afoul of the Speech or Debate Clause. Members of Congress are shielded from criminal prosecutions and civil suits arising out of their legislative activities. The clause states, “[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” The Supreme Court has interpreted this constitutional provision broadly to cover a wide variety of activities connected with the process of legislation. In Kilbourn v. Thompson, the Court held:

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

The Speech or Debate Clause provides absolute immunity against Members of Congress being forced to defend their legislative actions in court. This immunity “insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.” If a Member of Congress feels that she can best represent the interests of her constituents by not reading the text of a detailed knowledge of the contents of the bill, but not necessarily a literal reading of the text. Legislators would be able to acquire the necessary information to pass the quiz by reading summaries and talking with sponsors and staff.

141. Id.
142. Id.
143. 103 U.S. 168, 204 (1880).
144. See Powell v. McCormack, 395 U.S. 486, 502-03 (1969) (“[T]he [Speech or Debate] clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself.”); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (per curiam) (“[L]egislators . . . should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves.”).
145. Powell, 395 U.S. at 503.
bill but by instead spending her time on other legislative tasks, that judgment
cannot be questioned in the courts. No judicially-enforced penalty can be
imposed on Members who fail to read the text of a bill before voting.

In light of these concerns, it would be best to impose a Read the Bill rule
through some method other than a statute. Strong penalties, either imposed
by the courts or through deprivation of a Member's vote, are not the only way
to induce compliance with a rule. Instead, structures can be put in place to
enhance the ability and the incentive to read bills.

2. Two Facilitating Rule Changes

Some good government reforms of congressional procedures require not
just new norms, but substantial changes to Congress's internal institutional
design. One subject that has received a great deal of attention in the recent
academic literature, for instance, is constitutional decision-making in Con-
gress.146 Scholars have proposed significant and detailed changes to Con-
gress's committee structure and rules of debate to facilitate deliberation on
constitutional issues.147 Unlike the constitutional decision-making reforms,
implementing a Read the Bill rule does not require extensive changes to Con-
gress's institutional operating procedure. This is because reading the bill is
an individual duty of each Member of Congress, not something that requires
the collective deliberation or decision-making of Congress (or each chamber)
as a whole.148

The most basic change to the chamber rules that would facilitate Mem-
bers reading bills is a rule that requires the full text of a bill to be available to
all Members for a reasonable amount of time prior to the final floor vote.
This could be a set amount of time or a sliding scale based on the page or
word count of individual bills.149 Such a rule would prevent bills from being
rushed through without providing at least an opportunity for legislators to

146. See, e.g., Brest, supra note 66; Elizabeth Garrett & Adrian Vermeule, Institutional Design of a Thayerian Congress, 50 DUKE L.J. 1277 (2001); Katyal, supra note 66.

147. See Garrett & Vermeule, supra note 146, at 1303-30.

148. See Waldron, supra note 21, at 23 ("[R]esponsible lawmakers ought to pay
careful attention to the relation between their own individual decisions and the event-
tual effects, on citizens and on society, of the law that they make (or fail to make).")

149. Several Read the Bill proponents have settled on seventy-two hours as the
amount of time the text of a bill should be available – to Congress and to the public –
before a vote. See Let Freedom Ring, supra note 9; Read the Bill, supra note 9. Another commentator has suggested five days as a better time period. See Greenberg, supra note 7. A sliding scale would have the additional benefit of encouraging short-
er bills that can be passed more quickly.
read them.¹⁵⁰ This rule should be nonwaivable, or waivable only in bona-fide emergency situations by a supermajority vote.

A second rule change could make bills easier to understand on a straightforward reading. This rule would require the version of the bill made available to Members to include a "redline" version of all existing laws amended by the new bill. Sections that are removed by the new law would be printed in strikethrough text, and sections added would be underlined.

A bill often consists of pages and pages of amendments such as, "Section 1905 of the Social Security Act (42 U.S.C. 1396d), as amended by sections 2001(a)(3) and 2001(b)(2), is amended – (1) in subsection (b), in the first sentence, by striking 'subsection (y)' and inserting 'subsections (y) and (aa)'; and (2) by adding at the end the following new subsection . . ."¹⁵¹ The new subsection is then presented out of context, requiring the legislator (or his staff member) to search for the statute being amended and figure out what the changes mean. Even more obscure is when an amendment strikes language without adding any, and without giving any indication of the content being stricken.

The House of Representatives already recognizes this problem. House Rule XIII(3)(e)(1) requires that when a committee reports a bill that would repeal or amend part of an existing statute, the committee report must include a comparative print of the statutory text as amended.¹⁵² This Rule should be expanded to apply to the final version of a bill before a vote. Changes made during the floor debate and in conference committee should not be left obscure. The final version of the bill that is presented for a floor vote should either be written to incorporate the text being changed or should be accompanied by a redline report that is accessible to all Members (and preferably to the public as well) for the full waiting period time proposed above.¹⁵³

3. Creating a Read the Bill Norm

Members of Congress should be encouraged to read the text of bills through the cultivation of a norm or expectation that they do so. Just as main-

¹⁵⁰. See Barbara Sinclair, Question: What's Wrong with Congress? Answer: It's a Democratic Legislature, 89 B.U. L. REV. 387, 396-97 (2009) (advocating strengthened "layover requirements" to give legislators enough time to read proposed legislation before a vote, and noting that the House of Representatives in the 110th Congress usually abided by the layover rule); see also Waldron, Representative Lawmaking, supra note 27, at 352 ("Legislation requires time and careful deliberation . . .").

¹⁵¹. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 2006 (2010). This text is the beginning of the section of the Senate health care bill known as the "Louisiana Purchase" and is described infra note 223-27 and accompanying text.


¹⁵³. See supra notes 149-50 and accompanying text.
maintaining a free society requires a public culture that values freedom, maintaining a properly functioning legislative body requires norms that support responsible legislation. A norm of reading bills could be facilitated by the institutional changes described above. The norm could be enforced through changes within Congress, as described in this section, and also by voters at the ballot box. Existing norms about the behavior of Members of Congress include norms of deliberation and public-oriented justifications.

