

ARTICLE

EARMARKING EARMARKING

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In the realm of lawmaking, to earmark means roughly to designate (through a statutory provision or an accompanying committee report) certain appropriated funds for narrow (nearly always geographically delimited) purposes. Policymakers, civil society organizations, and scholarly observers routinely condemn earmarking as a practice putatively tied to corruption or reflecting abuse of the political process—critiques that have spawned a variety of recent reform efforts. Yet a meticulous, prescriptive evaluation of the practice quickly raises fairly profound questions encompassing institutional design, legal theory, organizational practice, and the role of a cognitively overburdened public in a democracy. Upon closer inspection, for example, earmarks seem no more or less likely to be connected to corruption than a host of other highly targeted outputs of the legislative process, such as private immigration bills or intricate changes to complex regulatory statutes benefiting particular companies or interest groups. Earmarks can also serve as side-payments capable of protecting legislative bargains from costlier distortions as legislators seek to advance their constituents' interests. Moreover, not all earmarks constitute "pork barrel" spending, as principled legislators could use targeted measures in order to manage the enormous analytical difficulty of designing complex legal provisions applying general principles to specific situations and to protect legislators' role in a system of separated powers.

Given these factors and the highly variable substantive content of earmarking, I reach three conclusions: (1) some earmarks are substantively defensible; (2) on balance, conventional earmarks are probably more transparent than many other political deals; and (3) even if certain specific earmarks are not desirable, any sensible evaluation of the overall practice of earmarking implicates a broader discussion regarding the merits of the legislative process and the pluralist system in which it exists. A more analytically sound approach to earmarking would recognize the connection between targeted spending and legislative compromise. Such an approach would consider incremental changes promoting greater transparency and focus greater attention on discussions of the merits of individual earmarks. In contrast, aggressive efforts to limit earmarks altogether are exceedingly difficult to defend and may engender wider distortions in otherwise defensible statutes and regulatory policies.

Earmarks are a cancer: Not because they consume a large part of the budget—they don't; not because we shouldn't be spending money—we should. But because they feed the system of corruption that is the way Washington works.

—Lawrence Lessig¹

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¹ Lawrence Lessig, *Earmark Reform*, Lessig.org (Mar. 4, 2009, 5:05am), http://www.lessig.org/blog/2009/03/earmark_reform.html.

I think [earmarking reform is] the wrong thing to do. I don't think it's helpful. It's a lot of pretty talk, but only gives the president more power. He's got enough power already.

—Senate Majority Leader Harry Reid (D-Nev.)²

I. INTRODUCTION

Few discussions of American democracy get very far without placing lawmakers near the center.³ While the executive branch possesses enormous discretion and legal authority, legislative institutions are the ones who confer it. The Constitution vests lawmakers with the power to create federal courts and define their jurisdiction,⁴ to prescribe the rules for membership in our national community, and to determine national defense priorities.⁵ Statutes can crush or create new industries. They control the government's ability to borrow and repay money on behalf of the public.⁶ Legislators allocate scarce financial resources, too, and in the process, they sometimes "earmark" certain funds in statutory line items or committee reports for specific projects. But what among this vast expanse of statutory production constitutes *desirable* legislative activity, and where specifically does the practice of legislative earmarking lie on that continuum?

Judges and lawyers routinely treat this question as an important one. The impact of a statute depends on how lawyers and judges interpret it. Those interpretations, in turn, often pivot on normative presumptions about the lawmaking process—including in some instances the idea that general authorizing legislation is preferable to targeted appropriations as a means of shaping substantive policy outcomes. Consider, for example, the storied case of *TVA v. Hill*.⁷ Under the Endangered Species Act of 1973⁸ ("ESA"), the Secretary of the Interior must review and authorize all federal projects that affect the "critical habitat" of an endangered species.⁹ In 1975, the Secretary made the necessary findings under the ESA and determined that the Tellico Dam Project would jeopardize the existence of a newly discovered three-

² Shira Toeplitz, *Harry Reid Blasts Obama on Earmarks*, POLITICO (Jan. 25, 2011, 4:18pm), <http://www.politico.com/news/stories/0111/48151.html>.

³ For just a few examples from judicial opinions, see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935); *E.D.F. v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986). For some examples of scholarly perspectives from a variety of methodological perspectives and historical periods emphasizing the centrality of Congress, see DAVID ROHDE AND MORRIS FIORINA, *HOME STYLE AND WASHINGTON WORK: STUDIES OF CONGRESSIONAL POLITICS* (1989); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (Peter Smith, ed., 1958) (1885); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

⁴ U.S. CONST. art. III, § 1.

⁵ U.S. CONST. art. I, § 8, cls. 11–16.

⁶ U.S. CONST. art. I, § 8, cls. 1–2.

⁷ 437 U.S. 153 (1978).

⁸ 16 U.S.C. §§ 1531–1544 (2006).

⁹ *Hill*, 437 at 160 (citing 16 U.S.C. § 1535 (1976)).

inch fish—the snail darter.¹⁰ At the time, the Tellico Dam was nearly completed, and Congress had earmarked about one hundred million dollars for its construction in the preceding decade, including additional appropriations after the Secretary’s findings.¹¹ TVA argued that this spending should control, but the Court held that finding that these allocations superseded the ESA would work an implied repeal of the statute. As a result, it enjoined construction of the dam.¹²

Although the Court did not explicitly address the desirability of earmarking in the legislative process, the dispute nonetheless tells us something about the stakes involved in normative reasoning about the lawmaking process. In reaching its decision, the Court relied upon a canon of construction disfavoring so-called “repeals by implication,”¹³ and stated that “the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.”¹⁴ The majority may have framed its reliance on this statutory canon as a means for favoring the interpretive primacy of statutes most closely addressing the precise situation before the Court.¹⁵ Yet this clear statement rule, like all substantive canons, implicates a larger choice.¹⁶ The Court helped settle the matter of what the most relevant statute actually is in this case, choosing the broadly applicable authorizing legislation over the targeted appropriations measure buried in an omnibus bill.¹⁷ The majority opinion justifies this choice as a way of protecting legislators from themselves:

When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, re-

¹⁰ *Id.* at 162 (quoting 40 Fed. Reg. 47505–06 (1975)).

¹¹ *Id.* at 167, 172.

¹² *Id.* at 189.

¹³ *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

¹⁴ *Id.* at 190.

¹⁵ *Id.* at 188–89.

¹⁶ See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) (“You need a canon for choosing between canons, and there isn’t any.”).

¹⁷ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) (defending the canon against implied repeals by appropriations measures as a method for “promot[ing] the primacy of ordinary lawmaking, in which the constellation of interests is quite different and the likelihood of deliberation higher.”). After all, without some implicit hierarchy of views about what constitutes the desirable forms of legislative activity, it is not clear which is the more general statute and which is the more specific one. Without some framework for disaggregating legislative action, one could argue that both the ESA and the Tellico Dam earmarks were equally relevant to the situation before the Court; the appropriations provision was the most specific legislative enactment with respect to the Tellico Dam, while the ESA was the most specific with respect to the procedure that should be followed when infrastructure projects threatened the habitats of endangered species.

pealing by implication any prior statute which might prohibit the expenditure.¹⁸

By strictly construing enactments in appropriations bills, the Court signals that it favors broadly applicable authorizing statutes over earmarks, which it may view as little more than political deals hastily scribbled onto the complimentary napkins available in legislative cloakrooms. It adopts and acts upon its desired view of the legislative process. However, nowhere does the Court's majority consider how those scribbles might fit into the broader law-making mechanism that produces statutes such as the ESA in the first place, nor does it grapple with the consequences of removing earmarks from the legislative process.

The skepticism of legislative efforts to shape policy through appropriations earmarks lurking in certain judicial opinions is far from unique. In fact, a few recent abuses have drawn enormous attention to the practice in recent years.¹⁹ Legislators at one point sought to designate funding for a "bridge to nowhere" in Alaska²⁰ and have made sure through earmarks over the years that federal district court judges in the Northern District of Alabama have eight separate courthouses from where to judge.²¹ The fate of the perennially troubled V-22 Osprey long depended on congressional earmarks.²² The tilt-rotor aircraft is merely the tip of the iceberg with respect to earmarks in military appropriations, as House legislators reportedly added approximately \$1.8 billion in earmarks to military appropriations in 2007 alone.²³ A former senior NASA official was recently convicted in a corruption scheme involv-

¹⁸ *Hill*, 437 U.S. at 190.

¹⁹ For just a few examples, see President Barack Obama, *Remarks of the President: Weekly Address*, Nov. 13, 2010, available at www.whitehouse.gov/the-press-office/2010/11/13/weekly-address-president-obama-calls-earmark-reform; David Brooks, Op.-Ed., *Saving the House*, N.Y. TIMES, Jan. 5, 2006, at A25; Jeff Flake, Op.-Ed., *Earmarked Men*, N.Y. TIMES, Feb. 9, 2006, at A27; Jennifer Steinhauer, *Lawmakers' End of Earmarks Affects Local Programs Large and Small*, N.Y. TIMES, Feb. 7, 2011, at A16; Jonathan Weisman & Charles R. Babcock, *K Street's New Ways Spawn More Pork; As Barriers With Lawmakers Fall, "Earmarks" Grow*, WASH. POST, Jan. 27, 2006, at A1; Lawrence Lessig, *Delusions on the Hill? The Earmark Puzzle*, HUFFINGTON POST, (Mar. 17, 2010, 6:52am), http://huffingtonpost.com/lawrence-lessig/delusion-on-the-hill-the_b_502073.html; Jake Sherman, *Cantor Calls for Earmark Moratorium*, POLITICO (Oct. 13, 2010, 10:41am), <http://www.politico.com/news/stories/1010/43526.html>.

