

No. 06-2770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ONE SIMPLE LOAN, *et al.*,
Plaintiffs-Appellants,

v.

U.S. SECRETARY OF EDUCATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN
IN SUPPORT OF APPELLANTS

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INTRODUCTION

Some constitutional provisions are open to interpretation. One constitutional requirement that is not ambiguous, however, is the requirement that every bill must pass both houses of Congress before it can be presented to the President and become law. The Deficit Reduction Act of 2005 (“DRA”) was presented to the President in violation of that requirement: The Senate passed one version of a bill, the House another, and then the Senate’s version was presented to the President, who signed it. Under the Constitution, that bill has not become a law.

Notwithstanding the straightforward constitutional requirement of bicameralism, the district court dismissed appellants’ claim that the DRA was invalid under the United States Constitution. With brief discussion, the court held that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), established an “enrolled bill rule” that required dismissal of appellants’ claim. A fuller discussion of *Marshall Field* and more recent Supreme Court case law construing *Marshall Field* shows that the court’s holding was incorrect and should be reversed.

INTEREST OF AMICUS CURIAE

Amicus curiae Public Citizen is a non-profit consumer advocacy organization founded in 1971. On March 21, 2006, Public Citizen filed a case challenging the constitutionality of the DRA, *Public Citizen v. Clerk, United States District Court, U.S. District Court for the District of Columbia*, Civil Action No. 06-523. Public

Citizen is directly affected by the DRA because the DRA purports to raise the fee for filing new cases in the United States district courts, where Public Citizen has paid filing fees every year for more than 30 years. On August 11, 2006, the district court dismissed Public Citizen's case, and an appeal is now pending. Because this appeal presents the same question at issue in Public Citizen's case, the Court's opinion in this case may influence the panel deciding our case. Accordingly, Public Citizen has an interest in the outcome of this appeal.

Both parties have consented to the filing of this amicus brief.

FACTUAL BACKGROUND OF THE DRA

A. The Legislative Process

This case arises from a substantive discrepancy between House and Senate bills that arose during the process of preparing a bill for transmission from the Senate to the House and, later, to the President. Because an explanation of the factual background involves some terminology specific to the legislative process, a brief description of that process is in order.

After one chamber of Congress passes a bill, the bill is printed, signed by the Clerk of the House or the Secretary of the Senate (depending on which chamber passed the bill), and sent to the other chamber. The printed version of the bill passed by a single chamber is called the "engrossed bill." 1 U.S.C. § 106. If the other

chamber passes the engrossed bill without amendment, the Clerk or Secretary of that chamber signs the bill and returns it to the originating chamber. *Id.* The bill is then printed again and, at this point, is called the “enrolled bill.” *Id.* The presiding officers of both the House and the Senate sign the enrolled bill to attest that it passed each chamber. *Id.* The enrolled bill is then sent to the President. *Id.*

B. The Deficit Reduction Act of 2005

In the fall of 2005, the House and Senate passed different versions of S. 1932, a budget bill referred to as the DRA. To reconcile the differences between the House and Senate bills, the legislation was sent to a House-Senate conference committee. The bill was modified in conference, and the final conference report was submitted to the House and Senate for their votes. *See* H.R. Conf. Rep. No. 109-362 (2005), *reprinted in* 151 Cong. Rec. H12641 *et seq.* (Dec. 18, 2005).

On December 19, 2005, the House passed the conference report on S. 1932 by a vote of 212 to 206. 151 Cong. Rec. H12276-77 (Dec. 18, 2005).

On December 19, 20, and 21, 2005, the Senate considered the conference report. Four points of order were raised against the report, and three were sustained on the ground that the provisions of the conference report on which they rested violated the rules of the congressional budget process. 151 Cong. Rec. S14203-04

(Dec. 21, 2005).¹ As a result, the conference report did not pass in the Senate. *Id.* at S14205. On December 21, the Senate then voted on an amended version of S. 1932 that omitted the items that gave rise to the points of order. *Id.* at S14337-86. The amended bill passed 51 to 50, with Vice President Cheney casting the tie-breaking vote. *Id.* at S14221; *see also id.* at H13178 (Dec. 22, 2005) (message from Senate clerk to House).

