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Congressional Dysfunction, Public Opinion, and the Battle over the Keystone XL Pipeline

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Congressional Dysfunction, Public Opinion, and the Battle over the Keystone XL Pipeline

*Evan C. Zoldan**

When President Obama vetoed the Keystone XL Pipeline Approval Act in early 2015, he signaled the end of a political drama that pitted Congress against the President, Democrats against Republicans, and the promise of jobs against concern for the environment. Like most drama in Washington, it burned bright and hot, but soon was overtaken by other, suddenly more urgent, matters.

Although news coverage of the pipeline has waned, the Keystone XL legislation represents the serious and enduring problem of congressional dysfunction. Using the Keystone XL legislation as a point of departure, this Article offers insights into the inner workings of Congress, the role of deliberation in lawmaking, and the relationship between public opinion and the legislative process.

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*When the people become indifferent to the acts of their
representatives, they will have ceased to take much interest in
the preservation of their liberties.¹*

INTRODUCTION

From the perspective of partisan politics, the fight over the Keystone XL Pipeline Approval Act was not unusual—the pipeline largely is opposed by Democrats, who fear its environmental impact, and supported by Republicans, who are optimistic about the pipeline’s job-producing potential. But, if we focus on the policy implications of the Keystone XL legislation, or the political points scored during the fight over its enactment, we may fail to see its serious defects as a matter of legislative process. Indeed, no matter what one thinks about the Keystone XL Pipeline Approval Act as a matter of policy or partisan political wrangling, the legislation reflects serious indicia of congressional dysfunction, including a lack of deliberation and a failure to provide guidance to courts, private parties, and government agencies.

This Article considers the Keystone XL legislation and concludes that it is a powerful but far from unique example of congressional dysfunction. Part I demonstrates that Congress’s dysfunctionality is normally equated with its failure to enact statutes. However, because our constitutional system does not value all congressional action equally, congressional action as well as inaction can be dysfunctional. Through a close reading of constitutional text, doctrine, and history, Part II confirms that a statute is dysfunctional if it fails to reflect deliberation or fails to provide guidance. Part III evaluates the Keystone XL Pipeline Approval Act in light of the constitutional values

1. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 841 (Boston, Hilliard, Gray & Co. 1833).

of deliberation and guidance and concludes that this high-profile legislation represents dysfunctional congressional action.

Although the President's veto ended the saga of the Keystone XL Pipeline for the time being, the lessons that the Keystone story teaches about deliberation, guidance, and congressional dysfunction endure beyond the end of this one particular political drama. Part IV evaluates congressional dysfunction beyond Keystone and offers suggestions about what we, the public, can do to improve the legislative process.

I. CONGRESSIONAL DYSFUNCTION IS NORMALLY EQUATED WITH CONGRESSIONAL INACTION

Criticism of the government is nothing new and, in a healthy democracy, not something to condemn.² Nevertheless, attacks on Congress as an institution have become increasingly frequent and pointed. Americans do not just disapprove of Congress; they hate it.³ This dissatisfaction is focused largely on how “dysfunctional” Congress has become;⁴ that is, Congress frequently is denounced for its inability to enact legislation addressing the nation's problems.⁵ And this criticism of congressional inaction is not limited to public opinion. In addition to the public at large, the media and scholars also have criticized Congress for its failure to act. This universal condemnation leaves the undeniable impression that Congress's main failure, its main dysfunction, is its failure to pass legislation.

Popular polls attest that the public is fed up with Congress. The last two terms of Congress have seen its lowest approval ratings in decades.⁶

2. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The Supreme Court noted our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehemence, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.*

3. During the 113th Congress, public approval of Congress reached an all-time low of 15%. Aaron Blake, *How Much Do People Hate Congress? Let Us Count the Ways*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/08/04/how-much-do-people-hate-congress-let-us-count-the-ways/>; see also *Congress and the Public, Congressional Job Approval Ratings Trend 1974–Present*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited Nov. 15, 2015) (showing a steady decline in public approval of Congress over last ten years).

4. Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 914 (2014).

5. Ruth Marcus, *The Fallout of Congressional Dysfunction*, WASH. POST (Jan. 17, 2014), https://www.washingtonpost.com/opinions/ruth-marcus-the-fallout-of-congressional-dysfunction/2014/01/17/52e97534-7fab-11e3-93c1-0e888170b723_story.html.

6. Rebecca Riffkin, *2014 U.S. Approval of Congress Remains Near All-Time Low*, GALLUP (Dec. 15, 2014), <http://www.gallup.com/poll/180113/2014-approval-congress-remains-near-time-low.aspx>; see also *Congressional Favorability*, PEW RES. CTR., <http://www.pewresearch.org/data-trend/political-attitudes/congressional-favorability/> (last updated Mar. 29, 2015).

Exit polls after the 2014 midterm elections indicated that nearly 80% of the public was angry over the way Congress does its job.⁷ Surveys further confirm that this dissatisfaction was linked to Congress's failure to enact laws. A recent Gallup poll confirmed that "Americans' high level of disapproval is less about what Congress is doing than about what it isn't doing: putting aside partisan bickering and getting things done."⁸ In fact, nearly 60% of Americans who disapprove of Congress do so because of their perception that Congress, rather than accomplishing anything, spends its time engaged in political spats.⁹

Popular criticism of Congress for its failure to enact legislation is reflected in, and fueled by, the popular media. Countless news headlines in recent years have declared our national legislature another "do-nothing Congress."¹⁰ Many of these news reports explicitly connected Congress's low approval rating to the fact that it passes so

7. Jeremy Diamond, *Exit Polls: Majority of Voters Dissatisfied or Angry with Washington*, CNN (Nov. 4, 2014, 6:49 PM), <http://www.cnn.com/2014/11/04/politics/midterm-exit-polls-1/>.

8. Lydia Saad, *Gridlock is Top Reason Americans Are Critical of Congress*, GALLUP (June 12, 2013), <http://www.gallup.com/poll/163031/gridlock-top-reason-americans-critical-congress.aspx>.

9. *Id.* The connection between public approval of Congress and its production of legislation is not merely anecdotal; indeed, data show that public opinion of Congress tracks closely the number of bills it enacts. Over the last twenty years, public opinion has fluctuated from a low of less than 15% to a high of nearly 60%. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited Nov. 15, 2015). Over this same period, the number of bills that Congress has enacted has ranged from a low of fewer than 300 bills per term to a high of more than 600 bills per term. *Legislation of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/legislation?q=%7B%22congress%22%3A%22114%22%7D> (last visited Nov. 15, 2015). From the mid-1990s until the beginning of the 2000s, there was a steady increase in both public approval of Congress and the number of bills that it passed. Starting in the early 2000s, both public approval and number of bills enacted began to trend downward, reaching low points in 2013. In the last two years, there has been a slight increase in both the number of bills passed and public approval. Perhaps most tellingly, the apex of public approval for Congress followed immediately after Congress's most productive term (56.2% in 2001) and the nadir of public approval followed Congress's least productive term (14.2% in 2013). *Congress and the Public*, *supra*; *Legislation of the U.S. Congress*, *supra*. These data suggest that the public pays attention to the number of bills that Congress enacts (perhaps by way of media reports); it also suggests that public approval of Congress depends, at least in part, on Congress's production of statutes.

