

THE SUPREME COURT REVIEW ACT: FAST-TRACKING THE INTERBRANCH DIALOGUE AND DESTABILIZING THE FILIBUSTER

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ABSTRACT

This Essay presents an analysis of the Supreme Court Review Act, a bill that was recently introduced in Congress. The Act would create a streamlined legislative process for bills responding to new Supreme Court decisions that interpret federal statutes or restrict constitutional rights. By facilitating legislative responses to controversial cases, the Act would promote the “dialogue” that commentators and the courts themselves have used as a model for interbranch relations. The Essay describes how the proposed Supreme Court Review Act would work, discusses some of its benefits, addresses its constitutionality, and raises some questions about its implementation and effects.

I. INTRODUCTION

The relationship between the Supreme Court and Congress has often been described as a dialogue.¹ One problem with this conception is that it is hard for Congress to find its voice. Individual members can speak out for or against judicial decisions, of course, and many do. But for Congress as an institution to speak authoritatively, through legislation, is hard, and it is especially hard in an age that features party polarization and narrow majorities.² A major impediment to legislative responses is the Senate filibuster, the now-routine use of which means that a supermajority is required for most ordinary legislation.³

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¹ See e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186, 1198 (1992) (“[J]udges . . . participate in a dialogue with other organs of government, and with the people as well.”); James J. Brudney & Ethan J. Leib, *Statutory Interpretation as “Interbranch Dialogue”*?, 66 UCLA L. REV. 346, 352 (2019) (explaining that courts and the legislature are “the primary interlocutors in the vision of dialogue that drives the enterprise of statutory interpretation”).

² See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 233–42 (2013) (discussing political polarization in Congress and diminished congressional ability to override Supreme Court decisions).

³ See STANDING RULES OF THE SENATE, R. XXII.2, S. Doc. No. 113-18, at 16 (2013) (requiring the affirmative vote of three-fifths of the senators duly chosen and sworn to end debate on legislation).

Having an arduous legislative process gives the courts more freedom of action.⁴ Suppose that a Supreme Court decision misinterprets a statute as judged by what the enacting Congress intended and what the current Congress wants. A majority of the House opposes the Court's interpretation, as does a majority of the Senate (fifty-five senators, say), as does the president. That alignment is not sufficient to override the decision. The filibuster requires sixty votes to overcome, and that is not even to mention limited space on the congressional agenda, conflicting visions of how to fix the decision, and other barriers to enactment. And that is in the best-case scenario, when all three lawmaking bodies oppose the Court's decision. Judicial decisions will therefore often "stick" even when they represent minority positions in Congress.

This reality should cast some doubt on a common rhetorical move in judicial opinions interpreting statutes, namely that if the legislature does not like a result, it can change it.⁵ That is true as a formal matter, and sometimes Congress in fact does just that, as in the Lilly Ledbetter Fair Pay Act, which overrode a decision restricting employees' ability to bring pay-discrimination claims.⁶ But given the difficulty of congressional response, the invitation to Congress often comes across as hollow or even cynical.

Enter the proposed Supreme Court Review Act ("SCRA").⁷ Introduced in 2022 by Senators Sheldon Whitehouse and Catherine Cortez Masto, the bill would create a streamlined congressional procedure for legislation that responds to Supreme Court decisions interpreting federal statutes or restricting constitutional rights. As compared to some other proposals for reforming the Court or reducing its authority—term limits for Justices and

⁴ See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 550 (1992); cf. Hasen, *supra* note 2, at 224 (arguing that Supreme Court Justices have had "the last word on statutory interpretation questions almost as often as they get the last word on constitutional questions").

⁵ See e.g., *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). For the trailblazing early study of overrides, see generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

⁷ S. 4681, 117th Cong. (2022); Press Release, Office of U.S. Sen. Sheldon Whitehouse, Whitehouse, Cortez Masto Propose Congressional Check on Supreme Court Decisions (July 28, 2022), <https://www.whitehouse.senate.gov/news/release/Whitehouse-Cortez-Masto-Propose-Congressional-Check-On-Supreme-Court-Decisions>. The current text of the bill is available at <https://www.congress.gov/bill/117th-congress/senate-bill/4681/text>. In the rest of this Essay, I will cite this version and use the short form "SCRA."

expanding the Court's membership, to pick two—the SCRA is decidedly modest. It does not change the Court itself, and it does not require anything unprecedented. One might even say that this is a measure that the Court itself has requested, through its reminders of Congress's power to legislate in response to decisions Congress dislikes.