Norms are weaker forces than laws for influencing behavior. Still, they can and do change the way people behave. This is easily seen in the situation of judges in the United States. Society expects them to be impartial and independent. Though there are only a few, rarely used, enforcement mechanisms to require judges to decide cases impartially, judges routinely use voluntary recusals to maintain an unbiased judicial system and even to avoid the appearance of impropriety. Judges also have historically exercised a great deal of self-restraint in their decisions, dating back to Marbury v. Madison. This zealous protection of judicial norms has maintained, to a large degree, a societal sense of honor and respect for judges.

American public opinion seems to have fewer expectations of our legislators than our judges. One norm that does motivate the behavior of legislators is a norm of service in the public interest, though legislators usually also act with a combination of this and other, less charitable purposes. Jeremy

154. See, e.g., WALDRON, supra note 27, at 84 ("[P]aper declarations are worth little if not accompanied by the appropriate political culture of liberty. And if political culture is as important to liberty as a set of institutional constraints, then we should stop pretending that political philosophy is interested only in prescribing institutions." (footnote omitted)).

155. See Garrett & Vermeule, supra note 146, at 1291.

156. See SHEPPARD, supra note 24, at 4 ("Officials act with very few controls or penalties, other than their access to promotion or image. The selection of officials and culture of officials are therefore the most likely external influences on how an official exercises discretion.").


158. See Harry T. Edwards, Judicial Norms: A Judge’s Perspective, in NORMS AND THE LAW 230, 232 (John N. Drobak ed., 2006) ("[S]elf-restraint has been a crucial key to the success of the judiciary in the United States in establishing the enforceability of its decisions. ... Self-restraint helps build up the courts’ constitutional legitimacy over time ... ." (emphasis omitted)).

159. 5 U.S. 137 (1803) (holding a statute unconstitutional but refraining from issuing an order to the President).

160. See Friedman, supra note 157, at 147-48.

161. See Garrett & Vermeule, supra note 146, at 1287-90 (explaining that legislators are motivated by a complex mix of self-interested and public-interested motivations). The norm of acting in the public interest is so important that challenging it provides the source of the humor behind a recent satirical article written in the "voice" of the House Minority Leader, openly stating that he does not value public-
Waldron has noted how our “idealized picture of judging” is combined “with a disreputable picture of legislating” and has suggested that the development of an ideal view of legislating could result in a better ground for scholarly evaluation of how the legislature actually behaves. Such an ideal may also put pressure on legislators, through their constituents, to behave more in accordance with the ideal. In that spirit, a norm of reading the bill could be helpful.

A small group of norm entrepreneurs in Congress could bring a Read the Bill norm to the forefront. Imagine the following situation: The majority party’s leadership creates a large, complex bill that is unpopular among independents and members of the minority party. The majority party has sped through the legislative process in order to ride a wave of momentum and avoid giving opponents an opportunity to closely investigate the bill’s contents and publicize the less popular portions. To ensure the bill’s passage, they pressure a number of moderate majority-party members from swing districts to support it. Those members have a golden political opportunity to oppose the bill (thus avoiding anger from their largely anti-bill constituents) while covering their disloyalty to the party with talk about good legislative practices. Those swing-district moderates could issue statements saying, “This bill may or may not be good for our country. I do not know. I cannot know, because the leadership has not given me or any of my colleagues time to sit down and read the bill to find out what is in it. The contents have changed drastically from day to day, with long amendments adding and removing provisions. The leadership insists that I should just trust them that the bill is good. I cannot abdicate my responsibility to read the bill and make that judgment for myself. Therefore, I must in good conscience vote against this bill, because I cannot vote to impose law on the American people that I have not seen for myself is a good law. To do so would violate the trust that the people of my district have placed in me.”


162. See WALDRON, supra note 27, at 2.

163. See Waldron, Representative Lawmaking, supra note 27, at 354 (“[W]e cannot undertake intelligent disparagement or criticism of our legislative institutions if we do not have a well-thought-through ideal which we can use to hold up to them for comparison. I do not mean a utopian ideal, one which cannot possibly be realized in practice. I mean a realistic normative account that shows us the moderate standards to which we ought to be holding our lawmaking. Otherwise – if there is no well-thought-through normative ideal – our criticisms will consist of intuitive gut-reactions, rather than intelligent assessments based on some articulate sense of what a good set of legislative institutions ought to be.”).
That statement would certainly make headlines.\textsuperscript{164} It would be a dramatic change from the existing norm of legislators not valuing a literal reading of the text.\textsuperscript{165} Defenders of the status quo would likely become angry and dismissive in response to such a statement.

Several Members of Congress have already responded dismissively to the Read the Bill movement. At a National Press Club event, Rep. John Conyers mocked the Read the Bill movement: \lq I love these members, they get up and say, \lq Read the Bill.\rq . . . What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?q\textsuperscript{166} Rep. Steny Hoyer also laughed in the face of a question from the press about the Read the Bill idea, saying, \rq If every member pledged to not vote for it if they hadn't read it in its entirety, I think we would have very few votes . . . I'm laughing because . . . I don't know how long this bill is going to be, but it's going to be a very long bill.\rq\textsuperscript{167} Then-Senator Roland Burris also reportedly \rq seemed baffled by the thought of actually reading the entire bill.\rq\textsuperscript{168} Nancy Pelosi, the Speaker of the House at the time, was also dismissive of the public's ability to read the bill. In a speech at the National Association of Counties, she argued, \rq [W]e have to

\begin{enumerate}
\item[164.] Some Members of Congress have complained about not having time to read certain bills before a vote was called, but they have not made high-profile statements linking the fast pace to their votes. \textit{See}, e.g., Ryan Byrnes & Edwin Mora, \textit{Democratic Senator Predicts None of His Colleagues 'Will Have the Chance' to Read Final Stimulus Bill Before Vote}, CNS NEWS, Feb. 12, 2009, http://www.cnsnews.com/news/article/43478 (\rq Some lawmakers said one of the reasons they would not vote for the bill was because there would be no time to study it before it came up for a vote.q). Most of the complaining Members have been in the minority party, thus attracting criticism that their professed desire to read the bill was based on political opportunism. \textit{See id.} (quoting three Republican representatives); John Dickerson, \textit{Just Skim It: Why Reading Aloud the Senate's Health Care Bill is a Waste of Everyone's Time}, SLATE, Dec. 17, 2009, available at http://www.slate.com/id/2239067/pagenum/all (\rq It's a bipartisan complaint usually made by the party in the minority.q).

