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DUE PROCESS OF LAWMAKING REVISITED

BY

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ARTICLES

DUE PROCESS OF LAWMAKING REVISITED

*Stephen Gardbaum**

ABSTRACT

Due to the role of ultra-wealthy party donors in its enactment, the recent Republican tax law may be seen as a case study in the systemic corruption of Congress that has concerned many commentators. For the most part, the solutions they have offered to the problem have been political in nature. In the short-term, the unpopularity of measures that so disproportionately benefit the very few will likely impose electoral costs resulting in repeal. In the longer term, congressional action or constitutional amendment is required to radically reform the current system of campaign finance. Regardless of the prospects of such future political responses, is there a legal solution in the here and now that might be able to deal with any part of the problem the critics have identified? This Article suggests there is. Beyond the very limited scope, prospects, and deterrent value of the criminal law of bribery, it proposes an independent constitutional response in the form of the Due Process Clause of the Fifth Amendment. Federal statutes that are enacted by means of illegitimate procedures, including the paying or withholding of donations for votes, violate the constitutional requirement of due process of lawmaking and should be invalidated by the courts, whether or not such conduct is, or could be, the subject of a successful criminal prosecution.

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INTRODUCTION

Much of the specific criticism of the recent Republican tax bill[1] along the lines that it enacted into law the direct economic interests, and reflected the enormous influence, of billionaire party donors[2] mirrors the more general contemporary literature on the institutional or systemic corruption of Congress.[3] Indeed, in this respect the tax law can be seen as a case study of the latter. Both the specific and more general critics express deep concerns about the process of congressional lawmaking in an era in which raising money for election and re-election campaigns has become the primary preoccupation of current and would-be legislators.

Both sets of critics also offer solutions to the perceived problem that are essentially political in nature. On the tax law, the hope or expectation is that the unpopularity of the measure, which so directly and disproportionately benefits the ultra-wealthy few, will help to sweep the Democrats into power in 2018 or 2020, resulting in amendment or repeal.[4] For those arguing that the more general dependence on campaign finance has rendered Congress institutionally corrupt, the main proposed avenues for reform are either a congressional statute aiming to transform the few who currently contribute to political campaigns into the many, or a broader constitutional amendment aiming at a similar effect.[5] Of course, Republicans are betting that enough ordinary voters will come to like their far smaller, immediate if temporary, tax cuts to prevent a transfer of power; and, in any event, a corrupt Congress may not be a reliable vehicle of reform,[6] regardless of the party in charge, leaving the near-unprecedented institution of the constitutional convention as perhaps the last, best hope. But regardless of the prospects of future political reform, is there a legal solution in the here and now that might be able to deal with any part of the problem that both sets of critics have

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1 Individual Tax Reform and Alternative Minimum Tax, Pub. L. No. 115–97 (2017). For a copy of the original bill, see An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, H.R. 1, 115th Cong. (2017).

2 *See* sources cited *infra* Part I.

3 *See generally* LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); LAWRENCE LESSIG, REPUBLIC LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT (rev. ed., 2015) [hereinafter LESSIG, REPUBLIC LOST]; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLINS' SNUFF BOX TO *CITIZENS UNITED* (2014).

4 *See infra* note 24 and accompanying text.

5 *See infra* note 30 and accompanying text. A different legislative solution to the problem—an internal ethics rule requiring legislators who receive outsize campaign contributions to recuse themselves from legislative actions that substantially benefit the donor—has been proposed in Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 231–32 (2010).

6 As Lessig acknowledges. *See* LESSIG, REPUBLIC LOST, *supra* note 3, at 276–77.

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identified and illuminated? This Article suggests that there is. Beyond the very limited scope, prospects, and deterrent value of the criminal law,[7] it proposes a constitutional response, in the form of the Due Process Clause of the Fifth Amendment.[8]

With such a vivid example of the "economy of influence" as the recent tax law currently in mind, this seems an opportune moment to revisit and further explore the notion that the Constitution imposes on Congress a duty of due process in lawmaking: a constitutionally mandated minimum procedural standard for the enactment of statutes that presumes certain processes are "undue" and rules them out. This idea, which is associated with Hans Linde's classic article of 1975,[9] has not gained very much traction among either judges or legal scholars in the intervening years,[10] but it does

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7 *See infra* Part II.

8 "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

9 Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

10 In a dissent written a year after Linde's article was published, Justice Stevens explicitly invoked the term "due process of lawmaking," Del. Tribal Bus. Comm. v. Weeks, 340 U.S. 73, 98 (1977) (Stevens, J., dissenting), and three years later, another dissent stated that: "I see no reason why the character of their [i.e., Congress's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of life, liberty, or property without due process of law." Fullilove v. Klutznick, 448 U.S. 448, 550 (1980) (Stevens, J., dissenting). To the limited extent legal scholars have focused on issues of legislative process, it has tended to follow the Supreme Court majority's one area of interest in the general subject: the role of legislative findings in justifying congressional use of its powers to regulate interstate commerce, *see, e.g.*, United States v. Morrison, 529 U.S. 598, 614 (2000) (holding that, although the gender violence prevention statute in question was supported by significant legislative findings, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."); United States v. Lopez, 514 U.S. 549, 552 (1995) (holding a Congressional gun safety statute unconstitutional as beyond the power of the Constitution's Commerce Clause "in light of . . . insufficient congressional findings and legislative history), and to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. *See, e.g.*, Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that "Section 5 does not so broadly enlarge congressional authority" so as to allow private individuals to collect damage from a State for violation of the ADA)); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."); *see also*, Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1711–13 (2002) (describing Linde's conception of "procedural regularity" as a deserving model of due process but not the one ("legislative deliberation" or findings) they were interested in exploring). SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION (2015) is a broader, comparative treatment of public policymaking in the legislative and executive branches. Although he does not specifically make much use of Linde or the concept of due process of lawmaking per se, or focus on the issue of corruption, one exception among legal scholars for his focus on judicial review of the legislative process is Ittai Bar-Simon-Tov. *See generally* Ittai Bar-Simon-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805,

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potentially provide a narrowly tailored solution to the most egregious—although by no means all—forms of contemporary corruption of Congress within the existing Constitution. Arguably, it would encompass some of the conduct that the specific criticism of the tax law describes. To achieve this solution, however, Linde's basic idea, which he left largely undeveloped, must be refined and explored, its scope and content filled in, and his relative lack of interest in (perhaps even skepticism about) judicial review of the constitutional requirement of due process of lawmaking cast aside, as well as the reasons for it addressed. This includes a reconsideration of the landmark early case of *Fletcher v. Peck*,[11] which Linde, reflecting the conventional view, mistakenly understood to categorically rule out a role for the courts in countering corrupt legislation.[12]

More affirmatively, it will be argued that judicial review of the due process of lawmaking is required for the same reason that the exclusionary rule exists in criminal procedure: the possibility of criminal prosecution provides too little deterrent against the relevant wrongdoing. As we will see,[13] the Supreme Court's interpretations of the federal bribery statutes, the Speech and Debate Clause, and the First Amendment have left only a narrow window for the prosecution of donors and legislators which, even when satisfied, is subject to prosecutorial discretion, low conviction rates, and, crucially, the survival of the law enacted with the aid of the bribery in question. Moreover, even though it will be argued that some of what transpired during the enactment of the tax law arguably crossed the line into actual bribery, crossing it should not be the *only* form of corruption that due process of lawmaking is understood to protect against, even if cannot encompass *all* forms. If not only the fact but the appearance of corruption is a compelling government interest that can justify limits on political speech, as the Supreme Court has consistently held,[14] then a legislative process that gives the reasonable appearance, if not necessarily the (legal) fact, of bribery is not a legitimate one and should for this reason be prohibited by due process itself.

807–71 (2010) (discussing political safeguards for legislature through judicial review); Ittai Bar-Simon-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 BOS. U. L. REV. 1915, 1916 (2011) [hereinafter Bar-Simon-Tov, *Puzzling Resistance*] ("This Article argues for a different model of judicial review — judicial review of the legislative process.").

11 10 U.S. 87 (1810).

12 *See* Linde, *supra* note 9, at 247 ("Seven years after *Marbury v. Madison*, Marshall, in *Fletcher v. Peck*, argued at length why a law once made could not be set aside for having been procured by bribery and corruption").

13 *See infra* Part II.