²⁰ See H.R. 3058, 108th Cong. § 186 (2005). In the end, legislators did *not* specifically earmark funding for the Gravina Island Bridge after substantial media coverage focused increasing public attention on the project. See Carl Hulse, *Two "Bridges to Nowhere" Tumble Down in Congress*, N.Y. TIMES, Nov. 17, 2005, at A19.

²¹ See *Bishop v. C & P Trucking Co.*, 840 F. Supp. 116, 116–17 (N.D. Ala. 1993).

²² See Christopher J. Castelli, *V-22 Funding Status Still Murky*, INSIDEDEFENSE.COM (May 11, 2006), <http://www.military.com/features/0,15240,96761,00.html>.

²³ See Marilyn W. Thompson & Ron Nixon, *Even Cut 50 Percent, Earmarks Clog Military Bill*, N.Y. TIMES, Nov. 4, 2007, at A1; Manu Raju, *Obey Earmark Proposal Stirs Opposition from Both Parties*, THE HILL (Dec. 12, 2007, 2:14pm), <http://thehill.com/homenews/news/13874-obey-earmark-proposal-stirs-opposition-from-both-parties>.

ing earmarks,²⁴ and earmarks make an appearance in other corruption cases.²⁵

These examples are perhaps vivid enough to explain the growing condemnation of legislative earmarking. Such criticism has taken root, moreover, despite a venerable undercurrent of American legal and political thought criticizing legislators for not being specific *enough* when they legislate.²⁶ Though varying in their desire to articulate such specific concerns about the practice of earmarking, a tendency to condemn earmarks unites an otherwise remarkably diverse group of political actors, scholars, and observers.²⁷ Legislators from both parties,²⁸ the President of the United States,²⁹ academic observers,³⁰ and university presidents³¹ have all heavily criticized earmarks. Even among successful lobbyists who celebrate their role in the legislative process, there is sometimes interest in joining the parade of earmark derogators.³² Because earmarks seem to benefit the few at the expense of the many, earmarks appear to epitomize profound problems with democratic institutions, potentially imperiling the institutions' legitimacy or viability.³³ Moreover, if earmarks reflect the disproportionate power of a small cadre of appropriators relative to other legislators, then the practice of earmarking may be undemocratic in some meaningful sense and facilitate the corruption

²⁴ See *United States v. Stadd*, 636 F.3d 630 (D.C. Cir. 2011).

²⁵ See, e.g., MARCUS STERN ET AL., *THE WRONG STUFF: THE EXTRAORDINARY SAGA OF RANDY "DUKE" CUNNINGHAM, THE MOST CORRUPT CONGRESSMAN EVER CAUGHT* (2007).

²⁶ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (Thomas, J., concurring); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring); *A.L.A. Schechter Poultry v. United States*, 395 U.S. 495 (1935); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (W.W. Norton, 1979); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319–20 (2000).

²⁷ See, e.g., Marc Thiessen, *House GOP Lives Up to No-Earmark Pledge*, WASH. POST (July 30, 2010, 12:58pm), http://voices.washingtonpost.com/postpartisan/2010/07/house_gop_lives_up_to_no-earma.html; Sam Youngman, *President Vows in State of the Union to Veto any Bill "Larded with Earmarks"*, THE HILL (Jan. 25, 2011, 10:16pm), <http://thehill.com/homenews/administration/140189-obama-to-issue-earmark-veto-threat-in-state-of-the-union-address>.

²⁸ See, e.g., David M. Herszenhorn, *Move to Ban Earmarks Exposes Both Parties to Divisions in Ideology*, N.Y. TIMES, Nov. 17, 2010, at A20; Claire McCaskill & Pat Toomey, Op-Ed., *Era of Earmarks Must End*, USA TODAY, Nov. 16, 2010, at A11.

²⁹ See Obama, *supra* note 19; Youngman, *supra* note 27.

³⁰ See generally LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 112–16 (2011); Lessig, *supra* note 19.

³¹ See, e.g., John Hennessy, *President's Column: To Save Innovation, Trim Entitlements*, STANFORD MAGAZINE, Jan./Feb. 2011, http://alumni.stanford.edu/get/page/magazine/article/?article_id=28032.

³² Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y REV. 23, 66 (2008) (expressing concern regarding "abuses that can result from 'earmarks'").

³³ See Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2009); Marc T. Law, Joseph M. Tonon & Gary J. Miller, *Earmarked: The Political Economy of Agricultural Research Appropriations*, 30 REV. AGRIC. ECON. 194 (2008); Lawrence Lessig, *In Praise of Tea*, HUFFINGTON POST (Nov. 11, 2010, 12:07pm), http://www.huffingtonpost.com/lawrence-lessig/in-praise-of-tea_b_782217.html.

of lawmakers harboring the power to send federal largesse in a particular direction.³⁴ At a deeper level, earmarks provoke arguments premised on the idea that they violate an ideal of accountable governance that ought to proceed on the basis of decisions guided by general principles with few if any exceptions, whether in the legal or legislative arena.³⁵

I take issue with these accounts. My contention is not that earmarking plays an ideal or irreplaceable role in the existing lawmaking process. Instead, my account seeks to shift the burden of proof back where it belongs, to critics of legislative earmarks who contend—implicitly and explicitly—that there is *either* something particularly worrisome about earmarks when compared to other forms of legislative or bureaucratic policymaking in a pluralist democracy, *or* that targeting earmarks would be a uniquely effective way of achieving desirable reforms in the lawmaking process. That position ignores at least four issues that I develop below.

First, I question the presence of any strong normative distinction between political dealmaking in the allocation of public dollars and in other contexts, such as bargaining over the terms of regulatory statutes (either in terms of the probability of legally actionable corruption or in terms of the broader prescriptive implications). Second, if the concern is not with earmarks per se but with the “culture of corruption” they allegedly represent, then one needs to consider whether formal limits on earmarks (such as those recently imposed in the House of Representatives)³⁶ are likely to accomplish the desired goals rather than simply displacing political bargains into other domains, such as the drafting of regulatory statutes, that on balance are probably more difficult to monitor.³⁷ Third, although much of earmarking probably constitutes pork barrel spending, the two concepts are not the same. In a system where lawmakers share power with executive branch officials but face a variety of difficulties in controlling executive bureaucracies, legislative earmarking can advance important separation-of-powers goals and help lawmakers manage the complexity of legislative drafting. Fourth, political deals are at the core of our system. Even if it is not desirable to turn every public decision into an opportunity for political dealmaking, neither is it necessarily the right goal (leaving aside the practical challenges of achieving it) to drastically limit the domain of political dealmaking in order to privi-

³⁴ See Sheryl Gay Stolberg, *What's Wrong with a Healthy Helping of Pork?*, N.Y. TIMES, May 28, 2006, at A4.

³⁵ See Allard, *supra* note 32, at 66.

³⁶ See Neftali Bendavid, *Tea Party Wins GOP Vow to Ban Earmarks*, WALL ST. J., NOV. 16, 2010, at A1; see also Paul Kane, *Legislators Again Advocate Permanent Ban on Earmarks*, WASH. POST, Feb. 8, 2012, at A10 (describing bipartisan efforts to ban earmarks in the 112th Congress).

³⁷ In addition, as I explain in Part IV, it is difficult to accept without considerable further elaboration the idea that targeting earmarking will fundamentally alter the institutions, voter attitudes, and elite behaviors supporting pluralist political bargaining. The question becomes even more intricate if the ambition is *not* simply to target political dealmaking but to change the nature of pluralist political bargaining so that it is more closely aligned with some coherent concept of socially desirable lawmaking.

lege governance by technocratic bureaucracy or civic republican decision-making scrubbed free of any concern with geographic or sectorial interests.³⁸

Acknowledging some of the complexities surrounding earmarks is not the same as settling for all time that the world would be worse without them. What makes more sense is to begin any serious analysis of the problem by presuming that, other things being equal, the existing distribution of political incentives will likely drive policymakers towards making deals, and without earmarks those deals will either be less transparent or less successful at enacting legislation. Those are outcomes that are not obviously desirable. As Speaker of the House John Boehner's (R-Ohio) recent experience during the debt ceiling debate may have revealed,³⁹ depriving the congressional leadership of the ability to shape legislative deals through earmarks can hobble its capacity to forge compromises in important domains of public policy.⁴⁰ Moreover, since the capacity for institutional change in our political system is scarce, it is not at all obvious why a \$15 billion annual problem⁴¹ (assuming it is a problem) should loom so large in an annual budget of more than \$3.8 trillion.⁴² Put differently, what follows is decidedly not an argument defending the substance of all or even most earmarks, but rather an effort to move the discussion back towards the substance of individual earmarked funding requests within the broader context of a system epitomized by political dealmaking.

Because of the foundational role of political dealmaking in the American lawmaking system, a sustained analysis of earmarking inevitably raises more profound questions about the legislative process in a pluralist democ-

³⁸ The reference to "technocratic bureaucracy" is meant to evoke the ideal of governance driven by the decisions of experts with relevant technical knowledge, largely insulated from the influence of ordinary politics or laypeople. Cf. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1995). As the term is used here, "civic republican" ideals tend towards criticism of interest-based representation, where legislators (for example) make decisions based on the concerns of their constituents rather than a more abstract, generalized conclusion regarding the well-being of the entire national community. My goal here is not to suggest that these ideals uniformly fit poorly with existing practices or desirable social goals in a democracy. Instead I want to suggest that the case for these ideals needs to be made in a manner that grapples with the context and details of the specific governance problem being addressed, and with some consideration for the costs and benefits of alternatives that are more tolerant of interest-based representation.