\item[165.] Senator George Voinovich, who claims to have read the entire February 2009 stimulus bill before its passage, refused to comment on whether his colleagues would also read the bill before voting. \textit{See} Byrnes & Mora, \textit{supra} note 164; \textit{see also} Stephen T. Colbert, Testimony Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, House of Representatives, Committee on the Judiciary (Sept. 24, 2010), transcript available at http://bluewavenews.com/blog/2010/09/24/stephen-colbert-does-congress-video-accurate-transcript/ (\rq Why isn't the government doing anything? Maybe this Ag Jobs bill would help, I don't know. Like most members of Congress, I haven't read it.\rq).

\item[166.] Ballasy, \textit{supra} note 6.

\item[167.] Gabriel & Magleby, \textit{supra} note 93.

\item[168.] Byrnes & Mora, \textit{supra} note 164.
\end{enumerate}
pass the [health care] bill so that you can find out what is in it . . . . But ignorance of pending legislation is clearly no virtue in a legislator.\footnote{169}

There is some evidence, however, that a good number of legislators want to spend more time focused on the task of reading and learning about bills. In an internal survey in 1993, Members were asked to rank a list of tasks that they would like to spend more time on.\footnote{171} Thirty-one percent of them said their first choice was to spend more time on “studying or reading about legislation or future issues.”\footnote{172} More than 78% of Members ranked this as one of their top five priorities to spend more time on.\footnote{173} The task of studying or reading about legislation was the most popular choice both as the number one priority and in the top five as a whole.\footnote{174} More recently, Sen. Tom Coburn has taken up the Read the Bill cause. He attempted to amend the health care bill to include a certification that every Senator read the text and demanded that a nearly 800-page amendment be read aloud on the Senate floor.\footnote{175}

If a few members of the majority party consistently committed to a Read the Bill pledge, creating difficulties for quick passage of legislation, the party leadership would be forced to make some changes.\footnote{176} The leadership would,

\begin{footnotes}
\footnotetext[170]{See SHEPPARD, supra note 24, at 239 ("An official has no moral claim to ignorance.").}
\footnotetext[172]{Id.}
\footnotetext[173]{Id.}
\footnotetext[174]{See id. at 281-87. The other choices in the survey were "attending committee hearings, meetings, and markups"; "meetings in Wash. on legislative issues with colleagues, govt. officials, or lobbyists"; "attending floor debate or watching it on television"; "giving speeches or making personal appearances to talk about legislation before Congress, other than in your District or State"; "managing and administering your office"; "fundraising for your next campaign, for other campaigns, or for your party"; "keeping track (oversight) of the way administrative agencies are implementing national policies and programs"; "meeting personally with constituents when they are in Washington"; "attending meetings and otherwise working with LSO's and other informal groups to which you belong"; "working with party leaders on coalition building"; and "returning home to meet with citizens of your State or District." See generally id.}
\footnotetext[176]{See Michael J. Gerhardt, Norm Theory and the Future of the Federal Appointments Process, 50 DUKE L.J. 1687, 1690 (2001) ("[T]he success of political leaders as norm entrepreneurs depends less on their personal attributes than on their
of course, attempt to fight back against a norm change that would make it more difficult to pass legislation it favors.\textsuperscript{177} The norm entrepreneurs would need to have significant resolve and refuse offers to be bought out in exchange for extra pork barrel spending for their home districts, progress on their legislative priorities, or other enticements. They would also have to persevere against any retaliation against them by Read the Bill opponents, such as refusal to act on bills they sponsor.\textsuperscript{178}

Senators and Representatives supporting a Read the Bill norm could pressure their colleagues to read bills as well. Members of Congress constantly rely on each other for support of their legislative priorities, explanations of bills in their areas of expertise, and other things. If a particular Member is known for not reading bills, or not reading them carefully, other Members might ask how they can rely on her to properly inform them about the contents and probable effects of a bill she supports. In this way, a norm of reading and thorough understanding could take hold.\textsuperscript{179}

Ultimately, voters can enforce a Read the Bill norm at the ballot box. This norm is, understandably, not usually the first thing on voters’ minds when they vote in a general election. One Read the Bill opponent put the choice in stark terms:

[I]magine you go into the voting booth and you have two choices. The first choice is Legislator A, who votes the way you like, shares your ideology, and generally “gets it,” even though he’s not exactly a policy wonk and he doesn’t actually read the bills. The second choice is Legislator B, who usually votes the wrong way, and is misguided on everything important, but who very conscientiously reads every word of every bill on his way to his wrong votes. Would you vote for Legislator A or Legislator B?\textsuperscript{180}

Most people, more concerned with substantive policy outcomes than procedural good governance issues, will vote for Legislator A. But this stark choice between Legislator A and Legislator B is not the most relevant situation to consider.

\textsuperscript{177} See id. at 1710-14 (providing examples of norm entrepreneurship and retaliation by opponents of the new norms).

\textsuperscript{178} See id. at 1710 ("Creating new norms entails risking sanctions, because it often requires violating existing norms.").

\textsuperscript{179} See S\textsc{heppard}, supra note 24, at 240 ("[O]fficials must depend on other officials for information. This is an obstacle to knowledge, but it is an obstacle that can be diminished by acting without imprudent haste.").

