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Penalty Default Interpretive Canons

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INTRODUCTION

A preference for a particular method of statutory interpretation over another often relates to one's view of the legislative process. In advancing his textualist approach, for example, Justice Scalia relies in part on a conception that the legislative process, filled with self-serving representatives who plant misleading statements into the legislative record, malfunctions.[1] Purposivists, on the other hand, share a more benign opinion of the legislative process—interpreting statutes in accordance with meritorious, public-regarding aims that were presumably sought by lawmakers in enacting the legislation in question. Neither understanding of the legislative process satisfies,[2] and scholars continue to search for methods of statutory interpretation that reflect the actual functioning of the legislative process.

A scholarly focus on whether a methodology of statutory interpretation is too cynical or too optimistic of the legislative process, however, is incomplete; in evaluating a methodology, scholarship must also explore how it *affects* the legislative process. Whether courts should remedy defects in the legislative process through the interpretive endeavor—or even whether they can—have been enduring questions in the

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[1] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34 (1997).

[2] Even modern public-choice theory—a school of political science rooted in cynicism of representatives' incentives—accepts a view of lawmakers that encompasses their pursuit of ideological preferences, in addition to campaign contributions and other rents. At times, however, the legal academy has not embraced such an expansive view of the theory. 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, 77 (1990).

academy,[3] although one rarely visited in recent years. In this short essay, I conclude that such a curative function is indeed possible and desirable when Congress itself wishes it. Congress, for instance, has internal rules designed to cure collective-action problems yet often has no means of enforcing them, even when it so desires. I propose, however, that courts can sometimes aid Congress by assuming that those rules function correctly even when they do not.

This interpretive approach falls within my novel categorization of several methodologies that contemplate a mismatch between reality and the view of the legislative process they assume. It is precisely this distorted view that eradicates identified problems in the legislative process. The problem I focus upon in this essay is that of "hidden" special-interest provisions, the beneficiaries of which are not transparent to other lawmakers or in the statute's plain language. More specifically, by assuming counterfactually that legislators actually *disclose* special-interest provisions, courts can create incentives for lawmakers to indeed do so.

Collectively, I label these methodologies "penalty default interpretive canons"[4] because they are analogous to the famous Ayres-Gertner thesis recommending that courts employ "penalty default" rules to specify outcomes that the contracting parties do not wish and, in turn, create incentives for the parties to reveal efficiency-enhancing information.[5] Penalty default interpretive canons punish individual lawmakers who obscurely dole out special-interest benefits by refusing to give those deals effect. These canons accordingly motivate lawmakers to make special-interest benefits manifest—and

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[3] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 319 (1986); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 315 (1990); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 607-11 (1995); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1584-85 (1988); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989) [hereinafter Sunstein, *Interpreting Statutes*]; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2114-15 (1990).

[4] Two scholars have labeled their proposal, by which courts would hold unconstitutional "statutes whose incompleteness is designed to shift responsibility from the legislature onto other governmental branches," as "the penalty default canon." Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 667 (2004). My labeling differs in that it applies to canons of statutory interpretation rather than constitutionality.

[5] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

thus subject to congressional and public scrutiny—during the legislative process.

These canons generally do no interpretive harm when the legislative process accords with its assumed goal; that is, when it is clear that statutory provisions benefit certain special interests, the canons operate to bestow those benefits. Thus, penalty default interpretive canons may satisfy both cynics of and believers in the legislative process. By identifying such a category, this essay presents a more robust typology of theories and methods of statutory construction vis-à-vis the legislative process.

This essay starts from the premise that hidden interest-group deals are problematic—a foundational assumption supported by pluralist and republican theories alike.[6] When one's view of the legislative process's proper aims expands from transparency in lawmaking, one will accept other interpretive methods as properly invoked—even when they rest upon unrealistic conjectures about the legislative process—so long as the conjecture is curative of the assumed "ills" that befall Congress.