14 *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

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The Article proceeds as follows. Part I briefly highlights some of the relevant criticism of the recent tax law as the product of a corrupt bargain between Republican political leaders and hugely wealthy party donors, as well as of self-dealing, and also surveys the more general current literature on congressional corruption. Part II explains the limited role of the criminal law in addressing these problems. Part III first reintroduces Linde's conception of the due process of lawmaking that binds federal and state legislatures, and then proceeds to refine and develop both the content of, and the constitutional arguments for, this procedural limitation as a response to, and partial solution of, the problem. Part IV presents the case for judicial review of the due process of lawmaking, as distinct from (as Linde saw it) serving as mostly an internal governance rule for legislators. As previewed above, this case is both affirmative and negative. The affirmative part is based on an analogy with the exclusionary rule in criminal procedure and the limited deterrent provided by the prospect of prosecution. It also looks to the likely comparative effectiveness of judicial and non-judicial enforcement. The negative part is a reconsideration of the early foundational case that is usually understood to have set an absolute bar to judicial review of legislation for corruption. The Article concludes by fleshing out both the specific targets and the limitations of its core thesis: federal and state statutes that are enacted by means of an illegitimate procedure violate the constitutional requirement of due process of lawmaking and should be struck down by the courts, whether or not that conduct is, or could be, the subject of a successful prosecution.

I. THE PROBLEM

Recent enactment of the Republican tax law resulted in widespread critiques of both its process and substance. Passed in a mere seven weeks[15] without holding a single evidentiary hearing, through a parliamentary maneuver that dispensed with the need for any bipartisan support and the threat of a filibuster in the Senate,[16] and with decisive votes held almost

15 The bill was introduced into the House on November 2, 2017, received its final vote of approval on December 20, and was signed into law by the President on December 22, 2017. *See* Jane C. Timm, *Trump Signs Tax Cut Bill, First Big Legislative Win*, NBC NEWS (Dec. 22, 2017, 11:29 AM), https://www.nbcnews.com/politics/politics-news/trump-signs-tax-cut-bill-first-big-legislative-win-n832141 (last updated Dec. 22, 2017, 12:48 PM).

16 The budget reconciliation procedure was approved by both Houses of Congress in late October 2017. *See* Ashley Killough, *Budget Narrowly Passes House, a Key Step in Tax Reform*, CNN POLITICS, https://www.cnn.com/2017/10/26/politics/house-budget-vote-tax-reform/index.html (last updated Oct. 26, 2017, 3:47 PM).

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before the ink was dry on the final version with no meaningful deliberation, the process by which the most significant tax legislation since 1986 was enacted contrasts in almost every respect with that earlier statute.[17] For many critics, the flaws in the procedure and the reluctance to engage in deliberation or public consideration were directly related to—and an attempt to hide—its content, which vastly favors the rich at the expense of everyone else. Reducing the highest federal income tax rate from 39.6 to 37 percent, cutting the corporate tax rate from 35 to 21 percent, significantly scaling back the federal estate tax, and not only maintaining, but extending to real estate profits, the "carried interest loophole" that famously permits Warren Buffet to pay a lower tax rate than his secretary,[18] the action plan seems to have been to rush this through with the minimum scrutiny and maximum diversions possible.

In addition to this general reaction to its process and content, a distinct critique of the law claims that it is also corrupt. It is not simply that the law favors the rich as a class, but that it is in essence a pay-off to the tiny class of billionaire Republican donors who fund the party and are critical to it gaining and maintaining power, as well as in some cases to themselves. In an op-ed for the San Francisco Chronicle entitled *GOP Tax Plan is Triumph of the American Oligarchs*, former Secretary of Labor Robert Reich opined that:

> Most Americans know that the tax plan is payback for major American donors. . . . The giant tax cut has been their core demand from the start. . . . In return, they have agreed to finance Trump and the GOP and mount expensive public relations campaigns that magnify their lies. Trump has fulfilled his end of the bargain. He's blinded much of his white working-class base to the reality of what's happening by means of his racist, xenophobic rants and policies. The American oligarchs couldn't care less about what all of this will cost America.[19]

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17 The Tax Reform Act of 1986 took over a year to enact from the time the House Ways and Means Committee and the Senate Finance Committee began holding evidentiary hearings, in which more than 450 witnesses gave testimony, and was eventually passed with bipartisan input and support, with only two Democratic Senators voting against the final version of the bill. For details of this process, see David E. Rosenbaum, *The Tax Reform Act of 1986: How the Measure Came Together; A Tax Bill for the Textbooks*, N.Y. TIMES (October 23, 1986), http://www.nytimes.com/1986/10/23/business/tax-reform-act-1986-measure-came-together-tax-bill-for-textbooks.html?pagewanted=all (last updated Nov. 1, 1986).

18 Warren E. Buffet, Opinion, *Stop Coddling the Super-Rich*, N.Y. TIMES (Aug. 14, 2011), http://www.nytimes.com/2011/08/15/opinion/stop-coddling-the-super-rich.html.

19 Robert Reich, Opinion, *GOP Tax Plan is Triumph of the American Oligarchs*, S.F. CHRONICLE (Dec. 21, 2017), https://www.sfchronicle.com/opinion/reich/article/The-triumph-of-the-American-oligarchs-12442259.php (last updated Dec. 22, 2017, 2:39 PM).

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Similarly, on the day the law passed, Professor Jack Balkin wrote:

> [N]ot only are Congressmen and Senators paying off their donors, they are also paying off themselves. . . . Congress has largely abandoned the goal of using tax and fiscal policy to further the public interest. . . . Instead, Congress seeks to pay off a small number of wealthy individuals and groups and personally enrich sitting Congressmen and Senators.[20]

Finally in this vein, in a New York Times op-ed entitled *Passing Through to Corruption*,[21] Paul Krugman argued that:

> Some Republicans have been quite open in saying that they felt compelled to push forward on corporate tax cuts to please their donors. But I'm talking about more than campaign finance; I'm talking about personal payoffs. . . . When members of Congress leave their positions, voluntarily or not, their next jobs often involve lobbying of some kind. This gives them incentive to keep the big-money guys happy, never mind what voters think.[22]

Krugman also refers to the "Corker kickback," an amendment adding real estate companies to the list of "pass through" businesses whose owners will get sharply lower tax rates in between the time Senator Corker voted against the Senate version of the tax bill because it increased the budget deficit by $1.5 trillion and for the final version of the bill, even though it did exactly the same.[23] Senator Corker owns a real estate company.

All three authors express the expectation, or at least the hope, that in passing the law, the Republicans and their donors made a major political mistake because even with all the additional smokescreens and distractions they will undoubtedly launch between enactment and the 2018 midterm elections, they could not hide the reality of whom it benefits for that long a time.[24]

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20 Jack M. Balkin, *The Tax Bill and Constitutional Rot*, BALKINIZATION (Dec. 21, 2017), https://balkin.blogspot.com/2017/12/the-tax-bill-and-constitutional-rot.html.

21 Paul Krugman, Opinion, *Passing Through to Corruption*, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/opinion/republicans-taxes-corruption.html.

22 *Id.*

23 *Id.*

24 Balkin, *supra* note 20 ("I am hopeful that the public will punish the Republican party for the tax bill in the coming election cycle."); Krugman, *supra* note 21 ("This bill, however, faces heavy disapproval. Ordinary voters may not be able to parse all the details, but they have figured out that this bill is a giveaway to corporations and the wealthy that will end up hurting most families. This negative view isn't likely to change."); Reich, *supra* note 19 ("But if polls showing most Americans against the tax cut are any guide, that triumph may be short-lived. Americans are catching on. . . . A tidal wave of public loathing is growing across the land. . . . That wave could crash in the midterm elections of 2018. If so, the current triumph of the oligarchs will be the start of their undoing.").

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This criticism essentially sees the tax law as a case study in the general corruption of Congress about which Lawrence Lessig and Zephyr Teachout have recently written notable books.[25] In *Republic Lost*,[26] Lessig distinguishes between "individual corruption," or criminal bribery involving quid pro quo exchanges, and "institutional corruption," which he defines as the systemic and distorting dependency of an institution (in the case of Congress, on campaign funds) that conflicts with its proper and intended role.[27] Individual corruption, which Lessig believes to be rare and involves only the occasional outlying "bad guy," can be seen as a debased form or extension of the dominant "exchange economy" we live in, whereas institutional corruption is more part of the residual "gift economy," in which dependency, expectation, and the pull of relationships are the norm rather than the direct quid pro quo.[28] This latter type of "economy of influence" has distorted its work and created an institutionally corrupt Congress, which fundamentally undermines the democratic and republican norm of political equality or equal citizenship. It is, moreover, this form of corruption (rather than bribery) that the Framers mostly had in mind in their very significant focus on the issue.[29]

Zephyr Teachout's book *Corruption in America*[30] traces the history of a more demanding and broader conception of corruption that the Framers deliberately instituted for the United States, and is closely related to the classical notion of republican *virtù*.[31] Not at all limited to the quid pro quo exchange, it is exemplified by such bright-line, preemptive rules as the constitutional ban on public officials receiving gifts from foreign governments for fear of dependency and interference with their duty to act in the public interest of the country.[32] This dominant conception, reflected not only in

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25 Balkin also sees it as a further example of "constitutional rot," the erosion of our constitutional democracy, which he had previously identified and explored. *See* Jack Balkin, *Constitutional Rot and Constitutional Crisis*, BALKINIZATION (May 15, 2017), https://balkin.blogspot.com/2017/05/constitutional-rot-and-constitutional.html (distinguishing constitutional crisis from constitutional rot, and classifying the decay in political norms and institutions under President Trump as constitutional rot).