³⁹ Chris Cillizza, *Worst Week in Washington*, WASH. POST, July 31, 2011, at B2 (describing the Speaker's difficulty in controlling the Republican Caucus without earmarks).

⁴⁰ See *infra* note 110 and accompanying text (discussing the debt ceiling debate).

⁴¹ *FY2010 Earmarks by Appropriations Subcommittee*, OFFICE OF MGMT. & BUDGET, <http://earmarks.omb.gov/earmarks-public/2010-appropriations-by-spendcom/summary.html> (last updated June 14, 2011) (listing the total earmarks in FY2009 budget). Given the Republican House moratorium on earmarks, the amount is surely smaller in more recent budgets. See Carl Hulse, *How Budget Battles Go Without Earmarks*, N.Y. TIMES, Feb. 27, 2011, at A17 ("earmarks have disappeared from the budgetary landscape").

⁴² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013—SUMMARY TABLES 205* (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/tables.pdf>.

racy.⁴³ Implementing democratic pluralism entails trade-offs. Eliminating schemes facilitating relatively simple side-payments when legislators forge political deals, for example, almost certainly entails unrecognized costs—costs that can only be appreciated by considering analogous legislative, regulatory, and judicial arrangements permitting particularized decisionmaking. My premise here, plausibly enough, is that local political constituents as well as organized groups subject lawmakers to a variety of pressures that continue even if roadblocks arise on existing routes facilitating the production of earmarks, and the consequences of those pressures matter in the evaluation of legislative institutions. Moreover, although cognitive and organizational factors make the earmarking problem loom larger than other matters of legislative organization, even the act of formally defining the concept of an earmark entails a variety of analytical dilemmas that rarely turn on simple technical concerns, but instead evoke competing visions of democracy.

The argument proceeds as follows. Part II begins by defining earmarks and exploring several definitional problems that begin to shed light on the complexities inherent in critiquing earmarks. Part III takes up those complexities. Though acknowledging the possibility that many instances of earmarking are socially harmful, the goal here is to explain how some earmarking activity is less problematic than commonly supposed. The core point is not so much about earmarks as it is about the role of laws and side-payments in a pluralist system. In brief, Americans are heavily invested in a pluralist democracy that often features some policymakers garnering side-payments—which can be defined as bargains not central to the stated goals of a particular policy and that ease the creation of a new policy by procuring support from individuals who would otherwise not be supportive. It is difficult to imagine a pluralist system that does not involve political bargaining including side-payments, and even more difficult to defend such a system. Part IV explores the cognitive, institutional, and political economy dynamics making earmarks loom so large in the broader context of legal and governance problems. It then considers whether concerns about earmarking can be placed on sounder analytical footing. The result yields a greater focus on the debates central to law and democracy in a pluralist system, along with a far more modest agenda of procedural change that pales in comparison to ordinary critiques of earmarking.

II. DEFINING EARMARKS AND SETTING THE STAGE

A half-decade after ordering U.S. troops into battle in Iraq, President Bush in 2007 requested that Congress yet again make multi-billion dollar

⁴³ By pluralist democracy, I mean a system where official governmental policy is determined through democratic institutions, but where power exists in multiple economic, social, organizational, and geographic centers both outside and within the state. *Cf.* ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 22–24 (1968).

appropriations to pay for the war.⁴⁴ Buried in the language of a massive emergency supplemental appropriations bill⁴⁵ were a variety of funding carve-outs allocating funds to support, for example, peanut storage.⁴⁶ How any legislator could see these appropriations as an emergency is difficult for most observers to fathom. When one unpacks appropriations measures, even national defense bills, it is not difficult to ridicule legislators' role in the national security policymaking process when one unpacks the vagaries of legislative bargaining in the military construction and procurement process.⁴⁷

Yet the practice of earmarking plainly raises some tricky definitional and analytical questions. Perhaps in part because earmarks trouble such a wide variety of observers, critics advance a variety of explanations to bolster the intuition that earmarks are troubling in a pluralist democracy. Some criticize the impact of earmarks on the implementation of laws.⁴⁸ Critiques of earmarks tend to imply that there is a background legal framework against which earmarks operate that deserves to be protected from interference.⁴⁹ For example, a specific requirement to fund a given university program in a particular district appears to undermine (and, perhaps under certain plausible assumptions, to reduce the available amount of funding for) a broader program supporting research grants—both by depleting available funds and by (often) failing to conform to desirable, more technocratic funding allocation mechanisms such as expert peer review. When the Senate debated the merits of a blanket policy eliminating earmarks in university research funding during the 1980s, Senator John Danforth (R-Mo.) forcefully argued that the crux of the issue came down to “whether research dollars should be spent by the Appropriations Committee frankly on the basis of political logrolling” or, rather, “whether that money should be spent according to a competition process . . . on the basis of merit.”⁵⁰ In other cases, critics point to the provincial focus and absence of policy justifications that seem inherently con-

⁴⁴ President George W. Bush, *2007 State of the Union Address* (Jan. 23, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070123-2.html>.

⁴⁵ H.R. 1591, 110th Cong. (2007).

⁴⁶ See Joel Havemann, *War Bill Also Includes Funding for Spinach, Peanuts, Shellfish*, L.A. TIMES, Mar. 24, 2007, at A19.

⁴⁷ See, e.g., President George W. Bush, *Statement on 2007 and the New Congress* (Jan. 3, 2007), available at <http://georgewbush-whitehouse.archive.gov/news/releases/2007/01/2007/0103.html> (“Earmarks often divert precious funds from vital priorities like national defense”).

⁴⁸ See Kane, *supra* note 45, at A10.

⁴⁹ The conflict between the appropriations supporting the Tellico Dam and the Endangered Species Act that spawned *TVA v. Hill* is one example. See generally Elizabeth Garrett, *The Story of TVA v. Hill: Congress Has the Last Word*, in STATUTORY INTERPRETATION STORIES 58 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, eds., 2010).

⁵⁰ 132 Cong. Rec. 12626 (1986). Interestingly, Senator Danforth's brother, William Danforth, was the Chancellor of Washington University in St. Louis at the time, and repeatedly encouraged his brother to make an issue of earmarks. ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* 166 (2009). Notwithstanding Senator Danforth's concern, however, the bulk of federal research funding is not subject to earmarks.

nected to earmarks (in the conventional approach),⁵¹ or the perceived connection between earmarks and corruption.⁵²

Corruption is a strong word. Lawmakers may be falling short of defensible ideals of virtue when they channel research funding to their jurisdictions from federal coffers, but consider the incentives of a legislator at a town-hall meeting addressing budget issues, whose jurisdiction is *not* benefiting from these earmarks. Those very incentives, though often compatible with lawmakers' decisions to seek targeted funding for their *own* districts (funding that they rarely describe as earmarks), have resulted in bipartisan support for curbing earmarks. Since their victory in the 2010 midterm elections, Congressional Republicans have increasingly embraced earmark reforms.⁵³ President Obama's approach to reform contrasts with the Republicans' plans in several key respects.⁵⁴ Key to the reach of these efforts, however, is the question of how earmarks should be defined.

Indeed, to mention earmarks is to raise the question of how to define them. The first thing to notice about efforts to police earmarks is that definitions fracture as soon as the discussion moves beyond vague, abstract concepts.⁵⁵ It is hard to operationalize a definition of earmarks, in part because the ambition of regulating earmarks implicates a variety of only vaguely articulated principles. President Barack Obama has disagreed considerably with the preceding administration over a myriad of domestic and international policies.⁵⁶ Nonetheless, both administrations have used a common def-

⁵¹ See Allard, *supra* note 32, at 66.

⁵² See KAISER, *supra* note 50, at 160; Lessig, *supra* note 1. Kaiser's investigation of the ways of Washington, D.C. lobbyists assigns considerable credit (or blame, as the case may be) to lobbyist Gerald S.J. Cassidy for "inventing" a new way to do business in Washington by obtaining millions for clients through earmarks. In contrast, other sources suggest that earmarking has been staggeringly common for far longer—and indeed, has declined in recent decades at the state level, see Jeremy Jackson, *A Legislative Bargaining Approach to Earmarked Public Expenditures*, Working Paper, Washington University in St. Louis 2, 40–41 (Aug. 28, 2007) (citing data from the National Conference of State Legislators indicating a decline in earmarking from over 50% of state funds in the 1950s to less than 25% by the late 1990s). An important limitation in Kaiser's otherwise engrossing account, moreover, is its almost exclusive focus on a single lobbying firm with a particular focus on obtaining earmarked appropriations for clients. As noted below, general data on lobbying practices indicates that the vast majority of lobbyists work on matters unrelated to appropriations.

⁵³ See Herszenhorn, *supra* note 28, at A20 (discussing Republican House proposals).

⁵⁴ See Obama, *supra* note 19 (discussing President Obama's proposals, advanced through a threat to veto targeted spending deemed insufficiently justified by the executive branch, which focus more on transparency than outright elimination of earmarks).

⁵⁵ When political actors criticize earmarks, they rarely mention "appropriations riders" (the practice of placing precise limits or prohibitions on an agency's ability to spend money for particular purposes) *restricting* rather than *mandating* expenditures for particular purposes. Nonetheless, it is interesting to note that a mechanistic application of the Office of Management & Budget ("OMB") definition would encompass appropriations riders because of their impact on the discretion of the executive branch.

