

# LISTENING TO CONGRESS: EARMARK RULES AND STATUTORY INTERPRETATION

*Rebecca M. Kysar*†

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† Assistant Professor of Law, Brooklyn Law School; J.D., Yale Law School. For helpful comments, I am grateful to Ellen Aprill, Lily Batchelder, Meredith Conway, Steven Dean, Miranda Fleischer, Vic Fleischer, Carlos Gonzalez, Bob Green, Kristin Hickman, Anthony Infanti, Heidi Kitrosser, Anita Krishnakumar, Doug Kysar, Sarah Lawsky, Richard Lazarus, Michael Livingston, Trevor Morrison, Eduardo Peñalver, Jeff Rachlinski, Kirk Stark, Larry Solan, Ted Seto, and participants at both the Loyola-Los Angeles Tax Policy Colloquium and the 2008 Junior Tax Scholars Conference. Funding to support work on this Article was provided by the Dean’s Summer Research Stipend Program at Brooklyn Law School, with particular thanks to Dean Joan Wexler.

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## INTRODUCTION

Many scholars have categorized legislative rules of procedure as precommitment devices<sup>1</sup>—devices adopted by agents to bind themselves<sup>2</sup>—drawing analogies between legislative rules and famous illustrations of precommitment: Ulysses binds himself to the mast near the island of the Sirens<sup>3</sup> while Jane burns the bridges she crosses to leave Tarzan’s jungle,<sup>4</sup> both to destroy the means to sate temptation. Yet in the context of legislative rules, these analogies fail. Precommitment devices typically utilize *external* forces to bind oneself;<sup>5</sup> however, by decision of the Supreme Court and by action of the Congress, the latter reigns nearly supreme over its legislative rules, including those that nominally take the form of precommitment devices, such as earmark rules that require disclosure of special interest spending and tax legis-

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<sup>1</sup> For the classic works concerning precommitment theory, see generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979) [hereinafter ELSTER, *ULYSSES AND THE SIRENS*] (discussing various examples of precommitment devices); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) [hereinafter ELSTER, *ULYSSES UNBOUND*] (discussing various examples of precommitment devices); THOMAS C. SCHELLING, *Ethics, Law, and the Exercise of Self-Command*, in *CHOICE AND CONSEQUENCE* 83 (1984) [hereinafter, SCHELLING, *Ethics*] (examining a legal framework for self-paternalism); THOMAS C. SCHELLING, *The Intimate Contest for Self-Command*, in *CHOICE AND CONSEQUENCE*, *supra*, at 57 [hereinafter, SCHELLING, *The Intimate Contest*] (exploring tactics of managing one’s own behavior); Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281 (1956) (arguing that the most effective negotiating strategy may be one that limits the bargaining ability of one party in a manner that is visible to the other party).

<sup>2</sup> See, e.g., Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 513 n.43 (1998) [hereinafter Garrett, *Harnessing Politics*] (“[I]n the budget context, supermajority requirements and other institutionalized structures can operate as precommitment devices to avoid collective action problems that reduce Congress’s ability to achieve preferred policy outcomes.”) (citation omitted); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 749–55 (2005) [hereinafter Garrett, *Purposes*] (discussing precommitment as one of the purposes for legislative rules); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 342–43 (2006) (describing certain budget rules as precommitment devices); Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1116–18 (viewing a balanced budget amendment as a precommitment device).

<sup>3</sup> HOMER, *THE ODYSSEY* 272–73 (Robert Fagles trans., 1996).

<sup>4</sup> EDGAR RICE BURROUGHS, *TARZAN OF THE APES* 255 (32d prtg. 1964) (“Because she had been afraid she might succumb to the pleas of this giant, she had burned her bridges behind her . . .”).

<sup>5</sup> See Jon Elster, *Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1759–60 (2003) (noting that “the individual can enlist others in the effort to bind himself” while “[b]y contrast, *there is nothing external to society*” to bind society as a whole).

lation (respectively, “earmarks” and “limited tax benefits”).<sup>6</sup> It should not surprise, then, that Congress often strays from its precommitments. Just as if Ulysses had hidden tools to loosen his ties or if Jane later discovered a fallen tree to provide a means of ingress, Congress possesses the ability to interpret, to enforce, and ultimately to undo its precommitment devices. This Article proposes a straightforward solution to this problem: Extra-congressional forces—powers separate from, and hence able to constrain Congress—should be applied so that earmark rules more closely resemble precommitment devices in their purely binding form. Recognizing that federal courts are unlikely to permit direct enforcement of earmark rules, this Article suggests a novel method of statutory interpretation that operates by imposing costs upon defectors from earmark rules and the interest groups they support, helping to ensure the success of a remarkable attempt by Congress to realize its better self.

Two decades ago, an influential article began with the dismal but accurate observation that “[w]e live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process.”<sup>7</sup> Things are no different today.<sup>8</sup> Indeed, in response to widespread public disapproval of the political controversies involving lobbying and congressional spending on behalf of special interests, both houses of the 110th Congress adopted earmark rules that require disclosure of all spending earmarks and tax provisions that benefit special interests.<sup>9</sup>

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<sup>6</sup> In this Article I will follow the terminology of the recent reforms by using the terms “earmark” in the spending context and “limited tax benefits” in the revenue context when referring to special interest legislation, but I will use the term “earmark rules” as a shorthand to refer to such internal rules that impose disclosure requirements on either or both types of legislation. To avoid confusion, other authors have used the term “earmarked taxes” in a different context to refer to those tax revenues for which the government has identified a specific purpose prior to their collection. See, e.g., Susannah Camic, *Earmarking: The Potential Benefits*, 4 *PITT. TAX REV.* 55, 56 (2006) (detailing the benefits of such taxes).

<sup>7</sup> Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 223 (1986) (citation omitted).

<sup>8</sup> In the Spring of 2006, a poll undertaken by NBC News and the *Wall Street Journal* showed that a 39 percent plurality thought that preventing congressional members from directing federal funding to benefit only certain constituents was the most important issue for Congress to accomplish that year. NBC News & The Wall Street Journal, Study #6062, at 12 (Apr. 21–24, 2006), available at <http://online.wsj.com/public/resources/documents/poll20060426.pdf>.

<sup>9</sup> The House of Representatives has adopted one such proposal as an internal resolution. H.R. Res. 6, 110th Cong. § 404 (2007) (enacted). The Senate has adopted similar disclosure rules. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760. Several similar proposals were made in the 109th Congress. See Budget and Transparency Act, H.R. 6201, 109th Cong. §§ 201–03 (2006); H.R. Res. 1008, 109th Cong. (2006); H.R. Res. 1000, 109th Cong. § 1 (2006); Legislative Transparency and Accountability Act of 2006, S. 2349, 109th Cong. § 3; Pork-Barrel Reduction Act, S. 2265, 109th Cong. §§ 4–5 (2006); Transparency and Integrity in Earmarks in Ear-

Recognizing the strong incentives for members of Congress to bury special interest legislation within complex tax and spending legislation and to conceal such legislation through ambiguous and obfuscatory drafting, scholars have long sought to bring these deals into the open in order to promote congressional deliberation and public accountability.<sup>10</sup> Although the recently adopted disclosure rules seem designed to address that laudable goal, their efficacy is doubtful given their status as “self-referential rules”<sup>11</sup>—that is, rules adopted by the foxes to govern administration of the henhouse. Part I of this Article provides a brief description of Congress’s internal rulemaking process and then discusses justifications for earmark rules, which are primarily grounded in precommitment and collective action theories.<sup>12</sup> In Part

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marks Act of 2006, S. 2261, 109th Cong. §§ 2–3. Prior to the passage of the Honest Leadership and Open Government Act (in September 2007), the Senate Appropriations Committee pledged adherence to the earmark rules, as passed in an earlier version of the Act. Press Release, U.S. Senate Comm. on Appropriations, Senate Appropriations Committee Announces Earmark Reform Standards (Apr. 17, 2007) (on file with author).

<sup>10</sup> See, e.g., Macey, *supra* note 7, at 261–66; see also, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 94 (1993) (noting that an important goal underlying campaign finance reform is to reduce the reality and appearance of political corruption by restricting contributions made in return for special favors); Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 984 (“One of the problems with the legislative process today is that its results are often seen by the public as the result of back-room, under-the-table deals between incumbents and organized special interests.”).

<sup>11</sup> Thomas Schelling describes personal strategies for constraining future behavior as “enforcing rules on oneself,” and his writing is closely tied to Jon Elster’s precommitment theory. Compare Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357, 357 (1985), with ELSTER, ULYSSES AND THE SIRENS, *supra* note 1, at 36–111. The use of precommitment strategies by governmental bodies, especially in the deficit-cutting context, has been explored in the academic literature. See, e.g., Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 412–13 (1998) (discussing the use of precommitment devices to overcome collective action problems in the budgetary legislative process); Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 188–96 (1986) (arguing that the statutory control of spending by future Congresses through across-the-board spending cuts is unconstitutional).

<sup>12</sup> For the classic works discussing collective action problems, especially within government, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 283–95 (1971) (discussing pressure-group activity and its relationship to the public interest); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 3–5 (1991) (discussing the application of public choice theory to legal doctrine); MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–57 (1965) (comparing the effectiveness of small groups to that of large groups); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4 (1971) (discussing the problem of government regulation of “when and why an industry (or other group of like-minded people) is able to use the state for its purposes”). For further resources discussing collective action problems in the budgetary process, see AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 127 (3d ed. 1997) (discussing the use of strategic devices to protect against “self-destructive tendencies”); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1133 (1997); Garrett, *supra* note 11, at 412; Kysar, *supra* note 2, at 343 (“Congressional members also confront a collective action

II, after describing political factors that precipitate the enactment of the earmark rules, this Article details the current regime's shortcomings and demonstrates the availability of evasion tactics. Part III posits that extra-congressional involvement would be a desirable response to the inherent weakness of self-imposed and self-enforced legislative rules,<sup>13</sup> but that direct judicial review of the rules faces substantial doctrinal difficulties.

In light of such difficulties, Part IV concludes that judicial involvement through a fresh use of statutory interpretation offers a more tenable and worthwhile approach. Specifically, the Article proposes that judges should interpret ambiguous legislation that falls within the ambit of the earmark rules *as if Congress had followed the rules*, notwithstanding the reasons documented in Part II for believing that the rules will be routinely evaded. In other words, if no special interest beneficiary has been disclosed (in accordance with the mandatory earmark disclosure rules), judges should assume that none was intended by Congress and interpret the statute accordingly. In this manner, the Judiciary, by not upholding such special interest deals, would impose costs on lawmakers—as well as the special interests they support—when they defect from earmark rules.<sup>14</sup> Such a counterfactual interpretive stance would have the salutary effect of strengthening congressional adherence to the earmark disclosure rules, while also arriving at a legitimate and meaningful interpretation of the statute in question by deferring to Congress's understanding of the statute's content rather than that of the defecting member. The analytical steps of this proposal should also guide the legal interpretation of statutes by an agency to the extent that the agency is not acting in—either by choice or by legal framework—a strictly policymaking role.

This Article's proposal is situated within a body of academic literature that advances various statutory interpretation methods for spe-

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problem—it is rational for members to rely upon the efforts of others or to defect from a balanced budget goal when other members do the same.”).

<sup>13</sup> See Elster, *supra* note 5, at 1760 (arguing that because “there is nothing external to society,” “societies cannot in a strong sense make themselves unable to renege on their precommitments”) (emphasis omitted).

<sup>14</sup> In this manner, the proposal is loosely analogous to a type of “penalty default rule,” whereby a court can justifiably invalidate a contract when the contracting parties strategically shift costs of completing the contract to the courts. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 95–97 (1989). Recent scholarship has proposed a Penalty Default Canon, mandating that courts hold unconstitutional “statutes whose incompleteness is designed to shift responsibility from the legislature onto other governmental branches.” Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 *GEO. WASH. L. REV.* 663, 667 (2004). Although this proposal identifies and is aimed at curtailing statutes left intentionally vague by individual lawmakers, it does not prescribe constitutional invalidation of such statutes and also does not encompass statutes left intentionally vague by Congress as a whole.

cial interest legislation.<sup>15</sup> As will be discussed in further detail in Part IV, however, it is guided by Congress's own disclosure rules<sup>16</sup> and so differs in an important respect from prior proposals for narrow interpretation of such legislation, thus keeping the interpretive mode within the judicial function.<sup>17</sup>

## I

### BACKGROUND OF EARMARK RULES

#### A. Brief Overview of Legislative Rules

Earmark rules are examples of legislative rules, or internal rules that govern congressional lawmaking.<sup>18</sup> The legislative rules substantially exist in the standing rules of each house. The House adopts its standing rules anew on the first day of each Congress, often by simply re-adopting the prior rules with amendments; the Senate standing rules are in force until revised by the Senate.<sup>19</sup> The Constitution im-

<sup>15</sup> For such prior proposals, see William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 319–37 (1988) (recommending, for example, narrow interpretations of statutes benefiting special interest groups at the expense of the general public); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 663–64 (1996) (arguing that judges are partners with, rather than agents of, the legislature and hence the federal courts must interpret statutes “along public-regarding lines”); Macey, *supra* note 7, at 227–40 (arguing that courts should refuse to uphold interest group deals that are not explicit in statutes); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486–87 (1989) (arguing that courts should narrowly construe interest group deals in statutes); *cf.* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540–44 (1983) [hereinafter Easterbrook, *Statutes’ Domains*] (advocating a textualist interpretation of private interest statutes, but a broad interpretation of public interest statutes); Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–19 (1984) [hereinafter Easterbrook, *Foreword*] (arguing that judges should interpret private interest legislation as a contract); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134–35 (1989) (predicting that judges who accept public choice theory will narrowly construe statutes); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272–73 (1982) (arguing that judges should not speculate as to interest group influence not revealed in public materials).

<sup>16</sup> This Article’s proposal will apply generally to earmark disclosure rules and is not limited to the current incarnation of the rules.

<sup>17</sup> See *infra* notes 316–28 and accompanying text.

<sup>18</sup> H.L.A. Hart would thus classify the earmark rules as “secondary rules,” or laws that govern the process of lawmaking. See H.L.A. HART, *THE CONCEPT OF LAW* 77–79 (1961).

<sup>19</sup> See, e.g., H.R. Res. 6, 110th Cong. (2007) (enacted) (substantially adopting the rules for the House of Representatives of the 109th Congress as the rules for the House of Representatives of the 110th Congress); STANDING RULES OF THE SENATE R. V, cl. 2, S. DOC. NO. 110-9 (2007) (“The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”); Stanley Bach, *Legislating: Floor and Conference Procedures in Congress*, in 2 ENCYCLOPEDIA OF THE AMERICAN LEGAL SYSTEM 701, 702 (Joel H. Silbey ed., 1994) [hereinafter Bach, *Legislating*]. Other legislative rules are not different in kind from the standing rules except that they are not formally incorporated into the standing rules. See Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 732 n.28 (1989) [hereinafter Bach, *Nature*]. Each house also collects preceden-

poses few limitations on the formulation of Congress's legislative rules;<sup>20</sup> each house of Congress adopts its own rules<sup>21</sup> and may unilaterally change them.<sup>22</sup> Furthermore, Congress may enact internal rules through statutes rather than through resolutions;<sup>23</sup> however, adoption via the former requires passage by the other house, as well as the President's signature.<sup>24</sup> Congressional flexibility with respect to legislative rules also exhibits itself in other manners: for instance, each house may choose from several different procedural frameworks in enacting legislation,<sup>25</sup> and it may also waive its legislative rules.<sup>26</sup>

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tial rulings, which carry varying degrees of force. See 1 DESCHLER'S PRECEDENTS, at vii (1977) (stating that precedents are akin to the common law, with the same precedential value); Bach, *Nature, supra*, at 734 (stating that the most weighty precedents are those that have faced action by the entire Senate body). Some precedents may even supplant the standing rules. See Bach, *Nature, supra*, at 733. The houses are also guided by conventional norms and practices. *Id.* at 735.

<sup>20</sup> See, e.g., U.S. CONST. art. I, § 4, cl. 2, amended by U.S. CONST. amend. XX, § 2 (requiring the assembly of Congress at least once a year); *id.* § 7, cl. 1 (providing the origination of revenue bills in the House of Representatives). See generally Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001) (providing a review of the constitutional limits placed on the legislative process).

<sup>21</sup> See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . ."). For an overview of the federal legislative process, see generally WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (4th ed. 1996); Bach, *Legislating, supra* note 19.

<sup>22</sup> See Bach, *Legislating, supra* note 19, at 702.

<sup>23</sup> Why a house might choose to enact internal rules through a statute rather than a resolution is unclear. Elizabeth Garrett argues that statutes serve to coordinate substantive policy directives with internal rules in order to dampen strategic behavior that would more likely arise either in the two-step voting process required by enacting the substantive policy through legislation, or in the internal rules through resolution. See Elizabeth Garrett, *Conditions for Framework Legislation*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 294 (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>24</sup> Some scholars argue that statutes adopting internal rules may be unconstitutional unless they are read to be voidable by one chamber. 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, 383-414 (2003). The Rules of Proceedings Clause may even be read to "bar internal rulemaking through other instruments" such as statutes. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 430 (2004). Additionally, the necessity of executive participation in statutes containing internal rules may violate separation-of-powers principles. See *id.* (arguing that unconstitutionality of statutory internal rules is likely not "good constitutional design").

<sup>25</sup> The Senate, for instance, can invoke cloture to expedite consideration of a bill. STANDING RULES OF THE SENATE R. XXII, S. DOC. NO. 110-9 (2007). The House has five modes of procedural operation that are not necessarily mutually exclusive. Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1345 (1990).

<sup>26</sup> For example, House Rule XV allows for suspension of rules such that bills are considered without points of order and are passed by a two-thirds vote; the Senate may generally waive rules directly by unanimous consent, or, effectively, upon appeal from a point of order by a majority vote. RULES OF THE HOUSE OF REPRESENTATIVES R. XV, H.R. DOC. NO. 109-157 (2007); STANDING RULES OF THE SENATE R. V, S. DOC. NO. 110-9 (2007); see also Bach, *Nature, supra* note 19, at 741 (noting that upon appeal from a point of order, most Senators vote to uphold the ruling based on politics rather than precedent). As part of the Gramm-Rudman-Hollings Act of 1985, the Senate amended the Budget Act to require a

Consistent with this flexibility, at present, legislative rules rely wholly upon internal enforcement by Congress. These rules are enforced by points of order, which are issued upon violations of the rules.<sup>27</sup> In the House, the Speaker and the Chairman of the Committee of the Whole rule on all points of order and are usually not overruled on appeal.<sup>28</sup> Senators, however, may vote on questions of order.<sup>29</sup> Senate rules often require Senators to submit points of order directly to the Senate, and generally a Senator has the power to demand a Senate vote on procedural questions.<sup>30</sup>

## B. The Purposes of Earmark Rules

### 1. *Earmark Rules As Precommitment Devices*

In light of Congress's purview over its legislative rules, it might seem irrational, at first, for legislators to agree to be bound at all by legislative rules. There are, however, logical explanations. A cynic would argue that the earmark rules were enacted after a series of political scandals, and thus may serve the quite rational (but less than laudable) end of appeasing voters in a purely symbolic gesture.<sup>31</sup> Although not without a ring of truth, given the substantial strengthening of the rules over a series of proposals,<sup>32</sup> this account lacks full explanatory force.

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three-fifths vote to waive certain procedural budgetary rules. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. § 900).

<sup>27</sup> Miller, *supra* note 25, at 1345-46.

<sup>28</sup> Bach, *Nature*, *supra* note 19, at 740.

<sup>29</sup> *Id.* at 740-41.

<sup>30</sup> See STANDING RULES OF THE SENATE R. XX, S. DOC. NO. 110-9 (2007).

<sup>31</sup> The cynic may further argue that an inattentive public is none the wiser, and fully anticipates the rules to work. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 68-71 (1990). Elizabeth Garrett identifies at least five purposes of congressional procedural rules, or "framework legislation": (1) responding in a symbolic fashion to a high-profile problem; (2) providing fundamental rules for later decision making; (3) facilitating collective action; (4) entrenching and precommitting to outcomes; and (5) changing the internal balance of Congress. Garrett, *Purposes*, *supra* note 2, at 733-64. As I will discuss, the earmark rules serve several of these purposes. For the classic works on symbolic legislation, see generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1974) (examining the importance of symbols in political claims); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990) (criticizing the enactment of symbolic legislation as a failure by Congress to resolve fundamental policy questions). See also Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 47-48, 77 (1990) (discussing the symbolic function of tax legislation). For an assessment of the possible underutilization of symbols, such as reward and community, in the tax legislative context, see William Blatt, *The American Dream In Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 *TAX L. REV.* 287 (1996).

<sup>32</sup> See *infra* notes 68-117 and accompanying text.

A less cynical account holds that legislative rules are enacted behind a Rawlsian “veil of ignorance”<sup>33</sup> that forces legislators to formulate rules in the interests of society, rather than in their own self-interests. Specifically, the rules are adopted without the identification of who will benefit or suffer by them—that is, in something like an “original position.”<sup>34</sup> To be sure, because all legislative rules are subject to change—for example, in the House they may simply expire at each session—the veil of ignorance may lift, especially given the short time frame in which the rules may operate.<sup>35</sup> At least in the case of the earmark rules, however, the precise political repercussions of disclosure were not likely apparent at the time of the rules’ adoption.

Legislators can use the veil of ignorance to commit themselves to serving the long-term interests of fiscal prudence and political accountability, rather than succumb to the demands of interest groups.<sup>36</sup> In this manner, legislative rules enable congressional members to save themselves from themselves, in anticipation of their lack of self-discipline.<sup>37</sup> Jon Elster has defined akin devices as precommitments, put into place when a “person acts at one point in time in order to ensure that at some later time he will perform an act that he could but would not have performed without that prior act.”<sup>38</sup> This goal is effectuated by committing an act that cannot be undone or, if so, only at substantial cost.<sup>39</sup>

Precommitment devices are often employed in the budgetary context,<sup>40</sup> where legislators may bestow benefits upon interest groups in exchange for rents, thereby leading to excessive spending or the

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<sup>33</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971) (arguing that principles of justice should be chosen behind a “veil of ignorance” such that “no one knows . . . his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like”).

<sup>34</sup> See *id.* at 136–42 (using this original position, whereby those in charge of formulating societal rules know nothing about their position in society, as a tool to eradicate distorting effects of knowledge of existing beneficiaries); Vermeule, *supra* note 20, at 399 (“A veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers . . . by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision.”).

<sup>35</sup> Garrett, *Purposes*, *supra* note 2, at 739.

<sup>36</sup> For instance, suppose an actor, at Time 1, wants to quit drinking but predicts that at Time 2 he will succumb to his addiction. If at Time 1 he can act to ensure he will incur costs if he does succumb (for instance, by ingesting disulfiram, a drug that causes serious illness upon ingestion of alcohol); and if the cost of that action is less than the value difference between drinking and not drinking as he sees it at Time 1; then the actor will rationally precommit himself.