To put my cards on the table, I think the SCRA is a good concept and hope something like it passes. My aim in this Essay, however, is to describe the proposal and its antecedents, address its constitutionality, and raise a couple of questions about its operation.

I will not try to predict the SCRA's odds of passage, except to the following extent. The SCRA would eliminate the filibuster for legislation responding to recent Supreme Court decisions, but as long as the filibuster remains in place for most legislation, the SCRA itself will face that sixty-vote hurdle, a sort of catch-22. Absent the rare filibuster-proof Senate majority, enacting the SCRA would therefore need bipartisan support even under unified government. The bill does have a feature, noted below, that is meant to make it attractive to the minority party in the Senate. Like other legislation, the SCRA's odds of passage could increase through packaging it with must-pass legislation or other inducements, approaches that, again, are necessary now because the ordinary legislative process does not work in the way the SCRA would decree.

II. HOW IT WORKS: MECHANICS AND ANTECEDENTS

The SCRA would create a streamlined set of internal rules of debate applicable to qualifying bills. A qualifying bill is one that responds to a new Supreme Court decision by amending a federal statute that the Court interpreted or by creating statutory protections for a constitutional right the Court “diminish[ed].”⁸ The most important feature of the streamlined procedures is that qualifying legislation would not be subject to the filibuster in the Senate.⁹ The SCRA would also establish several statutory timetables in both houses for action in committee and on the floor, which is important because neglect and delay are commonly fatal for bills.¹⁰ The result of all of this is a speedier, more majoritarian process, particularly in the Senate, for legislation that responds to new Supreme Court decisions. If SCRA had been in place in the summer of 2022, it is plausible that Congress could have

⁸ SCRA § 2(1)–(3).

⁹ *Id.* § 3(e)(1)–(2).

¹⁰ *Id.* § 3(c), (e).

responded to the *Dobbs* abortion decision by passing a bill that would have largely reinstated the pre-*Dobbs* law, as such a bill apparently had the support of a majority in the Senate, though not 60 votes.¹¹

In creating these streamlined procedures for a category of legislation, the Supreme Court Review Act is not novel. Dozens of expedited or “fast track” frameworks have been enacted in areas as important as free-trade agreements and as obscure as commercial space-launch insurance.¹² Probably the most important mechanism, in policy terms, is the one governing the budget process, which, to simplify, allows taxing and spending policy to operate on a majority basis through the “reconciliation” process.¹³

The closest model, though, is probably the Congressional Review Act (CRA).¹⁴ The CRA provides streamlined procedures for legislation disapproving of major, recently promulgated agency rules. The CRA and SCRA mechanisms are similar in that both involve interbranch interaction and are not limited to legislation in a particular subject area like trade agreements or budgetary matters.

Nonetheless, the two mechanisms rely on different institutional circumstances to work, with the SCRA being more broadly applicable. The disapprovals that come out of the CRA are ordinary statutes, enacted by both houses and the president as Article I, Section 7 of the Constitution requires. (Contrast the “legislative veto” struck down in *INS v. Chadha*,¹⁵ in which a single house or both houses minus the president could nullify agency action.)

¹¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); Lydia O’Connor, *Senators Introduce Long-Shot Bipartisan Effort to Protect Some Abortion Access*, HUFFPOST, Aug. 1, 2022, https://www.huffpost.com/entry/bipartisan-abortion-bill-senate_n_62e854d3e4b00fd8d842380c.

¹² See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346–47 n.9 (2003) (citing examples). See generally Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) (discussing the phenomenon of “framework legislation” that structures the lawmaking process).

¹³ See 2 U.S.C. §§ 631–45a; JAMES V. SATURNO, CONG. RSCH. SERV., R46468, A BRIEF OVERVIEW OF THE CONGRESSIONAL BUDGET PROCESS 2 (2020); Sarah Binder, *Will the Democrats’ Big Bill Get Past the Hurdles of Reconciliation?*, WASH. POST (Aug. 6, 2022, 2:26 PM), <https://www.washingtonpost.com/politics/2022/08/06/senate-reconciliation-inflation-reduction-act/>.

