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Representation Reinforcement: A Legislative Solution to a Legislative Process Problem

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ARTICLE

REPRESENTATION REINFORCEMENT: A LEGISLATIVE SOLUTION TO A LEGISLATIVE PROCESS PROBLEM

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One of the most valuable—and disturbing—insights offered by public choice theory has been the recognition that wealthy, well-organized interests with narrow, intense preferences often dominate the legislative process while diffuse, unorganized interests go under-represented. Responding to this insight, legal scholars in the fields of statutory interpretation and administrative law have suggested that the solution to the problem of representational inequality lies with the courts. Indeed, over the past two decades, scholars in these fields have offered up a host of John Hart Ely-inspired representation reinforcing "canons of construction," designed to encourage judges to use their role as statutory interpreters to tip the scales in favor of groups believed to be under-represented in the political process. This Article takes issue with such judicial solutions and instead proposes a legislative solution to what is, at bottom, a legislative process problem. A legislative solution has many advantages over a judicial one: (1) it avoids judicial usurpation of legislative power; (2) it reaches all legislation, not only those laws which become the subject of litigation; and (3) it has the potential to empower traditionally disadvantaged interests at the lawmaking stage, rather than merely reduce the harm worked upon them at the statute-interpreting stage. The Article argues for a new framework statute designed to institutionalize a congressional precommitment to evaluate the impact that proposed legislation will have on politically disadvantaged groups. It concludes by advocating a modified, but enduring, judicial role, limited to enforcing this congressional precommitment.

I. INTRODUCTION

One of the most valuable—and disturbing—insights provided by public choice theory has been the recognition that wealthy, well-organized interests with narrow, intense preferences often dominate the legislative process while diffuse, unorganized interests go under-represented. Building on this insight, and on the Supreme Court's prescient footnote four in *Carolene Products*,[1] John Hart Ely revolutionized constitutional law by arguing for a "participation-oriented, representation reinforcing approach to judicial re-

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[1] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

view"[2] of democratically-enacted statutes. In the late 1980s, legal scholars began applying the insights of public choice theory and Ely's representation reinforcement principle to the field of statutory interpretation, arguing that courts deliberately should construe statutory language to promote the interests of diffuse and under-represented groups over those of narrow, well-organized ones. These second-generation[3] representation reinforcement ("SGRR") scholars took Ely's justification of judicial review one step further—urging Courts to use their judicial power not only to invalidate laws that harm "Carolene" groups protected under the United States Constitution, but also to interpret laws in ways that would ameliorate fundamental representational inequalities in the legislative process.

From its inception, SGRR scholarship has exploded with suggested canons of construction designed to help judges interpret statutes in favor of politically-disadvantaged interests. The suggested canons take various forms, including: William Eskridge's and Cass Sunstein's proposal that ambiguous statutory language be construed in favor of the politically-disadvantaged or under-represented litigant;[4] Susan Rose-Ackerman's and Jonathan Macey's proffered rule that statutes should be interpreted consistently with the public-regarding purposes set forth in their preambles, ignoring any contradictory interest group deals hidden in their substantive provisions;[5] and Eskridge's and Sunstein's tenet that statutes explicitly manifesting a purpose to benefit narrow interests at the expense of diffuse ones (e.g., statutes containing tax or antitrust exemptions for certain groups, or appropriations statutes) should be narrowly construed.[6]

This Article argues that such judicially-based solutions are fundamentally inadequate to the task of reinforcing the representation of disadvantaged groups in the political process. In lieu of judicial remedies, it advocates a legislative solution to this legislative process dysfunction. Spe-

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[2] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

[3] I call these scholars "second-generation" only in the sense that their application of representation-reinforcement principles to the statutory interpretation context derives from Ely's original representation-reinforcement theory. The term is not meant to suggest that these scholars came significantly later in time than Ely; in fact, some were his colleagues or contemporaries.

[4] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 153 (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION]; Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 472 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

[5] *See, e.g.*, SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 44–45, 52–53 (1992) [hereinafter ROSE-ACKERMAN, PROGRESSIVE AGENDA]; Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250–52 (1986); Susan Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341, 352–53 (1988) [hereinafter Rose-Ackerman, *Progressive Law*].

[6] *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 323–24 (1988) [hereinafter Eskridge, *Politics Without Romance*]; Sunstein, *Interpreting Statutes*, *supra* note 4, at 474.

cifically, the Article proposes that Congress pass a framework statute entrenching a legislative precommitment to evaluate the impact that proposed legislation will have on diffuse, unorganized, and traditionally under-represented groups. As recent scholarship has shown,[7] such framework precommitments are an increasingly common feature of the legislative process—often implemented through information-forcing rules such as the Unfunded Mandates Reform Act's[8] cost estimate requirement or the National Environmental Protection Act's[9] environmental impact statement requirement.[10] In this vein, the Article proposes that Congress enact a representation reinforcing framework requiring all proposed legislation to be accompanied by an impact statement that outlines the legislation's expected effect on various interests. The interest impact statement should indicate: who Congress intends to benefit, who it acknowledges will be harmed, who supported the bill, who opposed it and, if Congress wishes, broad instructions on which interests the statute should be construed to favor or disfavor. The framework's guiding principle should be to force Congress to deliberate, *ex ante*, about which interests will be harmed by the legislation it passes, rather than allow Congress to focus, as it often does, solely on which groups will be benefited. In other words, the proposed framework should commit Congress to engage in an interest group harm-benefit analysis *before* enacting certain types of statutes. Moreover, this legislative precommitment to greater representation and consideration of disadvantaged groups' interests in the legislative process should be reinforced by the judiciary through deferential, process-ensuring canons of construction. However, the starting point should be a legislative commitment to greater representation of disadvantaged groups, not a judicial imposition of substantive preferences for such groups' interests at the statutory interpretation stage.

This Article proceeds in three parts. Part II makes a theoretical case for a legislature-centric, rather than judiciary-centric, solution to the problem of under-representation in the legislative process. Part III outlines a general proposal for a representation reinforcing framework statute, modeled on existing legislative frameworks, that would institutionalize a congressional precommitment to evaluate the impact that proposed legislation would have

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[7] *See, e.g.*, Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 749–55 (2005) [hereinafter Garrett, *Framework Legislation*] (discussing precommitment as one of the purposes of framework legislation); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 512 n.43 (1998) [hereinafter Garrett, *Harnessing Politics*] (noting that "in the budget context, supormajority [sic] 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."); 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 internal budget rules as precommitment devices).

[8] Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

[9] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2000).

[10] *See* discussion *infra* Section II.A.3.

on politically disadvantaged groups. Part IV concludes by advocating a modified, but enduring, judicial role in enforcing this congressional precommitment to reinforced representation of disadvantaged groups' interests during the lawmaking process.

II. The Case for a Legislature-Centric, Rather than Judiciary-Centric, Remedy to Representational Inequality

Given their court-centered training, it is perhaps unsurprising that legal scholars have turned to the judiciary to solve the legislative process dysfunctions illuminated by public choice theory. But in so doing, the legal academy has overlooked a better, and equally legal, solution: institutionalization of a legislative precommitment to account for the interests of traditionally disadvantaged groups during the lawmaking process. A legislative solution of this sort has many advantages over a judicial approach: (1) it would avoid "countermajoritarian" difficulties, or judicial usurpation of legislative powers; (2) it would reach all legislation, not only that which eventually becomes the subject of litigation; and (3) it has the potential to empower traditionally disadvantaged interests at the lawmaking stage, rather than merely reduce the harm worked upon them at the statute-interpreting stage. This Part reviews the SGRR scholars' proposals and argues that they are less effective than an *ex ante* legislative solution.

A. Representation Reinforcing Canons of Construction

Scholars advocating a representation reinforcing approach to statutory interpretation have borrowed, sometimes consciously, from John Hart Ely's seminal articulation of the principle.[11] Yet in applying representation reinforcement to the statutory context, these scholars have gone far beyond Ely's pale, advocating a form of judicial activism so blatant as to undermine Ely's fundamental objective of legitimizing judicial review to the public.

Ely's central project was to justify judicial review and provide an answer to the "counter-majoritarian difficulty" posed by his teacher and men-

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[11] *See* Rose-Ackerman, Progressive Agenda, *supra* note 5, at 45 (acknowledging that her recommendations "reflect concerns similar" to those raised by John Ely and noting that "Ely's aim, like mine, is to reinforce democratic representation by adding greater realism to judicial interpretation of statutes and review of the legislative process." (emphasis omitted)); Eskridge, Dynamic Statutory Interpretation, *supra* note 4, at 141–73; William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 Cardozo L. Rev. 2209, 2221 & n.56 (1995) (commenting that "John H. Ely, Democracy and Distrust (1980), develops a representation-reinforcement theory of judicial review, and Eskridge, [in Dynamic Statutory Interpretation] ch. 5, extends this theory to statutory interpretation."); Cass R. Sunstein, The Partial Constitution 143–44 (1993) [hereinafter, Sunstein, Partial Constitution]; Sunstein, *Interpreting Statutes*, *supra* note 4, at 473–74, 474 n.258 (noting, for example, that Ely's theory of judicial review based on representation reinforcement at least arguably supports an interpretive rule favoring minimum welfare rights).

tor, Alexander Bickel.[12] Ely reconciled this counter-majoritarian judicial role with the ideal of representative democracy by arguing that courts should intervene only where the political process is undeserving of deference because:

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[13]

In other words, Ely's conception of representation reinforcement was that judges should trump actions taken by the people's elected representatives only when those representatives either: (1) used their power to entrench themselves against electoral defeat irrespective of the public's wishes; or (2) were so hostile toward or prejudiced against a minority group that they systematically denied that group the rights and protections given to other groups. Ely's classic cases for intervention thus included, among others, incumbents (under the first category) and racial minorities and aliens (under the second category).[14]

By contrast, the SGRR scholars' project is to use interpretive rules to change the way the legislative process itself works. Their focus is not so much on protecting minorities as on reducing wealth transfers to powerful interests at the expense of diffuse groups' interests. Indeed, Eskridge and Sunstein, joined by Macey and Rose-Ackerman, define as a central democratic failure the legislative process's tendency simultaneously to produce too many rent-seeking statutes and too few public goods statutes.[15] These SGRR scholars thus articulate a common goal: to render it more difficult for wealthy, rent-seeking interests to achieve deep legislative success.[16] To this end, each scholar proffers his or her own set of interpretive rules designed to

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[12] In Bickel's words, the counter-majoritarian difficulty is rooted in the fact that "judicial review is a counter-majoritarian force in our system," allowing unelected, insulated judges to invalidate, or at least define the scope of, statutes and policies enacted by a democratically-elected legislature. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed. 1986).

[13] ELY, *supra* note 2, at 103.

[14] *See id.* at 73–75 (citing the Warren Court as an exemplar of Ely's participational approach to constitutional interpretation, for its decisions protecting racial minorities, aliens, illegitimates, and poor people), 103 (discussing elected representatives' self-interest), 161 (discussing majority hostility towards and exclusion of aliens in particular).

[15] Eskridge, *Politics Without Romance*, *supra* note 6, at 285.

[16] *See, e.g.*, *id.* at 311–12; ROSE-ACKERMAN, PROGRESSIVE AGENDA, *supra* note 5, at 52–55; Macey, *supra* note 5, at 239–40 (advocating an interpretive rule designed to enable courts to "serve as obstacles to the goals of rent-seekers"); Sunstein, *Interpreting Statutes*, *supra* note 4, at 471 (recommending narrow construction and clear statement rules to limit enforcement of statutes that effect naked wealth transfers to powerful interests).

deny force to statutory provisions benefiting narrow, privileged interests—except in those instances where a blatant congressional intent to transfer wealth to narrow interests is spelled out clearly on the face of the statute. The move away from Ely's vision of limited judicial intervention aimed at protecting the interests of unpopular, deliberately disadvantaged minorities—and towards selective judicial reengineering of interest group deals struck in the legislature—could not be more stark.

Among the SGRR scholars, William Eskridge, Jr. is perhaps the most open about the counter-majoritarian nature of his recommendations.[17] Eskridge offers up a host of representation reinforcing canons of construction designed to help judges and administrators interpret statutes in a manner that counteracts political market failures. First, he argues that in close cases, where the meaning of a particular statutory text is ambiguous, interpreters should consider which party or group will have more effective access to the legislative process if it loses and interpret the statute against the party with greater access.[18] In other words, statutory interpreters should pay attention to the likelihood that the losing interest will be able to stimulate legislative attention to its concerns—the more political power a group has, and the more likely it is to get its concerns onto the legislative agenda, the more inclined interpreters should be to rule against it in a close case. Second, Eskridge recommends that interpreters should treat "public goods" statutes differently than rent-seeking statutes. Whereas rent-seeking statutes should be narrowly construed, according to Eskridge, interpreters should recognize that "public goods" laws designed to distribute benefits and costs will not stimulate strong interest group support (because no singular interest benefits substantially),[19] and thus are not likely to be updated as time passes. Consequently, when construing "public goods" statutes, interpreters should fill in for legislators and update, or read updates into, such statutes.[20]

Sunstein's recommended representation reinforcing canons of construction place an emphasis on legislative deliberation and would require, *inter alia*, that: (1) interpretations involving constitutionally sensitive interests or groups be remanded to the legislature or administrative agencies for reconsideration if the lawmaking body appears to have deliberated inadequately in the first instance;[21] (2) statutes designed merely to transfer wealth to a particular interest or group be narrowly construed, unless they contain a clear

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[17] In fact, Eskridge explicitly touts counter-majoritarian statutory interpretation as "normatively desirable if it contributes to the overall legitimacy of the political system" and exhorts judges, when construing statutory language, to "resolve or even create ambiguities so as to counteract distortions in the political process." ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 4, at 157. Moreover, he urges judges to interpret statutes in this corrective manner even when doing so would produce a result that contravenes legislative expectations. *Id.*

[18] *Id.* at 153.

[19] *See id.* at 157–58.

[20] *See id.* at 158.

[21] Sunstein, *Interpreting Statutes*, *supra* note 4, at 471.

statement of the legislature's wealth-transferring intent;[22] (3) statutes be construed in a manner that forces those who are politically accountable and highly visible to make, take the heat for, and deliberate carefully about regulatory decisions;[23] and (4) statutes be construed to impose benefits roughly commensurate with their costs—unless there is a clear legislative statement to the contrary.[24] At the same time, Sunstein advocates that those few statutes which do benefit disadvantaged rather than wealthy political groups be construed liberally, so as to protect the disadvantaged groups.[25]

Rose-Ackerman proposes that interpreters construe statutory provisions consistently with the statute's (typically public-goods-promoting) preamble or statement of purpose.[26] Under this rule, if a statute's preamble promises diffuse, distributed societal benefits (as most do) but the statute's substantive clauses effect narrow interest group transfers, then courts should refuse to enforce the inconsistent substantive clauses.[27] When it comes to judicial review of agency actions, Rose-Ackerman is even bolder. Here, she urges an interpretive rule requiring agencies to implement the net-benefit-maximizing solution.[28] Further, she encourages courts to apply a presumption that agency regulations have adopted the net-benefit-maximizing approach, in order to make it especially difficult for politically powerful interests to obtain wealth redistribution at the hands of agency policymakers.[29] Finally, Rose-Ackerman argues that courts should seek to ensure that agency policymaking processes are open to all interested individuals, groups, and organizations and that all who have a stake in a particular policy are given public notice and an opportunity to provide information.[30] Ironically, she does not suggest that courts seek to ensure similar open access to the legislative process—a goal that this Article's proposed legislative solution endeavors to achieve.[31] (None of the other representation reinforcement scholars suggest this either, but Rose-Ackerman's omission in this regard is particularly noteworthy because she urges something so similar in the administrative context.)