<sup>37</sup> Jon Elster’s work represents the classic study of precommitment devices. See ELSTER, *ULYSSES AND THE SIRENS*, *supra* note 1; ELSTER, *ULYSSES UNBOUND*, *supra* note 1.

<sup>38</sup> Elster, *supra* note 5, at 1754.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., Staudt, *supra* note 2, at 1116–18.

enactment of laws with diffuse costs that benefit narrow interests.<sup>41</sup> Because it may be rational for lawmakers to rely upon the efforts of their colleagues in meeting the goal of a reduced deficit or, alternatively, to defect from that goal when others do so, Congress (or at least so the theory goes) employs precommitment devices to overcome these coordination difficulties.<sup>42</sup>

Earmark rules are akin to precommitment devices, albeit in weak form.<sup>43</sup> Although each member of Congress primarily may value transparency as a means to deliberation and accountability, and perhaps ultimately to a reduction in spending, any given member may defect from this goal in service of self-interest unless others are bound to it. By agreeing as a whole to disclose hidden interest group deals, Congress overcomes collective action and free-rider problems that would otherwise cause its members to engage in subterfuge. In this manner, earmark rules serve to bind congressional members to the common goal of transparent legislation. Predictably, however, individual members may later find the constraints imposed by the earmark rules undesirable when in conflict with more immediate goals,<sup>44</sup> and hence may develop methods to circumvent them.<sup>45</sup> Such circumvention may lead to the very collective action problems that the rules are supposed to avoid: if members become aware that their peers are not following the internal rules, they too will abandon the

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<sup>41</sup> See, e.g., Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment that Does What It Is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1465–66 (1997) (discussing public choice theory and noting the effect of self-motivated legislators); see also, e.g., James M. Buchanan, *Procedural and Quantitative Constitutional Constraints on Fiscal Authority*, in THE CONSTITUTION AND THE BUDGET 80, 80–84 (W.S. Moore & Rudolph G. Penner eds., 1980) (reviewing proposals for constitutional fiscal restraints). See generally TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980) (presenting a compilation of articles that review rent-seeking behaviors, which are defined as resource-wasting activities of individuals seeking transfers of wealth through the aegis of the state; additionally, proposing institutional reform); GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING (1989) (suggesting improvements to rent-seeking theories).

<sup>42</sup> See, e.g., Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 15 n.94 (1998) (arguing that Congress restrains itself from deficit increases by delegating some enforcement power to the President). For instance, a collective action problem may occur when lawmakers logroll, or exchange bilateral votes on pet projects. This problem arises most often when a non-attentive public bears the costs of the actions, such as in the appropriations and tax expenditure context. See SHARYN O'HALLORAN, POLITICS, PROCESS, AND AMERICAN TRADE POLICY 31–32 (1994).

<sup>43</sup> Using a helpful distinction, the earmark rules function as a “majoritarian precommitment,” where “today’s majority . . . bind[s] itself against future temptations,” as opposed to “cross-temporal entrenchment,” which involves “today’s majority seeking to control future majorities.” Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 507 (1997) (emphasis omitted).

<sup>44</sup> See Seto, *supra* note 41, at 1465–66.

<sup>45</sup> See, e.g., Kysar, *supra* note 2, at 347–49 (reviewing methods of circumvention techniques in the budgetary context).

rules. These tendencies towards defection are especially true in a self-governing regime, such as that of legislative rules.<sup>46</sup>

## 2. Earmark Rules As Transparency Devices

The above discussion illustrates that earmark rules function primarily as precommitment devices to achieve transparency in the legislative process. In doing so, earmark rules aim to keep undesirable interest group influence at bay through the principled discussion of legislation and a heightened accountability of legislators.<sup>47</sup> Although thorough examination of whether transparency can achieve these goals is outside the scope of this Article, this section briefly explores the concepts underlying the stated relationship.<sup>48</sup>

Many commentators consider deliberation to be a predominant virtue of American lawmaking,<sup>49</sup> which potentially increases the amount of legislation in furtherance of the public interest.<sup>50</sup> Because the earmark rules surface previously hidden deals with interest groups,<sup>51</sup> they are within a category of rules adopted to promote legis-

<sup>46</sup> Others have noted that the separation of powers strengthens political precommitments. ELSTER, ULYSSES UNBOUND, *supra* note 1, at 146–53; Elster, *supra* note 5, at 1773.

<sup>47</sup> A transparent design of the legislative process has the potential to reduce citizens' monitoring costs of their legislative agents, who may otherwise shirk their duties or engage in self-dealing. Additionally, in the spending and revenue context at issue here, "transparency is particularly important because individual decisions can be lost in the midst of detailed and obscurely worded omnibus bills. In the absence of visibility, accountability is virtually impossible." Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 924 (1999).

<sup>48</sup> This Article, for instance, does not address developments in the psychology literature that suggest, in the conflicts of interests area, that (1) it is unlikely that recipients will be able to use disclosures of conflicts of interests to discount advice correctly, even if the disclosures are honest and thorough, and (2) that advisors may further skew advice if they fear the recipients will discount it in light of disclosure, and because they feel absolved or unfairly penalized from the disclosure. See Daylian M. Cain et al., *Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 104, 114–18 (Don A. Moore et al eds., 2005); see also Dale T. Miller, *Commentary: Psychologically Naïve Assumptions About the Perils of Conflicts of Interests*, in CONFLICTS OF INTEREST, *supra*, at 126.

<sup>49</sup> See, e.g., 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 232 (Henry Steele Commager ed., Henry Reeve trans., Oxford Univ. Press 1946) (1835) (stating that the United States has "a conciliatory government under which resolutions are allowed time to ripen; and in which they are deliberately discussed, and executed with mature judgment").

<sup>50</sup> Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 377 ("The underlying theory of Madisonian republicanism is that well-informed deliberation is the method most likely to further the public interest."). But see Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 944 (1988) (arguing that deliberation is only one among many tools that reduce the influence of interest groups).

<sup>51</sup> To be sure, interest groups can provide information valuable to the legislative process. For instance, De Tocqueville argued that American participation in interest groups was an essential aspect of democracy. See DE TOCQUEVILLE, *supra* note 49, at 191–98. Inter-

lative deliberation.<sup>52</sup> A strict, early form of public choice theory hypothesizes that legislators view their preferences as exogenous to the legislative process and so are simply unaffected by legislative deliberation.<sup>53</sup> Although this form of public choice theory likely reveals the tendencies of interest group influence upon legislators,<sup>54</sup> more recent scholarship accepts a more expansive view of lawmakers' preferences to include satisfaction of their ideologies, as well as the accumulation of power and prestige,<sup>55</sup> thereby suggesting that congressional mem-

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est group activity should not then be viewed as inherently problematic, but its information-producing function assumes that its efforts are open and discernable to lawmakers and the public. The New Textualists believe that interest groups hide their policies within the legislative history, whereas other scholars have argued that the legislative history of a statute more often outlines its public-regarding purposes. See Macey, *supra* note 7, at 232. The earmark rules satisfactorily address hidden special interest provisions in both the statute and the conference report.

<sup>52</sup> Indeed, certain features of the legislative process directly encourage deliberation. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 363–65 (Leonard W. Levy ed., Da Capo Press 1970) (1833) (arguing that bicameralism promotes deliberation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–09 (1997) (stating that “the requirements of Article I, Section 7 promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation” and that “by relying on multiple, potentially antagonistic constitutional decisionmakers, the legislative process prescribed by Article I often produces conflict and friction, enhancing the prospects for a full and open discussion of matters of public import”).

<sup>53</sup> See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1700 (1988); Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149, 152 (1994). The central maxim of public choice theory is that political participants are rational maximizers of utility. BUCHANAN & TULLOCK, *supra* note 12, at 3–39.

<sup>54</sup> For example, public choice theory speculates that legislation providing concentrated benefits and distributed costs—like tax legislation—will proliferate due to heightened interest group activity. See Shaviro, *supra* note 31, at 56–57 (stating that “tax legislation generally is distributive, leading one to expect that it will be a positive-sum game for participants at the expense of the general public”). See generally OLSON, *supra* note 12 (arguing that groups with concentrated interests dominate over those with diffuse interests in the legislative process); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1973) (applying organization theory to political parties and other groups).

<sup>55</sup> See Shaviro, *supra* note 31, at 66–68 (stating that legal scholarship adopts a narrower view of legislative behavior, thus truncating views as accepted in the political science literature; also arguing that certain types of public choice theory have some explanatory power but need to be supplemented by a theory that appreciates other motivations for legislation, especially the symbolic importance of legislation to voters, the lawmakers' taste for power and prestige, and the lawmakers' ideological satisfaction); see also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 889–90 (1987) (arguing that public choice theory improperly rejects ideology—that is, individual beliefs about the public interest—of voters and legislators). Certain empirical evidence supports the notion that ideology and good policymaking more accurately predict the voting behavior of a congressional member than economic interests. See *id.* at 897–900.

bers indeed can be influenced by the process in which they participate.<sup>56</sup>

Even if we accept the premise of the transformative power of deliberation on the legislative process, it remains unclear whether transparency and disclosure accomplish those goals; indeed, transparency may actually *distort* the deliberative process. For example, a lawmaker may not feel free to defect from earlier, public pronouncements in fear of being labeled a “flip-flopper.” In this manner, transparency may promote polarization and partisanship in the political dialogue.<sup>57</sup> With increased transparency, lawmakers may also feel compelled to respond to the whims of public passion without regard to merit.<sup>58</sup> Additionally, transparency of voting behavior may thwart logrolling, a politically expedient practice that is not uniformly viewed as undesirable.<sup>59</sup>

Unlike these ambiguous implications of political transparency, the earmark rules aim to cure deliberative distortions that occur from ignorance of the full content of legislation, a seemingly uncontroversial and clear goal. If special interest projects are transparent, congressional members and interest groups will have the opportunity to

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<sup>56</sup> See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1550 (1988) (“The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups; republicans emphasize that deliberative processes are often undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence.”).

<sup>57</sup> See Cass R. Sunstein, *The Law of Group Polarization*, 10 *J. POL. PHIL.* 175, 176 (2002) (stating that “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies”) (emphasis omitted). Because of these concerns, the Framers closed the sessions at the Philadelphia Convention in order to maintain openness in deliberation. 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 479 (Max Farrand ed., rev. ed. 1966) (“Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument. Mr. Madison thinks no Constitution would ever have been adopted by the convention if the debates had been public.”) (narrative of Jared Sparks upon a visit with James Madison).

<sup>58</sup> See Vermeule, *supra* note 24, at 412 (“Without transparency, agents gain less from adopting positions that resonate with immediate popular passions, so transparency may exacerbate the effects of decisionmaking pathologies that sometimes grip mobilized publics.”).

<sup>59</sup> Although some argue that vote trading detracts from the achievement of public-oriented policies by imposing welfare-reducing externalities on those not voting, another view is that logrolling accurately registers the intensity of voters’ preferences. See Thomas Stratmann, *Logrolling*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 322, 322 (Dennis C. Mueller ed., 1997) (“Today, no consensus exists in the normative public choice literature as to whether logrolling is on net welfare enhancing or welfare reducing . . .”). A related consequence of the earmark rules may be a reduction in bipartisanship. See Bob Cusack, *Bipartisanship a Likely Casualty of Earmark Reform*, *THE HILL*, Feb. 16, 2006, at 4, LexisNexis Academic (arguing that in the past, agreements were reached in previous legislation because congressional members wanted to save their own pet projects and because both parties had an interest in maintaining the status quo).

debate their merits. Some scholars, however, have argued that disclosure of information may allow interest groups to “expos[e] decision makers to intensive scrutiny and threats of electoral retaliation.”<sup>60</sup> This view suggests that because interest groups can use the disclosed information to monitor whether lawmakers have maintained their deals whereas an ordinary voter has little ability to change legislative behavior through transparency, the earmark rules may, on balance, empower interest groups.<sup>61</sup> An alternative, convincing position is that disclosure will increase competition among interest groups by creating greater awareness of the conflict over limited budgetary resources. In so doing, the rules will encourage legislators and interest groups to substantiate their policies with reasoned goals and provide opportunities for lawmakers to review such decisions.<sup>62</sup> Indeed, the vicious fight over the enactment of the earmark rules strongly suggests that interest groups view disclosure of special interest projects as *detrimental* to their interests; historical events substantiate this view. For instance, after

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<sup>60</sup> Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 68, 80 (Elizabeth Garrett et al. eds., 2008). Ferejohn’s work suggests that the political realm incentivizes agents to desire some degree of transparency. John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in *DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION* 131, 133–40 (Adam Przeworski et al. eds., 1999). Garrett and Vermeule, however, do not think such incentives will necessarily produce the optimal mix of transparency. See Garrett & Vermeule, *supra*, at 93–94; see also Alberto Alesina & Roberto Perotti, *Fiscal Discipline and the Budget Process*, 86 *AM. ECON. REV.* 401, 403 (1996) (noting that “[p]oliticians typically do not have an incentive to adopt the most transparent practices” because they want to maintain their informational advantage). For additional examples of literature discussing disclosure regimes in the political context, see Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 *ELECTION L.J.* 295 (2005); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus”*, 50 *UCLA L. REV.* 1141, 1179 (2003) (proposing that campaign regulations “(1) produce heuristic cues for voters by requiring disclosure from prominent campaign advocates; and (2) increase public awareness of those heuristic cues by broadcasting them to the public in a highly visible way”).

<sup>61</sup> See Garrett & Vermeule, *supra* note 60, at 79–80. Because of this difference between desirable and undesirable accountability, they argue for a system of transparency that simultaneously provides information at a time when it reaches the public prior to elections but after the point it can be used to advantage interest groups. *Id.* at 83–87.

<sup>62</sup> See Garrett, *Harnessing Politics*, *supra* note 2, at 504–05 (arguing that budgetary offset requirements create competition among interest groups that ultimately results in better legislative deliberation and accountability). Relatedly, recent press articles argue that the earmark rules may have increased the appetite for special interest projects. See, e.g., Edmund L. Andrews & Robert Pear, *With New Rules, Congress Boasts of Pet Projects*, *N.Y. TIMES*, Aug. 5, 2007, at A1 (“Eight months after Democrats vowed to shine light on the dark art of ‘earmarking’ money for pet projects, many lawmakers say the new visibility has only intensified the competition for projects by letting each member see exactly how many everyone else is receiving.”). See generally EDELMAN, *supra* note 31 (describing how congressional activities are directed towards interest groups in contrast with public dissemination of such information). These stories, however, are based on anecdotal information, and they overlook data that suggests earmarks have decreased while the rules have been in place (although admittedly establishing no causal relationship). See Rahm Emanuel, *Op-Ed.*, *Don’t Get Rid of Earmarks*, *N.Y. TIMES*, Aug. 24, 2007, at A19.

numerous special interest tax provisions enacted in the Tax Reform Act of 1986 were heavily publicized, public outrage forced the Senate Finance Committee to adopt rules against such provisions.<sup>63</sup>

Finally, despite the seemingly obvious connection, special interest provisions may not have a strong correlation to undesirable or inefficient spending.<sup>64</sup> In assessing the benefits of earmark disclosure, however, one should not overlook the symbolic importance of the rules' adoption and their explicit pronouncement that congressional members should no longer hide benefits afforded to special interests.<sup>65</sup> This expressive gesture may restore voters' trust in Congress, thus strengthening the democratic process.<sup>66</sup> Additionally, in the revenue context, voters who perceive a fair tax system may be more compliant with it.<sup>67</sup> On balance, a preliminary analysis of the earmark rules indi-

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<sup>63</sup> See Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563, 567 (1989) ("A congressional aide commented that '[t]he public outrage [over the targeted tax provisions] directed at committee members has had a profoundly sobering effect.'"); Robert D. Hershey Jr., *Tax-Writing Rules Altered by Bentsen*, N.Y. TIMES, June 13, 1989, at D6 (describing new rules). One scholar has suggested that, although a lawmaker may gain respect of some constituents for the ability to appropriate federal funds to the district, disclosure is generally "stigmatizing" due to the limited number of such constituents—particularly if the lawmaker aspires to serve a broader constituency. Garrett, *supra* note 47, at 931.

<sup>64</sup> Although the Congressional Research Service calculated earmarks to amount to over sixty-four billion dollars in 2006, see John Fund, *Earmark Cover-Up*, WALL ST. J., Mar. 26, 2007, at A15, one federal budgetary analysis group has taken the position that reducing earmarks will not necessarily result in the reduction of federal spending because federal and state agencies, rather than Congress, will make the expenditures. Washington Budget Report, *April 23, 2007 Backgrounder: Earmark Reform; Senate Appropriations Committee Adopts Earmark Disclosure Policy*, <http://washingtonbudgetreport.com/Archives/B.earmarks.php>. Also, in *Clinton v. City of New York*, which held the Line Item Veto Act of 1996 (LIVA) unconstitutional, the dissenting opinion stated that limited tax benefits under the Act, which were targeted at one hundred or fewer beneficiaries, "amount to a tiny fraction of federal revenues and appropriations." 524 U.S. 417, 487 (1998) (Breyer, J., dissenting). The number of "limited tax benefits" has decreased in recent years. This decrease may be due, however, to the fact that after 1993, Congress's consideration of tax increases decreased, and thus targeted relief from such increases was unnecessary. Michael W. Evans, *The New Rules for Limited Tax Benefits in Tax Legislation*, 119 TAX NOTES 597, 600 (May 12, 2008).

<sup>65</sup> Additionally, the costs of gathering such information should not be prohibitive because congressional members will generally be aware of both the special interest legislation they support and the potential beneficiaries, although collecting the information into a publicly accessible medium may require consequential resources.

<sup>66</sup> Admittedly, however, voters may also lose faith in the democratic process once such interest group relations are exposed. Farber & Frickey, *supra* note 55, at 925 ("Increasing public awareness of the significance of interest groups may become the basis for constructive political action against them, but also may trigger a widespread cynicism destructive of the democratic process.").

<sup>67</sup> See Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, but a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 8 (1997) (arguing that although "special interest tax breaks and pork-barrel spending undermine the faith of the American people in the tax system and eat away at its foundation," LIVA may be valuable by restoring tax integrity, even if it has little effect on the deficit).

cates a potential to transform the lawmaking process through the promotion of transparency, deliberation, and accountability.

## II

### THE ADOPTION OF EARMARK RULES

#### A. Precipitating Political Factors and Early Proposals

As will be made evident below, the definition of an earmark is somewhat elusive, but earmarks generally are funds bestowed by Congress upon projects or programs by specifying a narrow location or recipient, or without a competitive allocation process.<sup>68</sup> Congress includes earmarks in appropriations and authorization bills. In many cases, however, earmarks are not included in the bill itself but are placed in the attached report language.<sup>69</sup> Earmarks are commonly “airdropped” into the Senate–House conference agreement or the joint explanatory statement,<sup>70</sup> a practice so named to emphasize that the provisions have not been voted on in the precedent House or Senate Bills and, because of legislative rules, likely will not be stricken by amendment.<sup>71</sup> Traditionally, the definition of an earmark, while clearly including spending provisions, did not cover tax provisions tailored to narrow interests.<sup>72</sup> Such provisions, however, were labeled “tax earmarks” during the earmark reform debates by members of the Appropriations Committees in order to highlight a perceived uneven scrutiny of spending bills, absent any focus on equally problematic tax benefits geared toward special interests.<sup>73</sup>

The earmark rules were first written in response to politically infamous events in 2005, 2006, and 2007—such as the Cunningham and Abramoff scandals and an earmark-laden transportation bill made sali-

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<sup>68</sup> See H.R. Res. 6, 110th Cong. § 404(a) (2007) (enacted); Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760.

<sup>69</sup> Of course, non-statutory language is not binding upon an agency, but agencies generally defer to such requests. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 649–52 (2006); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 613–14 (1988).

<sup>70</sup> See, e.g., 132 CONG. REC. 26,596 (1986) (statement of Sen. Packwood) (indicating that nearly a third of targeted transition relief provisions had been inserted at the conference agreement stage).

<sup>71</sup> Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 836 (1991) (“When the conference agreement returns to the full House and Senate for approval, it is extremely difficult to amend, because an amended version requires approval of the other body and places the overall compromise in jeopardy.”).

<sup>72</sup> The former Chairman of the Senate Finance Committee, Senator Chuck Grassley stated, “I think it’s a stretch of the use of the word ‘earmark’ to include tax provisions as earmarks.” Elana Schor, *Baucus not Inclined to Plan Earmark Disclosure Request*, THE HILL, May 3, 2007, at 4, LexisNexis Academic.

<sup>73</sup> See *id.*

ent by the Bridge to Nowhere—all of which involved controversial or illegal lobbying, or spending on behalf of interest groups.<sup>74</sup> In the wake of these events, public approval ratings of Congress dropped precipitously. Perhaps justifying the public's views, a study released by the Congressional Research Service indicated that congressional spending on special interests had increased by 300 percent from the years 1994 to 2005.<sup>75</sup> In 2006, the issue had become so visible that in his State of the Union Address, President George W. Bush expressed unprecedented support of earmark and lobbying reform.<sup>76</sup> By the Spring of 2006, there were numerous bills introduced on earmark and lobbying reform.<sup>77</sup> Although it never became binding, the Senate passed one such bill that applied disclosure requirements to earmarks within both appropriations and authorization bills,<sup>78</sup> whereas other

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<sup>74</sup> See Charles R. Babcock, *Earmarks Became Contractor's Business: Fee Reportedly Included Share of Firms*, WASH. POST, Feb. 21, 2006, at A3 (recounting improper fees obtained by California defense contractor/lobbyist in connection with the Cunningham scandal); Mark Mazzetti, *Report Spells Out Favors by Former Congressman*, N.Y. TIMES, Oct. 18, 2006, at A15 (reporting on former Congressman Randy Cunningham's acquisition of earmarks in exchange for more than \$2,000,000 in bribes); Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff: How a Well-Connected Lobbyist Became the Center of a Far-Reaching Corruption Scandal*, WASH. POST, Dec. 29, 2005, at A1 (detailing the corruption probe of the once-powerful Republican lobbyist); Peter Robison, *Alaska's \$223 Mln 'Bridge to Nowhere' Envied in U.S. Northwest*, BLOOMBERG.COM, Sept. 2, 2005, <http://www.bloomberg.com/apps/news?pid=10000103&sid=AWA7joXO0bRk> (covering a proposed \$223,000,000 federal earmark sponsored by Alaskan lawmakers to build the Gravina Island Bridge, also known as the Bridge to Nowhere, due to the island's scant population of fifty residents). Immediately prior to the House's passage of House Rule XXI, a 2007 lobbying and ethics reform effort, discussed *infra* text accompanying notes 84–91, federal agents raided the home of Senator Ted Stevens due to allegations that he had illegal ties to lobbyists and defense contractors. See Dan Eggen & Paul Kane, *Alaska Senator's Home Is Raided: Stevens Scrutinized in a Wide Inquiry into Corruption in the State*, WASH. POST, July 31, 2007, at A1. A jury convicted Senator Stevens on seven felony charges related to those allegations. See Neil A. Lewis, *Senator Is Guilty over His Failures to Disclose Gifts*, N.Y. TIMES, Oct. 28, 2008, at A1.

