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Representation Reinforcement and the Court-Congress Dialogue: A Process-Based Solution to a Processed-Based Problem

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INTRODUCTION

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. 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 review”2 of democratically-enacted statutes. Beginning in the late 1980s, legal scholars started 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-generation3 representation-reinforcement 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 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, second-generation representation-

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3I call these scholars “second-generation” only in the sense that their application of representation-reinforcement principles to the statutory interpretation context is derivative of 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.
reinforcement scholarship has exploded with suggested canons of construction designed to help judges interpret statutes in this manner. The suggested canons take various forms, including: Cass Sunstein’s and William Eskridge’s proposal that ambiguous statutory language should be construed in favor of the politically disadvantaged or under-represented litigant;⁴ Jonathan Macey’s and Susan Rose-Ackerman’s proffered rule that statutes be interpreted consistently with their stated public-regarding purpose as set forth in their preambles, ignoring any contradictory interest group deals hidden in their substantive provisions;⁵ and Sunstein’s and Eskridge’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 paper questions the focus of the second-generation representation-reinforcing canons of construction. Thus far, criticism of these suggested canons has been sparse, and limited to the argument that judges as well as legislators are susceptible to rent-seeking behavior and are as likely to provide differential interest group access based on wealth and clout.⁷ This paper comes at the problem from a different angle, arguing that even if judges are immune to interest group pressures, judicially-based solutions are inadequate to the task of reinforcing the representation of disadvantaged groups in the political process — and that a legislature-focused solution would be far more effective. First, the proposed judicial correctives reach only a small subset of all enacted statutes — i.e., those that become the subject of litigation and make their way before judges, who then have the opportunity to apply the Sunstein-Eskridge-Macey-Rose-Ackerman canons of construction to remedy dysfunctions in the statute’s original process of enactment. What of the

vast morass of statutes that never reaches this corrective stage? Second, judicial application of the suggested “representation-reinforcing canons” does nothing to discourage Congress, at the behest of powerful interests, from later overriding the judicial corrective. In fact, judicial reengineering of statutory provisions on such explicitly representation-reinforcing grounds virtually invites powerful interests to go back to Congress seeking an override, without giving Congress any incentive to take under-represented groups’ interests into account the second time around. (Eskridge both acknowledges and touts this dynamic as justifying judicial intervention on behalf of under-represented groups, but this paper argues that the dynamic undermines the efficacy of this suggested judicial corrective). Third, it is doubtful that courts are better equipped than legislatures to weigh the harms to certain interests against the benefits to other interests — i.e., to identify the societally pareto optimal balance — for individual statutes. As a result, judicial rules of construction based on a representation reinforcement ideal will operate as something of a sledgehammer, always favoring the diffuse interest over the narrow one and interpreting statutes to benefit the latter, without conducting a societal cost-benefit analysis — or always assuming that the cost-benefit analysis always will come out in favor of the diffuse interest. This both is inefficient and would exacerbate the countermajoritarian difficulty that Ely’s representation-reinforcement approach set out to resolve in the first place.

In lieu of activist judicial remedies, this paper argues for a legislative solution to a problem of legislative dysfunction. Specifically, it advocates that Congress pass a framework statute requiring all proposed legislation (e.g., committee reports, conference reports) to be accompanied by an impact statement outlining the intended/expected impact that its provisions would have on various interests, including: 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 idea is 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 if often does, solely on which groups will be benefited. In other words, the proposed framework would commit Congress to engage in an interest group cost-benefit analysis before

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8 See, e.g., ESKRIDGE, supra note 4, at 153.
9 See discussion infra Section I.B, at pp. __.
enacting certain kinds of statutes. This legislative precommitment to greater representation and consideration of disadvantaged groups’ interests in the legislative process, moreover, would be reinforced by the judiciary — through deferential, process-ensuring canons of construction. But the starting point would 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 paper proceeds in three parts. Part I makes the theoretical case for a legislature-centric, rather than court-centric, solution to the problem of under-representation in the legislative process. Part II outlines a general proposal for a framework statute, modeled on the Unfunded Mandates Reform Act, ¹⁰ that would institutionalize a congressional precommitment to evaluate the impact that proposed legislation will have on politically disadvantaged groups. Part III concludes by advocating a modified, but enduring, judicial role in enforcing this congressional precommitment to reinforced representation of disadvantaged groups’ interests in the legislative process.

I. THE CASE FOR A LEGISLATURE-CENTRIC, RATHER THAN COURT-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, these scholars have 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 the second-generation scholars’ recommended 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 examines the second-generation representation-reinforcement scholars’ proposals and elaborates on their inadequacies as compared against an ex ante legislative solution.

A. Statutory Representation-Reinforcement

Scholars advocating a representation-reinforcing approach to statutory interpretation have borrowed, sometimes self-consciously, from John Hart Ely’s seminal articulation of the principle. 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 and unrestrained as to undermine Ely’s fundamental objective of

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11 See Susan Rose-Ackerman, Rethinking the Progressive Agenda 45 (1992) (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.”); Eskridge, supra note ____(4), Chapter 5; William N. Eskridge, Jr., Fetch Me Some Soupmeat, 16 CARDOZO L. REV. 2209, 2221 & n.56 (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”); Macey ___; Cass R. Sunstein, The Partial Constitution 143-44 (1993) (__); Sunstein, supra note ____(4), at 473-74 & 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).
legitimating judicial review in the public’s eye. In order to appreciate
this contradiction fully, it is necessary to review both Ely’s formulation
and the second generation representation-reinforcement scholars’
suggested canons of construction in some detail.

Ely’s central project was to justify judicial review and provide an
answer to the “countermajoritarian difficulty” posed by his teacher and
mentor, Alexander Bickel. Ely reconciled this countermajoritarian judicial
role with the ideal of representative democracy by arguing that courts
should intervene only in those instances when the political process was
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.” 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 or
prejudiced against a minority group that they systematically denied the
minority the rights and protections given to other groups. Ely’s classic
cases for intervention thus included, inter alia, incumbents (under the first
category) and racial minorities and aliens (under the second category).

By contrast, the second generation representation-reinforcement
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

12 In Bickel’s words, the Count-Majoritarian Difficulty is rooted in the fact that
“judicial review is a countermajoritarian 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, e.g., 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); 161 (discussing majority
hostility towards and exclusion of aliens in particular); 103 (discussing elected
representatives’ self-interest).
groups’ interests. Indeed, Eskridge and Sunstein, joined by Jonathan Macey and Susan Rose-Ackerman, define as a central democratic failure the legislative process’s tendency simultaneously to produce too few “public goods” statutes (i.e., statutes that provide a collective benefit and contribute to the overall efficiency of society) and too many “rent-seeking” statutes (i.e., statutes that distribute resources to a designated group without contributing to society’s overall efficiency). These second generation representation-reinforcement scholars thus articulate a common goal: to render it more difficult for wealthy “rent-seeking” interests to achieve deep legislative success. To this end, each scholar proffers his or her own set of interpretive rules designed to 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 — to selective judicial reengineering of interest group deals struck in the legislature — could not be more stark.

Among the second generation representation-reinforcers, William Eskridge is perhaps the most blatant about the countermajoritarian nature of his recommendations. Indeed, Eskridge explicitly touts countermajoritarian 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.” Moreover, he urges judges to interpret statutes in this corrective manner even when doing so would produce a result that contravenes legislative expectations.

Prescriptively, Eskridge offers a host of representation-reinforcing canons of construction designed to help judges and administrators interpret statutes so as to counteract political market failures. First, and foremost,

15 Eskridge, supra note ___ (6), at 285 (1988).
16 See, e.g., Eskridge, supra note ___(6), at 311-312; ROSE-ACKERMAN, supra note __, at 52-55; Sunstein, 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); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 239-40 (1986) (advocating interpretive rule designed to enable courts to “serve as obstacles to the goals of rent-seekers”).
18 Id.
Eskridge argues that in close cases, where the meaning of a particular statutory text is ambiguous, interpreters should consider which party or group will have effective access to the legislative process if it loses, and should interpret the statute against the party with greater access. 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 —i.e., 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. In order to assist interpreters in evaluating individual groups’ levels of access to the legislative process, Eskridge provides his own hierarchy of groups with “Greatest Access,” “Moderate Access,” and “Little Access” to the political process — a hierarchy which he compiled after studying what groups historically have been most successful in securing congressional overrides of Supreme Court rulings (statutory constructions) against their interests.

Further, Eskridge recommends that interpreters treat “public goods” statutes differently than “rent-seeking” statutes. In the case of public goods statutes, interpreters should recognize that laws which generally distribute benefits and costs often will not be updated as time passes, because they do not necessarily stimulate strong interest group support (no one interest benefits substantially). Accordingly, Eskridge urges, interpreters should fill in for legislators and update, or read updates into, public goods statutes. In addition, Eskridge advocates relaxing standing requirements for consumers seeking judicial review of agency policy decisions, as a check against agency capture by wealthy interests.