⁵⁶ See Peter Baker & Thom Shanker, *Obama Meets with Officials on Iraq, Signaling His Commitment to Ending War*, N.Y. TIMES, Jan. 22, 2009, at A7 (highlighting Presidents Bush and Obama's different views on Iraq); John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. TIMES, Jan. 26, 2009, at A1 (highlighting President Obama's departure from Bush-era fuel emission standards); Elizabeth Rosenthal, *Danish Conservative*

inition for earmarks.⁵⁷ The focus of the definition under both administrations is not on whether legislative instructions are in the statutory text or in report language. Instead the focus is on making it presumptively improper for the legislative branch to make any specific spending allocation limiting executive branch authority:

Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Administration to control critical aspects of the funds allocation process.⁵⁸

A literal reading of this definition generates something of a paradox, because virtually any legislative enactment limits executive discretion. One leading compendium that defines terms of congressional procedure acknowledged as much, concluding that under the most far-reaching definitions of earmarks—pivoting on the extent to which executive authority to spend money is restricted—“virtually every [congressional] appropriation is earmarked.”⁵⁹ Indeed, it borders on incoherence to aspire that Congress not “curtail . . . the ability of the Administration,”⁶⁰ when in our constitutional scheme legislators are the ones in charge of placing constraints on executive power.⁶¹

Judging from the remarks of earmarking critics like President Obama, perhaps one clarification that could be made to the official executive branch definition of earmarking would involve a focus on procedural issues. The absence of some review process for earmarks such as those funding the now infamous “bridge to nowhere” connecting mainland Alaska to Gravina Is-

Prepares to Take Reins of Climate Debate, N.Y. TIMES, Sept. 20, 2009, at A14 (highlighting different stances of the Bush and Obama Administrations on climate change); Morgan Smith, *More Schools Choose to Teach Abstinence-Plus*, N.Y. TIMES, Sept. 16, 2011, at A21 (highlighting President Obama’s support for “evidence-based” sex education programs in contrast to the Bush Administration’s support for “abstinence-only” teenage pregnancy prevention strategies).

⁵⁷ See *Earmarks*, OFFICE OF MGMT. & BUDGET, <http://earmarks.omb.gov/earmarks-public/> (last updated June 14, 2011).

⁵⁸ Memorandum M-07-09 from Rob Portman, Dir., Office of Mgmt. & Budget to Heads of Dep’ts and Agencies (Jan. 25, 2007).

⁵⁹ WALTER KRAVITZ, CONGRESSIONAL QUARTERLY’S AMERICAN CONGRESSIONAL DICTIONARY 87–88 (3d ed. 2001).

⁶⁰ *Id.*

⁶¹ But see *USDA v. Murry*, 413 U.S. 508 (1973), where the Court—in an odd jurisprudential turn—invalidated a harsh statutory rule excluding from food stamp eligibility any family with a member who was mistakenly claimed as a tax dependent in the preceding year. The Court concluded that the rule established an “irrebuttable presumption” regarding the link between tax dependent status and the legislative goal of policing food stamp expenditures. Yet in that context, as with earmarks, it is Congress itself that decides on its overall goals—and nothing in *Murry* or the other handful of cases deploying the “irrebuttable presumption” doctrine persuasively explained why those goals cannot include the implementation of a bright line rule to manage a complicated trade-off between rules and standards.

land, critics claim, is in fact the touchstone of an earmark.⁶² In this vein, the President claimed that provisions appearing in the Administration-supported Recovery Act had all undergone “review,” or implicated merit-based selection.⁶³ Unfortunately, this definition also breaks down as a meaningful analytical standard, especially when applied to the much-critiqued bridge to nowhere episode. Whatever disagreements existed in Congress about the Gravina Island Bridge, it is difficult to sustain the position that the process through which the bridge was funded evaded all meaningful review. Even if one acknowledges that thoughtful critics have raised serious questions about the principled justification for the bridge, it is hard to describe the process as entirely opaque when the provisions funding the bridge triggered the determined opposition of Senator Tom Coburn (R-Okla.) and other legislators who forced a specific committee vote on the issue.⁶⁴ Indeed, the focus on process can distort and truncate the necessary substantive debate surrounding these projects. Public discussions of the Gravina Island project made much of its inclusion in an omnibus spending bill,⁶⁵ for example, but rarely addressed the bridge’s potential to shape longer-term, potentially higher-density development in a region immediately surrounding Alaska’s second largest airport, or the fact that lawmakers eventually amended the relevant spending bill to allow greater flexibility in the use of the funds.⁶⁶

It may be instructive to consider the definitions of earmarks in House and Senate rules in assessing just how restrictive an appropriations provision can be before becoming an earmark—or how procedurally truncated its approval process would need to be before it raises concerns. Though often honored in the breach, the House and Senate definitions prove no more helpful, or less prone to loopholes, than the executive branch efforts. In a manner substantially similar to the relevant House rule,⁶⁷ Senate Rule XLIV provides as follows in relation to what is known as a “congressionally directed spending item”:

[T]he term . . . means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or

⁶² See Jake Tapper, *How Kosher is Obama’s ‘Ban’ on Pork?* ABC NEWS (Jan. 6, 2009, 4:05 PM), <http://blogs.abcnews.com/politicalpunch/2009/01/how-kosher-is-o.html>.

⁶³ President Barack Obama, Remarks by the President at GOP House Issues Conference (Jan. 29, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-gop-house-issues-conference>.

⁶⁴ See Carl Hulse, *Senate Retains Money for Disputed Alaska Bridges and Other Pet Initiatives*, N.Y. TIMES, Oct. 21, 2005, at A21.

⁶⁵ See Carl Hulse, *A First Small Step Against Pet Projects*, N.Y. TIMES, Apr. 29, 2006, at A9 (noting Senator Coburn’s and others’ criticism of earmarks in omnibus spending bills).

⁶⁶ See Hulse, *supra* note 20 (noting that the final bill released the previously earmarked funds to Alaska “with no strings attached”).

⁶⁷ House Rule XXI, cl. 9, H.R. Res. 5, 112th Cong. (2011).

to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process[.]⁶⁸

It is easy enough, perhaps, to envision what is meant by “primarily at the request” of a lawmaker. It is also clear that the definition encompasses more than conventional expenditures to include contracts, loans, grants, and other vehicles for federal funding. The most intriguing provision here, however, is the reference to “other than through a statutory or administrative formula-driven or competitive award process.” Lawmakers have certainly continued enacting appropriations that do not involve formula-driven or competitive procedures. Yet in the end, almost any explicit earmark can, with a minimum of lawyerly effort, be transformed into an administrative formula-driven allocation. Replacing a “competitive” allocation scheme with a statutory formula that privileges a certain region would not violate the letter of the Senate Rule. But what about its spirit? Should lawmakers be penalized for *intending* to evade regulations on earmarking? Successfully adjudicating legislators’ motivations is likely to be a messy business. Any effort to tighten the definition further, however, would quickly implicate these mental-state issues regarding a legislator’s motivation for designing a statutory formula.⁶⁹ Ironically, tightening the scope of earmarking definitions can lead to less clarity and prove futile.⁷⁰

Not surprisingly, the Congressional Research Service (“CRS”) has faced some challenges in assessing the overall value of earmarks generated through the appropriations process in recent years. Although CRS has sought to address legislators’ questions about the scope of earmarking, its most comprehensive report on the subject describes in detail how different appropriations bills have routinely employed distinct definitions of earmarks, rooted in committee-specific conventions, yielding only rough information implicating multiple definitions.⁷¹ Take, for example, the standard used in the agriculture-related appropriations bills that CRS analyzed: “any designa-

⁶⁸ Senate Rule XLIV, cl. 5(a), S. Res. 8, 112th Cong. (2011). Authorizing committees occasionally use a variety of other definitions. See Cong. Res. Serv., Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1995, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006).

⁶⁹ Perhaps a legislator interested in supporting an infrastructure project in her state does not, for example, truly sidestep the “spirit” of the statutory definition simply by creating a statutory formula that allocates the funding to a unique location in her state. If such a move is considered undesirable, it is hard to see why the action should be much less problematic if the legislator designs a statutory formula that happens to benefit three or four locations, only one of which is the one originally motivating the legislator. Indeed, if the earmarking problem is defined broadly enough to encompass legislators willing to support any bills motivated at least in part by particularistic goals, it becomes difficult to disentangle the concern over earmarks from a concern over a potentially huge proportion of legislative activity. Cf. KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991).

⁷⁰ See Ron Nixon, *Special Funds in Budget Called New Earmarks*, N.Y. TIMES, Feb. 6, 2012, at A13.

⁷¹ Cong. Res. Serv., *supra* note 68, at 2–3.

tion in the annual appropriations act or accompanying conference report which allocates a portion of the appropriation for a specific project, location, or institution.”⁷² By contrast, here is the CRS discussion of the definition of earmarks for defense-related bills:

[I]n the case of defense-related legislation, the term *earmark* is used to mean allocating funds at a level of specificity below the normal line item level. Understood in this way, a congressional committee would not be said to earmark funds if it adds money to buy additional fighter aircraft, for example, but would be said to earmark funds if it specifies that a particular kind of radar is to be incorporated into an aircraft upgrade program. This assessment uses the more narrow definition of an earmark. Within military personnel and operation and maintenance accounts, statutory provisions or conference committee report language that allocate funding to specific locations, institutions, or activities are counted as earmarks. Within procurement and Research, Development, Test, and Evaluation (RDT&E) accounts, congressional additions at the *project* level are identified as earmarks, provided the project level changes did not involve simply adding items to be procured or accelerating the pace of an ongoing research program.⁷³

This approach differs quite sharply from how earmarking is defined in agriculture-related appropriations bills,⁷⁴ or those governing a variety of other government functions.⁷⁵ Even the mighty CRS has little choice but to admit that it is comparing defense procurement apples to agricultural appropriation oranges. Under this definition, language in a committee report accompanying an agriculture-related bill that designates money for the purchase of widgets by an agricultural sciences department at a university counts as an earmark, but the same language attached to a bill related to the military would not. The distinctions among these definitions show how the putative amount of earmarking in defense-related bills, for example, is not precisely comparable to the amounts estimated to be in the agriculture bills. What is more, efforts by CRS and others to estimate the scope of earmarking activity in a federal budget of well over \$3.8 trillion a year shed relatively little light on the amount of spending—other than perhaps the conclusion that the total amount of earmarking activity is likely to be relatively small.⁷⁶

⁷² *Id.* at 6.