¹⁴ 5 U.S.C. §§ 801–02. A previous proposal for something similar to the Supreme Court Review Act drew this analogy, calling for a “Congressional Review Act for the Supreme Court.” Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/>. More recently, Christopher Walker suggested a CRA-inspired fast-track mechanism for responding to Supreme Court decisions striking down agency regulations based on the “major questions” doctrine. Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J. L. & PUB. POL’Y 773 (2022).

¹⁵ 462 U.S. 919, 958–59 (1983).

But since presidents would rarely undo regulations their agencies just promulgated, the CRA is mostly effective right after changes in partisan control, as when a new president and an aligned congressional majority can wipe out regulations issued late in the prior president's term.¹⁶ The CRA can therefore lie dormant for decades and then spring to life for a brief season, perhaps in this respect like a periodic cicada. The SCRA would similarly require a Congress and President aligned enough to agree to legislate, but, when that alignment exists, most Supreme Court decisions could serve as triggers for the fast-track mechanism. The SCRA sponsors' goal is to make it easier to fight back against an ideologically distant Supreme Court, but it is worth noting that the SCRA itself does not require that responsive legislation go *against* the Court's decision, merely that the legislation reasonably relate to it.¹⁷ In principle, Congress could codify or even extend the decision.

One more difference between the CRA and the SCRA is worth noting. Under the CRA, the effect of disapproving a regulation is not only to nullify a particular regulation but also to prohibit future rules that are substantially the same as the disapproved rule.¹⁸ The disapproval therefore operates as an indirect amendment of the underlying organic statute, preventing the agency from engaging in future rulemakings. The SCRA is in a way the opposite: Congress amends the statute head on, specifying its new substance, which may have the effect of overriding a recent Supreme Court decision.

An interesting feature of the SCRA is an attempt at bipartisanship. Suppose multiple bills are introduced to respond to a decision. One proposal might reestablish the previously prevailing view of the law, but another might want to move the law even further in the direction of the Supreme Court's decision. Which one gets expedited treatment? In certain cases, the SCRA provides privileged status in the Senate to the responsive bill favored by the

¹⁶ See GEORGE WASHINGTON UNIV. REGUL. STUD. CTR., *Congressional Review Act*, <https://regulatorystudies.columbian.gwu.edu/congressional-review-act> (last visited Jan. 9, 2023) (tracking resolutions of disapproval under the CRA); cf. Steven J. Balla, Bridget C.E. Dooling & Daniel R. Pérez, *Beyond Republicans and the Disapproval of Regulations: A New Empirical Approach to the Congressional Review Act*, J. EMPIRICAL LEGAL STUD. (forthcoming 2023) (explaining that the CRA is useful in other periods as a vehicle for legislative position taking).

¹⁷ SCRA § 2(1)(D), (2)-(4).

¹⁸ 5 U.S.C. § 801(b).

Senate *minority* leader.¹⁹ That does not mean the minority's proposal would pass, of course, but it does put it on the fast track to a vote.

III. CONSTITUTIONALITY: PROCESS AND SUBSTANCE

To address whether the SCRA is constitutionally valid, we need to distinguish between the expedited mechanism the SCRA would create and the substance of the laws that would issue from the process.

The expedited mechanism is constitutional. Beyond bicameral passage and presentment to the president, the Constitution says little about the legislative process, instead leaving it up to each house to make its own rules of debate.²⁰ The committee system, for instance, is not mentioned in the Constitution, and some bills skip committee. There is a debate over whether the Constitution *permits* the filibuster, but nobody believes that the Constitution *requires* a supermajority for passage of ordinary legislation.²¹ The bills that would be enacted through the expedited SCRA process would avoid some of the customary and rules-based hurdles of the normal legislative process, but they would comply with the sparse requirements of the Constitution: passage in the House and Senate and presidential approval (or veto override). The rules governing the consideration of qualifying legislation would simply differ from the normal process under the two houses' rules.