Macey's proffered interpretive approach distinguishes between genuine public interest statutes on the one hand, and what he calls "hidden-implicit" and "open-explicit" special interest statutes on the other hand.[32] "Hidden-implicit" statutes are those which, according to Macey, "are couched in public interest terms to avoid the political fallout associated with blatant special

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[22] *Id.* at 471, 486.
[23] *Id.* at 477.
[24] *Id.* at 487.
[25] *Id.* at 472–73.
[26] *See* ROSE-ACKERMAN, PROGRESSIVE AGENDA, *supra* note 5, at 52.
[27] *Id.*
[28] Specifically, courts should require agencies to "make a plausible case" that they have engaged in a cost-benefit analysis and chosen a course of action that "maximize[s] net benefits subject to statutory, budgetary, and informational constraints." *Id.* at 39.
[29] *See id.*
[30] *See id.* at 41.
[31] *See* discussion *infra* Section III.A.2.
[32] Macey, *supra* note 5, at 232–33.

interest statutes," while "open-explicit" statutes are "naked, undisguised wealth transfers to a particular, favored group."[33] Along with Eskridge, Sunstein, and Rose-Ackerman, Macey favors judicial under-enforcement of "hidden-implicit" statutes, which he argues will force special interests either to forgo efforts to obtain redistributive wealth transfers or to incur the higher political costs associated with "open-explicit" wealth transfer statutes.[34] Where Macey differs from the others is that he sees no need to prescribe new interpretive rules to achieve this end. Rather, Macey believes that traditional methods of statutory interpretation focusing, for example, on a statute's stated purpose, already undermine the value and restrain the passage of "hidden-implicit" statutes.[35]

B. Countermajoritarian Redux

Although they offer different prescriptive approaches, the SGRR scholars all, at bottom, call upon the judiciary to manipulate statutory meaning in order to balance out judicially-perceived representational inequalities in the legislative process. To be sure, these scholars hope their proposed interpretive regimes ultimately will motivate the legislature to produce better statutes in the first instance,[36] but until then and to the extent that does not happen, they advocate open and deliberate judicial scale-tipping in order to protect certain interests, and punish others. Thus, Sunstein calls for "aggressive" judicial protection of statutory gains won by diffuse interests, such as the environment, endangered species, and the broadcasting public—gains he says often are "jeopardized in the post-enactment political 'market'"—but advocates "narrow construction" of statutes where the sole purpose is to transfer wealth to private interests, such as banking and agriculture.[37] Eskridge similarly urges courts to update distributed costs or distributed benefits statutes because these are the most likely to be forgotten or ignored by

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[33] *Id.*

[34] *Id.* at 238.

[35] *Id.* at 250–52.

[36] *See, e.g.*, Sunstein, *Interpreting Statutes*, *supra* note 4, at 477 (explaining that the goals behind his proposed interpretive rules are "to promote accountability and deliberation in government, to furnish surrogates when both are absent, to limit factionalism and self-interested representation, and to further political equality"); Macey, *supra* note 5, at 238, 261–262 (explaining how his proposal will force special interests to abandon efforts to obtain wealth transfers and claiming that "[i]f used properly, these suggestions will improve the performance of the legislature by increasing its incentives to act in the public interest"); Eskridge, *Politics Without Romance*, *supra* note 6, at 310 ("The effect of all this would be to raise the overall costs of rent-seeking legislation-drafting and lobbying costs as well as the risk of total defeat in either the legislature or the courts-to groups seeking a slice of the public pie. Because interest groups seeking rents will generally not spend more than the anticipated reward in order to obtain the statutes they desire, raising the costs of such statutes would discourage some rent-seeking legislation, though obviously not all of it."); ROSE-ACKERMAN, PROGRESSIVE AGENDA, *supra* note 5, at 44 (arguing that courts should take a more active role in increasing Congress's accountability to its constituents).

[37] Sunstein, *Interpreting Statutes*, *supra* note 4, at 486–87.

legislatures post-passage, but counsels that ambiguous statutes should be interpreted against the party or interest with greater legislative access.[38] Even Rose-Ackerman and Macey ask courts to ignore, or read out of existence, those statutory provisions deemed to effect narrow interest group transfers, unless the statute's preamble or statement of purpose explicitly references the wealth transfer.

All of these proposed interpretive rules represent a move away from Ely: Ely's concern was to justify judicial review and obtain heightened scrutiny for statutes that harm certain, typically constitutionally-protected, groups—not to require automatic partial invalidation of all statutes benefiting narrow, powerful interests or automatic enhancement of all statutes benefiting traditionally disadvantaged interests. While their efforts to remedy underlying dysfunctions in the legislative process are admirable, the SGRR scholars call for judicial assessment of which regulatory statutes and which interests are entitled to extra, versus diminished, protection falls prey to the very charge Ely sought to deflect: judicial super-legislating.[39] In asking courts to super-enforce public goods statutes and under-enforce rent-seeking ones, Eskridge, Sunstein, Macey, and Rose-Ackerman invite judges to use their own personal values and predilections to determine which groups are politically disadvantaged, and which statutes are rent-seeking rather than public-regarding.[40] One judge's political process "failing" may well be viewed by another judge as "democracy at work."[41] This is precisely the kind of value-laden judicial approach against which Ely struggled. Indeed,

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[38] ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 4, at 153.

[39] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 90 (1997) (calling Macey's proposal "judicial activism of a quite swashbuckling variety").

[40] To be sure, Eskridge offers courts his own hierarchy of relative political advantage to use in lieu of falling back on judges' personal values. *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 4, at 153. But, judges are unlikely simply to accept unquestioningly the word of even a well-respected scholar such as Eskridge. First, on a matter as unscientific as this one, the temptation to rely on one's own intuition likely runs high. Second, and more importantly, Eskridge's methodology is questionable. The hierarchy he provides is culled from his published study of interest group success at obtaining legislative overrides of unfavorable Supreme Court rulings. His hierarchy table assumes that if a Supreme Court interpretation disfavoring a group was overridden later by Congress, the group that benefited from the override was politically powerful, and that if a group seeking an override was not successful, it was because the group was politically weak. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). There are a number of obvious limitations to this reasoning, as Eskridge himself acknowledges, including that he reviewed only a sampling rather than the full universe of failed congressional override attempts. *See id.* at 341 & n.24. Moreover, factors other than political power—such as whether there was an ideologically-identifiable split on the Court that rendered the decision and whether the Court relied on the statute's plain meaning in arriving at its decision—may have influenced the success or failure of an override attempt. *See id.* at 343–53. Third, even if Eskridge's hierarchy were a perfect metric for relative political advantage, it would be far from complete in coverage and would leave courts with no guidance in ranking numerous interests affected by statutes that are likely to come before it.

[41] Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1425 (2005).

Ely defended judicial intervention with respect to democratically-enacted statutes only as necessary to ensure that the political process remains open to all groups—particularly those discrete and insular minorities protected by the Constitution. He did not defend, let alone advocate, a roving judicial license to pick and choose among interest groups for favored/disfavored treatment or to enforce one part of a statute (e.g., the preamble) over other parts (e.g., substantive provisions favoring narrow interests). Reengineering statutory meaning in this manner goes far beyond "say[ing] what the law is,"[42] and usurps the legislature's power to decide what the law should be.

C. Courts as Sledgehammers

Despite the decidedly counter-majoritarian effect of activist statutory interpretation, SGRR scholars openly embrace it as preferable to letting the legislature craft its own rules to guard against representational inequalities. Why? Because they believe that courts, unlike legislatures, are not particularly susceptible to interest group pressure, and therefore are better positioned both to craft legal rules designed to curb rent-seeking and to update distributed costs/distributed benefits statutes.[43] Moreover, they argue that litigation involves at least two parties representing opposing interests and possessing substantial incentives to present all relevant information, so "there is not the utter dearth of opposing viewpoints that one frequently finds in the legislative process."[44]

This argument has its merits. But it ignores the significant risk that when judges enter the political foray by engaging in interpretive rewriting of statutes, they inevitably become the targets of political forces that wish to ensure that particular statutes are interpreted in their favor. Therefore, shifting responsibility for ensuring representational equality from the legislature to the judiciary ultimately may achieve little more than the politicization of the judiciary. In fact, several scholars argue that such politicization already has occurred,[45] and that judges are as susceptible as legislators to political pressures.[46]

Even if we accept the assumption that interest groups exert greater pressure on Congress than on the courts, there remains the larger question of how to balance competing interests, costs, and benefits in particular regulatory contexts. It seems unlikely that courts are better equipped than legisla-

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[42] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[43] *See, e.g.*, Eskridge, *Politics Without Romance*, *supra* note 6, at 300–01.

[44] *Id.* at 304.

[45] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304 (1976) ("Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process."); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 46 (2005).

[46] *See* Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 45–48, 63–64 (1991) (arguing that judges are as susceptible to favoring wealthy interests as legislators).

tures or agencies to weigh the harm to certain interests against the benefit to others or to calculate the socially optimal legislative balance. Indeed, the interpretive rules proposed by the SGRR scholars do not come close to asking courts to engage in such balancing. Rather, the "representation reinforcing" canons take something of a sledgehammer approach, imposing a blunt and definitive presumption that diffuse, politically weak interests always should be favored over narrow, powerful ones, in all statutes and in all cases. These canons dictate the result of the interpretive analysis before the inquiry even begins. There are no empirics or cost-benefit analyses in this court-centric approach. Instead, it relies on the judge's intuitions to determine what constitutes a "distributed-costs/distributed-benefits statute," in Eskridge's formulation,[47] or a statute reflecting the unusual bypass of regulatory failure on behalf of a true public interest, in Sunstein's formulation.[48] The statutes then automatically receive a narrow or generous construction based solely on the results of these intuitions.

But a distribution away from diffuse interests in favor of powerful ones is not always socially undesirable. The mere fact that a statute redistributes wealth from politically weak to politically powerful groups does not mean that it does not also advance the public good. Interpretive rules that impose a blanket presumption in favor of the politically weaker group in all cases ignore gray areas and fail to make room for the cost-benefit comparisons such gray areas require.

D. The Inefficacy of a Judicial Approach

The crux of the SGRR scholars' proposals is judicial enforcement of a representational equality norm. Through canons of statutory construction—e.g., minimal enforcement of statutes designed to transfer wealth to powerful interests (except where the wealth-transferring intent is clearly revealed on the statute's face) and refusal to enforce rent-seeking statutory provisions (unless the rent-seeking goal is mentioned in the statute's preamble)—they seek to force Congress to make explicit, and to pay the political costs of making explicit, any legislative decision that violates this norm in favor of a particular interest or interests.[49] The judicial corrective is supposed to work by pressuring Congress to enact fewer rent-seeking statutes and to be blatant

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[47] Eskridge, *Politics Without Romance*, *supra* note 6, at 324; William N. Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1518–19 (1987).

[48] Sunstein, *Interpreting Statutes*, *supra* note 4, at 472–73.

[49] In this, their proposals are similar to the Supreme Court's clear statement rules in the federalism context, which have been described as judicial enforcement of an under-enforced constitutional norm. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). That is, judicial interpretive rules force Congress to defer to state entities (i.e., to respect federalism norms) unless Congress makes an explicit, clear statement on the face of a statute indicating its intention to override state entities' authority.

about those it does enact,[50] lest a court refuse to enforce ambiguous wealth transfers. Less directly, the threat of a judicial sledgehammer is also supposed to increase the costs to interest groups of procuring rent-seeking statutes in the first place by forcing groups to expend extra resources convincing members of Congress to favor them despite the public fallout likely to accompany passage of a blatant wealth-redistributing statute.[51]

The problem with this strategy, however, is that many, if not the majority, of statutes enacted into law by Congress will not come up for judicial review,[52] and those that do may not be reviewed until many years after they are enacted. Transfers enacted as earmarks through the annual appropriations process are not subject to judicial review at all.[53] This means that many wealth-transferring statutes will never be subjected to a judicial corrective, even if their rent-seeking provisions are hidden behind a public-regarding preamble and refuse to make clear the interest group deals they effect. Many other wealth-transferring statutes will operate for years, achieving their rent-seeking purposes to full effect, before a lawsuit brings them before judges wielding representation reinforcing canons of construction capable of ending their dysfunctional reign. Congress knows this. Therefore, in enacting rent-seeking statutes, Congress is free to play a game of probabilities. This is a game that Congress (and powerful interests) will win, and that the courts (and politically disadvantaged interests) will lose.

It is well established that the effective cost of a crime to the perpetrator is equal to the penalty multiplied by the probability of getting caught.[54] Analogously, so long as the probability that a particular statute will come up for judicial review remains low, the effective cost to Congress of ignoring the representation reinforcing canons of construction when drafting statutes

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[50] *See, e.g.*, ROSE-ACKERMAN, PROGRESSIVE AGENDA, *supra* note 5, at 53, 55, 62; Eskridge, *Politics Without Romance*, *supra* note 6, at 310; Macey, *supra* note 5, at 254, 261; Sunstein, *Interpreting Statutes*, *supra* note 4, at 471 (advocating an interpretive rule requiring a clear statement before courts will construe statutes as amounting to naked wealth transfers).

[51] *See, e.g.*, ROSE-ACKERMAN, PROGRESSIVE AGENDA, *supra* note 5, at 53, 55, 62; Eskridge, *Politics Without Romance*, *supra* note 6, at 310; Macey, *supra* note 5, at 254.

[52] *Cf.* Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533, 545 (2006) (observing that of 3725 enacted statutes eligible for judicial review between 1987 and 2000, the Supreme Court struck down only 22); *cf. also* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1115–16 (1997) (making a similar argument about incomplete judicial review of statutes that violate federalism principles).

[53] Earmarks are governed by internal House and Senate rules, and rely upon internal congressional enforcement, through a point of order. There is, at present, no judicial review available if Congress violates its own internal earmark rules. *See* Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. (forthcoming 2009).

[54] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968). Applying this to the representation-reinforcement context, the "crime," or behavior for which deterrence is sought, is passage of a rent-seeking statute that does not clearly reveal itself to be such or that masquerades as a public-regarding statute, and the "penalty" is judicial under- or non-enforcement of the statute.

also will be low, no matter how high the penalty imposed by the courts. (A high penalty multiplied by a near-zero probability of getting caught always delivers a near-zero effective cost.) This dynamic is exacerbated by the fact that even when a statute does become subject to judicial review, some representation reinforcing canons, including Eskridge's relative political access rule, will not even apply unless the rent-seeking statute is deemed ambiguous. Of course, where the statute at issue is a high-profile one, such as Title VII or the Patriot Act, Congress may sense a greater likelihood of judicial review down the line (i.e., a higher probability of getting caught) and may feel compelled to pay some attention to the representation reinforcement scholars' clarity-forcing interpretive rules. But in the vast majority of cases, Congress is likely to ignore these rules.[55]

Thus, the primary effect of the court-centric, "representation reinforcing canons" approach is likely to be after-the-fact judicial curtailment of the reach of statutes deemed to be rent-seeking, and judicial enhancement of statutes deemed to be public-regarding—not the production of fewer rent-seeking statutes or more public-regarding statutes in the first place. This is a second-best solution, with obvious anti-democratic consequences. By contrast, a legislature-centric solution aimed at forcing Congress to pay more attention to which interests it is benefiting or harming *ex ante*, while it is in the process of enacting legislation, has the advantage of affecting all potential statutes, not only those that eventually become subject to judicial review. It is deliberation-forcing as well as transparency-inducing. This is significant because, as Macey has pointed out,[56] Congress does not always legislate with full information or knowledge that it is benefiting certain interests over others. Bringing this information to light through litigation after a statute has been passed, as the SGRR scholars' judicial solution would do, could take years and would provide at best a piecemeal remedy. A legislative solution, by contrast, would force fuller information at the deliberation stage, when it could affect legislative decisions, instead of allowing rent-seeking statutes to be enacted without full congressional understanding and relying on litigation eventually to impose a judicial corrective or to inspire legislative amendment.

A fundamental difference between this Article's proposed legislative solution and the SGRR scholars' court-centric solution, then, is that a legisla-

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[55] *Cf.* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600–05 (2002) (finding in a case study of the legislative process that legislative aides "are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing," but noting that "in the ordinary course of drafting [legislative aides] do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted"). The study also quoted legislative aides unapologetically citing time pressures and a need for deliberate ambiguity as a requisite for achieving consensus as intrinsic legislative process features that work to undermine statutory clarity. *Id.* at 594–95.

[56] *See supra* text accompanying notes 32–34.

tive solution would focus on bringing the costs and benefits of pending legislation to legislators' attention, rather than on punishing narrow wealth transfers at the judicial review stage. In fact, a key failing of the SGRR scholars' approach is that it does not seek to empower politically disadvantaged groups, or to bring their concerns into the legislative process. Instead, it seeks only to limit the capacity for gain by politically powerful, narrow interests.

Further, even after a court construes an ambiguous statute against a politically powerful group or narrows the benefit conferred by a rent-seeking statute, the powerful group can—and, if the court is forthright about what it is doing, likely will—go back to Congress seeking an amendment clarifying that the statute was intended to benefit the group. Worse, powerful groups in this position might seek passage of an entirely new statute, containing a new hidden wealth transfer to the group beneath a new public-regarding preamble, on the theory that it will take at least a few years before that statute makes its way through the courts. Moreover, such second bites at the apple are likely to succeed because the representation reinforcing canons do nothing to give politically diffuse or disadvantaged groups a voice in the legislative process with which to push back against demands made by powerful groups. Nor do these canons provide any mechanism through which to force Congress to confront the true costs of the legislation it enacts. An impact report requirement would provide such a mechanism.