⁷³ *Id.*, at 11.

⁷⁴ See *supra* note 72 and accompanying text.

⁷⁵ See *id.* at 15, 18–19, 25–26, 29, 31, 38–39, 42–43, 46.

⁷⁶ The CRS approximation is roughly fifty billion dollars. *Id.* Using its own definition and date from Citizens Against Government Waste, the Heritage Foundation calculated that the FY2008 budget included nearly twenty billion dollars in earmarks. Brian M. Riedl, *Omnibus Earmarks Out: President Bush Should Cancel Congress' Pork Spending*, WEBMEMO: HERITAGE FOUNDATION, No. 1757 (Dec. 20, 2007), http://s3.amazonaws.com/thf_media/2007/pdf/wm1757.pdf.

Compared to the entire scope of the federal budget, estimates of total earmarking look like a rounding error.⁷⁷ Still, such a comparison should not necessarily imply that the problem is insignificant if we have other principled reasons to treat it as a problem. After all, a bribe offered by a defense contractor to an appropriations committee chair may seem trivial in amount compared to the size of a military contract, but if anything the asymmetry tells us something about how cheap it is to buy the legislator—an insight that makes a bribing situation potentially more troubling.⁷⁸ Moreover, as noted just below, we may be defining the problem in unduly narrow terms if we uncritically accept only the standard definition of “classical” earmarks. Nonetheless, the amount of money associated with earmarks as conventionally defined suggests we should consider whether criticisms of earmarking reflect deeper problems present elsewhere in the legal and legislative system.

From our scrutiny of definitional questions we can glean some preliminary conclusions. First, the problem of defining earmarks is not merely semantic. Rather, any definition implicates a familiar trade-off between under- and over-inclusiveness. Note, for example, that neither the executive nor the legislative definitions of earmarking encompass the use of narrow statutory formulas (as opposed to appropriations) in order to benefit discrete constituencies. Indeed, non-appropriations legislation can be the equivalent of earmarks as well. Changes in Medicare reimbursement rules, food safety regulations, or pharmaceutical rules benefit discrete communities. Targeted tax expenditures are other examples.⁷⁹ So are private immigration bills, which are conceptually similar to earmarks irrespective of whether they are stewarded through the legislative thicket by canny legislators interested exclusively in scoring political points with local constituents or genuinely concerned that current immigration statutes have produced an indefensible result in a particular situation.⁸⁰ The existence of quasi-earmarking arrangements

⁷⁷ Of course, if we include appropriations riders in the definition, then the *impact* of earmarks is harder to measure because it requires a qualitative judgment about the foregone benefits of policies that might have been implemented without the earmarks. We might also begin asking when (or whether) negative and positive earmarks might prove to be linked to each other in political compromises—whereby a legislator’s willingness to stop pushing for a negative appropriations earmark might be contingent on receiving something through a positive appropriations earmark. Inevitably, resolving this definitional matter does more than raise questions about how to quantify the impact of earmarks. It also shows how *some* positive appropriations earmarks might influence other legislative deals.

⁷⁸ See generally LESSIG, *supra* note 41.

⁷⁹ See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (striking down President Clinton’s use of the line-item veto for tax expenditures).

⁸⁰ See generally Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273 (2004) (discussing the changing fortunes of private immigration bills and the role they can play in creating exceptions to sweeping immigration statutes). Questions arise regarding the prescriptive merits of allowing such bills to occur. As with appropriations earmarks, however, even legislators motivated by civic republican goals above nearly all reproach would encounter considerable difficulty in writing immigration laws that anticipate every potential need for an exception. Indeed, legislators’ longstanding interest in immigration-related legislative vetoes

not involving appropriations raises the question of whether classic earmarks are a subset of a far larger problem implicating political deals favoring concentrated interests rather than dedicated streams of money.

Second, some earmarking definitions clearly implicate separation of powers concerns—wherein some definitions are an arguably impermissible attempt by the legislature to cabin executive discretion; others may be an inappropriate executive infringement on the congressional power of the purse. Moreover, despite these (perhaps unavoidable) dilemmas of overbreadth and under-inclusiveness, we might be able to use a combination of the concepts mentioned in definitions and public statements on the subject to generate what we might call an idea of a “problematic earmark” that can further the present discussion. To wit: the problem might be taken to involve a targeted spending measure requested by a legislator to fund a specific project of particular interest to a geographically concentrated community, particularly where such a measure circumvents a more general process of evaluation for allocating funding that would otherwise take place in the executive branch.

Finally, even at this stage we can see that any effort to implement a definition of earmarks implicates a variety of prescriptive trade-offs, including tricky rules-versus-standards questions, and choices about how to harmonize potentially competing values regarding separation of powers. All of these matters will make an appearance as we consider the structure of debates about earmarks.

III. EARMARKING THE EARMARKING DEBATE

The problem of nailing down a more detailed definition of earmarking delivers an early taste of some of the deeper complexities that arise with any sensible evaluation of earmarks and the system producing them. The following sections take up those complexities. Without suggesting that earmarking practices are guaranteed to enhance social welfare, I elucidate some of the implicit presumptions of the blanket critique of earmarking, tracing some of the utopian strands of that critique. In the course of questioning these presumptions, I develop an account of the function legislative earmarking serves in the lawmaking process and the resulting mixed merits of earmarks, along with more general observations about the prevailing institutions of American pluralist democracy. In contrast, the many critics of earmarking tend to malign the practice’s allegedly corrupt character, arguing that earmarking practices underscore the larger problems with prevailing legal and political institutions in the American political system. I take these critiques seriously, but find them utterly wanting.

underscores their reluctance to delegate maximal power over immigration to the executive. *See* *INS v. Chadha*, 462 U.S. 919, 995 (1983) (White, J., dissenting).

A. *If Earmark Reform is the Answer, What is the Question? “Pork,” Earmarks, and Differing Baselines for Evaluating Pluralist Politics*

A cliffhanger cloture vote in the Senate preceded congressional enactment in 2009 of one of the most significant public health statutes in generations, the Family Smoking Prevention and Tobacco Control Act.⁸¹ Over a decade earlier, the Food and Drug Administration (“FDA”) failed in an effort to assert regulatory jurisdiction over tobacco products on the basis of the Food, Drug, and Cosmetic Act⁸² (“FDCA”) as it existed at the time.⁸³ When the Supreme Court decided to read the FDA’s statutory authority narrowly and struck down the regulatory rules, conflict over tobacco regulation moved to Congress.⁸⁴ Given the growing national interest in the public health consequences of cigarette use, many lawmakers sought passage of legislation amending the FDCA to permit the FDA to regulate tobacco.⁸⁵ A dramatic legislative battle ensued, lasting roughly a decade. In the end, the new legislation vested broad authority in the FDA to regulate tobacco products.⁸⁶ The legislation required, among other things, a ban on all chocolate, vanilla, and other types of flavored cigarettes used to entice young smokers.⁸⁷

All such flavorings were banned, however, except one—menthol. The menthol provision cut against the grain of the bill’s broader focus on protecting public health. Nonetheless, carving out at least a temporary exemption for the nearly twenty million smokers buying mentholated cigarettes allowed legislators to avoid potentially significant divisions in the coalition supporting passage of the bill but allowed tobacco companies to continue using a flavoring that makes it easier for beginning smokers to form a habit through the use of a product engineered to mask the initially unpleasant qualities of cigarette smoking.⁸⁸

Though often themselves described as shrouded in smoke, earmarks are perhaps not so distinctive in certain respects. Clearly some earmarks fit the conventional understanding of legislative “pork,” which could be taken to mean a political deal (particularly involving funding) favoring a particular

⁸¹ Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified as amended at 21 U.S.C. §§ 301–399 (Supp. III 2009)).

⁸² Pub. L. No. 75–717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399 (2006)).

⁸³ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁸⁴ See generally Mariano-Florentino Cuéllar, *Coalitions, Autonomy, and Public Health Law: Organization and Regulatory Bargains in Food Safety, Tobacco Regulation, and Health Surveillance*, in *BEYOND CAPTURE* (Daniel Carpenter, David Moss & Steven Croley, eds.) (forthcoming).

⁸⁵ See Duff Wilson, *Senate Approves Tight Regulation Over Cigarettes*, N.Y. TIMES, June 12, 2009, at A1 (noting the history of federal involvement in regulating cigarettes).

⁸⁶ Family Smoking Prevention and Tobacco Control Act § 901 (to be codified at 21 U.S.C. § 387a).

⁸⁷ *Id.* at § 907(a)(1)(A) (codified as amended at 21 U.S.C. § 387g (Supp. III 2009)).