Although the Constitution says that "each house" may determine the rules of "its" proceedings, that does not mean that the houses may set or change their rules only through one-house resolutions or other one-house actions.²² The SCRA creates its expedited procedure through a statute that is itself passed through the legislative process. That is fine. As already observed, creation of special rules through statutes has been done many times before. A bill passed by both houses is necessarily passed by each one, so

¹⁹ See SCRA § 3(d)(2)(B) ("If multiple motions to place a covered joint resolution . . . on the appropriate calendar are signed by 40 Senators . . . the only covered joint resolution that shall be placed on the appropriate calendar . . . is the covered joint offered by the first motion that is signed by the Minority Leader . . .").

²⁰ See U.S. CONST. art. I, § 5, cl. 2 (providing that "[e]ach House may determine the Rules of its Proceedings").

²¹ Cf. *id.* art. II, § 2, cl. 2 (requiring a two-thirds vote for ratification of a treaty). For a sample of the voluminous debate on the filibuster's constitutional permissibility, see Josh Chafetz & Michael J. Gerhardt, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010).

²² For an extended treatment of the points in this paragraph, see Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 977–80 (2007); and Bruhl, *supra* note 12, at 383–413.

each house is agreeing to the SCRA's special rules. Now, the power of "each house" over its rules of debate does pose a problem for a "statutized" rule of debate if one house later wants to change the procedures but the other house or the president will not agree to amend or repeal the statute; I take up this complication later.²³

Turning to the products of the expedited process, the substance of the laws enacted through the SCRA would be subject to judicial review as in any other case. Generally speaking, there is no constitutional objection to Congress changing a statute to mean something different from what a court has said the previous version meant. It happens all the time, and the courts even invite it.

Responding to a Supreme Court *constitutional* decision is trickier. The Supreme Court (like the political branches, for that matter) regards the courts as the definitive arbiter of the Constitution's meaning.²⁴ If the Supreme Court says that the Constitution's Second Amendment protects the right to bear arms in certain circumstances, Congress cannot directly change that proposition of constitutional law. The SCRA does not purport to establish a mechanism, as exists in some countries, by which the legislature can formally override the Court's constitutional rulings; that would require either a constitutional amendment or a fundamental change in the legal culture.²⁵ But there are plenty of ways that Congress can *effectively* override or otherwise counteract a constitutional decision, such as by responding to *Dobbs v. Jackson Women's Health Organization* by enacting a national statutory right to abortion or protecting interstate travel for purposes of obtaining one.²⁶ Of course, that abortion-protective statute may be subject to constitutional challenges (perhaps based on the Commerce Clause or a fetal personhood argument), but that is true with or without enactment through the SCRA.

It is likely that the SCRA will sometimes be described as allowing Congress to "overrule" or "reverse" Supreme Court decisions. That description is close enough for most purposes, but the SCRA does not

²³ See *infra* Part VI.

²⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (emphasizing the Court's supremacy in settling constitutional meaning); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007) (explaining that the political branches have encouraged the courts to assume supremacy in constitutional interpretation).

²⁵ See generally PRESIDENTIAL COMM'N ON THE SUPREME COURT OF THE U.S., FINAL REPORT 183–91 (2021) (describing proposals for legislative overrides of constitutional rulings).

²⁶ 142 S. Ct. 2228 (2022); see, e.g., Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. § 4 (2022) (creating a federal statutory right for health care providers to provide abortion in certain circumstances).

contemplate changing the result in a concluded case. That is, if the Supreme Court interprets a statute to mean *X* rather than *Y*, such that one party loses its case, a responsive statute enacted through the SCRA would not reverse that specific judgment and give victory to the previously losing party. Congress cannot reopen a judicial judgment.²⁷ Through the SCRA, Congress is instead changing the law governing other cases, not actually changing the outcome of a decided case.²⁸

IV. WHY EXPEDITE HERE?

One might legitimately ask why streamlined procedures are needed here but not elsewhere. Democrats' efforts to pass major legislation on voting rights failed during the 117th Congress, for example, and some have asked why the filibuster should apply to voting rights when it does not apply to tax legislation (due to reconciliation) or trade agreements or other topics with dedicated fast-track procedures.

Of course, the Act will apply to voting rights, or any other topic one cares about, whenever the Supreme Court rules on the topic. The question would then be what is special about a topic that the Supreme Court has just addressed as opposed to topics it has not. Presumably one could devise a process-based reason, such as that quick action in response to the Supreme Court can prevent incorrect decisions from becoming entrenched in the law or that the SCRA could make the possibility of congressional response more salient to the Court.