Sunstein’s approach to remedying legislative process dysfunctions differs somewhat from Eskridge’s. Like Eskridge, Sunstein seeks to

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19 Id. at 153.
20 Id.
21 See id. at 167-58.
22 See id. at 158.
23 See id. at 159, discussed in greater detail infra Section III.B.1, at pp.___.
24 Indeed, Sunstein specifically has criticized Eskridge’s seminal idea that statutes should be dynamically interpreted, including the suggestion that interpreters should “update” distributed costs/distributed benefits statutes. See Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 906 (2003) (“[U]pdating may cause harm if the new values, not yet able to receive clear democratic support, are questionable on normative grounds.”)). Such criticisms notwithstanding, the two scholars’ ideas do converge with respect to the view that interpretive rules of statutory construction can and should be used to remedy legislative process dysfunctions
counteract the systemic design that imposes costs and grants benefits based on the political power of private groups. But Sunstein also places unique emphasis on legislative deliberation, both as a goal and as a means of improving the legislative process. Thus Sunstein’s recommended representation-reinforcing canons of construction would require, inter alia, that (1) interpretations involving constitutionally sensitive interests or groups be remanded to the legislature/administrative agencies for reconsideration if the lawmaking body appears to have deliberated inadequately in the first instance; (2) statutes designed merely to transfer wealth to a particular interest or group be narrowly construed, unless they contain a clear statement of the legislature’s wealth-transferring intent; (3) statutes be construed in a manner that forces those who are politically accountable and highly visible to make and take the heat for (and therefore to deliberate carefully about) regulatory decisions; and (4) statutes be construed to impose benefits roughly commensurate with their costs, so as to limit the scope of regulations whose disadvantages seem to dwarf their advantages — unless there is a clear legislative statement to the contrary.

At the same time, Sunstein advocates an enhancing, rather than limiting, judicial approach to those relatively few statutes that do benefit disadvantaged, rather than wealthy, political groups. For such statutes, he says, ambiguities should be construed liberally, so as to protect the disadvantaged group. Likewise, Sunstein calls for “an aggressive judicial role” in protecting the regulatory gains that occasionally are won by diffuse interests such as the environment, endangered species, the broadcasting public, etc. — gains he contends often are jeopardized in the post-enactment political market, as groups whose members managed to band together to secure favorable legislation succumb to collective action problems at the regulatory implementation stage.

highlighted by public choice theory.

25 See Sunstein, supra note (4) at 471.
26 See id. at 471 (Subheading (e): “Political Deliberation; the Constitutional Antipathy to Naked Interest-Group Transfers”).
27 See id. at 471 (Subheading (e): “Political Deliberation; the Constitutional Antipathy to Naked Interest-Group Transfers”), 486 (Subheading 3(i): “Minimizing Interest-Group Transfers”).
28 See id. at 477 (Subheading 1(a): “Promoting Political Accountability”).
29 See id. at 488 (Subheading 3(j): “Requiring Proportionality”).
30 Id. at 472-73 (Subheading 1(g): “Disadvantaged Groups”).
31 See id. at 478 (Subheading 3(b) “Taking Account of Collective Action Problems”), 486 (Subheading 3(h): “Protecting Nonmarket Values”).
Rose-Ackerman’s approach, though not her goal, differs somewhat from Eskridge’s and Sunstein’s in that she focuses on the disconnect between the “public goods” rhetoric that legislators often use to sell a statute, versus the private interest deals that the statute’s substantive provisions typically deliver. Rose-Ackerman’s primary proposal is that interpreters should construe statutory provisions consistently with the statute’s (typically public-goods-promoting) preamble or statement of purpose. Thus, if a statute’s preamble promises diffuse, distributed societal benefits (as most do) but the statute’s substantive clauses effect narrow interest group transfers rather than confer broad benefits, then courts should refuse to enforce the inconsistent substantive clauses. Like Sunstein and Eskridge, Rose-Ackerman’s aim is not simply to limit the reach of rent-seeking statutes, but rather, to realign legislative incentives so as to encourage Congress to pass more laws that benefit society at large (public goods statutes) and fewer laws that benefit only narrow interests. Thus, Rose-Ackerman’s scheme, too, would permit Congress to effect naked interest group transfers when it wants to, so long as Congress clearly communicates the nature of the interest group deal in the statute’s preamble or statement of purpose. Legislative history, including committee reports and statements made on the House and Senate floors, would be off-limits to interpreters, so as to discourage legislators from burying interest group deals in less visible places — a rule that also could improve legislative deliberation by increasing legislator awareness of interest group deals that otherwise might be snuck into the crevices of a statute or committee report.

When it comes to judicial review of agency actions, as opposed to legislative enactments, Rose-Ackerman is even bolder. Here, she urges an interpretive rule requiring agencies to implement the net-benefit-maximizing solution. 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.” Further, courts should apply a presumption in favor of net benefit maximization, thereby making it next to impossible for politically powerful interests to obtain wealth redistribution

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32 See SUSAN ROSE-ACKERMAN, supra note___, at 52.
33 See id.
34 See id.
35 See id. at 53.
36 See id.
37 Id. at 39.
at the hands of agency policymakers. 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. Ironically, she does not suggest that courts seek to ensure similar open access to the legislative process — a goal which my proposed legislative solution endeavors to achieve. (Of course, none of the other representation-reinforcing statutory interpreters suggests this either — a fault to which we will return imminently — but Rose-Ackerman’s failure in this regard is particularly noteworthy because she urges something so similar in the administrative context).

Like the other second generation representation reinforcement scholars, Jonathan Macey is concerned that the cost to the legislature of supplying laws favorable to special interest groups is far too low, resulting in a surfeit of rent-seeking legislation. In fact, Macey argues that all of the expenses incurred in connection with special interest statutes are borne by the taxpayer, with the only costs to legislators coming in the form of a loss of support from individuals and groups who are aware that they are harmed by the rent-seeking legislation. As a result, “interest groups and politicians have incentives to engage in activities that make it difficult for the public to discover the special interest group nature of legislation,” including “masking special interest legislation with a public interest facade.” Thus, Macey 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. “Hidden-implicit” statutes are those which, according to Macey, “are couched in public interest terms to avoid the political fallout associated with blatant special interest statutes,” while “open-explicit” statutes are “naked, undisguised wealth transfers to a particular, favored group.” Along with Eskridge, Sunstein, and Rose-Ackerman, Macey favors judicial under-enforcement of “hidden-implicit” statutes and aims, through such under-enforcement, to 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.\textsuperscript{45}

Where Macey differs from the others is in that he sees no need to prescribe new interpretive rules to achieve this end. Rather, Macey believes that traditional methods of statutory interpretation that focus on a statute’s stated purpose already undermine the value of, and restrain the passage of, “hidden-implicit” statutes. Quoting Benjamin Cardozo and Hart and Sachs, Macey notes that “[a]n essential principle of statutory interpretation is that judges ought not to look beyond the legislature’s stated purpose when interpreting statutes” and that judges generally should assume that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” Faithful application of these principles, Macey argues, will result in judicial undermining of “hidden-implicit” statutes because, where there is a sharp divergence between the stated public-regarding purpose of the legislature and the true special interest motivation behind a particular statute, courts will resolve ambiguities in the statute consistently with its stated public-regarding purpose.\textsuperscript{46} Thus, like Rose-Ackerman, Macey’s basic recommendation is that interpreters construe all statutes in light of their (typically public-regarding) purpose, even if a particular statute in actuality was the product of an interest group deal.

Macey identifies an additional benefit to his proposed emphasis on statutes’ stated public-regarding purpose: In those instances where Congress seeks to serve the public interest but unknowingly passes a special interest statute because interest groups control the flow of information to the legislature and misrepresent the costs of legislation that would benefit them, the process of judicial interpretation will uncover the misrepresentation and inform the legislature about the true effects of the legislation it has passed.\textsuperscript{47} This, he says, is because the litigation process often brings the costs of legislative schemes to light and prompts those adversely affected by a statute to organize coalitions to protest against it.\textsuperscript{48} These adversely-affected groups or individuals may not have opposed the legislation initially because they were unaware that it was pending or because they misconstrued the effects it would

\textsuperscript{45} Id. at 238.
\textsuperscript{46} Id. at 251.
\textsuperscript{47} See id. at 254.
\textsuperscript{48} Id.
have on them. This point about congressional awareness of costs imposed by proposed legislation is an important one, and we will return to it shortly.

**B. Countermajoritarian Redux**

Despite their differing prescriptive approaches, the second generation representation-reinforcement 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 place, but until then and to the extent that that does not happen, the scholars exhort courts openly and deliberately to put their thumbs on the scales to protect certain litigants/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 whose sole purpose is to transfer wealth to private interests such as banking and agriculture. Eskridge similarly urges courts to update distributed costs/distributed benefits statutes — because these are the most likely to be forgotten or ignored post-passage by legislatures, but counsels that ambiguous statutes should be interpreted against the party/interest with greater legislative access. 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 wealth transfer explicitly has been referenced in the statute’s preamble or statement of purpose.