When engrossing the amended bill for transmittal to the House, a Senate clerk made a substantive change to section 5101(a)(1): In two places, the clerk altered the duration of Medicare payments for certain durable medical equipment, stated as 13 months in the version passed by the Senate, to 36 months. *Compare* 151 Cong. Rec. S14337, S14346 (Dec. 21, 2005) (version passed by Senate), *with* S. 1932, engrossed

¹A point of order is “[a] claim made by a Senator from the floor that a rule of the Senate is being violated. If the Chair sustains the point of order, the action in violation of the rule is not permitted.” U.S. Senate, *Senate Glossary*, www.senate.gov/reference/glossary_term/point_of_order.htm. In this case, the points of order were based on items in the bill that would have had no budgetary impact or only an incidental budgetary effect. “Under the Byrd rule, any provisions in a final budget reconciliation bill that are extraneous to changing the budget can be stricken.” 151 Cong. Rec. S14204 (Dec. 21, 2005). The three points of order were claims that particular provisions violated the Byrd rule. *Id.*

in Senate (Dec. 21, 2005).² The budget impact of the change is \$2 billion over five years.³

Errors in engrossed bills have occurred before. The proper procedure is for the chamber that made the error to send a message to the other chamber requesting return of the bill, so that the error can be corrected. *See* 109th House Rules and Manual § 565 at 296-97 (2005) (House Doc. No. 108-241) (listing examples), *available at* www.gpoaccess.gov/hrm/browse_109.html. That procedure was not followed here. Rather, on February 1, 2006, the House voted on the engrossed version of S. 1932, which contained the clerk's error and, therefore, was not identical to the version of the bill passed by the Senate. *See* S. 1932, engrossed in Senate (full citation *supra* n.2); 152 Cong. Rec. H69, H77 (Feb. 1, 2006). The House passed S. 1932, with the error, by a vote of 216 to 214. 152 Cong. Rec. at H68.⁴

²S. 1932 as engrossed in the Senate on December 21, 2005, is available from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932eas.txt.pdf. The discrepancy appears twice in section 5101(a)(1).

³Letter from Congressional Budget Office Acting Director Marron to Rep. Spratt (Feb. 13, 2006), *cited in* Letter from Rep. Waxman to Andrew Card (Mar. 15, 2006), *available at* www.democrats.reform.house.gov/Documents/20060315121422-08628.pdf.

⁴The Congressional Record provides authoritative evidence of the vote on and passage of bills. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536, 1540 n.2 (2005); *McCreary Cty. of KY v. ACLU*, 125 S. Ct. 2722, 2750 (2005)
(continued...)

Because the legislation originated in the Senate, the House returned the legislation to the Senate for transmission to the President for his signature. *See* 152 Cong. Rec. S443 (Feb. 1, 2006) (message from House to Senate announcing that House agreed to Senate amendment to S. 1932). When the enrolled bill was prepared, the Senate clerk changed the provision in section 5101(a)(1) for 36 months of payment for certain durable medical equipment back to 13 months, as earlier approved by the Senate. *See* S. 1932, enrolled in Senate, at § 5101.⁵

The enrolled bill was signed by the Speaker of the House and President pro tempore of the Senate on February 7, 2006, and transmitted to the President later that day. 152 Cong. Rec. S768 (Feb. 7, 2006). The House, however, had never passed that version of the bill; indeed, the House had never even been sent that version for consideration.

On February 8, 2006, President Bush signed the enrolled bill. *See* 120 Stat. 4, Pub. L. No. 109-171 (2006), *available at* www.gpoaccess.gov/plaws/index.html.

⁴(...continued)
(Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

⁵A link to the enrolled bill is available online from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932enr.txt.pdf.

