COLLOQUY

Legislative Self-Constraint: A Reply to Professor Kahn

By WILLIAM D. POPKIN*

Introduction

The Gramm-Rudman Act[1] constrained Congress' ability to adopt future appropriations legislation.[2] The constraint took the form of an automatic presidential sequester order reducing appropriations to meet budget deficit targets. The reduction was based on a comparison of appropriations passed by Congress with deficit estimates made by the Office of Management and Budget (OMB) and the Congressional Budget Office, and submitted for review by the Comptroller General. While some appropriations were exempt from the sequester order,[3] and the reductions were not uniform for military and nonmilitary spending, the reductions generally followed a pro-rata scheme. Furthermore, Congress can exempt a future appropriation from the sequester order. But that would require an explicit exemption in the appropriation bill.[4]

Legal objections to Gramm-Rudman fell primarily into two categories: (1) because of the role played by the OMB, it delegated too much budgetary authority to the executive branch to control appropriations; and (2) it permitted the Comptroller General, an agent of the Legisla-

* Professor of Law, Indiana University School of Law (Bloomington).

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

2. *Id.* at § 252(a)(3).

3. *See, e.g., id.* at § 255 (social security, food stamps, and AFDC).

4. There have been a number of exemptions. *See, e.g.*, Sequestration—VA Home Loan Guarantee, Pub. L. No. 99-255, 100 Stat. 39 (1986); Food Security Improvements Act of 1986, Pub. L. No. 99-260, § 10(2), 100 Stat. 52 (1986); Sequestration of VA Loan Guarantee Commitments, Pub. L. No. 99-322, 100 Stat. 494 (1986); Panama Canal Commission Authorization Act, Fiscal Year 1987, Pub. L. No. 99-368, § 6, 100 Stat. 776 (1986); Territories and Insular Possessions, Pub. L. No. 99-396, § 19(b), 100 Stat. 844 (1986); *see also* 44 CONG. Q. 2881 (1986) (reporting exemptions from Gramm-Rudman adopted by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (pamphlet 10)).

ture, to exercise executive power. The second ground provided the basis for the Supreme Court's decision striking down the provision for an automatic sequester order.[5] The Court held that vesting executive decisionmaking in the Comptroller General, who was subject to removal by Congress by joint resolution, impermissibly vested executive power in an agent of the Legislature. Either the Legislature must delegate rulemaking authority to the Executive or it must exercise policymaking authority itself.[6]

The most innovative feature of Gramm-Rudman was its effort to constrain future legislation. The legality of this provision has attracted little public attention, but was the subject of academic commentary in a recent article by Professor Paul Kahn in the *Hastings Constitutional Law Quarterly.*[7] Professor Kahn notes that Gramm-Rudman both thwarts and distorts future legislative policymaking. It thwarts the Legislature by forcing the majority favoring an appropriation to muster a majority to repeal Gramm-Rudman or obtain an exemption from its provisions. It distorts policymaking by encouraging advocates of appropriations to inflate their proposals, not just as part of the normal bargaining process, but in anticipation of an across the board sequester order.[8]

Professor Kahn argues that these features of Gramm-Rudman make it constitutionally defective for two reasons. First, only hierarchically superior authority can bind or significantly constrain the future rulemaking power of another institution.[9] The Constitution can bind the Legislature and the Legislature can bind executive agencies, but these institutions cannot bind themselves. Part I of this Article criticizes the hierarchy thesis.

Second, Professor Kahn argues that the Legislature is special. As the means by which popular sovereignty is implemented, its future lawmaking power should not be constrained.[10] This argument asserts that constraining popular sovereignty is constitutionally objectionable by undermining the ability of democratic institutions to adapt to change.[11] Part II discusses this issue.

---

5. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

6. Justices Stevens and Marshall concurred on the ground that Gramm-Rudman vested policymaking authority in a person who operated as an arm of Congress. *Id.* at 3194 (Stevens, J., concurring). They did not rely on the fact that the Comptroller General could be removed by joint resolution or that the authority exercised was executive. *Id.*

7. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986).

8. *Id.* at 204-11.

9. *Id.* at 187, 211-28.

10. *Id.* at 207-11, 231.

11. *See infra* text accompanying notes 66-81.

Opposition to legislative self-constraint strikes a resonant chord with the modern spirit of opposition to stale legislation. The dead hand of prior statutes has proven hard to lift, and recent legislation, such as sunsetting provisions and short-term authorization statutes,[12] respond to this criticism. But suppose Congress decides that it mistrusts the future? Are efforts to constrain future legislation, though controversial, also unconstitutional?

The importance of these issues survives the unconstitutionality of Gramm-Rudman's automatic sequestration procedure for several reasons. First, the sequestration procedure might be revived by Congress, with the authority given solely to the executive branch to determine when the trigger operates.[13] Second, other efforts to constrain the content of future statutes might be attempted. For example, the Gramm-Rudman mechanism might be used to maintain spending levels rather than lower them. A group of four welfare programs, such as AFDC, Medicaid, Food Stamps, and School Lunches, might be lumped together in a package, totaling $40 billion, each receiving $10 billion. Legislation might provide that reduction of one program would result in an across the board pro-rata increase of all four programs to maintain the total $40 billion expenditure. In this way, efforts to reduce welfare spending, by picking on the less popular AFDC program, would be defeated.