All of these proposed interpretive rules represent a move away from Ely, whose 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 second generation representation-reinforcement 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 — i.e., judicial superlegislating. For in asking courts to super-enforce public goods statutes and under-enforce rent-seeking ones, Eskridge-Sunstein-Macey-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. As Amanda Tyler has noted, what one judge may deem a political process “failing” may well be viewed by another judge as “democracy at work.” Interpretive rules requiring judges narrowly to construe antitrust or tax exemptions are one thing — they are confined, well-established, and give notice — but general exhortations to construe “rent-seeking” statutes one way and “public goods” statutes another offer little definition or constraint, and leave far too much to the judge’s discretion. This is precisely the kind of value-laden judicial approach against which Ely struggled. Indeed, 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

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52 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, supra note __, at 153. But judges are unlikely simply to take as gospel 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 important, 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 — which means that his hierarchy table assumes that if a Supreme Court interpretation disfavoring a group later was overridden 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, Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L. J. 331 (1991). There are a number of obvious limitations to this reasoning, including Eskridge’s own acknowledgment, in his original study, that he reviewed only a sampling rather than the full universe of failed congressional override attempts, see id. at 341 & n. 24, and that 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 — influenced the success or failure of an override attempt. See id. at 343-352.

Third, even if Eskridge’s hierarchy were a perfect metric for relative political advantage, it is 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.

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 — to enhance protections for favored interests and limit benefits to disfavored groups — looks a lot more like super-legislating than does Ely’s approach of taking the statute as passed by the legislature and assessing its compliance, in that form, with other legal norms, including the constitutional requirement of equal political participation for all. Such judicial intervention goes far beyond “say[ing] what the law is,” and usurps the legislature’s power to decide what the law should be. Judicial intervention of this sort, as elucidated by Bickel and others, is undemocratic and undermines the legitimacy of law itself.

C. Courts As Sledgehammers

Despite the decidedly countermajoritarian effect of activist statutory interpretation, however, Eskridge openly embraces it as preferable to the alternative of letting the legislature craft its own rules to guard against representational inequalities. Why? Because, he says, public choice theory teaches that leaving hard questions to the legislature often is the worst possible option, given legislators’ susceptibility to interest group pressure. Courts, by contrast, are not particularly vulnerable to interest group pressure and thus, Eskridge argues, are better positioned both to craft legal rules designed to curb rent-seeking and to update distributed costs/distributed benefits statutes. Moreover, 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.”

Eskridge’s point is a decent one, so far as it goes. But it does not go very far. Significantly, it ignores the risk that when judges are asked to enter the political foray by engaging in interpretive rewriting of statutes,

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54 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
55 BICKEL, supra note __, at 16-17.
56 Eskridge, supra note __, at 300-01. (Va. L. Rev.).
57 See id.
58 See id. at 304.
they inevitably will become the targets of political forces who wish to ensure that particular statutes are interpreted in their favor. One need only consider the recent explosion in *amicus curiae* briefs submitted by interest groups in Supreme Court cases for evidence of this phenomenon. While it may be true that litigation ensures the presentation of both sides of an issue by opposing parties, *amicus* briefs are a different story, and wealthy, well-organized interest groups inevitably will be better situated to hire prestigious lawyers to draft such briefs on their behalves than will diffuse, disorganized ones. The upshot, then, is that shifting responsibility for ensuring representational equality from the legislature to the judiciary may achieve little more than the politicization of the judiciary. In fact, several scholars argue that such politicization already has occurred and that judges are as susceptible to political pressures as are legislators.

Further, even if we accept Eskridge’s assumption that interest groups exert greater pressure on Congress than they do on courts, there remains the larger question of how to balance competing interests, costs, and benefits in particular regulatory contexts. Here, it seems doubtful that courts are better equipped than legislatures or agencies to weigh the harms to certain interests against the benefits to others and to calculate the societally *pareto optimal* legislative balance. Indeed, the interpretive rules proposed by Eskridge and the other representation-reinforcement 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. They dictate the result of the

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59 Amicus briefs were, for example, filed in 13% of the cases heard by the Supreme Court in 1953, as compared to in 92% of the cases heard in 1993. In the 1993 term, 550 briefs were filed in 92 Supreme Court cases, for an average of almost 6 briefs (so roughly 3 amicus briefs, assuming an opening and sur-reply brief by the petitioner and one reply brief by the respondent) per case. *See, e.g.*, BRIAN Z. TAMANAH, LAW AS A MEANS TO AN END 164 (2006) (citing ANDREW J. KOSNER, SOLVING THE PUZZLE OF INTEREST GROUP LITIGATION 7-8 (1998); Lee Epstein, Interest Group Litigation During the Rehnquist Era, 9 J. LAW & POL. 639, 656, 675-76 (1992-93)).


61 *See* Elhauge, *supra* note (7), at 45-48, 63-64 (arguing that judges are as susceptible to favoring wealthy interests as are legislatures).
interpretive analysis before the inquiry even begins. There are no empirics, no cost-benefit analyses in this court-centric approach, which relies on judges’ intuitions to determine what constitutes a distributed-costs/distributed-benefits statute, in Eskridge’s formulation, or a statute reflecting the unusual bypass of regulatory failure on behalf of a true public interest, in Sunstein’s — and which commands an automatic narrow or generous construction based on the results of these intuitions.

Yet it is not always the case that a distribution away from diffuse interests in favor of powerful ones is societally undesirable. The mere fact that a statute redistributes wealth from weak to powerful groups does not mean that it does not also advance the public good. But interpretive rules that instruct judges to put their thumbs on the scales to favor the politically weaker group in all cases make no room for such grey areas, or for the cost-benefit comparisons they require.

Moreover, there is something inherently contradictory about such a solution: If the underlying legislative dysfunction that we seek to counter is the overproduction of rent-seeking (i.e., distributed-costs/concentrated-benefits) statutes and the underproduction of public goods (i.e., distributed-costs/distributed benefits) statutes, the preferred solution cannot be to take cost-benefit analysis entirely out of the equation. The fact that the legislature currently is doing an inadequate job of balancing the group costs versus benefits of proposed legislation does not mean that we should give that task to the politically and policy-wise isolated judiciary. A better solution, in my view, would be to inject an interest group cost-benefit analysis requirement into the legislative process itself. As discussed infra Part II, there are a number of ways to do this. One is through a framework statute requiring Congress to compose a meta-list of “Red Flag/Politically Underrepresented Groups” whom Congress generally dictates should get the benefit of the doubt in close interpretation cases. This is ex ante cost-benefit weighting by the branch/institution best-situated to know which groups are in danger of political exclusion. A second is to mandate that all legislative proposals that would impact a “Red Flag/Politically Disadvantaged Group” (which list should include the politically diffuse and chronically under-represented group of taxpayers) must be accompanied by a CBO or GAO impact report assessing the proposal’s expected costs and benefits for relevant interests. Such requirements would force all legislators to confront some empirical analysis about the likely consequences, for different interest groups, of their votes on proposed legislation, before deciding how to vote.
This last point is worth underscoring, for it highlights the fact that, whatever normative debate may be had about legislative versus judicial authority (the countermajoritarian issue) or competence (the cost-benefit issue) to correct for representational inequalities in the legislative process, a legislative corrective is, as a practical matter, likely to be far more efficient and effective than a judicial one.

D. The Limits of a Judicial Approach

The crux of the second generation representation-reinforcement 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, 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 to violate this norm in disproportionate favor of a particular interest or interests. The judicial corrective is supposed to work by pressuring Congress to enact fewer rent-seeking statutes and to be blatant about those it does enact, in order to ensure that such rent-seeking statutes will be implemented properly. The threat of judicial hatcheting also, less directly, is supposed to increase the costs to interest groups of procuring rent-seeking statutes by forcing groups to expend extra resources convincing Congress to favor them despite the public fallout likely to accompany passage of a blatant wealth-redistributing statute.

62 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.

63 See, e.g., Eskridge, supra note ___(Va.), at 310; Macey, supra note ___(16), at 254, 261; ROSE-ACKERMAN, supra note ___, at 53, 55, 62; Sunstein, supra note ___, at 471 (advocating interpretive rule requiring a clear statement before courts will construe statutes as amounting to naked wealth transfers).

64 See, e.g., Eskridge, supra note ___(Va.), at 310; Macey, supra note ___(16), at 254, 261; ROSE-ACKERMAN, supra note ___, at 53, 55, 62;
The problem with this strategy, however, is that the vast majority of statutes enacted into law by Congress do not come up for judicial review, and those that do may not be reviewed until many years after they are enacted. Indeed, transfers enacted as earmarks through the annual appropriations process are not subject to judicial review at all. This means that many wealth-transferring statutes never will be subjected to a judicial corrective, even if they hide their rent-seeking provisions 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 a court wielding representation-reinforcing canons of construction and ends their dysfunctional reign. Congress knows this. Thus, 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.