<sup>75</sup> Press Release, Office of U.S. Sen. John McCain, McCain Statement on Earmark Reform Before Senate Rules Committee (Feb. 8, 2006), available at <http://mccain.senate.gov/public/> (follow "Press Office" and "Press Releases" hyperlinks; then browse by February 2006 and follow "GO" hyperlink).

<sup>76</sup> President George W. Bush, State of the Union Address (Jan. 31, 2006), available at <http://www.whitehouse.gov/stateoftheunion/2006/index.html> ("I am pleased that members of Congress are working on earmark reform, because the federal budget has too many special interest projects. And we can tackle this problem together, if you pass the line-item veto.").

<sup>77</sup> See, e.g., Lobbying Transparency and Accountability Act of 2005, S. 2128, 109th Cong. §§ 106, 201, 304 (amended in 2006) (requiring, among other initiatives, lobbying firms and political action committees to disclose campaign contributions, fundraisers and gifts made to congressional members and staff; extending the time limit barring congressional members, staff and certain members of the executive branch from lobbying; and requiring congressional members and staff to pay fair market value for entertainment tickets). A companion bill introduced in the House gained no co-sponsors. See H.R. 4667, 109th Cong. (2006).

<sup>78</sup> Legislative Transparency and Accountability Act of 2006, S. 2349, 109th Cong. § 3. Because the Senate chose to enact this set of legislative rules as a bill, it required, but failed

proposals confined their reach to the former, more traditional vehicle for earmarks.<sup>79</sup> Although the proposed Senate earmark definition was expansive in this respect, it applies exclusively to bills that specified the recipient and then amount of governmental assistance on their face.<sup>80</sup> The definition thus does not apply to the many provisions that mask their special interest origins and indeed would encourage legislators to engage in further subterfuge. For example, instead of explicitly naming Gravina island as the recipient of the Bridge to Nowhere, legislation might state that funding be awarded “to any bridge project within one hundred miles of the coordinates 55°15’N, 131°45’W” (the location of Gravina island), thus evading the proposed earmark rules.

No consensus on earmark reform had been reached until, on September 14, 2006, the House passed House Resolution 1000, which made it “out of order” for the remainder of the year to consider a bill reported by a committee unless a list of earmarks and the members who requested them were included in the report.<sup>81</sup> An anti-“airdrop” provision disallowed consideration of a conference report unless its joint explanatory statement included a list of earmarks not committed to the conference committee or otherwise disclosed.<sup>82</sup> Tax legislation and conference reports generally could not be considered unless the Joint Committee on Taxation (JCT) had identified tax earmarks included in the bill or report or had declared it to be free of tax earmarks.<sup>83</sup>

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to receive, a vote on the bill from the House. Thus, the legislative rules did not become binding on the Senate even though that body could have passed the rules as a simple unilateral resolution without action from the House. *See supra* notes 23–24 and accompanying text.

<sup>79</sup> *See, e.g., id.* Although appropriation bills have been the principle vehicles for earmarks, their use in the authorization context has been notable. For instance, the transportation bill that, according to the Taxpayers for Common Sense carried more than 6,300 earmarks, including the Bridge to Nowhere, is categorized as an authorization bill. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1101, 119 Stat. 1144, 1153 (2005); *see also* David D. Kirkpatrick, *Alaskan Gets Campaign Cash; Florida Road Gets U.S. Funds*, N.Y. TIMES, June 7, 2007, at A1. Authorization bills renew or extend a government agency or program by providing spending authority to ongoing entitlement programs such as Social Security or by setting funding levels for certain agencies and programs. *See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 50–52 (rev. ed. 2000) (providing an overview of the federal budgetary process).

<sup>80</sup> S. 2349, § 103.

<sup>81</sup> H.R. Res. 1000, 109th Cong. § 1(a) (2006) (enacted).

<sup>82</sup> *Id.* § 1(a)(2).

<sup>83</sup> House Resolution 1000 defined an earmark to include (1) in the case of appropriation bills or accompanying conference reports, provisions or recommendations of “budget authority for a contract, loan, loan guarantee, grant, or other expenditure,” *id.* § 2(a)(1), to either a non-federal entity specifically identified in the bill or report, *id.* at § 2(a)(1)(A), or, if outside a competitive bidding process, to an identifiable entity, specific state, or congressional district, *id.* § 2(a)(1)(B); (2) in the case of other bills or accompanying conference reports, in addition to the preceding definitions, authorizations that preempt

## B. Earmark Rules

### 1. *House Earmark Rules*

Because House standing rules are adopted anew with each session of Congress, House Resolution 1000 was short-lived; the House of the 110th Congress, however, adopted revised earmark rules as one of its first acts as a new body.<sup>84</sup> House Rule XXI (enacted through House Resolution 6) requires that all bills, joint resolutions, and joint explanatory statements to conference reports, prior to consideration, contain a list of earmarks, limited tax benefits, and limited tariff benefits in the bill—including the name of the member who requested the item, or a statement that the bill or joint resolution contains no such items.<sup>85</sup> The House enforces this rule upon itself by making a point of order available if these submissions or statements are not provided.<sup>86</sup> For bills or joint resolutions that are not reported by a committee, such information must be printed in the Congressional Record prior to consideration.<sup>87</sup>

Additionally, House Rule XXI requires a member requesting earmarks, limited tax benefits, or limited tariff benefits to provide a written statement to the chairman and the ranking member of the committee of jurisdiction with the following information, to be made available to the public: their own name; the name and address of the intended recipient of an earmark (or the location of the activity if there is no such recipient); the name of the beneficiary in the case of a limited tax or tariff benefit; the purpose of any such provision; and a certification that neither the member nor the member's spouse has a financial interest in the provision.<sup>88</sup> Finally, the rule attempts to curb logrolling by prohibiting funding for earmarks, limited tax benefits, or limited tariff benefits conditioned on any vote cast by another congressional member.<sup>89</sup>

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statutory or state administrative allocation authority, *id.* § 2(a)(2). The resolution narrowly defined a tax earmark to mean a provision that (1) reduces federal tax revenues for the first year it is effective or for the five-year period after its effective date and (2) provides a federal tax deduction, credit, exclusion, or preference to only one beneficiary. *Id.* § 2(b)(1). It then goes on to list several groups of entities that constitute a single beneficiary, such as entities within the same controlled group of corporations; shareholders, partners, members, or beneficiaries of a corporation, partnership, association, or trust; all employees or qualified plans of an employer; all bondholders of the same issue of securities; and all contributors to a charitable organization. *Id.* § 2(b)(1)(2).

<sup>84</sup> H.R. Res. 6, 110th Cong. (2007) (enacted).

<sup>85</sup> *Id.* § 404. Just prior to this Article's publication, the House of the 111th Congress re-adopted House Rule XXI, expanding its scope to include provisions airdropped into conference reports. H.R. Res. 5, 111th Cong. (2009) (enacted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 404(b).

<sup>89</sup> *Id.*

House Rule XXI defines an “earmark” as follows:

[A] provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.<sup>90</sup>

“Limited tax benefits” are defined to include only those (1) “revenue losing provision[s]” that (a) “provide[ ] a Federal tax deduction, credit, exclusion, or preference to 10 or fewer beneficiaries under the Internal Revenue Code of 1986” and (b) “contain eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision” or (2) any federal tax provision that provides transition relief to only one beneficiary.<sup>91</sup> House Rule XXI dispenses with the feature from House Resolution 1000 that the JCT determines the list of limited tax benefits, instead relying upon House members to come forth with their special interest requests.

## 2. *Senate Earmark Rules*

At the beginning of the 110th Congress, the Senate easily passed earmark rules as part of a lobbying and ethics reform package in Senate Bill 1.<sup>92</sup> The Senate rules, however, were not effective until the fall of 2007 because they were part of a bill rather than a resolution; accordingly, they had to be enacted by the House and signed by the President before incorporation into Senate procedure.<sup>93</sup> After several months of negotiating, the two houses finally reached an agreement over the lobbying and ethics bill, and an amended bill—the Honest

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<sup>90</sup> *Id.* § 404(a).

<sup>91</sup> *Id.* Similarly, the rule defines a “limited tariff benefit” to be a modification of the tariff schedule that benefits ten or fewer entities. *Id.*

<sup>92</sup> Legislative Transparency and Accountability Act of 2007, S.1, 110th Cong. This act also contained extensive restrictions and disclosure requirements on lobbying activities that are beyond the scope of this Article.

<sup>93</sup> See Online Report, History of Bills, <http://www.gpoaccess.gov/hob/search.html> (select “History of Bills, Volume 153 (2007)”); enter “S. 1” in search field; click “Submit”; follow “Text” hyperlink next to result for “S. 1”) (tracking the legislative history of the Legislative Transparency and Accountability Act of 2007 and ultimately noting its enactment into public law on September 14, 2007). In contrast, because the House had adopted its rules through a resolution, they were incorporated upon a successful House vote without further action by the Senate or the President. See Online Report, *supra* (use same search pattern as in *id.*, but, at the last step, follow “Text” hyperlink next to result for “H. Res. 6”) (noting that the changes to Titles I–V in House Resolution 6 were agreed to on January 4th and 5th of 2007). At the time of this Article’s publication, the Senate of the 111th Congress had not altered the earmark rules; thus, the earmark rules of the Act continue to apply in the Senate.

Leadership and Open Government Act of 2007 (the Act)<sup>94</sup>—was passed by the House on July 31, 2007,<sup>95</sup> and by the Senate two days later,<sup>96</sup> in both instances by an overwhelming majority. Despite first threatening to veto the bill,<sup>97</sup> President Bush signed it into law on September 14, 2007.<sup>98</sup> During a portion of the eight and a half month period between the Senate's first vote on Senate Bill 1 and the President's signature, the Senate Appropriations Committee adopted informal earmark standards under pressure from earmark reform supporters.<sup>99</sup>

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<sup>94</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760.

<sup>95</sup> See Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 763 on Motion to Suspend the Rules and Pass, as Amended, Honest Leadership and Open Government Act of 2007 (July 31, 2007), <http://clerk.house.gov/evs/2007/roll763.xml> (showing that 411 representatives voted in favor of the bill's passage).

<sup>96</sup> See Senate Bill Clerk, U.S. Senate, Vote Number 294: On the Motion to Concur in the Amendment of the House to S.1 (Aug. 2, 2007), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=110&session=1&vote=00294](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00294) (stating that eighty-three Senators voted in favor of the bill). A Republican faction of fourteen Senators voted against the bill, decrying its earmark rules as too weak. See 153 CONG. REC. S10,692 (daily ed. Aug. 2, 2007) (statement of Sen. McCain) (stating that the bill had "completely gutted" earmark reform).

<sup>97</sup> See John Stanton, *Leaders Holding Ethics Bill*, ROLL CALL, Aug. 13, 2007, LexisNexis Academic (noting Democratic leaders' wariness of President George W. Bush's potential use of a pocket veto).

<sup>98</sup> See Press Release, Office of the Press Sec'y, President Bush Signs Honest Leadership and Open Government Act of 2007 (Sept. 14, 2007) (on file with author); see also Bart Jansen, *Lobbying Bill Signed into Law*, CONG. Q., Sept. 14, 2007, <http://public.cq.com/docs/cqt/news110-000002584737.html>.

<sup>99</sup> In April 2007, Senator Robert Byrd, the Chairman of the Senate Appropriations Committee, announced that his committee would immediately adhere to the standards similar to the earmark rules passed by the Senate as part of Senate Bill 1, including the adoption of the earmark definition as it applied to appropriations. Under the new committee rule, the committee bill and report had to clearly include the name of the Senator requesting the earmark, as well as its amount, recipients, and purpose. The rule also required that Senators certify that neither they nor their spouses have financial interests in any earmark they requested. Press Release, U.S. Senate Comm. on Appropriations, *supra* note 9. However, because the new Appropriations Committee standards were not formally incorporated in Senate procedure, no Senator could object to provisions that were not in accordance with the standards and Republican Senators criticized them on these grounds. Posting of Dana Chasin to OMBWatch, *Byrd Adopts DeMint Earmarks Rule for Appropriations*, <http://www.ombwatch.org/article/blogs/entry/3174/50> (Apr. 17, 2007) (quoting Sen. DeMint as stating "[t]here's no reason at all we shouldn't adopt this rule as a Senate rule. . . . [Without a Senate] rule, we have no authority to call [Senator Byrd] to account. We have no leverage here"). Although the earmark rules in Senate Bill 1 applied to limited tax benefits as well as earmarks, the Senate Finance Committee did not follow the Senate Appropriations Committee in adopting voluntary adherence to such rules, arguing that the Committee's informal "rifle-shot" practice already requires that any tax benefit affect ten entities or more. See Schor, *supra* note 72, at 4; see also Garrett, *supra* note 47, at 930 (describing guidelines promulgated by then-Chairman of the Senate Finance Committee, Lloyd Bentsen). The rifle shot rule, however, is not included in the Committee's Rules of Procedure and exists as an informal Committee practice. Schor, *supra* note 72, at 4.

The Act imposes earmark disclosure requirements on the entire Senate by adding Senate Rule XLIV to its standing rules, and by providing that, unlike the prior informal committee standards, Senators can challenge adherence to them by raising points of order.<sup>100</sup> Senate Rule XLIV provides that it is “out of order” to vote on a motion to proceed to consideration of a bill, joint resolution, or an accompanying committee report unless the chairman of the relevant committee or the Majority Leader (or his or her designee) certifies that each earmark (now innocuously referred to as a “congressionally directed spending item”),<sup>101</sup> limited tax benefit, or limited tariff benefit, as well as the Senators who submitted them, have been identified and made available to the public in a searchable format on a website forty-eight hours prior to such vote.<sup>102</sup> A Senator may raise a point of order that, if sustained, suspends the motion to proceed until the rule is followed.<sup>103</sup> Senate Rule XLIV also applies the disclosure rules to conference reports and accompanying joint statements, which are set aside if a point of order is sustained.<sup>104</sup>

For amendments that were not included in the bill or joint resolution as placed on the calendar or as reported by the committee, the earmarks, limited tax benefits, and limited tariff benefits therein, and the identity of the requesting Senator are required to be printed in the Congressional Record as soon as practicable.<sup>105</sup> Senate Rule XLIV further provides that a committee must identify and make available on the Internet a list of the earmarks, limited tax benefits, and limited tariff benefits contained in reported bills, joint resolutions, or committee reports, as well as the Senator requesting them.<sup>106</sup> Generally speaking, Rule XLIV allows waivers of all points of order by an affirmative vote of three-fifths of the Senators.<sup>107</sup>

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<sup>100</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760.

<sup>101</sup> The legislative history explains that “congressionally directed spending items” is a more accurate term “because congressional ‘earmarks’ merely reflect the spending priorities of Congress, just as Presidential ‘earmarks’ reflect the spending priorities of the President. The Constitution provides Congress control over the appropriations of the federal government, and congressionally directed spending constitutes a legitimate and important exercise of that authority.” 153 CONG. REC. S10,711 (daily ed. Aug. 2, 2007) (recording of the legislative history into the Congressional Record).

<sup>102</sup> § 521, 121 Stat at 761 (clause 1(a)).

<sup>103</sup> *Id.* (clause 1(b)).

<sup>104</sup> *Id.* (clauses 3(a)–(b)).

<sup>105</sup> *Id.* (clause 4)).

<sup>106</sup> *Id.* (clause 4(b)).

<sup>107</sup> *Id.* § 521, 121 Stat at 764 (clauses 10–11). For the provisions set forth above, however, the rule may also be waived by a joint agreement between the Majority and Minority Leaders upon certification that the waiver is necessary due to a “significant disruption to Senate facilities or to the availability of the Internet.” *Id.*

Senate Rule XLIV also requires a member requesting special interest legislation to provide a written statement to the chairman and the ranking member of the committee of jurisdiction, which includes the same information as the written statement requirements of House Rule XXI<sup>108</sup> and is to be made available on the Internet “as soon as practicable.”<sup>109</sup> Rule XLIV also establishes the availability of a point of order to strike airdropped spending provisions from conference reports that were absent from the measure originally committed to the conferees, subject to a sixty-vote waiver.<sup>110</sup>

Rule XLIV contains the same definition of earmarks as the House rule, with the exception that the definition encompasses only language included at the behest of a Senator, not a “Member, Delegate, or Resident Commissioner.” The Senate definition of limited tax benefits differs from the House’s by eliminating a fixed maximum number of beneficiaries. Instead, the term includes any revenue provision that (a) provides a Federal tax deduction, credit, exclusion, or preference “to a particular beneficiary or limited group of beneficiaries under the Internal Revenue Code of 1986” and (b), like the House definition, “contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision.”<sup>111</sup> As opposed to the House framework, there is no separate definition for transition provisions in the Senate earmark rules.<sup>112</sup>

During the floor debates of the Act, Senator Max Baucus, Chairman of the Senate Finance Committee, outlined his Committee’s approach to applying the earmark rules.<sup>113</sup> The Chairman stated that although the rule would apply most often to tax provisions that benefit ten or fewer taxpayers, the Committee would adopt a flexible approach, stating for instance that the rule may apply to a tax benefit “directed only to each of the eleven head football coaches in the Big

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<sup>108</sup> H.R. Res. 6, 110th Cong. § 404 (2007) (enacted) (clause 17).

<sup>109</sup> § 521, 121 Stat. at 762 (clause 6).

<sup>110</sup> *Id.* § 521, 121 Stat. at 764 (clause 8). If the point of order is sustained, the offending provision is stricken, at which point the Senate will consider whether to concur in the amended bill and send it back to the House. *Id.*

<sup>111</sup> *Compare* § 404(a) (clauses 9(d)–(e)), *with* § 521, 121 Stat. at 764 (clause 5).

<sup>112</sup> Senate Bill 1 retained the definition of limited tariff benefits as set forth in House Resolution 6. S. 1, 110th Cong. § 103 (2007) (clause 15(b)). As introduced, the Senate Rule followed the House’s definition of “limited tax benefits” to target only those provisions aimed at ten or fewer beneficiaries but was replaced with the more flexible standard by the Senate Majority Whip who argued that Senators could easily game the original definition by slightly expanding the circle of beneficiaries in the provision’s language. 154 CONG. REC. S493 (daily ed. Jan. 12, 2007) (statement of Sen. Durbin) (“Someone could easily write a provision that affects 11, 15, or 50 beneficiaries and be exempt from the disclosure requirements of the DeMint amendment.”).

<sup>113</sup> 153 CONG. REC. S10,700–01 (daily ed. Aug. 2, 2007) (statement of Sen. Baucus). For discussion of similar disclosure rules in LIVA, see *infra* Part III.A.

Ten Conference.”<sup>114</sup> The Chairman stated that the earmark rule would capture provisions that not only provide tax benefits as compared with *present* law, but that it would also apply to provisions providing benefits relative to those provided in the *proposed* law.<sup>115</sup> For example, if proposed tax legislation provided for a tax rate increase but exempted a limited number of beneficiaries from such an increase, the exemption would need to be disclosed—even if the beneficiaries maintain the same tax rate as compared with present law. The Chairman also clarified that, in defining beneficiaries, the earmark rules look directly to the statutory beneficiary rather than to who actually bears the economic incidence of the tax.<sup>116</sup> He further stated that the Committee would treat related groups of corporations as one beneficiary with the effect that a parent corporation would not avoid application of the rule simply by creating subsidiary corporations also entitled to the benefit.<sup>117</sup>

### C. Dysfunctions of the Earmark Disclosure Process

#### 1. *Deficiencies of the Earmark Rules*

Because the political struggle over the adoption of the earmark rules was hotly contested, it has not surprisingly produced a compromised regime in both the House and the Senate. These decisions have resulted in shortcomings of the earmark rules. For instance, in the Senate Rules, certain information need be disclosed on the Internet only “[t]o the extent technically feasible.”<sup>118</sup> Additionally, there are shortcomings in the definition of earmarks—the rule does not capture expenditures benefiting more than one locale or entity, yet could easily be drafted to do so.<sup>119</sup> The earmark label also includes only those provisions added at the behest of a congressional member;<sup>120</sup> to avoid the rules, a member may, for instance, persuade an Executive Branch official to request the earmark.

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<sup>114</sup> 153 CONG. REC. S10,700. The Chairman also stated that the Committee would measure the existence of a benefit utilizing the same time period as in the Budget Act—that is, the current fiscal year and the ten subsequent years. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* For instance, in determining the number of beneficiaries of the reduction of the corporate tax rate for a limited group of corporations, the Senate Finance Committee can look only to those corporations as beneficiaries, even though the tax cut may eventually benefit those corporations’ shareholders or customers. For a discussion of the difficulties in determining the economic incidence of a tax, see, for example, JOSEPH A. PECHMAN & BENJAMIN A. OKNER, WHO BEARS THE TAX BURDEN? 35–37 (1974).

<sup>117</sup> 153 CONG. REC. S10,700.

<sup>118</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 762 (clause 4(c)).

<sup>119</sup> *Id.* § 521, 121 Stat. at 762 (clause 5(a)) (defining earmarks as including those benefits “with or to an entity, or targeted to a specific State, locality or Congressional district”).

<sup>120</sup> *Id.*

The definition of limited tax benefits presents a host of problems emblematic of the deficient regime. Historically, special interests have had success obtaining tax relief through hidden provisions:<sup>121</sup> for instance, sections 706 and 707 of the American Jobs Creation Act of 2004<sup>122</sup> altered the Internal Revenue Code of 1986 (as amended) (the Code) to provide over \$445 million of tax breaks to builders of an Alaskan natural gas pipeline—the primary recipients of which are three oil companies, BP, ExxonMobil, and ConocoPhillips—according to Public Citizen, a public interest watchdog organization.<sup>123</sup> To limit the recipients of these tax incentives without having to name them directly, members used creative drafting. For instance, section 43 of the Code provides an enhanced oil recovery credit to owners of gas treatment plants “lying north of 64 degrees North latitude” that “prepare[ ] Alaska natural gas for transportation through a pipeline with a capacity of at least 2,000,000,000,000 Btu of natural gas per day.”<sup>124</sup>

The JCT has previously identified other examples of special interest tax provisions that benefit fewer than one hundred entities, including the following: excise-tax exemption for diesel fuel sold in the State of Alaska; excise-tax exemption for ozone-depleting chemicals that are recovered and recycled; waiver of a requirement for tax-exempt bond issuance relating to the sale of the Alaska Power Administration Facility; expansion of tax-exempt bond issuances for furnishers of electricity and gas; and expansion of the marital deduction for property passing to certain non-U.S. citizen spouses. Tax provisions like these usually do not name their special interest beneficiaries; Congress has, however, made exceptions to this practice—for instance, by explicitly granting special tax treatment to real and personal property located in Bangkok, Thailand that was owned by one James H.W. Thompson

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<sup>121</sup> Some scholars have argued that the House Ways and Means and Senate Finance Committees are able to provide tax benefits to special interests because tax expenditures are easily hidden in the complex web of tax laws, making their existence and beneficiaries unidentifiable. See ARNOLD, *supra* note 31, at 193–223 (discussing procedures favoring interest groups in the tax context); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 141–42 (1973) (stating that the tax legislative process is not transparent). *But see* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 *YALE L.J.* 955, 969 (2004) (questioning scholarship that argues that transparency in the tax expenditure process is worse than that of direct spending).