10. Ashley Alman, *In a Do-Nothing Congress, These Members Did the Least*, HUFFINGTON POST (Jan. 16, 2015, 3:48 PM), http://www.huffingtonpost.com/2015/01/16/do-nothing-congress_n_6488942.html; Lauren Fox, *'Do-Nothing' Congress Was Way More Productive Than the Current One*, U.S. NEWS & WORLD REP. (Dec. 1, 2013, 12:01 AM), <http://www.usnews.com/news/articles/2013/12/01/do-nothing-congress-was-way-more-productive-than-the-current-one>; Cristina Marcos, *A 'Do-Nothing Congress'?*, HILL (July 13, 2014, 10:30 AM), <http://thehill.com/blogs/floor-action/212041-a-do-nothing-congress>; Peter R. Orszag, *A New Do-Nothing Congress*, BLOOMBERG VIEW (Nov. 4, 2014, 9:03 AM), <http://www.bloombergvew.com/articles/2014-11-04/a-new-do-nothing-congress>. The original "do-nothing Congress" was the 80th, so-labeled by President Truman in 1948.

few laws.¹¹ Scholars, too, have lamented congressional inaction.¹² Some have linked Congress's inaction with the government's recent near default on its debt obligations.¹³ While acknowledging that legislative quantity is not equal to quality, Professor Zasloff echoed the popular sentiment that "the middle of the deepest economic crisis since the Great Depression . . . does not seem to be the time for inaction."¹⁴ Similarly, Professor Beerman aptly described gridlock in the Capitol as "worse than on the streets of midtown Manhattan during rush hour."¹⁵ Professor Teter has raised the interesting possibility of judicial review of arbitrary legislative inaction. Recognizing that public contempt for Congress stems from its failure to act, Teter argues that Congress's inaction often stems from the arbitrary obstructionism of a single member rather than from a principled policy objection.¹⁶

To be sure, Congress's failure to act has foisted significant costs, financial and otherwise, on the country. Take, for example, the 2013 shutdown of the federal government—a wasteful, embarrassing, and dangerous civics lesson about the consequences of congressional inaction. Aside from the estimated \$2–6 billion in direct financial losses, the shutdown forced the government to delay key functions, such as reviewing and approving medical devices, issuing export and import licenses, and executing federal loans.¹⁷ In addition to these economic consequences, Congress's inability to act has placed stress on other parts of our delicately balanced constitutional system.¹⁸ For example, presidential nominees to judicial and executive positions have languished in a kind of legislative limbo, receiving neither Senate confirmation nor rejection. As a result, key government positions have been left unfilled.¹⁹ Moreover, President Obama has cited Congress's

11. *E.g.*, Alman, *supra* note 10; Marcos, *supra* note 10.

12. *See, e.g.*, Dawood, *supra* note 4, at 928–29 (“[A] competitive party system can levy too great a constraint on action.”); Michael J. Teter, *Letting Congress Vote: Judicial Review of Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1436 (2014) (noting that when Congress does not act “important legislation languishes” and “critical policy matters go unaddressed”).

13. Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 481–82 (2012).

14. *Id.*

15. Jack M. Beermann, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 722 (2014).

16. Teter, *supra* note 12, at 1436.

17. OFFICE OF MGMT. & BUDGET, IMPACTS AND COSTS OF THE OCTOBER 2013 FEDERAL GOVERNMENT SHUTDOWN 1–3 (2013), <https://www.whitehouse.gov/sites/default/files/omb/reports/impacts-and-costs-of-october-2013-federal-government-shutdown-report.pdf>.

18. Dawood, *supra* note 4, at 917, 919.

19. The failure of the Senate to vote on presidential nominees has given rise to the increased use of recess appointments, a practice invalidated by the Supreme Court in *NLRB v. Noel*

choice “to do nothing” as the reason for his recent executive action on immigration.²⁰ This move has drawn a legal challenge that is already winding its way through the federal court system.²¹

II. CONGRESSIONAL DYSFUNCTION INCLUDES SOME CONGRESSIONAL ACTION

For its recent brinksmanship over public debt and its repeated failures to set policy, it is appropriate to fault Congress. And considering the very real harm caused by congressional inaction, it is tempting, even natural, to equate Congress’s dysfunction with its failure to pass laws as the public, the media, and some scholars have done. Nevertheless, as we grow anxious for Congress to do something, we should not make the mistake of thinking that doing anything is better than doing nothing. Indeed, congressional *action* can be as dysfunctional as inaction. Among the most dysfunctional of laws are those that evince a lack of deliberation or that fail to provide guidance.

A. *Legislation Formed Without Deliberation is Dysfunctional*

The Constitution demonstrates a strong commitment to legislative deliberation. As the Supreme Court has held, the constitutional process required before a bill becomes a law is designed to encourage deliberation.²² Reflecting the view that deliberation will produce better-considered laws, the Court noted that the Constitution creates an opportunity for “full study and debate” of the relevant issues.²³ In particular, the requirement of bicameralism, that each chamber of Congress independently consider proposed legislation before it becomes law,²⁴ long has been justified as beneficial to deliberation. Perhaps the best explanation of the connection between bicameralism and deliberation comes by way of anecdote. Thomas Jefferson, who was in France during the Philadelphia Constitutional Convention, asked George Washington to explain the merits of the Senate, a decision that Jefferson believed required some explanation due to the body’s distinctly undemocratic character. Washington responded with the following analogy: “Why did you pour that coffee into your saucer?”

Canning. 134 S. Ct. 2550, 2559 (2014).

20. President Barack Obama, Remarks on Border Security and Immigration Reform, 2014 DAILY COMP. PRES. DOC. 2 (June 30, 2014).

21. *Texas v. United States*, No. 15-40238 (5th Cir. Nov. 9, 2015, revised Nov. 25, 2015), *petition for cert. filed*, (U.S. Nov. 20, 2015) (No. 15-674).

22. *INS v. Chadha*, 462 U.S. 919, 951, 959 (1983).

23. *Id.* at 951.

24. U.S. CONST. art. I, § 7.

“To cool it,” Jefferson replied. “Even so,” responded Washington, “we pour legislation into the senatorial saucer to cool it.”²⁵ This story, though apocryphal, reflects the deeply held American belief that legislation is best when it is the product of deliberation.

Consider also the Speech or Debate Clause, which protects Representatives and Senators from being questioned outside the halls of Congress for their legislative activities.²⁶ The Court has read this provision to facilitate free and open debate by members of Congress. As the Court has held, the “heart” of the protections afforded by the clause are the deliberative acts of speaking and debate.²⁷ To this end, the Court held that the clause grants broad immunity for legislative acts, so long as they are an “integral part of the deliberative and communicative processes” by which members of Congress consider, pass, or reject proposed legislation.²⁸

In more subtle ways, too, the Constitution encourages deliberation. The Journal Clause requires each chamber of Congress to “keep a Journal of its Proceedings, and from time to time publish the same.”²⁹ This clause long has been interpreted to encourage deliberation by ensuring that legislative decisions are not made in secret.³⁰ As described by Joseph Story in his foundational *Commentaries on the Constitution*, publication of legislative journals sheds light on the activities of the people’s representatives. And when legislators know that their constituents can learn what motivated their votes in Congress, they are less likely to conspire and cut private deals, and more likely to deliberate.³¹ This reading of the Journal Clause also reveals the potential connection between deliberation in lawmaking and the quality of the laws themselves. As Justice Story described, by requiring deliberation, the people will ensure that the laws passed in their name are not oppressive.³² It is only when “the people become indifferent to the acts of their representatives, [that] they will have ceased to take much interest in the preservation of their liberties.”³³

25. SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 4 (1997).

26. U.S. CONST. art. I, § 6.

27. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

28. *Id.*

29. U.S. CONST. art. I, § 5, cl. 3.

30. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670–71 (1892); STORY, *supra* note 1, §§ 839–41; Nash E. Long, *The “Constitutional Remand”: Judicial Review of Constitutionally Dubious Statutes*, 14 J.L. & POL. 667, 678 (1998).

31. STORY, *supra* note 1, §§ 840–41.

32. *See id.* § 840.

33. *Id.* § 841.