Third, Congress might experiment with tying future legislation reducing spending in one area to an adverse political impact in another area. This could cost advocates of spending reduction the votes needed to make the reduction. For example, an environmental statute might provide funds for national parks, balanced by a presidential impoundment power over funds for pollution control. The law might further specify that future reduction of funds for national parks would automatically repeal the President's impoundment power, thus balancing the lower spending on parks with higher spending on pollution control. A future majority favoring lower park spending might therefore disintegrate, because some of them oppose repealing the impoundment power. The majority favoring reduction could, of course, vote for uncoupling the park spending reduction from the repeal of presidential impoundment power, just as an advocate of an appropriation under Gramm-Rudman could vote to repeal the Gramm-Rudman limits. However, some of the advo-

12. For a proposal that courts be able to declare statutes obsolete, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982).

13. President Reagan has proposed a thorough review of the budget process, *see* N.Y. Times, Nov. 14, 1986, at 1, col. 3, which could include revival of a proposal to vest complete control over the deficit estimation process in the executive branch. *See, e.g.*, H.R. 5254, 99th Cong., 2d Sess., 132 CONG. REC. H4923 (daily ed. July 24, 1986).

cates of park spending reduction, apart from those who want to maintain the impoundment power, might be opposed to presidential impoundment on principle and be unwilling to vote to preserve that power. Thus, the legislation favoring park spending contains a built-in political hurdle to spending reduction, over and above that required to gather a majority in support of reduction.

This arrangement is formally different from Gramm-Rudman in that a future law lowering park spending is not automatically inoperative unless a prior law is repealed, but the effect is similar in that it forces a political alliance not otherwise required if future legislation is to pass. If the Gramm-Rudman mechanism is suspect, so are arrangements which tie future spending reductions in one area to an adverse political impact in another area.[14]

The general question of legislative self-constraint is also important for two other reasons. First, Kahn's position is an extreme example of legal positivism, which requires an exercise of legal authority to be specifically authorized by a superior power. If self-constraining rules are possible without tracing their authority to a superior source, that would provide a counter-example to this version of legal positivism. Second, the issue of legislative self-constraint is very important in Great Britain, where parliamentary sovereignty is challenged by any effort to adopt a law limiting future legislation. The capacity of Parliament to adopt a Bill of Rights and to adhere to the statute joining the European Economic Community depends on the entrenchment of prior statutes from later change.[15]

---

14. An example of a tying arrangement appears in the Middle Income Student Assistant Act, Pub. L. No. 95-566, § 2(d), 92 Stat. 2402 (1978), which states that funding for one program will be at a certain level only if funding for other programs, such as work-study, is provided at a certain level. The point is to force opponents of the other programs, who are advocates of the first program, to vote sufficient funds for the other programs. This statute differs from the example in the text because an appropriation is contingent on future spending. In the text, the repeal of spending for national parks triggers spending for pollution control, by repealing presidential impoundment power. In both instances, however, opponents of a spending program must think twice about the effect of not appropriating money on an existing statute, in one case because it will reduce spending for a pet project and in the other case because it will increase other spending by removing the President's impoundment power.

15. *See* H. WADE, CONSTITUTIONAL FUNDAMENTALS 24-40 (1980); Winterton, *The British Grundnorm: Parliamentary Supremacy Re-Examined*, 92 LAW Q. REV. 591 (1976); Allan, *Parliamentary Sovereignty: Lord Denning's Dexterous Revolution*, 3 OXFORD J. LEGAL STUD. 22 (1983).

Whatever the theoretical position, British courts seem to treat the statute governing membership in the European Economic Community as entrenched to the extent that express rejection of the prior law is required before the court will give effect to the later law. *See* L. COLLIN, EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM 21-33 (1984).

This Article will therefore criticize the hierarchy thesis in general, as well as the view that principles of popular sovereignty are incompatible with all instances of significant legislative self-constraint. It argues that specific examples of legislative self-constraint should not be abstracted from an analysis of their substantive impact, as Professor Kahn's legal positivist approach would require. The Legislature's experiment with controlling its future lawmaking power should not be prematurely stifled by condemning all self-constraining statutes.

I. Hierarchy

Rules adopted by a hierarchically superior institution can constrain an inferior rulemaker.[16] That is not disputed. Professor Kahn argues further that hierarchical superiority is not only sufficient but is also necessary to constrain an institution's future rulemaking authority.[17] To support his argument, he discusses cases preventing executive agencies from disregarding their own rules, which in effect construe the prior agency rules as self-constraining. Professor Kahn traces the agency's authority to adopt self-constraining rules to a grant of power from a supe-

16. State constitutions frequently specify the process by which statutes must be passed. 1A SUTHERLAND, STATUTORY CONSTRUCTION 1-79 (C. Sands 4th ed. 1972). The United States Constitution contains examples of self-constraining rules consciously adopted by a superior authority, such as the Amendment Clause and the rule that the Constitution cannot be amended to take away the right of each state to two senators. U.S. CONST. art. V.

Identifying the superior authority always presents a problem because the question of its source of authority arises. In the case of the Constitution, Madison had no trouble answering that its source was the "people." He provided this answer in response to a question concerning how constitutional change could originate from a convention called by Congress under the Articles of Confederation to amend those Articles and how such change could limit the existing power of the states without their consent. *See* I THE RECORDS OF THE FEDERAL CONVENTION 314 (M. Farrand ed. 1937); THE FEDERALIST No. 40, at 255 (J. Madison) (Modern Library ed. 1971); *id.* No. 22, at 140-41 (A. Hamilton) (Articles of Confederation ratified by legislatures, not people).