<sup>122</sup> American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418.

<sup>123</sup> Public Citizen, *Tax Breaks Benefiting Energy Companies in the Corporate Tax Bill*, HR 4520: Signed into Law October 2004 (Oct. 29, 2004), [http://www.citizen.org/cmep/energy\\_enviro\\_nuclear/electricity/energybill/articles.cfm?ID=12395](http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/energybill/articles.cfm?ID=12395); *see also* 26 U.S.C. § 43(c)(1) (2006) (allowing Alaskan natural-gas processing plant owners to claim a 15 percent enhanced oil recovery credit); *id.* § 168(e)(3)(C) (expanding seven-year accelerated depreciation property to include an Alaskan natural-gas pipeline).

<sup>124</sup> *Id.* § 43(c)(1)(D).

at the time of his death and transferred to the "Jim Thompson Foundation."<sup>125</sup>

Many tax provisions benefiting special interests are found in transition rules that provide relief to certain taxpayers from newly imposed taxes. The Tax Reform Act of 1986 was infamous for rewarding transition relief to special interests:<sup>126</sup> for example, 220 special interest provisions granted reprieve from the 1986 Act's changes to depreciation methods and investment tax credits.<sup>127</sup> Certain of these provisions overtly named their beneficiary, such as the "Campbell Soup Company," which was granted use of over \$9 million of investment tax credits.<sup>128</sup> The true beneficiaries of other provisions, however, are not ascertainable from the face of the legislation, as in the following examples:

[T]he project involves a paper mill for the manufacture of newsprint (including a cogeneration facility) is generally based on a written design and feasibility study that was completed on December 15, 1981, and will be placed in service before January 1, 1991 . . . .

[T]he lessee or an affiliate is the original lessee of each building in which such property is to be used, such lessee is obligated to lease the building under an agreement to lease entered into before September 26, 1985, and such property is provided for such build-

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<sup>125</sup> See Staff of Joint Comm. on Taxation, 104th Cong., *Analysis of Provisions Contained in the Line Item Veto Act (Public Law 104-130) Relating to Limited Tax Benefits* (Comm. Print 1997) (JCS 1-97) [hereinafter *JCT Analysis*], at 59-60. Thompson was an American businessman who revitalized Thailand's textile industry but later disappeared under mysterious circumstances.

<sup>126</sup> See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 903-04 (1987) (citing transition rules as evidence that the 1986 Act was not in the public interest). *But cf.* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 285 (1987) (praising the Act as a "legislative miracle that defied all the lessons of political science, logic, and history"); Shaviro, *supra* note 31, at 51-55, 71-76 (accepting the view that the 1986 Act was not purely in the public interest, but critiquing Doernberg and McChesney's public choice explanation of the Act). The Senate Finance Committee's list of transition rules, including beneficiaries and revenue costs, see 132 CONG. REC. 26,596 (1986); 33 TAX NOTES 1, 33 (Oct. 6, 1986). Senator Bob Packwood, then-Chairman of the Finance Committee, estimated that the transition rules had a revenue cost of \$10.6 billion. 132 CONG. REC. 26,596; see also Dale Russakoff & Anne Swardson, *Game of the Rules: There's Nothing Trivial in This Pursuit*, WASH. POST, Sept. 24, 1986, at A21 (estimating that the transition rules were worth over \$10 billion and were drafted to hide the identity of their beneficiaries). Although no earmark disclosure rules mandating disclosure of these rules existed at the time of the 1986 Act, the list was released upon the insistence of Senator Howard Metzenbaum during the debate on the Senate tax bill. 33 TAX NOTES, *supra*, at 75-81. According to the *Philadelphia Inquirer*, the Senate list failed to disclose the identity of numerous beneficiaries. Donald L. Barlett & James B. Steele, *Disguising Those Who Get Tax Breaks*, PHILA. INQUIRER, Apr. 13, 1988, at 1-A.

<sup>127</sup> 132 CONG. REC. 26,608 (1986) (statement of Sen. DeConcini).

<sup>128</sup> Pub. L. No. 99-514, § 204(e)(4)(B), 100 Stat. 2085, 2165 (1986).

ing, and such buildings are to serve as world headquarters of the lessee and its affiliates.

[A] wastewater or sewage treatment facility if . . . site preparation for such facility commenced before September 1985, and a parish council approved a service agreement with respect to such facility on December 4, 1985.<sup>129</sup>

Several problems with the definition of limited tax benefits are apparent in both the House and Senate earmark rules. On the one hand, under the House earmark rules, tax provisions can easily be drafted to ensure that they benefit more than ten entities.<sup>130</sup> Of course, broadening the reach of any given provision would lose more revenue than originally contemplated. Additional revenue loss would likely require larger offsets under budgetary rules<sup>131</sup> and more congressional support, perhaps reducing the threat of such gaming through creative drafting.<sup>132</sup> On the other hand, a more flexible standard, like that developed in the Senate earmark rules, may be problematic in that parties (as well as Senate members) might strategically bend the definition to their advantage.<sup>133</sup> Even further, neither definition captures those provisions enacted to provide disproportionate benefits to one or two companies but that incidentally assist other entities as well. For instance, the American Jobs Creation Act of 2004 created tax relief for domestically manufactured arrows.<sup>134</sup> House Ways and Means Committee member Paul Ryan and Senator Orrin Hatch supported the provision on behalf of two companies located in Wisconsin and Utah;<sup>135</sup> assuming there are more than a handful of domestic arrow manufacturers, however, the provision would not be subject to the earmark rules since it was written to benefit *all* such

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<sup>129</sup> *Id.* § 204(a)(5), (7), (10).

<sup>130</sup> *See, e.g.*, Clay Chandler, *Line-Item Veto May Alter the Way Bills Are Crafted*, WASH. POST, Aug. 12, 1997, at A1 (arguing that after passage of similar disclosure rules in LIVA, “fiscal experts already are contemplating measures to ensure that pet proposals have more than 100 beneficiaries”).

<sup>131</sup> These offset rules, known as pay-as-you-go or PAYGO rules, require that new increases to the deficit in a fiscal year be “paid for” either by increasing revenues or by reducing other areas of direct spending. In the case of statutory PAYGO rules, if the offset requirements are not met, the President is forced to execute a sequester. Congress has failed to enact PAYGO rules during certain periods. *See* Kysar, *supra* note 2, at 384–89.

<sup>132</sup> *Cf.* Garrett, *supra* note 47, at 923–32 (arguing that cancellation power may improve accountability by heightening public awareness of certain federal programs).

<sup>133</sup> Garrett, *supra* note 23, at 300 (identifying a “tension between developing sufficient information to allow precise definition of the framework law’s scope, and leaving enough uncertainty about the framework’s future application to minimize that ability of strategic political actors to undermine its objectives and to pursue their narrow self-interest”).

<sup>134</sup> American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 332, 118 Stat. 1418, 1477.

<sup>135</sup> Heather M. Rothman, *House Rules on Tax Earmarks Likely to Have Little Effect*, *Observers Say*, BNA DAILY TAX REPORT, Oct. 20, 2006, at J-1.

manufacturers, even if these two companies reap the lion's share of the tax benefits.

The Senate and House earmark rules also apply only to tax provisions that are "not uniform in application with respect to potential beneficiaries."<sup>136</sup> In the Senate, Chairman Baucus stated that in applying this criterion, the Committee will first look to the face of the statute to determine the class of potential beneficiaries. The Chairman stated that when a statute has a closed class of beneficiaries—for example, ethanol plants planned or in existence in Wabash County, Indiana prior to July 2007—the Committee will not interpret the class as open simply because it did not list specific beneficiaries. If, however, the statute opens the class to all Wabash County ethanol plants without regard to the date planned or in existence, then the Committee will determine the likelihood that others will join the class during the current fiscal year and the ten subsequent years, taking into account the incentives provided to manufacturers to join such a class.<sup>137</sup>

The Committee must then determine whether or not the provision provides eligibility criteria that apply equally to the class of potential beneficiaries.<sup>138</sup> Suppose the Committee determines that the relevant class of beneficiaries for a tax credit given to ethanol plants planned or in existence in Wabash County will encompass fewer than ten ethanol plants in the next ten years, thereby falling within the ambit of the earmark rules: if the provision does not distinguish among the plants in bestowing benefits, it need not be disclosed under the earmark rules. If the provision was limited to those plants that produce ethanol made from the county commissioner's corn, then disclosure would be required. As is evident from this exercise, the potential for controversy and gamesmanship lie in the Committee's *initial* determination of the class of potential beneficiaries. Where the Committee determines the potential class of beneficiaries to be *all* ethanol plants statewide, the provision's singling out of only those plants in Wabash County will result in an uneven application of eligibility criteria, and disclosure will be required. From Chairman Baucus's comments on the floor, it appears the Committee will accept a given provision's superficial delineation of the class of potential beneficiaries, however narrow—in our hypothetical case, Wabash County plants—rather than exercising judgment as to the appropriate class of beneficiaries, thereby severely limiting the breadth of the rules. A

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<sup>136</sup> See Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760 (clause 5(b)); H.R. Res. 6, 110th Cong. § 404 (2007) (enacted) (clause 9(e)).

<sup>137</sup> 153 CONG. REC. S10,701 (daily ed. Aug. 2, 2007) (statement of Sen. Baucus) (stating that the class of potential beneficiaries will be determined by assessing the likelihood that others will join the class over time).

<sup>138</sup> H.R. Res. 6, § 404.

broader approach would be to conclude that the “uniform in application” requirement is not met if the beneficiary class is so narrowly defined as to deny the same tax treatment to similarly situated persons.<sup>139</sup> Under the Committee’s present formulation of the rules, however, tax provisions will almost always be “uniform in application” with respect to potential beneficiaries.

The earmark rules treat limited tax benefits and earmarks differently, and the opportunities to evade capture appear to be greater with regard to the former. Although spending provisions are only considered earmarks if they target a single entity or locale, limited tax benefits must contain uniform eligibility criteria, a requirement that, as discussed above, can be easily circumvented.<sup>140</sup> From a theoretical perspective, it is somewhat unclear why tax provisions targeted to narrow interests are treated as less problematic (and are thus enacted in less strict form) than spending provisions: the government can use *both* tax incentives *and* spending to bestow benefits upon an entity. Tax incentives (or benefits) are thought by many to be the functional equivalent of a direct spending mechanism, and in recognition of this, are referred to as “tax expenditures.”<sup>141</sup>

Although many scholars accept the notion that a tax expenditure is simply another form of federal spending, the definition of a limited tax benefit in the earmark rules demonstrates that neither Congress nor the public recognize their sameness.<sup>142</sup> To be sure, identifying a tax expenditure is not without controversy because any such identification derives from the normative baseline of an income tax: provisions varying from the “ideal” base are considered expenditures. Although experts have correctly pointed out the subjectivity inherent in establishing a baseline,<sup>143</sup> tax policymakers agree on the classifica-

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<sup>139</sup> The JCT advocated this approach when interpreting a similar provision in LIVA. *JCT Analysis*, *supra* note 125, at 38.

<sup>140</sup> See *supra* notes 121–29 and accompanying text.

<sup>141</sup> See SURREY, *supra* note 121, at 3–4 (noting the author’s coinage of the term “tax expenditures”). For instance, suppose the government wished to direct \$7 million of its resources to an alternative energy company. Assuming the company pays tax on any payments it receives at a rate of 35 percent, the government could make a direct payment to the company in the amount of \$10,769,230.77 to achieve this subsidy. Alternatively, it could achieve the same result by granting a tax deduction or exemption to the company that would reduce its taxable income in the amount of \$20 million. Both of these methods bestow a \$7 million subsidy upon the company.

<sup>142</sup> See Theodore J. Eismeier, *The Power Not to Tax: A Search for Effective Controls*, 1 J. POL’Y ANALYSIS & MGMT. 333, 341–42 (1982) (“Nor do many in Congress share with advocates of tax expenditure analysis the view that, in principle, tax expenditure provisions are the equivalent of direct expenditures.”); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1170–71 (arguing that congressional members view repealing a tax expenditure as a tax increase, rather than a reduction in spending or return to the baseline).

<sup>143</sup> See, e.g., Bruce Bartlett, *The End of Tax Expenditures As We Know Them?*, 92 TAX NOTES 413, 414–17 (July 2, 2001) (detailing the numerous arguments over the meaning of

tion of a substantial portion of provisions as expenditures;<sup>144</sup> the earmark rules essentially define those tax provisions that benefit a narrow group of people as tax expenditures. One need not refer to the larger debate over establishing a proper tax baseline in measuring tax expenditures in order to argue that the current definition of limited tax benefits is likely to be under-inclusive in capturing suspect provisions.<sup>145</sup> The rules can be avoided through clever drafting. Given their limited reach, they do not comport with most experts' views of problematic special interest tax provisions.<sup>146</sup>

Some scholars, such as Edward Zelinsky, have argued that the tax legislative process may be less susceptible to interest group pressures than other congressional lawmaking.<sup>147</sup> Regardless of the truth of this claim,<sup>148</sup> the earmark rules simply are an attempt to expose those interest group deals that *do* exist. Thus, greater influence upon tax committees by interest group pressures does not justify a narrow treatment of limited tax benefits in the earmark rules. Indeed, if Zelinsky is correct in arguing that the tax committees' involvement with diverse interests insulates them from capture by certain interests, then in those instances where special interest dealing does occur, shining sunlight on such deals would be more effective in eradicating them than in the spending context.<sup>149</sup>

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a baseline in the tax expenditure context); Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 247 (1969) (finding the revenue effects of tax incentive provisions are the most important, yet the most difficult to calculate); Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661, 1661 (Mar. 30, 1992); Thuronyi, *supra* note 142, at 1166-67 (finding that, while government officials seem to agree on the tax expenditure figures, academics still dispute them).

<sup>144</sup> See GEN. ACCOUNTING OFFICE, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY 111-13 (1994) (citing differences in baselines used by the Treasury and the Congressional Budget Office, but noting virtually identical lists of tax expenditures produced by each).

<sup>145</sup> See Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget*, 54 HASTINGS L.J. 603, 613 (2003) ("But the proper response to this criticism [of a shifting baseline] lies in a reexamination of the list of tax expenditures, broadening and deepening the level of public exposure, not scrapping the whole instrument. The criticism in no way refutes the underlying insight that specially favorable tax rules constitute a form of government subsidy or expenditure, nor suggests that the information we have [in the budgetary context] should be suppressed.").

<sup>146</sup> Additionally, because limited tax benefits are identified by the Senate Finance and Ways and Means Committees, rather than the nonpartisan Joint Committee on Taxation (which was utilized in LIVA), the opportunities for evasion may be more pronounced.

<sup>147</sup> See, e.g., Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1190-91 (1993) (arguing that the tax legislative process does not make the tax system more susceptible to rent-seeking than direct expenditure programs).

<sup>148</sup> But see sources cited *supra* note 121 (presenting authority to the contrary).

<sup>149</sup> In an interesting article, Edward Zelinsky conducts an empirical study and argues that tax expenditures create framing effects—that is, to the public, tax relief does not equal direct outlay—and therefore argues that the disclosure of tax expenditures has not

## 2. *Defections from the Earmark Rules*

Despite weaknesses in the earmark rules, they do fulfill an important disclosure function; unfortunately, opportunities to defect from the regime are many. The largest threat to the faithful adherence to the earmark rules is simply that their enforcers will falsely certify as to the contents of legislation. One month after the House enacted House Rule XXI, it considered an appropriations bill.<sup>150</sup> Instead of disclosing the special interest provisions that had been included, Appropriations Committee Chairman Obey simply submitted to the record that the bill did not contain “any congressional earmarks, limited tax benefits, or limited tariff benefits.”<sup>151</sup> Clause 9 of House Rule XXI provides that it “shall not be in order” to consider a bill unless special interest provisions are disclosed or unless the chairman of the committee of initial referral states that the bill contains no such provisions.<sup>152</sup> Chairman Obey interpreted this rule to allow for certification that no such provisions are contained in a bill, even if in truth they are, and was criticized by Republican Representatives for engaging in “Orwellian doublethink.”<sup>153</sup>

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reduced their existence. See generally Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797 (2005). This would seem to support the conclusion that disclosure of limited tax benefits may be unsuccessful in creating public or legislator antipathy towards them; nonetheless, the results of Zelinsky’s study may change when the recipient of the tax relief is, for example, a hedge fund manager, rather than a fireman. In the latter example used in Zelinsky’s study, the public may simply be sympathetic to the recipient of the tax relief and therefore will look for ways to argue that the fireman should be compensated. It is possible that if faced with an unsympathetic recipient, the public may not hesitate to label any economic relief as subsidy. See also Garrett, *supra* note 47, at 931 (stating that “the experience with the 1997 tax bill’s [list of special interest provisions] suggests that interest groups and lawmakers generally viewed disclosure as stigmatizing”). Additionally, Zelinsky’s study does not lead to the conclusion that all disclosure is futile because it shows that a significant portion of the public equates tax relief with direct outlays.

<sup>150</sup> H.R. J. Res. 20, 110th Cong. (2007).

<sup>151</sup> 153 CONG. REC. H988 (daily ed. Jan. 29, 2007) (statement of Rep. Obey).

<sup>152</sup> H.R. Res. 6, 110th Cong. § 404 (2007) (enacted).

<sup>153</sup> 153 CONG. REC. H,1213 (daily ed. Feb. 6, 2007) (statement of Rep. Price). Relatedly, the Chairman of the House Appropriations Committee ignited a controversy during the summer of 2007 by stating that appropriations bills would not contain earmarks until the bill went to conference and, accordingly, would not disclose earmarks until the conference report stage, at which point members would have thirty days to review the earmarks, although they would have limited opportunities for amendments at that stage. 153 CONG. REC. H6263–64 (daily ed. June 12, 2007) (statement of Rep. Obey). The Chairman argued that this process was necessary to move the bills because insufficient resources were available to examine the earmarks. *Id.* Since the House Rules require earmarks to be disclosed prior to consideration of a bill, House Republicans balked at the Chairman’s airdropping tactic, and eventually reached a compromise such that two of the twelve appropriations bills proceeded without the disclosure of any earmarks. John Boehner, Commentary, *House Republicans Claim Victory in Earmark Reform Showdown*, THE EXAMINER, JUNE 14, 2007, [http://www.examiner.com/a781746~House\\_Republicans\\_claim\\_victory\\_in\\_earmark\\_reform\\_showdown.html](http://www.examiner.com/a781746~House_Republicans_claim_victory_in_earmark_reform_showdown.html).

Similarly, Senate Rule XLIV provides that the Majority Leader (or his or her designee) or the chairman of the committee of jurisdiction shall certify as to whether all earmarks, limited tax benefits, and limited tariff benefits have been identified in the legislation, joint resolution, or committee report under consideration.<sup>154</sup> According to Senator DeMint, the Senate Parliamentarian and the Congressional Research Service have confirmed that the Chair would base any such ruling on sustaining a point of order “only on whether or not the certification has been made, and not on the contents of the available lists or charts, including the accuracy or completeness of this information.”<sup>155</sup> Thus the Parliamentarian, when asked to rule upon a point of order, can make no independent determination as to whether an item is an earmark or a limited tax provision.<sup>156</sup> Under this practice, Senate and House leaders may falsely certify that the requirements of the earmark rules have been met with no repercussions.<sup>157</sup> However, even if this point were clarified, such that lawmakers could assert points of order against the content of the disclosure lists, ample op-

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<sup>154</sup> The prior version of this rule as passed by the Senate in the beginning of 2007 provided that this role was held by the Senate Parliamentarian, a non-partisan and likely more neutral, Senate employee. See 153 CONG. REC. S10,693 (daily ed. Aug. 2, 2007) (statement of Sen. McCain) (“Our favorite switcheroo: Under the previous Senate reform, the Senate [P]arliamentarian would have determined whether a bill complied with earmark disclosure rules. Under Mr. Reid’s new version, the current [M]ajority [L]eader, that is, Mr. Reid himself, will decide if a bill is in compliance. When was the last time a Majority Party Leader declared one of his own bills out of order? I have only been here 20 years, but I have never seen it. I do not think you are going to see it in the future. So while under this new version of the bill earmarks should be disclosed in theory, the fact remains that only the committee chair or the majority leader or his designee can police it. If they say all the earmarks are identified, we take it as gospel.”).

<sup>155</sup> 153 CONG. REC. S10,696 (daily ed. Aug. 2, 2007) (statement of Sen. DeMint) (“[T]his has also been confirmed by the Senate Parliamentarian, who says he would not be able to ensure full earmark disclosure.”).

<sup>156</sup> The legislative history of the Act provides that the Parliamentarian cannot determine the accuracy of the list because such a duty is “unworkable in practice,” utilizing too many resources. 153 CONG. REC. S10,711 (daily ed. Aug. 2, 2007) (recording of the legislative history into the Congressional Record). Instead, the Parliamentarian must defer to the Committee Chair in determining why a particular item is in a bill or in identifying the individuals impacted by the provisions. 153 CONG. REC. S10,699–700 (daily ed. Aug. 2, 2007) (statement of Sen. Durbin).

<sup>157</sup> One further technique to evade the earmark rule is simply to bury project requests in informal letters and phone calls to agencies or other materials rather than in conference reports and legislative text. Ironically, special interests provisions would be further from the public’s view in this scenario than prior to the adoption of the earmark rules. A cure to this defect would be to require disclosure of such contacts between lawmakers and agencies. See John Solomon & Jeffrey H. Birnbaum, *In the Democratic Congress, Pork Still Gets Served: “Phonemarking” Is Among Ways Around Appropriations Process*, WASH. POST, May 24, 2007, at A1 (“Within days [of the adoption of the House earmark rules], however, lawmakers including Senate Majority Leader Harry M. Reid (D-Nev.) began directly contacting the Energy Department. They sought to secure money for their favorite causes outside of the congressional appropriations process—a practice that lobbyists and appropriations insiders call ‘phonemarking.’”).

portunities to defect from the legislative rules would still exist. For instance, lawmakers could not easily challenge the absence of a disclosure for an ambiguously drafted special interest provision—the very sort of inscrutable provision that the rules are meant to unearth.

### III

#### EXTRA-CONGRESSIONAL ENFORCEMENT OF LEGISLATIVE RULES

##### A. The Line Item Veto Act

As discussed above, congressional members can successfully evade both the earmark rules and other internal reforms. Recognizing its weaknesses, Congress has in the past called upon the Executive Branch for assistance in ensuring that the goal of deficit reduction not be abandoned in service of special interests.<sup>158</sup> In the 1990s, Congress enacted the Line Item Veto Act of 1996 (LIVA),<sup>159</sup> which granted the President the ability to cancel, after signing legislation into law, (i) any dollar amount of discretionary budget authority; (ii) any item of new direct spending; or (iii) any limited tax benefit.<sup>160</sup> Congress subsequently could nullify any such presidential cancellation by enacting a disapproval bill and overriding any subsequent presidential veto.