The Constitution's emphasis on deliberation reflects the historical experiences of the generation that framed it. James Wilson, among the most well-respected members of the Philadelphia Convention, and undoubtedly the most learned in the history and theory of government,³⁴ emphasized the centrality of deliberation in legislative work.³⁵ Legislation following deliberation was apt to be thoughtful and reasoned; by contrast, legislation enacted out of anger by lawmakers responding to a particular, rousing event often resulted in legislative "despotism, injustice, and cruelty."³⁶ Reflecting the national mood of the period leading up to the framing of the Constitution, the influential Vermont Council of Censors strongly condemned the legislature's "fickleness" and "want of deliberation in passing laws."³⁷

Importantly, the Court's emphasis on deliberation is broader than the contours of the bicameralism, speech or debate, and journal requirements. Indeed, even when there is no question that these bare constitutional requirements have been met, the Court has emphasized the value of deliberation. In *King v. Burwell*, the Court's recent landmark opinion interpreting the Affordable Care Act, the Court reiterated that it considered deliberation a primary responsibility of Congress.³⁸ In no uncertain terms, the Court criticized Congress for the Act's "inartful drafting,"³⁹ attributing the ungainly language of the statute to a lack of deliberation:

Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster

34. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 1002–09 (2008).

35. See 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 294 (Kenmit L. Hall & Mark David Hall eds., 2007).

36. 2 *id.* at 867.

37. Address of the Council of Censors (Feb. 14, 1786), in RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 68 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter VERMONT REPORT]. Legislation lacking in deliberation was not limited to the framing period and neither was criticism of legislation enacted without appropriate deliberation. In the first half of the nineteenth century, the sheer volume of special bills introduced made it impossible for the legislators to learn the contents of the bills before enacting them. Indeed, the disregard for deliberation in several states attracted the criticism that legislators "passed bills about which they knew nothing" and without "having heard more than the title" of the proposed legislation read. Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 272–73 (2004).

38. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

39. *Id.*

requirement. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.⁴⁰

The Court's opinion in *King* affirms that the bicameralism, speech or debate, and journal requirements of the Constitution, however important, do not represent the outer limits of the Constitution's concern for legislative deliberation. Rather, these clauses can be seen as part of a broader commitment of the Constitution to a robust legislative process designed to produce well-considered legislative language. Indeed, it is unlikely that the Court was concerned that the policies underlying the ACA were under-deliberated; in fact, the ACA "was the subject of more than two years of intense study and deliberation."⁴¹ Rather, the Court's statement is better read as a criticism of Congress's lack of deliberation about the choice of statutory language instead of a lack of deliberation about the concepts this language embodied.⁴²

Taken together, the Constitution's processes that encourage members of Congress to engage in deliberation before passing laws, and the historical experience that gave rise to these processes, set a standard against which we should judge the worth of acts of Congress. A parsimonious reading of the Constitution's requirements for valid lawmaking—bicameralism and presentment—fails to capture the spirit of the ideal legislative process. Rather, in light of our textual, doctrinal, and historical commitments to deliberation, we should valorize legislation that reflects debate and study in both chambers of Congress, the cooling off demanded by presenting the same language to two distinct bodies, and consideration of the language of the laws enacted. Moreover, we should value legislation that reflects care in its construction and gives the public the opportunity to understand the process by which it was formulated. By contrast, we should disapprove of legislation that is the product of thoughtless, perfunctory assent or inflamed passions, or which appears to obfuscate its origins and purpose.⁴³ In short, while legislation that does not bear the hallmarks of deliberation may be constitutional, it must also be considered dysfunctional.

B. Legislation that Fails to Provide Guidance is Dysfunctional

In addition to deliberation, another key function of legislation is to

40. *Id.* (citation omitted).

41. Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 99 (2015).

42. *Id.*

43. Zasloff, *supra* note 13, at 485 (noting that extreme partisanship has led to bills emerging from committees without the legislators themselves knowing their contents).

provide guidance to citizens and government actors. This principle is woven throughout the Constitution's text and is reflected in Supreme Court doctrine, jurisprudence, and long-standing principles of statutory interpretation. For example, the Ex Post Facto⁴⁴ and Due Process⁴⁵ clauses embody the concept that a person should not be held accountable for conduct that he could not have known was wrong. Interpreting the Due Process Clause, the Supreme Court held that a commitment to the rule of law depends on the premise that a person is "free to steer between lawful and unlawful conduct."⁴⁶ When a law is vague rather than clear, it denies even the reasonably careful citizen the opportunity to avoid behavior that is proscribed.⁴⁷ Moreover, vague legislative directives give administrative agencies and courts the ability to resolve ambiguity in an ad hoc and subjective manner, encouraging inconsistent application of the law.⁴⁸ The Ex Post Facto Clause ensures that a person is punished only for conduct that was proscribed at the time it was committed.⁴⁹ As Lon Fuller has said of retroactive legislation, it is a "monstrosity"; it literally makes no sense to govern by rules that have not yet come into effect.⁵⁰

The Constitution's strong preference for statutes that provide guidance is reflected in constitutional history. In the decade before the framing of the Constitution, one of the most common sources of citizen discontent was the Confederation-era legislative habit of enacting laws that failed to provide guidance to citizens. Again, the Vermont Council of Censors summed up the national mood when excoriating its state's legislature for failing to pass laws that provided guidance: "[T]he revised laws have been altered—re-altered—made better—made worse; and kept in such a fluctuating position, that persons in civil commission scarce know what is law, or how to regulate their conduct in the determination of causes."⁵¹ James Madison made much the same point. He cautioned against equating representative government with well-written laws, denouncing as inequitable laws that are "so incoherent that they cannot be understood" or that are "repealed or revised before they are promulgated, or undergo such incessant changes that no man, who

44. U.S. CONST. art. I, §§ 9–10; *Calder v. Bull*, 3 U.S. 386 (1798).

45. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

46. *Id.*

47. *Id.*

48. *Id.* at 108–09.

49. U.S. CONST. art. I, §§ 9–10.

50. LON FULLER, *THE MORALITY OF LAW* 53 (1964).

51. VERMONT REPORT, *supra* note 37, at 68.

knows what the law is to-day, can guess what it will be to-morrow.”⁵²

The strong constitutional preference for statutes that provide guidance is also reflected in the way that the powers of the different branches of government are organized. Under the nondelegation doctrine, when Congress vests authority in the executive branch, it must supply the executive with an “intelligible principle”⁵³ to implement. In the absence of congressional guidance in the form of rules to follow, standards to apply, factors to consider, methods to employ, or goals to meet, a congressional grant of authority is not permitted.⁵⁴

Although the level of guidance demanded by the Constitution is not onerous,⁵⁵ nonconstitutional rules also reflect the principle that statutes must provide guidance. Among the most elementary canons of statutory construction is the principle that every word, clause, and sentence of a statute should be interpreted to have meaning.⁵⁶ An interpretation must be rejected if it will render any part of a statute “inoperative or superfluous, void or insignificant.”⁵⁷ This canon of construction is more than simply a judicial shortcut or rule of thumb. Rather, it implements the constitutional value of guidance by ensuring that courts do not construe statutes in a way that leaves affected actors unaware of how statutory language controls their conduct.

Together, these constitutional and interpretative principles suggest that legislation is dysfunctional when it cannot be read in a way that provides guidance. A statute fails to provide guidance when it does not inform government agencies or private parties about what conduct is permitted or proscribed. It fails to provide guidance when it unsettles the standing law by filling it with incoherent exceptions. It fails to provide guidance when it cannot be interpreted in a way that gives meaning to all of its provisions. Legislation that fails to provide guidance, like legislation that evinces a lack of deliberation, has little value in our constitutional system.

52. THE FEDERALIST NO. 62, at 317 (James Madison) (Buccaneer Books ed. 1992).

53. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

54. *Id.* at 374–75, 379.

55. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–33 (1980) (observing that the nondelegation doctrine never required “more detail than was feasible”); *Rogers v. Tennessee*, 532 U.S. 451, 462–63 (2001) (rejecting Due Process Clause and Ex Post Facto Clause challenges to retroactive judicial abolition of common law rule).

56. 2 FRANK E. HORACK, JR., *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 4705 (3d ed. 1943).