More important is what happens in a primary election. At the primary stage, voters usually have a choice between two or more candidates who all share a significant number of the voters' own policy views, since they are all members of the same party. At this stage, voters can make choices between candidates with subtly different policy positions, between candidates with different policy priorities, and between candidates with different views on governance issues like reading the bill. Primary voters can help ensure that a Read the Bill candidate appears on the general election ballot – or even that both parties' candidates favor reading the bills before voting.

Norms held by voters can also influence the views of candidates running for office. If grass-roots support for reading the bill is strong, candidates may choose to take a Read the Bill pledge or emphasize the issue in their campaigns. In the 1990s, the governance issue of term limits gained popular salience. Many congressional candidates voluntarily took term-limits pledges, promising that they would run for only a specific number of terms in office before retiring. Some of these candidates later broke their term limits pledges, but others kept them. Whether they kept the pledge or not, that pledge helped them get elected in the first place by appealing to the norm that was publicly popular. Taking the pledge also strengthened the term-limit norm, though it remains weak enough for pledge-breakers to be re-elected with some frequency.

Another problem with enforcement of a Read the Bill norm by the public is voters' lack of knowledge about the legal rules legislators enact into law. The public often looks at Congressional votes for their symbolic value rather than the ultimate legal or even policy outcomes. This is why a bill titled the “Consumer Product Safety Improvement Act of 2008” (CPSIA)

181. Cf. Garrett & Vermeule, supra note 146, at 1288 (“[S]ome constituents might desire a representative who takes constitutional argument seriously, and might punish a representative who appears wholly opportunistic about the Constitution.”).


184. See Press Release, Senator Sam Brownback, Brownback Formally Announces That He Will Not Run for Re-Election to Senate (Dec. 19, 2009), available at http://brownback.senate.gov/public/press/record.cfm?id=306113 (“Today, I am formally announcing that I will honor my pledge [to serve only two terms in the Senate] and I will not be a candidate for the U.S. Senate in 2010.”).


can garner a huge majority in Congress even if the content of the bill will actually impose onerous rules that hurt much more than they help. No politician wants to give his opponent the easy target of labeling him “anti-safety.” This does not excuse those politicians from taking their role as legislators seriously, however. As difficult as it may be, they must do their best to craft good rules of law (preferably during the negotiation stage rather than allowing a terrible but good-sounding bill to come to the floor for a final vote). And they must explain to voters why they made politically unpopular decisions that they felt were in the public interest.

B. Applying the Read the Bill Norm at Various Stages of the Legislative Process

A bill is not a static entity. The content of a bill may change dramatically between its introduction and the final up-or-down vote on the floor of each chamber. If similar, but non-identical, bills are passed in the House and Senate, the bill will change yet again in a conference committee and be brought for another vote in both chambers. Thus, a legislator who wants to read the bill does not have an obvious single time to sit down and read the text, certain that he will never have to do it again. Instead, the legislator has to cope with the changes made to the bill as it moves through the legislative process. The level of attention devoted to each bill will depend on a legislator’s relationship to that bill. A legislator might be a sponsor of a bill, a member of a committee considering the bill, a sponsor of an amendment to the bill, a major advocate for or against the bill, a target of lobbying, or simply a bystander until the final vote. One major benefit of implementing Read the Bill as a norm rather than a codified rule is the opportunity for flexibility in how it applies to these different situations.

This section is not intended to be a definitive guide to the application of a Read the Bill norm in Congress. My intent here is only to begin to think about some of the issues involved in implementing a Read the Bill norm, providing a starting point for further analysis and experimentation. Norms work best when they develop organically to fit the situations, not when they are categorically imposed from outside the context in which they are to be used. Individual legislators can take the ideas raised here as a starting point.


189. See, e.g., Leslie Wayne, Burden of Safety Law Imperils Small Toymakers, N.Y. TIMES, Oct. 31, 2009 (explaining how the CPSIA’s well-intentioned, yet expensive, safety-testing requirements threaten to bankrupt small businesses that make children’s toys from safe, natural materials, while allowing large toy manufacturers with a history of safety problems to corner the market).

190. See, e.g., ESKRIDGE ET AL., supra note 26, at 25.
for experimentation about how to apply the norm in their own processes of learning about pending legislation.

1. Sponsoring and Introducing a Bill

The sponsor of a bill will usually be its strongest proponent. Other members rely on the sponsor for information about why the bill is important and what it will do. The sponsor should therefore be a leading expert in the content of his own bill.

But how important is the text of a bill at the time of its introduction? A legislator may well expect that significant changes will be made to the text as the bill moves through the legislative process. Many final bills are completely unrecognizable from their initial form, everything but the bill number having been changed between introduction and enactment. If this is the expectation, perhaps the initial text of the bill is less important to write well, as good law.

Massive textual changes at different stages of the legislative process are one thing that makes it difficult for both legislators and the public to keep track of what is being considered by Congress. If legislative language is introduced with the expectation that it will be dramatically changed later, everyone who is not “in the loop” is prevented from making useful comments about the effects of a bill and from proposing amendments based on the existing text.191 Thus, the legislative process would be more democratically open and responsive if bills were introduced with language that could plausibly become the basis of the final text.

The nature of the legislative process is that bills are crafted through negotiation. This absolutely requires changes to the text as the bill moves through committees, to the floor, to the other chamber, and back. A complex bill cannot, and should not, be introduced in its final form. Nonetheless, the sponsor of a bill should do his best to introduce plausible statutory language rather than placeholders that pave the way for a future complete rewrite. Doing so will allow discussions of the legal effects of the bill from the outset and make the process more participatory.