26 LESSIG, REPUBLIC LOST, *supra* note 3.

27 *See id.* at 238–39.

28 *Id.*

29 *Id.* at 236–50.

30 *See* TEACHOUT, *supra* note 3; *see also* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (articulating the uniquely American historical conception of governmental corruption).

31 *Id.* at 40–43. On the concept of republican virtù, see generally NICCOLÒ MACHIAVELLI, THE PRINCE AND THE DISCOURSES (E.R.P. Vincent ed., Luigi Ricci trans., Carlton House 1900) (1532); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

32 U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them [the

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numerous other provisions of the Constitution but also in nineteenth and early twentieth-century anti-corruption laws, as well as in the common law rule of the non-enforceability of lobbying contracts as against public policy, has been abandoned by the Supreme Court in recent decades in favor of the far narrower transactional model of the quid pro quo exchange, in both criminal law and constitutional free speech contexts.[33]

Both the specific and general critiques strongly imply that the only possible effective response, or solution, is a political one. In the case of the tax law, this would be the ordinary political response of election defeat in 2018, or 2020, and so the chance to amend or repeal the offending tax law. In the case of more general institutional corruption, Lessig proposes the solution of, first, a congressional statute to foster far broader participation in the system of campaign finance, which ought to be upheld against free speech claims as promoting the compelling interest in fighting the appearance of (this broader conception of) corruption.[34] But a fuller and deeper solution, he argues, most likely must be in the register of constitutional politics, by means of one or more constitutional amendments. Because these are unlikely to be proposed by an institutionally corrupt Congress, it would likely necessitate the first federal constitutional convention since 1787.[35]

The major goal of this Article is to suggest that there may also be a *legal* response to at least some of this, even under our current constitutional regime. One part of this legal response, although by far the lesser one, is through the criminal law. By failing to mention this possibility, the critics are perhaps too quick to assume that the evidence of actual bribery we have surrounding the tax bill would not satisfy the Court's exacting standards under existing statutes. The primary part, and the part that the remainder of this Article following Part II focuses on and develops, is through the existing Constitution. In a nutshell, the Constitution imposes on Congress a requirement of due process of lawmaking that the surrounding evidence strongly suggests the tax law violated.

United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."). *But see* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1 (2012) (arguing, on textualist and originalist grounds, that the Framers were not as "obsessed" with corruption as Teachout claims and, specifically, that the Emoluments Clause does not apply to the President or other elected officials, but only to appointed ones).

33 *See* TEACHOUT, *supra* note 3, at 6–9.

34 Levitt, *supra* note 5, at 231–32 (describing a proposed internal ethics rule requiring legislators to recuse themselves from legislative actions benefiting large campaign donors).

35 LESSIG, REPUBLIC LOST, *supra* note 3, at 39–51.

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II. THE LIMITED ROLE OF CRIMINAL LAW

The role of criminal law in addressing the risk of corruption in Congress was largely non-existent until after the Second World War.[36] As Teachout explains, the Framers focused on the broader conception of institutional corruption and the attempt to create structural barriers in a prophylactic or preemptive strategy to minimize it. To the extent there was a focus on *ex post* individual conduct, Congress was initially deemed the appropriate body to adjudicate and punish corrupt conduct by its members and not the courts, and later when its members were brought within the scope of relevant statutes, few prosecutions were initiated.[37] This general approach changed only with the enactment of the Hobbs Act in 1946[38] to counter extortion on the part of state and federal officials, including members of Congress, and then the general federal bribery and gratuities statute in 1962.[39]

In recent decades, however, the federal courts, including the Supreme Court, have narrowed the general scope and effectiveness of these laws, but especially in the campaign contribution context, by creating two key limits. First, they have effectively implied a near-exception to federal bribery laws for campaign contributions.[40] Although the language of the general federal bribery statute requires only an "intent . . . to influence any official act"[41] on the part of the briber and that the actual or agreed payment is "in return for . . . being influenced in the performance of any public act"[42] on the part of the public official, the federal courts have held that Congress could not have intended this language to include campaign contributions, as otherwise almost all would fall within it. Accordingly, in *United States v. Brewster*,[43] a case involving U.S. Senator Daniel Brewster of Maryland, the Federal Court of Appeals for the District of Columbia held that the bribery provision of the statute requires proof of an explicit quid pro quo. As long as donor and member of Congress do not expressly attribute the payment to a specific act, the contribution does not violate the statute.[44] In subsequent cases, the

36 TEACHOUT, *supra* note 3, at 50, 121–22.

37 *Id.* at 120–24.

38 18 U.S.C. § 1951 (1994).

39 18 U.S.C. § 201 (1994).

40 Joseph R. Weeks, Bribes, *Gratuities and the Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach It, and a Proposal for Change*, 13 J. LEGIS. 123, 129 (1986) ("[T]he courts have interpreted section 201 to provide an implicit exception for campaign contributions.").

41 18 U.S.C. § 201(b)(1) (1994).

42 *Id.* § 201(b)(2)

43 506 F.2d 62 (D.C. Cir. 1974).

44 *Id.* at 72 ("The bribery section makes necessary an explicit quid pro quo.").

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Supreme Court has affirmed this requirement.[45] The Supreme Court itself applied the same standard to the Hobbs Act in *McCormick v. United States*,[46] a 1991 decision involving alleged extortion of campaign donations by a state legislator. Only an "explicit promise" to do or refrain from doing an official act in exchange for the payment violates the statute.[47]

The second key limit is that the Supreme Court has interpreted the Speech and Debate Clause of Article I, Section 6[48] as providing immunity to members of Congress from criminal prosecution for their prior legislative acts. More specifically, evidence of legislative votes previously cast is inadmissible in evidence in a court of law.[49] Accordingly, only where evidence of a legislative vote is not required, as for example where there is relevant evidence of non-voting legislative or other official acts (such as arranging meetings, etc.),[50] or of an agreement regarding a future legislative vote, will members of Congress not be shielded from prosecution by this clause.

Despite these significant limitations, it is at least arguable that certain statements made in the context of the passage of the recent tax law cross the line from what the Court has deemed legitimate campaign contributions to illegal ones under these precedents. Take for example, House G.O.P. member Chris Collins's candid identification of the "pressure" he was under to vote for the bill: "My donors are basically saying, 'Get it [the tax bill] done or don't ever call me again.'"[51] Senator Lindsey Graham warned that if Republicans failed to pass the tax plan, "the financial contributions will

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45 *See, e.g.*, United States. v. Sun-Diamond Growers, 526 U.S. 398, 404, 405 (1999) (describing the separate gratuity section of statute 18 U.S.C. § 201(c), the Court affirmed that the quid pro quo requirement applies to the bribery section of the statute only and not to the gratuities).

46 500 U.S. 257 (1991).

47 *Id.* at 273–74 ("[A violation of the Hobbs Act occurs] only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. . . . We thus disagree with the Court of Appeals' holding in this case that a *quid pro quo* is not necessary for conviction under the Hobbs Act when an official receives a campaign contribution." (alteration in original) (footnote omitted)).

48 "They [Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

49 *See* United States. v. Johnson, 383 U.S. 169, 179 (1966) (stating that the Speech and Debate privilege extends to "'anything generally done in a Session of the House by one of its members in relation to the business before it [words spoken in debate]." (citing Kilburn v. Thompson, 103 U.S. 168, 204 (1880))).

50 *See, e.g.*, United States. v. Brewster, 408 U.S. 501, 528 (1972) (holding that evidence of other, non-voting legislative conduct is not protected under the Speech and Debate Clause).

51 Cristina Marcos, *GOP Lawmaker*: *Donors Are Pushing Me to Get Tax Reform Done,* HILL (Nov. 7, 2017, 11:23 AM), http://thehill.com/homenews/house/359110-gop-lawmaker-donors-are-pushing-me-to-get-tax-reform-done.

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stop."[52] For donors, Sean Lansing, former chief operating officer of the Koch brothers' political advocacy group Americans for Prosperity, provided a confirmation: "[i]f they don't make good on these promises [for tax reform] . . . there are going to be consequences, and quite frankly there should be."[53]

This unusually direct evidence of paying or threatening to withhold money for votes on the tax bill, and of legislators' motivation, may well satisfy the narrow window that the Supreme Court has left for successful prosecutions under the relevant federal law. Essentially, as we have seen, what it takes to push our ordinary campaign finance system, which has been characterized as "legalized bribery," over the line into the illegal, is proof of an explicit quid pro quo exchange of contribution for a particular future legislative vote. It seems naive to understand these statements in any other way.