A deeper response, though, would resist the apparent premise that there needs to be a good reason to select a topic for expedited procedures as opposed to the "normal" process. The filibuster is, in a word, *bad*. And so, one might reasonably say, it should be departed from whenever possible, even if any particular departure does not have a particularly compelling answer for why there rather than elsewhere. The burden should instead be on the other side; that is, why ever use the bad process? Similarly, if the objection is that the SCRA would tend to erode the filibuster by leading to still more exceptions to it in the future, the answer could be that the objection has identified a feature of the SCRA rather than a bug.

²⁷ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (holding that a statute that "retroactively command[ed] the federal courts to reopen final judgments" violated Article III of the Constitution).

²⁸ *Cf. infra* Section V.B (describing retroactivity).

Further, the “normal” process is already riddled with exceptions. As noted above, there have been dozens of fast-track procedures enacted all over the policy universe, and reconciliation removes the filibuster from some of the most consequential legislation. It is worth observing, as well, that there is a distinctively partisan asymmetry in the current pattern of where supermajorities are required.²⁹ For decades, the Republican Party’s domestic goals could mainly be effectuated through fiscal policy (that is, tax cuts) and judicial selection, neither of which is currently subject to the filibuster.³⁰ Many of the Democrats’ legislative priorities—voting rights, health care, employment policy, environmental regulation—face the filibuster at least in part. And when measures on these topics overcome the filibuster and get enacted, they are subject to judicial veto through interpretation or invalidation. The SCRA would tend to counteract this partisan asymmetry.

V. IMPLEMENTATION AND IMPLICATIONS

Here I address some questions about the SCRA’s practical implementation and implications of its use.

A. *Definitional and Boundary Problems*

Some of the definitions in the bill are unclear around the edges. Consider the following imprecisions.

To qualify for the expedited procedures, a bill responding to a Supreme Court statutory decision is supposed to amend the statutory provision that

²⁹ See Jonathan Gould & David Pozen, Opinion, *How a Biased Filibuster Hurts Democrats More than Republicans*, THE HILL (Nov. 27, 2021, 11:01 AM), <https://thehill.com/opinion/campaign/583180-how-a-biased-filibuster-hurts-democrats-more-than-republicans/> (“Above and beyond its downsides for whichever party controls the Senate at a given time, the filibuster disproportionately disadvantages those with ambitious legislative agendas. And any way one measures it, the contemporary Democratic Party is much more legislatively ambitious than the contemporary Republican Party.”); David Litt, *Why Mitch McConnell Didn’t Kill the Filibuster*, DEMOCRACY DOCKET (Mar. 24, 2021), <https://www.democracymarket.com/news/why-mitch-mcconnell-didnt-kill-the-filibuster/> (“There are currently three ways to bypass the 60-vote threshold for legislation in the Senate — and all three of them are far more useful to conservatives than to progressives.”).

³⁰ Judicial nominations, for the Supreme Court and lower courts, are now approved on a majority basis, the filibuster for nominations having been eliminated not through a formal amendment of the Senate rules but instead through parliamentary precedents reinterpreting the rules. This is, depending on one’s perspective, the “constitutional” or “nuclear” option for changing the Senate rules. See Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97-110 (2017).

the Court interpreted or amend a statutory provision that is “directly implicated,” but the responsive bill is not permitted to add “extraneous matter.”³¹ A bill responding to *West Virginia v. EPA*³² by clarifying that the EPA does indeed have the power to combat climate change through “generation shifting” requirements would clearly qualify. But what about a bill that also or instead attempts to abrogate the “major questions doctrine” that the majority used to conclude that Congress had not been clear enough previously, a doctrine that seems poised to narrow regulatory authority all across the U.S. Code? The question here is not the question whether Congress can create or abrogate canons or otherwise dictate interpretive methods,³³ but instead whether such a broader response would qualify for the SCRA’s expedited treatment or would be considered extraneous.