In Part I of this essay, I discuss typical critiques of two dominant interpretive methodologies—textualism and purposivism—that focus on their unrealistic depictions of the legislative process. In Part II, I then set forth the category of penalty default canons. Specifically, I discuss the several theories and methodologies that comprise this category and argue that their improbable account of the legislative process counterintuitively improves upon it. I also identify aspects of textualism and purposivism that may function as penalty default interpretive canons depending on one's conception of the ideal legislative process. I conclude, however, that the subset of penalty default interpretive canons deriving from Congress's own rules intrudes less on Congress's lawmaking function than other interpretive canons and methodologies.

I. THE TRADITIONAL TYPOLOGY

One could argue that interpretive methodologies are improperly invoked when their underlying view of the

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[6] *See* Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 575-78 (2009) (arguing that pluralists generally would not seek to enforce interest-group deals that are hidden from congressional members while republicans would generally prefer exposure of interest-group deals to further deliberation).

legislative process deviates from that process's actual functioning. I refer to this perspective as the "traditional" way of understanding statutory interpretation, and in this part, apply it to both textualism and purposivism.

A. Textualism

I begin with textualism. Textualists rely, in part, on hypothesized dysfunctions in the legislative process to justify rejecting a statute's legislative history in favor of the statutory text. They argue, for example, that members of Congress do not use legislative history to enrich debate or to convince their colleagues of a statute's proper meaning; instead, Congress uses legislative history strategically to influence later judicial constructions of the legislation. Owing to the massive increase in statutory proposals, textualists argue that legislators rarely even have the chance to read an act's legislative history. For this reason, textualists insist that there are ample opportunities for legislators to inject a pet agenda into the legislative history without fear of retaliation from competing interests.[7] In this manner, committee reports and floor statements do not record genuine legislative debate. And legislative materials thus do not reflect Congress's actual intent.

Moreover, it is a costly endeavor to cement interest-group deals in the actual language of a statute—which must pass through the two houses of Congress and be signed by the President.[8] The insertion of legislative-history language favorable to the interest group is a much cheaper deal to strike.[9] Because committee members' views are often in line with interest groups rather than their fellow lawmakers, this phenomenon may be quite prevalent.[10] Textualists argue that

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[7] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686 nn.56-58 (1997) (citing sources concluding that members of Congress seldom see legislative history before casting their votes). *But see* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 377 n.44 (1990) (citing studies that show legislators are more likely to read a committee report than a bill).

[8] Thus, interest groups and lawmakers attempt to smuggle in their deals under the guise of public-interest legislation. Macey, *supra* note 3, at 232.

[9] *See* Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 54-55 (1994) ("While the generation of supplementary legislative materials is costly, it is not nearly so costly as writing more specific statutes. In addition to the time and manpower necessary to produce the statutory language, it must be agreed upon by the Congress, a process that becomes more precarious as legislation becomes more specific.").

[10] Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) ("Committee membership rarely

judicial consultation of legislative history increases the likelihood that these hidden deals will be enforced—thus making them more valuable and prevalent.[11] In light of these features of the legislative process, textualists firmly believe that the surest guide to the legislature's intent is the actual text of the statute voted upon by members of Congress.

Finally, some textualists rely on insights from public-choice theory that indicate the legislative process's inability to aggregate lawmakers' individual preferences into a single collective choice, a contention made famous by Kenneth Arrow.[12] One could describe this phenomenon as another dysfunction of the legislative process. Taking these dysfunctions together, although the Court lacks a textualist majority, it "now seems to accept that the uncertainties of the legislative process make it safer simply to respect the language that Congress selects, at least when that language is clear in context."[13]

To be sure, textualism, as a comprehensive theory of statutory interpretation, relies on more than an assumption of the "dysfunctional" legislative process; it also assumes that the statute's words rather than legislative intent govern from a constitutional perspective and that judges simply lack the institutional capability to make sense of the fragments of statutory meaning embedded in the legislative record.[14] But imagine a judge who is committed to textualism solely because she views the legislative process as dysfunctional. She will be employing a correct methodology when her assumption matches reality—for example, when she ignores a member's statement in the *Congressional Record* that favored an interest-group position but was not accepted by his colleagues.

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represents a cross-section of the legislature. Instead, legislators tend to self-select into those committees in which their supporters have the greatest stakes.").