In relevant part, LIVA defined a limited tax benefit as “any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries . . . in any fiscal year for which the provision is in effect” or “any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year.”<sup>161</sup> LIVA enlisted the JCT either to identify limited tax benefits in proposed tax legislation or state that LIVA did not apply to the legislation. In the event that the JCT did neither, the President had the authority to determine which, if any, provisions met the statutory definition. The JCT published a detailed method that it would use to identify limited tax benefit provisions and solicited public comment on the report;<sup>162</sup> it did so, perhaps, to quell the unease provoked by the grant of provision-cancellation discretion to the President.<sup>163</sup>

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<sup>158</sup> The legislative history of LIVA states it was enacted out of public concern for “greater fiscal accountability” and aimed “to eliminate wasteful federal spending and to cancel wasteful federal spending and to cancel special tax breaks.” H.R. REP. NO. 104-491, at 15 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 892, 892.

<sup>159</sup> Pub. L. No. 104-130, § 2, 110 Stat. 1200, 1200 (1996), *invalidated by* *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>160</sup> *Id.* § 2.

<sup>161</sup> *Id.* § 2, 110 Stat. at 1209.

<sup>162</sup> See *JCT Analysis*, *supra* note 125. For instance, the report enumerated examples of past provisions that would have met the statutory definition of limited tax benefits.

<sup>163</sup> See Garrett, *supra* note 47, at 909–10 (noting similarities between cancelling limited tax benefits and passing bills of attainder, given the lack of procedural protections in both contexts).

Congress's experiment with self-restraint by way of Executive enforcement was short-lived. In *Clinton v. City of New York*, the Supreme Court held that LIVA violated the Presentment Clause of the U.S. Constitution because it effectively allowed the President to amend or repeal statutes—a legislative function—without following the constitutional requirement of bicameralism.<sup>164</sup> Of relevance here, LIVA, in addition to its unconstitutional features, provided a disclosure mechanism that highlighted the existence of special interest provisions through a list of limited tax benefits.<sup>165</sup> The mere publicity surrounding JCT's list, independent of LIVA's feature of cancellation by the President, likely increased the costs of garnering support for the disclosed provisions;<sup>166</sup> but one has to wonder whether the JCT would have any incentive to produce an accurate list when the President has no power to determine which tax provisions are subject to cancellation if the JCT fails to do so.<sup>167</sup> As in the earmark context, where, standing alone, Congress's rules of procedure appear to be paper tigers, it seems unlikely that Congress would obey LIVA's disclosure function if it were severed from the extra-congressional cancellation feature held to be unconstitutional in *Clinton*.<sup>168</sup>

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<sup>164</sup> *Clinton*, 524 U.S. at 445–46. Some authors argue that the Court's decision should not be read to invalidate the entirety of LIVA, and that the Act's provisions regarding discretionary spending are constitutional under *Clinton*. See Garrett, *supra* note 47, at 891–92 (arguing that the different definition of “cancel” with respect to discretionary spending may save the portions of LIVA relating to such spending).

<sup>165</sup> See Garrett, *supra* note 47, at 923–36 (discussing LIVA's ability to heighten public awareness of government programs and targeted tax provisions); Martin A. Sullivan, *Disclosure, Not Presidential Power, Is Key to Line-Item Veto*, 76 TAX NOTES 719, 720 (Aug. 11, 1997) (advocating that LIVA's important feature is the production of the list of “limited tax benefits” rather than cancellation).

<sup>166</sup> Garrett, *supra* note 47, at 929.

<sup>167</sup> *Id.* at 931–32.

<sup>168</sup> *Id.* at 936 (stating that LIVA's disclosure provision is “meaningless without the threat of cancellation to prompt congressional compliance”). Although discussion of direct executive enforcement of earmark rules is outside of the scope of this Article, any such methods likely face additional difficulties because, as discussed below, the Judiciary generally views legislative rules as within Congress's purview rather than the President's. See *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (concluding that Article I “simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt”). As will be discussed in the remainder of this Part, the source of this difficulty is the Rulemaking Clause of the Constitution, which may even bar Executive enforcement to a greater degree than direct judicial review. There is evidence that “the primary thrust of the rulemaking clause is to protect the legislature from the executive branch, not from the judiciary.” Miller, *supra* note 25, at 1359; see also Vermeule, *supra* note 24, at 430 (stating that, in the context of enacting legislative rules as statutes, an “important objection sounds in the separation of powers; quite apart from the Rules of Proceedings Clause, it might be said that presidential involvement in Congress's internal rulemaking poses an unacceptable risk of executive invasion of core legislative functions”).

## B. Judicial Review of Legislative Rules

Similar to LIVA's disclosure function when viewed in isolation, the earmark rules lack an enforcement mechanism outside of congressional will; thus, congressional members are certain to find ways to disregard or evade them.<sup>169</sup> The current enforcement of earmark rules through the point of order procedure may provide a modicum of protection to their integrity,<sup>170</sup> although, as discussed above in Part II, this control mechanism has serious flaws. It is possible that with the ability to hold defectors politically accountable, constituencies function as a check on the behavior of those they elect into office.<sup>171</sup> In the earmark rule context, however, this argument loses traction as, absent faithful adherence to the rules, it is unlikely that the public will know which lawmakers have disregarded or defected from the earmark rules. Moreover, in the legislative rule context, because each house has sole authority over its own rules, bicameralism cannot function to strengthen precommitment devices.<sup>172</sup> Recognizing, then, that extra-congressional forces are likely necessary to ensure enforcement of the earmark rules, this section examines avenues for judicial involvement.<sup>173</sup>

### 1. *Supreme Court Caselaw*

As discussed in Part I, each house of Congress has near-complete freedom to establish, interpret, enforce, and modify its legislative rules. Few explicit constitutional limitations exist upon Congress's legislative rulemaking,<sup>174</sup> and the houses enjoy latitude in interpreting

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<sup>169</sup> Garrett, *supra* note 47, at 935 (arguing that “[e]nforcement mechanisms are vital to the success of any disclosure process”).

<sup>170</sup> *Id.* at 935 (noting deficiencies of the disclosure process in the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, until the Act was enforced by points of order).

<sup>171</sup> See Garrett, *Purposes*, *supra* note 2, at 750 (“[I]f defections are likely to come from individual lawmakers over a series of decisions necessary to achieve the collective goal, frameworks can facilitate detection and effective punishment by the majority and therefore reduce the incentive to defect. . . . Second, by imposing political costs, frameworks can also make defection more difficult even when a majority wants to defect.”).

<sup>172</sup> This speaks to Elster's point that bicameralism is employed because a “unicameral assembly is too powerful to precommit itself—it is *unable to make itself unable* to untie itself from the mast.” Elster, *supra* note 5, at 1773.

<sup>173</sup> See *id.* at 1760 (noting that where societies lack judicial review, constitutions have little binding force). For a helpful discussion of the justiciability of Congress's failure to comply with a statutized, procedural rule, see Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L., 447, 487–98 (2008).

<sup>174</sup> Bach, *Nature*, *supra* note 19, at 726–27. Section 7 of Article I requires that each House “proceed to reconsider” a bill vetoed by the President. U.S. CONST. art. I, § 7. Two further rules governing congressional rulemaking are found in Section 5 of Article I: Clause 1 of that Section states that “a Majority of each [House] shall constitute a Quorum to do Business” and Clause 3 requires that each House keep a “Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment

even those requirements, often reading them “in ways which suit their convenience” without scrutiny from courts.<sup>175</sup> When the substance, interpretation, application, or enforcement of legislative rules has been challenged (including those enacted by statute), the Supreme Court has generally been reluctant to intervene.<sup>176</sup> As a result, “[n]o outside force compels Congress to abide by its rules. If these rules are enforced rigorously and consistently, it is only because Congress chooses to do so.”<sup>177</sup>

The Rulemaking Clause specifically states that “Each House may determine the Rules of its Proceedings.”<sup>178</sup> Courts generally interpret this Clause to stand for the proposition that such rules are wholly within the purview of each house, beyond scrutiny from the other branches.<sup>179</sup> The first such case, *United States v. Ballin*,<sup>180</sup> concerned the interpretation offered by a House rule that the constitutional “Quorum to do Business” requirement was met by counting *both* voting members *and* non-voting members.<sup>181</sup> The defendants argued that an act passed according to this interpretation did not meet the constitutional requirement for a quorum and asked the Supreme Court to invalidate the act. The Court, rather than simply agreeing with the House interpretation, held that because the Constitution does not define a majority it is “within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.”<sup>182</sup> Reasoning that the Constitution “empowers” each house to create its legislative rules, thereby preempting judicial review of said rules, the Court ceded authority to interpret the “Quorum to do Business” Clause in the Constitution.<sup>183</sup>

The Court did, however, constrain legislative rulemaking by clarifying that “[Congress] may not by its rules ignore constitutional restraints or violate fundamental rights” and indicating that there “should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”<sup>184</sup> Outside these limitations, congressional rulemaking au-

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require Secrecy.” *Id.* § 5, cl. 1, 3. Clause 3 further provides that “the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.” *Id.* § 5, cl. 3.

<sup>175</sup> Bach, *Nature*, *supra* note 19, at 730.

<sup>176</sup> *Id.* at 730–31.

<sup>177</sup> *Id.* at 731.

<sup>178</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>179</sup> See John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1790–92 (2003).

<sup>180</sup> 144 U.S. 1 (1892).

<sup>181</sup> See U.S. CONST. art. I, § 5, cl. 1.

<sup>182</sup> *Ballin*, 144 U.S. at 6.

<sup>183</sup> *Id.* at 5.

<sup>184</sup> *Id.* The Court has never held that a legislative rule lacked a reasonable relationship with its goal. John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textual-*

thority is “absolute and beyond the challenge of any other body or tribunal.”<sup>185</sup> Although the *Ballin* Court reserved the right to review legislative rules for constitutionality, its holding curtails review when the Constitution does not set forth detailed requirements, such as in the “Quorum to do Business” Clause.

Decided the same day as *Ballin*, *Field v. Clark (Marshall Field)*<sup>186</sup> concerned whether private plaintiffs could submit evidence to assert that an enrolled bill presented to the President lacked certain crucial provisions that had been passed by Congress. Confronted with this question, the Court created the “enrolled bill” doctrine, holding that it could not second-guess the legislative practice whereby the presiding officer would attest that the bill presented to the President was the same as the one passed.<sup>187</sup> The Court further refused to impose a legislative rule that would require stricter legislative journal-keeping, leaving such matters to “the discretion of the respective houses of Congress.”<sup>188</sup>

By contrast, *United States v. Smith*<sup>189</sup> indicated a greater willingness by the Court to examine legislative rules. *Smith* involved the Senate’s submission of a confirmation resolution concerning a presidential appointment to the Federal Power Commission and the subsequent request for the resolution’s return for reconsideration. A relevant Senate rule provided that a motion to reconsider a confirmation “be accompanied by a motion to request the President to return such notification to the Senate.”<sup>190</sup> Although the President refused to return the resolution, the Senate reconsidered and rejected the nomination; the Executive Branch argued that under the Senate rule, the Senate’s power of reconsideration was contingent on the President’s return of the confirmation resolution. The Court reasoned that it had the power to interpret the rule because the question presented affected persons other than congressional members but provided that it “must give great weight”<sup>191</sup> to the Senate’s construction of its own rules in a “serious and delicate exercise of judicial power.”<sup>192</sup> The Court then held that the text, history, and precedential treatment of the rule did not support the Senate’s interpretation.<sup>193</sup>

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*ism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 532 (2001) (arguing that if the Court were to hold that a legislative rule lacked a reasonable relationship with its goal, it would conflict with the thrust of the Rulemaking Power Clause).

<sup>185</sup> *Ballin*, 144 U.S. at 5.

<sup>186</sup> 143 U.S. 649 (1892).

<sup>187</sup> *Id.* at 671–73.

<sup>188</sup> *Id.* at 671.

<sup>189</sup> 286 U.S. 6 (1932).

<sup>190</sup> *Id.* at 31.

<sup>191</sup> *Id.* at 33.

<sup>192</sup> *Id.* at 48.

<sup>193</sup> *Id.* at 35–48.

To be sure, nearly all legislative rules affect persons outside of Congress, even if only indirectly. *Smith* and its progeny indicate that the Court will review legislative rules only when they affect fundamental rights of individuals outside the Legislative Branch or raise constitutional concerns. Some such cases involve Congress, functioning in a semi-judicial capacity, bestowing fundamental rights on individuals; this may explain the Judiciary's willingness to insert itself in order to ensure the presence of procedural safeguards.<sup>194</sup> For instance, *Christoffel v. United States*<sup>195</sup> involved a witness who argued that his conviction for perjury before a House committee could not stand because he did not testify before a "competent tribunal," as the relevant statute required. Specifically, the witness argued that a quorum as defined in the legislative rules was not reached. The Court reversed the conviction, reasoning that although under legislative practice a quorum is presumed to continue when no point of order is raised, the witness lacked the authority to raise one.<sup>196</sup> The dissent argued that the Court is obliged to presume that congressional conduct conforms to its rules and that the Rulemaking Clause prevents the Court from determining legislative rules or requiring further enumeration of them.<sup>197</sup>

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<sup>194</sup> The legislative rule at issue in *Yellin v. United States* also invoked the interests of a non-congressional party in a court-like setting. The Petitioner refused to answer questions from a House committee and was thus convicted for contempt of Congress. 374 U.S. 109, 111 (1963). The Petitioner argued that the committee did not comply with its own rule, which required the committee to consider injury to a witness's reputation in deciding whether to publicly question the witness rather than to do so in a closed, executive session. *Id.* at 114–15. The Court reasoned that the committee rule bestowed a right upon the witness and that, accordingly, the witness was entitled to judicial review to protect such right. *Id.* The Court also gave weight to the fact that the committee had followed the rule in the past, thus supporting the notion that it intended to confer rights upon the witness and that the witness could rely upon the committee's adherence to it. *Id.* at 116–17, 123–24. The dissent argued that the issue was one of rule interpretation and that the committee's construction of the rule must be given deference. *Id.* at 145–48. In contrast, in a case involving the Impeachment Trial Clause, *Nixon v. United States*, the Court held non-justiciable a Senate rule delegating fact-finding to a committee. Although the Senate had a constitutional duty to "try" impeachment cases under the Impeachment Trial Clause of the Constitution, the Court invoked the political question doctrine, reasoning that the text of the Impeachment Trial Clause did not contemplate involvement by any other body, even in the case of judicial review, and that it lacked judicially discoverable and manageable standards of review. 506 U.S. 224, 228–38 (1993). Although the case involved a specific constitutional clause separate from Congress's authority under the Rulemaking Clause, it may be read to support the Court's general unwillingness to review legislative rules.

<sup>195</sup> 338 U.S. 84 (1949).

<sup>196</sup> *Id.* at 87–88. The Court held that the lower court erred by issuing instructions that allowed the jury to find the presence of a quorum by relying solely upon the absence of a point of order. *Id.* at 87.

<sup>197</sup> *Id.* at 91.

More recently, the Court examined the scope of the Rulemaking Clause in *United States v. Munoz-Flores*.<sup>198</sup> There the Court held justiciable the issue of whether a particular piece of legislation complied with the constitutional requirement that revenue bills originate in the House.<sup>199</sup> In concurrence, Justice Scalia invoked *Marshall Field*<sup>200</sup> to argue that the enrolled bill doctrine dictated the result since the bill indicated origination in the House on its face.<sup>201</sup> In response, the majority contended that *Marshall Field* was distinguishable because it had interpreted the Journal Clause, rather than another constitutional requirement binding on Congress (such as the Origination Clause, as in *Munoz-Flores*).<sup>202</sup> However, this argument appears tenuous, because *Marshall Field* invoked the set of constitutional requirements under Article 1, Section 7 for valid passage of a law.<sup>203</sup>

## 2. Lower Federal Court Caselaw

The lower federal courts employ doctrines such as standing, political question doctrine,<sup>204</sup> and separation of powers to bar challenges raised against legislative rules.<sup>205</sup> In the event that courts do reach the merits of such challenges, they usually approve the rule in deference to the Legislature's prerogative over matters of self-governance.<sup>206</sup>

<sup>198</sup> 495 U.S. 385 (1990).

<sup>199</sup> *Id.* at 387.

<sup>200</sup> *Field v. Clark*, 143 U.S. 649 (1892).

<sup>201</sup> *Munoz-Flores*, 495 U.S. at 408–09 (Scalia, J., concurring).

<sup>202</sup> Vikram David Amar, *Why the "Political Question Doctrine" Shouldn't Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Congress: Part Two in a Series*, FINDLAW, Apr. 13, 2006, <http://writ.lp.findlaw.com/amar/20060413.html>.

<sup>203</sup> *Id.*

<sup>204</sup> *Baker v. Carr* sets forth the following circumstances that indicate when a political question may arise:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). Compare Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600–01 (1976) (arguing that political question doctrine does not require "extra-ordinary abstention" from judicial review), with Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1032–33 (1985) (arguing that courts often invoke the principles of the political question doctrine even when they are purporting not to do so).

<sup>205</sup> See Roberts, *supra* note 184, at 535–37.

<sup>206</sup> Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1275 ("When courts do not summarily dismiss procedural claims, they accord extraordinary deference to the legislature."). See generally *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (rejecting jurisdictional defects but upholding a House rule that granted territorial delegates a vote in the Committee of the Whole).

Cases involving legislative rules are almost uniformly appealed to the D.C. Circuit,<sup>207</sup> which has repeatedly indicated its reluctance to review congressional rules while refusing to adopt an absolute prohibition against such review.<sup>208</sup>

In the 1970s, the D.C. Circuit denied justiciability of Congress's mechanism for the distribution of press passes<sup>209</sup> and refused to order a congressional committee to protect corporate information it had obtained by subpoena.<sup>210</sup> It also held that a Representative lacked standing to challenge the practices by which the budget for the Central Intelligence Agency was not demarcated from other appropriations, refusing "to intervene on behalf of one member of the Legislative Branch to change 'the rules of its proceedings' adopted by the entire body of the House."<sup>211</sup>

In the 1980s, a series of D.C. Circuit cases followed an approach advocated by Judge Carl McGowan to maintain judicial review but to refuse to decide challenges of legislative procedures on the grounds of "equitable discretion" based on separation of powers.<sup>212</sup> For in-

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<sup>207</sup> Only a few cases outside of the D.C. Circuit have involved the justiciability of legislative rules. In one such case, *Mester Manufacturing Co. v. INS*, the Ninth Circuit concluded that the Houses could delegate to a committee or an officer the duty to present a bill to the President after adjournment. 879 F.2d 561, 570-71 (9th Cir. 1989). The court held that since there was no explicit constitutional requirement to the contrary, it would defer to the internal procedure Congress has set forth, acknowledging that "[t]he Constitution also requires extreme deference to accompany any judicial inquiry into the internal governance of Congress." *Id.* at 571. It further reasoned that *INS v. Chadha*, 462 U.S. 919 (1983), did not contradict this deferential approach. *Id.* at 571 n.15. The *Mester* court reasoned that, in contrast to violating the Constitution, Congress simply supplemented the "nonexplicit text of the Constitution with reasonable procedures that implement its commandment." *Id.*; see also *Texas Ass'n of Concerned Taxpayers v. United States*, 772 F.2d 163, 167 (5th Cir. 1985) (holding that meaning of "raising revenue" within the Origination Clause was a nonjusticiable political question left to Congress to define); *Dauids v. Akers*, 549 F.2d 120, 122 (9th Cir. 1977) (affirming trial court's approval of allegedly unconstitutional apportionment of committee seats).

<sup>208</sup> See, e.g., *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) (refusing to review House allocation of committee seats on separation-of-power grounds, while also confirming power to review rules for "constitutional infirmity").

<sup>209</sup> *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1346-51 (D.C. Cir. 1975).

<sup>210</sup> *Exxon Corp. v. FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978) (reasoning that the Judiciary should not interfere with the internal procedures of Congress).

<sup>211</sup> *Harrington v. Bush*, 553 F.2d 190, 194-97, 214 (D.C. Cir. 1977); see also *United States v. Richardson*, 418 U.S. 166, 175-80 (1974) (holding that a taxpayer did not have standing to compel publication of the Central Intelligence Agency budget).

<sup>212</sup> See, e.g., Hon. Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 262, 254-67 (1981); see also, e.g., *Moore v. U.S. House of Representatives*, 733 F.2d 946, 948 (D.C. Cir. 1984); *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981). Then-Circuit Judge Scalia argued vehemently against the court's use of the equitable discretion doctrine, reasoning that abstention was constitutionally required under the Rulemaking Clause unless extra-congressional rights were at issue. *Moore*, 733 F.2d at 959-65. In light of critiques of the doctrine and the failure by the Supreme Court to embrace it, the D.C. Circuit has

stance, in *Gregg v. Barrett*,<sup>213</sup> the D.C. Circuit refused to review a First Amendment challenge by several congressional members who charged that Congress failed to adhere to its own internal rules concerning the accuracy of the Congressional Record prints. The *Gregg* court relied on the equitable discretion doctrine and stated that it was precluded “from reviewing congressional practices and procedures when they primarily and directly affect the way Congress does its legislative business.”<sup>214</sup> The court did, however, reach the merits as they applied to co-plaintiffs who were not congressional members, reasoning that the equitable discretion doctrine only applied to congressional members, whose involvement invoked stronger separation-of-powers concerns.<sup>215</sup> As to the private plaintiffs, the court rejected the appellant’s claim that a First Amendment right required receipt of a verbatim record of congressional proceedings.<sup>216</sup>

*Gregg* is but one example of the D.C. Circuit’s refusal to prescribe legislative rules. In another relevant instance, the D.C. Circuit in *Vander Jagt v. O’Neil*<sup>217</sup> addressed a Fifth Amendment challenge by House minority members that their party was underrepresented on various committees.<sup>218</sup> The court held that the Rulemaking Clause does not prohibit judicial review; it simply forbids the other branches from determining legislative rules.<sup>219</sup>

The D.C. Circuit has also denied judicial review of claims that require interpretation of legislative rules. In *Metzenbaum v. FERC*,<sup>220</sup> several congressional members, states, and private citizens challenged the validity of a statute because it was passed by the House in violation of legislative rules that required delayed consideration of certain amendments. The court refused to decide the question on the basis of the political question doctrine, stating that it did not want to impose its own interpretation of the legislative rules.<sup>221</sup> Similarly, *United States v. Rostenkowski*<sup>222</sup> involved the question of whether a Senator violated certain mail fraud and embezzlement statutes; the case turned on an interpretation of legislative rules. The court held that although

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called into question its viability. *Chenoweth v. Clinton*, 181 F.3d 112, 114–15 (D.C. Cir. 1999).

<sup>213</sup> 771 F.2d 539 (D.C. Cir. 1985).

<sup>214</sup> *Id.* at 542.

<sup>215</sup> *Id.* at 546.

<sup>216</sup> *Id.* at 547.

<sup>217</sup> 699 F.2d 1166 (D.C. Cir. 1983).