ARGUMENT

I. The DRA Is Not A Law Under Article I, Section 7, Clause 2 Of The United States Constitution.

A. The Constitution's Bicameralism Requirement

The United States Constitution provides: “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States” U.S. Const., art. I, § 7, cl. 2; *see also id.* art. I, § 1 (“All legislative Powers granted herein shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives.”) (emphasis added). The requirement that a bill pass both chambers of Congress before being presented to the President, referred to as bicameralism, is not a formality but rather “serve[s] essential constitutional functions.” *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Under the Constitution's bicameral requirement, before a bill may become a law, it must be passed in *identical* form by both chambers. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (“The Constitution explicitly requires that each of [] three steps be taken before a bill may ‘become a law’”: a bill containing the “exact text” must be approved by one house; the other house must approve “precisely the same text,” and “that text” must be signed by the President) (quoting art. I, § 7); *City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.) (“At the heart of the notion

of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form.”), *aff’d*, 524 U.S. 417 (1998); Parliamentarian, U.S. House of Reps., *How Our Laws Are Made*, at XVII (June 30, 2003) (bill must be “agreed to in identical form by both bodies” before presentation to the President); *see also West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (statutory purpose determined by “statutory text adopted by *both* Houses of Congress and submitted to the President”) (emphasis added). If any provision of the text of a bill voted on in one house differs from the text voted on in the other or from the version signed by the President, the law has not been validly enacted. *Clinton*, 524 U.S. at 448.

“By providing that no law could take effect without the concurrence of the prescribed majority of the members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials.” *Chadha*, 462 U.S. at 948-49. Indeed, “[Alexander] Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution,” for to adopt a unicameral legislature would be to confer on a single body ““all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived.”” *Id.* at 949 (quoting *The Federalist* No. 22, at 135 (H. Lodge ed. 1888)). Bicameralism is a central part of the

system of checks and balances erected “to protect the people from the improvident exercise of power.” *Id.* at 957.

B. Evidence Of The Bicameralism Violation

Here, the version of the Deficit Reduction Act of 2005 passed by the Senate was not identical to the version passed by the House, and the House never passed the version of the bill that was presented to the President. The DRA is thus invalid under article I, section 7, clause 2. *See United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (“[T]he principle that the courts will strike down a law when Congress has passed it in violation of [a constitutional] command has been well settled for almost two centuries.”).

1. Only two documents are needed to demonstrate the constitutional violation: Public Law No. 109-171 (the version of the bill signed by the President) and S. 1932 as engrossed in the Senate (the version of the bill passed by the House). Comparison of these two bills shows that the bill passed by the House was substantively different from the bill sent to and signed by the President. The violation is confirmed by an additional item, S. 1932 as passed by the Senate on December 21, which is substantively identical to Public Law No. 109-171 but different from the engrossed bill passed by the House.

First, as for the Public Law, courts regularly rely on the Public Law printing, the United States Code, and even non-governmental publications such as West's as evidence of the text of statutes. *See, e.g., Schaffer v. Weast*, 126 S. Ct. 528, 535, 536 (2005) (cites to Pub. L., U.S.C., and U.S.C.A.); *United States v. Booker*, 543 U.S. 220, 261-63 (2005) (same).

Second, as for the engrossed bill on which the House voted, Congress has established formal mechanisms for publication of and public access to the official text of engrossed bills. Pursuant to statute, an official copy of the precise text of the engrossed bill on which the House voted on February 1, 2006, is printed by the Government Printing Office ("GPO"). *See* 44 U.S.C. § 706 (enacted 1968). That official version is readily available to the public and the Court from GPO:

The information provided on [GPO's website, known as GPO Access] is the *official*, published version and the information retrieved from GPO Access can be used without restriction, unless specifically noted. This free service is funded by the Federal Depository Library Program and has grown out of Public Law 103-40, known as the Government Printing Office Electronic Information Enhancement Act of 1993.

GPO, *About GPO Access*, www.gpoaccess.gov/about/gpoaccess.html (emphasis added); *see also id.* ("The National Archives and Records Administration (NARA) recognizes GPO as an official archival affiliate for the electronic content on GPO Access."). The text of the engrossed bill is also available from the Congressional Record. *See* 152 Cong. Rec. H68-H114 (Feb. 1, 2006). These official publications

offer reliable evidence of the content of bills. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004) (citing a Senate report and the Congressional Record to show content of bill and amendments); *Cook County v. Chandler*, 538 U.S. 119, 131 (2004) (citing Senate and House bills, as reprinted in U.S.C.C.A.N., to show content of bills); *see also Clinton*, 524 U.S. at 437 n.24 (citing bill numbers to show content, without noting source).