Of course, even if the line was crossed, whether such prosecutions will be brought or would succeed is another matter.[54] Somewhat curiously, to the best of my knowledge, no one—not even the critics of the tax law quoted above—has even suggested they could be. But the major point of this Article is to suggest that whether or not criminal prosecution is in order, there is an alternative legal response to the problem highlighted by the tax law: the process by which it was enacted falls below the minimum standards of legitimacy set by the Constitution.

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52 Rebecca Savransky, *Graham: 'Financial Contributions Will Stop' if GOP Doesn't Pass Tax Reform*, HILL (Nov. 9, 2017, 11:32 AM), http://thehill.com/policy/finance/359606-graham-financial-contributions-will-stop-if-gop-doesnt-pass-tax-reform.

53 *Koch Brothers' Political Network Will Spend Between $300 and $400 Million on 2018*, CBS NEWS (June 26, 2017, 7:42 AM), https://www.cbsnews.com/news/koch-brothers-political-network-will-spend-between-300-and-400-million-on-2018/.

54 *See infra* text accompanying notes 100–01 for an explanation of the possible reasons.

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III. THE ROLE OF CONSTITUTIONAL LAW: DUE PROCESS OF LAWMAKING

A. The Core Principle

The Due Process Clauses of the Fifth and Fourteenth Amendments have long been held to apply to federal and state legislatures, and not only to judiciaries and executives. Obviously the "substantive" component of due process—which first arose in the late 1880s,[55] appeared to have been killed off after 1937, but has been revived in its modern, privacy/autonomy-based version since the 1960s[56]—is primarily a constitutional limit on the output of legislatures in particular. But even before the first era of substantive due process, the Supreme Court had held that procedural due process applied to Congress.[57]

Hans Linde's classic article *Due Process of Lawmaking*,[58] published eleven years after the revival of substantive due process in *Griswold v. Connecticut*[59] and three after its controversial extension in *Roe v. Wade*,[60] was first and foremost a critique of this recent development in favor of an understanding of due process as being exclusively about procedure. It makes three main claims. First, occupying approximately the first two-thirds of its content and serving as its primary focus, the entire doctrine of substantive due process was and is a mistake, including in particular its "rational basis review" component, which demands of any piece of legislation that it is rationally related to a legitimate government interest. Linde critiques the notion that under due process, legislation must be substantively reasonable or rational from a variety of perspectives, including the textual, originalist, psychological, and practical.[61]

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55 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 62 (1905) (striking down state labor laws on substantive due process grounds); Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (invalidating—for the first time—a state law on substantive due process grounds); Mugler v. Kansas, 123 U.S. 623, 660, 661 (1887) (stating that the Court is prepared to examine the substantive reasonableness of state legislation).

56 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (reviving substantive due process doctrine in respect to the use of contraceptives).

57 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855) ("The . . . [Due Process Clause of the Fifth Amendment] is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

58 *See* Linde, *supra* note 9.

59 381 U.S. 479 (1965).

60 410 U.S. 113, 164 (1973).

61 Linde, *supra* note 9, at 201–35.

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Second, due process is rather to be understood as exclusively concerned with the procedures by which the government acts, and not the reasons for which it does. Since all branches of the federal government are subject to the requirements of the Fifth Amendment, this means that Congress is constitutionally required to observe due process in lawmaking. In posing the question of what due process of law means in the lawmaking context, Linde answers as follows: "[The] government is not to take life, liberty, or property under color of laws that were not made according to a legitimate law-making process."[62] Although he provides neither a list of which lawmaking processes are legitimate and which are not, nor a methodology for applying this standard, he writes that this question is the proper focus of attention and that "[d]ue process of lawmaking will include some but not all of the rules [constitutional, statutory, internal, etc.] governing the particular lawmaking body."[63] He does give the example of bribery as an obvious instance of an illegitimate process that violates due process of lawmaking,[64] or "what the Constitution demands of lawmakers."[65]

Third, turning to the issue of what enforcement and remedy applies to such violations, Linde is somewhat opaque and equivocal, as a major theme of his article is the conception of constitutional law as a set of directives for the conduct of government rather than as the basis for judicial review, with which he believes constitutional scholarship has become overly obsessed.[66] His seeming skepticism about judicial enforcement of the due process of lawmaking is partly based on precedent, in that he cites *Fletcher v. Peck* as having categorically ruled out judicial review of legislation for corruption.[67]

To the extent Linde did oppose, or at least wish to minimize, judicial review of the due process of lawmaking, I take up the reasons for my disagreement with him in the following Part. In the remainder of this Part, I simply express my agnosticism for the purposes of this Article about the primary target of his critique, the doctrine of substantive due process underlying the "rational basis" requirement, and focus on his second claim by further exploring and developing the thesis that due process "provide[s] a constitutional standard below which no lawmaking process may fall."[68]

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62 *Id.* at 239 (alteration in original).

63 *Id.* at 245 (alteration in original).

64 *Id.* at 248.

65 *Id.* at 243.

66 Indeed, perhaps his major critique of the substantive conception of due process as requiring laws to be a rational means to a legitimate end is that, whether or not it works as a standard for judicial review, it cannot serve as a constitutional directive to lawmakers.

67 *See supra* note 12.

68 Linde, *supra* note 9, at 245.

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More generally, although to be sure not without internal and external contestation, the Supreme Court has long understood the concept of due process of law to provide limits on government actions, or individual rights, that are *independent* of those contained in more specific provisions of the Constitution, including the Bill of Rights.[69] As part and parcel of the distinct concept of due process, these independent limits can be—and are—both more and less than specific textual ones. So, until the Warren Court "incorporated" almost all of the specific provisions in the Bill of Rights against the states, the Fourteenth Amendment's Due Process Clause was held to encompass significantly less than these provisions.[70] Even now, due process does not entail the Seventh Amendment right to a jury trial in civil cases over $20, the Fifth Amendment right to indictment by grand jury only, or the Third Amendment right against the quartering of soldiers in peacetime.[71] Conversely, the right to due process against both federal and state governments has been held to include *more* than the specific textual provisions, both in terms of such "substantive" rights as the use of contraceptives, abortion, and same-sex marriage,[72] as well as certain procedural rights in the criminal or civil litigation context. Examples are the prosecutor's duty to disclose exculpatory evidence under the *Brad*y doctrine[73] and the void for vagueness principle in criminal law.[74]

Due process of lawmaking, as part of the general requirement of due process binding all branches of federal and state governments, can and should be understood in the same way. That is, the concept of due process of

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69 Starting with Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("If . . . some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . [i]t is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process.").

70 *See, e.g.*, Adamson v. California, 332 U.S. 46, 54 (1947) (holding that due process does not include the Fifth Amendment right against self-incrimination); Palko v. Connecticut, 302 U.S. 319, 322 (1937) (holding that due process does not include Fifth Amendment right against double jeopardy).

71 *See, e.g.*, KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 470 (19th ed. 2016).

72 *See generally* Obergefell v. Hodges, 135 S. Ct. 2071 (2015) (holding the right to due process includes the right to same-sex marriage); Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that the right to due process includes the right to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the right to due process includes the right to access contraception).

73 Brady v. Maryland, 373 U.S. 83, 87 (1963).

74 *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) (holding that due process is violated where a criminal statute does not clearly indicate the crime and its elements). Another possible example is the exclusionary rule in criminal procedure, which Richard Re has argued should properly be understood as an independent requirement of due process rather than, as generally viewed by the Court, a prophylactic rule preventing violations of the Fourth Amendment's prohibition of unreasonable searches and seizures. *See* Richard Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1907 (2014).

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lawmaking is an independent and potentially additional requirement on Congress (as well as state legislatures). It is neither limited to the extremely brief textual provisions dealing with the legislative process in Congress in Article I, section 7[75] nor foreclosed by Article I, section 5, clause 2's empowering of each House to establish its Rules of Proceedings.[76] Just as due process can and does impose constitutional requirements beyond those in the Bill of Rights, so too it can and does impose constitutional requirements beyond those contained in the text of Article I. Moreover, whereas in the Bill of Rights context, many (although not all[77]) of these additional requirements have been "substantive" in nature, and partly contested for that reason, the additional requirements of due process of lawmaking placed on Congress are clearly and exclusively procedural in nature.

Let me give two concrete examples to illustrate this abstractly-stated argument. Imagine the following hypothetical based very loosely on the circumstances surrounding passage of the recent tax law. The majority party in both Houses of Congress has determined that it is politically essential for a tax law to be passed within a very short, pre-determined period ("by Christmas"), and that passing virtually any tax law is better than not passing one at all. By using a certain parliamentary tactic, the majority party has sufficient votes by itself to pass the law without the support of any member of the minority party. However, when the bill is in conference committee, the majority party members are deadlocked between two different versions and simply cannot agree among themselves to support one rather than the other.[78] After exhausting all arguments, the committee chair suggests tossing a coin to resolve the deadlock and all members of the majority party agree that they will support version *A* or *B* depending on the toss. (Or imagine the same thing happening when the bill returns to the full Senate and House after the majority party committee members votes for *A* over *B* by one vote.) Version *A* of the bill wins the coin toss, is supported by all majority party members per the agreement, and narrowly squeaks though the final votes to be signed by the triumphant President within the textually specified ten-day

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75 In their entirety, these provisions are: "[1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. [2] 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 [continues with procedure for presidential signing, veto, and congressional override]." U.S. CONST. art. I, § 7, cl. 1, 2.