To be sure, judicial review of a statutory provision affecting a diffuse, disadvantaged group can bring the issue to the group's attention and spur some organizational advocacy. But as Eskridge's work on congressional overrides of Supreme Court statutory interpretations demonstrates, such litigation-induced awareness often does not translate into political power—let alone political power sufficient to overcome countervailing pressure exerted by a powerful opposing interest.[57] There is something gnawingly unsatisfactory and short-lived about a remedy meant to address representational inequality that does so little to empower underrepresented groups.

III. A Representation Reinforcing Framework Statute

Faced with public choice theory's gloomy portrait of the legislative process, SGRR scholars essentially have thrown up their hands and concluded: Congress clearly cannot be trusted, so we must devise a way for the judiciary to step in and correct Congress's mistakes. I have argued in Part II that such judicial correctives are both undemocratic and inefficient, and that our polity would be better off with a legislative solution to this legislative process dysfunction. But the question remains: How can Congress be trusted to

[57] *See, e.g.*, Eskridge, *supra* note 40, at 361–62 (describing frequent overrides of judicial interpretations benefiting the diffuse, marginalized, politically disadvantaged group of criminal defendants and suspects).

police itself? Won't the same incentives that lead members of Congress to cater to wealthy, powerful interests at the expense of diffuse, unorganized interests also prevent Congress from being the one to correct this imbalance?

Perhaps. No framework statute, including the one proposed here, entirely can eliminate the incentives members of Congress have to cater to powerful interest groups. But a framework statute can at least curb these incentives by establishing structures that promote well-informed deliberation and discourage rent-seeking. As Elizabeth Garrett has noted, frameworks have proved useful in, among other things, solving collective action problems and entrenching certain macro-objectives so that future decisions are more likely to align with them.[58] In fact, a number of congressional frameworks enacted in the budget, base closure, federalism, and environmental contexts suggest that legislators may welcome structural devices designed to entrench public-regarding goals against encroachment by well-organized, politically powerful groups. In the 1980s and 1990s, for example, Congress enacted the Gramm-Rudman-Hollings Act ("GRH")[59] and pay-as-you-go budget rules ("PAYGO"),[60] both of which were designed to give preference to the interests of diffuse, unorganized groups—e.g., taxpayers and future citizens who ultimately would foot the bill for soaring deficits—over those of politically powerful special interests. Both GRH and PAYGO established legislative precommitments to deficit reduction that allowed members of Congress to tell disappointed interests, "I had no choice; budget rules forced my hand and precluded me from giving you more." Other prominent frameworks used to counteract collective action problems and entrench macro-objectives include: the Defense Base Closure and Realignment

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[58] *See* Elizabeth Garrett, *Conditions for Framework Legislation*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 295 (2006).

[59] Balanced Budget and Emergency Deficit Control Act of 1985, Title II, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended in scattered sections of 2 U.S.C.). GRH was a framework statute that imposed an automatic sequester, cutting government spending by a fixed percentage across several spending categories, if deficits in a given year exceeded a predetermined deficit maximum. The point of the statute was to place spending authority outside the ordinary lawmaking process, which had proved incapable of producing balanced budgets because of lawmakers' tendency to give in to interest group pressure. *See, e.g.*, Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenors-Appellants at 1, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377 to 85-1379), 1986 WL 728086 (stating that "the provision which vested the statutorily-prescribed mathematical calculations of the cuts in the independent Comptroller General" was enacted "in order to 'wall' off that accounting function from political manipulation.").

[60] Budget Enforcement Act of 1990, Title XIII, Pub. L. No. 101-508, 104 Stat. 1388–573 (1994) (codified as amended at 2 U.S.C. § 902). PAYGO rules require that any new tax legislation and any new spending enacted by Congress must be revenue neutral; that is, the legislation cannot cause the government to lose more money than it gains. PAYGO operates as a check on interest group pressure for tax subsidies or spending programs because it enables/forces legislators on the receiving end of such pressure to say no unless the pressing group can find some way (either through a tax increase or through a spending cut elsewhere in the budget) to pay for the expenditures it seeks.

Act,[61] which establishes a legislative precommitment to close down unnecessary military bases in the face of powerful home district pressure to keep individual bases open; the Unfunded Mandates Reform Act[62] ("UMRA"), which locks in a legislative commitment to reduce the incidence and size of federal mandates to state and local governments; the proposed Federalism Act of 1999[63] ("FAA"), which sought to entrench a legislative precommitment to principles of federalism by limiting federal preemption of state and local government authority; and the National Environmental Policy Act[64] ("NEPA"), through which Congress precommitted the entire federal government to environmental awareness.

Section A of this Part briefly describes these legislative precedents, emphasizing the political dysfunctions they were designed to overcome and/or the overlooked policy concerns they were crafted to highlight. Section B outlines a proposal for a representation reinforcing framework statute, borrowing significantly from the mechanics of these existing legislative precedents.

A. Legislative Precedents

As other scholars have noted, legislative rules of procedure often operate as precommitment[65] devices. These are devices enacted by legislators to bind themselves, Ulysses-like, to a particular goal or principle and prevent themselves (and future Congresses) from answering the Siren call of short-term, self-interested politics.[66] In the last few decades, such procedural precommitments increasingly have been implemented through framework statutes, passed by both Houses of Congress and signed by the President.[67]

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[61] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, div. B, title XXIX, pt. A, 104 Stat. 1808 (1990) (codified as amended at 10 U.S.C. § 2687 note, titled "Defense Base Closure and Realignment Commission" (2006)).

[62] Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501 (2006)).

[63] H.R. 2245, 106th Cong. (1999).

[64] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321–47 (2000)).

[65] Precommitment theory has a rich pedigree. Its foundational works include: JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); THOMAS C. SCHELLING, CHOICE AND CONTEST 57 (1984); Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, AM. ECON. REV., May 1984, at 1.

[66] *See, e.g.*, Garrett, *Framework Legislation*, *supra* note 7, at 749–55 (describing precommitment as one of the purposes of framework statutes implementing legislative rules); Garrett, *Harnessing Politics*, *supra* note 7, at 513 n.43 ("[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."); Kysar, *supra* note 7, at 342 (internal budget rules as precommitment devices); Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, U. ILL. L. REV. 1105, 1116–18 (1998) (balanced-budget amendment as a precommitment device).

[67] *See* Garrett, *Framework Legislation*, *supra* note 7, at 720 (describing framework statutes as part of the "modern congressional change and reform" that "began with the Legislative Reorganization Act of 1970); *see also* Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1496 (2008).

While none of these frameworks completely has erased the specter of self-interested legislator behavior, several have proved effective at increasing compliance with their public-regarding goals. This Section discusses the design and effect of federalism, base closure, and environmental precommitments enacted in the form of framework statutes.

1. Federalism

During the latter half of the 1990s, after Republicans regained control of both houses, Congress sought to entrench a procedural precommitment to greater federal government respect for state and local government authority. It attempted to do so through two framework statutes: UMRA, which became law in 1995, and the FAA, which became stalled in committee and has not, to this date, been enacted. Because the FAA remains merely a proposal rather than an operating framework law, and because it is modeled on UMRA, this Section focuses primarily on the provisions of UMRA.

The background concerns that motivated UMRA were similar, in many ways, to those that motivate this Article's proposal for a representation reinforcing framework statute. State and local government officials were concerned that federal lawmakers, who are faced with political and electoral incentives both to enact popular federal programs and to avoid raising taxes or incurring deficits to pay for those programs, systematically were passing program costs on to state and local governments through unfunded mandates.[68] They were, at bottom, complaining about a collective action problem: Because every individual legislator wanted to take credit for enacting popular federal programs, but no legislator was willing to take the blame for raising taxes, too many costs were being shifted to state and local governments without analysis of whether the benefits justified the costs.[69] This issue is not unlike public choice and SGRR scholars' concern that Congress's political and electoral incentives to cater to wealthy, powerful interests and ignore diffuse, unorganized ones has produced a surfeit of legislation skewed towards the concerns of wealthy, powerful groups.

UMRA seeks to protect state and local interests by ensuring that legislators are informed of the costs imposed on state and local governments by federal mandates. Before UMRA was enacted,[70] the Congressional Budget Office ("CBO") was supposed to provide legislators with estimates of the costs that state and local governments would incur in complying with federal

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[68] *See* Garrett, *supra* note 52, at 1133-34.

[69] *See* Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1065 (1995) (discussing accountability concerns with federal mandates); Garrett, *supra* note 52, at 1134.

[70] The State and Local Government Cost Estimate Act of 1981 required CBO to estimate the costs that state and local governments would incur over five years in carrying out or complying with "any significant bill or resolution." State and Local Government Cost Estimate Act of 1981, Pub. L. No. 97-108, 95 Stat. 1510, 1510.

mandates, but in practice often did not do so[71] and faced no sanction from Congress for this failure.[72] As a consequence, federal lawmakers often were not aware that a bill on which they were voting included an unfunded mandate—nor were they aware how much the mandate would cost state and local governments.[73] UMRA is designed to change this dynamic by ensuring that Congress has information about the costs of intergovernmental mandates before it decides whether to impose them, and by encouraging the federal government to provide funding to cover the costs of such mandates.[74]

UMRA works as follows: Whenever a proposed bill contains an unfunded mandate, the Act requires congressional committees to alert CBO, and then requires CBO to issue a report estimating the costs of that mandate. When the authorizing committee[75] eventually reports the proposed bill out to the full House or Senate, UMRA requires that the committee report accompanying the bill incorporate the estimates generated by CBO and: (1) identify and describe any federal mandates in the bill or joint resolution; (2) provide a statement about the direct costs to state, local, and tribal governments, and to the private sector,[76] of complying with the mandates; (3) state whether the bill provides funding to cover these costs; and (4) include a qualitative and, if practical, a quantitative assessment of the costs and benefits expected to result from the mandates (including the effects on health, safety, and the protection of the natural environment).[77] UMRA also requires authorizing committees "promptly" to submit any bill of a "public character" to the Director of CBO and to identify any mandates contained

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[71] Indeed, a CBO report indicates that during the 14-year period from 1982–1995, CBO provided Congress with a little more than 7000 such estimates; after passage of the UMRA, by contrast, CBO conducted 6000 estimates in just 5 years (from 1996–2000). CONG. BUDGET OFFICE, A CBO REPORT: CBO'S ACTIVITIES UNDER THE UNFUNDED MANDATES REFORM ACT, 1996 TO 2000, at ix, 1 (2001) [hereinafter CBO REPORT, 1996 TO 2000].

[72] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 488 (3d ed. 2001). Senator Sasser (D-Tenn.) described the situation pre-UMRA as follows: "The problem [with the 1981 Act], it has become clear, is that this yellow caution light has no red light to back it up." 139 CONG. REC. S14765-06 (1993) (statement of Sen. Sasser).

[73] ESKRIDGE ET AL., *supra* note 72, at 488.

[74] CBO REPORT, 1996 TO 2000, *supra* note 71, at vii.

[75] An authorizing committee is a standing committee of the House or Senate with legislative jurisdiction over the subject matter of the laws, or parts of laws, that establish or continue the legal operations of federal programs or agencies. Authorizing committees draft "authorizing legislation," which is a necessary precursor that must be enacted before legislation actually appropriating funds to a program can be passed.

[76] UMRA has separate requirements requiring reporting by congressional committees of mandates imposed on (1) state, local, and tribal governments ("intergovernmental mandates"); and (2) private sector entities. My discussion will be confined to UMRA's provisions concerning intergovernmental mandates, as the treatment of such mandates is more analogous to that proposed by my "Transparency in Legislation Act." Private sector mandates, for example, are not subject to points of order. *See* discussion *infra* Part II.B.2.

[77] Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 423, 109 Stat. 48, 53–55 (codified at 2 U.S.C. § 658b) (2006).

therein.[78] Conference committees are to follow these same reporting requirements "to the greatest extent practicable."[79]

In addition to the requirements it imposes on committees, UMRA contains specific directives to CBO regarding the cost estimates to be conducted on bills or resolutions reported by the authorizing committees.[80] These cost estimates are triggered whenever CBO estimates that the direct costs of federal mandates imposed by the bill will exceed $50 million.[81] If the CBO statement cannot be published with the committee report, the committee is responsible for ensuring that it is published in the *Congressional Record* before the bill or resolution is considered on the floor of the House or Senate.[82] At the request of any Senator, CBO must estimate the costs of any intergovernmental mandates contained in an amendment the Senator wishes to offer.[83]

UMRA generally has been viewed as a success. Since it took effect in 1996, there has been an overall decrease in the number of proposed bills containing unfunded mandates above the statutory threshold—i.e., bills that would be out of order under the UMRA's provisions. Thus, according to CBO, the number of bills with mandates exceeding the UMRA threshold has declined from eleven in 1996, the first year UMRA took effect, to an average of six over each of the next nine years.[84] More importantly, substantial anecdotal evidence and CBO's own observations[85] indicate that UMRA has

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[78] 2 U.S.C. § 658c ("Duties of the Director; Statements on Bills and Joint Resolutions Other than Appropriations Bills and Joint Resolutions"). In practice, however, CBO typically reviews each bill approved by a committee to identify mandates and estimate their costs. CBO REPORT, 1996 TO 2000, *supra* note 71, at 3.

[79] *Id.* § 658c(d) ("Amended Bills and Joint Resolutions; Conference Reports").

[80] Specifically, CBO must prepare for inclusion in the committee report a detailed estimate of, *inter alia*: (1) the total amount of the direct cost of complying with the federal intergovernmental mandates in the bill or joint resolution; (2) the appropriations needed to fund such authorizations for up to ten years after the mandates take effect; (3) the amount, if any, of additional appropriations provided by the bill or joint resolution to fund the intergovernmental mandates; and (4) if CBO cannot estimate the cost of a mandate, a statement asserting that such an estimate is not feasible and explaining why. *Id.* § 658c.

[81] The $50 million threshold figure is in 1996 dollars, and is to be adjusted annually for inflation—in 2006, that adjusted threshold was $64 million. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, A CBO REPORT: A REVIEW OF CBO'S ACTIVITIES IN 2006 UNDER THE UNFUNDED MANDATES REFORM ACT 1 (2007).

[82] 2 U.S.C. § 658b(f)(2) ("Other Publication of Statement of Director").

[83] *Id.* § 658f ("Requests to the Congressional Budget Office from Senators").

[84] *See* CONG. BUDGET OFFICE, A CBO REPORT: A REVIEW OF CBO'S ACTIVITIES UNDER THE UNFUNDED MANDATES REFORM ACT, 1996 TO 2005, at 4 (2006) (showing fifty-three bills with mandates exceeding the statutory threshold from 1997 to 2005).

[85] One Congressional Budget Office Report, for instance, observes the following "pattern[ ] about federal mandates and their costs":

> In some cases, lawmakers have altered legislative proposals to reduce the costs of federal mandates before enacting them. . . . For many of those mandates—such as a requirement that drivers' licenses show Social Security numbers, a moratorium on certain taxes on Internet services, preemptions of state securities fees, and provisions in the farm bill about the contents of milk—it was clear that information provided by CBO played a role in the Congress's decision to lower the costs.

affected Congress's deliberative processes and has altered the outcome of at least some legislation.[86] UMRA does have its limits: While the framework has prompted Congress to scale back some statutory provisions[87] or create exceptions[88] in order to bring mandate costs below the prescribed threshold, it has not stopped Congress from enacting legislation with mandates exceeding the threshold when Congress has deemed it appropriate to do so.[89]

CBO REPORT, 1996 TO 2000, *supra* note 71, at viii.

[86] One notable UMRA success involved the portion of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") initially known as the Immigration Control and Financial Responsibility Act. Pub. L. 104-208, 110 Stat. 3009 (1996). The original committee version of the bill contained a provision requiring state driver's licenses to include Social Security numbers by October 1, 1997, a requirement which would have resulted in a large influx of people seeking early renewals and would have imposed direct costs on state governments of $80–200 million in the first six years. H.R. 3610, 104th Cong. (1996). Faced with the heightened scrutiny required by UMRA and the threat of a point of order, however, this provision was revised by a manager's amendment that allowed states to implement the new license requirements over an extended period of time, and thereby eliminated the influx of renewals and reducing the direct costs to $10–$20 million over six years. *See* CBO REPORT, 1996 TO 2000, *supra* note 71, at 14–15; ESKRIDGE ET AL., *supra* note 72, at 486. A manager's amendment is one that is agreed to by both sides (parties) in advance, before a bill is considered on the floor; the "managers" are the majority and minority members who manage the debate on a bill for their side. C-SPAN Congressional Glossary, http://www.cspan.org/guide/congress/glossary/manamend.htm (last visited Nov. 2, 2008).