Third, the text of the bill passed by the Senate on December 21, 2005, is printed in full in the Congressional Record, *see* 151 Cong. Rec. S14337-86 (Dec. 21, 2005), in accordance with Congress's instruction. *See* GPO, *Congressional Record: Main Page*, www.gpoaccess.gov/crecord/index.html ("The Congressional Record is the *official* record of the proceedings and debates of the United States Congress.") (emphasis added); U.S. Senate, *The Congressional Record*, www.senate.gov/pagelayout/legislative/d_three_sections_with_tasers/congrecord.htm (Congressional Record "includes all bills, resolutions, and motions proposed, as well as debates and roll call votes"). And the Supreme Court has recognized that the Congressional Record provides reliable evidence of the content of bills. *See, e.g., Smith v. City of Jackson*, 125 S. Ct. at 1540 n.2; *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885, 1914 (2005) (Thomas, J., joined by Rehnquist, C.J., and Stevens and O'Connor, JJ., dissenting).

2. The fact that the House voted on the bill engrossed in the Senate cannot legitimately be questioned. Members of Congress do not vote on legislation in the abstract; they vote on printed bills. And the only Senate bill on which the House can vote is an engrossed Senate bill. 7 *Deschler's Precedents of the U.S. House of Reps.* (House Doc. No. 94-661), ch. 24, § 12 at 4889, available at <http://origin.www.gpoaccess.gov/precedents/deschler/browse.html>.⁶ Indeed, the point of engrossment is to print the text of a bill so that it can be sent from one chamber to the other and “in that form. . . dealt with” by the house that receives it. 1 U.S.C. § 106. Engrossed bills are conveyed through formal messages, and such messages are “the sole source of official information in one chamber regarding actions taken by the other House.” 16 *Deschler's Precedents*, ch. 32, § 1 at 1 (citing 8 *Cannon's Precedents*, ch. 268, §§ 3342-43 (1936)). In fact, House members “are not assumed to know anything about the action of the Senate except what is conveyed in the papers that are delivered to [them].” 8 *Cannon's Precedents*, ch. 268, § 3342 at 805 (quoting Rep. Mondell), available at www.gpoaccess.gov/precedents/cannon/vol8.html; see *id.* § 3343 at 805 (where a bill transmitted from the Senate to the House was different from the bill

⁶Deschler's Precedents “set[s] forth and analyze[s] the modern precedents of the House of Representatives.” *Deschler's Precedents*, Preface at iii. By law, the precedents must be updated every two years. *Id.* at iii n.3. “[T]he precedents may be viewed as the ‘common law,’ so to speak, of the House, with much the same force and binding effect.” *Id.* at vii.

passed in the Senate, the Speaker explained that the House is “bound by the formal interchange of documents between the bodies . . . and the House can only look at the record as forwarded to it by the Senate”).

Thus, on February 1, 2006, when the House voted to concur “in the Senate amendment to the House amendment to S. 1932,” 152 Cong. Rec. H68 (Feb. 1, 2006), the House could only have been voting on the engrossed bill, which states in bold letters on the first page “SENATE AMENDMENT TO HOUSE AMENDMENT.” No other version of S. 1932 and no other Senate amendment regarding S. 1932 was before the House or eligible to be voted on under House procedures.⁷

⁷A report from the Office of the Clerk of the House of Representatives confirms the facts. In response to an April 6 request from the chairman and the ranking member of the Committee on House Administration, the Office of the Clerk of the House prepared a “report on the activities of the Office of the Clerk related to the engrossment, enrollment and presentment procedures used to process S. 1932.” *See* Jt. App. A170. The House Clerk’s report states that the bill engrossed in the Senate on December 21, 2005 was sent to the House on December 22 and that the House passed “the Senate engrossed amendment to the House engrossed amendment to S. 1932 *without any change from the form in which the Senate delivered its amendment to the House.*” *Id.* at A173 (emphasis added). The report further states that “section 5101(a) of the Senate amendment . . . both as passed by the House and as passed by the Senate according to the Senate’s December 22, 2005 message to the House, reflected the number ‘36.’” *Id.* at A174. And the report states that on February 6, the Senate delivered the enrolled version of S. 1932 to the Office of the House Parliamentarian for presentation to the Speaker and that “[a]t this point, section 5101(a) . . . reflected the number ‘13.’” *Id.*

II. This Court Can Properly Consider The Evidence Before It.

Because there is no legitimate dispute about the underlying facts, there is no serious question that enactment of the DRA violated the bicameralism requirement of article I, section 7. Rather, the question here is whether, in the face of indisputable evidence proving a constitutional violation, the judiciary must turn a blind eye and permit enforcement of a bill that the Constitution does not recognize as law. Notwithstanding the district court's conclusion to the contrary, the answer to that question is no.