76 "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." U.S. CONST. art. I, § 5, cl. 2.

77 *See supra* notes 72–73 and accompanying text.

78 Assuming there is an odd number of majority party members, imagine one of them abstains and the others are equally divided on the two versions.

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period. Let's stipulate that the resulting law meets the substantive standard of minimal reasonableness/non-arbitrariness under the due process "rational basis test" that Linde abhors. Is there any constitutional problem with the lawmaking process? Although it appears to satisfy the sparse textual requirements of Article I, in that it has "passed" both Houses of Congress, surely the answer is yes. The obvious problem is that Congress did not use a legitimate process in passing the law. In short, Congress failed to engage in due process of lawmaking.[79]

A second hypothetical comes closer to some of the critiques of the tax law referenced above and also to Linde's own example of an obviously illegitimate lawmaking procedure. Imagine that the final Senate vote on the tax bill was 50-50, with the Vice President breaking the tie in favor of the bill. It subsequently transpires that one senator who had previously announced he was not running for re-election and who had expressed severe doubts about the bill because it significantly increased the budget deficit but in the end voted in favor of it, did so in exchange for a ten million dollar payment (or the promise of a lucrative job) from a real estate developer who stood to gain much more from the law's provisions. The senator and the developer are both convicted of bribery under the relevant federal statute.[80] Is there any constitutional problem with the lawmaking process? Once again, the requirements of Article I appear to have been met but the obvious problem is that the law was enacted by means of a paradigmatically illegitimate process. Due process of lawmaking was not respected.

Accordingly, it seems reasonably clear that, as far as Congress is concerned, the Fifth Amendment's Due Process Clause contains an independent and supplementary requirement of due process of lawmaking above and beyond the very brief textual provisions on its role in the legislative process in Article I.[81] This requirement imposes constitutional minimum standards of legitimacy for the processes by which Congress "passes" bills before they are sent to the President, and this is so whether or not such standards are reflected in each House's Rules of Proceedings authorized by

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79 This example is not intended to deny that in some other (non-deliberative) contexts, including military drafts, rotation of office holding in direct democracies, sports matches, and perhaps judicial case selection (but not decision), the randomness of the coin toss or lottery is a fair and justifiable procedure. On this latter example, see Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47–52 (2009).

80 Let's stipulate that the Senator's conviction survives a Speech and Debate Clause immunity claim. The Speech and Debate Clause states that, "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

81 *See supra* note 75. The role of the president in the context of the veto, as well as that of Congress in response to a presidential veto, are more fully the focus of the text, taking up approximately ninety percent of the wording in Article I, Section 7, the only provision dealing with the lawmaking process.

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Article I, section 5. Even if the Senate's Rules were to permit coin tosses or bribery, laws enacted as a result would still violate due process.

B. The Scope and Extension of Due Process of Lawmaking

Having, I hope, established the core principle and requirement of due process of lawmaking as independent of, and additional to, the provisions of Article I, the question naturally arises as to its extension and scope. What else, apart from a coin toss and criminal bribery that was essential to the enactment of a law, would violate this duty? In terms of bribery, is such a criminal conviction necessary or would the conduct itself be sufficient even without conviction, or even prosecution—perhaps because it is deemed covered by the Speech and Debate Clause immunity? Must the bribery have been a "but for" cause of the law's enactment? If not, does any such conduct, even by a single member among an overwhelming majority for a bill, render the legislative process illegitimate? Is it only conduct amounting to criminal bribery that violates the duty or are any other, broader forms of corruption included? And moving beyond corruption, what other procedural flaws in the enactment of a bill would render the process constitutionally illegitimate? What if no notice of a bill's contents is provided to ordinary House members before a definitive vote? What if Senate rules were to delegate to a committee the power to make subsequent changes to its content after the "final" vote?

As with Linde's own response to the issue of what constitutes a legitimate process, I think these are the right questions to ask, once the core requirement is established. The major goal of this Article is to revisit and solidify its establishment, especially in light of the subsequent massive increases in the amount of money in politics and the seemingly ever stronger arm tactics of elite donors. Nonetheless, although the task of systematically working out the full application and implications of the requirement of due process of lawmaking is one that must be left to future work, let me at least begin to address the corruption-related questions.

As an independent constitutional limit on Congress, the requirements of due process are not necessarily coextensive with the provisions of the criminal law as it happens to be enacted and interpreted at any given time. As such, due process is an essential rather than a contingent principle, until amended, and historically predates the existence of any relevant criminal law in this area. For the same reason, a violation of due process of lawmaking for bribery or any other form of included corruption is not dependent on criminal conviction or prosecution. The (independent) question is what is a minimally legitimate lawmaking process; what process is constitutionally due for enacting legislation. Whether or not, for example, the statements of

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lawmakers and donors quoted above[82] would amount to sufficient evidence of a quid pro quo exchange under the federal criminal bribery statute, they should be understood as fatally tainting the legislative process as illegitimate for constitutional purposes. Even if, or just because, conduct may fall short of criminal bribery, this does not mean it is "OK," or legitimate, for due process of lawmaking purposes. On the other hand, however deeply problematic our "ordinary" system of campaign finance—in which donations are more routinely exchanged for influence and/or access—undoubtedly is from a variety of perspectives, including the republican and equality of citizenship ones voiced by Lessig and Teachout, it does not rise to the same level of illegitimacy so as to call into question the entire modern process of lawmaking. In other words, from the perspective of "due" legislative process, there was something out of the ordinary and particularly egregious about the enactment of the tax law, as evidenced by both the reactions to it and the unusually candid statements quoted in Parts I and II above. This "something" is perhaps encapsulated as follows: influence and access are one thing, but undue influence and access are another.

Is there a standard that captures this distinction between "ordinary" and "undue" influence on the one hand, but does not necessarily require satisfying the current criminal criterion of the explicit quid pro quo or express promise on the other? The affirmative answer I would like to suggest is twofold: the implied promise and the specific threat of withholding. An implied promise lies in between an overt or explicit agreement to exchange money for a particular legislative vote and the mere expectation of a return favor arising from a gift. Where an understanding between donor and legislator that creates an (obviously non-legally binding) obligation—take my money and vote for the bill—can be reasonably inferred from the circumstances, then this is also the sort of conduct that potentially[83] renders the legislative process constitutionally illegitimate. Even where an understanding cannot be said to create an obligation, but nonetheless involves a specific threat of withholding donations—if you do not vote for Bill *X*, say goodbye to any future contributions—this too bespeaks illegitimacy of process, despite the fact that donations are obviously voluntary and within the discretion of the donor to bestow in the first place.

In the context of Congress's power to limit constitutionally protected political speech that takes the form of campaign contributions or expenditures, the Supreme Court has long held that there is a compelling

82 *See supra* notes 50–52 and accompanying text.

83 That is, if the other conditions are met.

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governmental interest in combating not only the fact of corruption but also its appearance.[84] Although (1) the Court has narrowed the conception of corruption to quid pro quo exchange in this context too[85] and (2) like the criminal bribery context, this First Amendment one is also different from the independent constitutional due process issue, this second recognized interest may be a plausible perspective to adopt. That is, whether or not there is evidence of conduct that would amount to actual bribery in either the criminal or free speech contexts, any conduct that reasonably gives rise to the appearance of corruption, to the type of undue influence and access arguably evidenced during enactment of the tax bill, including the implied promise and the specific threat of withholding, renders the process constitutionally illegitimate under the Due Process Clause. Even questionably or borderline lawful conduct may create the appearance of the type of corruption that amounts to undue legislative process. It bears emphasizing that contrary to the Court's express holding in *Citizens United v. Federal Election Commission*,[86] this type of undue influence and appearance of corruption can result from "independent" expenditures. Whether the source of the money in question is super PACs, other expenditures independent of campaigns themselves, or direct contributions, the threats to withhold funds and their effects on the legislators and the legislative process would be the same.

Finally, and to address one of the (not necessarily insuperable) difficulties mentioned by Chief Justice Marshall in his majority opinion in *Fletcher v. Peck*,[87] the conduct giving rise to the illegitimacy of the process need not be a "but for" cause of either the passing of the legislation as a whole or the individual member's vote. On the former, the reason is that, especially if appearance of corruption is the relevant standard, even if the pressure from donors is not a strictly essential condition of the legislation passing, the process is still fatally tainted for constitutional purposes; the process is still an illegitimate—if not necessarily an (independently) unlawful—one. On the other hand, however, even criminal bribery by a single member that had no discernible effect on the content of a bill or the likelihood of its enactment probably would be insufficient. The conduct in question must at least give the appearance of having a significant impact on Congress's *collective* work product to taint the process as constitutionally illegitimate, even if it cannot be specifically proven that but for the conduct it would not have passed.