[11] Manning, *supra* note 7, at 688 ("'[T]o the degree that judges are perceived as grasping at any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept.'") (quoting Int'l Bd. of Elec. Workers, Local No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring)); *see also, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568, 570 (2005) (recognizing that, in some circumstances, "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists" manipulate legislative history to obtain results that they could not achieve on the face of the statute).

[12] Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 547 (1983) (citing Arrow's paradox, which posits that the order in which decisions are made—rather than majority preferences—dictates the outcome of majority voting).

[13] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419 (2003).

[14] SCALIA, *supra* note 1, at 29-37.

When her assumption does not match reality, however, she will overlook potentially valuable insight into congressional intent. Perhaps, for instance, lawmakers voted for the statute with full knowledge that the legislative history would be used as a gap-filling device.[15] The difficulty for the judge, of course, is distinguishing between these two scenarios—a nearly impossible task. Inevitably, then, judges at times will invoke textualism improperly, depending on their own interpretive theory.[16]

B. Purposivism

The second theoretical approach to statutory interpretation that I will address is purposivism. Purposivism instructs courts to interpret statutes in a manner that will best effectuate the statute's purpose. This approach was made dominant by the legal-process school, founded by Henry Hart and Albert Sacks. Hart and Sacks argued that "every statute must be conclusively presumed to be a purposive act" because "a statute without an intelligible purpose is foreign to the idea of law and inadmissible."[17] To determine the statute's purpose, Hart and Sacks prescribed three assumptions the judge must make: (1) statutes are the work of reasonable lawmakers pursuing reasonable purposes; (2) the statute must not be read to mandate irrational patterns of outcomes; and (3) what constitutes an irrational pattern of outcomes must be "judged in the light of the overriding and organizing purpose."[18]

One might argue that purposivism rests upon a rosy view of the legislative process: there is no consensus among lawmakers on a statute's rational purpose, lawmakers are not rational, and/or there is no enacted logical purpose.[19] To the

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[15] *See generally* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 265, 273 (Ian Shapiro ed., 1994) (discussing the influence of rules of construction on legislative behavior).

[16] Some textualists would, of course, have responses to this conundrum that do not rely on dysfunctions in the legislative process. For instance, Scalia would surely respond that judges should keep to the text of the statute precisely because they are institutionally ill-equipped to weed out genuine from strategic legislative history.

[17] *See generally* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1124-25 (William Eskridge, Jr. & Philip Frickey eds., 1994).

[18] *Id.*

[19] On the other hand, it may be that Hart and Sacks thought of their theory as primarily normative rather than descriptive. WILLIAM N. ESKRIDGE ET AL., CASES

extent purposivists rely on an optimistic view of the legislative process, they also seem to suffer from the critique that their methodologies are improperly invoked when the legislative process does not function in accordance with this view. Consider a judge who finds an intelligible purpose behind a statute and applies it to a set of facts because she assumes the legislative process produces that purpose. The judge will be invoking a correct methodology if her hypothesis bears true. But when her assumption does not match reality, the judge may be imputing a purpose never contemplated by Congress.[20]

II. PENALTY DEFAULT INTERPRETIVE CANONS: A NEW TYPOLOGY

So far, we have seen interpretive methodologies that are arguably improperly invoked when there is a mismatch between assumptions about the legislative process and its actual functioning. In this part, I argue that this categorization is too narrow—that methodologies sometimes utilize the tension between their underlying assumptions and reality to further the functionality of the legislative process.

In the 1980s, legal scholars began to suggest interpretive methods to combat both the oversupply of private-regarding legislation and an undersupply of public-regarding legislation. This distortion, according to public-choice theory, occurs because special interests seek rents from lawmakers at the expense of a disinterested public. To combat this perceived inefficiency, some scholars have argued that courts should interpret statutes narrowly against interest groups.[21] Critics maintain that this approach demands that judges exceed their

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AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 750 (4th ed. 2007).

[20] Of course, some purposivists would argue that, even where there is no ascertainable purpose, a judge should impart one to develop an organized, principled statutory regime. This alternative view demonstrates that errors produced by a particular interpretive methodology will appear or disappear depending on one's ideal view of the legislative process and the courts' role in effectuating that view, which I discuss below.