[87] For example, the proposed Internet Gambling Prohibition Act, Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. § 3(a) and Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. § 2(a), were amended, as a result of UMRA, to eliminate a $60 million intergovernmental mandate (exempting, *inter alia*, state lotteries). *See, e.g.*, ESKRIDGE ET AL., *supra* note 72, at 488. Similarly, the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996), was revised to lessen the parity requirements between mental and physical health coverage, in order to reduce overall health insurance costs imposed on states. *See* CBO REPORT, 1996 TO 2000, *supra* note 71, at 15.

[88] Internet Tax Freedom Act, Pub. L. No. 105-277, § 1100, 112 Stat. 2681, 2681–719 (1998), for example, was revised to allow states to continue collecting sales tax on internet access so as to avoid cutting off a substantial source of state revenue. *See* CBO REPORT, 1996 TO 2000, *supra* note 71, at 15. Likewise, the National Securities Markets Improvement Act, Pub. L. No. 104-290, 110 Stat. 3416 (1996), was revised to limit the scope of a preemption against state securities registration, in order to allow states to continue to collect certain fees. *See* CBO REPORT, 1996 TO 2000, *supra* note 71, at 15.

[89] In fact, during the ten-year period between 1996 and 2005, Congress enacted five statutes containing unfunded intergovernmental mandates that exceeded UMRA's threshold. They were: (1) Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (requiring state and local governments to meet certain standards for issuing drivers' licenses, identification cards, and vital-statistics documents, estimated to cost state and local governments over $100 million over the 2005–2009 period, and authorizing partial federal funding to defray those costs); (2) Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, 118 Stat. 2615 (2004) (temporarily preempting state authority to tax certain Internet services and transactions, estimated to cost state and local governments at least $300 million in lost revenues); (3) Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (preempting state taxes on premiums for certain prescription drug plans, estimated to cost states $70 million in lost revenues in the first year); (4) Agricultural Research, Extension, and Education Reform Act, Pub. L. No. 105-185, 112 Stat. 523 (1998) (reducing federal funding to administer the Food Stamp program, estimated to cost states between $200–$300 million per year); and (5) Small Business Job Protect Act, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (increasing the minimum wage, estimated to cost state and local governments, as employers, more than $1 billion during the first five years after it took effect).

Perhaps even more important than the revisions that have been made to statutes deemed by CBO to impose intergovernmental mandates exceeding the statutory threshold, however, is the work that UMRA does behind the scenes. Insiders report that UMRA has the most effect before a bill reaches the floor, as drafters work to avoid its provisions. As former House Rules Committee Chairman Gerald B. Solomon (R-N.Y.) has noted, UMRA "changed the way that prospective legislation is drafted," ensuring that "[a]nytime there is a markup, this [unfunded mandates issue] always comes up."[90] Thus, UMRA rarely is invoked as a formal matter—either through points of order[91] or through post-committee amendments designed to bring federal mandates within its threshold—because it forces lawmakers and their staffs to consider, at the drafting stage, the impact that proposed bills would have on state and local governments.[92]

In addition to focusing Congress's attention on the issue of unfunded mandates, UMRA also has increased the flow of information between Congress, CBO, and the intergovernmental lobby. CBO now consults the intergovernmental lobby and other relevant interest groups during the early stages of legislative drafting, often to obtain information about the impact, including estimated costs, that federal mandates will impose on state and local governments. Further, committee staff, "eager to avoid a floor fight over mandates[,]frequently touch base with CBO officials to determine whether their legislative proposals qualify as unfunded mandates or exceed the $50 million threshold."[93] UMRA also has made the job of state and local governments (and their lobbyists) easier by giving them early notice of potential unfunded mandates and by relaxing some of the pressure to monitor committees closely in order to learn of laws with such mandates.[94]

Like UMRA, the FAA was motivated by a concern that federal laws too often encroach on state and local government interests without adequate disclosure or consideration. Whereas UMRA deals with federal costs imposed on state and local governments through unfunded mandates, the FAA seeks to curb federal preemption of state and local government authority. The FAA reflects a concern that many federal statutes and agency rules effectively preempt local government authority without expressly acknowledging this fact. The Act thus is designed to make federal legislators and agency rule makers aware of and accountable for their decisions to preempt state and local laws. The FAA is modeled on UMRA and similarly requires committee and conference reports to: (1) identify any section of a proposed bill that expressly preempts state or local government authority; (2) identify the con-

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[90] Allan Freedman, *Unfunded Mandates Reform Act: A Partial 'Contract' Success*, CONG. Q. WKLY., Sept. 5, 1998, at 2318.

[91] *Id.* ("The point of order has never been used in the Senate. It has been invoked as least seven times in the House, but it has never come close to blocking a bill.").

[92] *See id.* (citing CONG. Q., 1995 CONG. Q. ALMANAC 3-15 (1995)).

[93] *Id.*

[94] *See* ESKRIDGE ET AL., *supra* note 72, at 513.

stitutional basis for preemption; (3) set forth reasons for the preemption; and (4) include a federalism impact assessment performed by the Director of CBO.[95] The Act reciprocally requires CBO to issue a report describing the preemptive impact of the bill, including estimated costs to state and local governments, and identifying any bill provision that establishes a condition for receipt of funds under the program that is not related to the purposes of the program.[96] An innovative provision also announces a judicial canon of construction to the effect that "[n]o Federal statute enacted after the effective date of this Act shall preempt . . . any State or local government law . . . unless the statute expressly states that such preemption is intended or unless there is a direct conflict between such statute and a State or local law."[97]

2. Base Closures

Like UMRA, the Defense Base Closure and Realignment Act[98] was motivated by legislators' collective inability to take a particular course of action that all, or most, members of Congress believed was in the public interest. After World War II, and particularly after the Cold War, the United States was left with many military bases and installations throughout the country that it no longer needed. While Congress as a whole agreed that numerous bases should be closed or consolidated to save federal funds, individual legislators were unwilling to close bases in their own districts, and congressional debates about which military bases should be closed became extremely political, rather than focusing on objective criteria for closing particular bases. Acting against a backdrop of "repeated, unsuccessful efforts to close military bases in a rational and timely manner,"[99] Congress passed the Defense Base Closure and Realignment Act, a framework statute that delegates the authority to determine which bases should be closed or consolidated to an independent, bipartisan commission of experts called the Defense Base Closure and Realignment Commission ("Commission").

Under the procedure established by the Act, the Secretary of Defense first submits recommendations to Congress and to the Commission.[100] The Commission then must hold public hearings and prepare a report, containing an assessment of the Secretary's recommendations as well as the Commission's own recommendations for base closures and realignments.[101] In making their recommendations, the commissioners are restrained by the following procedural rules: (1) they are given clear, published criteria for determining which bases to close; (2) they must have GAO assess the Com-

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[95] Federalism Accountability Act of 1999, S. 1214, 106th Cong.
[96] *See id.*
[97] *Id.*
[98] Defense Base Closure and Realignment Act § 2901, 10 U.S.C. § 2687 (2006).
[99] Dalton v. Specter, 511 U.S. 462, 479 (1994).
[100] Defense Base Closure and Realignment Act §§ 2902(a)–(c)(1)(A), 2903(c)(1).
[101] *Id.* § 2903(d)(1)–(2).

mission's process and recommendations; and (3) they must submit their list of proposed base closures to Congress and the President for an up-or-down approval vote (no amendments or alterations).[102] If the President accepts the Commission's recommendations as a package (no amendments),[103] the recommendations are submitted to Congress.[104] Congress then may either reject or accept the Commission's recommendations as a package—but if it wishes to reject the recommendations, it must pass a joint resolution to stop the recommendations from taking effect.[105] In other words, the statutory default is that the recommendations, once approved by the President, will take effect—unless Congress affirmatively stops them from doing so. Moreover, if Congress passes a resolution rejecting the recommendations, the President has the power to veto the resolution—a likely outcome since any recommendations coming before Congress first will have been approved by the President. Thus, in order to block the Commission's recommendations from going into effect, two-thirds of the members of Congress affirmatively must oppose them.

Since the first iteration in 1990, Congress has enacted three base closure and realignment statutes, pursuant to which four bipartisan Defense Base Closure and Realignment ("BRAC") Commissions have convened and submitted recommendations to Congress and the President. Overall, the process established by the framework has proved successful, prompting numerous base closings and saving the government substantial expense: Combined, the four BRAC commissions have recommended the closure of 125 major military facilities and 225 minor military bases and installations, and the realignment of 145 others.[106] The resulting closures and realignments have saved taxpayers over $16 billion through 2001, and over $6 billion in additional savings annually.[107] The process is not, however, perfect: Members of Congress and the President have at times interfered with the Commission's recommendations to save bases for political reasons,[108] and difficulties persist in developing accurate cost data and modeling to project cost savings over time. But while the base closure framework has not transformed politicians into nonpartisans, it has, on balance, forced them to adopt politically unpleasant closures they would not implement on their own.

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[102] *Id.* §§ 2913(b)–(d), 2914(d).

[103] *Id.* § 2903(e); *Dalton*, 511 U.S. at 470.

[104] Defense Base Closure and Realignment Act § 2903(e)(2), (e)(4).

[105] *Id.* § 2904.

[106] William Hershey, *Ohio Shows Unity for Bases*, DAYTON DAILY NEWS, Mar. 12, 2005, at D1.

[107] John Simerman, *State's Bases on the Block Again*, CONTRA COSTA TIMES, Feb. 6, 2004, at A01.

[108] President Clinton, for example, interfered with the 1995 BRAC recommendations by proposing that, as an alternative to shutting down bases in the electorally-rich states of California and Texas, private contractors should take over maintenance work at the facilities. Eric Schmitt, *House Votes to Overturn a Plan by Clinton to Save Military Jobs*, N.Y. TIMES, June 24, 1997, at A14.

3. Environmental Impact Statements

Like UMRA, which was passed during a period of heightened attention to federalism interests prompted by the Republican takeover of both houses of Congress, the National Environmental Policy Act ("NEPA") was passed in 1970 during a time of intensive legislative attention to environmental concerns. The Act was designed to entrench environmental protection as a background concern during the formation of all regulation and legislation. Congress believed that "[o]ne of the major factors contributing to environmental abuse and deterioration is that actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment."[109] The NEPA framework seeks to solve this problem through two key provisions: (1) a broad declaration of national environmental policy; and (2) an information-forcing mechanism to ensure that federal policymakers are aware of the environmental impact of their actions.

First, NEPA establishes a national policy calling for, among other things, "productive harmony" between man and nature and for maintenance of the environment for "succeeding generations."[110] It also directs that "to the fullest extent possible" the policies, regulations, and laws of the United States be interpreted and administered in accordance with NEPA's environmental policies.[111] Second, NEPA requires federal agencies, before taking any "major Federal action," to prepare a "detailed statement" explaining the environmental consequences of their proposed actions.[112] The statement, known as an environmental impact statement ("EIS"), must disclose to the public: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[113] The object of the EIS requirement is to avoid uninformed agency decisions that sacrifice long-term societal interests or inflict irreversible environmental damage.[114] Regulations provide

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[109] S. REP. No. 91-296, at 9 (1969).

[110] 42 U.S.C. § 4331(a)–(b)(1) (2000).

[111] *Id.* § 4332.

[112] *See* Pub. L. No. 97-258, 96 Stat. 877 (1982); Pub. L. No. 94-83, 89 Stat. 424 (1975); Pub. L. No. 91-190, 83 Stat. 852 (1970), as amended by Pub. L. No. 94-52, 89 Stat. 258 (1975) (codified as amended at 42 U.S.C. §§ 4321–4347 (2000)).

[113] 42 U.S.C. § 4332(c) (2000).

[114] *See* Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) ("[T]he harm at stake [in a NEPA violation] is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize . . . the risk of uninformed choice.");

that if an agency is unsure whether its proposed action is a "major Federal action," the agency may prepare a concise "environmental assessment" to help it determine whether an EIS is necessary.[115]

NEPA's national policy declaration[116] announces a regulatory precommitment to the interests of two diffuse groups—future generations and the public at large. In furtherance of this commitment, the Act's EIS requirement seeks to ensure that federal agencies and legislators are given accurate information regarding—and are forced to take into account the environmental consequences of—their policy decisions. Like the mandate cost estimates in UMRA and the preemption impact statements in the FAA, NEPA's EIS requirement is designed to entrench, or secure a regulatory precommitment to, environmental sensitivity as a routine part of the legislative process. Notably, NEPA does not require federal agencies to choose an environmentally-friendly course over an environmentally-harmful one. But, as a practical matter, the EIS requirement ensures that agency decisions will reflect environmental values. As the Supreme Court has observed,

> [s]imply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precatory language of . . . the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies to respond to the needs of environmental quality.[117]

In its thirty-five year history, NEPA unquestionably has increased federal agency sensitivity to environmental concerns during the policymaking process. Numerous proposed federal actions that would have had serious environmental consequences have been modified,[118] or in some cases even

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see also Robert G. Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*, 2005 GEO. U. ENVTL. L. & POL'Y INST. PAPER 3.

[115] *See* 40 C.F.R. § 1501.4 (2003) (implementing NEPA).

[116] 42 U.S.C. § 4331.

[117] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (internal quotes and citations omitted).

[118] In 1971, for example, the Army Corps of Engineers sought to dredge the Cache River for flood control, threatening the bottomland hardwood wetlands in the river basin on which the woodpecker and many other species of wildlife depended. Environmentalists challenged the adequacy of the Corps's NEPA analysis in court, pointing out that the Corps had failed to evaluate alternatives to its dredging program that would cause less damage to wetland habitat. The court enjoined the Corps from proceeding until it fully considered alternatives, and public outcry over the incident led to the abandonment of the dredging project and the creation of a national wildlife refuge. Envtl. Def. Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Dreher, *supra* note 113, at 5. Other examples of NEPA's successful impact include: (1) forcing improvements in a land management plan that ultimately helped save the Los Alamos National Laboratory from a potentially serious release of radiation when it was swept by wildfire in May 2000. The laboratory's initial management plan did not address the risk of wildfire, but other federal agencies alerted the Los Alamos staff to that risk in comments on the draft EIS. As a result of these warnings, the laboratory had prepared a fire contingency plan, cut back

abandoned,[119] as a result of the NEPA process.

Notably, NEPA places direct constraints on federal agencies, rather than on legislators. Thus, its primary impact is on the administrative policymaking process, rather than on the legislative process in Congress. Despite this difference between NEPA versus UMRA, the Defense Base Closure and Realignment Act, and this Article's proposed representation-reinforcing framework statute, NEPA remains an important precommitment precedent for a number of reasons. First, it shows that when the proper political conditions exist, Congress is capable of entrenching a precommitment to protect the interests of a diffuse interest. Second, it illustrates that a statutory requirement which forces the relevant policymaking entity (in NEPA's case, federal agencies) to seek out information about the impact that its policy proposals will have on particular interests (e.g., endangered species, future generations) can produce policy changes that reduce the harm worked on those particular interests. To be sure, the administrative policymaking process is different from the legislative process, which means that specific procedural precedents are not readily transferrable from NEPA to the representation reinforcement context. However, the general idea behind NEPA—that federal agencies must prepare a detailed EIS to accompany new policy proposals—is one that can be transferred to the legislative context. Moreover, congressional committees and federal agencies are at least somewhat analogous in that both exercise gatekeeping jurisdiction/authority over legislation/regulations governing particular policy areas.[120] Thus, there is at least some basis

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trees and underbrush around its buildings, and taken other steps to guard against the risk of radiation release prior to the fire; and (2) forcing a proposed freeway in Kentucky's bluegrass region to be redesigned in order to protect historic, aesthetic, and natural values as a result of public input and legal action during the NEPA planning process. *See id.* at 4–6.

[119] A few noteworthy examples include: (1) saving the Department of Energy from building expensive new nuclear reactors at its Savannah River site, because the EIS requirement enabled DOE to evaluate alternative technologies, including using a particle accelerator or existing commercial reactors, to replace its obsolete existing reactors. Admiral James Watkins, then Secretary of Energy, testified before the House Armed Services Committee: "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country." *Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs Before the H. Comm. on Armed Services*, 102d Cong. 912 (1992); (2) saving wild Atlantic salmon populations in the Penobscot River from construction of a major new hydropower dam because the EIS showed that the proposed Basin Mills Dam would undermine long-standing federal, state, and tribal efforts to restore wild Atlantic salmon populations to the Penobscot River. The FERC received strong comments opposing the project from federal and state fishery managers and the Penobscot Indian Nation, among others, and concluded that the public interest was best served by denial of the license. *See* Dreher, *supra* note 114, at 4–6; and (3) forcing the state highway agency to abandon a proposal for a new four-lane freeway that would have worked significant wetland loss and cost taxpayers $1.5 billion, in favor of an alternative plan, raised as a result of the EIS requirement, that called for expanding and improving an existing highway. *See id.*

[120] Congress divides its legislative, oversight, and internal administrative tasks among approximately two-hundred committees and subcommittees. Within assigned areas, these functional subunits gather information; compare and evaluate legislative alternatives; identify policy problems and propose solutions; select, determine, and report measures for full chamber consideration; monitor executive branch performance (oversight); and investigate allegations

for analogizing between a framework designed to force agency rulemakers to gather information about the environmental impact of their proposed regulations, and a framework designed to force congressional committees to gather information about the impact that committee proposals would have on politically-disadvantaged groups.