Once the source of superior authority is identified, the next question is whether that source persists or whether its historical act of creation is self-limiting. Specifically, do the "people" retain a latent Constitution-creating authority, other than as provided for by the Constitution, and, if so, by what form would that authority be exercised? The ability of a sovereign to restrain itself has raised difficult theological questions, and similar questions have been raised concerning legal sovereigns. While Professor H.L.A. Hart finds nothing unintelligible in the notion of a self-constraining sovereign, the sovereign does not have to withdraw. H. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 177 (1983). *See also* Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966).

17. Kahn, *supra* note 7, at 211-31.

rior institution, the Legislature. The cases he cites,[18] as he acknowledges,[19] are concerned with serious harms to individuals, such as deportation and loss of employment on loyalty grounds. Forcing an agency to be bound by its own rules might therefore be an example of judicial rejection of unprincipled government harm to individuals, which is objectionable on its own terms, apart from whether self-constraining rules were authorized by a hierarchically superior authority.

The "individual harm" explanation founders, in Professor Kahn's view, because these cases do not involve the denial of a constitutional, statutory, or common-law right by the agency which refused to adhere to its own rules—apart from whatever rights accrue from the mere fact that existing rules were violated.[20] Moreover, in *United States v. Nixon*,[21] the Court held that an executive official's rules could not be disregarded, even though no question of individual harm was involved. The case involved an intrabranch dispute between the President, who claimed executive privilege, and the Special Prosecutor, who claimed that previously adopted rules, promulgated by the Attorney General and granting him authority to investigate the Watergate scandal, prevented the executive privilege claim. The weaknesses of the individual harm explanation for why self-constraining rules are valid suggest to Professor Kahn that the source of these rules lies in a grant of power from a superior legislative authority.[22]

Professor Kahn's argument rests on two questionable assumptions. The first is that there must be constitutional, statutory, or common-law rights which exist independent of the disregarded rule. Recent Supreme Court pronouncements seem to favor Professor Kahn's approach, tying procedural safeguards to preexisting substantive rights,[23] but other cases, including those upholding self-constraining rules, are consistent with the view that government inflicted harm must always pass a procedural test. If the harm is serious enough and the procedure arbitrary enough, and no compelling justification for the agency's behavior in disregarding its

18. Vitarelli v. Seaton, 359 U.S. 535 (1959) (discharge of federal employee as security risk); Service v. Dulles, 354 U.S. 363 (1957) (discharge of federal employee for suspect loyalty); Accardi v. Shaughnessy, 347 U.S. 260 (1954) (deportation).

Cases which constrain legislative committees to follow their own rules can be similarly explained. Yellin v. United States, 374 U.S. 109 (1963) (contempt of Congress conviction); Christoffel v. United States, 338 U.S. 84 (1949) (perjury conviction).

19. Kahn *supra* note 7, at 214-15 n.98. *See also id.* at 228 n.158.

20. *Id.* at 212.

21. 418 U.S. 683 (1974).

22. Kahn, *supra* note 7, at 213-16.

23. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 10-12 (1978).

own rules exists, rights are violated by abandoning institutional self-constraint, even if imposing the harm does not itself violate an independent right.

Admittedly, the *United States v. Nixon* case does not fit into the individual harm framework, because the dispute was defined as an institutional clash within the executive branch, not as a conflict between a harmed individual and the government. But that does not vindicate the hierarchy thesis. The harm threatened in *United States v. Nixon* was serious, even if not directed to an individual. If the Nixon tapes were not turned over to the Special Prosecutor, the Watergate affair threatened to undermine the integrity of the political process, by a process which itself appeared to be a politically ad hoc decision to reject existing rules. Thus, the need to follow existing government rules was of the utmost importance.

Another case involving former President Nixon supports the argument that threatened harm, though not to an individual, was both serious and legally relevant. In *Nixon v. Administrator of General Services Administration*,[24] the Court considered a statute requiring Nixon to turn over his papers to the government.[25] The special circumstances of Watergate prevented the statute from violating the Bill of Attainder Clause.[26] These circumstances provided a compelling governmental interest justifying the statute's demand for Nixon's papers, and overcoming charges that the statute was merely an effort to punish a fallen political figure. Similarly, in *United States v. Nixon*, the harm to the body politic, like individual harm, was so serious that prior rules constraining future action could be countenanced.

Further, Justice Rehnquist's opinion in *Edelman v. Jordan*[27] supports the analogy between institutional and individual harms. In that case, the Court decided that a federal statute did not require the state to waive its immunity from damage suits when it accepted federal funds for an Aid to the Aged, Blind, and Disabled[28] program. Justice Rehnquist invoked the "unconstitutional conditions" doctrine to support the decision.[29] Usually that doctrine is sensitive to claims that individual rights

24. 433 U.S. 425 (1977).

25. Presidential Recordings and Materials Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974). *See* 433 U.S. at 429.

26. U.S. CONST. art. I, § 9, cl. 3.

27. 415 U.S. 651 (1974).

28. ILL. REV. STAT., ILL. PUB. AID C., ch. 23, ¶¶ 3-1 to 3-12 (1973).

29. 415 U.S. at 671-74 (it is unconstitutional to condition the receipt of federal benefits upon the beneficiary's waiver of a constitutional right).

are being compromised by imposing conditions on their exercise.[30] Justice Rehnquist argued that this doctrine was applicable to states' rights,[31] an institutional rather than an individual concern, and that the statute should be interpreted to avoid having such an adverse impact on states. Judicial concern for the Special Prosecutor's role in obtaining the Nixon tapes, like Justice Rehnquist's concern for states' rights, rests on institutional values, which are no less important than preventing individual harm from arbitrary agency action.