[21] Sunstein, *Interpreting Statutes*, *supra* note 3, at 486-87; *see also* Frank H. Easterbrook, *The Supreme Court, 1982 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-15 (1984) (suggesting that courts should narrowly interpret statutes that transfer rents to special interests); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 663-64 (1996) (arguing that courts must interpret legislation "along public-regarding lines"); *cf.* Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134-35 (1989) (predicting that judges who embrace public-choice theory will construe legislation against special-interest groups).

interpretive role because public-choice theory does not indicate the appropriate level of interest-group influence.[22] Arguably, these methods are objectionable when the political process produces an acceptable level of interest-group activity.

Other interpretive methods, however, simply combat "hidden" interest-group deals and therefore do not as readily shift power to the judiciary in an objectionable way. In short, these methods direct the judge to elevate or ignore certain aspects of the political process in the hierarchy of interpretative aids. Jonathan Macey has argued that interpreting statutes according to their stated purpose will limit interest-group activity.[23] To justify this approach, Macey contends that interest groups and lawmakers hide their deals in "hidden-implicit" statutes because "open-explicit" statutes are more politically costly. By refusing to uncover deals in hidden-implicit statutes, judges following Macey's approach can create incentives for more transparent legislation. Richard Posner similarly seeks to limit hidden interest-group deals by simply ignoring them, although he rejects purposivism precisely because public-choice theory predicts fewer statutes with public-regarding purposes.[24] In Posner's view, judges should not conjecture about interest-group activity that is not publicly available.[25]

Both Macey's and Posner's approaches rest on the relatively noncontroversial premise that interest-group activity should be exposed, as opposed to the more controversial premise that it should be limited.[26] To effectuate this goal, both approaches also rely on a counterfactual vision of the

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[22] *See* Elhauge, *supra* note 10, at 34 ("[A]ny defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions about the merits of particular political outcomes. Accordingly, expansions of judicial review cannot meaningfully be limited by requiring threshold findings of excessive interest group influence. Further, the use of interest group theory to condemn the political process reflects normative views that are contestable and may not reflect the views of the polity.").

[23] Macey, *supra* note 3, at 227, 238, 250-56.

[24] RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985).

[25] Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 286 (1982). In pairing different interpretive techniques with different classes of statutes, William Eskridge essentially adopts this approach for statutes with concentrated benefits and distributed costs. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 296-97 (1988).

[26] Elhauge, *supra* note 10, at 45 n.72 (carving out from his critique of public-choice-driven interpretive theories those theories that "rel[y] only on the proposition that such interpretation alleviates the information cost problems of politics by forcing interest groups and politicians to publicize any nefarious purpose a 'captured' statute has").

legislative process. By assuming that the publicly stated purpose on the face of legislation is correct or by ignoring nonpublic evidence of interest-group deals, judges counter hidden special-interest legislation.

Elsewhere, I have recommended a statutory interpretation methodology that also possesses these characteristics. My proposal increases the costs of hidden-implicit special-interest deals by assuming—at times counterfactually—that the legislature discloses certain special-interest earmarks in accordance with its own legislative rules.[27] This proposal is perhaps less controversial than Macey's or Posner's because it assists the legislature in curing the ills it perceives of itself. Otherwise, the legislative rules are effectively unenforceable, either through litigation[28] or within Congress itself.[29] Although the methodology assumes the functionality of the legislative process, it is appropriately invoked even when reality differs—that is, unless one does not support the goal of unearthing hidden interest-group deals. Additionally, when the legislature abides by its own rules and discloses special-interest legislation accordingly, the methodology upholds those deals.

Courts have also developed penalty default interpretive canons. In attempts to reduce logrolling and nontransparent lawmaking, the U.S. House and Senate have internal rules that typically forbid members from adding riders to appropriations bills without deliberation in the ordinary committee process. Although these rules are routinely ignored or waived,[30] courts effectively bolster them by employing an interpretive canon that presumes the legislature does not substantively amend through appropriations measures, even though this legislative practice often occurs.

Perhaps the leading case in this area is *Tennessee Valley Authority v. Hill* (*TVA*), where the Court held that the Endangered Species Act of 1973 prohibited completion of a dam

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[27] Kysar, *supra* note 6, at 562-67.