⁸⁸ See Michael Siegel, Perspective, *A Lost Opportunity for Public Health—The FDA Advisory Committee Report on Menthol*, 364 NEW ENGLAND J. MED. 2177, 2177 (2011).

constituency and resulting in an infrastructure project or similar expenditure that is inefficient in social welfare terms.⁸⁹ Accordingly, analyzing earmarks sheds light on the question of whether some legislative deals resulting in “pork barrel” spending may have broader merit. But as we will see, the merits of earmarks raise even more interesting problems than those raised by an investigation of the ultimate merits of pork barrel spending, because not all pork is created equal, and it is misleading to assume that all earmarks are best understood as examples of pork.

As would be the case with pork barrel spending, the menthol deal plainly raises the question of whether carve-outs in complex regulatory legislation produced by congressional authorizing committees are comparable or perhaps even more troubling than earmarks—a point to which I return below. In addition, the fate of menthol underscores the extent to which dealmaking plays a prominent role even in domains where considerable scientific and technical information exists regarding the nature of a problem and the viability of potential solutions. Public health advocates have roundly criticized the menthol exemption.⁹⁰ What if, instead, the criticism of the menthol exemption was simply on the ground that it carves out a particular issue in a manner that advantages some interests over others? This argument is comparable in most respects to that advanced by critics of earmarks, and thus it implicates the merits of political bargaining as well as the benefits and costs of legislative specificity.⁹¹

Whether legislators take up exemptions for mentholated cigarettes in a vast regulatory statute or funding for military procurement projects, political bargains permeate the legislative process. Small wonder: where legislators’ interests (channeling their constituents’ interests) do not entirely converge, policymaking is liable to depend to some degree on side-payments—of varying characteristics—because policymakers will not always agree on ends or means, and because long-term bargains are often difficult to enforce in the political system.

The dilemmas associated with the FDA tobacco legislation starkly illustrate an early question relevant to any legislative reform effort. The problem is not just to articulate a general conception of desirable lawmaking practices but also to consider how to mesh the ideals with the constraints of existing institutions and political pressures. One could, for example, criticize both the compromise on menthol, as well as earmarks, by emphasizing the value of legislation written to take account of general principles, unsoiled by crass

⁸⁹ See generally JOHN A. FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–68* (1974) for a classic overview of this theory of “pork barrel.”

⁹⁰ See Stephanie Saul, *Opposition to Menthol Cigarettes Grows*, N.Y. TIMES, June 5, 2008, at C1 (noting opposition to menthol exemption by seven former Secretaries of Health and Human Services in Democratic and Republican administrations).

⁹¹ Meanwhile, for lobbyists who make their living by chiseling away (or appending) nuggets of legislation, perhaps there is something to be gained by channeling public frustration towards earmarking practices and away from bargaining over regulatory statutes.

political compromises exempting particular products from regulation or allocating some cache of funds to a particular district. Time and again, normatively oriented theorists of legislation have articulated ideas in this vein as they grapple with the question of what constitutes sensible lawmaking practice.⁹² Concern that the lawmaking process will devolve into a colossal jigsaw puzzle of political deals also explains the existence of single-subject rules seeking to limit the existence of omnibus legislation.⁹³ Such normatively oriented discussions of the legislative process thus seem to imply that there is an optimal degree of specificity for lawmaking: targeted funding measures or blunt carve-outs are (to some observers) too narrow to reflect the ideal lawmaking process, while vast omnibus legislation is too vague.

But as the perennially threatened state of single-subject rules readily demonstrates, implementing any effort to police an inherently political, discretionary process is no easy feat. Presumably, one should not rush to the conclusion that all private interests should be screened out of the legislative process without some extraordinary degree of confidence in the capacity of society to derive sensible general goals.⁹⁴ Moreover, if we have good reason to think that existing institutions, political conventions, and interests will continue to create incentives for political deals despite efforts to police them in some contexts, we should consider whether the resulting displacement of political deals to more opaque environments is worth the effort. In short, if earmarking reform is the answer to the problem of disciplining legislators' penchant for political dealmaking, we need to consider at least two further concerns regarding such efforts. First, does it make sense to distinguish dealmaking through earmarks from the kind of compromise reflected in the menthol exemption built into the FDA tobacco bill? Second, what consequences could arise if political dealmaking is regulated in some contexts but not others?

In addressing these issues, earmarking questions are difficult to disentangle from the merits of political dealmaking because of the role funding can play in cementing legislative coalitions. As an example, imagine the painstaking process through which a congressional committee chair assembles a cross-cutting bill addressing federal transportation policy. Even if the

⁹² See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (describing Congress as "made up of reasonable people pursuing reasonable purposes reasonably").

⁹³ See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 813–14 (2006). There is much to be said for the idea that the line that single-subject rules aim to police is highly unstable, as it depends on substantive judgments about the scope of a particular "subject." Even if those lines were amenable to straightforward demarcation, it is quite likely that legislators would often be able to get around them by reshaping the content of a bill. Nonetheless, the persistence of such rules in some jurisdictions, particularly at the state level, illustrates the pull of ideals premised on limiting legislators' capacity to strike straightforward political deals within a specific piece of legislation.

⁹⁴ That, of course, is one version of precisely what the lawmaking process is designed to address.

committee chair has a prescriptively compelling vision for how to allocate federal highway dollars and how to craft an urban mass transit strategy addressing multiple policy concerns, it strains credulity to expect that the force of the chair's normative logic would assuage every political roadblock. But by blending broader arguments about national priorities with distributive benefits capable of luring otherwise reticent legislators, the leadership of the House Transportation and Public Works Committee steered a major transportation bill to enactment.⁹⁵ Absent some compelling rationale to think of side-payments as inherently problematic in our system, the merits of this arrangement depend—logically enough—on the social value of the transportation bill in the form that it was passed relative to the social cost of the earmarks.

Should we aspire to live in a system that side-steps side-payments? There is little to support the idea that frequent use of side-payments to grease the policymaking process is bound to deliver an overly bloated government.⁹⁶ In fact, side-payments matter because policymakers relevant to lawmaking or statutory implementation rarely agree completely on ends or means. Regardless of whether such disagreement is a characteristic of any conceivable political system, it is all but certain to arise in a pluralist system incorporating a relatively liberal tolerance for divergent political perspectives and cultural values. Given this reality, a pluralist, “open access” political system without side-payments is difficult to sustain or even define.⁹⁷

Moreover, earmarks are far from unique as instances of legislative micro-management. Appropriations riders essentially earmark funding for *any* purpose save the ones prohibited.⁹⁸ Immigration earmarks exist in the form of exemptions from more general provisions, and private bills can give rise to arguments about the value of carve-outs and highly targeted lawmaking as well as the cost of a system that perhaps relieves too much pressure

⁹⁵ See Diana Evans, *Policy and Pork: The Use of Pork Barrel Projects to Build Policy Coalitions in the House of Representatives*, 38 AM. J. POL. SCI. 894, 913 (1994). To the extent that this strategy encourages some legislators to hold out for political deals rather than considering the merits of cross-cutting policy appeals, it is worth considering that a legislator's capacity to make a credible threat of voting against legislation depends on the issue and the characteristics of her district. Consider, for example, a Northern California legislator's questionable ability to threaten credibly to vote against a high-profile environmental protection measure favored by her party and her constituents. Moreover, the capacity of particular legislators to block legislation depends in part on the internal organization of the legislature, which implicates broader issues regarding the distribution of power within Congress. See, e.g., David P. Baron, *Legislative Organization With Informational Committees*, 44 AM. J. POL. SCI. 485, 486–87 (2000); Peverill Squire, *Member Career Opportunities and the Internal Organization of Legislatures*, 50 J. POL. 726, 741–42 (1988).

⁹⁶ See, e.g., Marco Battaglini & Stephen Coate, *Inefficiency in Legislative Policymaking: A Dynamic Analysis*, 97 AM. ECON. REV. 118, 139 (2007).

⁹⁷ See DOUGLASS NORTH, JOHN WALLIS & BARRY WEINGAST, *VIOLENCE AND SOCIAL ORDERS* 112–17 (2009) for a discussion of the characteristics of an “open access” order.

⁹⁸ Dan Morgan & Juliet Eilperin, *Microsoft Allies Urge Congress to Cut Antitrust Unit's Budget*, L.A. TIMES, Oct. 10, 1999, available at <http://articles.latimes.com/1999/oct/15/business/fi-22481> (discussing legislative efforts among legislators supportive of Microsoft to use appropriations riders in order to limit the Department of Justice's Antitrust Division spending to affect its enforcement of laws against Microsoft).

from a political economy that would produce greater demand for more far-reaching changes.⁹⁹ Carefully targeted modifications of regulatory statutes designed to benefit particular regions also pose challenges, and they may be more pronounced in terms of ultimate impact than classic ones.¹⁰⁰

These examples reiterate that the potentially high cost of curbing conventional earmarks may not fully address the problems that arise when legislators write targeted provisions. They also showcase how some defensible pluralist cases exist in relation to various examples of targeted provisions that exist in the legislative process, ranging from private immigration bills to targeted changes in intricate regulatory statutes designed to benefit specific constituencies.¹⁰¹ Such considerations complicate the calculus regarding the merits of drastic restrictions on earmarks.

Recall, too, that legislators may often face strong incentives pushing them towards striking legislative bargains addressing local concerns, and there is no reason to expect such incentives to dissipate in the absence of earmarking.¹⁰² Policy outputs are often driven by the intersection of funding decisions, statutory schemes, and administrative arrangements. It is hard to ask even the most principled legislator to disregard the impact of such policy outputs on the people, interests, and communities within her district. As long as some lawmakers' votes are critical for a law's passage but their political circumstances make it a difficult vote, there is every reason to think (in a pluralist system) that side-payments will often need to occur. Therefore, unless observers are willing to define with some precision a world of no side-payments (hard enough) and coherently advocate for such a vision, the issue confronting reformers is not whether to accept side-payments, but what form they should take.