The second questionable assumption on which Professor Kahn's hierarchy thesis rests is that the hierarchically superior Legislature has created the self-constraining rule adopted by the inferior agency by delegating authority to the agency.[32] Professor Kahn states: "Congress can create second-order rules that constrain the exercise of executive authority."[33] But the notion that the grant of rulemaking power to an inferior institution creates the rules that are then adopted is pure fiction.[34] The grant of rulemaking authority is not specifically concerned with whether adopted rules can be revoked. All we can say with any degree of certainty is that adoption of a self-constraining rule lies within the broad scope of delegated authority.[35] However, permission to adopt a rule does not tar the hierarchically superior authority-granting institution with creation of the adopted rule by an inferior agency. The fiction that treats the superior institution as the creator of rules adopted by an inferior institution may seem required by democratic principles. Democracy, however, is adequately served by the existence of a general grant of legislative authority to an agency, confidence that the adopted rule is not outside the limits of that grant, and the ability to reverse the rule if it is objectionable. Positing a closer link between superior and inferior institutions is, in fact, damaging to democratic principles. Democracy is enhanced by accountability,[36] which is served by recognizing that the inferior

30. *See generally* R. O'NEILL, THE PRICE OF DEPENDENCY (1970).

31. 415 U.S. at 673.

32. Kahn, *supra* note 7, at 215.

33. *Id.* "Second-order rules" is Kahn's term for a rule about how future rules are made. *Id.* at 195.

34. It is even more fanciful to suggest that congressional silence ratifies the agency rule. *Id.* at 215 n.98.

35. Suggesting that Congress had any intention at all about permitting self-constraint is like suggesting that it considered the question of executive impoundment. Neither is likely. *See* Pennsylvania v. Lynn, 501 F.2d 848, 857 (D.C. Cir. 1974) (Congress is not likely to consider impoundment of funds when it creates a program).

36. One of the arguments against the legislative veto was that it diffused responsibility to such an extent that the agency would not act responsibly in adopting a regulation subject to veto. *See* Consumers Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 475 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983).

rulemaker is the real source of the decision.

In *United States v. Caceres*,[37] the Supreme Court, while allowing an agency to break its own rules, did not apply the hierarchy thesis. Instead it analyzed the issue in terms of the harm to the individual and the threat of arbitrary agency action if the agency did not follow its own rules. The case concerned an Internal Revenue Service Manual which set forth procedures to authorize a wiretap,[38] and which IRS agents failed to follow. An individual objected to the admission of evidence obtained in violation of these rules. The Court did not dismiss the claims on the ground that the individual had no constitutional, statutory, or common-law right to the protections contained in the Manual. Instead, the Court looked at the way the IRS operated and concluded that the mistake had been made in good faith,[39] and that individual interests would be better served by allowing the Agency, in certain instances, to break its rules.[40] If the Court were confronted with a different agency, whose good faith was in doubt, or with a more significant harm, it might require an agency to follow its own rules.

Professor Kahn also argues that the hierarchy thesis is vindicated by the way judges approach judicial self-constraint.[41] He observes that courts cannot bind themselves if they are at the same level of authority. Only a superior court binds an inferior court. Freedom from self-binding decisions, however, is not the proper analogy to Gramm-Rudman. No one claims that the Legislature can bind itself in the sense of not being able to repeal laws. Gramm-Rudman only constrains the Legislature's future rulemaking authority—but so do courts. Courts constrain themselves by their self-imposed reluctance to adopt prospective decisions. The threat of retroactive application of decisions severely constrains future judgments. That is one of the reasons why Justice Black objected to prospective decisions.[42] Of course, the court can still adopt a future decision prospectively, disregarding the bias for retroactivity, just as Congress can adopt appropriations and exempt them from Gramm-Rudman. However, the future judicial decision is constrained by the bias for retroactivity, which is a factor operating in addition to whatever the merits of the case would indicate.

Professor Kahn suggests that the courts' greater adherence to stare

37. 440 U.S. 741 (1979).

38. *Id.* at 744, 749-50.

39. *Id.* at 752, 757.

40. *Id.* at 756 (mandating strict adherence might discourage an agency's adoption of rules, which in most instances would be followed).

41. Kahn, *supra* note 7, at 216-19.

42. James v. United States, 366 U.S. 213, 225 (1961) (Black, J., dissenting).

decisis when decisions involve statutory interpretation[43] supports the hierarchy thesis, on the ground that judicial self-restraint arises from delegated sovereign authority, inferred from the fact that the Legislature can reverse the court's decision.[44] There are two problems with this argument. First, it may no longer be true. There are signs that special weight will no longer be accorded to stare decisis in statutory interpretation cases.[45] Second, the argument for this judicial approach cannot rely on a grant of authority from a superior legislative source. The Legislature's ability to veto a judicial decision does not establish that judicial authority to act with self-restraint originated from the hierarchically superior legislative authority. A later veto is no more a specific source of authority than is a broad initial grant of rulemaking power. The reasons why stare decisis might have greater weight in statutory interpretation cases probably include the belief that reliance interests are more severely affected,[46] that the Legislature exercises greater supervision over such decisions, and that the meaning of a statute is an historical fact which cannot be overruled.[47] All these reasons seem questionable, originating in an antiquated view of the role of statutes in our legal system. They are nonetheless the more likely explanations for according stare decisis special weight in statutory interpretation cases, rather than the belief that self-constraining interpretations are authorized by a hierarchically superior Legislature.