57. *Corley v. United States*, 556 U.S. 303, 314 (2009).

III. THE KEYSTONE XL LEGISLATION AND CONGRESSIONAL DYSFUNCTION

For the public at large, anxious for a legislature that would act, the 114th Congress began auspiciously. In the first days of the 2015 session, members of Congress introduced scores of bills, some even with bipartisan support, signaling that Congress was ready to overcome the dysfunction of inaction. However, if we measure the value of congressional action against the attributes of deliberation and guidance, it is evident that some of the decisions made by Congress early in the term must be considered dysfunctional. The Keystone XL Pipeline Approval Act, one of the very first bills introduced in Congress, is a prime example of congressional dysfunction due to the lack of deliberation it reflects and guidance it provides.

A. *Keystone XL Legislation*

1. The Keystone XL Pipeline

The saga of the Keystone XL Pipeline began in 2008, when TransCanada, a Canadian oil company, applied for a permit from the United States to construct and operate a pipeline in order to import crude oil across the Canadian border.⁵⁸ Pursuant to the permitting process for cross-border oil pipelines, the Secretary of State exercises the President's power to grant the type of permit sought by TransCanada.⁵⁹ As part of its review, the State Department is required to consider the environmental impact of the proposed transaction as delineated by the National Environmental Policy Act⁶⁰ and the Endangered Species Act.⁶¹ TransCanada's application for a permit immediately sparked a controversy in Congress and among the American public. Proponents of the pipeline argued that it would create jobs and energy independence; opponents questioned the economic benefits and feared the environmental risk.⁶² Opinion in Congress fell largely along party lines. While Republicans overwhelmingly favored the pipeline, Democrats largely opposed it. Because of these disagreements and, in particular, because of concerns about

58. PAUL W. PARFOMAK ET AL., CONG. RESEARCH SERV., R43787, KEYSTONE XL PIPELINE: OVERVIEW AND RECENT DEVELOPMENTS 1 (2015).

59. Exec. Order No. 13337, 3 C.F.R. 13337 (2004).

60. 42 U.S.C. § 4332(2)(C) (2012).

61. 16 U.S.C. §§ 1532, 1536 (2012).

62. PARFOMAK ET AL., *supra* note 58, at 10–12.

environmental impacts in Nebraska, the permitting process initiated in 2008 terminated in the denial of TransCanada's permit application.⁶³

In 2012, TransCanada applied again for a permit, this time with a modified route.⁶⁴ With the application pending before the State Department, members of Congress introduced a number of bills in 2013 and 2014 to bypass the permitting process and approve TransCanada's application directly.⁶⁵ With a slim Democratic majority in the Senate, however, all of these bills died at the end of the 113th Congress.⁶⁶

2. The Keystone XL Pipeline Approval Act of 2015

In the wake of a Republican sweep of both chambers of Congress in the 2014 midterm elections, the resurrection of Keystone XL legislation was high on the agenda. Soon after the 114th Congress was seated in January 2015, new Keystone XL legislation was proposed. Within days of the beginning of the new term, members in both the Senate⁶⁷ and the House⁶⁸ introduced legislation to bypass the pending administrative process. The House bill passed almost immediately;⁶⁹ the Senate took more time, passing a similar (though not identical) bill three weeks later.⁷⁰ The House ultimately passed the Senate's version of the bill, called the Keystone XL Pipeline Approval Act, making it the first major piece of legislation passed by the 114th Congress.

The Keystone XL Pipeline Approval Act provided that TransCanada's previously filed application to build the pipeline was deemed "to fully satisfy" the requirements of "any . . . provision of law that requires Federal agency consultation or review."⁷¹ In particular, the Keystone XL legislation created an end-run around the requirements of the National Environmental Policy Act and the Endangered Species Act, effectively amending these statutes to the extent that they stood in the way of the approval of TransCanada's permit.⁷² The result of the Keystone XL legislation was the creation of a special benefit for a particular company by exempting TransCanada from generally applicable laws, including environmental laws, to which any other

63. President Barack Obama, Statement on the Keystone XL Pipeline, 2012 DAILY COMP. PRES. DOC. 1 (Jan. 18, 2012).

64. PARFOMAK ET AL., *supra* note 58, at 1.

65. *Id.* at 7–8.

66. *Id.* at 7.

67. Keystone XL Pipeline Approval Act, S. 1, 114th Cong. (2015).

68. Keystone XL Pipeline Act, H.R. 3, 114th Cong. (2015).

69. 161 CONG. REC. H180–81 (daily ed. Jan. 9, 2015).

70. 161 CONG. REC. S637–38 (daily ed. Jan. 29, 2015).

71. S. 1 § 2(b) (2015).

72. *Id.*

person or company is subject. While other companies engaged in cross-border pipeline projects are required to submit their applications for administrative review, TransCanada's application was insulated by the legislation from the administrative process. In the case of TransCanada, Congress, rather than the State Department, made the determination without the factual predicate normally required under standing law.⁷³

In addition to the main thrust of the Keystone XL legislation, the statute included a number of other notable features. First, the legislation contained two sections that described the "sense of the Senate" on issues only marginally related to the pipeline. Section 5 of the bill provided that "[i]t is the sense of the Senate that climate change is real and not a hoax."⁷⁴ Section 6 provided that "[i]t is the sense of the Senate" that the Congress should tax bitumen,⁷⁵ a type of petroleum product that the pipeline would carry. Second, Section 6 of the bill also contained what can only be described as a strongly worded suggestion to the House of Representatives. Section 6 provided that the House "should consider and refer to the Senate a bill" to tax bitumen.⁷⁶

The sense of the Senate provisions are remarkable because they reflect the origin of the language that was enacted by both chambers of Congress. Statutory language has to originate somewhere, of course; and there is nothing unusual about statutory language originating in the Senate. However, the sense of the Senate provisions were passed not only by the Senate, but also by the House, as is required by the bicameralism requirement of the Constitution.⁷⁷ In other words, the Keystone XL legislation contained provisions in which the House purported to describe the belief of the other chamber of Congress.

The provision providing a strongly worded suggestion to the House is remarkable for similar reasons. In Section 6, the whole Congress (including the House) suggested that one chamber (again, the House) send the Senate a bill taxing bitumen. The fact that it agreed to this

73. See, e.g., Evan C. Zoldan, Opinion, *The Surprising Constitutional Defects in Keystone XL Legislation*, PLAIN DEALER (Feb. 13, 2015, 5:35 AM), http://www.cleveland.com/opinion/index.ssf/2015/02/the_surprising_constitutional.html (noting that the Keystone XL bill deems TransCanada's application compliant with federal laws and regulations without any factual predicate); see also Chris Mooney, *Why you should be skeptical of Congress's Keystone XL bill even if you favor the pipeline*, WASH. POST (Nov. 18, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/11/18/another-reason-to-be-outraged-over-congress-keystone-bill-it-gives-one-company-special-treatment/> (explaining that the bill takes the fact-finding process away from the State Department).

74. S. 1 § 5 (2015).

75. *Id.* § 6.

76. *Id.* § 6.

77. U.S. CONST. art. I, § 7.

language directing it to write new legislation conveys the distinct impression that the House of Representatives was tagging along with the Senate's bill rather than exercising its own judgment about the legislative language. Moreover, both the sense of the Senate language and the strongly worded suggestion language are remarkable because they do not create actual legal requirements. That is, although these provisions were enacted like any other bill, they merely expressed the opinion of Congress (or at least the Senate) on matters related to climate change and taxes rather than providing binding rules of conduct.

As was widely anticipated, the President vetoed the Keystone XL Pipeline Approval Act.⁷⁸ In his statement returning the vetoed bill to the Senate, the President gave two reasons for his decision. First, he criticized the bill for attempting to “cut[] short thorough consideration” of the issues being weighed by the State Department.⁷⁹ Second, he criticized the bill for conflicting with “established executive branch procedures” and attempting to “circumvent longstanding and proven processes” for permit approval.⁸⁰ Although proponents of the bill attempted to keep it alive, the Senate failed by a handful of votes to override the President's veto,⁸¹ effectively ending the Keystone XL Pipeline saga for the term.