The court below accepted the argument of appellees Secretary of Education, *et al.* (“the Secretary”) that—notwithstanding the indisputable evidence that the House never passed the bill presented to the President—courts are precluded from considering any evidence aside from the enrolled bill signed by the Speaker of the House and President pro tempore of the Senate. Decision at 17-18. Although the Secretary's argument was based entirely on *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), her motion papers omitted all discussion of the facts of the case and, in particular, the evidence that was the focus of the Supreme Court's opinion: legislative journals. A full discussion of the case demonstrates the inapplicability of *Marshall Field* to the situation presented here.

A. *Marshall Field* Turns On An Argument About Legislative Journals.

In *Marshall Field*, the plaintiffs alleged that the Tariff Act of October 1, 1890, was not enacted in accordance with the Constitution because the legislative journals showed that the enrolled bill presented to the President omitted a section that was included in the bill passed by both Houses. The Supreme Court held that the journals could not be used to challenge the valid enactment of a statute. However, in dicta going beyond what was necessary to decide the case, the Court stated that when an enrolled bill has been signed by the Speaker of the House and the President of the Senate attesting to its passage and then signed by the President, “its authentication as a bill that has passed congress should be deemed complete and unimpeachable.” 143 U.S. at 673. To reconcile this dicta with the courts’ “duty to review the constitutionality of congressional enactments,” *Munoz-Flores*, 495 U.S. at 391, the dicta must be considered in context as an explanation of why, as between an enrolled bill signed by the Speaker of the House and the President of the Senate, on the one hand, and information gleaned from congressional journals, on the other, the Court would credit the enrolled bill.

The argument of the *Marshall Field* plaintiffs turned on the significance of journals: “The clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress is the one declaring

that ‘each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.’” *Marshall Field*, 143 U.S. at 670 (quoting art. I, § 5). The plaintiffs argued that “the object of this clause [article I, section 5] was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by two houses of congress.” *Id.*; *see id.* at 672 (“[T]he contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and signed by the president.”). Journals were so central to the case that the United States attached to its brief an appendix containing a list of state authorities addressing the question whether legislative journals could be used to impeach an enrolled act. *Id.* at 661-66 (reproducing list).

The Supreme Court fully agreed that “a bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, . . . does not become a law of the United States if it ha[s] not in fact been passed by congress.” *Id.* at 669. “In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted.” *Id.* Moreover, the Court expressly recognized that the Speaker of the House and the President of the Senate have no authority to attest by their signatures

to any bill not passed by each house, and likewise that the President has no authority to approve a bill not passed by Congress. *Id.*

Nonetheless, the Court rejected the plaintiffs' article I, section 5 argument about the significance of congressional journals. It held instead that the keeping of the journals, although required by the Constitution, was not a requirement for the valid passage of a bill. Moreover, the Court noted that the Constitution does not prescribe precisely what matters must be recorded in the journals, but rather left those details to the discretion of Congress. *Id.* at 671. And to explain the "evils" that would result "from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them," *id.* at 673, the Court quoted extensively from cases decrying the "danger" of "intentional corruption" of the journals, the concern of putting every law "at the mercy of all persons having access to these journals," the "mischiefs absolutely intolerable" of allowing a law to be "impeached by the journals," and the likelihood of errors in journals "made amid the confusion of the dispatch of business." *Id.* at 674-77. For these reasons, the Court held that the journals could not be used to determine whether the enrolled bill signed by the President was the same bill passed by Congress.