B. Proposal: A "Transparency in Legislation Act"

Like the legislative frameworks discussed in the previous Section, the representation reinforcing framework statute proposed below would seek to solve a collective action problem, entrench a macro-objective (or legislative precommitment), and address informational deficiencies in the legislative process. The collective action problem in this context arises from the fact that members of Congress have no electoral incentive to pay attention to the costs or harms that a legislative proposal will impose on politically weak groups—particularly not when a powerful group stands to benefit from the proposal. Thus, even if legislators might wish, for moral or policy reasons, to be sensitive to the interests of indigent criminal defendants, consumers, or future taxpayers, they may perceive little to no gain from pushing to protect those groups' interests. Further, legislators may not always be aware that a bill will harm or impose costs on a particular group. Politically diffuse or weak groups are not likely to be on legislators' radar screens or be able to bring themselves to legislators' attention and accordingly may become unintended casualties of many bills. This is especially true in the present era of omnibus legislation. The framework proposed in this Article thus primarily seeks to ensure that Congress receives information about the costs that a proposed bill would impose on diffuse, underrepresented groups before it decides whether to vote for the bill, and thereby to encourage Congress more efficiently to balance the harms and benefits worked by the legislation it enacts. A representation reinforcing framework statute would seek to entrench a legislative precommitment to consider the impact that proposed legislation will have on such groups as a mandatory part of the legislative process, much as UMRA entrenches a precommitment to consider the costs to states of unfunded federal mandates, and as NEPA entrenches a precommitment to consider the environmental impact of proposed federal actions.

1. A "Red Flag" List

The goal of a representation reinforcing framework statute should be to make statutory tradeoffs clear both to Congress and to the public and, thereby, to give Congress strong incentives to make better distributive choices. Thus, whereas the second-generation representation reinforcers at-

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of wrongdoing. CONG. RESEARCH SERV., COMMITTEE TYPES AND ROLES (2003). For more on the role of administrative agencies, see, for example, ESKRIDGE ET AL., *supra* note 72, at 1118–26.

tempt to use the judicial branch to hack away at congressionally-enacted interest group gains and to impose transparency requirements that shame Congress into behaving better, this Article's proposed framework would place greater emphasis on giving Congress the tools it needs to deliberate more effectively and to police its own behavior towards underrepresented groups in the first instance.

To this end, one key step in the proposed framework statute should be the establishment of a list of "Red Flag" groups to whom Congress commits to give greater voice in the future. "Red Flag" groups should be defined to mean societal groups who are diffuse, politically unorganized, and whose interests traditionally have gone overlooked in the legislative process. Once a list of specific "Red Flag" groups has been established, it should be made a defined statutory feature that sets the baseline for what triggers the statute's other requirements.

Because creation of a list of groups to be given extra consideration in the legislative process is likely to become partisan, and, if performed by Congress, susceptible to the very political dysfunctions the framework seeks to counteract, the framework should require that Congress establish an independent, bipartisan commission—similar to that established by the Base Closure Act—to be charged with deciding which groups should be placed on the "Red Flag" list. To ensure the independence and bipartisanship of the commission, the statute should prescribe a politically balanced procedure for selecting the commission's members. The Defense Base Closure and Realignment Act, for example, directs that the nine members of the base closure commission be nominated by the President and confirmed by the Senate, and requires the President, in selecting nominees, to consult with and take recommendations from the Speaker of the House and the Senate majority leader for the appointment of two members each, and with the minority leaders of the House and the Senate for the appointment of one member each.[121] The remaining three nominees are left to the President's discretion. The same or similar rules should be used to govern selection of the members of a representation reinforcement commission.

As in the base closure context, the framework statute should set out baseline criteria that a group must meet in order to be placed on the list. A few possibilities include: (1) the group should have a large membership (a threshold size could be established); and (2) the group should face structural impediments to organization—such as low financial resources, lack of existence at the time legislation is passed (as with tort victims, who do not become members of a group until they are injured, or future taxpayers, who are not necessarily born at the time the statute is enacted). Paradigmatic groups who should be considered for list status would include legal aliens, indigent

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[121] *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. B, title XXIX, pt. A, § 2902(c)(2), 104 Stat. 1808 (1990) (codified as amended at 10 U.S.C. §2687 note on Defense Base Closure and Realignment Commission (2006)).

defendants, future taxpayers, those living below the poverty line, and perhaps consumers. In addition, the baseline criteria dictated by the framework statute should make clear that groups that already have a vocal lobby in place (e.g., the NAACP, NOW, and the AARP) cannot be designated as "Red Flag" groups by the independent commission. Finally, the framework should limit the total number of groups that can be given "Red Flag" status, in order to keep compliance with the statute's prescriptions feasible and to guard against establishment of an unwieldy, overly-inclusive list.

Once the independent commission has compiled a list of "Red Flag" groups, the list should be submitted to Congress and the President for an up-or-down vote approving or disapproving it. As with the Base Closure Commission's recommendations, the statutory default should be that the commission's list automatically is deemed adopted, unless Congress affirmatively votes to disapprove it. This procedural mechanism would shift the burden of inertia and political foot-dragging in favor of the framework.

Congressional adoption of such a list of "Red Flag" groups would be far preferable to *ad hoc* judicial determination of groups' relative political power for a number of reasons. Significantly, inclusion on the "Red Flag List" would ensure only that additional attention will be paid to the impact that legislative proposals will have on the group. It would not provide an automatic guarantee that the group will win or lose the benefit of the doubt in statutory interpretation against other groups who are politically weaker or stronger—unlike judicial invocation of representation reinforcing canons of construction, which would place an automatic thumb on the scales in favor of the weaker political group. Further, if a list of "Red Flag" groups is established as part of a framework statute, then it will be a stable list that applies uniformly across all statutes, rather than an *ad hoc* one that shifts with the whims of the different judges and courts who come to apply it. This is not to say that a statutory list would be permanent or unchangeable; Congress could and should appoint subsequent commissions to review and update the List periodically. But changes to the List would have to take a formal route, and be subject to popular input and electoral accountability, rather than be imposed from on high by the politically isolated judiciary.

2. *Information-Forcing Mechanisms*

The second key aspect of a representation reinforcing framework statute should be a requirement that any bill that appears likely to affect a "Red Flag" group adversely, or to benefit a narrow interest while imposing costs on a "Red Flag" group, must be accompanied by an impact report conducted by an independent entity such as CBO or the GAO. Further, such an impact report must be made available to members of Congress before they vote on the bill. Borrowing from the UMRA, NEPA, and FAA models, the proposed framework should require all congressional committees: (1) to submit to CBO/GAO any bill or joint resolution that seems likely to impose costs, but

not corresponding benefits, on an under-represented "Red Flag" group; and (2) to identify specifically in an "interest impact" statement the "Red Flag" group(s) on whom the costs are being imposed, as well as the group(s) whom the bill is designed to benefit. The statute also should require committees to identify the groups who lobbied for and against the bill or resolution, both as a proxy for which groups are expected to be harmed or to benefit and as a crude indicator of groups' political participation in the drafting process. In addition, the statute should direct CBO/GAO to review bills reported out of committee for adverse effects on "Red Flag" groups—formalizing the process that takes place in practice in the UMRA context. This would force congressional committees to give at least some thought to the consequences that bills and resolutions will have for under-represented groups at the drafting stage, as well as provide a back-up check to keep committees honest and catch inadvertent reporting errors. Finally, the statute would allow, and even encourage, congressional committees to state whether ambiguities in the statute should be construed to favor or disfavor certain specified groups or interests.

Once a committee has submitted a legislative proposal and "interest impact" statement to CBO/GAO, that entity then should be required to prepare an impact report evaluating: (1) the impact in qualitative and, if possible, quantitative terms, that the bill is expected to have on List groups; and (2) the benefits the bill is expected to confer on other groups. Again, the point of the impact report requirement is to force Congress to take into account the effect that proposed legislation or statutory language will have on groups whose concerns often get passed over in the lawmaking process. The report is meant to provide information, as well as promote deliberation. This is significant because, as Jonathan Macey has highlighted, one of the ways in which powerful, well-organized interests impose their will on the legislative process is by controlling the flow of information to legislators—often distorting the picture so that legislators believe they are enacting a statute which benefits the public when they actually are passing special interest legislation.[122] Mandatory impact reports conducted by CBO, GAO, or some other neutral entity might shed light on such distortions, or help legislators understand who will be the true beneficiaries and victims of proposed legislation.

The critical feature of both UMRA and NEPA is that both statutes emphasize early analysis by CBO and federal agencies, and inclusion of CBO's and federal agencies' estimates, in a report or impact statement that accompanies the relevant proposal. This ensures that individual legislators in the case of UMRA, and agency lawmakers in the case of NEPA, are made aware of the effect that a proposed law or federal action will have on state and local governments or the environment while they are contemplating the proposal, and before they decide how to vote. Moreover, both statutes dictate several

[122] *See* Macey, *supra* note 5, at 254.

specific cost and impact assessments that must be included in the report or impact statement, to ensure that legislators and agency lawmakers have as much relevant information as possible when deciding whether to vote to approve a particular proposal. These provisions promote informed deliberation by Congress and federal agencies, and provide some measure of assurance that local government and environmental concerns will not get swept under the rug during the oft-rushed lawmaking process.

Following this model, the proposed "Transparency in Legislation Act" would require the "interest impact reports" generated by CBO/GAO to accompany the bills or resolutions they analyze and to be presented to the full congressional membership at the same time as such bills or resolutions—or where that is not possible, to be published in the *Congressional Record before* the vote on such bills or resolutions. Further, it would require that the CBO/GAO report contain a qualitative and, if possible, a quantitative analysis of the relative costs and benefits that the bill or resolution would impose on different interests, with special emphasis on costs and benefits to "Red Flag" groups. In using neutral CBO or GAO number-crunchers to conduct the empirical work, the framework statute would come as close as possible to ensuring that the impact reports upon which legislators rely are fair and accurate, a guarantee sorely lacking in the current scheme in which politically powerful groups often are the only ones presenting impact reports to legislators.[123] Finally, in order to guard against last-minute circumvention of this information-forcing mechanism, the statute would follow the UMRA model of requiring conference committee reports to include CBO/GAO reports reflecting any changes made in conference, and would allow any member of Congress to request CBO/GAO analysis of the consequences of proposed amendments, to be submitted prior to the vote on the amendment.

The framework proposed in this Article thus advocates, in essence, a "danger signals" approach for the legislative process. In administrative law, the "danger signals" or "hard look" doctrine directs courts to be alert to "signals" indicating a lack of careful decision-making by an agency, and to give extra scrutiny, or a "hard look," to regulations that appear to be the result of a careless decision-making process.[124] Under this Article's proposal, the "danger signal" would be flashed by Congress itself, through the "List of Red Flag Groups"—and the "hard look" would be provided both by the impact report and by courts upon later review. That is, a group's inclusion on the List would act as a danger signal indicating that the group's concerns are likely to be overlooked in the legislative process. Anytime a bill, conference

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[123] *See, e.g.*, *supra* note 114 and accompanying text. CBO is well-respected as a relatively independent part of the congressional structure, and its estimates are considered reliable and thorough. *See* Garrett, *supra* note 52, at 1149 (citing *MacNeil/Lehrer NewsHour: Discussion with William Beach, Economist at the Heritage Foundation, and Robert Reischauer, Senior Fellow at Brookings Institution* (PBS television broadcast Dec. 12, 1995); *Playing Games with CBO*, WASH. POST., Jan. 31, 1988, at D6.

[124] *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

report, or amendment that would affect the group is reported out, an impact report would be generated in an effort to ensure that Congress deliberates thoroughly about the impact that proposed legislation is likely to have on the group (a "hard look"). As a further check, if Congress were to choose, even after considering the impact report, to enact a statute that disadvantages a "Red Flag" group, courts later reviewing that statute would provide a second "hard look," by searching the record for evidence that Congress consulted with members of the disadvantaged group while deliberating on the bill.[125] This Article's proposal would differ slightly from the traditional danger signals approach in that courts no longer would have to read tealeaves to discern danger signals—instead, (1) Congress, through the independent commission, would identify *ex ante* the groups most likely to suffer underrepresentation; (2) Congress itself would seek to ensure that those groups' concerns are given a "hard look" during the legislative process; and (3) the judiciary would give statutes that adversely affect List groups a follow-up "hard look" to confirm that the groups were consulted while the statutes were being drafted and enacted.

3. A Point of Order Trigger

UMRA usefully establishes a $50 million threshold for intergovernmental mandates,[126] exempting mandates that impose costs below the threshold from detailed CBO review and subjecting mandates that impose costs above the threshold to both detailed CBO review and a presumption of invalidity, enforceable by a parliamentary point of order.[127] This rule has several advantages. Most notably, it keeps UMRA manageable by sparing CBO from conducting detailed estimates for smaller mandates and thereby enabling CBO—and Congress—to focus its attention on identifying the most egregious instances in which proposed bills seek to impose unfunded mandates on state and local governments. Further, the rule reflects a recognition that UMRA cannot—and should not necessarily—eliminate all intergovernmental mandates, and sets up a *de facto* acceptable level of unfunded mandates that Congress may impose without significant procedural resistance. Congress is free to enact federal mandates that impose less than $50 million in direct costs on state and local governments, without providing offsetting funds to affected states or localities, so long as the relevant committee report acknowledges that an unfunded mandate is being enacted.

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[125] *See* discussion *infra* Section IV.A.2.

[126] *See* 2 U.S.C. § 658c(a)(1) (2006).

[127] *Compare id.* § 658c(a)(1)–(2) (describing estimates required for bills or resolutions that exceed the $50 million threshold), *and id.* § 658d (making out of order proposed bills, etc. that would impose intergovernmental mandates above the threshold specified in § 658c(a)(1)), *with id.* § 658c(c) (requiring only a brief explanation of the basis for the cost estimate for bills that impose mandates below the $50 million threshold). For a fuller discussion of how the point of order works, see *infra* Section III.B.2.

Borrowing from this model, this Article recommends that a representation reinforcing framework also should establish a threshold below which statutes imposing costs on "Red Flag" groups would not trigger detailed CBO/GAO analysis, and above which a statute imposing costs presumptively would be out of order. There are a few different options for how the trigger could be defined. One option would be to emulate the $50 million UMRA trigger by identifying a specific dollar figure as the maximum acceptable cost that legislative proposals can impose on a "Red Flag" group. So, for example, the framework might dictate that any bill which "would impose more than $10 million or $20 million in costs on a 'Red Flag' group" is out of order. If Congress wished to enact a proposal that would impose costs above this threshold on a "Red Flag" group, it would have to vote affirmatively to waive the point of order.

Other options for a threshold that should trigger review under a representation reinforcing framework statute include: (1) the ratio between expected costs to "Red Flag" groups versus expected benefits to narrow interests, with a low ratio resulting in no review even for bills whose sole purpose is to transfer wealth to narrow interests; (2) the ratio between the estimated number of citizens who will bear the costs of or be harmed by the bill versus the estimated number of citizens who will benefit from the bill, again with a low ratio triggering no review no matter how rent-seeking the purpose of the bill; or, more simply, (3) an automatic presumption that any bill that benefits fewer than, say, 100 people or harms more than, say, 5,000 people, is likely to redistribute wealth from a diffuse, underrepresented group and should trigger review. This last trigger-threshold is modeled on one used in the now-defunct Line Item Veto Act, which empowered the Joint Tax Committee to subject any tax provision benefiting 100 or fewer taxpayers to presidential cancellation.[128]

In fact, the ideal threshold for CBO/GAO review may be one that combines all three of these measures. Ultimately, whatever measure is chosen should provide that bills in which those who benefit also pay most of the costs and in which the costs are roughly commensurate with the benefits (or the benefits exceed the costs) would not trigger CBO/GAO review, though the committee reporting out the bills should be required to identify the benefiting group(s) as well as identify who lobbied for and against the bill.