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84 *See* Buckley v. Valeo, 424 U.S. 1, 47–49 (1976) (discussing how independent expenditure ceilings burden First Amendment expression).

85 *See id.* at 45 (discussing large independent expenditures in relation to a quid pro quo exchange).

86 558 U.S. 310, 357, 360 (2010) (holding, inter alia, that independent political expenditures, by definition, cannot corrupt or have the appearance of corruption).

87 *See infra* notes 98–100 and accompanying text.

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From the perspective of the individual member of Congress, the same constitutional test should be employed as is used in the context of "race-neutral" government measures under the Equal Protection Clause: the concerns about continuing campaign contributions need only be a motivating factor in voting, and not necessarily the sole or dominant one. Indeed, as in the equal protection context, this test may be applied to the legislation as a whole: were concerns about campaign donations a motivating factor in the enactment of the law?[88]

In sum, due process of lawmaking is violated not only by acts currently constituting criminal bribery, but also by conduct that reasonably gives the appearance of bribery so as to taint the legitimacy of the process. This includes an implied promise of money for a specific vote and the threat of discontinuing payments if such a specific vote is not forthcoming. The type of conduct evidenced by the quoted statements concerning the tax bill above[89] may well fall under either category, without also including the type of ordinary, run of the mill, "institutional corruption" of our general system of campaign finance. This, I believe, is consistent with and helps to explain the unusually strong reaction to this aspect of the process of enacting the tax law, which reflected more than the "usual business" of Congress. At the same time, due process requires neither criminal conviction or prosecution nor proof that the illegitimate process was an essential, but for, cause of the law's enactment. If it appears to have had a discernible impact on the likelihood of passage and was at least a motivating factor in the votes of legislators, this is sufficient.

IV. JUDICIAL REVIEW OF THE DUE PROCESS OF LAWMAKING

Establishing that there is a constitutional requirement of due process of lawmaking and the general contours of its content does not necessarily determine how it is to be enforced or violations remedied. Analytically, these are of course two distinct issues, as they always are with respect to any constitutional provision, and were, for example, famously treated as such in *Marbury v. Madison*.[90] In terms of comparative practice also, there is a variety of answers to what the remedial implications of a rule, practice or norm being deemed "constitutional" are. For example, in the Netherlands, constitutional rights contained in the country's bill of rights bind the legislature but are not enforceable by the courts, which generally lack the

88 *See infra* note 106 and accompanying text.

89 *See supra* notes 50–52 and accompanying text.

90 5 U.S. (1 Cranch) 137, 148 (1803) (separating the questions of whether Section 13 of the 1789 Judiciary Act conflicted with the Constitution, and whether the courts should nonetheless apply it).

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power of judicial review of legislation.[91] In the United Kingdom, the appellation "constitutional" applied to a statute or convention typically substantially raises the political costs of repeal or violation but does not trigger judicial enforcement. This said, it is fair to say that, at least since the "canonization" of *Marbury*, the general norm and presumption in the United States is that constitutional limitations placed on the political branches are judicially enforceable, with specific exceptions in cases of non-justiciability and political questions.

Neither of these two exceptions applies to judicial enforcement of the due process of lawmaking. Although provisional, the discussion of what conduct triggers illegitimacy in the lawmaking process in Part III above was informed by the need to provide judicially manageable standards. To recap, in addition to the most egregious and clear cases of illegitimacy, such as the coin toss and criminal bribery that was essential to the enactment of a law, an implied promise of money and a threat to discontinue funding surrounding a specific legislative vote will violate due process as giving rise to the appearance of undue influence, where it has a discernible impact on a bill's likelihood of enactment and there is evidence it was a motivating factor in legislators' support for it.

Similarly, whether an illegitimate procedure for due process purposes is employed in the enactment of a law is not an issue that the Constitution leaves to the political branches, so as to be a "political question." The fact that Article I empowers Congress to establish its rules of proceedings does not mean or imply that there are no constitutional restrictions on the content of such rules nor that Congress is the final judge of the constitutionality of any of its procedures.[92] For example, Article III empowers Congress to set rules for the jurisdiction of the federal courts, but ever since *Marbury* struck down one such rule as unconstitutional,[93] it has been understood that this power is subject to the rest of the Constitution and judicial review. And although it may be understandable that courts would prefer to shy away from such a responsibility, this is not thought to be a sufficient justification for use of the

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91 BOEKJE GRONDWET [Constitution] Sept. 22, 2008, art. 120 (Neth.) ("[T]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."). Despite this "domestic" constitutional rule, Dutch courts, like courts in all member-states, are obligated under European Union law not to apply national law that conflicts with it.

92 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855) ("The . . . [Due Process Clause of the Fifth Amendment] is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will.").

93 This was the rule contained in Section 13 of the 1789 Judiciary Act, interpreted by Chief Justice Marshall to unconstitutionally expand the original jurisdiction of the Supreme Court.

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political question doctrine, especially where here, unlike say with separation of powers issues, the checking function of institutional competition behind a political resolution of an issue may be completely lacking due to single party control of both the White House and Congress. Finally, if the Constitution sets minimum standards below which legislative process may not fall, then it no more violates broader separation of powers values for the courts to enforce them than for any constitutional limit on legislative outputs, and perhaps less. This is because procedural review far more rarely than substantive review, if ever, leaves a legislature constitutionally disabled from acting.[94]

If justiciability and the political question doctrine do not rule out judicial review of the due process of lawmaking, as I have argued, then neither does the early precedent of *Fletcher v. Peck*, as many, including Linde, seem to believe.[95] *Fletcher* is a seminal Marshall Court decision best known as the first occasion on which the Supreme Court invalidated a *state* law as unconstitutional. Both its facts and constitutional claims are unusual, perhaps even sui generis, which is part of why I believe the Court's decision does not stand for such a general proposition as a categorical bar. Accordingly, they bear brief summary.[96]

The case involved the fallout from the new nation's first massive financial scandal: Yazoo.[97] A consortium of land speculation companies called the "Combined Society," led by Patrick Henry of "give me liberty" fame, attempted to purchase thirty-five million acres of land situated close to the Yazoo River on the cheap from the state of Georgia. Georgia claimed, but did not control, all of the land, which it had appropriated from several Native American tribes. Aided by an arrangement in which the companies had made every member of the legislature who voted for the sale except one a shareholder in the purchases, the Georgia legislature in 1795 passed a land grant bill accepting the companies' offer of $250,000, but it was vetoed by the Governor. A second bill, incorporating a new bid of $500,000, was then passed and accepted. When news of the "greatest real estate deal in

94 *See* Bar-Siman-Tov, *Puzzling Resistance*, *supra* note 10, at 1954–58 ("[I]n contrast to strong-form substantive judicial review, JLRP [judicial review of the legislative process] is perfectly compatible with legislative reenactment of invalidated statutes.").

95 *See* Linde, *supra* note 9, at 247 (discussing Marshall's opinion in *Fletcher* regarding judicial review).

96 *See generally* TEACHOUT, *supra* note 3, at 83–94.

97 For historical scholarship on the scandal, see generally C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* (1966). *See also* JOHN T. NOONAN, JR., BRIBES: AN INTELLECTUAL HISTORY OF A MORAL IDEA 435–42 (1984); Tracy Jenkins, *Conflict of Interest in the Yazoo Affair*, 3 JAMES BLAIR HIST. REV. 49 (2012) ("[T]he Yazoo sale [turned] into the first major nationally-important scandal in the United States . . . .").

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history"[98] emerged, the public was outraged and in the election the following year every legislator who voted for it was thrown out. A committee of the new "anti-Yazoo" legislature quickly concluded that the law had been fraudulently passed and the full body enacted a new statute, the Rescinding Act, revoking the 1795 land grant. In defiance of this second law, however, the Yazoo companies continued to sell parcels of the land throughout the country, and their uncertain legal status together with the surrounding circumstances converted the matter from a regional into a national scandal. President Thomas Jefferson appointed a commission that included James Madison, which, due to continuing political opposition to bailing out land speculators, only in 1814 resulted in federal legislation offering a compromise solution between the full legal title and no legal title claims of the opposing camps and parties: the federal government would offer to buy the land from purchasers at a reduced price.[99]

In 1800, John Peck, a citizen of Massachusetts, had acquired a parcel of the Yazoo land and sold it to Robert Fletcher, a citizen of New Hampshire, in 1803. The case arose when Fletcher sought to have the sale voided in federal court by claiming breach of contract on the basis that Peck's covenant of a legal right to sell the land was false: either because the 1795 land grant was corrupt and so invalid in the first place or the1796 law had legally revoked it. There was speculation at the time, as evidenced by both oral argument and the opinion of Justice Johnson,[100] that Fletcher was put up to the task in order to bring a test case before a potentially sympathetic, property rights-oriented, Federalist-dominated Court.