In its recent discussions of the portion of the *Marshall Field* opinion relevant here, the Supreme Court has reiterated that *Marshall Field* is about “‘the nature of the evidence’ the Court would consider in determining whether a bill had actually passed Congress” and that the evidence at issue was journals. *Munoz-Flores*, 495 U.S. at 391 n.4 (quoting *Marshall Field*, 143 U.S. at 670); *see id.* (describing the plaintiffs’ argument in *Marshall Field* to be that “the constitutional Clause providing that ‘[e]ach House shall keep a Journal of its proceedings’ implied that whether a bill had passed must be determined by an examination of the journals”); *United States Nat’l Bank of Or. v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455 n.7 (1993) (*Marshall Field* concerns “the nature of the evidence”).

The understanding that *Marshall Field* was tied to the plaintiffs’ contention about the evidentiary value of congressional journals is also reflected in Supreme Court precedent from the years soon after *Marshall Field*. For instance, in *Harwood v. Wentworth*, 162 U.S. 547 (1896), the Supreme Court stated:

We see no reason to modify the principles announced in *Field v. Clark*, and therefore hold that, having been officially attested by the presiding officers of the territorial council and house of representatives, having been approved by the governor, and having been committed to the custody of the secretary of the territory as an act passed by the territorial legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be *unimpeachable by the recitals, or omissions of recitals, in the journals of legislative proceedings*, which are not required by the fundamental law of the territory to be so kept as

to show everything done in both branches of the legislature while engaged in a consideration of bills presented for their action.

Id. at 562 (emphasis added). Notably, both *Marshall Field* and *Harwood* were authored by Justice Harlan.

Again, in *Board of Commissioners v. W.N. Coler & Co.*, 180 U.S. 506 (1901), Justice Harlan made clear the centrality of the journals to his opinion for the Court in *Marshall Field*. There, the plaintiff challenged the enactment of a state law by arguing that the yeas and nays on the second and third readings of the bill in each house had not been entered on the journals, as required by the state constitution. In his opinion for the Court, Justice Harlan quoted extensively from portions of the *Marshall Field* opinion that characterize the plaintiffs' argument as focusing on journals and that discuss the lack of requirements for journals. *Id.* at 522-23. And he distinguished *W.N. Coler* by explaining that the question in the case was the effect on legislation of failing to enter on the journals items that are expressly required to be entered, as opposed to *Marshall Field*, which involved journal items that are not required to be entered. *Id.* at 524. (The Court decided that the answer in *W.N. Coler*, which involved a challenge to a state law, turned on state law.)

Below, the district court cited two decisions of this Court for the proposition that *Marshall Field* established an "enrolled bill rule" that treats legislative documents "as properly adopted" if they have been "authenticated in regular form." Decision 18

(citing *United States v. Pabon-Cruz*, 391 U.S. 86 (2d Cir. 2004); *United States v. Sitka*, 845 F.2d 43 (2d Cir. 1988)). Neither case limits the Court’s authority to consider the evidence of a constitutional violation in this case. First, *Pabon-Cruz* did not even involve an “enrolled bill rule” issue. The opinion discusses the “rule” only to explain, and then reject, the government’s argument that the rule was relevant to the case. 391 U.S. at 99-100. Second, whereas the instant case involves a challenge to a statute based on substantive variations between the versions that passed each house, *Sitka* was a challenge to the Sixteenth Amendment based on “trivial inconsistencies” between the version proposed by Congress and the versions approved by various states. 845 F.2d at 46. Moreover, although the Court stated that an enrolled bill rule was first articulated in *Marshall Field*, it did not describe the rule in any detail and gave no indication whether, in its view, there were circumstances under which the rule would allow consideration of evidence in addition to the enrolled bill. Thus, although this Court has twice described the enrolled bill rule, it has not had occasion to consider or apply such a rule in the context of a challenge alleging that a statute was not validly enacted.

B. The Constitutional Violation Here Is Unrelated To Any Contention About Journals And Is Shown By Undisputed Evidence Created By Statutory And Congressional Mandate.

The Supreme Court viewed *Marshall Field*, first and foremost, as a case about article I, section 5’s journal requirement. *See Marshall Field*, 495 U.S. at 670 (“The clause of the constitution upon which [plaintiffs] rest their contention . . . is the one declaring that ‘each house shall keep a journal of its proceedings.’”); *id.* at 672 (describing plaintiffs’ “contention . . . that [the enrolled act] cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers”). Here, however, the issue presented does not concern journals at all. The only constitutional requirement on which the appellants need “rest their contention” is the bicameral requirement of article I, section 7, clause 2.