The test for bills that respond to a constitutional ruling is similarly loose, as the fast-track procedures apply to bills that are “reasonably relevant” to the Supreme Court’s decision.³⁴ The *Dobbs* decision addressed abortion, but its reasoning (especially as expounded in Justice Thomas’s concurrence) may call into question other privacy-based constitutional rights like access to contraception.³⁵ Would legislation providing federal statutory protection to access to contraceptives qualify for the fast-track treatment that may well be the difference between passage in the Senate and failure?

A further definitional issue: A covered Supreme Court decision is one that interprets or reinterprets a federal statute or “diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States.”³⁶ Whether a decision diminishes a right will sometimes be reasonably debatable. Does *Kennedy v. Bremerton School District*³⁷ expand Coach Kennedy’s Free Exercise and Free Speech rights or diminish students’ rights under the Establishment Clause or both? Note that this difficulty would be ameliorated if the SCRA were changed so that it applies not only to decisions diminishing constitutional rights but, along the lines of the

³¹ SCRA § 2(1)–(2), (4).

³² *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

³³ On that question, see, for example, Linda D. Jellum, “Which is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009) (positing limits on congressional power to direct courts; interpretive methods); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (“This Article concludes that Congress has constitutional power to codify some tools of statutory interpretation.”).

³⁴ See SCRA § 2(1)(D)(ii).

³⁵ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

³⁶ SCRA § 2(3)(B).

³⁷ 142 S. Ct. 2407 (2022).

provision regarding statutory decisions, to decisions interpreting the Constitution in whatever direction.

For all of these questions about eligibility for the expedited procedure, as with most matters of congressional procedure, the answer will generally be that the majority of the house can have its way.³⁸ In any event, if a bill is enacted through the expedited procedures when it did not qualify for them, it will have still complied with the Article I, Section 7 process for lawmaking and will not be subject to judicial invalidation due to the procedural defect. The check on misapplication or manipulation of the procedures comes from conscience, other members, or the voters.

Finally, one should keep in mind that uncertainty over the scope of the procedures, and potential expansions of their scope in practice, need not be regarded as necessitating sharper drafting of the SCRA's triggers. Equally, the imprecision and ensuing debates might be regarded as a path for further destabilizing the filibuster.

B. Retroactivity of Responsive Legislation?

As explained above, a statute enacted through the SCRA could not change the outcome of a decided case, making the losing party into the winner. That particular judgment is final. The statute would instead change the law. Certainly that means that conduct occurring after the effective date of the statute would be governed by the new law. But what about pending cases that have not been decided (or cases yet to be filed) involving conduct that happened before the SCRA-facilitated amendment? To make things concrete, consider the Supreme Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, which held that damages for emotional distress were not available for a particular kind of discrimination claim.³⁹ Suppose that another person, Shummings, was a victim of discrimination on the same day as Cummings. Shummings has not sued but still may (that is, the statute of limitations has not expired). Is the case brought by Shummings governed by the Supreme Court's interpretation in *Cummings* or by a new amendment that

³⁸ In the Senate, the usual practice is that the chair makes parliamentary rulings with the benefit of the nonbinding advice of the parliamentarian, with such rulings subject to appeal to the Senate, which votes on appeals on a majority basis. RIDDICK'S SENATE PROCEDURE, S. Doc. 101-28, at 145, 148, 987, 989 (1992). Section 3(e)(3)(D) of the proposed legislation provides that appeals from the chair's rulings on extraneousness are subject to reversal only on a three-fifths vote, but in circumstances in which the SCRA would be used, the chair, whether the Vice President or a member of the Senate, would be aligned with the Senate majority.

³⁹ 142 S. Ct. 1562, 1571 (2022).

Congress enacts via the SCRA to override *Cummings*? The normal presumption is that statutes apply only to future conduct, not past conduct, and that is so even where Congress has the authority to legislate retroactively, as it often does in civil matters.⁴⁰ That means Shummings's case would be governed by the *Cummings* interpretation of the law.

Yet one might suppose the presumption against retroactivity should not apply, or should even be reversed, when a statute is expressly pitched as a rejection of a judicial interpretation. Such statutes might be described as "curative" or "restorative"; they can be understood as merely clarifying that the law was always what the legislature now clearly says that it is, that the judicial decision was always wrong. At least in the federal courts, though, a characterization as restorative or clarifying is not sufficient to achieve retroactive effect.⁴¹ So, to return to the hypothetical above, if Congress wants to protect someone like Shummings, and if it has the power to do so, the responsive statute should clearly state that it applies to prior conduct and pending cases.