[28] Courts have ruled that legislative rules are nonjusticiable under the Rulemaking Clause of the Constitution, except in a few rare cases involving other constitutional rights or clauses. *Id.* at 560-61; *see also* Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1021-25 (2011).

[29] The purpose of the rules, after all, is to require congressional members to disclose "earmarks" that would otherwise remain hidden. Enforcement by fellow congressional members would be paradoxical, then, since it would require identifying hidden earmarks.

[30] Sandra Beth Zellman, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 506 (1997).

that would threaten the existence of a rare fish.[31] The Court concluded that continued appropriations for the project did not repeal substantive law, reasoning that an opposite holding would "[n]ot only . . . lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need."[32] The Court then cited an internal House rule that provided a point of order against substantive amendments in appropriations.[33] This approach is similar to my own in that it assists the legislature in enforcing rules intended to address problems Congress sees of itself—the tendency to engage in legislative subterfuge rather than deliberation. It also implicitly recognizes Congress's inability to police rules that combat legislative subterfuge.

Similarly, the so-called elephant-in-mousehole doctrine, applied by the Supreme Court[34] and the courts of appeals,[35] holds that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[36] The elephant-in-mousehole doctrine has its origins in *FDA v. Brown*

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[31] 437 U.S. 153, 172 (1978).

[32] *Id.* at 190-91.

[33] *Id.* at 191.

[34] The Court employed the canon again in *Gonzales v. Oregon*, when it held that the attorney general did not have authority under the Controlled Substance Act to prohibit physicians from prescribing drugs for use in assisted suicides. The Court rejected "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision." 546 U.S. 243, 267 (2006) (citing Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001); FDA v. Brown & Williamson Co., 529 U.S. 120, 160 (2000)).

[35] Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316, 1325 (D.C. Cir. 2007) (citing the elephant-in-mousehole doctrine in holding that the Department of Defense did not have authority under the National Defense Authorization Act to curtail civilian employees' collective-bargaining rights); Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (holding that Congress did not grant the Federal Trade Commission authority to regulate attorneys under the Gramm-Leach-Bliley Act because to hold otherwise would require the conclusion "that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity"); NISH v. Rumsfeld, 348 F.3d 1263, 1269 (10th Cir. 2003) ("We simply do not see the elephant in the mousehole" where the military claimed that the Randolph-Sheppard Act gave blind vendors priority in awarding mess hall contracts.).

[36] *Whitman*, 531 U.S. at 468. *But see* Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

& Williamson Tobacco Corp., where the Supreme Court held that nicotine was not regulated by the FDA because it did not constitute a drug under the Federal Food, Drug and Cosmetic Act. Although nicotine arguably fell within the statute's broad definition of "drug," the Court held that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[37]

Related to this approach is the "dog-doesn't-bark" canon. Under this canon, if a statutory interpretation would significantly change the existing legal landscape, a lack of congressional debate on the issue is evidence that Congress did not intend that interpretation.[38] These two canons are striking in that they defy the insights of public-choice theory—that interest groups and lawmakers sometimes employ vague terms or ancillary provisions (or, to use Macey's language, hidden-implicit statutes) to convey important benefits. When hidden-implicit deals occur, these canons work to deny such benefits.

To be sure, the elephant-in-mousehole doctrine and the dog-doesn't-bark canon sometimes—if not the majority of times—simply fulfill congressional intent, as was most likely the case in *FDA v. Brown*. In these instances, the canons will accurately reflect congressional intent by refusing to alter the legal scheme based on innocuous provisions (rather than by thwarting a hidden legislative agenda). Still, when members of Congress deploy obscure lawmaking techniques to reward interest groups, these canons will frustrate that effort. These two canons, then, along with the presumption against substantive lawmaking through appropriations riders, appear to function—or have the potential to function—as penalty default interpretive canons. They require the judiciary to assume the legislative process is working correctly (i.e., lawmakers are not engaging in legislative subterfuge) even

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[37] 529 U.S. 120, 160 (2000).