The Court unanimously held that the 1796 Rescinding Act was unconstitutional. For the majority, this was because it violated the Contracts Clause of Article I, Section 10, and perhaps also the ex post facto clause, given that many prior contracts for the sale of the land under the 1795 grant had already been executed.[101] For Justice Johnson, writing separately, it was because the law violated a more general unwritten principle that governments cannot undo contracts at will, even though he interpreted the Contracts Clause itself as narrower in scope than the majority and as not

98 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION, 1800–1815, at 551 (1919).

99 Ch. 39, 3 Stat. 116 (1814).

100 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147–48 (1810) (dissenting Justice Johnson wrote that he has "been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence . . . of being a mere feigned case.") (Johnson, J., dissenting); *see also* TEACHOUT *supra* note 3, at 89–90 (stating that "Justice Marshall scolded Joseph Story (Fletcher's attorney) for representing a case that was 'manifestly made up'").

101 *Fletcher*, 10 U.S. at 137–40 (majority opinion).

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covering this case.[102]

On Fletcher's prior claim that the 1795 Act should be invalidated based on the legislators' corrupt conduct, the majority opinion, written by Chief Justice Marshall, held that the procedural posture of the case—a private law contract dispute between two individuals—rendered it inappropriate to examine such a "solemn question" in what in this context was a "collateral and incidental" claim.[103] This is especially the case, Marshall added, where, as here, the Court is asked to nullify a law based on allegations of legislators' conduct about which the many subsequent purchasers of the land would have had no knowledge or notice.[104] Unraveling the chain of prior, good faith transactions among innocent buyers and sellers, as Fletcher's claim effectively seeks, would, according to Marshall (and the general pro-Yazoo argument with which Federalists were sympathetic), violate principles of equity and undermine private property rights.[105] Accordingly, the Court does not rule out reviewing the corruption claim in a more propitious setting, as for example, where the state is a party to the case.

It is true that before declining to reach the merits of this claim here, Marshall expressed skepticism about the general issue of judicial review of statutes for corruption, but he did not address it sufficiently to provide a definite answer. What he did was identify certain practical "difficulties" involved:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the [corrupt] means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members?[106]

He also voiced familiar concerns about how far the validity of a law depends on the motives of its framers and whether courts should examine them, concerns that have not prevented the Court from doing just this in several modern contexts.[107]

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102 *Id.* at 144–45 (Johnson, J., dissenting).

103 *Id.* at 131 ("[t]his solemn question cannot be brought thus collaterally and incidentally before the court.").

104 Given the depth of the scandal, one may well wonder whether this is accurate.

105 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 132–33 (1810).

106 *Id.* at 130.

107 Most prominently in the context of race discrimination under the Equal Protection Clause, where the Court has described the "basic equal protection principle [to be] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). More specifically, in the context of "race- neutral" laws, a plaintiff must show that "a discriminatory purpose has been a motivating factor in the decision

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It is rather Justice Johnson's *dissenting* opinion,[108] and not the majority, that takes a more definitive or categorical position on the general issue of judicial review of legislation for corruption; that is, whether or not such a claim is raised in the specific context of vested rights. He wrote:

> As to the idea that the grants of a legislature may be void because the legislator are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just -- because there is no power that can declare them otherwise.[109]

He went on to suggest that prosecution for bribery is a preferable alternative, which is more suited to judicial enforcement.[110] Presumably, Johnson only took the trouble to address this issue in his opinion because he saw some difference between his and the majority's position on it. Perhaps this was the difference between "difficulties" and "insuperable difficulties."

Thus far, I have presented reasons why judicial review is not ruled out by either non-justiciability doctrines or precedent. The affirmative case for judicial review of legislation for corruption on the basis that it violates the due process of lawmaking is based on an analogy with the exclusionary rule in criminal procedure. Indeed, in this respect, it is not coincidental that some scholars view the exclusionary rule as an implication of due process.[111] For that part of the due process of lawmaking which is more or less co-extensive with criminal bribery under federal statutes, the analogy is as follows: Just as evidence gained as the result of an illegal search is excluded from trial, so too should legislation resulting from illegal bribery be excluded from the statute book. In both cases, the product of the illegal act is fatally tainted by the illegality. The exclusionary rule exists because relying exclusively on the prosecution of police officers for illegal searches is not thought to provide sufficient deterrent or protection against the harm. This same reasoning applies, perhaps even more strongly, to laws that are enacted as the result of bribery. Contrary to Justice Johnson's stated view in his *Fletcher* dissent,[112] the prospect of being prosecuted for bribery provides too little deterrent to donors or members of Congress, and so does not adequately protect the integrity of the legislative process.

[being challenged]." Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

108 Justice Johnson's primary dissent from Marshall's opinion in the case was his rejection of the majority's position that the State of Georgia had acquired fee simple title to the land at the time of the 1795 land grant. He argued that it still lawfully belonged to the Native American tribes from which Georgia had appropriated it. *Fletcher*, 10 U.S. at 144 (Johnson, J., dissenting).

109 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J., dissenting)

110 *Id.*

111 *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

112 *See Fletcher*, 10 U.S. at 144–45.

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Let me explain why. First, as discussed in Part II above, the Supreme Court's interpretation of the relevant federal bribery laws has left only a narrow window for successful prosecutions. This is especially the case where the "payment" is in the form of campaign contributions, as arguably with the tax law, for here the statute has been read in light of the Court's protection of political donations as a form of speech under the First Amendment. To recap: essentially, what it takes to push our ordinary campaign finance system, which has frequently been characterized as "legalized bribery," over the line into the illegal, is proof of a quid pro quo exchange of contribution for a particular future legislative vote. Although, again, this is arguably just what happened in the case of the tax law, for it seems naive to understand the types of statements cited above in any other way, this is what makes it so unusual and created the exceptionally strong reaction to the process.

Second, whether such indictments are sought, given both the sort of general prosecutorial discretion that saw few "big fish" prosecuted during and after the financial crisis of 2008 and the potential undermining of prosecutorial independence at the outset of the Trump administration, when forty-six U.S. Attorneys were fired,[113] is another matter. For one thing, prosecutors may be hampered and influenced by the same political pressures that result in legislative due process violations in the first place. Third, again as we have seen, the Court has interpreted the Speech and Debate Clause of Article I Section 6 as conferring immunity from prosecution on members of Congress for any prior legislative votes that they have cast. Fourth, the track record of recent corruption cases suggests that, even where prosecuted, convictions are far from certain.[114] Finally, even with a conviction, any

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113 Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html.

114 The last three sitting U.S. Senators to have been indicted on corruption charges were either acquitted or had their convictions overturned on appeal: Robert Menendez (2017), acquitted; Ted Stevens (2008), overturned; Kay Bailey Hutchinson (1993), acquitted. *See* Terence Samuel, *There Have Been 12 U.S. Senators Indicted While in Office. Here's a List.*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/04/02/there-have-been-12-u-s-senators-indicted-while-in-office-heres-a-list/?utm_term=.4ba95c3a19b9. In addition, two other prominent politicians, former Virginia Governor Robert McDonnell and former Speaker of the New York Assembly Sheldon Silver, had their corruption convictions overturned in 2016 and 2017 respectively, although Silver was subsequently convicted again at his retrial in May 2018. *See* Robert Barnes, *Supreme Court Overturns Corruption Conviction of Former Va. Governor McDonnell*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/politics/supreme-court-rules-unanimously-in-favor-of-former-va-robert-f-mcdonnell-in-corruption-case/2016/06/27/38526a94-3c75-11e6-a66f-aa6c1883b6b1_story.html; Benjamin Weiser, *Sheldon Silver, Ex-New York Assembly Speaker, Gets 7-Year Prison Sentence*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-

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individual sentences handed down are typically vastly outweighed by the donors' collective return on "investment." For the law, like the recent tax law that so directly and disproportionately benefits them, still remains. Accordingly, judicial review to set aside laws that were enacted with the "help" of this type of illegitimate process may be the only effective way to alter these incentives and create sufficient protection against abuse.[115]

Obviously, however, even such limited threats of prosecution will not deter forms of corruption of the legislative process that are not within the current scope of the criminal law. Here, by necessity, if we want to protect against, and reduce the incentives to engage in, such conduct, an alternative mechanism is required. Since I have argued above that due process of lawmaking should be understood to encompass the reasonable appearance of certain forms of corruption and the illegitimacy of the legislative process and not only criminal bribery, judicial review of the resulting legislation is such a mechanism of protection, and perhaps the only one. Buying influence and access may be protected political speech, but buying undue influence creates at least the appearance of constitutionally illegitimate lawmaking procedures.