The basic question in deciding whether legislative self-constraint is constitutionally permissible should therefore be not whether a self-constraining rule is authorized by a hierarchically superior authority, but whether legislative self-constraint in particular should be constitutionally permitted. This question requires us to look specifically at the nature of legislation in our political system.

---

43. *See* Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948); International Longshoremen's Ass'n v. Davis, 106 S. Ct. 1904, 1930 (1986).

44. Kahn, *supra* note 7, at 218 n.113.

45. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Lodge 76, Int'l Assoc. of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); Windust v. Department of Labor & Indust., 52 Wash. 2d 33, 323 P.2d 241 (1958). *But cf.* Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (paying homage to the special role of stare decisis in statutory construction and declining to overrule a prior case).

46. Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403, 1407 n.27 (1934).

47. *See* Zimmerman v. Wisconsin Elec. Power Co., 157 N.W.2d 648, 651, 38 Wis. 2d 626, 634 (1968); *see also* Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 516, 47 Wis. 2d 120, 128 (1970).

II. Are Legislatures Special?

Perhaps the Legislature should not be permitted to constrain itself because it is the institution charged with implementing popular sovereignty, which should be "inalienable and complete."[48] As Professor Kahn acknowledges, there are two problems with this argument. First, there are self-constraining laws now in effect which are clearly constitutional and which cannot easily be distinguished from Gramm-Rudman. Second, the argument against legislative self-constraint rests on substantive policies about how responsive to change the Legislature should be, and whether those policies must have constitutional significance. This Article argues that the distinctions between laws by which the Legislature constrains itself, in the manner of Gramm-Rudman and other clearly constitutional legislative action which constrains future legislation, do not provide a sufficient basis for drawing constitutional lines. This Article then suggests that the policy reasons against legislative self-constraint, while strong, are not powerful enough to invalidate all such statutes.

A. Existing Self-Constraining Legislation

Statutes frequently constrain, sometimes severely, future legislation. Statutes create as well as reflect interest groups, which then cluster around the statute to protect the status quo. These constraints are generally a by-product of the legislation. Their formal operation is different from a statute like Gramm-Rudman, which directly constrains the content of future laws. However, a formal difference is not necessarily a constitutionally significant difference. In both situations the future Legislature is constrained, not bound, by a prior law, and sufficient political will can overcome the effect of either type of prior legislation. The significant influence of past statutes which constrain their own repeal is recognized by the Constitution, which forbids appropriations to raise and support armies for more than two years.[49]

The distinction between laws which formally constrain the content of future legislation and laws which create powerful political interests becomes especially suspect when the political influence created by the statute operates at a level superior to lawmaking. Legislatures have considerable, though not unlimited, power to gerrymander electoral districts,[50] control the electoral process,[51] and regulate political financing,[52]

48. Kahn, *supra* note 7, at 231.

49. U.S. CONST. art. I, § 8, cl. 12.

50. Davis v. Beandemer, 106 S. Ct. 2797 (1986). The Legislature's use of multimember districts is also practically free of judicial control, absent discrimination on grounds of race or

all of which directly influence the composition of later Legislatures, and therefore of later legislation.

Some statutes have a more formal effect on how laws are made. One type, which Professor Kahn discusses, specifies that a future statute will not repeal a prior law unless it does so "expressly."[53] Professor Kahn argues that these statutes only impose "clear statement" requirements.[54] They do not directly constrain the content of future laws, but only resolve ambiguities in future statutes.[55] The reference to "ambiguity" makes the constraining effect of the prior law sound more innocent than it is. The point of a clear statement requirement, like the requirement of reasonable doubt to convict, is to make it harder to achieve a substantive result.[56] A court confronted with the prior law does not first determine whether there is an ambiguity in the later statute, and then call on the clear statement mandate of the prior law to resolve doubts. The prior statute helps determine whether the ambiguity exists in the first instance.

Indeed, the purpose and effect of a clear statement requirement is to influence the substantive content of future statutes. It is likely to do so in two ways. First, clarity may spark opposition that would otherwise be unaware of the import of the future statute. Second, those insisting on

---

other "suspect classification." *See* Chapman v. Meier, 420 U.S. 1 (1975) (distinguishing court versus legislative adoption of multimember districts).

51. *Compare* Jenness v. Fortson, 403 U.S. 431 (1971) (held constitutional a Georgia law requiring candidates for local election to win the primary or file a petition signed by a minimum of five percent of the eligible voters), *with* Williams v. Rhodes, 393 U.S. 23 (1968) (held unconstitutional an Ohio law making third party candidates on the ballet a virtual impossibility).

52. Buckley v. Valeo, 424 U.S. 1 (1976).

53. Kahn, *supra* note 7, at 201 n.59 (Administrative Procedure Act). *See also* Tax Reform Act of 1986, § 1302, Pub. L. No. 99-514, 1986 U.S. CODE CONG. & ADMIN. NEWS (pamphlet 9A) ("any change in future legislation applicable to private activity bonds shall apply to section 501(c)(3) bonds only if expressly provided in such legislation").