Once such a threshold has been established, the representation reinforcing statute, like UMRA, should be enforced through a parliamentary procedure called a "point of order."[129] The UMRA point of order operates as follows: Any bill reported out of committee that contains a federal mandate but is not accompanied by a CBO cost statement is deemed "out of order;" likewise any bill, joint resolution, amendment, motion, or conference report

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[128] Line Item Veto Act of 1996, Pub. L. 104-130, 110 Stat. 1200, *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

[129] *See, e.g.*, 2 U.S.C. § 658d.

that includes an intergovernmental mandate exceeding $50 million is deemed "out of order" unless Congress has provided federal funding to cover the costs of complying with the mandate.[130] The point of order is not self-enforcing; it does not automatically invalidate any piece of legislation. Rather, it empowers individual legislators to object to legislative proposals that violate the UMRA's provisions. Thus, if a bill or resolution reported out of committee imposes intergovernmental mandates costing more than $50 million or is not accompanied by a CBO cost statement, any legislator in either chamber may raise a point of order against it on the chamber floor. Once a point of order has been raised, brief debate (20 minutes total) is had and then the full chamber votes on whether to waive the point of order for the particular bill or resolution.[131] In other words, the point of order does not make it impossible for Congress to circumvent UMRA's requirements—but it does make such circumventions transparent, by requiring deliberations and a recorded vote on the decision to waive a point of order.

Points of order are a common enforcement mechanism in the budget process. They are, for example, used to ensure committee compliance with the spending and revenue targets set forth in the annual budget resolution[132] and to prevent use of the streamlined "reconciliation" procedure to enact "extraneous" or "non-germane" statutory provisions.[133] Points of order strike an admirable balance between encouraging compliance with a framework statute's procedural requirements and maintaining legislative flexibility. On the one hand, the point of order empowers a single dissenting legislator to hold Congress's feet to the fire if it chooses to evade the UMRA's rule that the federal government must pay for any mandate over $50 million or tries to sneak non-germane amendments into a reconciliation bill; indeed, a recorded vote on whether to waive the point of order increases legislators' public accountability[134] for decisions to impose unfunded mandates on state and local governments or to sneak "pork" into a reconciliation bill, and thus provides a powerful legislative incentive to comply with the original framework requirement. At the same time, Congress retains the power, by simple majority vote, to waive the point of order with respect to a particular federal mandate or reconciliation bill.

A representation reinforcing framework statute could adopt a similar flexible point-of-order enforcement mechanism: First, as under UMRA, any bill or resolution that imposes costs on a "Red Flag" group and is reported

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[130] *Id.* § 658d(a)(1), (2).

[131] *See, e.g.*, Parliamentary Outreach Program, House Rules Comm., *The Unfunded Mandate Point of Order*, PARLIAMENTARY OUTREACH PROGRAM NEWSL., June 18, 1999, http://www.rules.house.gov/POP/pop106_11.htm.

[132] *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 305(d), 88 Stat. 297, 311 (1994) (codified as amended at 2 U.S.C. § 636(d)(2) (2006)).

[133] *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 390, 390-91 (codified as amended at 2 U.S.C. § 644(a) (2006)).

[134] *See* ESKRIDGE ET AL., *supra* note 72, at 513–14.

out of committee without a CBO/GAO "impact report" should be deemed "out of order." This would enforce the statute's information-forcing mechanism. Second, any bill, resolution, amendment, motion, or conference report that violates the threshold established in the statute—i.e., that imposes a high ratio of costs on "Red Flag" groups versus benefits on other groups or has a high ratio of number of persons who will bear costs versus number of persons who will benefit—should be deemed "out of order." Such a rule would enable individual legislators sympathetic to an under-represented group's concerns to disaggregate the parts of a large omnibus bill, shine sunlight on specific provisions that burden the under-represented group, and force such a provision to survive a separate, recorded vote highlighting each legislator's position. As under UMRA and other budget frameworks, the point of order mechanism would enable Congress to enact statutes that harm "Red Flag" groups if it wants to, but would require it to be transparent about doing so. Put another way, it would establish a framework, or baseline, presumption of invalidity against statutes that harm "Red Flag" groups, invocable by a single dissenting legislator, but would allow a majority of Congress to waive the presumption in appropriate cases.

In other words, the proposed framework would create an information-plus, or a disclosure-plus, regime. It would go further than NEPA's disclosure-only regime by creating a statutory presumption against the validity of legislation that is revealed disproportionately to harm or impose costs on "Red Flag" groups, without corresponding benefits to those groups. But it would not bind Congress's hands irrevocably, given the availability of the point of order waiver.

4. Expected Results

Like NEPA and UMRA, the representation reinforcement statute proposed in this Article should operate to focus greater legislative attention on the interests of "Red Flag" groups. The very fact that impact reports are required and that they must accompany any bill adversely affecting a "Red Flag" group should induce legislators to pay attention to the impact that a bill will have on "Red Flag" groups from the outset, when first drafting statutory language. Congressional committees are likely to consult with CBO/GAO early and often to assess the impact that their proposals will have on List groups, in order to avoid crafting legislation that runs afoul of the ratio threshold and becomes subject to a point of order. The impact report requirement thus should function to inject consideration of a statute's impact on disadvantaged groups not only into floor deliberations but also into the initial, committee stage of the legislative process—a stage at which only politically powerful groups traditionally have been positioned (i.e., had the clout) to raise concerns, minimize, reshape, and even derail legislation unfavorable to their interests.

Further, committee members and CBO/GAO analysts are likely to look to representatives of the "Red Flag" groups early in the legislative process to provide information to help CBO/GAO conduct its impact assessment. This raises an important question: If a group is underrepresented enough to qualify for the List—e.g., criminal defendants, legal aliens—then to whom will congressional committees and CBO/GAO turn if and when they decide to take these groups' concerns into account? There are at least three possibilities. First, while most "Red Flag" groups will lack an organization or resources for responding to committee or CBO/GAO contacts, surrogate organizations such as Public Citizen, Common Cause, the ACLU, the Concord Coalition, and others whose mission is to represent the interests of groups that lack political power,[135] may be able to step in and represent these groups' interests during the legislation-drafting stage. Second, some "Red Flag" groups may be organized, but lack political power for other reasons (e.g., Native Americans). Such groups should be galvanized by a representation reinforcing framework that gives them early notice of bills affecting their interests, enabling them to use their resources more effectively. Third, some underrepresented, diffuse groups actually may organize, if only loosely, as a result of the new framework, in order to take advantage of increased congressional attention to their concerns.

Finally, the greater transparency created by the impact report—a public document that must accompany all legislation reported out of committee—should increase media and voter awareness about the consequences of the laws passed by elected officials. This increased public awareness, in turn, should operate as a check on legislators and encourage them to heed the interests of diffuse groups by increasing the political costs of passing rent-seeking legislation. Moreover, the point of order mechanism should increase the political costs of enacting legislation that places disproportionate costs or harms on "Red Flag" groups by forcing individual members of Congress to take a recorded, public vote to waive the statute's presumptive protection of such groups.

This is not to suggest that the framework should be expected to cure all legislative tendencies to favor powerful groups over weaker ones. The representation reinforcement context lesson to be learned from NEPA and UMRA is that an information-forcing framework statute cannot, and should not, be expected to eliminate entirely the problem upon which it is designed to focus greater attention. Just as UMRA does not prevent the enactment of all un-

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[135] *See, e.g.*, Mission Statement for the ACLU, http://www.aclu.org/about/index.html (last visited Nov. 2, 2008) (describing organization's mission, in part, as seeking to "extend rights to segments of our population that have traditionally been denied their rights"); Public Citizen, http://www.citizen.org/about/ (last visited Nov. 2, 2008) (describing organization's purpose as "represent[ing] consumer interests in Congress, the executive branch and the courts"); Common Cause, http://www.commoncause.org/ (last visited Nov. 2, 2008) (describing organization as "a vehicle for citizens to make their voices heard in the political process"); Concord Coalition, http://www.concordcoalition.org/about-us (last visited Nov. 2, 2008) (describing organization as devoted to advocating "responsible fiscal policy" on behalf of future generations).

funded intergovernmental mandates and NEPA does not prevent the adoption of environmentally harmful federal action, the statute proposed in this paper cannot be expected to preclude Congress from passing any legislation harmful to the interests of under-represented groups. But while complete eradication of the problematic category of legislation is an unrealistic goal for a framework statute, the new framework can be expected to produce a reduction in the scope or magnitude of offending legislation enacted within its parameters. If UMRA's $50 million threshold can lead to immigration law changes that save state governments between $60 and $190 million, and NEPA's EIS requirement can lead to the abandonment of a hydropower dam project that would have destroyed the habitat of wild Atlantic salmon,[136] then perhaps the parameters (e.g., ratios) set by a representation reinforcing framework can be expected to reduce, as opposed to eliminate, the harm imposed on Red Flag groups. Perhaps what we can expect to see is a reduction in the imbalance between costs imposed on under-represented groups versus benefits incurred by private interests, adjustments ensuring that a larger number of citizens reap the benefits of a statute, or modifications lowering the absolute costs imposed on an under-represented group. Indeed, the UMRA-inspired amendments to mandate-imposing legislation and the modifications that have been made pursuant to NEPA's EIS requirement illustrate that when the costs to a particular entity—whether state and local governments or the environment—are highlighted, Congress and federal agencies often can and will find ways to reduce those costs by scaling back otherwise blanket provisions, or by creating an appropriate exception.

Consider the following examples of how a representation reinforcing framework might work:

1. Suppose that, under pay-as-you-go budget rules, Congress were contemplating tax legislation which would grant tax credits to oil companies and pay for the revenue loss through an increase in cigarette taxes. Suppose also that persons living below the poverty line were a designated group on the "Red Flag" list. If the impact report issued by the CBO/GAO revealed that the costs of the cigarette tax increase would be borne primarily by persons living below the poverty line, while the benefits disproportionately would be reaped by non-"Red Flag" oil companies, then a point of order presumptively would lie against the legislation. This would mean that Congress could not enact the tax cut for oil companies paid for by a tax increase (effectively) on persons living below the poverty line, unless members of Congress were willing to take a public, recorded vote to waive the presumptive protection for persons living below the poverty line. Alternatively, the information revealed in the impact report might lead Congress to tweak the proposal to pay for the oil company tax cut with a consumption tax on luxury cars, ships, and jewelry, rather than cigarettes.

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[136] *See supra* note 119.

2. Suppose that Congress were contemplating legislation that would cut Medicaid spending and direct the Treasury Secretary to use the savings to pay down the national debt. Suppose further that both persons living below the poverty line and future taxpayers were designated "Red Flag" groups. If the impact report showed that the proposed legislation would benefit future taxpayers and impose costs on persons living below the poverty line, pitting "Red Flag" group against "Red Flag" group, the point of order mechanism would not be triggered, and Congress would be free to enact or not enact the legislation, absent procedural constraint.

3. Suppose that Congress were considering legislation which proposed a $5,000 tuition credit for college students who agree to spend one year post-graduation engaging in some form of national service. Suppose again that future taxpayers were a designated "Red Flag" group. If the impact report revealed that the proposal would cost taxpayers an amount below the de minimis threshold that triggers the point of order, then the tuition credit legislation would face no impediments. However, if the impact report revealed that the proposal would cost taxpayers an amount greater than the point of order trigger threshold, and would benefit a non-"Red Flag" group (i.e., the small subset of individuals who choose to engage in national service), then a point of order would lie against the proposed legislation. Again, this would mean that members of Congress would have to take a recorded, public vote to waive the presumptive protection for future taxpayers in order to enact the tuition tax credit legislation. Alternatively, Congress might be inspired to make the tuition tax credit available only to college students who fall below a certain income bracket, or otherwise to limit the scope and cost of the credit to avoid the point of order trigger.

5. *Reasons Congress Might Pass a Representation Reinforcing Framework Statute*

Public disenchantment with elected officials has been at the high end of the spectrum for the past few years. Even leaving aside the Abramoff lobbying scandal,[137] a 2006 public opinion poll taken by NBC and the Wall Street Journal showed that a thirty-nine percent plurality thought the prevention of Congressional members from directing federal funding to benefit only certain constituents was the most important issue for Congress to accomplish

[137] Jack Abramoff is a former lobbyist who pled guilty in 2006 to three felony counts related to the defrauding of American Indian tribes and corruption of prominent public officials. *See Abramoff Pleads Guilty, Will Help in Corruption Probe*, BLOOMBERG NEWS SERV. (Jan. 3, 2006). In 2008, Abramoff was found guilty of trading expensive gifts, meals, and sports trips in exchange for political favors. *See* Wilber Del Quentin & Carrie Johnson, *Abramoff Sentenced to 4 Years in Prison for Corruption*, WASH. POST, Sept. 5, 2008, at A03. Abramoff's lobbying activities became the subject of significant news coverage and public outrage, and prompted an extensive corruption investigation that in turn led to the conviction of White House officials J. Steven Griles and David Safavian, U.S. Representative Bob Ney (R-OH), and nine other lobbyists and Congressional aides.

that year.[138] Public opinion, one of the most significant factors in inspiring Congress to enact framework legislation,[139] thus supports some kind of procedural change designed to shift the balance of congressional attention from powerful constituents to less powerful ones. While recently enacted earmark reform[140] goes part of the way towards addressing this public concern, it deals with only one component of the equation and easily can be circumvented. In order truly to address the public's concerns, systemic legislation focusing not just on disincentivizing Congress from enacting statutes benefiting narrow interests, but also on encouraging Congress to pay attention to the interests of the diffuse public and other less powerful interests, is needed.

But why would Congress (and the President, whose signature is required for framework legislation), want to refocus its attention in this manner? Most members of Congress have one or two diffuse groups whose causes they believe in and to whose interests they believe the legislative process pays insufficient attention. Presidents and Presidential candidates likewise have particular groups who are close to their hearts ideologically and whose interests they hope to champion while in office. At least some empirical evidence supports the notion that ideology and a desire to make good policy play a far more significant role in determining legislators' voting behavior than public choice theory gives them credit for.[141] While different legislators and Presidents undoubtedly will have different ideologies and understandings of which groups should be placed on a "Red Flag" list of the kind proposed in this Article, all are likely to agree that there are important groups who belong on such a list and who deserve a legislative precommitment to calculate and weigh the costs that proposed legislation will impose upon them. Thus, lawmakers should be able to agree to the concept of the proposed framework, if not necessarily to the makeup of the "Red Flag" list.

Indeed, the prospect of entrenching a procedural commitment to pay special attention to the legislative impact on a group close to his or her heart should be particularly enticing to the President, who knows that his or her time in office will be limited and who may be eager to leave behind procedural protections for certain groups when he or she steps down. In fact, the requirement that the President approve the commission's list before it can

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[138] NBC NEWS/WALL STREET JOURNAL, STUDY #6062, QUESTION 15 (2006), http://online.wsj.com/public/resources/documents/poll20060426.pdf.

[139] *See* Garrett, *Framework Legislation*, *supra* note 7, at 752 (observing that "frameworks are often a response to public outcry when some focusing event or policy entrepreneur brings the voters' attention to a problem with long-term consequences"); *id.* at 726 & n.29 (noting, for example, that Congress changed a particular feature of the Congressional Pay Framework in response to public outcry).

[140] See H. Res. 6, §404, 110th Cong. (2007) (adopting changes to internal House Rules designed to combat earmarks); Pub. L. 110-81, § 521, 121 Stat. 735, 760 (2007) (codified at 2 U.S.C. §1601 note) (2007)) (adopting changes to Senate Rules designed to combat earmarks).

[141] *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 889–90, 897–900 (1987); 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, 66–68 (1990).

take effect gives the President extra leverage to ensure that his or her most preferred groups make it onto the List—which in turn should give the President an incentive to act as a policy entrepreneur and champion passage of the proposed framework.

Individual members of Congress, of course, cannot be so certain that their preferred groups will make it onto the commission's "Red Flag" list. But they can be assured of an opportunity to make a case to the commission to include their preferred groups. Further, there are some benefits, from Congressmembers' perspective, to this selection process: Because a bipartisan, independent commission, rather than Congress and the President, would decide what groups should be placed on the list, legislators would not have to worry that the list could be hijacked by their ideological opponents; members could also take ultimate comfort in their power to disapprove the commission's list if the commission gets it horribly wrong; finally, because the consequence of putting a group on the list would be only heightened attention to the impact that proposed legislation will have on the group—not a promise to give the group whatever it asks for—lawmakers are likely to perceive little downside to establishment of such a framework.

6. Potential Challenges

A representation reinforcing framework statute undoubtedly would face a number of administrative and constitutional challenges. One criticism likely to be leveled against such a framework is that the impact report requirement would bog down the legislative process, increasing, perhaps prohibitively, the time and expense required to enact new laws. Such concerns, while understandable, are overblown. If, as I have suggested, the framework limits the total number of "Red Flag" groups, then the associated costs and time necessary to compile the impact report accordingly would be limited. Further, CBO and GAO are already extant entities with extant staff and already are charged with evaluating information of the kind required in the impact report. Thus, while the framework would increase their duties and require some additional expense, it does not require starting from scratch. Moreover, as both the UMRA and NEPA precedents have demonstrated, much of the information required for the impact report can be gathered by the CBO/GAO from outside entities such as think tanks and surrogate organizations whose mission is to protect the interests of "Red Flag" groups, reducing the work that CBO/GAO staff would have to perform.