This difference is critical. In *Munoz-Flores*, the Supreme Court rejected the argument, based on *Marshall Field*, that Congress’s designation of a bill as “H.J. Res.” precluded judicial review of the issue whether a revenue bill had originated in the Senate. 495 U.S. at 391 n.4 (responding to concurrence at 408-09); *see infra* p. 18. Although *Munoz-Flores* recognized that the “H.R.” designation on a bill could be taken to mean that “Congress explicitly determined” that the bill had originated in the House, as is constitutionally required of revenue bills, the Court stated that

“congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law’s constitutionality.” 495 U.S. at 391.

Although the clause of the Constitution at issue in *Munoz-Flores* was article I, section 7, clause 1 (origination), and at issue here is clause 2 (bicameralism and presentment), the distinction drawn in *Munoz-Flores* is one between constitutional provisions that establish requirements with respect to the enactment of laws—such as the Origination Clause and the bicameralism requirement—and constitutional provisions that do not—such as the Journal Clause. *Id.* at 391 n.4. *Munoz-Flores* expressly rejects a distinction between article I, section 7, clause 1 and clause 2, explaining that “§ 7 gives effect to *all* of its Clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law.” *Id.* at 396 (emphasis in original). The notion that a purported law may be challenged based on clause 1 of section 7 but not based on clause 2 thus rests on a distinction that was correctly rejected in *Munoz-Flores* and that, moreover, lacks any principled basis.

Furthermore, *Munoz-Flores* explained that *Marshall Field* involved an “interpretation of the Journal Clause,” which is not “a constitutional requirement binding Congress” with respect to the enactment of laws. 495 U.S. at 391 n.4. Where such a constitutional requirement *is* implicated, *Marshall Field*’s discussion of the value of Congress’s authentication “does not apply.” *Id.*

In this case, a constitutional requirement with respect to the enactment of laws is directly implicated—the requirement that both Houses pass the same version of a bill before that bill can be presented to the President and become law. Bicameralism was, among other things, “designed to prevent” “[u]nilateral action by any single participant in the law-making process.” *City of New York*, 985 F. Supp. at 179. A violation of the bicameral requirement is a violation of a fundamental aspect of our representative form of government. *See Chadha*, 462 U.S. at 949 (discussing the founders’ Great Compromise); *see also Clinton*, 524 U.S. at 440 (“[T]he power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’”) (quoting *Chadha*, 462 U.S. at 951).

To be sure, the plaintiffs in *Marshall Field* were also alleging an article I, section 7 violation. The Court’s opinion, however, does not focus on that issue. Rather, after quickly agreeing to the plaintiffs’ position with respect to the requirements of article I, section 7, clause 2, the Court framed the issue before it in terms of a different constitutional provision: “The clause of the constitution upon which [plaintiffs] rest their contention that the act in question was never passed by congress is the one declaring that ‘each house shall keep a journal of its proceedings. . . .’” 143 U.S. at 670 (quoting art. I, § 5). From that point on, with the

exception of one paragraph, the Court discussed journals and state court cases about journals. *See id.* at 671-80.

After the extended discussion of the unreliability of journals, the Court concluded the discussion in one sentence, saying: “We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of congress, that the enrolled bill, designated ‘H. R. 9416,’ as finally passed, contained a section that does not appear in the enrolled act in the custody of the state department.” *Id.* at 680. Admittedly, that one sentence is susceptible to a broad reading, but it need not be read broadly; and, in the context of the opinion as a whole, it makes little sense to do so. Aside from a paragraph discussing the congressional leaders’ signatures attesting to the passage of a bill and the respect due to Congress, *id.* at 672, the “reasons stated” focus exclusively on journals and their shortcomings. Moreover, the Court’s conclusion is specific to “the appellants” before it. In light of the lengthy discussion of journals that precedes the Court’s conclusion, and given the Court’s statement that the plaintiffs’ contention that the Tariff Act of 1890 never passed Congress “rest[ed]” on the Journal Clause, a broad reading of the one sentence conclusion is unwarranted.