Gary Becker’s foundational work on the economics of criminal law and deterrence suggests that the Effective Cost of a Crime to the perpetrator is equal to the Penalty times the Probability of Getting Caught. Applying this to our context, the “crime,” or behavior we are seeking to deter, 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. Under Becker’s formula, this means that 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 also will be small. 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 and may feel compelled to pay some attention to the representation-reinforcement scholars’ clarity-forcing interpretive

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65 Cf. Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on Court’s Constitutional Rulings* 31 LEGISL. STUD. Q. 533, 545 (Nov. 2006) (observing that of 3725 statutes enacted /eligible for judicial review between 1987 and 2000, the Supreme Court struck down only 22).

rules — but in the vast majority of cases Congress is likely to ignore these rules.\footnote{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 staffers “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 [staffers] 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 staffers 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.}

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 actual rent-seeking statutes in the first place, let alone of more public-regarding statutes. This is a second-best solution, with obvious anti-democratic consequences. By contrast, a legislature-centric solution aimed at getting Congress to pay more attention to which interests it is benefiting or harming \textit{ex ante}, while it is in the process of enacting legislation, has the advantage of affecting all potential statutes — not just those that eventually become subject to judicial review. It is deliberation-forcing as well as transparency-inducing, in that the impact reports submitted to Congress also would be available to the public. As Macey points out,\footnote{See supra notes 37-39 and accompanying text.} Congress does not always legislate with full information or knowledge that it is harming or benefiting certain interests over others. Bringing this information to light after a statute has been passed, through litigation, as Macey proposes, could take years and is 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 my proposed legislative solution and the second generation representation-reinforcement scholars’ court-centric solution, then, is that it 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. This, in my
view, points up a key failing of the second generation representation-reinforcement scholars’ approach: They do not seek to empower politically disadvantaged groups, or to bring their concerns into the legislative process. They seek only to limit the capacity for gain by politically powerful, narrow interests.

This is problematic for a number of reasons, including that 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 either an amendment clarifying that the statute was intended to benefit the group or, worse, passage of a new statute hiding a new wealth transfer to the group beneath a new public-regarding preamble, secure in the knowledge that at least a few years will pass before that statute makes its way through the courts. This danger of powerful groups seeking a second bite at the apple is very real, as Eskridge acknowledges and even touts as justification for his proposal that ambiguous statutes be construed against the politically more powerful litigant group.69 Moreover, such second bites 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 who have lost out to the disadvantaged group through a judicial interpretation. Nor do these canons provide any mechanism to force Congress to confront the true costs of the legislation it enacts, as would an impact report requirement. 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 organization, 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.70 There is something gnawingly unsatisfactory and short-lived about a remedy meant to address the legislative process dysfunction of representational inequality that does so little to empower under-represented groups.

69 See Eskridge, supra note __, at 153.
70 See, e.g., Eskridge, Overriding, supra note __, at 361-62 (describing frequent overrides of judicial interpretations benefiting the diffuse, marginalized, politically disadvantaged group of criminal defendants and suspects).
A legislative remedy along the lines of the framework statute I propose infra Part II, by contrast, at least would aim to empower politically disadvantaged, traditionally under-represented groups. First, by requiring impact reports to accompany most legislative proposals, it would seek to force Congress to consider the interests of politically diffuse, disadvantaged interests at the statutory enactment phase. Second, it would seek to encourage legislators to meet with representatives or surrogate representatives of those interests when drafting statutes, by promising judicial deference to statutory provisions enacted through a representationally-inclusive legislative process. Such an ex ante approach is superior to a post-hoc judicial approach because it stands at least some chance of undermining politically powerful interests’ lock on political access in the first instance. Will legislators invite disadvantaged interests to the table only to “look good” and without any real intent to listen to them? Probably. But once the concerns of these interests are voiced, behavioral science studies and informational regulation models suggest that they are likely to influence even hostile legislators, at least at the margins. Moreover, if Congress still chooses to ignore or impose substantial costs on disadvantaged groups after hearing from them, then at least it will be doing so consciously, with full information, and will be forced to explain its decision.

II. A PROCESS-BASED PROPOSAL: A “TRANSPARENCY IN LEGISLATION ACT”

Faced with public choice theory’s gloomy portrait of the legislative process, second generation representation-reinforcement scholars essentially have thrown up their hands and concluded that: Congress clearly cannot be trusted, so we must devise a way for the judiciary to step in and correct Congress’ mistakes. I have argued in Part I 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

71 For detailed explication of this proposal, see infra Part II.

72 Cf., e.g., Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 YALE L.J. 71, 95-96 (2000); Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 GEO. L.J. 257, 297 (2001) (discussing informational regulation in the environmental context). For a fuller discussion of these theories (and sources) see infra Section III.A.2, and accompanying notes 143-147.
Congress be trusted to 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 in the first place also prevent Congress from being the one to correct this imbalance?

Perhaps. No framework statute, including the one proposed in this Part, can eliminate entirely Congressmembers’ incentives to cater to powerful interest groups. But such incentives can be curbed. In fact, congressional behavior in the budget context suggests that legislators may welcome the opportunity to shift some political power from wealthy to diffuse interests — at least to the extent that legislators themselves feel constrained by well-organized, politically dominant groups. Congressional willingness to enact the Gramm-Rudman-Hollings Act, ("GRH") and PAYGO (pay-as-you-go) budget rules are two instructive examples. Both GRH and PAYGO were, in effect, legislative precommitments that allowed members of Congress to say to disappointed interests, “I had no choice; budget rules forced my hand and precluded me from giving you more.” Moreover, these two budget rules (one clumsy – GRH, the other elegant and more effective – PAYGO) were ones that preferred the interests of diffuse, unorganized groups — i.e., taxpayers and citizens at large, who foot the bill for soaring deficits — over those of politically powerful special interests.

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73 1985, 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., Reply Brief of the Speaker and Bipartisan Leadership Group of the House of Representatives, Intervenors-Appellants at *1, Bowsher v. Synar, 478 U.S. 714 (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”).

74 Title XIII, Pub L No 101-508, 104 Stat 1388-573, codified as amended at 2 USC § 902 (1994). The PAYGO rules required that any new tax legislation and any new spending enacted by Congress be revenue neutral; that is, the legislation could not lose more money than it raised. PAYGO operated as a check on interest group pressure for tax subsidies or spending programs because it enabled/forced legislators on the receiving end of such pressure to say no unless the pressing group could find some way (either through a tax increase or through a spending cut elsewhere in the budget) to pay for the expenditures it was seeking.
What is needed to combat the systemic problem of uneven political representation, then, is an analogous congressional precommitment to pay greater attention to the needs of politically disadvantaged or under-represented groups when enacting legislation. Modeled on a third different budget-related framework statute, the Unfunded Mandates Reform Act (“UMRA”), this paper’s proposed “Transparency In Legislation Act” would create a mechanism to force Congress to take into account the impact that proposed legislation would have on groups whose concerns typically get ignored in the legislative process.
A. Theory and Basic Idea

It should be noted that the primary goal of the proposal outlined in this paper is not to reduce the incidence of rent-seeking statutes enacted by Congress \textit{per se}; it is to increase the information available to Congress about the impact that rent-seeking statutes have on diffuse, under-represented interests and to encourage Congress to weigh overall societal costs/harms against overall societal benefits when enacting legislation. In other words, the goal is to make statutory tradeoffs clear both to Congress and to the public — and thereby to give Congress strong incentives to make better distributive choices. It is, of course, possible and even likely that once such tradeoffs are clearly revealed, Congress will be dissuaded from enacting rent-seeking statutes, or at least will be persuaded to reduce the magnitude of the rent-seeking benefits it confers. A major difference between my proposal and the canons of construction proposed by the second-generation representation reinforcement scholars, then, is that those scholars assume Congress enacts rent-seeking statutes with full knowledge of their wealth redistributing consequences,\footnote{Macey, of course, is an exception. See supra notes 38-41 and accompanying text.} while I believe that Congress is in many instances unaware of these consequences. Thus, whereas the second-generation representation reinforcementers attempt 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, I place greater emphasis on giving Congress the tools it needs to make better distributive decisions and to police its own rent-seeking tendencies in the first instance.

To this end, the key, first step in my proposed framework statute would be for Congress itself to define a “List of Politically Underrepresented Groups” whose interests traditionally have gone overlooked in the legislative process, and who Congress commits to give greater voice to in the future. This “List” would be akin to the definition of “unfunded mandates” provided by Congress in the UMRA — an important, defined, statutory feature that establishes what will trigger the statute’s other requirements. Moreover, creation of the “List” in a framework statute rather than in the midst of a concrete legislative battle over funds should help to diffuse, or minimize, controversies.
surrounding which groups should be placed on the “List.” Legislators and interest groups would be operating behind at least a partial veil of ignorance, in that they cannot predict with certainty, at the point of drafting the “List,” which groups ultimately will be pitted against each other on subsequent legislative proposals. To be sure, legislators may have some idea of how different groups’ interests are likely to match up down the line, but their information will be incomplete. As a result, legislators should be more willing to include a particular group on the framework “List” than they might be at a later point in the legislative process. Further, public perceptions about particular groups’ political access are likely to play a role in determining at least some groups’ entitlement to “List” status. And at least a few groups should emerge as obvious choices for inclusion—e.g., taxpayers, consumers.