B. The Keystone XL Pipeline Approval Act was Dysfunctional Congressional Action

The Keystone XL legislation made for good political drama; it pitted Congress against the President, Republicans against Democrats, and jobs against the environment. But, like most drama in Washington, it was quickly overtaken by other, suddenly more urgent, matters.⁸² And, as a matter of energy policy, the failure of the Keystone XL legislation will likely have no lasting effect. Indeed, the legislation, by design, affected only a single company and did not purport to resolve the many pressing issues related to the production, importation, and transportation of oil. Nevertheless, despite the ephemeral nature of the Keystone XL legislation, the lessons we can learn from the saga are actually quite

78. President Barack Obama, Message to the Senate Returning Without Approval the Keystone XL Pipeline Approval Act, 2015 DAILY COMP. PRES. DOC. 1 (Feb. 24, 2015).

79. *Id.*

80. *Id.*

81. Coral Davenport, *Senate Fails to Override Obama's Keystone Pipeline Veto*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/05/us/senate-fails-to-override-obamas-keystone-pipeline-veto.html?_r=0.

82. Immigration issues, the confirmation of a new Attorney General, and the beginning of the 2016 presidential race occupied the political news throughout 2015.

important. The Keystone XL legislation is a palpable example of legislation that evinces a lack of deliberation and fails to provide guidance. As a result, the Keystone XL legislation serves as a concrete symbol of dysfunctional congressional action and offers a warning for the future of the legislative process.

1. The Keystone XL Pipeline Approval Act Evinced a Lack of Deliberation

The Keystone XL Pipeline Approval Act evinced a lack of deliberation on the part of the House of Representatives. As noted above, an essential part of our legislative process is the study and debate of relevant issues. The process of bicameralism is intended to slow down the legislative process in order to give each chamber of Congress the opportunity, independently, to consider the text of proposed legislation. Deliberation is not satisfied by mere perfunctory assent to proposed language, but requires actual consideration of this language. The public deliberation of proposed legislation is designed to reveal the reasons why members voted for or against it.

Sections 5 and 6 of the Keystone XL legislation reflected a lack of deliberation on the part of the House of Representatives. The “sense of the Senate” language in these sections, which is perfectly reasonable from the perspective of the Senate, makes little sense when emerging from the House. What does it mean for the House to enact—into law, no less—language that purports to express the sentiment of the other chamber of Congress? To speak of the House explaining the motivations of the Senate is, to repurpose the words of Lon Fuller, “to talk in blank prose.”⁸³ Similarly, the strongly worded language in Section 6, which instructed the House to refer a tax bill to the Senate, reflected the House’s lack of deliberation. What reason would the House have to enact into law a reminder to itself to craft future legislation? Of course, there is no reason at all. Rather, this provision reflected a suggestion from the Senate, making the language meaningless when enacted by the House.

With respect to both the sense of the Senate language and the strongly worded suggestion to the House, it appears that the House abdicated its responsibility to deliberate. By assenting to language that is meaningless when coming from the House, the House appears to be tagging along with the Senate’s deliberative process, acting as an agent of the Senate rather than as a coequal chamber of the legislature. By perfunctorily assenting to language that literally makes no sense when

83. FULLER, *supra* note 50, at 53.

coming from the House, the House failed to take the opportunity to study and debate—to deliberate—that is so valued by our constitutional tradition.

The progression of the bill through the legislative process led even some members of Congress to conclude that it lacked deliberation. A number of members objected to the fact that the bill was submitted directly to the House floor for a vote;⁸⁴ the once textbook, but no longer standard,⁸⁵ process would have included hearings held by the Committee on Transportation and Infrastructure. Of course, the failure to assign bills to committee for vetting ceased to be novel some time ago.⁸⁶ As Professor Barbara Sinclair has described, the “textbook” path of a bill to enactment has largely been supplanted by “unorthodox” lawmaking.⁸⁷ But, whether the process by which the Keystone XL legislation reached the floor of Congress was unusual, or whether it represents a commonplace new orthopraxy, the point remains the same: cutting out the committee process limited opportunities for the refinement and crafting of the bill’s language.⁸⁸ Others objected that cutting the executive branch out of the process prevented the “thorough consideration of complex issues” that implicate the national interest.⁸⁹ Still other members argued that the bill failed to reflect deliberation because it was directed at a single company rather than designed to address important and neglected issues of energy policy.⁹⁰

Finally, the fact that the House failed to exercise deliberation in the way contemplated by the Constitution is even more striking in light of the fact that the Keystone XL legislation actually cut off the deliberative

84. See 161 CONG. REC. H954 (daily ed. Feb. 11, 2015) (statement of Rep. Rush) (indicating that the bill did not go “through regular order and the committee process”); 161 CONG. REC. H172 (daily ed. Jan. 9, 2015) (statement of Rep. Defazio) (explaining that none of the hearings took place in the Transportation Committee).

85. BARBARA SINCLAIR, UNORTHODOX LAWMAKING 14–17, 34–36 (1997).

86. *Id.*

87. *Id.* at 4–5, 72–74.

88. The Court, too, has expressed concern about the connection between nonstandard legislative process and under-deliberated legislative language. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

89. 161 CONG. REC. H174 (daily ed. Jan. 9, 2015) (statement of Rep. Pallone); see also 161 CONG. REC. S521 (daily ed. Jan. 27, 2015) (statement of Sen. Cantwell) (noting that if Congress, rather than the administration, approves the pipeline, Americans will lose protections attached to the national interest determination); 161 CONG. REC. H175 (daily ed. Jan. 9, 2015) (statement of Rep. Rush) (explaining that seizing power from the president will prevent thorough consideration of complex issues).

90. See 161 CONG. REC. S620 (daily ed. Jan. 29, 2015) (statement of Sen. Udall) (“This bill lacks a comprehensive energy policy.”); 161 CONG. REC. S137 (daily ed. Jan. 12, 2015) (statement of Sen. Schatz) (asserting that the bill is about a “specific pipeline” rather than national energy policy).

process that might have taken place at the administrative level. As the President characterized the legislation when he vetoed it, by attempting to remove the permitting decision from the State Department, the Keystone XL legislation “cuts short thorough consideration” of important policy issues.⁹¹ Perhaps the State Department was actually engaging in deliberation; perhaps it was merely stalling to avoid making a politically contentious decision. Either way, however, the Keystone XL legislation ensured that any deliberation that might have taken place at the administrative level would be extinguished. Because this administrative deliberation was not replaced by deliberation at the legislative level, the Keystone XL legislation represented not just an absence of deliberation, but an affirmative rejection of deliberation.

2. The Keystone XL Legislation Failed to Provide Guidance

The Keystone XL legislation failed to provide guidance both to government actors and private parties by enacting inoperative language and by singling out a particular company for special treatment. First, the legislation failed to provide guidance by including a substantial amount of language that appeared to do precisely nothing. Sections 5 and 6 expressed the “sense of the Senate” that “climate change is real and not a hoax” and that the House should pass a bill taxing bitumen. Neither of these sections of the statute had any legally operative effect. As courts have held, “sense of Congress” language is merely precatory and does not obligate courts, agencies, or private parties.⁹² If the “sense of Congress” creates no binding obligations, *a fortiori*, neither can the sense of just one chamber of Congress. And, indeed, how could a court give meaning to this “sense of the Senate” language? Would Section 5, declaring that climate change is not a hoax, authorize the Environmental Protection Agency to take additional action on climate change? Does it perhaps invalidate a state law banning its government officials from using the phrases “climate change” or “global warming”?⁹³ Does Section 6, which instructed the House to draft a bill to tax bitumen, foreclose a court or administrative agency from interpreting current law

91. President Barack Obama, Veto Message to the Senate, *supra* note 78

92. *Yang v. Cal. Dep’t of Soc. Servs.*, 183 F.3d 953, 958–59 (9th Cir. 1999) (holding that “sense of Congress” language in a bill is precatory only and creates no binding obligations); *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 995 (1st Cir. 1992) (citing *Brooks v. Johnson & Johnson, Inc.*, 685 F. Supp. 107, 108 (E.D. Pa. 1988) (holding that “sense of Congress” statutory language is “plainly precatory”)).