Sometimes clear statement rules are used to maintain relative spending priorities in an authorization statute, if the appropriations legislation specifies a different priority. See Act of Dec. 12, 1980, Pub. L. No. 96-516, § 19, 94 Stat. 3009 (1980), dealing with the National Science Foundation. It provides that, if total appropriations for a group of programs falls short of the total authorized for the group, the authorizations for each program will be reduced pro rata, unless the later appropriations statute expressly provides otherwise. For example, if two $50 programs are authorized, and only $50 is appropriated for one of them, the authorization level for each program is reduced to $25, unless the statute appropriating $50 for one program expressly specifies to the contrary.

54. Kahn, *supra* note 7, at 202.

55. *Id.* at 203 (the APA "addresses situations of real ambiguity").

56. This feature of a clear statement rule would be objected to by Professor Dickerson, who insists that the effect of an interpretive rule be limited to cases in which they are genuinely part of the context of a later statute, and to cases in which all other criteria for determining meaning are in equipoise. R. DICKERSON, INTERPRETATION AND APPLICATION OF STATUTES 270-76 (1975). They should not, in his view, operate as rules of law.

the clear statement must reveal the intensity of their preferences and this may encourage other legislators to bargain for their pet legislative projects in exchange for supporting a clear statement repealing prior law. Clarity is therefore likely to produce opposition that makes future legislation more difficult, which is what Gramm-Rudman also achieves.

The desirability of a clear statement rule in bringing legislative preferences into the open might count as an argument in their favor. It is not, however, an argument that Professor Kahn can make, because it requires distinctions among self-constraining rules, based on nonformal criteria. The same point can be made about Professor Kahn's argument justifying statutes which permit express repeal only by referring explicitly to the repealed statute.[57] He justifies this provision in a statute delegating to the President extraordinary powers during a national emergency,[58] as essential to assure clear understanding of presidential authority during times of crisis. This reason for supporting a clear statement requirement is powerful but irrelevant, if only formal nonsubstantive criteria can justify self-constraining legislation.

Professor Kahn also argues that the fact that legislatures cannot bind themselves to previously adopted procedures[59] provides further evidence that self-constraining laws are suspect.[60] However, legislative procedures, though not binding, still have a significant constraining effect, because they can be disregarded only by flexing the political muscle—not only to pass the desired legislation, but also to disregard the procedural rule. The constraining effect of nonbinding legislative procedures supports rather than rejects legislative self-constraint. Procedural rules vary in their effectiveness in constraining adoption of future statutes. The fili-

57. Kahn, *supra* note 7, at 203-04.

58. 50 U.S.C. § 1621(b) (1982).

59. Kahn, *supra* note 7, at 225. *See* United States v. Ballin, 144 U.S. 1, 5 (1892). Legislatures can also adopt statutes in violation of their own procedural rules. Goodwin v. State Bd. of Admin., 212 Ala. 453, 455, 102 So. 718, 719 (1925). *Cf.* Field v. Clark, 143 U.S. 649 (1892) (statute enrolled and signed by the President with different language from that passed by the Legislature is law as provided in enrolled form).

The outer boundaries of the rule that procedures for passing statutes can be violated was reached in State v. Savings Bank of New London, 79 Conn. 141, 152-53, 64 A. 5, 9-10 (1906), where a bill had accidentally been sent to the Governor for signature when it had not passed the legislature. No law resulted. *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (vote sufficient to expel from the House of Representatives would not have that effect when the exclusion, not expulsion, procedure had been followed by the House and the substantive exclusion criteria were not met).

60. Kahn, *supra* note 7, at 225-28.

buster rule in the Senate[61] has a severe constraining effect. Only revision of the underlying rules themselves at the beginning of each Congress can remove this obstacle. Other rules are adhered to less diligently. Appropriations bills in the Senate cannot include nongermane substantive legislation,[62] but votes on this issue tend to reflect substantive preferences for the underlying legislation, not adherence to the spirit of the procedural rule.[63] In other situations points of order raised against the violation of legislative procedures will result in cajoling and bargaining, with the legislators raising the point of order to get them to withdraw their objections, a process which constrains the adoption of statutes violating the procedural rules.[64] Procedural objections are even more effective towards the end of a legislative session, when it is difficult to find time to marshal legislative votes to overcome the objections.

In contrast to Gramm-Rudman, the self-constraining force of procedural rules is not focused on the substantive content of specific later legislation. For this reason, the constraining effect of procedural rules might be considered different from statutes with a more focused substantive impact. But many procedural rules clearly have, and are meant to have, a substantive bias. They are intended to slow down the legislative process, so as to protect minority political interests and to prevent special interests from prevailing.[65] Procedural rules are meant to have substantive impact, just like statutes constraining substantive content.

In summary, the formal distinction between constraining the content of future laws, binding the Legislature to clear statement requirements, and constraining (but not binding) the Legislature by adopting procedures, does not explain why some laws which constrain future legislation are constitutional and others are not. All such statutes try to influence the substantive content of future legislation, whatever the formal

61. SENATE COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE SENATE, S. DOC. NO. 1, 98th Cong., 1st Sess. 18, Rule XX, cl. 2 (1984) [hereinafter STANDING RULES].

62. *Id.* at Rule XVI, cl. 4.

63. *See* Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 1, 91-93, 104 (1979); *see generally* A. SCHICK, LEGISLATION, APPROPRIATIONS, AND BUDGETS: THE DEVELOPMENT OF SPENDING DECISION-MAKING IN CONGRESS (May 1984) (copy on file at the *Hastings Constitutional Law Quarterly* offices).