This is not, however, to suggest that creation of the “List” will be easy or uncontroversial. There are as many different notions of under-represented groups as there are legislators. Some, for example, will argue that small property owners belong on the “List” because democratically accountable legislatures regularly run roughshod over their interests in obeisance to powerful environmental groups. Others will argue that future generations, who will bear the environmental costs of global warming, are a classic diffuse and under-represented group deserving of inclusion on the “List.” Thus, disagreements as to which groups should be placed on the “List” are likely to abound. But this is not necessarily a bad thing. At a minimum, it would get members of Congress talking about relative political access and focusing on the problem of under-represented groups, which would be a welcome change from the status quo. Moreover, given (1) that the cost of including a group on “the List” is merely heightened attention to the impact that proposed legislation would have on the group — not a promise to give the group whatever it asks for; and (2) legislators’ systemic tendency to

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76 This concept draws from John Rawls, A Theory of Justice 118-23 (rev. ed. 1999), and has been used to describe constitutions as commitment devices by Jon Elster, Jon Elster, Ulysses Unbound 130-33 (2000). The partial veil of ignorance idea has been developed by Elizabeth Garrett in the context of framework statutes such as the one I am proposing, see Elizabeth Garrett, The Purposes of Framework Legislation, 14 J. Contemp. L. Issues 717, 736-37 (2005), by Adrian Vermeule in the context of constitutional frameworks, see Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L.J. 399 (2001), and by Michael Fitts in the context of political institutions generally, see Michael A. Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 Mich. L. Rev. 917 (1990).
Congress likely would err on the side of including groups rather than excluding them.

Congressional compilation of a “List of Politically Underrepresented Groups” in this manner would be far preferable to Eskridge’s suggestion that courts come up with a list of relative political advantage on their own (ideally adopting the hierarchy proposed by Eskridge in his book) and interpret ambiguous statutes according to a group’s rank on that list. First, establishing a list of under-represented groups is simpler and less controversial than producing a hierarchy of relative political advantage — a group either makes it onto the under-represented list or it does not, there is no ranking involved. Relatedly, inclusion on the “List of Politically Underrepresented Groups” ensures only that an impact report will be conducted on any legislative proposal that is likely to affect the group; inclusion does 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 higher or lower on the list. Second, Congress, with input from constituents and affected interests, is better positioned than are electorally-isolated judges to study its own lawmaking procedures and identify groups in need of greater protection. Further, if concerns about partisanship or over-politicization abound, Congress could appoint an independent commission to assist in establishing “the List.” Third, and perhaps most importantly, if Congress establishes “the List” 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 of Politically Underrepresented Groups” would be permanent or unchangeable; Congress certainly could and should update “the List” to reflect changing political realities. But changes of this sort would have to take a formal route — i.e., through amendments to the framework statute, and be subject to popular input and electoral accountability — rather than be imposed from on high by the politically-isolated judiciary.

What I am advocating, in other words, is akin to a “danger signals” approach for the legislative process. In the administrative context, the “danger signals” or “hard look” doctrine directs courts to be alert to “signals” indicating a lack of careful decisionmaking by an agency, and to give extra scrutiny, or a “hard look,” to regulations that
appear to be the result of a careless decisionmaking process. In my proposal, the “danger signal” would be flashed by Congress itself, through the “List of Politically Underrepresented 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 red flag (or danger signal) that the group’s concerns are likely to be overlooked in the legislative process; anytime a billconference report/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 listed group, courts later reviewing that statute would provide a second “hard look,” by searching the record for evidence that Congress at least heard from (e.g., took testimony from) the disadvantaged group while deliberating on the bill. My proposal would differ slightly from the traditional danger signals approach in that courts no longer would have to read tea leaves to discern danger signals—in instead, Congress would identify ex ante the groups most likely to suffer under-representation, Congress itself would seek to ensure that those groups’ concerns are given a “hard look” during the legislative process, and 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.

The second key aspect of a representation-reinforcing framework statute would be a requirement that any bill which seems likely to affect a “List” group adversely, or to benefit a narrow interest while imposing costs on a “List” group (i.e., to impose costs that outweigh its benefits), be accompanied by an impact report conducted by an independent entity such as CBO or the GAO, and that such impact report be made available to members of Congress before they vote on the bill. Impact reports produced pursuant to this statute would, among other things detailed infra Section II.B.1, include (1) a list of all groups that lobbied or testified for and against the bill, perhaps with Public Citizen/Common Cause/ACLU being listed, where appropriate, as acting on behalf of a politically unorganized group; (2) the impact, in qualitative and, if

78 See discussion infra Section III.A.2.
A PROCESS-BASED SOLUTION

possible, quantitative terms, that the bill is expected to have on “List”
groups; and (3) 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 reports are meant to be both information-providing and deliberation-inducing. 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.79 Mandatory impact reports conducted by CBO, GAO, or
some other neutral entity might shed light on such distortions, or help
legislators learn the true beneficiaries and victims of proposed
legislation.

Further, the very fact that such reports are required and that they
must accompany any bill that adversely affects a “List” group or
redistributes benefits from a “List” group to a powerful interest should
induce legislators to pay attention to the impact that a bill will have on
“List” groups from the outset, when first drafting statutory language.
The impact report requirement thus is designed 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.

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.

The next Section outlines in greater detail my proposal for a
representation-reinforcing framework statute, borrowing substantially

79 See, e.g., supra notes 38-41 and accompanying text.
from the provisions of the UMRA.

**B. Mechanics: Modeled On the Unfunded Mandates Reform Act**

The background concerns that motivated the Unfunded Mandates Reform Act were similar, in many ways, to those that motivate my proposal for a representation-reinforcing framework statute. In brief, 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. In other words, state and local governments feared that as a result of dynamics inherent in the budget process, a suboptimal, excessive number of unfunded mandates were being enacted. In essence, they were concerned about a legislative process dysfunction. For while state and local governments are not an under-represented or disadvantaged group, the vice against which they complained was that of a federal legislature succumbing to a collective action problem: Each legislator wants to take credit for enacting popular federal programs, but no legislator is willing to take the blame for raising taxes; the result of which is that too many costs end up being shifted to state and local governments without analysis of whether the benefits justify the costs. This is not unlike public choice and second generation representation reinforcement scholars’ concern that Congress’ 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.

Further, the UMRA was designed to address informational deficiencies regarding the costs of complying with federal mandates similar to the informational deficiencies that often exist in the general legislative process concerning costs imposed on diffuse, unorganized groups. Before

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the UMRA was enacted, \textsuperscript{82} CBO was supposed to provide legislators with estimates of the costs that federal mandates imposed on state and local governments, but in practice it often did not do so, \textsuperscript{83} and faced no sanction from Congress for this failure. \textsuperscript{84} 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. \textsuperscript{85} The UMRA seeks 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. \textsuperscript{86}

Similarly, Congress, at least in theory, is supposed to assess the costs and benefits to society at large before enacting, but in practice it does not always do so. As a result, legislators may not always be aware that a bill will harm or impose costs on a particular group. In fact, politically diffuse or weak groups are not likely to be on legislators’ radar screens, are not likely to bring themselves to legislators’ attention, and may well become unintended casualties of many bills. This is especially true in the present era of omnibus legislation. Thus, a major goal of my proposed representation-reinforcing framework statute, the “Transparency in Legislation Act,” is to ensure that Congress has information about the costs that a proposed bill would impose on diffuse, under-represented 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. As detailed \textit{infra} Section II.B.3, experience under the

\textsuperscript{82} The State and Local Government Cost Estimate Act of 1981, Pub. L. 97-108, 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.”

\textsuperscript{83} Indeed, a CBO report indicates that during the 14-year period from 1982-1995, CBO provided Congress with only 7,000 such estimates; after passage of the UMRA, by contrast, CBO conducted 6,000 estimates in just 5 years (from 1996-2000). Compare Congressional Budget Office, \textit{A CBO Report: CBO’s Activities Under the Unfunded Mandates Reform Act, 1996-2000} (May 2001), at 1 with \textit{id. at Summary} p. ix.

\textsuperscript{84} \textit{See, e.g., Eskridge, Frickey & Garrett, supra note }\textsuperscript{76}, at 488. 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.” 137 Cong. Rec. S14766 (Nov. 1, 1993).

\textsuperscript{85} \textit{Eskridge, Frickey & Garrett, supra note }\textsuperscript{76}, at 488.

UMRA suggests that the latter half of this goal is not just a pipe-dream, but an attainable consequence of information-forcing cost-benefit rules.  

1. An Information-Forcing Mechanism

The UMRA operates primarily by imposing reciprocal duties on congressional committees and on CBO. Thus, any time an authorizing committee reports a bill or joint resolution that includes a federal mandate, UMRA requires that the committee report accompanying the bill or joint resolution must: (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 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). The statute also requires authorizing committees “promptly” to submit any bill or joint resolution of a “public character” to the Director of the Congressional Budget Office and to identify any mandates contained therein. (In practice, however, CBO typically reviews each bill approved by a committee to identify mandates and estimate their costs). Conference committees are to follow these same reporting requirements “to the greatest extent practicable.”

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87 See discussion infra pp. ___.  
88 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.  
89 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, discussed infra Section II.B.2.)  
91 Id. §658c (Section 424, “Duties of the Director; Statements on Bills and Joint Resolutions Other than Appropriations Bills and Joint Resolutions).  
92 CBO Report, supra note 66, at 3 (Ch.1).  
93 2 U.S.C. §658c(d) (Amended Bills and Joint Resolutions; Conference Reports).
In addition, the UMRA contains specific directives to CBO regarding the cost estimates to be conducted on bills or resolutions reported by the authorizing committees. Specifically, if CBO estimates that the direct costs of federal mandates imposed by the bill will exceed $50 million, then CBO must prepare for inclusion in the committee report a detailed estimate containing, *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 10 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. 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. Further, at the request of a Senator, CBO must estimate the costs of any intergovernmental mandates contained in an amendment the Senator wishes to offer.