It also is possible that, if enacted, a representation reinforcing framework statute would face an Equal Protection Clause challenge on the ground that it gives "Red Flag" groups certain rights not enjoyed by the rest of the citizenry. Such a challenge would be misguided and unlikely to succeed for a number of reasons. First, the Supreme Court has described the Equal Protection Clause as, in essence, a directive that "all persons similarly situated

. . . be treated alike."[142] A representation reinforcing framework would not dictate any actual treatment towards "Red Flag" groups or convey any actual rights to the member of such groups. The only benefits the statute can be said to confer on "Red Flag" groups are a requirement that congressional committees issue impact statements explaining the effect that new laws would have on "Red Flag" groups and a procedural presumption against requiring "Red Flag" groups to bear the costs of legislation that benefits the few. These procedural rules impose deliberative duties on members of Congress, but they do not guarantee any specific consequences in favor of or against any group. In fact, Congress can ignore them if it wishes. If, for example, a congressional committee fails to issue the impact statement or votes to enact a new law that imposes disproportionate costs to benefits on a "Red Flag" group, the only enforcement mechanism provided by the framework is for a member of Congress to raise a parliamentary point of order against the proposed law in question. If no member of Congress raises a point of order against the proposal, or if a majority of each chamber votes to waive a point of order that is raised, then simply, the new proposal is voted upon as though the framework did not exist. The framework does not confer any private rights on individual members of "Red Flag" groups, or on the groups as a whole; it merely seeks to influence Congress's deliberative process. "Red Flag" groups and their individual members are given no tangible rights and cannot sue in court to force Congress to abide by the framework's procedural rules.[143]

Second, even conceding for the sake of argument that the procedural obligations imposed by the framework might confer unique rights on "Red Flag" groups, the baseline criteria for identifying "Red Flag" groups in no way amount to classifications based on suspect or quasi-suspect criteria such as race, religion, national origin, or sex. Accordingly, any equal protection challenge against the representation reinforcement framework would be evaluated under the "rational basis" test, which requires merely that the representation reinforcement framework statute's "Red Flag" group classifications be "reasonably related" to a "legitimate" state interest.[144] It is of course exceedingly rare for a statute to fail the rational basis test, and it is difficult to imagine a court declaring the national interest in giving voice to

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[142] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[143] If desired, the representation reinforcement framework statute itself could make this explicit. But this is not necessary. Longstanding Supreme Court precedent makes clear that Congress's failure to comply with its own procedural rules, whether dictated by the Constitution or by statute, does not serve as grounds for judicial invalidation of a statute that has met the bicameralism and presentment requirements in Article I, §7. *See, e.g.*, United States v. Munoz-Flores, 495 U.S. 385 (1990) (Stevens, J., concurring) (tax legislation that improperly "originated" in the Senate rather than the House cannot be invalidated where the House did not object and legislation was enacted in accordance with Article I, §7 procedures).

[144] *Cleburne*, 473 U.S. at 440 ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *see also* Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Romer v. Evans, 517 U.S. 620, 632–33 (1996); Nordlinger v. Hahn, 505 U.S. 1, 11–12 (1992).

traditionally under-represented groups "illegitimate," or deeming a representation reinforcing framework statute not "reasonably related" to this interest.

In addition, the use of a commission to recommend a list of "Red Flag" groups may face a constitutional challenge based on the nondelegation doctrine. The nondelegation doctrine is a principle which dictates that the United States Congress cannot delegate the legislative powers conferred upon it by Article I, §7 of the federal Constitution to any other entity. But the Supreme Court long has recognized that "in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"[145] and accordingly has ruled such delegations constitutional as long as Congress provides an "intelligible principle" to guide the delegatee:

> In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination. So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.[146]

Under this standard, the proposed framework's specification of baseline criteria for determining which groups should be placed on the "Red Flag" list would constitute just such an "intelligible principle" to which the commission would be "directed to conform" in formulating its "Red Flag" recommendations. Indeed, the Supreme Court's track record in nondelegation cases has been exceptionally deferential towards Congress. Only twice in the Court's history has it held that a congressional delegation of power violated the "nondelegation" doctrine.[147] Moreover, the Court's ruling on a related issue in a case involving the base closure statute implies the constitutionality of a system which uses a commission to submit recommendations to the President for an up or down vote, backstopped by a congressional right of disapproval. In that case, *Dalton v. Specter*,[148] certain Senators brought suit under the Administrative Procedure Act[149] ("APA"), alleging that the Secre-

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[145] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[146] *Id.* (internal quotations omitted).

[147] *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 412–13 (1935) (a special case, as it was discovered mid-litigation that the particular exercise of the power at issue contained no legally operative sentence); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–525 (1935) (striking down a broad delegation authorizing private parties to establish a "fair competition" standard and to promulgate rules applying that standard to almost all American industries).

[148] 511 U.S. 462 (1994).

[149] 5 U.S.C. § 500–559 (2006).

tary and the Commission did not follow the procedural mandates of base closure statute. The Court ruled that the actions of the Secretary and the Commission were not reviewable "final agency actions" within the meaning of the APA because the reports recommending base closings carried no direct consequences unless approved by the President.[150] The Court further ruled that the President's decision to approve or disapprove the Commission's recommendations was not subject to judicial review because "when the statute in question commits the decision to the discretion of the President" the President's decision is beyond the reach of judicial power.[151]

IV. THE COURT-CONGRESS DIALOGUE: AN ENDURING ROLE FOR THE JUDICIARY

The "Legal Process" school of thought, which heavily influenced the development of American law during the 1950s and 1960s, recognized that each organ of government has a special competence or expertise.[152] In fact, Legal Process theorists posited that "the key to good government is not just figuring out the best policy, but also identifying which institutions should be making which decisions and how the different institutions can collaborate most productively."[153] Part II of this paper articulated why the legislature, not the judiciary, is the appropriate and most competent institution to address the problem of representational inequality. Part III elaborated one model for how the legislature might seek to remedy this legislative process dysfunction. This Part takes up the second prong of the Legal Process precept, contemplating how Congress and the courts can collaborate most productively towards greater equality of representation.

A. Reinforcing Legislative Transparency

Judges and legislators come at the representational inequality problem from different angles. Legislators deal with the problem *ex ante*, as they try to predict the consequences of proposed legislation and weigh the anticipated benefits against the anticipated costs. Judges witness the actual harm caused to a particular group in a concrete case, albeit cabined by which litigants are able to bring lawsuits, but are ill-equipped to weigh the harms

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[150] *Dalton*, 511 U.S. at 469.

[151] *Id.* at 473.

[152] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2032-33 (1994). The legal process school was a movement within American law that attempted to chart a third way between legal formalism and legal realism. It is associated with scholars such as Herbert Wechsler, Henry Hart, Albert Sacks and Lon Fuller and their students, John Hart Ely and Alexander Bickel.

[153] *Id.* at 2033 (citing Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90–91, 94–96 (1935) and Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 617–24 (1940)).

they witness against benefits that may not be apparent in the case before them. As others have noted,[154] the two branches have much to learn from each other and could do a significantly better job of signaling to each other than they currently do. This Part suggests two new twists on well-worn tools of statutory interpretation designed to facilitate such cross-institutional signaling: (1) process-based clear statement rules; and (2) process-based legislative history.

1. Process-Based Clear Statement Rules

Clear statement rules have been the subject of increasing scholarly attention over the past two decades.[155] William Eskridge and Philip Frickey in particular have devoted much ink to them, famously calling the Rehnquist Court's resort to such rules akin to "quasi-constitutional lawmaking" and chastising that Court for using such rules to engage in "countermajoritarian" and "*Lochner*-style" judicial review.[156] Notably, the clear statement rules to which Eskridge and Frickey referred were substantive in nature,[157] designed to protect under-enforced constitutional norms—e.g., the nondelegation doctrine, separation of powers principles, and most conspicuously, federalism limitations on the national government—against accidental or undeliberated

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[154] *See, e.g.*, Judge James L. Buckley, *Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241, 313 (1989) (moderating a symposium on improving communication between the judiciary and Congress in order to better the quality of statutes, their interpretation, and their revision); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653 (1992); Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 183 (1986) (arguing that greater understanding between the judiciary and legislature of one another's constraints in performing their functions would lead to better legislation and better statutory interpretation); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 982 (1989) (stressing the importance of "bridg[ing] the gulf between those who produce legislative history and those who digest it"); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279, 281 (1991) (noting that the "complexities of the law-making and law-interpreting tasks in the third century of this republic cry out for systematic dialogue between those who make and those who interpret legislation.").

[155] *See, e.g.*, Eskridge & Frickey, *supra* note 49; William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DEPAUL L. REV. 345 (1990); Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (1995); Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123 (2004); Michael P. Lee, Comment, *How Clear Is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255 (1998); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994); Laura E. Walvoord, Comment, *A Critique of* Torcasio v. Murray *and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act*, 80 MINN. L. REV. 1183 (1996).

[156] Eskridge & Frickey, *supra* note 49, at 597–98; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 81–87 (1994).

[157] Eskridge & Frickey, *supra* note 49, at 595 (calling such rules "'substantive' canons").

infringement. Clear statement rules operate by establishing a default presumption that Congress does not intend to enact statutes that undermine constitutional norms, and by requiring Congress to express its intent to contravene a particular constitutional norm directly, on the face of the statute, if it wishes to overcome that presumption.[158] What I propose in the representation reinforcement context, by contrast, is a procedural clear statement rule that reinforces Congress's own precommitment to representational equality, as embodied in a framework statute.

Under the procedural clear statement rule, when courts are faced with a statutory provision that harms a "Red Flag" group, or with a choice between a narrow versus expansive statutory construction that would harm/burden/impose costs upon a "Red Flag" group (as defined by Congress in its framework statute), courts should look to whether Congress, either on the face of the statute or in its "interest impact" statement to CBO/GAO, identified the "Red Flag" group as one it expected or intended for the statute to burden. This proposal differs from the clear statement rules advocated by the second-generation representation reinforcement scholars in that it asks for a clear statement that Congress intended, or at least was aware of, the *costs* a particular statute ultimately imposes on a politically under-represented group—rather than for a clear statement that Congress intended a statutory wealth transfer to a particular rent-seeking interest. Again, the immediate focus would be not so much on impeding rent-seeking deals—though this might be a welcome secondary benefit[159]—as on guarding against inadvertent legislative disadvantage or harm to traditionally underrepresented groups.

If the court finds that Congress did in fact identify the "Red Flag" group as one that would bear costs under the statute—either in the statute itself or in the impact statement to CBO/GAO—then it should construe any statutory ambiguities using traditional tools of statutory interpretation, applying no special presumptions in favor of the under-represented group.[160] But if Congress nowhere indicated an intent or understanding that the "Red Flag" group would be harmed or bear costs under the statute, then the court should proceed to take a process-focused look at the statute's legislative history.

2. *Process-Based Legislative History*

Where there is no clear statement of congressional intent or acknowledgment that a "Red Flag" group would be adversely affected by the statutory provision at issue, I submit that courts should look, as an empirical matter, at which groups Congress consulted during the legislative process. In other words, courts should review the legislative history to determine: (1)

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[158] *Id.* at 630–31.

[159] *See* discussion *supra* Part III.B.4, at 50–51.

[160] There are, of course, exceptions—such as where a statute harms a constitutionally protected group. *See* discussion *infra* Section III.B.2.

from whom Congress took testimony while drafting and deliberating on the statute; and (2) which groups lobbied for or against the statute.[161] As discussed earlier in this Article, such an interpretive approach is analogous to the "hard look" and "danger signals" doctrines courts use when reviewing administrative regulations: in recognition of the public choice concept that legislatures may become "captured" by wealthy, organized interests and out of touch with diffuse, unorganized ones, courts would give legislation that adversely affects a "Red Flag" group a "hard look" to ensure that it is the product of a careful, even-handed, deliberative process. The difference is that courts in the administrative context essentially must read tea leaves to identify amorphous "danger signals" indicating that an agency may have been captured, and have no clear set of rules for determining whether an agency has engaged in adequate deliberation. Courts in the legislative representation reinforcement context, by contrast, would be able to rely on Congress' own "Red Flag" list of endangered groups on whose behalf a "hard look" should be triggered, as well as on a statute's legislative history, for evidence of whether Congress engaged in adequate deliberation. Such an interpretive approach, in turn, should give Congress extra incentive to seek input from "Red Flag" groups and reinforce Congress's precommitment, through its framework statute, to correct the legislative process' tendency towards representational inequality.

If, upon conducting a "hard look" at the legislative history of a statute that adversely affects a "Red Flag" group, the court finds no evidence that the group (or a surrogate organization representing the group's interests)[162] participated in the legislative process that produced the statute—and Congress has made no clear statement in the statute's text or in the committee's impact statement to CBO/GAO indicating an awareness or intent to burden the "Red Flag" group—the court should construe the statute in favor of the "Red Flag" group. The court should be very clear about why it is ruling as it is, making an explicit statement to the effect that:

> Congress, in the Transparency in Legislation Act, has flagged group X as particularly in danger of exclusion from the political marketplace and has set in place legislative procedures to ensure, and to record the fact that, it legislates with knowledge of the impact that proposed statutes will have on group X. The legislative history of Act Y, at issue in this case, indicates that Congress was not aware of the burden that Act Y would impose on group X, and that group X did not participate in the political process leading up to the enactment of Act Y. Because Congress itself has, in the Transparency in Legislation Act, professed a commitment not to

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[161] Recall that the lobbying information will be provided by Congress itself as part of its impact statement to CBO/GAO. *See* discussion *supra* pp. 54–57.

[162] *See supra* note 135 and accompanying text.

> impose burdens on group X inadvertently or without due deliberation, we now respect that commitment and construe Act Y to work minimal harm on group X—and invite Congress to reassess and revise Act Y if it deems the harm to group X to be justified in this instance.

In other words, courts should treat the congressional precommitment established in the representation reinforcing framework statute as creating a presumption against the enactment of legislation that harms or disadvantages "Red Flag" groups without ensuring that "Red Flag" groups are given some voice in the deliberative process preceding such legislation. Congress can rebut this presumption in one of two ways: (1) with a clear statement, in the statute's text or in the committee's impact statement to CBO/GAO, indicating its expectation that a "Red Flag" group will face certain costs or burdens under the statute; or (2) by showing that the "Red Flag" group's concerns were taken into account or represented during the legislative process.

It is important to note that under this Article's proposed process-based approach, legislative history would be used not for its substance (to divine intent), but as evidence of a fair process—i.e., as a catalogue or record of which groups' interests were represented during the drafting and deliberative stages of a statute's formulation. Again, courts would be asking "who (which group) is harmed by the statute or interpretation at issue? Did that group actually participate in the legislative process?" rather than the traditional legislative history query of "what did Congress say about the meaning of this particular word or phrase (in committee reports, members' statements on the floor, etc.)?" This Article's process-based approach also would differ significantly from Eskridge's "hierarchy of political disadvantage" rule in that Eskridge is unconcerned with evaluating what deliberative process actually took place for a particular statute. He does not ask, or direct courts to ask, whether a group disadvantaged by a statute in fact participated in the legislative process leading to the statute's enactment; he asks only where the group falls on his hierarchy of relative political advantage, and prescribes a blanket interpretive presumption in favor of the litigant whose group places lower on that hierarchy—even if the disadvantaged group participated, but lost out, in the legislative process when the statute originally was enacted.

Notably, this Article's proposed process-based approach to judicial review is not without some precedent. In fact, it shares similarities with Justice Stevens' recommendation that courts in political gerrymandering cases limit their review of state legislatures' line-drawing to determining whether the minority political party was consulted during the redistricting process.[163] Justice Stevens' preferred approach, like this Article's proposed approach, would begin with a facial perusal of the criticized districting plan (statute) for obvious "warning flags" (danger signals) such as unusual district shape,

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[163] *See* Karcher v. Daggett, 462 U.S. 725, 759 (1983) (Stevens, J., concurring).

lack of geographical compactness, or disregarding of county boundaries (adverse impact on a "Red Flag" group).[164] A districting plan that contains such warning flags, like a statute that harms a "Red Flag" group, in turn would "prompt[ ] an inquiry into the process" that led to the plan's (statute's) adoption.[165] The court then would examine the process for formulating the districting plan to determine whether it was neutral, rather than partisan, and afforded "adequate opportunity for the presentation and consideration of differing points of view."[166] If so, a "strong presumption of validity should attach to whatever plan such a process produced."[167] If, on the other hand, the process was partisan, excluded divergent viewpoints, and provided no explanation for why one plan was selected over another, then there should be a presumption of unfair/improper districting.[168] The political gerrymandering doctrine is a particularly good analogue to the representation reinforcement problem because in both cases, the underlying goal is to ensure access to the political process—by voters on the one hand, and interest groups on the other.