<sup>218</sup> *Id.* at 1176.

<sup>219</sup> *See id.* at 1173 (stating that Congress’s rulemaking authority “is not analytically different from many other constitutionally enumerated powers” and hence that legislative rules need not be treated with “special care”) (internal quotation marks omitted).

<sup>220</sup> 675 F.2d 1282 (D.C. Cir. 1982).

<sup>221</sup> *Id.* at 1287.

<sup>222</sup> 59 F.3d 1291, 1305 (D.C. Cir. 1995).

it had the authority to interpret legislative rules, the Rulemaking Clause barred justiciability of allegations requiring interpretation of a “sufficiently ambiguous” House Rule that “in the absence of ‘judicially discoverable and manageable standards’” would require the court to make “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>223</sup>

Finally, as mentioned above, the doctrine of standing also serves as a barrier to challenges of legislative rules.<sup>224</sup> At issue in *Skaggs v. Carle*<sup>225</sup> was a House rule that required a three-fifths majority vote to pass tax increases. The D.C. Circuit held that the Representatives and their constituents, who had claimed vote dilution, lacked standing because they had suffered no vote dilution and hence no injury; a simple majority could always repeal the procedural rule.<sup>226</sup>

### C. Justiciability of Earmark Rules

Through invocation of general justiciability principles—such as political question, standing, equitable discretion, and separation-of-powers concerns, as well as the text of the Rulemaking Clause itself—the Supreme Court and lower courts rarely review legislative rules and, when they do engage in such review, afford substantial deference to the Legislature.<sup>227</sup> Nor has any federal court considered the validity of a legislative rule governing the enactment of legislation<sup>228</sup> or “interfered with a purely internal rule of the House or Senate that did not involve other specific constitutional limitations or (in a couple of

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<sup>223</sup> *Id.* at 1306–07; see also *United States v. Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995) (stating that a court may interpret legislative rules where it “requires no resolution of ambiguities”).

<sup>224</sup> For example, in *Kurtz v. Baker*, a taxpayer brought suit when the chaplains of the House and Senate refused to deliver secular remarks or to allow him as a guest speaker during the morning prayer, in accordance with congressional rules. The House rules at issue stated that “[t]he Chaplain shall attend at the commencement of each day’s sitting of the House and open the same with prayer” and that the “[t]he daily order of business shall be as follows: First. Prayer by the Chaplain.” 829 F.2d 1133, 1143 (D.C. Cir. 1987) (citations omitted). The Senate rules provided by resolution that “the Chaplain shall open each calendar day’s session of the Senate with prayer.” *Id.* at 1143 (citation omitted). The D.C. Circuit held that the taxpayer did not have standing to sue because, in relevant part, the taxpayer challenged legislative rules of each House rather than exercises of congressional power or enactment, an essential element for taxpayer standing. *Id.* at 1140. After denying the taxpayer’s other bases for injury-in-fact, the court also reasoned that the taxpayer lacked standing because his injury was not attributable to the chaplains’ denial of his request but rather to the relevant legislative rules. *Id.* at 1144–45. In so doing, the court acquiesced to the principle that only Congress can change such rules and accordingly, no judicial relief was available.

<sup>225</sup> *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997).

<sup>226</sup> *Id.* at 834–36.

<sup>227</sup> See, e.g., *Bell*, *supra* note 206, at 1271.

<sup>228</sup> See *Roberts & Chemerinsky*, *supra* note 179, at 1791.

rare cases) violate the constitutional rights of individuals.”<sup>229</sup> Even when legislative rules involve constitutional violations, courts have exercised their discretion to withhold equitable relief because of separation-of-powers concerns.<sup>230</sup> In this manner, legislative rules can be fairly characterized as endogenous rules that, apart from whatever political pressure the electorate exerts over legislators, lack extra-congressional enforcement.

Lawmakers challenging compliance with the earmark rules face an uphill battle in the courts given their clear reluctance to intervene “[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute.”<sup>231</sup> Private parties challenging the earmark rules also face many significant hurdles:<sup>232</sup> for instance, if a taxpayer argued that tax legislation was adopted invalidly because Congress did not follow the earmark rules,<sup>233</sup> courts would be reluctant to grant relief, for not only does the taxpayer’s Representative have recourse in fighting the adoption of the statute in question, but granting such a request may call into question the validity of all laws.<sup>234</sup>

Furthermore, it would be difficult to argue that a taxpayer’s fundamental rights were at issue if Congress violated its earmark rules or adopted objectionable ones. Congress did not bestow an individual right or privilege in the earmark rules similar, for instance, to the procedural protections afforded to the congressional witness in *Yellin v. United States*,<sup>235</sup> nor are explicit constitutional requirements at issue. As discussed below, some theorists have posited that citizens are entitled to due process in lawmaking,<sup>236</sup> and hence it could be argued that taxpayers are entitled to the disclosure of earmarks or limited tax benefits or, alternatively, to congressional adherence to its own procedures. Because the Court has not accepted deliberation or other features of a due process of lawmaking (apart from lawmaking in special

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<sup>229</sup> John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J. L. & POL. 505, 533 (2004).

<sup>230</sup> See, e.g., *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1174–76 (D.C. Cir. 1983).

<sup>231</sup> *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981).

<sup>232</sup> See *id.* (holding that a court could use its equitable powers to dismiss a case if the plaintiff could obtain redress for injury from the legislative process).

<sup>233</sup> See, e.g., *United States v. Smith*, 286 U.S. 6, 7–9 (1932); *United States v. Ballin*, 144 U.S. 1, 3–4 (1892).

<sup>234</sup> See *Metzenbaum v. FERC*, 675 F.2d 1282, 1288 (D.C. Cir. 1982).

<sup>235</sup> See *Yellin v. United States*, 374 U.S. 109 (1963) (holding that congressional rules governing witness testimony were written to confer rights on witnesses, and Congress was therefore required to follow its own rules).

<sup>236</sup> See *infra* notes 269–71 and accompanying text.

constitutional contexts such as issues invoking federalism concerns),<sup>237</sup> it is unlikely these arguments would prove convincing.<sup>238</sup>

Finally, it is implausible that plaintiffs in such cases would meet standing requirements. Proving that special interest provisions were enacted *because* of the lack of adherence to the earmark rules, or that a court ruling would redress the plaintiff's harm—essential elements of demonstrating a plaintiff's standing to challenge a special interest provision—would be a nearly impossible hurdle.<sup>239</sup> If a plaintiff sued claiming her rights as a taxpayer—arguing, for instance, that her taxes were improperly spent on special interest legislation due to congressional non-adherence to the earmark rules—it is unlikely that a court would find standing under the federal taxpayer doctrine due to the lack of a “logical nexus between the status asserted [by the taxpayer] and the claim sought to be adjudicated.”<sup>240</sup> For these many reasons, it is highly doubtful that challenges to defects in the earmark rule process, either in the rules' drafting or in lawmakers' adherence to the rules, would succeed.

#### IV

##### EARMARK RULES AND STATUTORY INTERPRETATION

###### A. Proposal

As an alternative to direct review of the earmark rules, this Article proposes that courts look to the earmark rules for guidance in interpreting ambiguous statutes.<sup>241</sup> This proposal specifically suggests that

<sup>237</sup> Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1752–55 (2002).

<sup>238</sup> The argument that, as a result of the failure to disclose earmarks or limited tax benefits, Congress enacted legislation that violates the Fifth Amendment on equal protection grounds or the Tax Uniformity clause also likely fails. *See generally* Zelenak, *supra* note 63 (arguing that special interest tax provisions likely withstand constitutional scrutiny in these respects).

<sup>239</sup> In this manner, a plaintiff would not be able to show standing. An injury must be “fairly . . . traceable to the challenged action of the defendant” and must be redressable by the courts. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citation omitted); *see also* Apache Bend Apartments v. United States, 987 F.2d 1174, 1180 (5th Cir. 1993) (holding that the taxpayer did not have standing to contest targeted transition relief bestowed by Congress upon its competitor since the taxpayer incurred no specific injury).

<sup>240</sup> *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (holding that a taxpayer may challenge the constitutionality of a federal tax or spending program when such nexus exists). The logical nexus exists when the challenged law at issue relies on Congress's taxing and spending power under Article I, Section 8 of the Constitution and where the law violates “specific constitutional limitations” imposed on that power. *Id.* at 103, 102–04. It unclear whether or not tax expenditures on behalf of special interests constitute improper spending within the paradigm of taxpayer standing cases.

<sup>241</sup> In a loosely analogous proposal, John C. Roberts has argued that congressional authority under the Rulemaking Clause to create an authoritative committee system supports the use of committee reports in statutory interpretation. *See* Roberts, *supra* note 229, at 531–42.

courts defer to Congress's rulemaking authority by assuming that the rules function correctly. In other words, courts should construe narrowly, against special interests, statutory benefits that were not disclosed in accordance with the earmark disclosure rules but that would fall within the ambit of the rules if the statute were construed in the manner urged by the special interest. As a corollary, courts should accept as strong evidence of special interest legislation statutory benefits that are disclosed in accordance with the rules, with a caveat: even when a provision is disclosed, courts should exercise caution if the disclosure occurred after the legislation was passed. In such instances, disclosure is not indicative of robust legislative deliberation; a lawmaker has strong motivation to alter the legislative record to benefit special interests since a large portion of the costs of disclosure—that fellow lawmakers and interest groups will jeopardize its inclusion—is absent.

The scope of this proposal is as follows. First, it is not triggered unless there is ambiguity in the statute at issue. Courts generally should uphold explicit special interest deals because “[i]t is well settled that it is illegitimate for judges to impose their own values in place of those of the legislature, because such a substitution thwarts Congress’s constitutional authority to make law.”<sup>242</sup> Nevertheless, in the special interest context, lawmakers have strong incentives to obscure the true nature of the provision intentionally by masking it in public-regarding terms;<sup>243</sup> accordingly, one should expect ambiguity to arise often as a result of such subterfuge.

Second, this Article’s proposal will apply in certain tax and spending litigation scenarios. For instance, a special interest defendant in a tax enforcement proceeding may claim offsetting tax benefits or relief from the provision enforced by the IRS. Alternatively, a special interest plaintiff may sue an agency to receive legal entitlements bestowed by Congress in spending legislation. In both examples, this Article’s proposal would guide the judge in construing any ambiguous provisions at issue.

Third, this Article’s proposal is not in conflict with those doctrines of judicial deference towards agency interpretations—for example, those involving (i) a policy choice made by an agency in its exercise of legally binding authority delegated by Congress (*Chevron* deference)<sup>244</sup> or (ii) outside *Chevron*’s scope, an agency’s interpreta-

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<sup>242</sup> Macey, *supra* note 7, at 239.

<sup>243</sup> See sources cited *supra* note 10 and accompanying text.

<sup>244</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing a two-part inquiry for evaluating agency interpretations of statutes: (1) whether the statute unambiguously provides a resolution of the issue and (2) if not, whether the agency’s interpretation of the statute is reasonable). A later decision by the Court in *United States v. Mead Corp.* establishes that *Chevron* deference only applies where

tion of a statute (*Skidmore* deference)<sup>245</sup>—since this Article’s proposal acts to eliminate the finding of ambiguity that is required before such doctrines are triggered. Rather than turning to canons of statutory interpretations only after a statute is deemed to be ambiguous, in these contexts judges should employ such interpretive methods in their threshold inquiry regarding ambiguity.<sup>246</sup> As a result, this Article’s proposal, as a type of canon of construction, would in most cases neutralize doctrinal requirements of deference towards the agency’s interpretation by establishing the plain meaning of an otherwise-ambiguous statute.

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Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

533 U.S. 218, 226–27 (2001). In a prior decision, *Christensen v. Harris County*, the Court held that “[i]nterpretations such as those in opinion letters[,] . . . which lack the force of law[,] do not warrant *Chevron*-style deference” instead suggesting that “a formal adjudication or notice-and-comment rulemaking” were prerequisites for such deference. 529 U.S. 576, 587 (2000).

<sup>245</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Skidmore* deference requires that a court establish the appropriate level of judicial deference towards an agency’s interpretation of the statute by considering several factors, including “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140. *Mead* held that where *Chevron* deference does not apply, agencies are still entitled to *Skidmore* deference, paraphrasing its requirements in saying that a court’s decision should be based upon “the degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.” *Mead*, 533 U.S. at 228.

<sup>246</sup> See, e.g., *Rapanos v. United States*, 547 U.S. 715, 737–39 (2006) (applying judicial canons of construction in first step of *Chevron* analysis); see also, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 984–85 (2005) (referring to the rule of lenity as a canon of statutory interpretation that could be applied to determine whether statute is unambiguous such that deference is unnecessary). Additionally, the earmark disclosure lists, as legislative history, inform the question of ambiguity. See *Chevron*, 467 U.S. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”). In subsequent cases, both the Supreme Court and lower courts have sometimes interpreted *Chevron* to allow consultation of legislative history at step one of the analysis. See *INS v. St. Cyr*, 533 U.S. 289, 321 n.45 (2001) (“We only defer . . . to agency interpretations of statutes that, applying the normal ‘tools of statutory construction,’ are ambiguous.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (finding statute’s meaning clear upon considering “ordinary canons of statutory construction,” including its legislative history); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 233 (1986) (deferring to administrative construction “unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress”); *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (using “traditional tools of statutory interpretation—text, structure, purpose, and legislative history” in determining whether a statute is ambiguous under the *Chevron* doctrine). But see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1209–10 (4th ed. 2007) (noting that the Supreme Court has “refused to give serious consideration to legislative history” in determining whether a statute is ambiguous for *Chevron* purposes).

Additionally, the rationale of this Article's proposal should also guide an agency's interpretation of an ambiguous statute just as it would a court's—assuming the agency is acting in an interpretive rather than a policymaking capacity. Thus, if an agency has adopted a statutory interpretation that conflicts with the earmark disclosure lists, a court may find that the interpretation violates the standards of review under the deference doctrines—for instance, such an interpretation may be “unreasonable” under *Chevron* or “invalid” or “unpersuasive” under other doctrines of deference, such as *Skidmore*.

Relatedly, where agencies act in policymaking capacities, such as in the deployment of discretionary funds, this proposal attempts to provide a useful framework through which agencies can discern the collective intent of Congress. Thus, even where there is no judicial recourse regarding an appropriations provision,<sup>247</sup> agencies that wish to follow congressional intent can use this proposal as a guide.<sup>248</sup>

The aim and effect of this proposal can be demonstrated by using the fact pattern of a recent federal district court case, *In re G-I Hold-*

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<sup>247</sup> To the extent applicable only to the court system, this Article's proposal will have more impact in the authorization and tax contexts, rather than in the appropriations context. In the latter context, courts may be reluctant to determine the substantive meaning of the appropriation, which is whether it has legal effect. See *Atlee v. Laird*, 347 F. Supp. 689, 706 (E.D. Pa. 1972) (concluding that it is “impossible” to determine whether congressional funding of Indo-China military activities is equated to congressional authorization of such activities). Additionally, the Court has also refused to review agency allocation of funds from a lump sum congressional appropriation because such an appropriation allows the agency to determine how to meet its statutory directives. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion.”). Nonetheless, where Congress statutorily restricts agencies to spend funds in a certain manner, the intended recipients of such funds may sue for proper distribution of them. See, e.g., *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996) (holding reviewable a funding decision by the Secretary of the Interior because Congress intended to limit the secretary's discretion in the matter); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997) (finding agency use of funds judicially reviewable where Congress mandated full funding of program at issue); *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 869 F. Supp. 760, 764–65 (D.S.D. 1994) (distinguishing *Lincoln* and finding availability of judicial review where Congress has imposed statutory conditions on the expenditure of funds). Additionally, in recent history, the congressional use of earmarks in authorization legislation has been substantial. See *supra* note 79.

<sup>248</sup> For discussion of statutory interpretation by the executive branch, see generally Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) (arguing that statutory interpretive norms used by agencies ought to differ from those used by the courts); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing that the theory underlying a canon of construction determines the appropriateness of its use by the executive branch); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990) (arguing that legislative history should have an important role in agency statutory interpretation).

ings,<sup>249</sup> which involved the interpretation of a tax transition rule, a common vehicle for provision of special interest benefits.<sup>250</sup> The case involved a taxpayer that amended a partnership agreement. Under the amended agreement, the taxpayer redeemed its partnership interest in exchange for a deferred property distribution. Subsequent to the signing of the contract but prior to the distribution, Congress amended a nonrecognition provision in the Code to require that a taxpayer recognize taxable gain upon distributions of securities it receives from a partnership.<sup>251</sup> Congress provided transition relief to those taxpayers who had entered into a binding contract for partnership distributions of “(i) a fixed value of marketable securities that are specified in the contract, or (ii) other property.”<sup>252</sup> The court interpreted these distribution options as mutually exclusive and held that transition relief was not available to the taxpayer because the agreement entitled the partnership to vary the value of securities it distributed.<sup>253</sup> In interpreting the transition rule, the court refused to consider an affidavit from a lobbyist retained by the taxpayer to seek relief from the proposed change to section 731.<sup>254</sup> The court stated that, although it need not consult legislative history because the transi-

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<sup>249</sup> 369 B.R. 832 (D.N.J. 2007).

<sup>250</sup> For examples of scholarly work concerning statutory interpretation in the tax context, see Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 11–14 (2000); Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 17–20 (2004); Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 462–86 (1993); Livingston, *supra* note 71, at 849–86; Edward J. McCaffery, *Tax’s Empire*, 85 GEO. L.J. 71, 94–121 (1996); Robert Thornton Smith, *Business Purpose: The Assault Upon the Citadel*, 53 TAX LAW. 1, 14–20 (1999). See generally Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879 (2007); Brian Galle, *Interpretive Theory and Tax Shelter Regulation*, 26 VA. TAX REV. 357 (2006); Michael Livingston, *Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986).

<sup>251</sup> Under section 731(a) of the Internal Revenue Code, a partner recognizes taxable gain upon partnership distributions only to the extent money, as opposed to property, received exceeds the partner’s basis in its partnership interest. 26 U.S.C. § 731(a) (2006). At the time the agreement was entered, the Code treated securities as property; however, subsequent to the signing of the agreement but prior to the distribution, Congress added section 731(c) to provide that securities were treated as money for purposes of the gain recognition provision. See Pub. L. No. 103-465, § 741, 108 Stat. 4808, 5006–10 (codified at 26 U.S.C. § 731(c)). The statute was amended out of concern that taxpayers could exchange interests in appreciated assets for marketable securities while enjoying tax deferral. H.R. REP. NO. 103-316, at 1069–70, as reprinted in 1994 U.S.C.C.A.N. 4040, 4345.

<sup>252</sup> *In re G-I Holdings*, 369 B.R. at 837.

<sup>253</sup> The agreement provided that the distribution would be worth approximately \$464 million. It further provided that the partners would later agree upon which property the distribution would be comprised, and if they were unable to do so the distribution would consist of (i) cash not to exceed \$48 million and (ii) government securities. *In re G-I Holdings*, 369 B.R. at 839.

<sup>254</sup> *Id.* at 841. (“The affidavit of a lobbyist, especially when written during the course of litigation, provides no evidence of contemporaneous Congressional intent, and thus is of no value to a court . . .”).

tion rule was unambiguous,<sup>255</sup> even in the event of ambiguity it would not have considered the lobbyist's affidavit, given that the involvement of an interest group in the lawmaking process does not evince congressional intent, which instead reflects the shared assumptions of lawmakers.<sup>256</sup>

Accepting the precise facts of *In re G-I Holdings*, this Article would not require courts to turn to the earmark rules for guidance because the court did not find the transition rule to be ambiguous, and thus there is no need to look outside the text of the statute. Suppose, however, that the transition rule was interpreted by the Internal Revenue Service in the section 731 regulations to provide relief for receipt of a "fixed value of securities *and* other property,"<sup>257</sup> thereby causing the court to deem the statute ambiguous. Following this Article's proposal, the court would then determine whether or not the earmark rules applied. The transition rule would be captured by the earmark rules if its potential beneficiaries constituted no more than one taxpayer, in the case of the House earmark rules on tax transition relief; or no more than a limited group of beneficiaries, typically defined as ten taxpayers, in the case of the Senate rules. If so, the court would look to whether the provision was in fact disclosed in both houses as a limited tax benefit. If it was not, the court would construe the provision against the taxpayer, denying nonrecognition relief under section 731(a). If the provision was so disclosed in both houses, and if the taxpayer was disclosed as a potential beneficiary prior to the congressional vote, the court would conclude that the taxpayer was indeed afforded transition relief.<sup>258</sup> The theories and doctrine supporting this proposal are discussed below.

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* In support of this proposition, the court cited *Circuit City Stores v. Adams*, 532 U.S. 105, 120 (2001) ("Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. . . . We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined . . . . It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.").

<sup>257</sup> For instance, although section 707(a)(2)(B) of the Internal Revenue Code does not apply if there is a transfer from a partnership to a partner of money *or* other property, the regulations thereunder assume application of this subsection if there is a transfer of money *and* other property, thus possibly creating ambiguity in the legal framework. See *id.* at n.13.

<sup>258</sup> In both cases, judicial resolution of the matter under the proposal clears the ambiguity in the statute, such that deference towards the agency's interpretation in the regulations is not necessary under *Chevron* or other related doctrines. See *supra* notes 244–46 and accompanying text.

## B. Underpinnings of the Proposal

### 1. *Separation-of-Powers Concerns*

The purpose of earmark rules is to *highlight* the insertion of such provisions so that they can be subjected to the scrutiny of the legislative body.<sup>259</sup> Ostensibly innocuous provisions that mask their true beneficiaries—such as those that provide transition relief for all companies formed on a certain date—successfully evade majority scrutiny simply because they are inscrutable. The earmark rules attempt to stem this legislative subterfuge by using “the best of disinfectants”—sunshine.<sup>260</sup> Utilizing the earmark rules to interpret undisclosed provisions narrowly, against special interests, essentially precommits Congress to *follow through* on what it has wrought and encourages the enactment of legislation that represents the fully informed will of the majority. The proposed judicial role also honors and reinforces Congress’s own remedies for the shortcomings it has perceived of itself.<sup>261</sup> As explained below, this approach satisfies separation-of-powers concerns.

*Ballin* and its progeny have interpreted the Rulemaking Clause to conclude that each house of Congress has general authority over its own rules.<sup>262</sup> Lack of judicial competence concerning the dynamics of the legislative process may justify such deference.<sup>263</sup> It is also argua-

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<sup>259</sup> See *supra* Part I.B.2.

<sup>260</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914).

<sup>261</sup> Some commentators have noted that judges exceed their constitutional function, producing countermajoritarian results, by not examining materials that are central to the legislative procedures that Congress has chosen. See, e.g., Bell, *supra* note 206, at 1258 (arguing that “new textualists may usurp legislative prerogatives no less than do the ‘judicial activists’ they regularly excoriate for invalidating government actions on constitutional grounds”); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 40 (1994) (arguing that “rejecting or systematically discounting legislative history is countermajoritarian, both in declining to consult materials that are integral to Congress’s chosen lawmaking process and in failing to acknowledge the substantial opportunity costs imposed on Congress”); George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 67 (arguing that, in construing statutes, courts should defer to the importance bestowed upon the committee system by Congress). For classic works detailing the countermajoritarian difficulty, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43–72 (1995).