Plainly, legislators have plenty of experience writing provisions that deliver particularized benefits without explicitly naming beneficiaries. Through the American Jobs Creation Act of 2004,¹⁰³ for example, lawmakers provided nearly \$500 million in tax breaks to companies working on a natu-

⁹⁹ See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. (forthcoming 2012) (discussing special provisions of the 1990 Immigration Act designed to benefit particular constituencies).

¹⁰⁰ See generally, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

¹⁰¹ Food and agriculture policy is another domain where technical authorizing provisions can have staggering regional effects. See BILL WINDERS, *THE POLITICS OF FOOD SUPPLY: U.S. AGRICULTURAL POLICY IN THE WORLD ECONOMY* (2009). Indeed, the long history of agriculture policy's role in addressing concerns about rural development showcases the extent to which legislators have extensive experience in using federal regulatory and financial power to allocate benefits regionally. Accordingly, this is another domain that could be affected absent some deeper and unlikely change in the public's (or legislators') political motivations.

¹⁰² Note that advocates for reforming earmarking sometimes seem to imply (but rarely develop the point explicitly) that successfully squelching targeted appropriations would later make it easier to achieve other (perhaps even more ambitious) institutional reforms. See *infra* Part IV.b.

¹⁰³ Pub. L. No. 108-357, 118 Stat. 1418 (2004) (codified as amended in scattered sections of 26 U.S.C.).

ral gas pipeline in Alaska.¹⁰⁴ Although the primary beneficiaries were reportedly ConocoPhillips, BP, and ExxonMobil,¹⁰⁵ congressional staff crafted the bill in a manner that stopped well short of actually naming the companies. Instead, the statutory text provided tax relief to companies with gas treatment plants beyond “64 degrees North latitude,” if they process “Alaska natural gas for transportation through a pipeline with a capacity of at least 2,000,000,000,000 Btu of natural gas per day.”¹⁰⁶ Even if they refrain from such statutory sophistry, legislators living with limits on earmarking can allocate funds to somewhat more general categories while making it thoroughly clear to agencies how they would like the funds to be spent.¹⁰⁷ Not surprisingly, legislators continue to pursue *de facto* earmarks despite living under the increasingly aggressive rules in the House of Representatives designed to squelch earmarks—and in some cases, despite having campaigned aggressively against federal spending.¹⁰⁸

Accordingly, we can expect *de facto* earmarking to persist even in the face of efforts to regulate its *de jure* versions. One can expect the *de jure* efforts to have some distributional consequences. Strict legislative rules purporting to ban earmarks may do little to prevent lawmakers from deftly writing general statutes to assuage local concerns. In some cases legislators may simply insist that a particular instance of blatantly targeted legislation simply does not count as an earmark, as did one fierce critic of earmarking in the House when he voted to slash military spending and then quietly supported restoration of the money, including \$150 million to build a ship in his district.¹⁰⁹ But an ostensible ban undertaken by the leadership of a given house of Congress at a particular time almost certainly makes it harder for the legislative leaders involved to move bills through the legislative process. House leaders associated with the recent attempt to institutionalize an earmark ban, for instance, may find it difficult to shape explicitly the market for legislative bargains by disrupting both the supply of and (however imper-

¹⁰⁴ See *Tax Breaks Benefiting Energy Companies in the Corporate Tax Bill, HR 4250*, PUBLIC CITIZEN (Oct. 29, 2004), http://www.citizen.org/cmep/article_redirect.cfm?ID=12395.

¹⁰⁵ See *id.*

¹⁰⁶ 26 U.S.C. § 43(c)(1) (2006).

¹⁰⁷ See Allen Weinstein, *The Pentagon Budget's Stealth Earmarks*, MOTHER JONES (June 6, 2011, 2:00 AM), <http://motherjones.com/print/116321>.

¹⁰⁸ For just one example synthesizing these developments in the House of Representatives during the 112th Congress, see Ron Nixon, *Cost-Cutters, Except When the Spending is Back Home*, N.Y. TIMES, July 19, 2011, at A16, noting the public relations efforts of GOP House freshmen regarding earmarks.

¹⁰⁹ See, e.g., Editorial, *Pork? That? What Do You Mean?*, N.Y. TIMES, Aug. 1, 2011, at A24.

Representative Steven Palazzo, of Mississippi, who campaigned fiercely against earmarks, voted to slash military spending and voted for an amendment to quietly restore the same money, including \$150 million for a warship to be built in his district. Pork? No, he insists, saying he merely voted for a package that happened to include that hometown goodie and the Pentagon now must decide how to finance it.

Id.

factly) demand for some earmarks. Some observers suggest that Speaker Boehner's capacity to achieve a far-reaching legislative bargain involving long-term deficit reduction was almost certainly weakened by his inability to deploy the earmarks often used to improve prospects for legislative dealmaking.¹¹⁰

Indeed, perhaps earmarking reformers are right that a distinctive mix of institutional changes and evolving public attitudes could cut against legislative measures that are similar to earmarks but avoid falling under the precise definitions used by the relevant committees. Bargaining over how to assuage local or particularistic concerns might then be displaced towards complex regulatory statutes. Why not simply encourage legislators to strike the generally required bargains purely within the context of regulatory statutes such as the Clean Air Act, federal aviation safety statutes, or the Family Smoking Prevention and Tobacco Control Act?

But not all political deals are created equal. Even if many earmarks involve pork barrel projects and even if one supports the goal of limiting political deals involving pork barrel spending, greater problems could result from increasingly pushing dealmaking into the regulatory process.¹¹¹ In fact, it is far from obvious that any greater transparency or lower political transaction costs would be associated with political deals resulting in the modification of complex regulatory statutes. Ironically, the very same qualities that make earmarks stand out in discussions about the legislative process—their fairly obvious price tag, and the fact that they tend to have discrete, identifiable beneficiaries—could make the interest-serving provisions of complex

¹¹⁰ See Cillizza, *supra* note 39, at A2. The piece includes the following observation:

Boehner had maintained for days that while he didn't have the 217 "ayes" he needed to pass the bill yet, he would get them. But, robbed of the usual persuasion tactics on a tough vote — a bridge here, a highway there — thanks to the House's self-imposed earmark ban, there was little he and his leadership team could do as it became clear that the hard "nos" weren't softening.

Id.

¹¹¹ It is, of course, logically possible that strictly enforced limits on earmarking could still be compatible with legislative choices to support legislative compromises *without* targeted benefits. If we leave aside the potential for some targeted earmarks to deliver socially desirable outcomes, the probability that restrictions on earmarking will result in legislation free of geographically targeted dealmaking depends heavily on assumptions about legislators' incentives and the costs and benefits of dealmaking in other contexts (such as within complex regulatory statutes). In similar fashion, it is possible that legislators in an earmark-free world will still enter into (higher transaction cost) political deals, but that such deals will occur less often, in part because they are (other things being equal) less desirable to legislators than deals involving appropriations. These possibilities, however, raise two important issues that often run the risk of falling away in discussions of legislative reform: (1) that any prediction about the consequences of strictly restricting earmarks depends on presumptions about legislators' incentives and the constraints imposed by lawmaking institutions; and (2) comparing the social merit of different kinds of political deals is a subtle enterprise, and it is unlikely that the sheer number of deals—by itself—provides a reliable guide to what is a socially desirable output of the lawmaking process.

regulatory bargains more difficult to observe.¹¹² In fact, it may be more difficult to sustain the incentives for expertise and administrative competence if agencies become the primary site for working out the necessary side-payments. From a transaction cost perspective, it borders on madness to adopt a rigid preference for bargaining over side-payments in settings involving complicated statutory arrangements, such as the Clean Air Act.¹¹³

Side-payments can also play a role in the maintenance of long-term legislative bargains that are often difficult to enforce in the political system. In situations where advanced countries with well-developed legal systems confront conflict, institutions exist for adjudication and legal enforcement to determine whether pre-existing bargains (either statutes or contracts) have been honored or breached.¹¹⁴ The effectiveness of such institutions depends on a variety of factors, which only partially resemble the less elaborately institutionalized bargaining within the more fluid legislative context. By contrast, while formal legal institutions play an important role in *enforcing* and fleshing out the consequences of statutory bargains, they play a relatively *limited* role in two areas that can give rise to the need for *ex ante* side-payments: the maintenance of procedural features internal to the legislature and the policing of bargains regarding the precise details of *how* complex legislation will be considered (and thus what political valence it will have with the public).¹¹⁵ The most formal acknowledgement of this limited role is the political question doctrine,¹¹⁶ under which the Court abstains from deciding a case when prudence dictates that the elected branches solve the controversy. The changing fortunes of the doctrine almost certainly reflect judicial intuitions regarding the courts' institutional capacity to shape outcomes effectively over time.¹¹⁷ The material point is that formal doctrine and informal practice leave a substantial space of thinly policed bargaining in our pluralist political system, and particularly in the legislature, at the mercy of more fluid institutional arrangements, of interactions involving repeat play, and other details of legislative life. The resulting space for bargaining is one where some bargains persist, but many are quite fragile.

That fragility is not infinite. With overlapping generations of legislators and a variety of institutional mechanisms, we can observe some stability in

¹¹² Nor should we assume that some conveniently symmetrical balance of forces would ensure scrutiny for all relevant provisions of a complex regulatory statute. While organized interests often battle over major elements of legislative bargains, major fights over intricate statutes can sometimes overwhelm some of the interests involved—particularly during major legislative battles where bills evolve quickly in response to a variety of pressures.