Still one might wonder whether such process-based review might not inspire legislators to attempt to game the system, by inviting certain interests to the table only to guard against judicial chastisement, without any real intent to listen to them? This certainly is a possibility, perhaps even a probability. But if so, it still would be better than the current system, in which legislators tend to ignore diffuse, disorganized groups altogether. Indeed, behavioral science[169] and interest group[170] studies show that once

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[164] *Id.* at 760–63. In *Karcher*, Justice Stevens found the district configurations to be "uncouth" and "bizarre," and went to some lengths to describe one new district called "the Swan," that twisted and stretched from the New York suburbs to the rural upper reaches of the Delaware River and contained segments of at least seven counties. Another, called "the Fishhook," comprised of parts of five counties, that cut "a curving partisan path through industrial Elizabeth, liberal, academic Princeton and largely Jewish Marlboro in Monmouth County." *Id.* at 762–63.

[165] *Id.* at 763.

[166] *Id.* at 759.

[167] *Id.*

[168] *Id.* Justice Stevens concluded that the districting process in Karcher had been extremely partisan, excluding Republicans, and rejecting many geographically sensible districting configurations in favor of one that heavily favored the Democratic party. *Id.* at 764.

[169] The theory is called "group polarization." *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 535–36 (2002) (citing Amiram Vinokur & Eugene Burnstein, *Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts: A Group-Problem-Solving Approach*, 29 J. PERSONALITY & SOC. PSYCHOL. 305, 306–07 (1974)); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–75 (2000) (quoting JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP 142 (1987)). The theory holds that when the outcome of a decision can be placed on a normative scale, such as being liberal rather than conservative, then if all of the members of a group charged with making a decision are on one end of the scale, that dynamic itself can drive the group to choose an outcome that is on one end of the scale rather than in the middle. Seidenfeld, *supra*, at 535. One posited reason for this is that group discussion sways a member according to the number and strength of new arguments that the member hears for or against an outcome; thus if only one side is presenting its views, group members will become aware of more plausible arguments for that outcome than against

marginalized interests are included in the dialogue and given an opportunity to voice their concerns, even hostile legislators will be somewhat influenced by them. The very act of including "Red Flag" groups in the "argument pool" leading up to the enactment of a statute will be good for the deliberative process, as "[m]ajority rule . . . suffers when it is not constrained by the need to bargain with minority interests."[171] Experiences with informational regulation and disclosure requirements in the environmental and financial contexts similarly teach that legislators are likely to "manage what they measure,"[172] meaning that once forced to confront information of which they had not previously been aware (about costs to "Red Flag" groups), legislators may make different decisions than they otherwise would have, simply as a result of gaining additional information to evaluate.[173] Thus, if Congress does choose to harm a "Red Flag" group even after hearing from its representatives, at least it will be doing so consciously and in a somewhat public manner (because of the impact report and clear statement requirement), and perhaps it will impose fewer costs on the group than it otherwise would have.

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it. *Id.* By contrast, if the argument pool is expanded, and new members with opposing views add plausible arguments to the debate, the decision will move towards the middle of the scale. *See* Sunstein, *supra*, at 95–96.

[170] *See, e.g.*, H. SELECT COMM. ON LOBBYING ACTIVITIES, REPORT & RECOMMENDATIONS ON FEDERAL LOBBYING ACT, H.R. REP. No. 81-3239 (1951); S. COMM. ON GOVERNMENTAL AFFAIRS, 99TH CONG., CONGRESS AND PRESSURE GROUPS: LOBBYING IN A MODERN DEMOCRACY 13 (1986) ("When groups push on both sides of an issue, officials can more freely exercise their judgment than when the groups push only on one side." (quoting LESTER MILBRATH, THE WASHINGTON LOBBYISTS 345 (1962) (internal quotation marks omitted))); Diana M. Evans, *Lobbying the Committee: Interest Groups and the House Public Works and Transportation Committee*, *in* INTEREST GROUP POLITICS 257, 257–59 (Allan J. Cigler & Burdett A. Loomis eds., 1991) (concluding, based on a study of the House Public Works and Transportation Committee's behavior during consideration of a highway reauthorization bill, that interest groups are most effective at getting the majority of their policy preferences accepted when they face no competition for elected officials' attention from opposing interests).

[171] LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 9 (1994) (quoted in William N. Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1295 & n.73 (2005)).

[172] *See* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 299 (2001) (quoting Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342 (1996)).

[173] *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 783 (2006) (quoting Karkkainen, *supra* note 172, at 297). Oldfather observes that:

> [T]he very process of complying with a disclosure requirement can also lead to changes in the underlying activity independent of the effects of external monitoring. The phrase often associated with this effect is "you manage what you measure." To the extent a disclosure requirement leads the regulated entity to compile information it had not previously gathered, the entity may make different decisions than it otherwise would have, simply as a result of having additional information to take into consideration in its decision-making process.

Id.

But what should a court do if a group harmed or burdened by a statute is not a "Red Flag" group, yet the court believes it to be disadvantaged or under-represented? Should it look to the statute's text and legislative history for a clear statement or for evidence that the group was consulted during the legislative process, and construe the statute in the group's favor if not? I believe the answer should be twofold. On the one hand, the judiciary can and must intervene on behalf of constitutionally-protected *Carolene* groups, such as African Americans and Native Americans. The Constitution demands as much. But, on the other hand, if the group in question is neither a "Red Flag" group nor a constitutionally-protected one, then the court must construe the statute using its traditional interpretive tools, with no scale-tipping in favor of the group. To be sure, the courts can and should look to see whether Congress consulted such groups during the legislative process, but even if Congress did not, courts should not stray from traditional rules of statutory interpretation, or apply automatic presumptions, to find in favor of such groups. That is the essence of legislative, rather than *ad hoc* judicial, determination of what groups are entitled to reinforced representation.

At the same time, however, such situations present an ideal opportunity for the courts to start a cross-institutional conversation with Congress. The Supreme Court in particular could suggest to Congress in the text of an opinion that certain groups harmed by a statute are ones which should be added to the "Red Flag" list in the future.[174] It may turn out that the groups the courts recommend are ones Congress did not realize would be harmed by the statute in the first instance, and for whom no CBO/GAO impact analysis was conducted during the original enactment process. In such cases, the courts' institutional positioning, and their ability to see *post hoc* the impact that a statute in fact has, could be used to inform Congress and possibly to inspire changes to the legislative process (via revisions to the "Red Flag" list) in the future.

B. Checking The Legislature

As this last point suggests, courts not only must reinforce, but also check Congress's treatment of politically disadvantaged, under-represented groups during the legislative process. But they must do so in fine balance, without crossing the line into judicial super-legislating. This Section discusses two interpretive rules designed to assist courts in performing such a calibrated checking-and-balancing function. These rules could be suggested to courts by Congress in a separate section of the proposed framework statute titled, "Interpreting the Transparency in Legislation Act," or they could be adopted by courts on their own, as are most other interpretive rules.

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[174] *See, e.g.*, Katzmann, *supra* note 154, at 665–66 (discussing ways in which courts might transmit criticisms and suggestions to the legislature).

1. Broader Standing Rules

William Eskridge has argued, in the administrative context, that interpretive rules can be used to keep the regulation-formation process open to diverse perspectives and to ensure representation of diffuse groups who Congress may have intended as the beneficiaries of a statute, but who regulators implementing the statute might slight in favor of narrow interests who have captured the regulators.[175] In particular, Eskridge criticizes the Supreme Court's decision in *Block v. Community Nutrition Institute*,[176] in which the Court refused to allow consumers to seek judicial review of orders issued by the Secretary of Agriculture setting floor prices for milk handlers to pay to milk producers.[177] Eskridge points out that for consumers, a diffuse and badly organized group, the result of the Secretary's orders was higher prices. Thus, the Court's decision denying consumers standing enabled an unfair system to remain in place, whereas allowing judicial review could have helped "retrieve the statutory purpose by opening up the calcified administrative process to consumer pressure."[178] For similar reasons, Eskridge has hailed the class action lawsuit as a device that enables diffusely interested groups who go unrepresented in the political process to become represented in litigation, through "entrepreneurial counsel," who organize the group and are financed by fees payable out of class action awards.[179]

Combining these two insights, I advocate that courts adopt broader standing rules empowering members of "Red Flag" groups to challenge statutes that harm them almost as a matter of course. This could mean revising the Court's own precedents requiring standing requirements as applied to members of "Red Flag" groups, as well as broad judicial construction of statutes granting standing or involving the ability to sue in certain types of cases. The idea would be to give consumers, tort victims (who cannot organize because they do not know who they are until after they have become victims), and perhaps even certain categories of taxpayers broad power to sue, so that even if members of these diffuse groups are left out of the loop during the legislative process, attorney entrepreneurs can organize for them after the fact and represent their interests in court. In other words, where the legislative corrective embodied in the framework statute fails, perhaps because there are no surrogate organizations representing the interests of a particular group or because existing surrogate organizations are unable to anticipate a potential harm to a group, attorneys can act as second-round surrogates and, through the use of devices such as class actions and negligence suits, bring to light problems that might eventually catch the legisla-

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[175] *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 4, at 159.
[176] 467 U.S. 340 (1984).
[177] *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 4, at 159.
[178] *Id.*
[179] *See* Eskridge, *Politics Without Romance*, *supra* note 6, at 304.

ture's eye. Indeed, in this light, existing statutes and legal rules barring standing for members of diffuse groups may be criticized as impediments to diffuse groups' access to the political process—in that they cut off surrogates who might be ready to agitate or organize on behalf of a diffuse group.

The Supreme Court's recent decision in *Hein v. Freedom From Religion Foundation*[180] offers a good case study for how a broader standing rule could work. That case involved an executive order that created a White House office and centers within federal agencies to assist faith-based community groups in competing for federal financial support.[181] Members of the Freedom From Religion Foundation ("FFRF"), an organization opposed to government endorsement of religion, brought suit challenging certain actions taken by the directors of the White House Office of Faith-Based and Community Initiatives.[182] FFRF and its members asserted standing based on the fact that the members were federal taxpayers opposed to the Executive Branch's use of congressional appropriations (federal tax dollars) for these conferences.[183] The Seventh Circuit accepted FFRF's assertion of standing, holding that taxpayers have standing to challenge any action taken by a federal agency so long as the marginal or incremental cost to the public of the alleged (here, Establishment Clause-violating) action is greater than zero.[184] The Supreme Court, in a divided opinion, disagreed. It held that a taxpayer's mere objection to the manner in which federal tax dollars are spent, even if based on the taxpayer's interest in ensuring that federal dollars are not spent in violation of the Constitution, is "too [ ] attenuated" to constitute the "kind of redressable 'personal injury' " required for Article III standing.[185]

The analysis in this Article suggests a middle-ground approach to this problem of taxpayer standing. Rather than flatly refuse taxpayers standing to challenge laws or agency actions that may have been promulgated without adequate consideration of their impact on a diffuse and unorganized group (the practical effect of the Supreme Court's ruling in almost all cases), or conversely, grant taxpayers automatic standing in virtually every case (the practical effect of a "standing-whenever-the-marginal-cost-to-the-public-exceeds-zero" rule), this Article would recommend a third way: taxpayers should be given standing to challenge federal statutes or agency actions so long as they are able to make a prima facie evidentiary showing that the ratio

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[180] 127 S. Ct. 2553 (2007).

[181] *Id.* at 2555.

[182] Specifically, they charged that the directors violated the Establishment Clause by organizing conferences that were designed to promote, and had the effect of promoting, religious community groups over secular ones—by, for example, singling out faith-based organizations as being "particularly worthy of federal funding" and "extoll[ing]" the belief in God as the distinguishing feature responsible for the effectiveness of faith-based social services. *Id.* at 2560 (quoting Petition for Writ of Certiorari at 73a, *Hein*, 127 S. Ct. 2558 (No. 06-157)).

[183] *Id.* at 2561 (quoting Petition for Writ of Certiorari at 69a, *Hein*, 127 S. Ct. 2558 (No. 06–157)).

[184] Freedom From Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006).

[185] *Hein*, 127 S. Ct. at 2563 (quoting Allen v. Wright, 468 U.S. 737, 751 (1976)).

of the statute's or agency action's cost to the public versus the benefits conferred by the statute or agency action exceeds a threshold figure, which ideally could be statutorily-prescribed. In this way, taxpayer standing would be conferred only in those instances where it is most likely that the challenged federal action has failed adequately to balance costs against benefits.

2. *An Ely-Rule*

Recall that one of Ely's paradigm cases for when judicial invalidation of legislative enactments is justified is where legislators are so hostile or prejudiced against a minority group that they systematically deny the minority rights and protections given to other groups.[186] This paradigm can be taken one step further, to create an interpretive rule that asks whether a particular construction of a statute would have the effect of shutting a "Red Flag" group out of the political process. In other words, Courts could supplement Congress's representation reinforcement framework by adopting a new substantive canon dictating that: Where a statute has two or more plausible interpretations, one of which effectively would shut a "Red Flag" group out of the political process, then that interpretation should be rejected. This rule should apply even in the unlikely event that Congress has expressed an intent to shut the "Red Flag" group out of the political process. The Ely Rule would differ from the process-based clear statement rule in that it would focus on how a statutory interpretation affects a "Red Flag" group's access to the political process, rather than on whether an interpretation imposes costs on the "Red Flag" group. The Ely Rule, moreover, would refuse to enforce even an avowed congressional intent to exclude a "Red Flag" group from the political process. That is, it would refuse to sanction a congressional statement that "we meant to shut this group out of the political process." Instead, as a corollary to the process-based legislative history approach advocated above, which asks "What groups were given input or consulted in the past, when the statute was drafted?", the Ely Rule would ask the forward-looking question, "What effect will this statute or interpretation have on a 'Red Flag' group's ability to participate in the lawmaking process in the future?"

An Elysian rule of this sort of course would have its roots in the Equal Protection Clause, which generally was aimed at preventing "class legislation" and designed to augur against the establishment of an out-caste, or group of citizens who are permanent losers in politics.[187] The rule likewise would be supported by the Due Process Clause, which requires that a neutral rule of law be applied to all persons and at least implies that the law will not

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[186] *See supra* notes 2, 13–14 and accompanying text.

[187] Eskridge, *supra* note 171, at 1308 (citing Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954), and WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (surveying the ratification debates)).

be applied arbitrarily against a disfavored class or group.[188] In addition, the rule would aim to protect the First Amendment's blanket guarantee to all individuals of a right "to petition Government for a redress of grievances."[189]

Further, like the process-based legislative history approach, the proposed Elysian rule has some precedent in prior Supreme Court doctrine. In *Thornburg v. Gingles*,[190] for example, the Court held that the relevant inquiry in determining if Section 2 of the Voting Rights Act has been violated should be whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[191] The difference between the Ely-rule and current equal protection analysis, however, is that whereas the latter merely dictates that any statute or interpretation that attempts to infringe on a particular group's right to participate equally in the political process must be subjected to strict scrutiny, and upheld only if supported by a compelling state interest, the Ely-rule would dictate that if the infringed group is a "Red Flag" group, then the infringing statute or interpretation would be presumptively void, or at least unenforceable by the courts.

V. Conclusion

The second-generation representation reinforcement scholars have identified and undertaken a salient task in seeking to remedy the legislative process problem of representational inequality. But in focusing solely on the judicial interpretation of statutes and ignoring the legislative side of things, they have offered the wrong, or at least an incomplete, solution. The remedy to this legislative process dysfunction should not be a one-dimensional one that looks merely to what the judiciary can do to fix the mess made by the legislature; it should be one that encourages the legislature to correct the dysfunction at its roots and provides judicial rules to encourage and reinforce the legislative corrective.

In this sense, the framework and judicial rules of construction proposed in this Article can be seen as part of a larger project to make courts and Congress work together to ensure a deliberative legislative process. Courts should reinforce—not reengineer—broad participation and representation of all interests in the legislative process, and should seek to encourage thorough, balanced legislative deliberation. But these ends should not be achieved through judicial usurpation of the task of balancing competing in-

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[188] *Id.* (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that due process rule of law includes an anti-unreasonableness feature)).

[189] U.S. Const. amend. I.

[190] 478 U.S. 30 (1986).

[191] *Id.* at 44 (quoting S. Rep. No. 97-417, at 28 (1982)).

terests' claims; they should be achieved through judicial—and scholarly—encouragement of a congressional precommitment to broader representation and participation.