C. *Bolstering Inferences from Inaction?*

One could speculate whether the creation of an expedited process for responding to the Supreme Court could strengthen the inference, occasionally invoked in judicial decisions, that lack of congressional response to a prior interpretation indicates approval of the interpretation. Yet as textualists above all others have pointed out, there are many explanations for legislative inaction in response to a judicial interpretation besides legislative agreement with it.⁴² Members may have had even higher priorities or may have disagreed about how to amend the law, or a powerful committee chair may have stopped action due to a tiff with the president, among many other possibilities. The SCRA would make it somewhat easier for Congress to respond and, for that reason, would strengthen a bit the inference from

⁴⁰ Landgraf v. USI Film Prods., 511 U.S. 244, 265-80 (1994).

⁴¹ See *Rivers v. Roadway Exp., Inc.*, 511 U.S. 297, 304-13 (1994) ("A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but we do not 'presume' an intent to act retroactively in such cases. We still require clear evidence of intent to impose the restorative statute 'retroactively.'").

⁴² E.g., *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 614, 672 (1987) (Scalia, J., dissenting) ("The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.") (citations omitted).

inaction to approval. But the reasons for inaction would remain numerous and the inferences correspondingly weak. Before or after the SCRA, congressional inaction should figure little in statutory interpretation.

D. *Potential Feedback Effects*

More broadly, might the availability of fast-track procedures affect the Supreme Court's approach to statutory interpretation? Perhaps the Court would feel freer to reach decisions it thinks the current Congress dislikes, because Congress could more easily rectify errors. That is, the attitude that "if Congress does not like this interpretation, it can change it" would become slightly more descriptively realistic, and, perhaps, counter-preferential interpretations would accordingly become more common. Or, to the contrary, might the easier availability of overrides make the Court more likely to heed current legislative preferences?

The best answer is that there is probably no predictable effect on judicial behavior, at least with the current Supreme Court. We can address the matter by drawing on both theory and observation.

The generally prevailing orthodoxy among judges is that interpretation looks backwards, to what the enacting Congress meant or how reasonable readers would have understood their enactment.⁴³ From that perspective, the ease of legislative response, which necessarily comes from a later legislature, is irrelevant.

As a matter of the practical reality, the evidence is mixed on whether the Supreme Court considers likely congressional responses to its decisions.⁴⁴ The existing empirical literature does not yet take into account the current Supreme Court, which, by this observer's reckoning, does not appear to be particularly concerned about legislative preferences one way or the other. Further, the SCRA would be most powerful when both houses and the presidency are aligned, which often is not the case. In sum, there is little reason to expect the SCRA to affect the Court's decision-making.

⁴³ See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

⁴⁴ See Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 413-15, 424-25 (2010).

VI. WOULD THE EXPEDITED PROCEDURES BE FOLLOWED?

A final question is whether Congress would obey the SCRA and use its procedures. As explained above, legislative rules are ultimately within a current majority's control and are generally not subject to external enforcement. The SCRA itself contains a disclaimer noting that its expedited procedures are enacted

as an exercise of the rulemaking power of the Senate and House of Representatives, respectively . . . and . . . with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.⁴⁵

The statute thus commits and then immediately disclaims commitment. Why?

Such clauses are typical in statutes creating expedited frameworks, and the proposition they state would probably be true even without this language.⁴⁶ Remember that the Constitution gives “each house” power over its rules and other matters of internal governance. Although the SCRA's procedures are valid because each house enacts them, the Constitution makes the procedures voidable at the option of each house.

That doesn't mean the procedures will not be followed. The SCRA's statutory rules and deadlines will be the default or focal point. It's true that a majority could change or ignore them, as with other rules. But that is most likely to happen when a bill is not favored on the merits, such that losing the expedited treatment is unlikely to matter. When the majority favors the bill, it will use the expedited procedures to facilitate passage, despite minority objections or attempts to delay or to filibuster. So, yes, the procedures will work—when the institutional circumstances are aligned in the right way for them to matter.

⁴⁵ SCRA § 3(g).

⁴⁶ Bruhl, *supra* note 12, at 363-72 (discussing the “disclaimer clause”).