The duty of ordinary, non-sponsor legislators to read the bill should not universally kick in at the time the bill is introduced. Most bills die without ever making it to a floor vote, meaning that the majority of legislators never consider or vote on them at all. In the 110th Congress, which was in session from 2007 through 2008, 7,340 bills were introduced in the House of Repre-

191. See Gerald B.H. Solomon & Donald R. Wolfensberger, The Decline of Deliberative Democracy in the House and Proposals for Reform, 31 HARV. J. ON LEGIS. 321, 358 (1994) (“Substitutes disadvantage members who wish to draft amendments based on the bill as it was reported by the committee of jurisdiction. Substitutes also confuse House members about what it is they are voting on, since no committee report is available to explain the changes.”).
sentatives and 3,741 were introduced in the Senate. Of these, only 460 were enacted into law, and seven were approved by the House and Senate but vetoed and not overridden. Most of the others died in committee; some were voted down on the floor of the House or Senate. Reading every introduced bill would be an overwhelming task for each individual Senator or Representative to undertake, particularly considering that they would have to read the same bills again if those bills came to a floor vote in a changed form. Since the majority of bills never get a floor vote at all, and those that do are likely to change before getting there, it does not make sense to expect every legislator to read all the bills at their introduction. The duty to read bills at this stage belongs only to the sponsors of the bill and possibly to legislators who plan to be heavily involved in the negotiations over the bill from the outset.

2. Committee Consideration and Markup

Members of congressional committees are expected to become experts in the substantive area of those committees. This enables them to better understand the bills that are considered by the committee, to write committee reports on legislation (or supervise committee staff who write the reports), and to intelligently discuss the bills with other legislators and with constituents and interest groups. Committee members also participate in bill markups, in which the legislative language is amended in detail to produce the version of the bill that will progress to the floor if voted out of committee.

At this stage, committee members should do a careful reading of the bill. They should read the original text that was introduced and sent to the committee so they know what they are starting from. They should read and understand all the amendments being considered by the committee before voting on them. And then, if there have been a significant number of major amend-

193. See id. (listing 3,741 bills with the S. designation).
196. See Margolis, supra note 37, at 279 ("Members of a committee can use their particular expertise to 'fine tune' a bill before reporting it to the full House . . . .").
197. See, e.g., Davidson, supra note 43, at 100, 106 ("[Congress's] detailed legislative work is conducted mainly in its committee rooms.").
ments, such that the legislators may have lost track of how everything fits together during the process of amendment, there should be a final opportunity to read and consider the new statutory language before the committee votes on whether to send the bill to the floor.

3. Amendments

In general, legislators voting on an amendment should read and understand both the amendment and the original text of the bill. Without reading both, they cannot truly understand how the amendment would affect the proposed legislation, so they would not know what rules of law they are voting to proceed with. This is true both at the committee stage and when amendments are proposed on the floor.

Three types of amendments require separate consideration here: riders, "killer amendments," and substitute amendments. Riders are provisions that have little or no relationship to the main content of the statute but are attached to a popular bill so they can be enacted into law even if the provision on its own could not garner majority support.198 Killer amendments are the opposite—highly unpopular provisions attached to a popular bill in a bid to make it so objectionable that it will lose its majority support.199 Substitute amendments are amendments that strike out the entire text of the bill and replace it with new text.200

The first two types of amendments are not good-faith attempts to improve a bill. Instead, they are political ploys. A legislator thus need not understand the text of the main bill before voting on whether to attach a rider or a killer amendment. A rider is essentially a stand-alone legislative proposal that is attached to a different legislative proposal (the existing bill).201 A legislator should be able to vote to attach a rider after reading just the rider, even if he has never looked at the text of the main bill, since it does not change anything about the bill as it exists before the rider.

A killer amendment is more complex. This type of amendment could be an unpopular stand-alone provision, like a rider. But it might also be an amendment to the main subject of the legislation. It might be designed to weaken the legal rules being created, rendering the bill toothless. Or it might dramatically strengthen the legal rules being created, making them too unpalatable or controversial to garner majority support.

The classic example of a killer amendment is the latter type. During the floor debate over the Civil Rights Act of 1964, Sen. Howard "Judge" Smith famously proposed an amendment to add the word "sex" to the list of forbid-

198. See ESKRIDGE ET AL., supra note 26, at 34.
199. See id.; Jenkins &. Munger, supra note 186, at 499 ("The ostensible purpose of a killer amendment is to transform a bill that is a sure winner into a loser.").
200. See ESKRIDGE ET AL., supra note 26, at 34.
201. See id.
den grounds of employment discrimination (adding it to the existing grounds of race, color, religion, and national origin). Sen. Smith hoped that by adding this highly controversial amendment to the bill, he could defeat its passage. He miscalculated, however, and the Civil Rights Act of 1964 became law with the prohibition on sex discrimination attached.

This episode illustrates a problem with killer amendments—sometimes they are successfully attached, but fail to kill the bill and actually do become law. The sponsor, and the legislators voting for the amendment, must make a political calculation weighing the chance of killing the bill against the chance of the dreaded provision actually becoming law. This maneuver, unlike attaching a rider, requires a good understanding of what the proposed legislation would do as well as how the amendment would change it. Those voting for a killer amendment thus should read both the amendment and the original bill.

Those voting against a killer amendment, however, may not need to read the amendment in detail. Supporters of the bill may need to do no more than identify the amendment as an attempt at killing the bill before deciding to vote against it. The precise details of how the amendment tries to kill the bill are irrelevant for a legislator in that posture.

This suggests a broader rule: A supporter of a bill who has read and understood the statutory text and does not see any reason for changes may be justified in voting against amendments to the bill without reading them. Of course, a legislator should not assume that the bill is perfect as is. Many of the amendments might be good ones—clarifying the text, adding beneficial new provisions, or removing extraneous or harmful provisions. A legislator should certainly do what he can to create the best law possible. Certainly he should not vote to include provisions he has not read and understood. But there may be a point at which a legislator legitimately considers the bill good enough and decides to focus his attention on other bills instead of perfecting this one.