<sup>262</sup> See *Field v. Clark*, 143 U.S. 649, 672 (1892); *United States v. Ballin*, 144 U.S. 1, 6 (1892). The Framers undertook no discussion of its meaning during the Convention. Roberts, *supra* note 229, at 529 (noting additionally that the clause was not discussed in the Federalist Papers).

<sup>263</sup> See *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1182 (D.C. Cir. 1983) (Bork, J., concurring) (citing “a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better”).

ble that inherent within legislative powers resides the control over legislative rules.<sup>264</sup> Justice Story embraced this rationale and stated:

No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.<sup>265</sup>

Cast differently, the flow of the rulemaking power from Congress's status as a lawmaking body presents separation-of-powers arguments in favor of a deferential judicial approach to legislative rules.<sup>266</sup> By contrast, one author has argued that hard distinctions between statutes and legislative rules fall apart when both may bestow third party rights,<sup>267</sup> and that judicial review of legislative rules does not jeopardize the legislative function more so than judicial review of statutes.<sup>268</sup> Although not without some validity, such a view threatens to overlook that the Constitution commits to the Legislative Branch authority over its internal organization.

Some constitutional theorists argue for judicial review of the lawmaking process—albeit not in the legislative rule context where congressional members can arguably better police the process themselves—rather than review of the substance of legislation. These

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<sup>264</sup> Roberts, *supra* note 229, at 529–30. Whether sole rulemaking authority exempts legislative rules from judicial review altogether is disputable. See *Vander Jagt*, 699 F.2d at 1173 (holding that the Rulemaking Clause “simply means that neither [the Court] nor the Executive Branch may tell Congress what rules it must adopt”).

<sup>265</sup> 2 STORY, *supra* note 52, at 298. Similarly, a state court has provided that “if [the] provision were omitted [from the state’s constitution], and there were no other constitutional limitations on the power, the power would nevertheless exist, and could be exercised by a majority.” *French v. Senate of the State of Cal.*, 80 P. 1031, 1032 (Cal. 1905) (refusing to order senate membership for ex-members who were expelled without procedural protections and upon false accusations). In another context, Justice Story argued that if the authority over legislative membership decisions is “lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger.” 2 STORY, *supra* note 52, at 295. Story’s conclusion unconvincingly assumes that the legislature will pursue the good, and the other branches can only threaten that pursuit.

<sup>266</sup> Separation-of-powers concerns may arise based on the harm alleged or the remedy sought rather than the plaintiffs’ status. *Vander Jagt*, 699 F.2d at 1183 n.3 (Bork, J. concurring) (“[S]eparation-of-powers considerations do not, strictly speaking, operate here on the basis of the plaintiffs’ status as legislators. Rather, in keeping with the standing doctrine, my concern is with the separation-of-powers implications of the harm alleged: ‘diminution of influence’ in the legislative process.”). But see Miller, *supra* note 25, at 1360–61 (suggesting that judicial review of legislative rules “does not hamstring Congress, nor make Congress an easy mark for the other branches”).

<sup>267</sup> See Miller, *supra* note 25, at 1347 (arguing the difference between statutes and legislative rules lies in discerning the interests invoked by each).

<sup>268</sup> *Id.* at 1360–61.

scholars argue that the former is less intrusive because it is driven by “neutral principles”<sup>269</sup> and so is better suited to the skills of the Judiciary;<sup>270</sup> such theorists further recognize that elected officials often lack incentives to establish fair processes.<sup>271</sup> Nonetheless, the protection afforded by Congress’s autonomy counsels against wholly embracing the process theorists’ approach.<sup>272</sup> Although courts may possess expertise over litigation processes, these skills are not translatable to the legislative process.<sup>273</sup> Also, it is unlikely that courts can avoid imposing value judgments in their formulation and evaluation of legislative processes since, inevitably, such procedures “involve trade-offs between efficiency and promoting deliberation and equality among legislators.”<sup>274</sup>

The story of the earmark rules supports the notion that legislators lack neutral motives in adhering to their internal rules.<sup>275</sup> This Article’s statutory interpretation proposal recognizes that courts are not necessarily better suited to scrutinize the content of the earmark rules or to strike down legislation passed in conjunction with evasion of applicable rules. Either approach would require that the Judiciary im-

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<sup>269</sup> ELY, *supra* note 261, at 54–55.

<sup>270</sup> *Id.* at 21, 102. For a representative passage of the process theory literature, see Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 223–24 (1976) (“Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose. In order to weight the anticipated benefits for some against the burdens the law would impose on others, legislators must inform themselves also about those burdens. These demands on the legislative process imply others. The projections and assessments of conditions and consequences must presumably take some account of evidence, at least in committee sessions. . . . These kinds of demands are implicit in due process, if lawmakers are really bound to a rule that laws must be made as rational means toward some agreed purpose.”); see also ELY, *supra* note 261, at 102–03 (arguing that courts should strike down statutes only if they negatively influence the political process or are outcomes of pathologies in such process); FARBER & FRICKEY, *supra* note 12, at 119 (“We agree with Hans Linde that courts seem more capable of constructing ‘a blueprint for the due process of deliberative, democratically accountable government’ than of assessing, in all but exceptional cases, whether legislation properly promotes public values”) (quoting Linde, *supra*, at 253); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1132 (1995) (“According to processualists, the function of judicial review is not to impose ‘substantive values’ on the nation, but to safeguard the process of democratic decision making.”).

<sup>271</sup> See JOHN ARTHUR, WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY 48, 49–52 (1995).

<sup>272</sup> For an overview of the critiques of the process theorists, see Bell, *supra* note 206, at 1292–96.

<sup>273</sup> See *id.* at 1295 & n.157.

<sup>274</sup> *Id.* at 1295.

<sup>275</sup> See *supra* Part II.C (discussing deficiencies of and defections from the earmark rules). Such evasion occurs in other contexts. See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1074 n.156 (1996) (suggesting that incumbents may set spending cap levels to disadvantage challengers).

pose its own conception of the legislative process, and so would raise pragmatic and separation-of-powers concerns. Instead, by simply asking courts to assume that Congress has followed its own rules and interpret ambiguous legislation accordingly, this proposal prescribes a role for the Judiciary that is less intrusive and more deferential to the Legislature.<sup>276</sup> Furthermore, courts and scholars often view statutory-interpretation methods as less intrusive or combative means of promoting constitutional principles than directly enforcing such principles.<sup>277</sup> Such an approach remands the decision to the elected body in a “suspensive veto that slows, but does not derail, majority will.”<sup>278</sup> In this manner, the courts’ employment of statutory interpretation may allow a more gentle disapproval of a given congressional practice than would upholding direct constitutional challenges.<sup>279</sup>

## 2. *Doctrinal Support*

This Article’s approach to statutory interpretation finds support in the caselaw regarding the Rulemaking Clause of the Constitution. Courts generally do not question a legislative body’s determination of the validity of its documents. Thus, under the enrolled bill rule at issue in *Marshall Field*,<sup>280</sup> the Court refused to question the presiding officer’s certification that the bill at issue was properly enacted by the House.<sup>281</sup> The Court’s holding implies that although the officer had a legal obligation to truthfully certify compliance with the legislative

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<sup>276</sup> See *supra* Part IV.A.

<sup>277</sup> Courts use interpretative methods to encourage constitutional principles, refusing to directly enforce them because of separation-of-powers concerns. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 504 (1996) (arguing that clear statement rules allow Congress to retain lawmaking function). But see Mashaw, *supra* note 53, at 1690–94 (arguing that pursuing under-enforced, extra-congressional norms through statutory interpretation may be more activist than direct adjudication).

<sup>278</sup> Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 366 (1982).

<sup>279</sup> See ELY, *supra* note 261, at 4 (“When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to ‘correction’ by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”).

<sup>280</sup> *Field v. Clark*, 143 U.S. 649, 672 (1892).

<sup>281</sup> *Id.* at 668–72. The Court also suggested that an opposite holding would create a state of uncertainty regarding the validity of laws. *Id.* at 670. Some subsequent decisions have viewed the enrolled bill doctrine as an application of the political question doctrine. See *Baker v. Carr*, 369 U.S. 186, 214–15 (1962) (noting that the political question doctrine generally applies to the process of enacting legislation); *United States v. Sitka*, 845 F.2d 43, 46 (2d Cir. 1988) (“Another doctrine closely related to—if not inherent in—the political question doctrine is the so-called ‘enrolled bill rule’”); *United States v. Stahl*, 792 F.2d 1438, 1440–41 (9th Cir. 1986) (describing enrolled bill rule as extension of political question doctrine); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (holding that interpretation of the rules of the House of Representatives “is political in nature”).

procedures, the Judiciary is not the proper tribunal to hold congressional members accountable for false certifications.<sup>282</sup> Unless a court accepts the Legislature's determination, separation-of-powers concerns arise when the court evaluates legislative procedures. Similar to the Court's conclusion in *Marshall Field*, this Article's proposal would require that judges accept as true the Majority Leader's or committee member's certification of a bill's composition and its compliance with the earmark disclosure rules.<sup>283</sup> To do otherwise would "manifest a lack of respect due a coordinate branch."<sup>284</sup> A court's interpretation of a statute to confer special interest benefits when Congress had not disclosed the benefits as required by its own rules would intrude upon the legislative function.<sup>285</sup>

Indeed, the context surrounding the earmark rules may mandate that the courts employ a greater degree of deference. In contrast to the matter at hand, *Marshall Field* involved an express constitutional procedural requirement that the houses keep a journal in which their votes are entered. The Constitution does not, however, require the disclosure of earmarks and limited tax benefits; thus, courts should be even more reluctant to prescribe or question the mode in which the

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<sup>282</sup> See *Marshall Field*, 143 U.S. at 672 ("The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated . . .").

<sup>283</sup> An analogous circumstance is when the courts assume Congress has not violated or waived its own legislative rules to accept as true Congress's "careful distinction" between appropriations bills and substantive legislation. See Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 197-98 (1992) (citing *Andrus v. Sierra Club*, 442 U.S. 347 (1978)). Susan Rose-Ackerman proposes that courts should prohibit Congress from waiving its own rules that do not allow the insertion of substantive legislation in appropriations bills. *Id.*

<sup>284</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring). The inconsistency between the "[n]ew textualists' deference to legislative judgments when legislative procedures are directly challenged" and their "antipathy for legislative judgments [through legislative history] reflected in their interpretative approach" has been explored in the literature. Bell, *supra* note 206, at 1279.

<sup>285</sup> Some have argued that *Munoz-Flores*, in which the Court held that whether a federal statute certified by congressional leaders as a "revenue-raising law" actually was such under the Origination Clause did not present a political question, has drastically narrowed the holding of *Marshall Field*. See, e.g., Amar, *supra* note 202. Nonetheless, interpreting legislation in accordance with the certification required by the earmark rules does not invoke separate constitutional requirements, such as the Origination Clause, and thus *Marshall Field* should prevent courts from questioning the veracity of the certification. See *Munoz-Flores*, 495 U.S. at 391 n.4 (1990) (arguing that *Marshall Field* was distinguishable in that it did not involve another constitutional requirement binding Congress). Additionally, courts have subsequently held that the enrolled bill rule was not overruled or limited by *Munoz-Flores*. See, e.g., *Public Citizen v. U.S. District Court for D.C.*, 486 F.3d 1342, 1355 (D.C. Cir. 2007); *United States v. Pabon-Cruz*, 391 F.3d 86, 99 (2d Cir. 2004) (describing the enrolled bill rule as a "longstanding rule, invoked by many courts, including the Supreme Court and our own Court"); *Zeigler v. Gonzalez*, No. 06-0080-CG-M, 2007 U.S. Dist. LEXIS 47134, at \*8 (S.D. Ala. June 28, 2007) (finding that the enrolled bill rule bars challenge to the Deficit Reduction Act of 2005).

content of the legislation is disclosed. Finally, if a court does not permit litigants to challenge a signed bill on the ground that it never passed either house of Congress out of respect for the legislative officers who certified as to its enrollment, as in *Marshall Field*, then presumably a court will accept the content of that legislation as certified by the officers.<sup>286</sup> This proposal also finds support in caselaw holding that the question of whether Congress has followed its own rules is a nonjusticiable political question.<sup>287</sup> For instance, the D.C. Circuit has stated that it “must assume that [a house of Congress] acted in the belief that its conduct was permitted by its rules, and deference rather than disrespect is due that judgment.”<sup>288</sup>

The Supreme Court similarly has grounded an interpretation of a statute in conformity with legislative rules. In the landmark environmental law case of *Tennessee Valley Authority v. Hill*, the Court held that the Endangered Species Act of 1973 prohibited completion of a dam that would threaten the survival of an endangered species, even though Congress had continued to appropriate money for the project subsequent to the appropriations committees being apprised of the dam’s environmental impact.<sup>289</sup> The Court argued that the appropriations did not constitute an implied repeal of the relevant provisions of the Endangered Species Act and that they instead must follow the statute’s provisions.<sup>290</sup> In substantiating this argument, the Court reasoned that a contrary determination would “[n]ot only . . . lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.”<sup>291</sup> The Court then cited an internal House rule that required appropriations to comport with existing law and provided a point of order against appropriations changing the law.<sup>292</sup>

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<sup>286</sup> *But cf.* U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 455 n.7 (1993) (holding that the enrolled bill doctrine does not preclude a court from considering the meaning of an enrolled bill); *Pabon-Cruz*, 391 at 99–100 (finding that enrolled bill rule does not apply where the congressional intent of a bill’s language, rather than its accuracy or validity, is at issue); *Cherry v. Steiner*, 716 F.2d 687, 693 (9th Cir. 1983) (“The enrolled bill doctrine . . . forestall[s] judicial inquiry into procedural irregularities occurring prior to the enactment of bills, not inherent defects in bills as enrolled.”). These cases, however, can be distinguished in that that the statutes at issue involved questions of simple statutory interpretation and did not involve “judicial inquiry into the internal governance of Congress” which “requires extreme deference.” *Mester Mfg. Co. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989). In the latter cases, the court will not question the proper functioning of Congress’s internal rules. *See Gregg v. Barrett*, 771 F.2d 539, 549 (D.C. Cir. 1985).

<sup>287</sup> *See, e.g., Metzbaum v. FERC*, 675 F.2d 1282, 1288 (D.C. Cir. 1982) (holding that *Baker v. Carr* requires deference to the judgment of the House of Representatives).

<sup>288</sup> *Id.*

<sup>289</sup> 437 U.S. 153, 189–93 (1978).

<sup>290</sup> *Id.* at 189–90.

<sup>291</sup> *Id.* at 190–91.

<sup>292</sup> *Id.* at 191.

Substantial precedent thus exists to support this Article's proposal of assuming congressional compliance with its own earmark rules when interpreting ambiguous statutes, a distinct advantage over the more doctrinally problematic approach of directly reviewing the rules.<sup>293</sup>

### 3. *Foundations of Statutory Interpretation*

#### a. *Textualism and Intentionalism*

In addition to having doctrinal support, this Article's proposal fits within several views of statutory interpretation. Textualists, at first glance, would object to the proposal's use of extra-statutory devices in interpreting statutes. Textualists claim that consulting legislative history encourages congressional members or lobbyists to insert hidden or vague provisions that do not represent majority will.<sup>294</sup> In contrast, the purpose of earmark rules is to *highlight* the insertion of such provisions so that they can be subject to the scrutiny of the legislative body. Seemingly innocuous provisions that mask their true beneficiaries, such as those that provide transition relief for all companies formed on a certain date, successfully evade majority scrutiny simply because they are inscrutable. The earmark rules attempt to stem this legislative subterfuge; similarly, utilizing the earmark rules to interpret narrowly undisclosed special interest provisions encourages the enactment of legislation that represents the fully informed will of the majority, thereby meeting the textualist critique of the expansive use of legislative history in statutory interpretation. Textualists also argue that legislative history is illegitimate since society is "governed by laws,

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<sup>293</sup> Indeed, courts have invoked *Marshall Field* in other contexts. See, e.g., *Mester Mfg.*, 879 F.2d at 570–71 ("In the absence of express constitutional direction, [the courts must] defer to the reasonable procedures Congress has ordained for its internal business" where an employer argued that immigration bill at issue was null and void because it was presented after adjournment *sine die*); *Gibson v. Anderson*, 131 F. 39, 42–43 (9th Cir. 1904) (refusing to question an act's date of approval that was shown on the published statutes); *United States v. Campbell*, No. 06-3418, 2007 U.S. App. LEXIS 7813, at \*1 (7th Cir. Apr. 3, 2007) (unpublished order) (rejecting argument that jurisdictional statute has no legal effect because the House and Senate did not vote on it in the same session of Congress); cf. *Am. Fed'n of Gov't Employees v. United States*, 330 F.3d 513, 522 (D.C. Cir. 2003) (rejecting the argument that a statute's rational basis may only be contained in the congressional papers and citing *Marshall Field* for the statement that "Congress has broad discretion in determining what must be published in the official record") (citing *Field v. Clark*, 143 U.S. 649, 671 (1892)). To be sure, the Court has delved into the question of whether Congress has followed its own rules, but only where such inquiry was necessary to protect the rights of private parties. See *Christoffel v. United States*, 338 U.S. 84, 88–89 (1948) (examining rules involving third-party rights but also stating that "[c]ongressional practice in the transaction of ordinary legislative business is of course none of our concern").

<sup>294</sup> See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (citing to invented legislative history).

not by the intentions of legislators,”<sup>295</sup> but whether lawmakers correctly understand the meaning of such laws is highly relevant in assessing the legitimacy of the laws’ enactment. Proper functioning of the earmark rules serves this legitimizing purpose.

Intentionalists, in opposition to textualists, contend that courts must aim to discover and capture legislative intent in interpreting statutes, and may use a variety of tools external to the statutory text to do so.<sup>296</sup> Critics of textualists have noted that judges exceed their constitutional function, producing countermajoritarian results out of step with congressional intent, when they “declin[e] to consult materials that are integral to Congress’s chosen lawmaking process.”<sup>297</sup> Some claim that the judiciary should not police the accuracy of legislative history, arguing that this task is legislative in nature.<sup>298</sup> These arguments also support this Article’s proposal. For the issue at hand, the legislature has created its own set of legislative rules designed to ensure that it can satisfy its duty of voting upon a statute, the meaning of which is shared collectively. This Article’s proposal counsels courts simply to defer to Congress’s legislative rules, thus producing a result that represents the collective intent of Congress.

#### b. *Pluralism and Republicanism*

Some scholars also divide the statutory-interpretation literature into two strains—alternatively influenced by pluralism or by republicanism.<sup>299</sup> Pluralists view interest groups as competing for scarce societal resources and exerting pressure on political representatives to obtain benefits that ultimately result in a political equilibrium.<sup>300</sup> The government essentially functions to aggregate the preferences of its constituents in an accurate manner, thereby leaving little or no room for representatives to exercise their own judgment.<sup>301</sup> Pluralism, therefore, suggests that statutes constitute deals between lawmakers and interest groups, and courts must enforce them as if they were contracts between private parties.<sup>302</sup>

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<sup>295</sup> See, e.g., *id.* at 519 (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”).

<sup>296</sup> Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1026 (1998) (dividing statutory interpretation theories between textualism and intentionalism).

<sup>297</sup> James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 40 (1994).

<sup>298</sup> HENRY J. FRIENDLY, BENCHMARKS 216 & n.114 (1967).

<sup>299</sup> Sunstein, *supra* note 56, at 1581.

<sup>300</sup> See Farber & Frickey, *supra* note 55, at 875–76 (describing pluralism as the view that the political process results in an equilibrium of “private political power”).

<sup>301</sup> See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 144–67 (1972).

<sup>302</sup> Judge Easterbrook argues that judges should not interfere with the political struggle between interest groups and should therefore uphold interest group bargains. See Easterbrook, *Foreword*, *supra* note 15, at 15–19; Easterbrook, *Statutes’ Domains*, *supra* note 15, at

Republicanism, on the other hand, generally embraces the notion that laws should be supported by reason and hence does not accept out of hand the products of politics.<sup>303</sup> Instead, republicans view the political process as transformative, rather than simply derivative, of preferences.<sup>304</sup> That is not to say republicanism accesses sources external to private preferences;<sup>305</sup> rather, that republicanism simply embraces public deliberation as a potential method of refining and revising those preferences.<sup>306</sup> Republicanism strives to suppress deals between lawmakers and interest groups<sup>307</sup> and rejects the concept of statutes as struck bargains because these modes lack the deliberative function. The pluralist approach to statutory interpretation accordingly promotes deliberation in hopes of minimizing the detrimental effects of interest groups.<sup>308</sup> For instance, the canon of construction that requires the Legislature to clearly state its intent attempts to inject thoughtful analysis into the legislative process. Such canons may arise in statutory contexts that lack transparency and are thought to be dominated by interest group politics.<sup>309</sup>

These two approaches to statutory interpretation are naturally taken to be in general conflict with one another.<sup>310</sup> This Article's pro-

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540–41. Relatedly, pluralism supports the approach that courts effectuate congressional purposes. See Sunstein, *supra* note 56, at 1581.

<sup>303</sup> See Sunstein, *supra* note 56, at 1548–49.

<sup>304</sup> See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140–41 (1986).

<sup>305</sup> See Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (1987) (contending that “the source of legitimacy” is “deliberation itself”). See generally MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986) (describing Aristotelian reasoning as rejecting foundationalism).

<sup>306</sup> See Sunstein, *supra* note 56, at 1549. In this manner, deliberation becomes a central tenet of republican politics, embraced by early thinkers like Aristotle but, in its fullest form, is “distinctly American.” *Id.* at 1548. Liberal thinkers do not view preferences as external to the political process and instead value deliberation as a tool to more effective and equitable social outcomes. See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 143–84 (1946); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 30–31 (London, Parker, Son, & Bourn, 2d ed. 1861); RAWLS, *supra* note 33, at 136–42.

<sup>307</sup> See Linde, *supra* note 270, at 223–24; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41–44 (1985).

<sup>308</sup> See, e.g., Macey, *supra* note 7, at 233 (adopting a statutory interpretation method that unearths hidden interest group deals).

<sup>309</sup> See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–91 (1978) (accepting the canon that appropriations measures should not typically be construed to amend substantive statutes).