The UMRA also contains a list of “Exclusions,” or specific types of bills, joint resolutions, amendments, and the like with respect to which no unfunded mandate analysis or estimates are required. Thus the statute explicitly allows Congress to ignore any unfunded mandates imposed by bills or resolutions that: (1) enforce constitutional rights of individuals; (2) establish or enforce statutory rights against discrimination on Fourteenth Amendment grounds; (3) require compliance with accounting and auditing procedures relating to grants or property provided by the federal government; (4) provide emergency assistance or relief at the request of any state, local, or tribal government; (5) are necessary for national security or the effectuation of international treaty obligations; (6) the President and Congress both have designated

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94 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* at 1 (April 2007).
96 Id. §658b (“Other Publication of Statement Director”).
97 Id. §658f (“Requests to the Congressional Budget Office from Senators”).
98 Id. §658a.
as emergency legislation; or (7) relate to Social Security benefits. In other words, the UMRA reflects an *ex ante* congressional balancing of interests, anticipating seven situations in which Congress has determined that the goals of a statute or the interests of the groups benefited by the statute trump the concerns of, and justify imposing unfunded mandates upon, state and local governments.

There are at least five aspects of this framework that are key to the UMRA’s success, and worth emulating in a representation-reinforcing framework statute. First, the UMRA puts the burden on congressional (authorizing) committees to identify federal mandates contained in proposed bills or joint resolutions and to submit such bills or resolutions to the CBO for cost estimates. This rule forces congressional authorizing committees to be attentive to the costs and consequences, to state and local governments, of every bill and resolution the committee proposes; moreover it injects such considerations into the drafting stage, when they could lead to adjustments in the way the bill is structured or worded. Further, the informal practice that has arisen whereby CBO reviews each bill approved by committee to identify mandates operates as a functional check, reinforcing committees’ attentiveness to the consequences their proposals will have for state and local governments and correcting for informational deficiencies that may prevent even well-meaning committees from recognizing all instances in which a bill or resolution imposes an intergovernmental mandate.

Borrowing from the UMRA model, my proposed “Transparency in Legislation Act” would require all congressional committees (not just authorizing 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 “List” group, and (2) specifically to identify in an “interest impact” statement the “List” 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 would 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 would direct CBO/GAO to review bills reported out of committee for adverse effects on “List” groups —

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99 *Id.*
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.

Second, the UMRA emphasizes early analysis by CBO and inclusion of CBO’s estimates in a report that accompanies the relevant bill or resolution, so individual legislators can consider the report — and be aware of the effect on state and local governments of any unfunded mandates assessed therein — alongside the bill or resolution itself, before deciding how to vote. Moreover, the statute dictates several specific cost assessments and other information that must be included in the report accompanying the bill or resolution, to ensure that legislators have as much relevant information as possible when deciding how to vote. This aspect of the UMRA promotes informed deliberation by Congress as a whole, and provides some measure of assurance that state and local governments’ concerns will not get swept under the rug during the often-rushed floor considerations. 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 “List” 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. 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

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100 See, e.g., supra notes 38-41 and accompanying text.
This proposed cost-benefit requirement differs from that suggested by Rose-Ackerman in that it would apply to legislators enacting statutes, not to agency regulators drafting implementing regulations. Moreover, the requirement would be imposed by legislators themselves, through a framework statute mandating real-time production of a report that would become part of the public record, not by courts requiring after-the-fact certification that an agency conducted a cost-benefit analysis and that the chosen regulation maximizes net benefits. It likewise differs from Cass Sunstein’s support, in the unrelated context of evaluating regulatory reforms proposed under the Contract With America, for a rule requiring administrative agency regulators to conduct cost-benefit analyses before issuing implementing regulations. Sunstein’s focus on cost-benefit analysis does not arise out of a concern for representation-reinforcement, but out of an attempt to promote more effective regulation and, like Rose-Ackerman’s cost-benefit suggestion, would introduce no balancing of any kind (costs or interests) into the legislative process that produces federal statutes in the first instance. This disjunct between Sunstein’s and Rose-Ackerman’s recommendations for the regulatory state versus for the legislative process under whose aegis the regulatory state operates is puzzling, and reflects an underlying mistrust of Congress as an institution.

Third, the UMRA establishes a $50 million threshold for intergovernmental mandates, 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. This rule has several advantages. Most notably, it keeps the

102 Id. §658c(a)(1).
103 Compare id. §658c(a)(1)-(2) (describing estimates required for bills or resolutions that exceed the $50 million threshold) and §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
UMRA manageable by sparing CBO from conducting detailed estimates for smaller mandates and thereby enabling CBO — and Congress — to focus their attentions on identifying and addressing 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 the 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 much procedural resistance. In other words, Congress is free to enact federal mandates which 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. The rule thus accounts for legislative realities and allows federal legislators some wiggle room, while also protecting state and local governments by requiring federal legislators to acknowledge (and thereby alerting the relevant interests and non-committee members) that a particular bill or resolution on which they are voting contains an unfunded mandate.

Based on this model, I would recommend that a representation-reinforcing “Transparency in Legislation Act” also should establish a threshold below which rent-seeking statutes would be considered harmless error and would not trigger detailed CBO/GAO analysis or procedural obstacles designed to encourage Congress to rethink its distributive priorities. While I cannot provide a precise figure akin to the $50 million UMRA threshold, it would seem that the appropriate threshold for triggering review under a representation-reinforcing framework statute should be defined in terms of: (1) the ratio between expected costs to “List” 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; or (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. Indeed, the ideal threshold for CBO/GAO review may be one that combines both of these measures. Ideally, whatever measure is chosen would provide that bills in which those who benefit also pay most of the costs and in which the costs are

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threshold. For a fuller discussion of the how the point of order works, see infra Section II.B.2.
roughly commensurate with the benefits (or the benefits exceed the costs) would not trigger CBO/GAO review, though the committee reporting out the bill would be required to identify the benefiting group(s) as well as list who lobbied for and against the bill.

Fourth, the UMRA wisely recognizes that there are some situations (e.g., emergency federal assistance) and some national interests (e.g., national security, the Social Security system, protecting constitutional rights) that trump the underlying goals of the framework statute itself. In order to accommodate these situations and interests, the UMRA exempts certain types of legislation from its information-forcing rules. A representation-reinforcing framework statute likewise should engage in some \textit{ex ante} congressional balancing of interests, and should exempt certain kinds of legislation from undergoing detailed CBO/GAO cost-benefit analysis prior to its enactment. A good starting point for such \textit{ex ante} balancing of interests can and should be UMRA’s exclusion list; while not all of the types of legislation exempted from UMRA review necessarily should be exempted from representation-reinforcing review, at least some clearly should —e.g., emergency assistance, treaty-related legislation (Congress should not have to wait for cost-benefit analyses before enacting federal relief for victims of natural disasters, or complying with international treaties).

2. Enforcement

The UMRA has two main goals: (1) ensuring that Congress has information about the costs of mandates before it decides whether to impose them; and (2) encouraging the federal government to provide funding to cover the costs of intergovernmental mandates.\textsuperscript{104} The statute enforces both of these goals through a parliamentary procedure called a “point of order.”\textsuperscript{105} The 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 “out of order;” likewise any bill, joint resolution, amendment, motion, or conference report that includes an intergovernmental mandate exceeding $50 million is “out of order” unless Congress has provided federal funding to cover the costs of complying with the mandate.\textsuperscript{106}

\textsuperscript{104} See 2 U.S.C. §1501(2)-(6).
\textsuperscript{105} See 2 U.S.C. §658d.
\textsuperscript{106} Id. §658d(a)(1) & (2).
It is important to note that the point of order is not self-enforcing; it does not automatically invalidate any piece of legislation. Rather, it empowers legislators to object to proposed legislation that violates 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.\footnote{See, e.g., U.S. House of Representatives, Comm. on Rules Majority Office, Parliamentary Outreach Program, The Unfunded Mandate Point of Order, Vol. 106, No. 11 (June 18, 1999).} In other words, the point of order does not make it impossible for Congress to circumvent the 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.

This system strikes an admirable balance between encouraging compliance with the UMRA’s provisions and maintaining legislative flexibility. On the one hand, the point of order empowers a single dissenting legislator to hold Congress’ feet to the fire if it chooses to evade the UMRA’s requirements; indeed, a recorded vote on whether to waive the point of order increases legislators’ public accountability\footnote{See Eskridge, Frickey & Garrett, supra note \_\_\_, at 488-89.} for decisions to impose unfunded mandates on state and local governments, and provides a powerful incentive to comply with the UMRA’s requirements. On the other hand, Congress does retain the power, by simple majority vote, to waive the point of order and to decide not to subject a particular bill or resolution to the UMRA.

A representation-reinforcing framework statute also should adopt this flexible point-of-order enforcement mechanism. First, as under the UMRA, any bill or resolution that imposes costs on a “List” group and is reported out of committee without a CBO/GAO “impact report” should be “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 “List” 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 the UMRA, the point of order mechanism would enable Congress to enact rent-seeking or concentrated benefit/diffuse costs statutes 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 rent-seeking statutes, invocable by a single dissenting legislator, but would allow a majority of Congress to reverse the presumption through a waiver vote.