93. Terrance McCoy, *Fla. Scientist Told to Remove Words ‘Climate Change’ from Study on Climate Change*, WASH. POST (Mar. 10, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/10/why-this-florida-scientist-had-to-remove-the-term-climate-change-from-her-study/>.

to permit the taxation of bitumen? If these readings are far-fetched, such a result highlights the lack of guidance provided by Sections 5 and 6. These sections force courts into an impossible choice: they must either ignore one of the oldest canons of statutory construction—to avoid rendering statutory language inoperative—or they must stretch the language of these merely hortatory remarks to find meaning. Either way, these provisions fail to provide guidance, both to courts and to government agencies.

Second, the Keystone XL legislation failed to provide guidance because it singled out an individual company for special treatment. As members of Congress opposing the bill noted, rather than providing general rules of conduct for all applicants for federal permits or setting energy policy generally, the bill provided a special exemption for a particular corporation.⁹⁴ By singling out a particular company, TransCanada, to receive a special exemption from the normal permitting process, the Keystone XL legislation offered no guidance to private parties about how to approach the regulatory approval process in the future. Companies seeking government approval for any sort of regulated activity may be encouraged by the example of the Keystone XL legislation to forego the normal administrative processes altogether. Rather than spending the time and resources normally required to navigate the administrative process under standing law, they may instead find it more expedient to lobby Congress for a special exemption from the law.⁹⁵

The Keystone XL legislation also failed to provide guidance to government agencies because, by singling out a particular company, it failed to announce any national policy.⁹⁶ One way to read the Keystone XL legislation is as an approval of the policy to import foreign oil. Or, the legislation could be read as a rejection of oil from outside North America. Or, it could be read merely as a transfer of wealth to TransCanada. Each of these inferences is permissible because, by singling out TransCanada, Congress did not indicate what policy it was

94. See, e.g., 161 CONG. REC. S225 (daily ed. Jan. 16, 2015) (statement of Sen. Udall) (noting that the bill concerns “one private-sector energy project”); 161 CONG. REC. S137 (daily ed. Jan. 12, 2015) (statement of Sen. Schatz) (noting that the legislation concerns only “a specific pipeline”); 161 CONG. REC. H171 (daily ed. Jan. 9, 2015) (statement of Rep. Grijalva) (calling the bill “an earmark for a Canadian corporation”); 161 CONG. REC. H174 (daily ed. Jan. 9, 2015) (statement of Rep. Pallone) (referring to the bill as “special treatment” for a single company).

95. See, e.g., 161 CONG. REC. S144 (daily ed. Jan. 12, 2015) (statement of Sen. Cantwell) (noting that the bill sets the precedent that applicants can bypass the administrative process by appealing to Congress directly).

96. 161 CONG. REC. S313 (daily ed. Jan. 21, 2015) (statement of Sen. Cantwell).

trying to advance.⁹⁷

C. Are Deliberation and Guidance Too Much to Ask from Congress?

Even if one accepts deliberation and guidance as constitutional ideals for legislative action, one may object that demanding these from Congress is unrealistically onerous. Any additional requirements placed on Congress to encourage deliberation and guidance may further impede what little it accomplishes. Moreover, it is hard to reconcile the values of deliberation and guidance with Congress's current practices; for example, the House and Senate often use "sense" language indicating their impressions or intentions.⁹⁸ The force of these objections is mitigated, however, once we distinguish between different types of congressional action: although *legislation* should be held to the constitutional ideals of deliberation and guidance described above, the other activities of Congress need not conform to these ideals. Therefore, even if we demand deliberation and guidance from legislation, Congress's other activities will not be constrained by these demands; and the values of deliberation and guidance will not impede Congress's performance of its nonlegislative activities.

The Constitution distinguishes between Congress's legislative and nonlegislative activities. As the Supreme Court has described, the Constitution vests the "legislative powers" of the United States in Congress as a collective body rather than in either chamber alone.⁹⁹ Only when acting as this collective entity is Congress exercising the legislative powers of the United States—to wit—the enactment of legislation.¹⁰⁰ For this reason, it is only when Congress engages in "an exercise of legislative power" that it is bound by the Constitution's bicameralism and presentment requirements.¹⁰¹ By contrast, the Constitution provides that either chamber may express its sense or

97. Keystone's specificity creates a problem that is the mirror image of the problem presented by an overly broad delegation of authority. Just as a delegation without parameters fails to state legislative policy because it provides no firm idea of what Congress was trying to accomplish, a statute that applies to a single person fails to establish legislative policy because it provides no generally applicable rule for courts or agencies to apply by analogy or precedent in the future. A statute that applies to a single individual is, in Blackstone's words, a "transient, sudden order" rather than a law. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 43–44 (1872). This dichotomy suggests that there is an appropriate level of legislative generality required before a statute properly may be considered "law."

98. *E.g.*, S. Res. 156, 114th Cong. (2015) (indicating the "sense of the Senate").

99. *McGrain v. Daugherty*, 273 U.S. 135, 160–61 (1927); U.S. CONST. art. I, § 1.

100. *McGrain*, 273 U.S. at 160–61; U.S. CONST. art. I, § 7.

101. *INS v. Chadha*, 462 U.S. 919, 957–58 (1983) (explaining that Congress is required to meet the bicameralism and presentment requirements of Article I when it is engaging in "an exercise of legislative power").

impressions by passing a resolution rather than a law.¹⁰² To take one recent example, the Senate expressed its impression about the importance of childhood stroke awareness by passing a “resolution expressing the sense of the Senate with respect to childhood stroke and recognizing May 2015 as ‘National Pediatric Stroke Awareness Month’.”¹⁰³

Comparing legislation with nonlegislative action reveals the reason for the Constitution’s fundamental distinction between these types of activities. Legislation sets out “rules for the government of society.”¹⁰⁴ It creates rights and obligations, which a person ignores at his peril. Because of the weighty consequences of legislation, the Constitution sets out procedures for its creation that encourage deliberation before it is enacted. Similarly, because of the consequences that legislation carries, the Constitution discourages legislation that fails to provide guidance.

By contrast, resolutions do not necessarily represent the exercise of legislative power. They do not normally set out the rules that govern society or create any rights or obligations. Resolutions do, however, provide Congress with a low-cost way to make its impressions or intentions known.¹⁰⁵ Like other nonlegislative acts, resolutions can be used by legislators to signal their commitments to constituents and colleagues.¹⁰⁶ Resolutions serve an important function precisely because they are not laws and do not create binding obligations.¹⁰⁷ Consider the Senate’s resolution recognizing National Pediatric Stroke Awareness Month. The resolution signals the Senate’s awareness of an issue that it believes is of national importance. Nevertheless, it creates no obligations, binds neither agencies nor private parties, and commits no resources; a person may ignore the sense of the Senate without risk.

For these reasons, it makes sense to distinguish between legislation and nonlegislative activities for the purposes of deliberation and guidance. While it is appropriate for Congress to express its intentions or impressions through a resolution without displaying deliberation or providing guidance, more is required when Congress enacts legislation. In the case of Sections 5 and 6 of the Keystone Pipeline legislation, Congress blurred the line between these two types of congressional

102. U.S. CONST. art. I, § 7.

103. S. Res. 156 (2015).

104. *Fletcher v. Peck*, 10 U.S. 87, 136 (1810).

105. Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1283 (2005).