Substitute amendments may also provide an opportunity to vote on an amendment without reading the original bill. A substitute amendment is essentially an opportunity to proceed with completely new text, but without starting the legislative process over from the beginning. Since the entirety of the original bill is removed when a substitute amendment is adopted, it is probably permissible for a legislator to vote for a substitute amendment when he has read the amendment but not the original text of the bill. Yet substitute amendments can be troublesome, particularly near the end of the legislative

202. See id. at 14, 34.
203. Id. at 14.
205. Jenkins & Munger, supra note 186 ("If outcomes are not known with certainty at the time legislators cast their votes, then it is quite possible that expectations could be mistaken and inconsistent.").
206. See ESKRIDGE ET AL., supra note 26, at 34.
process, because they require all of the legislators who have been following the bill to begin again, reading an entirely new text and re-analyzing the effects of the bill.

4. Cloture and Floor Votes

When a bill comes to the floor of the House or Senate, every Member of that chamber becomes involved. The general duty of all Members to read the bill should come into play sometime during this stage.

Fundamentally, a legislator should not vote to enact a bill and impose new rules of law on the public without reading the bill himself and understanding those new rules of law. This requires reading the bill in its final form before an up-or-down vote. However, the floor debate usually involves the opportunity for amendment of the text. To participate effectively in proposing and voting on amendments, a legislator must have read the text of the bill and the amendment in advance.

One way to approach this problem is for legislators to start reading the bill when it is calendared, so they have a working knowledge of it by the time debate begins. If significant changes are made through amendment, they can then read the changed portions or the entire bill again before the final vote.

Senators may choose to vote against cloture if they have not had sufficient time to read the bill. A successful cloture vote provides that debate will last no more than thirty additional hours. If that would not be enough time for a Senator to read the final bill, voting no would be appropriate.

When a bill is sent to conference committee after passing the House and Senate in different versions, each Member must again take a close look at the text when the compromise bill returns to see what changes have been made. He should read any parts that have been changed from the version that passed his own chamber. After so much focus on the text at the initial passage stage, it would make no sense to rely solely on the conference report at the end. The post-conference text is the actual text that will become law if passed.

5. Yes Votes vs. No Votes

The duty to read the bill should be stronger when a legislator votes in favor of a bill than when he votes against it. When a legislator wants to impose new rules of law on the public, he should be very sure about what those rules of law are.

207. See Senate R. XXII (2), available at http://rules.senate.gov/public/index.cfm?p=RuleXXVI (“After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof. . . . ”).
A legislator voting against a bill also makes a judgment about what rules of law should be in effect. He indirectly votes for the current rule rather than a new one. It would, of course, be best if the legislator understood both the new rule of law and the present one, and affirmatively preferred the status quo. Legislators should certainly do their best to read all bills that come up for a final vote and become substantially informed about the changes being proposed. But the core of the duty to read the bill is the duty to take care in making new law.

This leads to an easy-to-follow rule for legislators: If legislators have not had enough time to read the text of a bill that is brought for a floor vote, they should vote no or not vote at all. This rule encourages a bill’s proponents not to rush it through without thorough consideration. If the proponents want their bill to pass, and there are enough legislators abiding by the Read the Bill norm, the proponents will have to provide sufficient time to read the bill.

Framing the duty this way leads to an obvious status quo bias. Because the duty to read a bill is imposed only for voting yes, voting no is much easier. Our constitutional system is full of rules that purposely cause a status quo bias. The many procedural hurdles in the legislative process make it very difficult to pass legislation. A bill must not only achieve majority support in both the House and Senate, it must make it through the committees in each chamber first. It can be subject to a filibuster in the Senate. The conference committee may change the text substantially and then it must be passed again in both chambers. The President has an opportunity to veto it, which kills the bill unless it receives two-thirds support in both chambers for a veto override. This is not a quick and easy process. The Framers made it difficult on purpose.

A Read the Bill duty adds to the status quo bias, but only weakly. It does not impose any supermajority requirement. It is not even particularly difficult to comply with. All it requires is time. A delay of at most a few days will generally provide sufficient time for every Member of Congress to read a bill and come to the floor prepared to vote.

Some commentators argue that a Read the Bill rule for yes votes but not for no votes would create a libertarian anti-federal-legislation bias. However, a Read the Bill rule applies just as much to bills repealing existing law as to bills creating new law. Any change in the existing legal framework requires


209. See John O. McGinnis & Michael B. Rappaport, Our Supemajoritarian Constitution, 80 TEX. L. REV. 703, 805 (2002) (detailing the Framers’ intent to “ensure[] government by popular consent while avoiding the danger of resting its essential business . . . of mere majority will”).
legislators to carefully read and understand the new law they are creating, whether that is a system of new regulations, a change to the current system of regulations, or a complete removal of the regulations.\(^{210}\)

An interesting middle case is how the duty applies when a bill is presented to extend or reauthorize a statute that is about to expire due to a sunset provision. If the legislature does nothing, the controlling law will change. But the change was anticipated, and people may have relied upon it, particularly in areas like the tax code in which professionals plan far in advance.\(^{211}\) In other cases, such as the recent Voting Rights Act Reauthorization,\(^{212}\) changing circumstances in the real world between the original act and the reauthorization may even lead to questions about the statute’s continued constitutionality.\(^{213}\) The burden of literally reading the text of a bill is rather light in these cases, simply due to the fact that a reauthorization of an existing law can be written in very few words. The Voting Rights Act Reauthorization runs only four pages in the statutes at large,\(^{214}\) though some of this consists of line edits to non-included statutory sections that would also have to be read. The real challenge is in analyzing the constitutional and policy questions.\(^{215}\)

### C. Legislative Drafting for a Read the Bill Legislature

Perhaps the most common complaint about a Read the Bill rule is that bills are simply much too long for an individual Member of Congress to read them all.\(^{216}\) There is some merit to this objection. Though the modern Congress passes fewer bills per year than in prior decades, the number of pages of

---

\(^{210}\) A Read the Bill norm might work in favor of repeals over enactment of new laws because a repeal can be accomplished with significantly fewer words. However, responsible deregulation usually involves replacing restrictive rules with less restrictive ones, not wiping away a section of code entirely.


\(^{215}\) See generally Brest, supra note 66.