Marshall Field found that resort to the journals to contradict the enrolled bill was not proper because the Constitution leaves to each chamber discretion to decide the content of the journals and does not even require that the text of bills and amendments be included in the journals. 143 U.S. at 671. And notably, in 1890, when the law at issue in *Marshall Field* was enacted, no statute seems to have required publication of engrossed bills. Here, by contrast, “the nature of the evidence” consists of official records that, pursuant to congressional and statutory directive, contain the complete official text of the bill that passed each chamber. *See supra* pp. 10-11. And whereas the content of legislative journals is subject to the discretion of each chamber, the House had no discretion with respect to the content of S. 1932 as engrossed in the Senate on December 21, 2005. “Engrossed” is the term used for a bill that has passed one chamber and been printed. 1 U.S.C. § 106. When the House receives an engrossed (that is, printed) bill from the Senate, the House has no way to alter the text of that printing. To be sure, the House could amend the bill, but then the bill would no longer be the bill engrossed in the Senate.

Therefore, when the House voted on the engrossed bill transmitted from the Senate, it voted on the exact text of that bill.⁸ The engrossed bill, S. 1932, passed by

⁸*See also 7 Deschler’s Precedents of the United States House of Representatives* (House Doc. No. 94-661), ch. 24, § 12 at 4889 (1976) (“A Senate bill cannot be acted on in the House . . . until the House is in possession of the signed copy of the
(continued...)”)

the House on February 1, 2006, is thus not *evidence* of the bill that passed the House that day; it *is* the bill that passed the House that day. And because, after its formal printing—which preceded the House vote—the content of the engrossed bill was not susceptible to alteration, consideration of the engrossed bill to show the content of the bill that passed the House on February 1 raises none of the fears about “intentional corruption” or “mischiefs absolutely intolerable” that concerned the Court in *Marshall Field*.

Finally, *Marshall Field*'s deference to the enrolled bill and leaders' attestation was based largely on the Court's skepticism about the evidentiary value of journals and the mischief that would result from relying on them to prove the invalidity of a law. In contrast, here, the possibility for mischief is not presented by consideration of the engrossed bill, but by a finding that such evidence is not proper for the Court's consideration. On the facts of this case, to limit judicial review to the enrolled bill would pave a clear road for deliberate abuses of the kind that *Marshall Field* considered unthinkable. Here, a Senate clerk made a substantive change to the text of a bill after the House vote. If the enrolled bill and attestation were dispositive, a clerk of either chamber could become the sole lawmaker by purposely altering the text

⁸(...continued)
engrossed Senate bill.”), *available at* <http://origin.www.gpoaccess.gov/precedents/deschler/chap24.html>.

of a bill during the enrollment process; and Congress itself would have little defense against such mischief.

In *Christoffel v. United States*, 338 U.S. 84 (1949), the defendant claimed that he could not be convicted of perjury based on statements he made before a congressional committee because a quorum was not present when he testified before the committee, as required by congressional rules. Relying on congressional rules, the trial court had instructed the jury that it should assume that a quorum was present if, at the start of the committee's session several hours before the defendant's testimony, a quorum had been present. *Id.* at 86-87. The jury convicted the defendant, and the court of appeals affirmed. Reversing, the Supreme Court explained that Congress's practice for determining the presence of a quorum did not decide the matter. Rather, "to charge . . . that such a requirement is satisfied . . . in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed." *Id.* at 90; *see id.* (error to affirm jury instructions that "allowed them to find a quorum present without reference to the facts at the time").

Similarly here, Congress's method of authenticating that a bill has passed each chamber should not be allowed to decide the matter. To hold the DRA validly enacted, "in the face of evidence indicating the contrary," would be to rule as a matter

of law that both chambers need not pass the same bill for it to become law. The Constitution does not permit that result.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed. The Court should hold that the DRA is invalid because it was not enacted in conformity with article I, section 7, clause 2 of the United States Constitution.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief was produced in WordPerfect using 14-point Times New Roman typeface and contains 6753 words.

Allison M. Zieve

September 6, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2006, I served the foregoing BRIEF AMICUS CURIAE OF PUBLIC CITIZEN on all parties required to be served by causing two true and correct copies thereof to be placed in the United States mail, first-class postage prepaid, addressed as follows:

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