<sup>310</sup> See Sunstein, *supra* note 56, at 1581; see also ELY, *supra* note 261, at 5–6, 78–82 (comparing pluralist belief in access to the political process with republican belief in equality). The merit of one approach over the other is beyond the scope of this Article. Instead, in recognition of the impact of both pluralist and republican thought on American constitutionalism, this Article defends its thesis in light of both theories. Generally, however, pluralists are critiqued on the inability to accurately reflect preferences through ordinary majoritarianism due to strategic behavior, cycling problems, and other factors, and due to

posal—that judges should assume the earmark rules have functioned correctly when interpreting ambiguous legislation—does not directly violate the tenets of either interpretative approach. First, congressional members cannot be said to create legislative deals among themselves if certain aspects of those deals are hidden *and* if as a body, congressional members have put in place rules that mandate disclosure of such deals prior to their legislative consummation (assuming they have not waived such rules). In such instances, there is no legislative bargain that reflects the preferences of constituents, at least in so far as they conflict with one another.<sup>311</sup>

An earlier strain of the statutes-as-contracts literature contends that statutes should be understood as deals between legislators and interest groups<sup>312</sup> rather than as deals among the legislators them-

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the lack of a mechanism to gauge intensity of preferences. See Sunstein, *supra* note 56, at 1545–46. Economic critiques of interest group politics suggest a lack of correspondence between the preferences of constituents and enacted legislation. See *id.* at 1546 n.29. Additionally, although on one hand pluralists may view the lack of political participation as a sign of reaching equilibrium, other theorists suggests that collective action problems may instead be the cause. See RUSSELL HARDIN, *COLLECTIVE ACTION* 220–30 (1982) (applying Olson’s collective action theory and the undersupply of public goods to political participation). And on the other hand, pluralist critiques of republicanism might conclude preference formation is illegitimate rent seeking or antagonistic to private entitlements; in response, republicans may view such wealth transfers as the permissible result of political deliberation. Republicanism also may be susceptible to the critique that deliberation toward a common goal is false given the differences in heterogeneous society. See, e.g., Don Herzog, *Some Questions for Republicans*, 14 *POL. THEORY* 473, 484 (1986). Other layers of society may contribute to the deliberative process within a collective, a point some scholars argue is often overlooked in the republican literature. See DE TOCQUEVILLE, *supra* note 49, at 68–70, 189–93, 242–43.

<sup>311</sup> At first glance, textualists would also presumably object to the proposal’s use of extra-statutory devices in interpreting statutes. Such scholars posit that consulting legislative history encourages congressional members or lobbyists to insert hidden or vague provisions that do not represent majority will. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (citing to invented legislative history); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 *HOFSTRA L. REV.* 1125, 1132 (1983) (arguing that legislators can amend their remarks in the Congressional Record); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 327 (1990) (arguing that interest groups pack committee reports to support meanings in statutes that benefit their position); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 *DUKE L.J.* 371, 376–77 (arguing that lobbyists fashion legislative history to their advantage). Conversely, however, the purpose of earmark rules is to *highlight* the insertion of such provisions so that they can be subject to the scrutiny of the legislative body, thereby meeting this critique of using the disclosure lists provided by the rules in statutory interpretation. Additionally, because textualists generally support interpreting statutes *narrowly*, they would likely support my suggestion that undisclosed special interest benefits be construed *narrowly*, against special interests. See Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 *WIS. L. REV.* 205, 216 (stating that textualists argue “that statutes deserved narrow construction principles for reasons resembling Willistonian contract doctrine”).

<sup>312</sup> See Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation*, 76 *N.C. L. REV.* 1145, 1147–48 (1998) (“Unlike the earlier law-and-economics literature, which contended that statutes should be under-

selves. Although a lawmaker may request the addition of a provision that benefits an interest group, if that deal is not disclosed or apparent from the face of the statute, it does not represent a deal between the legislative body and the interest group in question; the intent of a particular lawmaker or constituent does not create law because it does not reflect the preferences of the lawmaking body.<sup>313</sup> At first glance, this Article's proposal offends those who believe statutes are simply deals among public-private players; this critique, however, falls away when the deals are invisible to such players. In this manner, the proposal serves a non-instrumentalist function, aiming to provide a basis for legitimate interpretation of statutes in the context of the lawmaking process.

Although not in conflict with the pluralist ideal, this Article's proposal more obviously fits within those canons of statutory construction based on republican ideals. By reinforcing mechanisms designed to shed light upon special interest dealings, the proposal is structured to minimize pathologies within such contacts: only when deals are exposed can they be scrutinized by other lawmakers and interest groups competing for resources, ultimately freeing the deliberative body to realize the republican goal of emergent reason. The proposal ensures that lawmakers who fail to disclose their support for legislation, as well as the interest groups with which they deal, face consequences because courts, via narrow statutory interpretation, will refuse to uphold any bargains struck, thus furthering the republican ideal of deliberation.<sup>314</sup> Nonetheless, in so advancing deliberation, this Article's proposal does not go so far as to adopt the due-process-of-lawmaking theory to impose "standards of rational policymaking [that] threaten important features of democratic policymaking—the system of representation, interest-group activism, and bargaining as the central form of decisionmaking."<sup>315</sup>

#### 4. *Comparison with Other Approaches*

As discussed, this Article's proposal attempts to arrive at meaningful interpretations of statutes, yet it also seeks to influence the legisla-

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stood as bargains between legislatures and private interest groups, these more recent articles envision statutes as bargains among the legislators themselves.”).

<sup>313</sup> See *id.* at 1181–82. For other difficulties in the interpretation of statutes as contracts, see *id.* at 1171–81 (arguing, for example, that legislators are not in actuality agents of their constituents).

<sup>314</sup> The Court has favored decisions by politically accountable actors in other contexts. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (holding that a decision to prevent aliens from federal employment must be made by a politically accountable branch in order to comport with due process).

<sup>315</sup> Frickey & Smith, *supra* note 237, at 1742 (discussing critiques of James Q. Wilson on the rational policymaking process advanced by Theodore Lowi and stating that they apply to due process of lawmaking regimes as well).

tive process by reinforcing Congress's own prescribed rules, a goal that can be properly characterized as instrumental.<sup>316</sup> Unlike other instrumental approaches to statutory interpretation, which ground their techniques in an external or court-prescribed view of the legislative process, this Article's proposal is guided by Congress's own conception of the ideal legislative process.<sup>317</sup> In this manner, the proposal does not require courts to assert competence over the legislative process, avoiding a critique often raised against other instrumental approaches to statutory interpretation.<sup>318</sup> The proposal is also mindful of the fact that, when adopting legislative rules, Congress does so with the expectation that it will have flexibility in applying them so as not to undermine the current will of the majority. Congress can waive or change rules when considering legislation, and can amend its rules at any time. The proposal does not require Congress to abdicate those powers but instead—and merely—holds the Legislature to its own account of what transpired in the legislative process.<sup>319</sup>

A category of these instrumental approaches involves judicial interpretation of special interest legislation, like this Article's proposal.

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<sup>316</sup> Other scholars have viewed statutory interpretation as serving instrumental purposes to the legislatures. See, e.g., John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 579–82 (1992) (arguing that judicial review can serve to enhance the power of the enacting legislatures); Jane S. Schacter, *Metadecocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 608 (1995) (detailing use of statutory interpretation to protect political accountability). For other instrumental approaches to statutory interpretation see, for example, Macey, *supra* note 7, at 226–27, 253–57 (proposing that courts interpret statutes in accordance with their public-regarding, stated purpose in order to discourage interest group deals); Sunstein, *supra* note 56, at 1549–51, 1558–64 (arguing that courts should encourage deliberation through statutory interpretation); Sunstein, *supra* note 15, at 412 (stating that the most important aspect of his interpretative approach is to improve modern government).

<sup>317</sup> Additionally, although public choice theory predicts that procedural hurdles will benefit interest groups at the expense of the general public, see Eskridge, *supra* note 15, at 291, this critique should not be lodged at this Article's proposal because the earmark rules, although amounting to procedural hurdles, are directed only at interest group legislation and do not impede the enactment of public interest legislation. This assumes, however, that the enactment of public interest legislation does not depend on the enactment of interest group legislation as part of a political compromise.

<sup>318</sup> FARBER & FRICKEY, *supra* note 12, at 98–99 (“What [the proper role of congressional staff] should be is . . . surely the primary concern of the legislative rather than the judicial branch.”).

<sup>319</sup> Similarly, this proposal does not invoke controversial notions of legislative entrenchment since it only concerns the earmark rules in place at the time the ambiguous legislation in question was enacted. Most constitutional scholars suggest that an anti-entrenchment norm forbids one legislature from binding its successors; thus a statute cannot attempt to govern the procedures of subsequent legislatures. See, e.g., Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972) (describing the rule that legislators cannot impose their will on successors “so obvious as rarely to be stated”); Roberts & Chemerinsky, *supra* note 179, at 1775–76. For disagreement as to whether entrenchment is unconstitutional, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002).

For instance, Jonathan Macey has argued that judicial interpretation of ambiguous statutes in accordance with the public-regarding purposes set forth by the Legislature minimizes insidious interest group influence.<sup>320</sup> Macey identifies the pathology at which the earmark rules are aimed: “Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation”; they often accomplish this “by the subterfuge of masking special interest legislation with a public interest façade.”<sup>321</sup> Macey argues that there is a trade-off within “open-explicit” statutes, which are more likely to be enforced yet incur higher political costs.<sup>322</sup> He further argues that by refusing to adopt a statute-as-contract method of interpretation to unearth special interest deals, instead relying on the public purposes of the statute, judges can incentivize open-explicit statutes by making “hidden-implicit” statutes less valuable. Similarly, this Article’s proposal utilizes a statutory interpretation method that would increase the costs of so-called “hidden-implicit” special interest bargains.

Other scholars have suggested various interpretation methods based on the type of legislation at issue. Judge Frank Easterbrook argues that courts should uphold interest groups’ deals and, at least in his later work, should do so even in the case of hidden, “cloakroom” deals.<sup>323</sup> By contrast, Cass Sunstein has contended that courts should interpret statutes narrowly against interest groups.<sup>324</sup> William Eskridge paints a sophisticated interpretative approach by systematically classifying legislation according to its distribution of benefits and costs: for instance, because public choice theory predicts rent-seeking by special interests at the expense of the general public, Eskridge proposes that courts should narrowly construe statutory benefits when they are concentrated and are funded by the public largesse.<sup>325</sup>

These proposals face the critique that the Judiciary exceeds its interpretative role when it chooses to interpret, broadly or narrowly, statutes based upon the classification of beneficiaries, thereby substituting its will for the Legislature’s.<sup>326</sup> Because Eskridge’s approach is

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<sup>320</sup> Macey, *supra* note 7, at 227; see also Posner, *supra* note 15, at 272–73 (arguing that the confinement of statutory interpretation to publicly available materials curtails interest group pressure). Other scholars have suggested that courts strike down special interest legislation on constitutional grounds. See, e.g., Jerry Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980).

<sup>321</sup> Macey, *supra* note 7, at 232.

<sup>322</sup> *Id.* at 233.

<sup>323</sup> Easterbrook, *Foreword*, *supra* note 15, at 4, 17, 49–51.

<sup>324</sup> Sunstein, *supra* note 15, at 478–79 (arguing that courts should construe statutes aggressively if interest groups threaten their implementation).

<sup>325</sup> Eskridge, *supra* note 15, at 325.

<sup>326</sup> See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 90 (1997) (calling Macey’s position “judicial activism of a quite swash-

based on an extrinsic theory regarding the supply and demand of legislation rather than simply the will of the Judiciary, perhaps it best withstands this scrutiny. Nonetheless, although public choice theory predicts certain malfunctions in the legislative process, an inevitably debatable normative conception of a judicial role is necessary before a judicial remedy can be inserted to cure such problems.<sup>327</sup> Critics argue that because public choice theory does not supply a normative view about the correct level of interest group involvement, such proposals require judges to do so in excess of the judicial function.<sup>328</sup> This Article's statutory interpretation proposal, however, is not founded upon public choice theory. Instead, it derives from Congress's own legislative rules—adopted to guard against abuses from the relationship between lawmaker and special interests—thereby not offending the traditional conception of the judge as interpreter.<sup>329</sup> Finally, Einer Elhauge, one notable opponent of public-choice based methods of interpretation, has stated that an interpretative method “seems unobjectionable because it relies only on the proposition that

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buckling variety”). Macey responds to this criticism by stating that embracing the “traditional approach of statutory interpretation” does not translate into judicial activism. Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1086 (1998) (reviewing MASHAW, *supra*) (citation omitted). If, however, one reads Macey's approach somewhat differently to be that judges should interpret statutes according to their stated purpose, rather than according to whatever purpose the judge concludes to be public-regarding, then Macey's proposal does not translate into extreme judicial activism. See Macey, *supra* note 7, at 250 (advocating “traditional approach” of statutory interpretation in which judges do not “look beyond the legislature's stated purpose”).

<sup>327</sup> See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34 (1991) (“[A]ny defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions about the merits of particular political outcomes. Accordingly, expansions of judicial review cannot meaningfully be limited by requiring threshold findings of excessive interest group influence. Further, the use of interest group theory to condemn the political process reflects normative views that are contestable and may not reflect the views of the polity.”). Nonetheless, a strong advantage of Eskridge's approach lies in its ability to “suggest[ ] where we might be more or less worried about misjudging legislative intent by using the wrong presuppositions.” MASHAW, *supra* note 326, at 95.

<sup>328</sup> Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 49 (1991) (“The conceptual difficulty with any theory of statutory interpretation derived from public choice is that it must incorporate the rather odd assumption that the judge is exempt from the behavioral principles which public choice regards as universal.”).

<sup>329</sup> For a well conceived argument against the imposition of judicial conceptions of the lawmaking process, see Frickey & Smith, *supra* note 237, at 1750 (“It is one thing for the Court to enforce explicit constitutional prohibitions on congressional lawmaking procedural innovation—as, for example, with the legislative veto, or with tax legislation that originated in the Senate rather than the House. These exercises of the procedural regularity model of due process of lawmaking may well make sense. It is quite another thing for the Court to impose procedural obligations upon Congress going far beyond the Constitution or the houses' own rules. There is a deep separation-of-powers problem at the heart of what we perceive to be the new due-deliberation model of due process of lawmaking.”) (citations omitted).

such interpretation alleviates the information cost problems of politics by forcing interest groups and politicians to publicize any nefarious purpose a ‘captured’ statute has.”<sup>330</sup> By encouraging congressional adherence to the earmark rules, this Article’s proposal would fall within the category acceptable to Elhauge.

### C. Shortcomings of the Proposal

This Article’s proposal has certain advantages that primarily relate to its ability to encourage legislative adherence to its own rules while maintaining deference to the legislature’s relationship with those rules. Because of this feature, however, this proposal will not cure many defects in the drafting of the earmark rules themselves, since it does not allow judges to substitute their own ideal version of such rules. In this sense, its scope is limited. Part II above explores certain defects inherent in the earmark rules (such as the problematic definition of limited tax benefits). Yet, the proposal would not allow judges to argue that a limited tax benefit under the House earmark rules should properly be one aimed at one hundred beneficiaries, rather than ten beneficiaries; however, where the rules themselves are ambiguous, a judge arguably could provide reasonable interpretations of the rules that aim to represent the intent of Congress, thereby possibly curing some defects. For instance, a judge may reasonably interpret a limited tax benefit not to apply equally to all potential beneficiaries when the statutory beneficiary class is narrowly defined, thereby ameliorating a concern outlined in Part II.<sup>331</sup>

Another critique of the proposal may be that judges must, as a threshold issue, identify whether the ambiguous legislation at issue falls within the ambit of the earmark rules in order to determine the consequence of whether special interest benefits are disclosed. The proposal suggests that in making this inquiry, judges should first evaluate the interpretation of the legislation urged by the special interest group. Judges should then take into account all of the parties’ views concerning the implications of the special interest group’s interpretation—that is, whether such interpretation should have triggered the earmark rules. Judges will, for instance, need to determine whether, under the House rules, a limited tax benefit has fewer than ten beneficiaries when examining the House rules and, under the Senate rules, which tax provisions provide a benefit to a “particular beneficiary or limited group of beneficiaries.” A similar challenge will be to deter-

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<sup>330</sup> Elhauge, *supra* note 327, at 45 n.72.

<sup>331</sup> As discussed in Part II, such an interpretation—although supported by the JCT’s approach to a similar provision in LIVA—may be in tension with that advocated by the Senate Finance Committee in the floor debates of the earmark rules. See *supra* note 139 and accompanying text.

mine whether the earmarks were “included primarily at the request of a Senator,” as required by the rules in order to trigger mandatory disclosure, although some evidence of such occurrence will likely exist.<sup>332</sup> This critique resembles those directed at prior statutory interpretation proposals: that judges are ill equipped to distinguish between special interest and public-oriented statutes.<sup>333</sup> This Article’s proposal, however, is guided by a legislatively mandated definition of special interest legislation. Indeed, in the case of limited tax benefits, judges have the benefit of a JCT report produced in conjunction with LIVA that sets forth a comprehensive interpretation of this concept, as well as the record of a floor debate from the Senate Finance Committee concerning the interpretation of the current rules.<sup>334</sup>

Additionally, recent scholarship has argued that statutory interpretation methods do not create meaningful incentives for Congress because most statutes will not come up for judicial review, or will do so only years after their enactment.<sup>335</sup> This shortcoming is worsened because canons of construction, like the one proposed in this Article, often apply only where the statutory text at issue is ambiguous, thus

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<sup>332</sup> When a representative sought clarification from House Appropriations Chairman David Obey about the omission of a NASA earmark in the Iraq bill, the Chairman responded, “The fact is, that an earmark is something that is requested by an individual member. This item was not requested by any individual member. It was put in the bill by me!” Fund, *supra* note 64, at A15. Presumably, the courts should see past this self-serving statement to conclude that the earmark was in fact requested by the Chairman, within the meaning of the earmark rules.

<sup>333</sup> See Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 484 (1999) (“‘Pork’ is in the eye of the beholder; a private interest bill is often one that the commentator believes to be bad policy.”). Similarly, William Eskridge concedes that his own statutory interpretation approach may be difficult to implement in that the distribution of benefits and costs of many statutes cannot be easily identified. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 158 (1994) (noting that although the author views the charitable contributions deduction as distributing benefits to a narrow set of recipients, others view the deduction as providing distributed benefits to society because charities benefit the public).

<sup>334</sup> See *JCT Analysis*, *supra* note 125; see also 153 CONG. REC. S10,687–719 (daily ed. Aug. 2, 2007). Yet, a further criticism could be lobbied against the proposal precisely because judges have the benefit of the legislative definition—that in so relying upon the definition, they are interpreting the earmark rules themselves, thereby intruding upon Congress’s authority under the Rulemaking clause. There is support for this criticism in the caselaw. See *United States v. Rostenkowski*, 59 F.3d 1291, 1307 (D.C. Cir. 1995); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982). In *Metzenbaum v. FERC*, however, the court assumed the rules worked correctly in order to avoid interpretation of the rules. 675 F.2d at 1288. This Article’s proposal comports with the court’s approach in this regard and only involves interpretation of the earmark rules to the extent necessary for such an assumption. Additionally, by disregarding altogether Congress’s own certification as to the content of its legislation, courts would jeopardize Congress’s supremacy over its internal processes to a greater degree than in interpreting the earmark rules.

<sup>335</sup> Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. (forthcoming Winter 2009) (manuscript at 13–16, on file with author).

reducing the pool of applicable cases.<sup>336</sup> On the other hand, ambiguity will likely arise often since, as previously discussed, lawmakers have incentives to draft interest group benefits in obscure terms. Additionally, parties conduct themselves in the shadow of litigation and a single court case taking away special interest benefits will cause the repeat players in the legislative process—lobbyists and interest groups—to pressure lawmakers to comply with the rules. Moreover, to the extent an agency exercises legal interpretation—or, in exercising its policymaking discretion chooses to obey Congress’s will—this Article’s proposal should guide agency interpretations of ambiguous statutes as well.

Finally, if courts take it upon themselves to interpret statutes in accordance with the earmark rules, Congress may simply respond by removing the rules or expressly prohibiting the use of the earmark rules in statutory interpretation. However, assuming that Congress predicted later defections by individual members from a primary common goal of transparency and initially enacted the earmark rules to overcome coordination difficulties (as theorized in Part I), the courts’ assistance in preventing such defections may instead cause the rules to proliferate across sessions of Congress. That is, this Article’s proposal attempts to further the original objectives of the earmark rules (discarding with the unpersuasive stance that they are simply empty gestures). Insofar as the proposal achieves that goal, it should only make the re-adoption of the earmark rules *more* acceptable to Congress, rather than less so; indeed, in such a case, Congress may find it expedient to adopt this Article’s proposal expressly as part of the earmark rules.<sup>337</sup> This of course assumes that Congress has maintained such collective objectives in the interim; however, in the event it has not, Congress would simply remove the rules regardless of any feedback loop with the Judiciary.<sup>338</sup>

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<sup>336</sup> See *id.* at 14.

<sup>337</sup> For sources supporting the constitutionality of such an endeavor, see, for example, Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 448 (1950) (“Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously. In both England and America we have long proceeded on the basis that, although ultimate interpretation is for the courts, it is within the legislative province to lay down rules of interpretation for the future.”); Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 180–81 (1980) (“No one seriously doubts the power of the legislature to define words at it wishes. Similarly, the directive provides the judiciary with a clear indication of the legislature’s often amorphous intent.”). *But see* ESKRIDGE ET AL., *supra* note 246, at 953–54 (noting possibility of constitutional objections to interpretive instructions).

<sup>338</sup> Arguably, Congress has already partially abandoned the earmark rules because Congress—although now obviously aware of its members’ inability to assert a point of order against falseness or incompleteness of the special interest disclosure list as discussed in Part II.C.2 above—has not yet adopted proposals to allow for such a point of order. Thus,

## CONCLUSION

Courts should defer to the certifications of congressional members, as required by legislative earmark rules, when interpreting ambiguous statutes that arguably fall within the scope of the rules. This proposal is substantiated by doctrine: denying weight to certifications under the earmark rules is inconsistent with Congress's rulemaking authority. Additionally, the proposal promotes a legitimate interpretation of a statute by illuminating the intent of lawmakers as a collective body, refusing to uphold hidden special interest deals when the legislature has enacted rules requiring disclosure of such deals. Finally, this approach reinforces internal rules, exacting costs from defecting lawmakers and the interest groups they support.

Through adoption of the earmark rules, Congress has embraced the desirable norms of deliberation and transparency with regard to special interest legislation. Of course, given the rules' status as weak precommitment devices, Congress inevitably succumbs to collective action difficulties and other problematic forces in the legislative process. In other words, Congress yields to its lesser self, and so it would be unwise to expect a full and proper functioning of the earmark rules. Nevertheless, by raising the costs of the strategic behavior leading to such problems, this Article's proposal strengthens adherence to the rules through statutory interpretation. In this manner, the proposal attempts to seize the rare day in which Congress has chosen self-actualization, yet looks beyond that day out of concern for the future of the democracy. Its novel approach seeks to do so while navigating between the Scylla of precatory legislative rules and the Charybdis of judicial intrusion.

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one of the important rationales for this Article's proposal—that the judge is simply assisting Congress in its precommitment to transparency—falls away from the time of Congress's awareness until Congress has cured this deficiency in the rules. This argument, however, is unconvincing since the availability of a point of order against the contents of the list would not be effective. This is because congressional members would have no way of knowing whether a congressional member actually complied with the rules. The failure to cure the deficiency does not necessarily indicate that Congress has abandoned the original precommitment but that it recognizes the futility of such a cure.