\(^{216}\) See *Read This!*., supra note 22.
text enacted into law has skyrocketed. Some scholars argue that this phenomenon is due to the difficulty of passing federal legislation, which leads to logrolling and bundling of legislative provisions into a single bill. While this may explain why bills tend to be long, it does not explain the increase over time. In any case, the requirement of reading the entire bill will provide a countervailing pressure to bring the length of bills back down.

Shorter bills are a good thing in their own right. They make legislation more accessible to the public, which may balk at reading a 1,000 page bill but feel comfortable looking through one that is 10 or even 100 pages. When statutes are understandable, businesses may spend less money on lawyers who help them come into compliance. An attempt to keep bills short also provides a reason for committee members to refrain from attaching riders, which, by themselves, are not popular enough to garner majority support and thus have an undemocratic cast.

Further, if proposals are unbundled to keep individual bills shorter, all participants in the legislative process have an opportunity to make separate judgments on components that might otherwise be logrolled together. Individual legislators will have more opportunity to vote for the “good parts” while voting against the “bad parts” instead of making a compromise judgment on the entire package. The President, too, will have an opportunity to veto smaller bills rather than face the difficult choice of accepting or rejecting the entire package. Congress once sought to give the President this power, at least for budget bills, in the form of the line item veto. The Supreme Court held that the line item veto, as implemented, was unconstitutional, but, of course, if each provision is presented as a separate bill, the President may veto any one individually. Smaller bills offer the President not only a better opportunity to veto bills based on his policy disagreements with Congress but also a less difficult decision when faced with a provision of a bill he considers unconstitutional. Thus, reading the bill could also lead to fewer bills being enacted into law. This could encourage Members of Congress to focus

217. See Beam, supra note 91 ("In 1948, Congress passed 906 bills. In 2006, it passed only 482. At the same time, the total number of pages of legislation has gone up from slightly more than 2,000 pages in 1948 to more than 7,000 pages in 2006. (The average bill length increased over the same period from 2.5 pages to 15.2 pages."); see also Posting of Donny Shaw to Open Congress Blog, http://www.opencongress.org/articles/view/1375-For-Bills-in-Congress-How-Long-is-Long-(Nov. 25, 2009) (listing the ten longest bills written between 2001 and 2009 by word count).
218. See, e.g., Eskridge, supra note 208, at 1449.
220. See U.S. CONST. art. I, § 7; Clinton, 524 U.S. at 471 (Breyer, J., dissenting).
more thoroughly on their top legislative priorities instead of attempting to do everythong at once, and doing it poorly. 222

Another major problem is that bills are often written in language that is very difficult to understand. Sometimes this is out of necessity, such as when the proposed legislation would govern a highly technical area and must be written in technical language. Other times, complex legislative language is motivated by an intent to obscure what is going on. A recent example is the so-called “Louisiana Purchase” in the Senate health care bill. 223 To win the support of Sen. Mary Landreiu, a moderate Democrat from Louisiana, the bill was amended to provide Louisiana with an extra $300 million in Medicaid funds. 224 But in an attempt to obscure what was going on, the text of the amendment did not mention Louisiana. 225 Instead, it defined a lengthy set of conditions describing which states would receive extra money – a set of conditions that only Louisiana meets. 226 The section describing Louisiana is over 600 words long. These 600 words could have been eliminated and replaced with just one: “Louisiana.” 227

Reading the bill is a more difficult and less useful task when deliberate obscurity hides the meaning of the text. Because transparency is a major value of the legislature as an institution, 228 part of the Read the Bill norm should be a norm of writing bills in understandable language.

IV. SHOULD THE PRESIDENT READ THE BILL BEFORE SIGNING IT?

Does the duty to read the bill extend to the President? If Members of Congress must read the bill before voting to enact it into law, perhaps the President must also personally read the bill before signing it into law. While it might be a good practice for the President to read bills before signing, for all the reasons legislators should do so, the case for a presidential duty to read bills is much weaker than for a congressional one. The President’s involvement with and responsibility for legislation is not as extensive as Congress’s.

222. See GREENBERG, supra note 100, at 10 (“Paradoxically, forcing Congressmen to confine themselves to their top priorities would strengthen Congress: legislative attention would be more focused, while its authority and product would be taken more seriously.”).


224. See id.


226. Id.

227. Id.

228. See Waldron, Representative Lawmaking, supra note 27, at 337-40.
A. The Recommendation Clause

The Constitution states that the President "shall . . . recommend to [Congress's] consideration such Measures as he shall judge necessary and expedient."229 Some scholars argue that this clause, the Recommendation Clause, reveals that the Framers intended the President to take a strong role in the legislative process.230

However, even though the President has the power – or perhaps the duty, given the use of the word "shall" rather than "may"231 – to recommend legislation to Congress, his formal legislative role is quite limited. Nothing requires Congress to act on the President's legislative recommendations. The President's recommendation does not even ensure that his bill will be introduced in Congress, since only a Member of Congress may introduce a bill. In practice, the President can be a powerful player in the legislative process, but this is due to his political influence and the veto power, not because of any constitutional power to intrude into Congress's legislative process.

B. The Veto Power

No bill can become law without either the President's approval or the support of a two-thirds majority of both houses of Congress to override his veto.232 A President need not actually exercise the veto to affect legislative outcomes. Congress always negotiates with an understanding of the President's role in the legislative process.233 Thus, Congress will sometimes agree to alter legislation in ways the President wants, because he threatens to veto the bill if they do not.

This means that, in practice, the President is often a major player in determining what goes into a final bill and what does not. In this respect, he acts as a legislator does, negotiating the content of the bill and sometimes having his own staff draft legislative language. But he does so from the outside, like a lobbyist for an interest group, not as a participant who actually gets to vote on the bill.

In the end, when the bill is passed and comes to the President's desk, he is the only person who can stand in the way of the bill becoming law. The courts may strike down a statute on constitutional grounds, but if the problem is simply bad policy or a bill that does not work properly to bring about the policy it intends, courts will not interfere with the judgment of the political

229. U.S. CONST. art. II, § 3.
branches about what the law should be. The President is thus the final actor who either creates the law with his signature or prevents it from being enacted. Some might argue that this makes the President even more responsible for the content of a law than an individual legislator, since the legislator’s vote is balanced against others, while the President makes the final, unilateral decision to sign a bill into law.