64. Among the procedural rules to which a Senator might appeal to thwart a legislative majority are the requirement that there be three readings of a bill, *see* STANDING RULES, *supra* note 61, at Rule XIV, cl. 2, and that conference agreements between the House and Senate not exceed the scope of the bills on which the Houses disagree, *id.* at Rule XXVIII, cl. 2.

65. The prevention of special interest legislation is a major reason for state constitutional rules about the form of legislation. *See* Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 390-91 (1958).

distinction, and formal categories will therefore not resolve the issue. Only an analysis of the values at stake when self-constraining rules are adopted can justify the drawing of constitutional lines.

B. Substantive Concerns about Legislative Self-Constraint

Professor Kahn correctly observes that the problem with self-constraining legislation lies in the potential limits it places on popular sovereignty, which should be "inalienable and complete,"[66] unimpaired by the actions of past Legislatures. The principle of inalienable popular sovereignty is accepted by everyone at some level of generality. The problem is to transform the general proposition to a judgment about whether the technique by which Gramm-Rudman constrains the future is constitutional. In the preceding pages I have argued that the existing constitutional techniques by which a majority favoring legislation can be forced by prior legislative action to marshal additional political strength—such as by statutes manipulating the electoral process, by clear statement, and by procedural rules—cannot be distinguished from a statute like Gramm-Rudman, which imposes a more direct constraint on the substantive content of future laws. I admit, however, that the ability to find distinctions depends in large part on the importance of making them. Popular sovereignty is too vague a principle to be self-applying. Decisions about whether a particular practice violates that principle draw on our perceptions of its meaning and significance.

One value underlying the commitment to popular sovereignty is the importance of keeping legislators accountable. For this reason, the process must not be rendered "opaque" to constituents.[67] Gramm-Rudman contributes to opaqueness by encouraging strategic moves that do not reflect actual positions, such as by urging appropriations, and by allowing current legislators to blame the past Legislature for inaction.[68] If this kind of opaqueness were unconstitutional, a good deal of our legislative process would be suspect. Legislators posture all the time. They inflate demands strategically. They also confuse constituents by voting for an authorization bill and opposing a related appropriation, and by voting for a procedure favoring a bill and voting against the bill in substance. But those constituents who really care are not confused. Furthermore, they would not be confused by an elected representative's refusal to vote an exception to Gramm-Rudman, any more than they would be confused by a refusal to vote for an appropriation bill because

66. Kahn, *supra* note 7, at 231.
67. *Id.* at 208.
68. *Id.* at 208-09.

of its alleged impact on the deficit. Constituents who care will hold the current legislator accountable for not voting the exception and for not knowing the legislative strategy needed to obtain the desired appropriation. Gramm-Rudman creates no significant additional legislative "opaqueness," only an obstacle to mustering a future majority.

Thus we return to the question of what our attitude should be toward such obstructions to popular sovereignty. There is one fixed point of reference in evaluating legislative techniques for constraining future legislation: the majority rules. It may come as a surprise to learn that this is nowhere specified in the Constitution. It is a basic rule of parliamentary law,[69] presumably incorporated into the Constitution by vesting legislative power in Congress,[70] and suggested by negative implication from the requirement of supramajorities in certain situations.[71] If a statute constraining the content of future legislation is tantamount to requiring a supramajority, the law would be unconstitutional. The constraint of a statute like Gramm-Rudman is not, however, the equivalent of a supramajority requirement. The point of a statute like Gramm-Rudman is to tie together two legislative issues that would not otherwise be linked and to require a majority vote on both issues before either can pass. The statute in effect defines a program of related legislation on which the majority must take a position, before any one part of the program can be adopted. These linkages make the task of mustering a majority more difficult, but are not the equivalent of saying that legislation requires a supramajority vote. Establishing such programmatic links might even be desirable legislation, given the pressures for ad hoc decentralized deci-

69. United States v. Ballin, 144 U.S. 1, 6 (1892); Adams v. Fort Madison Community School Dist., 182 N.W.2d 132, 135 (Iowa 1970); Morris v. Cashmore, 253 App. Div. 657, 659, *aff'd*, 278 N.Y. 730 (1938); Tayloe v. Davis, 212 Ala. 282, 285, 102 So. 433, 435 (1924). *See also* P. MASON'S, MANUAL OF LEGISLATIVE PROCEDURE § 10 (1979).

The House of Representatives' rules also specify that the majority rules. MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 271, 98th Cong., 2d Sess. 656, Rule XXXVIII (1982).

70. U.S. CONST. art. I, § 1.

71. U.S. CONST. art. I, § 3, cl. 6 (two-thirds of Senate to convict after impeachment); U.S. CONST. art. I, § 5, cl. 2 (two-thirds to expel); U.S. CONST. art. I, § 7, cl. 2-3 (two-thirds to override veto); U.S. CONST. art. II, § 2, cl. 2 (two-thirds of Senate to ratify treaty); U.S. CONST. art. V (two-thirds to propose constitutional Amendments). *See also* U.S. CONST. amend. XII (majority of all electors needed to elect the President, not just majority of those present and voting, which is the usual parliamentary rule).

The fact that the Vice-President can break a tie (U.S. CONST. art. I., § 3, cl. 4), does not mandate majority rule, because it does not specify that the majority must always rule. It only states how ties are to be broken when majority rule is required.