106. *Id.*

107. SINCLAIR, *supra note* 85, at 10 n.5.

activities. It would have been unobjectionable for Congress, or either chamber, to pass similar language in the form of a resolution that, by definition, creates no binding obligations. But, by enacting language in the form of legislation, which is supposed to set out rules for the governance of society, Congress was required to provide deliberation and guidance. In answer to the objection posed above, deliberation and guidance may be too much to ask from every activity of Congress, but it is the bare minimum we should expect from acts of Congress.

IV. THE FUTURE OF CONGRESSIONAL DYSFUNCTION

The Keystone XL Pipeline Approval Act did not become law. And with the changing exigencies of political life in Washington, it may never become law. But, concern about congressional dysfunction directs us to look beyond this single political fight for more generally applicable lessons. Indeed, the Keystone XL legislation is not the first—and will not be the last—example of dysfunctional legislation. In nearly every term, Congress enacts legislation that can be considered dysfunctional. In 2014, to take just one recent example, Congress transferred a large sum of money to a named individual to whom the federal government owed no financial obligation.¹⁰⁸ Moreover, Congress routinely gives preferential tax treatment to specific corporations,¹⁰⁹ transfers public wealth to named individuals,¹¹⁰ and grants exemptions to specific individuals from generally applicable statutes and regulations.¹¹¹ Like the Keystone XL legislation, these laws are susceptible to the charge that they are dysfunctional because they were enacted without due deliberation and because they fail to provide guidance. This problem of dysfunctional legislation is well known; scholars and jurists have long attempted to formulate ways to curtail it, including proposing internal institutional reform.¹¹² After

108. Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013).

109. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 80 (1991).

110. Continuing Appropriations Act, 2014, § 145 Priv. L. No. 107-2, 116 Stat. 3119 (2002); Priv. L. No. 103-5, 108 Stat. 5064 (1994); Priv. L. No. 103-3, 108 Stat. 5062 (1994); *see also* R. ERIC PETERSEN & JENNIFER E. MANNING, *MEMBERS OF CONGRESS WHO DIE IN OFFICE: HISTORIC AND CURRENT PRACTICES* 12–14 (2012).

111. Priv. L. No. 111-2, 124 Stat. 4525 (2010); Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 111-2, 124 Stat. 4525 (2010); Terri's Law, Pub. L. No. 109-3, § 2, 119 Stat. 15, 15 (2005).

112. As commentators have noted, Congress's willingness to comply with its internal rules designed to foster deliberation are uneven at best. *See, e.g.,* Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 863 (2010); Victor Goldfeld, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial*

evaluating the most significant suggestion to monitor legislative dysfunction, judicial review of the legislative process, I will advance an alternative approach that is based on the connection between public opinion and congressional dysfunction described in Part I.

A. *Judicial Review of Congressional Dysfunction*

Scholars have long argued that the process by which a law is formed is relevant to its constitutionality.¹¹³ Forty years ago, Professor Tribe advocated that judicial review should focus not only on the substance of a law, but also on the procedures that led to its creation. He described the role of the Due Process Clause in guarding the validity of the procedures of lawmaking as “structural due process.”¹¹⁴ Around the same time, Professor Sandalow recognized that members of Congress have neither the time nor the incentives to focus fully on the issues before them.¹¹⁵ Because members of Congress simply have not thought deeply about proposed legislation, much legislation does not reflect an “authoritative statement of societal norms.”¹¹⁶ Although not all legislation that lacks deliberation is unconstitutional, argued Sandalow, courts have a role in monitoring legislation that impinges on fundamental values to ensure that the legislation is the product of “deliberate and broadly based political judgment.”¹¹⁷

The arguments of scholars like Tribe and Sandalow have not prevailed in the federal courts;¹¹⁸ nevertheless, they have attracted the approval of individual judges, perhaps most notably Justice Stevens. In his famous dissent in *Fullilove v. Klutznick*, Justice Stevens recognized that “it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately.”¹¹⁹ Despite this, he opined, the character of Congress’s procedures should be “considered relevant to the decision whether the legislative product has caused a

Review of Congressional Processes, 79 N.Y.U. L. REV. 367, 370 (2004).

113. See, e.g., Terrence Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269–70 (1975); see also Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 242–43 (1976). Contemporary scholars continue to articulate models of judicial review over the legislative process, for example, see Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1937 (2011).

114. Tribe, *supra* note 106, at 269–70.

115. Sandalow, *supra* note 106, at 1188.

116. *Id.*

117. *Id.*

118. Bar-Siman-Tov, *supra* note 113, at 1918–19.

119. *Fullilove v. Klutznick*, 448 U.S. 448, 550 (1980) (Stevens, J., dissenting).

deprivation of liberty or property without due process of law.”¹²⁰

Tribe, Sandalow, and Justice Stevens all suggest that the courts have a role in reviewing legislation for process failures. Given the Constitution’s commitment to deliberation and guidance, and the fact that the Court often is comfortable preserving substantive rights by enforcing procedural rules,¹²¹ it seems natural to rely on courts to evaluate the legislative process. Nevertheless, a judicial review model of policing the legislative process is susceptible to a number of serious criticisms, many of them familiar.¹²² As a practical matter, it may be difficult for courts to distinguish between judicial review that protects the integrity of the legislative process and one that substitutes judicial judgment for legislative judgment on policy matters.¹²³ Moreover, as a theoretical matter, separation of powers considerations discourage courts from taking too hard of a look at the legislative process for fear of treading on the prerogative of a coequal branch of government.¹²⁴

There are answers to these objections that make the judicial review model of correcting dysfunctional legislation more palatable. Nevertheless, these answers also reveal the limitation of judicial review as a remedy for dysfunctional legislation. Proponents of structural due process or related doctrines would mitigate the potential for judicial overreaching by limiting the potential scope of judicial review of legislative procedures. Sandalow suggested limiting judicial review to legislation that impinges on fundamental values.¹²⁵ Justice Stevens suggested that judicial review of the legislative process should be limited to legislative classifications that would receive strict scrutiny under the Equal Protection Clause.¹²⁶

As these qualifications suggest, the judicial review model of policing dysfunctional legislation, whatever its merits, cannot reach all statutes

120. *Id.* at 550.

121. *Miranda v. Arizona*, 384 U.S. 436, 444, 445 (1966); *see also* JOHN RAWLS, *A THEORY OF JUSTICE* 85–86 (1971).

122. The scope of this Article precludes an in-depth discussion of the merits of judicial review of the process of lawmaking. Many other scholars have written at length about this important and controversial subject. For the purposes of this Article, I argue only that, whatever its merits, the judicial review model of overseeing the legislative process does not address all legislative process failures.

123. Goldfeld, *supra* note 112, at 375 (haunting any discussion of a novel basis of judicial review for social or economic legislation is the ghost of *Lochner*).

124. Philip P. Frickey & Stevens S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 *YALE L. J.* 1707, 1750 (2002).

125. Sandalow, *supra* note 113, at 1188.

126. *Fullilove v. Klutznick*, 448 U.S. 448, 550–51 (1980) (Stevens J., dissenting); *see also* ELY, *supra* note 55, at 145–47.

that evince a lack of deliberation and that fail to provide guidance. Take the Keystone XL legislation as an example: for the reasons stated above, this legislation represents congressional dysfunction.¹²⁷ Nevertheless, it involves a grant of a benefit rather than the deprivation of a right. Moreover, its subject matter is economic in nature and does not impinge on fundamental values. Because legislation granting economic benefits rather than burdening fundamental rights receives only minimal scrutiny under the Equal Protection Clause,¹²⁸ it is unlikely that judicial review of the legislative process, as envisioned by Tribe, Sandalow, and Justice Stevens, would prevent laws like the Keystone XL legislation. Nor would the judicial review model address the other examples of dysfunctional legislation noted above, like special transfers of wealth and exemptions from the standing laws, many of which grant economic benefits and none of which relate to fundamental rights or suspect classes.¹²⁹ As a result, although there is an important role for judicial review of the legislative process to ensure some minimal level of deliberation and guidance, it is not sufficient to address all types of dysfunctional legislation.