A bill can become law without the President’s signature, however. One way for this to happen is, as mentioned above, a veto override. The other way is for the President to simply ignore the bill while Congress remains in session. The Constitution provides that “[i]f any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it,” unless Congress has adjourned during that time. This is a constitutionally mandated method for a bill to become law without the President’s explicit approval. If the President has not read the bill and does not sign it, it nonetheless becomes law. It is difficult to consider this process an abdication of the President’s duty to read the bill, since the Constitution specifically allows for a bill to become law without any action by the President whatsoever. This counsels against finding a presidential duty to read the bill.

The ten-day period also highlights the fact that time constraints weigh differently on the President than on Congress. Congress does not have an unlimited amount of time to pass bills, but the time periods are measured in months, or even the entire two-year session of Congress. The President, by contrast, has an extremely short time period in which to consider a bill passed by Congress. The Constitution gives the President only ten days to sign or veto a bill. With the President’s many other executive responsibilities, this may not be enough time to read the entire bill before signing it. It may be

234. See Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (“The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”).

235. Veto overrides are possible, of course, but they are difficult to accomplish and thus rarely occur.


237. See supra Part I.B.

238. One scholar has even taken the view that the Senate and House of Representatives may pass the same bill in different sessions of Congress. See Seth Barrett Tillman, Colloquy, Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?, 16 CORNELL J.L. & PUB. POL’Y 331 (2007); Seth Barrett Tillman, Reply, Defending the (Not So) Indefensible, 16 CORNELL J.L. & PUB. POL’Y 363 (2007). This is not the traditional view, however. See Aaron-Andrew P. Bruhl, Response, Against Mix-and-Match Lawmaking, 16 CORNELL J.L. & PUB. POL’Y 349, 350 (2007) (“The ‘contemporaneity’ requirement is one of those rules that ‘everyone knows’ (or at least thinks they know) but that is seldom defended.”).

particularly troublesome if Congress passes several large bills in a short time frame.

C. The Appointments Clause Analogy

The Appointments Clause does not govern the legislative process, but it provides a useful analogy. Like the legislative process, the appointments process crosses two branches of government. The appointments power is shared between the President and the Senate. The Constitution lays out the roles of each participant in the process: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [officers of the federal government]."240 Many scholars argue that the Senate should review the President's nominees deferentially, particularly in the appointment of executive officers (as opposed to judges).241 The Senate has an important role to play in the appointments process, but should not exercise completely independent judgment. The President is the primary actor in the appointments process and makes the fundamentally important decision of whom to nominate.242

The legislative process switches the primary and secondary roles. Congress is the primary actor in deciding what legislation to enact. The Recommendation Clause allows the President to recommend legislation to Congress,243 but this certainly does not mean that all, or even most, legislation is initiated by the President.244 Perhaps the President should be somewhat deferential to Congress's legislation in the way that Congress should be somewhat deferential to the President's nominees for federal office.

This deference could take a variety of forms. For instance, the President may decide to exercise his veto power primarily when he believes that a bill is unconstitutional instead of for policy disagreements with Congress, as pres-

240. Id. at art. II, § 2, cl. 2.
242. See Hanah Metchis Volokh, The Two Appointments Clauses: Statutory Qualifications for Federal Officers, 10 U. PA. J. CONST. L. 745, 754 (2008) (arguing that the President, as the first mover in nominations, cannot be constrained by Congress in his choice of nominee).
244. See MALBIN, supra note 38, at 27 ("Despite the popular misperceptions about executive branch domination of Congress's agenda, the fact is that much important legislation gets its start in Congress.").
idents did in the first decades after the Founding. Or, in a very different conception of deference, the President may choose to exercise his judgment about the policy aspects of a law but defer to Congress to work out the technical details of the bill’s language. Under this view, the President may sign a law without reading it because he trusts that Congress, as a separate branch of government duly performing its constitutional responsibilities, has written an effective law to carry out its desired policy.

To the extent that the duty to read a bill arises out of a responsibility to personally make sure that the laws are good ones whenever there is an opportunity to do so, perhaps it also applies to the President. But because the duty is actually a consequence of a broader understanding of the constitutional role of Congress, the duty seems much weaker in the context of the President. Congress is the branch of government tasked with creating the details of the law, so the duty attaches primarily to legislators.

V. CONCLUSION

Senators and Representatives are elected to Congress for the purpose of making laws that will govern the nation. Their role in the constitutional process of legislation requires them to exercise their considered judgment when voting. In order to be properly informed about what the law is, these legislators should read the actual text of the bill they are voting on. That text, and nothing else, will become the law of the land.

Implementing this reform would require a significant paradigm shift among Members of Congress and their staffs. Such changes do not happen overnight, but emerge slowly from the changing expectations of the public about how their representatives should behave.

Even if every Member of Congress were to take this advice and make a serious attempt to read the text of each bill before voting, perhaps there still would not be enough time in the day for them to accomplish this task. Does this make the proposal so impractical as to be useless? I think not. There is still significant value in a Read the Bill norm even if the ideal can never be completely realized. The norm serves to focus a legislator’s attention on his lawmaking function, the primary task for which he was elected. If he makes the attempt to read bills, and spends more of his time becoming acquainted with the legal effects of pending legislation instead of concentrating on other activities, that in itself fulfills good legisprudential principles. The activities of Congress are currently so far outside the legisprudential ideal that any


246. See MALBIN, supra note 38, at 246 (arguing that the President can delegate tasks involving negotiation of proposed legislation, but Members of Congress cannot).
move in this direction would constitute an improvement. Instead of a complex norm involving an amorphous goal of being “informed” before a vote, the relatively simple and concrete norm of reading the bill can provide a clear focus for legislation-oriented activity among Members of Congress.