[38] Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007) (holding that New Mexico's local-aid program qualified as "equalized expenditures" under the Federal Impact Aid Program since, at the time of its enactment, legislative history indicated no intention to alter the Department of Education's method of calculating expenditures); Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (rejecting a particular statutory construction because, in light of extensive legislative history, "Congress' silence [on the matter] . . . can be likened to the dog that did not bark"); Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951 (9th Cir. 1981) (opinion withdrawn based on enactment of new statute) (concluding that the Alaska Lands Act did not apply to non-Alaska land, despite rather clear statutory text to the contrary, because the legislative history did not indicate "a change in current laws of access of the magnitude of the . . . proposed interpretation").

when it malfunctions—resulting in a refusal to convey hidden special-interest-group benefits.

This exploration of penalty default interpretive canons generates a rethinking of the errors produced by two of the archetypal schools of interpretive theory—textualism and purposivism—which can also be employed as penalty default interpretive canons. Indeed, Macey's proposal identifies purposivism as the means to achieve transparent legislation—holding the legislature to its stated public-regarding purpose, no matter its disingenuousness.[39] Similarly, textualism, by ignoring legislative history despite congressional practice to bury low-cost interest-group deals precisely there, incentivizes legislatures to elevate special-interest deals to the text of the statute.

Of course, the range of errors produced by these theories will be minimized or maximized as one accepts more or fewer types of legislative dysfunctions as proper targets of judicial incentives. For instance, if one agrees that interest-group activity should be curtailed, one may not be troubled by a court casting a public-regarding gloss to a statute, even though the legislature intended no such purpose.

A second-order question arises, however, after one accepts that an occurrence in the legislative process is problematic: whether and to what extent the judiciary should suppress it. My own view, as I have explored elsewhere, is that canons assuming the correct functioning of rules that the legislature sets for itself are less vulnerable to the attack that the judiciary has exceeded its interpretive function.[40] My approach to the earmark-disclosure rules and the approach articulated by the *TVA* Court fall within this subcategory of penalty default interpretive canons. Legislative rules can be thought of as indications of congressional intent regarding the process and content of lawmaking. Recognizing both the congressional willingness to abide by these rules and the collective-action problems in doing so, these interpretive methodologies may assist the legislature in achieving its goal of enacting legislation in accordance with its rules, even when individual defections from those rules occur.

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[39] *See* Macey, *supra* note 3.

[40] *See* Kysar, *supra* note 6, at 568-78 (citing support for the proposal in accordance with precedent, separation-of-powers theory, textualism, intentionalism, republicanism, and pluralism). These canons should not apply, however, when the legislature has collectively waived the rules.

As to my proposal, one might argue that a court's bestowal of special-interest benefits when Congress has not, by its own rules, disclosed them presents greater separation-of-powers concerns. Indeed, because of those concerns, courts routinely assume that Congress has followed its own rules in other contexts.[41] This proposal thus dovetails with this case law by refusing to question Congress's internal rules of procedure in accordance with its rulemaking authority granted by the Constitution.[42] In so doing, it recognizes that there is indeed no legislative bargain when Congress's own bargaining rules are not met.

CONCLUSION

This essay starts from the premise that hidden interest-group deals in the legislative process should be discouraged. This assumption is useful for identifying penalty default interpretive canons as tools to discourage those deals. It also effectuates the primary goal of this essay—to discard the view that an interpretive theory is improperly invoked when it paints an unrealistic picture of the legislative process. The scope and occurrence of such interpretive errors will, of course, depend on one's theory of the legislative process and the role of the judiciary. I therefore do not seek to definitively answer the question posed by this symposium, "How much work does language do?" But I hope to reframe our view, as statutory interpretation scholars, of the interaction between judicial construction of statutory language and the legislative process.

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[41] *See, e.g.*, Metzenbaum v. Fed. Energy Regulatory Comm'n, 675 F.2d 1282, 1288 (D.C. Cir. 1982) (holding that the question of whether Congress has followed its own rules is nonjusticiable and thus courts, out of "deference," must assume that Congress acted in accordance with its rules); *see also* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) (refusing to question the presiding officer's certification that a bill presented to and signed by the President was the same as the one enacted by the House).

[42] The Rulemaking Clause of the Constitution states that "Each House may determine the Rules of its Proceedings." U.S. CONST. art. 1, § 5, cl. 2. Courts interpret this Clause to stand for the proposition that legislative rules are beyond judicial review. *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1790-92 (2003).