Although undoubtedly less common than judicial oversight of legislative outputs, there is an emerging trend around the world for courts to review legislative processes, primarily in response to the near-universal sense of a decline in how they operate compared with how they are supposed to, particularly in the quality and quantity of meaningful deliberation about the public interest.[116] This trend belies the notion that matters of legislative process are inherently political questions and so not suitable for judicial review. While elsewhere the causes of this perceived decline may be more varied and somewhat less attributable to the distortion resulting from the role of campaign contributions, the growing role of constitutional courts worldwide represents a common judicial attempt to reverse it. For example, in a series of cases starting in 2012, the South African Constitutional Court has engaged in robust review of several types of legislative procedures, not only the lawmaking process itself but also internal parliamentary rules and mechanisms for the conduct of its business, including finding them in violation of the constitutional rights of individual members.[117] These cases,

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corruption.html.

115 I do not view judicial review of due process and an internal ethics rule of legislative recusal, *see supra* note 5, as mutually exclusive but rather as potentially complementary.

116 For an excellent comparative survey, see generally ROSE-ACKERMAN, EGIDY & FAWKES, *supra* note 10.

117 *United Democratic Movement v. Speaker of the Nat'l Assembly* 2017 (5) SA 300 (CC) (S. Afr.) (overturning

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all connected to the attempts to hold then-President Zuma accountable for corruption, culminated in December 2017 when the Constitutional Court held that the National Assembly had violated its constitutional obligation to create a set of specially-tailored procedural rules for the impeachment of a president, and ordered it to do so "without delay."[118]

Also in 2017, the Israeli Supreme Court struck down a tax law on procedural grounds alone for violating the right of all legislators to meaningfully participate in the lawmaking process, when they received the final version of an omnibus tax bill at the last minute.[119] The German Constitutional Court in 2010 invalidated the federal parliament's recent amendment of the country's welfare legislation because the flawed procedure that it used to determine the subsistence minimum violated the constitution.[120] Finally, the Colombian Constitution expressly grants the Constitutional Court the power to review legislation for errors of procedure,[121] and in addition to fairly frequent exercise for violating the detailed textual procedural rules,[122] the Court has also invalidated a tax law for violating the "unwritten" principle of "minimum public deliberation." This occurred when the government, in an attempt to close the budget deficit, added increased Value-Added Tax ("VAT") rates on certain necessities at the last minute with no notice to legislators just before the final vote.[123]

Although none of these examples deal (at least directly) with the problem of legislative corruption, they do add the weight of broadly successful

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Speaker's decision that she lacks power to hold secret ballot for motion of no-confidence); *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) (S. Afr.) (holding that the National Assembly violated its constitutional obligation to hold president accountable); *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) (S. Afr.) (holding that Rules violate constitutional right of individual MPs to table a motion of no-confidence in the president); *Oriani-Ambrosini v. Sisulu* 2012 (6) SA 588 (CC) (S. Afr.) (holding that National Assembly Rules violate constitutional right of individual MPs to introduce legislation).

118 Econ. Freedom Fighters and Others v. Speaker of the Nat'l Assembly 2018 (2) SA 571 (CC), at para. 216 (S. Afr.).

119 HCJ 10042/16 Quintintiski v. Knesset (2017) (Isr.). The decision is discussed in Ittai Bar-Siman-Tov, In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation, BLOG INT'L J. CONST. L. (Dec. 13, 2017), http://www.iconnectblog.com/2017/12/in-wake-of-controversial-enactment-process-of-trumps-tax-bill-israeli-sc-offers-a-novel-approach-to-regulating-omnibus-legislation/.

120 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 1 BvL 1/09.

121 Constitución Política de Colombia [C.P.] art. 241.

122 *See* Manuel José Cepeda Espinosa & David Landau, Colombian Constitutional Law: Leading Cases 323–24 (2017).

123 Corte Constitucional [C.C.] [Constitutional Court], 2003, Justice Manuel José Cepeda Espinosa, Sentencia C-776 (Colom.), discussed and translated in ESPINOSA & LANDAU, *supra* note 122, at 318–23.

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experience to the more general argument for judicial review of process, which is commonly viewed in this country as more problematic than review of legislative outputs.[124] Apart from the pragmatic point that this misses a potentially useful and effective opportunity to help fix what almost everybody regards as broken, and the textual/doctrinal one that "due" legislative process implies the existence of "undue," from a broader normative perspective whatever the arguments (if any) that justify judicial review of substance in a democracy would seem to apply at least as much to judicial review of process.[125] As mentioned previously, this is because procedural review far more rarely than substantive review, if ever, leaves a legislature constitutionally disabled from acting.[126]

This latter point leads to a final one. Is it realistic, one might wonder, to think that the same courts which have circumscribed criminal bribery statutes and Congress's power to regulate money in politics, as well as expand the scope of legislators' criminal immunity, will come to understand and apply due process in the way this Article proposes? Is this not in fact an instance of what Eric Posner and Adrian Vermeule have labeled the "inside/outside fallacy," in which inconsistent and incoherent assumptions about the motivations of actors within the legal system are made in the diagnostic and prescriptive sections of a piece of work?[127] While not necessarily claiming this course of action to be likely, after all predicting judicial behavior is mostly a fool's errand, I do not believe it is unrealistic, or that the argument relies on inconsistent assumptions about the motivation of judges. The reason is precisely this less "drastic" nature of the judicial intervention called for here—the regular fare of invalidation plus the possibility of re-enactment by means of due rather than undue process—as compared with either incarceration or other punitive measures against individual legislators, or direct restriction on political speech and campaigning. In other words, the concerns that might motivate the courts in their First Amendment, Speech and Debate Clause, and statutory criminal law rulings may well not apply in the legislative due process context. This is especially the case when the comparative effectiveness of judicial versus non-judicial enforcement of due process is taken into account.

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124 *See* Bar-Siman-Tov, *Puzzling Resistance*, *supra* note 10, at 1925–26.

125 For a helpful survey of the general arguments for judicial review of legislative process, see *id*. at 1970–74.

126 *See id*. at 1954–58.

127 Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 UNIV. CHI. L. REV. 1743, 1745 (2013).

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CONCLUSION

The aims of this Article have been (1) to reintroduce, develop, and extend the core principle that Congress is bound by a constitutional requirement of due process of lawmaking, (2) to present the case for judicial review and enforcement of this duty, and thereby (3) to provide the basis for a specifically legal and effective response to concerns raised about the undue influence of donors in the legislative process, as exemplified in the enactment of the recent tax law. Although it does provide some provisional guidance as to the scope and extension of this core principle—even if (or just because) questionable conduct falls short of criminal bribery, this does not mean it is "OK," or legitimate, in terms of due process of lawmaking—the Article does not fill in the full contours and content of the constitutional duty placed on Congress. This must be left to future work.

Similarly, this Article obviously does not provide a full solution to the profound problem of the endemic or systemic corruption of Congress and the skewing of democracy resulting from the recent vast (related) increases in both the amount of money flowing into politics—through direct and indirect expenditures, as well as lobbying—and the cost of election and reelection campaigns. When sophisticated political pundits evaluate candidates' electability ("viability") by the amount of funds in their war chests, when presidents and presidential candidates only ever set foot in non-battleground states, such as California, to attend fundraisers, when a flawed candidate faces no serious primary challenge to be its presidential candidate from a member of her political party because she has locked up all its major donors at the outset,[128] the republic is, if not already lost, clearly in deep trouble. To save it, far more than judicial review of the due process of lawmaking for actions that actually constitute, come close to, or give the appearance of, bribery is obviously required. Nonetheless, in the meantime, the Constitution is not completely defenseless against the most harmful forms of corruption and undue influence in lawmaking. While they may be relatively rare, the enactment of the tax law is further evidence that donors are employing ever more brazen and strong-arm tactics against the integrity of the legislative process; in essence, engaging in a form of political looting.

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128 Bernie Sanders is, of course, not a member of the Democratic Party and, before the Democratic primaries began, was not widely viewed as a serious challenger to Hillary Clinton. *See, e.g.*, Dan Pfeifer, *Commentary: Bernie Sanders Isn't Barack Obama, and 2016 Isn't 2008*, CHI. TRIBUNE (July 19, 2015, 9:55 AM), https://www.chicagotribune.com/news/nationworld/ct-bernie-sanders-obama-dan-pfeiffer-20150719-story.html.

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The institutional independence of Congress is at a minimum where its members are beholden to donors for reelection, where hyperpolarized politics leaves no room for moderation, and where the same party controls both the executive and legislative branches. When this combination exists, as now, it is the perfect storm for excess, with few effective constraints on power and the pursuit of naked self-interest. This is when it is critical for the courts to play their designated role in our constitutional democracy as the ultimate check on political overreaching.

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