3. UMRA Successes and Lessons

The UMRA generally is 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 11 in 1996, the first year the UMRA took effect, to an average of 6 over each of the next nine years. More importantly, substantial anecdotal evidence and CBO’s own observations indicate that the UMRA has affected Congress’ deliberative processes and has altered the outcome of at least some

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110 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.

legislation. Congress’ experiences under the UMRA offer important lessons for the representation-reinforcement context about the scope of changes that a framework statute can be expected to inspire.

One notable UMRA success involved the portion of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)\(^\text{111}\) that initially was known as the Immigration Control and Financial Responsibility Act, or S. 269. The original committee version of S. 269 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.\(^\text{112}\) 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\(^\text{113}\) allowing states to implement the new license requirements over an extended period of time, thereby eliminating the influx of renewals and reducing the direct costs to $10-$20 million over six years.\(^\text{114}\)

Other UMRA successes include the Internet Tax Freedom Act,\(^\text{115}\) which was narrowed in scope to allow states to continue collecting sales tax on internet access so as to avoid cutting off a substantial source of state revenue;\(^\text{116}\) the proposed Internet Gambling Prohibition Act,\(^\text{117}\) which was amended to eliminate a $60 million intergovernmental mandate (exempting, \textit{inter alia}, state lotteries);\(^\text{118}\) the Health Insurance Portability and Accountability Act,\(^\text{119}\) which was revised to reduce the parity requirements between mental and physical health coverage in

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\(^\text{112}\) See Congressional Budget Office, \textit{A CBO Report: A Review of CBO’s Activities Under the Unfunded Mandates Reform Act, 1996 to 2000}, at 14-15 (May 2001) (Table 2, Entry on “Immigration Reform” & accompanying n. c); \textit{Eskridge, Frickey, & Garrett, supra} note \_, at 486.
\(^\text{113}\) 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 member who manage the debate on a bill for their side.
\(^\text{114}\) Congressional Budget Office, \textit{supra} note 94, at 15 (note c); \textit{Eskridge, Frickey, & Garrett, supra} note \_, at 486.
\(^\text{116}\) See \textit{1996 to 2000 CBO Report, supra} note \_, at 15 (Table 2, note e).
\(^\text{118}\) See, e.g., \textit{Eskridge, Frickey, & Garrett, supra} note \_, at 488.
order to reduce overall health insurance costs imposed on states;\textsuperscript{120} and the National Securities Markets Improvement Act,\textsuperscript{121} which limited the scope of a preemption against state securities registration in order to allow states to continue to collect certain fees.\textsuperscript{122} But while the UMRA has prompted Congress to scale back some statutory provisions or create exceptions 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. In fact, during the ten-year period between 1996 and 2005, Congress enacted five statutes containing unfunded intergovernmental mandates that exceeded the UMRA threshold.\textsuperscript{123}

The representation-reinforcement context lesson to be learned from these experiences 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. That is, just as the UMRA does not prevent the enactment of all unfunded intergovernmental mandates, the statute proposed in this paper cannot and should not be expected to preclude Congress from passing any rent-seeking legislation. 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 any offending legislation enacted within its parameters. If

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{120} See 1996 to 2000 CBO Report, supra note __, at 15 (Table 2, note b).
\item \textsuperscript{122} See 1996 to 2000 CBO Report, supra note __, at 15 (Table 2, note d).
\end{itemize}
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the UMRA’s $50 million threshold can lead to immigration law changes that save state governments between $60 and $190 million, and gambling law changes that save states $60 million, then perhaps the parameters (e.g., ratios) set by a representation-reinforcing framework can be expected to reduce, as opposed to eliminate, the extent of wealth redistribution from diffuse to narrow interests — so that the imbalance between costs imposed on taxpayers and benefits incurred by private interests is lessened, or so that a larger number of persons reaps the benefits of a statute, or so that the absolute costs imposed on an under-represented group are lowered, and the corresponding windfall to narrow interests is decreased. Indeed, the UMRA-inspired amendments to mandate-imposing legislation illustrate that when the costs to a particular interest — here, state and local governments — are highlighted, and are so great as to trigger a point of order, Congress often can and will find ways to reduce those costs by scaling back otherwise blanket provisions, or by creating an appropriate exception.

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. In fact, observers say the 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., once noted, UMRA “changed the way that prospective legislation is drafted,” ensuring that “[a]nytime there is a markup, this [unfunded mandates] always comes up.” Thus, the UMRA rarely is invoked as a formal matter — either through points of order 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.

In addition to focusing Congress’ attention on the issue of unfunded mandates, the UMRA also has increased the flow of information between Congress, CBO, and the intergovernmental lobby.

124 The point of order has never been used in the Senate. It has been invoked at least seven times in the House, but it has never come close to blocking a bill. Allan Freedman, *Unfunded Mandates Reform Act: A Partial ‘Contract’ Success*, C.Q. WEEKLY (Sept. 5, 1998)

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.”\textsuperscript{126} The 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 unfunded mandates.\textsuperscript{127}

All of these are benefits that should carry over to the representation reinforcement context. 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. Committee members and CBO/GAO analysts likewise are likely to look to representatives of the “List” 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 under-represented enough to qualify for “the List” — e.g., the poor, criminal defendants, illegal 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 many “List” groups will lack an organized lobby or entity to respond to committee or CBO/GAO contacts, surrogate organizations such as Public Citizen, Common Cause, the ACLU, the Southern Poverty Law Center, the Leadership Conference on Civil Rights, and the like may be able to step in and represent these “List” groups’ interests during the legislation-drafting stage. Second, some “List” 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 under-represented, diffuse groups actually may organize, if only loosely, as a result of the new framework, in order to take advantage of

\textsuperscript{126} Freedman, \textit{supra} note __, at __.
\textsuperscript{127} \textit{See ESKRIDGE, FRICKLEY, & GARRETT, supra} note __, at 487.
increased congressional attention to their concerns.

It bears noting that promoting attention to, and even consultation with, traditionally under-represented groups during the initial stages of the legislative process is a remedial goal that only a legislative, process-based solution to the problem of representational inequality can hope to achieve. Judges taking an axe (read: representation-reinforcing canons of construction) to a statute after-the-fact can hope, at best, to undo a legislature’s worst rent-seeking offenses; they cannot force the legislature to pay attention to under-represented groups in the first instance. This is significant because “state legitimacy is not just a function of competent institutions acting under the proper procedures, but also requires meaningful participation by all groups and the integration of equality and other norms into public law.”

One of the great Hart and Sacks, “Legal Process School,” concepts is that of “institutional competence” — the idea that, in a government which seeks to advance the public interest, each organ has a special competence or expertise. According to this school of thought, “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.”

III. THE COURT-Congress Dialogue: An Enduring Role for the Judiciary

One of the great Hart and Sacks, “Legal Process School,” concepts is that of “institutional competence” — the idea that, in a government which seeks to advance the public interest, each organ has a special competence or expertise. According to this school of thought, “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.”


130 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)) (emphasis added).
legislature might seek to remedy this legislative process dysfunction. This Part takes up the second prong of the Legal Process approach, 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 they witness against benefits that may not be apparent in the case before them. As others have noted, 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 Section suggests two new twists on well-worn tools of statutory interpretation, that are 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

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attention over the past two decades.\textsuperscript{132} Eskridge and 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 “\textit{Lochner}-style” judicial review.\textsuperscript{133} Notably, the clear statement rules to which Eskridge and Frickey referred were substantive\textsuperscript{134} in nature, designed to protect underenforced constitutional norms (e.g., the nondelegation doctrine, separation of powers principles, and, most conspicuously, federalism limitations on the national government) against accidental or undeliberated infringement, by requiring Congress to address those norms directly on the face of any statute seeking to push their limits.\textsuperscript{135} What I propose in the representation-reinforcement context, by contrast, is a \textit{procedural} clear statement rule that reinforces Congress’ own precommitment to representational equality, as embodied in a framework statute.

The rule would work as follows: When courts are faced with an ambiguous statutory provision, or with a choice between a narrow versus expansive statutory construction that would harm/burden/impose costs upon a “List” group (as defined by Congress in its framework statute), courts would look to whether Congress, either on the face of the statute or in its “interest impact” statement to CBO/GAO, identified the “List” group as one it expected or intended the statute to burden. This proposal differs

\begin{itemize}
  \item \textsuperscript{133} Eskridge \& Frickey, supra note 129 (Vand.), at 597-598 (1992); \textit{see also} William N. Eskridge, Jr. \& Philip P. Frickey, \textit{The Supreme Court, 1993 Term, Foreword: Law As Equilibrium}, 108 \textit{HARV. L. REV.} 26, 81-87 (1994).
  \item \textsuperscript{134} Eskridge \& Frickey, \textit{supra} note __, at .595 (calling such rules “substantive canons”).
  \item \textsuperscript{135} \textit{Id.} at 630-31.
\end{itemize}
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 that 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 — as on guarding against inadvertent legislative disadvantaging or harm to traditionally under-represented groups.