The Constitution explicitly states that a majority is a quorum, U.S. CONST. art. I, § 5, cl. 1, but not that majority rules.

sionmaking concerning spending.[72]

Although constraining the substance of future statutes is not the equivalent of requiring a supramajority, the constraint still exists and its constitutionality depends on our view of efforts to obstruct future legislative change. Our attitude is properly ambivalent. When the conflict between past and future is framed as one between tradition and change, we tend to prefer change, because we see no particular substantive value in tradition, at least when the Legislature would reject it. But when the issue is the pace of change, between quicker and slower responses, the tendency is to favor caution. The Supreme Court has expressed this view in numerous cases involving claims that statutes unconstitutionally obstruct political change, where the Court has shown a preference for cautious change through a stable two-party system. For example, new parties and new groups within the two parties must be permitted a political voice, but statutes discouraging their rise to political prominence can take account of the potential disruptive effects of political change outside of the two-party system;[73] a state can discourage candidates from being sore losers within a party but must allow them reasonable access to the ballot, if they can muster financial support;[74] government financing of the two major parties is permitted, while successful new parties can obtain government aid after they have succeeded at the ballot;[75] and multimember districts are allowed unless it can be shown that the purpose is to exclude minority political interests,[76] which has so far meant only racial minorities.[77] The effect of these rules is to force political change into the two-party mold, where change can occur by the gradual process of intraparty compromise. Quick responsiveness of the political process to political change can be discouraged, but long-term exclusion will not be countenanced.

The one person, one vote requirement further evidences an ambivalent attitude towards political change, favoring a system in which the pace of change is controlled. This requirement forces the Legislature to

72. State constitutions have long been concerned with what can be lumped together in one statute. The one subject rule attempts to identify what issues are programmatically related, *see* Ruud, *supra* note 65, and the prohibition of substantive law in appropriations bills applies only when the substantive rule is not related to the spending provision. *See* Brown v. Firestone, 382 So. 2d 654, 664 (Fla. 1980); Henry v. Edwards, 346 So. 2d 153 (La. 1977).

73. *See supra* note 51.

74. Anderson v. Celebrezze, 460 U.S. 780 (1983).

75. Buckley v. Valeo, 424 U.S. 1 (1976).

76. *See* Chapman v. Meier, 420 U.S. 1 (1975).

77. *Cf.* Davis v. Bandemer, 106 S. Ct. 2797 (1986) (blatant gerrymandering to favor the incumbent party will be upheld unless there is a showing of persistent exclusion over time).

look at electoral districts every ten years, when the census is taken.[78] Within that ten year period, political change does not have to be directly reflected in redistricting. Short-term legislative constraints are therefore accepted but long-term constraints are discouraged by the requirement of periodic redistricting.

Popular sovereignty therefore means that reasonably short-term constraints on political change are permissible. Change can be slowed down, but not completely stifled. By this standard legislative self-constraint should be tolerated for a reasonably short period of time. Self-constraint in the manner of Gramm-Rudman would be constitutional, because it was intended to operate only from 1986 until 1991. If budget deficits were not lowered by then in accordance with the statutory time table, the statute would no longer be effective, unless the self-constraining rules were readopted.

Any lingering doubts about what popular sovereignty means should be resolved in favor of moving cautiously when evaluating a statute like Gramm-Rudman. Gramm-Rudman is itself an experiment in legislative self-constraint, and we cannot know exactly what popular sovereignty requires in this context until we have had more experience. Perhaps the future impact of such statutes will be objectionable. Unlike clear statement rules, which force issues into the open, self-constraining law may proliferate to stifle rather than slow down political change. Instead of linking programmatically related statutes, completely unrelated policies may be welded together in one statute. We may on that account want to strike down all such statutes. The situation is reminiscent of the legislative veto. The Supreme Court's pronouncement on this issue is very formalistic:[79] the legislative veto violates separation of powers. But it is hard to overlook the fact that the veto began as an experiment in the context of executive reorganization plans over fifty years ago.[80] Only when the veto threatened to engulf the entire political process, evidenced by a Senate bill which would have subjected all agency regulations to a legislative veto,[81] was the veto found to violate our constitutional structure.

78. U.S. CONST. art. I, § 2, cl. 3.

79. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

80. Act of June 30, 1932, Pub. L. No. 212, § 407, 47 Stat. 382, 414. *See The Legislative Veto After* Chadha, 1984: *Hearings Before the H. Rep. Comm. on Rules*, 98th Cong., 2d Sess. 1059-60 (1984) (statement of Judge Steven Breyer, United States Court of Appeals, First Circuit).

81. S. 1080, 97th Cong., 2d Sess. §§ 101-03, 128 CONG. REC. 2,719-21 (daily ed. March 24, 1982).

Self-constraining statutes should be allowed time to evolve before we conclude that direct constraints on the content of future laws is unconstitutional.

Conclusion

Self-constraint may sometimes be as desirable in government as in people. Formal doctrines condemning self-constraining rules fail to address directly their substantive impact or to distinguish equally effective but permissible rules. The fundamental policy issue is adaptability to change in the specific context of the institutional processes by which adaptation occurs, and the substantive implications of prohibiting or permitting change. When the relevant institution is the Legislature, responsiveness to democratic change is an obvious but not self-defining concern. At this point in time, however, we simply do not know the full implications of allowing the Legislature to constrain its future rulemaking power. Short-term constraints, like Gramm-Rudman, seem well within the boundaries of constitutional doctrine that allows the Legislature to slow down political change by forcing political movements into the two-party system. Whether it will seem that way fifty years from now is impossible to tell.