B. Public Opinion and Congressional Dysfunction

Because a judicial review-oriented approach to reducing dysfunctional legislation leaves some significant gaps in coverage, it is appropriate to look for ways to supplement it. An approach is suggested by Part I, which describes the connection between public dissatisfaction with Congress and Congress's failure to enact legislation. As noted, Congress's failure to pass laws is the main reason for the public's disapproval of that body.¹³⁰ Americans want—perhaps reasonably—Congress to “get[] things done.”¹³¹ Most Americans who disapprove of Congress cite its failure to act as the reason for their dissatisfaction.¹³²

If these sentiments encourage Congress to pass statutes like the Keystone XL legislation, then we, the public, are at least partially to blame for congressional dysfunction. The public's disapproval of congressional inaction is both underinclusive and overinclusive of the problem of congressional dysfunction. Disapproval of congressional

127. See *supra* Part I.

128. *Kotch v. Bd. of River Port Pilot Comm'rs for the Port of New Orleans*, 330 U.S. 552, 556–57 (1947).

129. For a theory of judicial review of special legislation, a typical type of dysfunctional legislation, see Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014).

130. See *supra* Part I.

131. Saad, *supra* note 8.

132. *Id.*

inaction is underinclusive because both inaction (like Congress's failure to pass a budget) and action (like legislation that fails to reflect deliberation or provide guidance) may be dysfunctional. Moreover, disapproval of congressional inaction is overinclusive because it disapproves of Congress's unwillingness to pass dysfunctional legislation as well as its unwillingness to pass legislation that provides guidance and reflects deliberation. As a result, the public's dissatisfaction with Congress's failure to act is too blunt an instrument to address the problem of dysfunctional legislation: sometimes it will provide Congress the right incentives, but other times it will provide the wrong ones.

The public's dissatisfaction with Congress would be more effective if, rather than reflecting congressional inaction generally, it was targeted both toward congressional inaction *and* congressional action that reflects indicia of dysfunction. That is, rather than merely criticizing Congress for failing to pass statutes, the public should indicate, through polls, elections, lobbying, contributions, and otherwise, that it values statutes that reflect deliberation and provide guidance.

The public is well positioned to monitor not only the outcomes of the legislative process—that is, legislation—but also the legislative process itself. As noted in Part II, the Constitution requires that the chambers of Congress keep records of their proceedings.¹³³ Pursuant to this mandate, and supplementing it, each chamber of Congress keeps not only records of votes, but also comprehensive, publicly available records of the debates that accompany votes.¹³⁴ Because Congress now publishes “substantially verbatim transcripts of floor debate and remarks,”¹³⁵ the public is able to read the debate, or lack of debate, that accompanies proposed legislation. Because these debates are available on a daily basis, and available on the Internet,¹³⁶ the public is able to monitor debates as they occur. Access to congressional debate enables the public to formulate opinions not merely on the substance of legislation, but on the legislative process as well. It allows members of the public to press their representatives not merely for particular outcomes, but for a robust process of deliberation. The unprecedented ability of the public to monitor the legislative process makes possible, perhaps more realistically than ever before, the ideal envisioned by

133. U.S. CONST. art. I, § 5.

134. McGreal, *supra* note 105, at 1283.

135. Richard J. McKinney, *An Overview of the Congressional Record and Predecessor Publications*, LAW LIBR. LIGHTS, Winter 2002, at 17–18.

136. CONGRESS.GOV, www.congress.gov (last visited Nov. 15, 2015).

Justice Story: that “the public mind” will be “enlightened by an attentive examination of the public measures” and that the conduct of every member of Congress will be open to scrutiny by a public jealous of its liberties.¹³⁷

A model of public oversight of the process of lawmaking is superior in many ways to the judicial review model. First, because public oversight comes from the public rather than the courts, it is not susceptible to the charge that it is countermajoritarian. As a result, a public oversight model can be more demanding of the legislative process than a judicial review model, scrutinizing Congress even when it does not burden fundamental rights and suspect classes.¹³⁸

Second, the public oversight model can react to and influence legislation before it is enacted. Therefore, public oversight during the legislation formulation process allows process dysfunctions, like lack of deliberation and unclear statutory language, to be corrected before negotiation over final language is complete. It is relatively costless for Congress to take another day to discuss an under-deliberated provision. By contrast, judicial review must wait to interpret or invalidate legislation until it has been enacted.¹³⁹ Indeed, it can take years for legislation to wind its way through the courts before being struck down as unclear or lacking deliberation. In the interim, uncertainty about the fate of the legislation can persist, delaying public compliance and regulatory implementation. For these reasons, it is less costly for process errors to be corrected by the political process, before statutes are finalized, than through the judicial process.

Third, public oversight of the legislative process is superior to judicial review because it sends incentives to the members of Congress that actually have committed the process error. For example, if the Congress that drafted the Keystone XL legislation had received word from constituents that its language failed to provide guidance, the very members who drafted and debated the bill would learn the value of guidance to their constituents. By contrast, when a court interprets or strikes down legislation, sometimes years after it is enacted, the membership of Congress has changed or, at least, is far removed temporally from the Congress that drafted the legislation. The Congress

137. STORY, *supra* note 1, § 840.

138. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 550–51 (1980) (Stevens, J., dissenting); Sandalow, *supra* note 113, at 1188.

139. Indeed, constitutional and prudential limitations on federal court jurisdiction, like ripeness, *Texas v. United States*, 523 U.S. 296, 300 (1998), limit the timeframe during which courts can weigh in on the interpretation or validity of legislation.

that is sitting when legislation is interpreted or invalidated is unlikely to learn as much from judicial intervention as would a Congress that received a rebuke from its constituents during the process of bill formulation.

Moreover, while legislators are motivated by the opinions of their constituents, scholars have long noted that, with rare but notable exceptions, Congress pays little attention to the way that courts interpret its statutes. For example, Congress routinely ignores judicial decisions that reveal mistakes or ambiguities in the law.¹⁴⁰ Moreover, as recent scholarship has shown, drafters of federal legislation do not, during the drafting process, take into account how courts will later interpret these statutes.¹⁴¹ For all of these reasons, the public is well situated to monitor Congress and express its satisfaction or dissatisfaction with the robustness of the Congress's lawmaking procedures. As a result, the public possesses a powerful tool to help mitigate dysfunctional legislation. Although the public rarely will agree on the substantive outcome of the debates that take place in Congress, it should not be controversial for the public to agree that it wants guidance and laws that reflect Congress's considered judgment. In light of the constitutional values of deliberation and guidance, the public can, and I suggest should, take a more active role in overseeing Congress's lawmaking process. At a minimum, we should indicate to Congress that we do not want it merely to do *something*, but that we want it to debate and study; that we want each chamber to reflect on the language it enacts; that we want it to provide guidance to courts, to the public, and to administrative agencies. These indicia of good legislative process are all within the power of Congress; and they also will help align our laws with the spirit of deliberation and guidance that our constitutional system values.

CONCLUSION

The public can, and should, criticize Congress for failing to address pressing issues of national scope. But, it is entitled by the Constitution to demand more from Congress than mere action; rather, it is entitled to congressional action that bears certain hallmarks of quality, including deliberation and guidance. The public's role in ensuring that Congress

140. Henry J. Friendly, *Judges Who Can't and Legislators Who Won't*, 63 COLO. L. REV. 787, 792–93 (1963).

141. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

enacts high-quality legislation can be powerful. By conveying popular approval of legislation that reflects deliberation and guidance, and its disapproval of legislation without these attributes, the public can encourage Congress to enact legislation that comports with important constitutional values. And, although good legislative process is no guarantee of high-quality legislation, it is a good start in that direction.