If the court finds that Congress did in fact identify the “List” group as one that would bear costs under the statute — either in the statute itself or in the impact statement to CBO/GAO — then that should end the court’s inquiry, and it should construe any statutory ambiguities against the group’s interests. But if Congress nowhere indicated an intent or understanding that the “List” 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 “List” 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) who Congress took testimony from while drafting and deliberating on the statute and (2) which groups lobbied for or against the statute. (Recall that the lobbying information will be provided by Congress itself as part of its impact statement to CBO/GAO). As discussed earlier in this paper, 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 “List” group a “hard look” to ensure that it is the product of a

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136 See discussion infra Part II.A, at p. 22.
137 There are, of course, exceptions — such as where a statute harms a constitutionally protected group. See discussion infra Section III.B.2.
138 See discussion supra Section II.B.1, pp. ___.
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 “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 “List” groups and reinforce Congress’ 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 “List” group, the court finds no evidence
that the group (or a surrogate representative for the group) 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
“List” group — the court should construe the statute in favor of the
“List” 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 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 we 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 (Transparency in
Legislation Act) as creating a presumption against the enactment of
legislation that harms or disadvantages “List” groups without ensuring
that “List” 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 “List” group will face certain costs/burdens under the statute; or (2) by showing that the “List” group’s concerns were taken into account or represented during the legislative process.

Jerry Mashaw has suggested, in passing, that courts “should look for a combination of substantive and decision-process ‘danger signals’ that together would suggest that legislation is essentially private-regarding — that it benefits some group in ways that cannot convincingly be explained in terms of a broad range of possible public purposes, or in terms of a well-functioning democratic process.”\(^{139}\) A major difference between Mashaw’s suggestion and my proposal is that I would shift the focus of the court’s “danger signals” analysis from whether legislation is rent-seeking to whether legislation harms traditionally under-represented groups, and would have Congress define those groups \textit{ex ante} for the courts. In fact, this shift in focus is perhaps what most distinguishes my proposed approach to judicial review from that of the second-generation representation-reinforcement scholars’: The interpretive rules I advocate would encourage Congress and the courts to obtain information about a statute’s impact on certain under-represented groups, including “general public” groups such as taxpayers and consumers, and to protect those groups, rather than ask courts to punish Congress for benefitting its preferred constituents. The initial result may be no different under either approach — that is, the same statutes may trigger a judicial “hard look” irrespective of whether the “danger signals” are defined in terms of harm to under-represented groups such as taxpayers or in terms of wealth-transferring benefits to a powerful group, but the remedy would differ in that courts following my approach would scrutinize whether the political process that produced a statute was open to under-represented groups, instead of merely finding marginal ways to curb statutory benefits to powerful groups.

It is important to note that under my 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.)?” My 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, such process-based 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. Justice Stevens’ preferred approach, like the approach proposed under the “Transparency in Legislation Act,” would begin with a facial perusal of the criticized districting plan (statute) for obvious “warning flags” (danger signals) such as unusual district shape, lack of geographical compactness, or disregarding of county boundaries (adverse impact on a “List” group). A districting plan that contains such warning flags, like a statute that harms a “List” group, in turn would “prompt[] an inquiry into the process” that led to the plan’s (statute’s) adoption. The court then would examine the process for formulating the districting plan to

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141 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, and 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.
142 Id. at 763.
determine whether it was neutral, rather than partisan, and afforded “adequate opportunity for the presentation and consideration of differing points of view.” If so, a “strong presumption of validity should attach to whatever plan such a process produced.”143 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.144 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 science145 and interest group146 studies

143 Id. at 759.

144 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.

145 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)). It 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. Siedenfeld, 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 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.

146 See, e.g., 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., 3d ed. 1991) (concluding, based on a
show that once 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 “List” 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.”

Experiences with informational regulation and disclosure requirements in the environmental and financial contexts similarly teach that legislators are likely to “manage what they measure,” meaning that once forced to confront information of which they had not previously aware (about costs to “List” groups), legislators may make different decisions than they otherwise would have, simply as a result of gaining additional information to evaluate. Thus, if Congress does choose to harm a “List” group even after hearing from its representatives, at least it will be doing so consciously and in a somewhat public manner (because of the 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; H.R. REP. No. 3239, 81st Cong., 2d Sess. (1951), Report and Recommendations on Federal Lobbying Act; Congress and Pressure Groups, S. Print 161, 99th Cong., 2d Sess. at 13 (1986) (quoting statement by ACLU that “[w]hen groups push on both sides of an issue, officials can more freely exercise their judgment than when the groups push on only one side” (quoting LESTER MILBRATH, THE WASHINGTON LOBBYISTS 345 (Rand McNally & Co., 1962) (internal quotation marks omitted)).


149 See Chad M. Oldfather, Remedy ing Judicial Inactivism: Opinions as Informational Regulation, 58 FLA. L. REV. 743, 783 (2006) (quoting Karkkainen, supra note __, 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.
impact report and clear statement requirement), and perhaps will impose fewer costs on the group than it otherwise would have.

But what should a court do if a group harmed or burdened by a statute is not a “List” 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 twofold. On the one hand, the judiciary can and must intervene on behalf of constitutionally protected Carolene groups —e.g., African Americans, Native Americans— irrespective of whether Congress has included such groups on its “List” of disadvantaged interests or whether Congress consulted such groups during the legislative process. The Constitution demands as much. But, on the other hand, if the group is neither a “List” 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 its opinion that certain groups harmed by a statute are ones that should be added to the “List” in the future (and a copy of the opinion perhaps could be sent to Congress to ensure its consideration).\textsuperscript{150} 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 Court’s institutional positioning, and its 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 “List”) in the future.

\textsuperscript{150} See, e.g., Katzmann, supra note ___(128), at 665-66 (discussing general proposals for ways in which courts might transmit criticisms and suggestions to the legislature).
B. Checking The Legislature

As this last point suggests, courts not only must reinforce but also must check Congress’ 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 with this checking-and-balancing function.

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.\textsuperscript{151} In particular, Eskridge criticizes the Supreme Court’s decision in \textit{Block v. Community Nutrition Institute},\textsuperscript{152} 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.\textsuperscript{153} 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.”\textsuperscript{154} 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 through fees payable out of class action awards.\textsuperscript{155}

Combining these two insights, I advocate that courts adopt broader standing rules empowering members of “List” groups to

\textsuperscript{151} See Eskridge, supra note __ (4), at 159.
\textsuperscript{152} 467 U.S. 340 (1984).
\textsuperscript{153} Eskridge, supra note __ (Politics Without Romance), at 304-05.
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 “List” 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 taxpayers
(who would be entitled to challenge virtually any rent-seeking statute)
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 for them
in court. In other words, where the legislative corrective embodied in the
framework statute fails, perhaps because there are no surrogate
representatives for a particular group or because the appointed surrogates
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 legislature’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*¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸
FFRF and its members asserted standing based on the fact that the

¹⁵⁷ Id. at *6.
¹⁵⁸ 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
“extolling” the belief in God as the distinguishing feature responsible for the
effectiveness of faith-based social services. Id. at *7.
members were federal taxpayers opposed to the Executive Branch’s use of congressional appropriations (federal tax dollars) for these conferences. 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. 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.

The analysis in this paper 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 paper 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 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.

159 Id. at *7.
161 551 U.S. ___ (at *10, Part B).
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.\(^\text{162}\) This paradigm can be taken one step further, to create an interpretive rule that asks whether a particular statutory construction itself would operate to keep a “List” group out of the political process: If so, then that interpretation should be presumptively void, *irrespective of any clear statement by Congress*. In other words, the rule should hold that Congress cannot, under any circumstances, legislate in a manner that shuts a “List” group out of the political process in general, and that courts thus will not construe or interpret any statute in a manner that would have this effect. Unlike the process-based clear statement rule, which would ask whether Congress was aware of and intended or accepted the harm caused to a “List” group and would allow the statute/interpretation to stand if Congress intended it, the Ely-rule would refuse to enforce even avowed congressional intent to exclude a “List” group from the political process. 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 “List” 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 outcaste, or group of citizens who are permanent losers in politics.\(^\text{163}\) 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

\(^{162}\) *See supra* notes 13-14 and accompanying text.

implies that the law will not be applied arbitrarily against a disfavored class or group.\textsuperscript{164} Further, like the process-based legislative history approach, the proposed Elyrian rule has some precedent in the Supreme Court’s election law doctrine. In \textit{Thornburg v. Gingles},\textsuperscript{165} 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.”\textsuperscript{166} The difference between the Ely-rule and current equal protection analysis, however, is that whereas the latter merely dictates that any statute or interpretation which 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 “List” group, then the infringing statute or interpretation automatically would be presumptively void, or at least unenforceable by the courts.

\textbf{IV. 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.

I agree with Ely that courts should reinforce — not reengineer — broad participation and representation of all interests in the legislative process, and with Sunstein that courts should seek to encourage thorough, balanced legislative deliberation. But these ends should not be achieved through judicial usurpation of the task of balancing competing interests’

\textsuperscript{164} \textit{Id.} at 1308 (citing \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1954) (stating that due process rule of law includes an anti-unreasonableness feature)).

\textsuperscript{165} 478 U.S. 30 (1986).

\textsuperscript{166} \textit{Id.} at 44 (citing S. Rep. No. 417, 97th Cong. 2nd Sess. at 28).
claims; they should be achieved through judicial — and scholarly — encouragement of a congressional precommitment to broader representation and participation.