¹¹³ See generally ACKERMAN & HASSLER, *supra* note 100.

¹¹⁴ See generally NORTH, WALLIS & WEINGAST, *supra* note 97.

¹¹⁵ See Cuéllar, *supra* note 99 (discussing the difficulties that legislators supporting the 2007 compromise immigration reform package faced in policing bargains made regarding precisely how the legislation would be considered in the Senate).

¹¹⁶ See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (defining the classical political question doctrine).

¹¹⁷ See generally Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

bargaining. Some examples include: moderate senators' temporary compromise on judicial nominations in the latter years of the Bush Administration,¹¹⁸ the continuing existence of the filibuster in the Senate,¹¹⁹ and the persistence of the "motion to recommit" in the House.¹²⁰ These examples involving procedural features are complemented by the apparent persistence of some bargains as legislation moves through the process, including the enactment of the Fair Sentencing Act,¹²¹ which required individuals across the political spectrum to avoid politically tempting amendments on matters such as the death penalty (some with potential policy consequences almost certainly considered very desirable by certain lawmakers).

In a setting where legislators interact with each other over long time horizons, reputational considerations are sometimes sufficient to preserve legislative deals across bills and across time.¹²² What legislators nonetheless lack is an always-reliable, infinitely resilient institutional capacity to enforce political bargains without side-payments. And plenty of historical experience showcases the collapse of certain apparent bargains—witness the nearly achieved 2007 immigration reform effort.¹²³ Ex ante side-payments, in the form of an earmark, can help preserve the stability of otherwise fragile political bargains. As such, a critical question in evaluating them turns on the value of the resulting framework for federal transportation policy, foreign aid, public health laws, or other substantive statutes.

B. Separation of Powers

The preceding discussion abstracts somewhat from the constitutional system of separated powers. Legislators enmeshed in that system would nonetheless be justified in thinking about earmarks issues not purely as a matter of physical geography but as a question of legal geometry, concerning matters such as agency problems and legislative prerogative relative to executive power. Particularly, given legislators' role in a system that pur-

¹¹⁸ Humberto Sanchez, *Filibuster Tests Senate Agreement on Judicial Nominations*, ROLL CALL (Dec. 7, 2011), http://www.rollcall.com/issues/57_70/filibuster_tests_senate_agreement-210833-1.html.

¹¹⁹ See RICHARD S. BETH & STANLEY BACH, CONG. RES. SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE* (2003).

¹²⁰ MEGAN S. LYNCH, CONG. RES. SERV., RL34757, *THE MOTION TO RECOMMIT IN THE HOUSE OF REPRESENTATIVES: EFFECTS, RECENT TRENDS, AND OPTIONS FOR CHANGE* 14 (2008).

¹²¹ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (to be codified in scattered sections of 21 and 28 U.S.C.).

¹²² For some interesting examples using different analytical approaches, see B. Douglas Bernheim et al., *The Power of the Last Word in Legislative Policy Making*, 74 *ECONOMETRICA* 1161 (2006); Edward B. Hasecke & Jason D. Mycoff, *Party Loyalty and Legislative Success: Are Loyal Majority Party Members More Successful in the U.S. House of Representatives?*, 60 *POL. RES. Q.* 607 (2007).

¹²³ See Cuéllar, *supra* note 99. Why some bargains collapse and others do not probably depends at least a bit on the extent of public salience and on the extent to which politicians think of the "currency" in which side-payments are made as fungible; but that is a separate question.

ports to value separation of powers, it is exceedingly difficult to argue that legislative supremacy in making specific funding allocations is inherently problematic.

The most extreme criticisms of earmarks routinely skirt over important problems of legislative organization and power-sharing between legislators and executive officials.¹²⁴ Yet before addressing issues arising in the context of separation of powers, it is important to address a persistent criticism that earmarks merely allow a small cadre to impose their will on the executive branch. Individual legislators need the cooperation of their fellow legislators if they are to devote resources to their preferred projects. Even when a legislator individually pressures a bureaucracy to approve a given expenditure,¹²⁵ the legislator's influence presumably reflects the agency's calculation of the legislator's capacity to influence the enactment of future legislation. In practice, of course, power is not uniformly distributed in the legislature.¹²⁶

But neither is power exclusively concentrated in the hands of a narrow band of legislative leaders or appropriations committee members. Some members unquestionably have more power than others. Although legislators compete aggressively for slots on appropriations committees or for membership in the congressional leadership, precisely how much power some of the successful competitors harbor in a world where they must compete within party caucuses for votes is not obvious and has produced one of the most longstanding debates in the study of congressional organization.¹²⁷

Even if one acknowledges the distinctive power of appropriators in overseeing agencies or otherwise setting congressional policy, they are operating in a system that makes them depend to some degree on authorizers to shape policy outcomes.¹²⁸ If appropriators can only achieve their goals by enacting legislation (or credibly threatening to do so), they would harbor an interest in enticing other legislators to benefit from the appropriations process. To the extent that appropriations committees have distinctive authority in some domains, such an arrangement would tend to depend on the assent of (and, presumably, the benefits derived from such arrangements by) other

¹²⁴ Note that this point is also relevant to parliamentary systems, inasmuch as legislators face agency problems in controlling career ministry officials who might retain considerable authority to shape policy through the dispensation of funding in the absence of fairly strict statutory controls. See, e.g., Lanny W. Martin & Georg Vanberg, *Policing the Bargain: Coalition Government and Parliamentary Scrutiny*, 48 AM. J. POL. SCI. 13, 24–25 (2004).

¹²⁵ Cf. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245 (1971) (noting that pressure by a powerful legislator on the Department of Transportation, when acknowledged in the context of a regulatory record otherwise not supporting the decision in question, renders the decision arbitrary and capricious).

¹²⁶ See generally KREHBIEL, *supra* note 69; DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991).

¹²⁷ See Keith Krehbiel, *Where's the Party?*, 23 BRIT. J. POL. SCI. 235, 235–37 (1993) (briefly summarizing the relevant literature).

¹²⁸ Cf. TVA v. Hill, 437 U.S. 153, 191(1986) (concluding that appropriations committees lack the jurisdiction of authorizing committees over key functions of government).

legislators.¹²⁹ It is, in short, highly unlikely that earmarks are entirely controlled by legislators serving on appropriations committees or subcommittees. Nor do all earmarks benefit obvious geographic constituencies.¹³⁰

Few serious observers of the American system would argue that the legislature should be irrelevant to oversight of the bureaucracy. If one is highly invested in a formalistic account of the scope of legislative power, it is perhaps not so hard to imagine that earmarking is but one consequence of the legislature's unwillingness to write more detailed statutory provisions of general application, thereby avoiding the need for earmarks and preserving for itself a more prominent yet institutionally appropriate role in national life.¹³¹

The long arc of state-building in American history offers ample reason to question whether legislatures can long avoid broad delegations even when lawmakers are strongly committed to limits on executive power. The Jeffersonian-Republicans' embrace of an elaborate embargo requiring expansive delegations to the Executive in the run-up to the War of 1812 is just one example.¹³² Facing harassment on the high seas, the Republican Congress creating a licensing system to regulate commerce, banning most trade with Great Britain and France without explicit Executive approval.¹³³ Merchants resisted this more-narrowly tailored statute by effectively exploiting its loopholes.¹³⁴ As a result, Congress was forced to raise the level of generality in succeeding statutes and give the President more discretion to facilitate enforcement of the embargo.¹³⁵

This example underscores the considerable practical and conceptual difficulties confronting legislators when they seek to write narrow statutory provisions that nonetheless adequately address generalized, cross-cutting problems of governance. The difficulties associated with writing narrowly targeted laws are essentially acknowledged by courts applying what is left of the nondelegation doctrine today, which continues purportedly to regulate legislators' decisions to vest authority in the executive branch by requiring

¹²⁹ See Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in POLITICAL SCIENCE: THE SCIENCE OF POLITICS 51 (Herbert Weisberg ed., 1986).

¹³⁰ One example is Senator Arlen Specter's (D-Pa.) insistence that a vast amount of resources in the American Recovery and Reinvestment Act be reserved for cancer research (plainly an example of a legislative enactment that straddles the formal definitions of earmarks discussed *supra* in Part II and the broader concept of targeted funding included because a legislator who could play a key role in a winning coalition insisted on it). At the time of the vote, Senator Specter was a member of the Republican Party.

¹³¹ See generally Lowi, *supra* note 32.

¹³² See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1650–57 (2007) (noting expansive delegations of authority to the President, despite theoretical disagreements to such delegation).

¹³³ *Id.* at 1650 (explaining the Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States (Embargo Act), ch. 5, 2 Stat. 451 (1807)).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1651–55.

“intelligible principles”¹³⁶ but operates to condone and legitimize extraordinarily broad delegations.¹³⁷ Whatever the consequentialist case for such delegations—which lawmakers have a variety of political reasons to seek as well—they leave the legislature with an interest in alternative tools to shape some aspects of executive action. Bereft of legislative vetoes and similar measures in the wake of cases such as *INS v. Chadha*,¹³⁸ oversight investigations and appropriations-related controls loom larger for legislators operating in a world where their political incentives to shape agency activity remain strong.

The preceding discussion shows how earmarks could be relevant in situations where legislators attempt to develop rules or standards in legal design. A prescriptive and instrumental case for earmarks or their analogues exists near both ends of the “rules” and “standards” continuum. Legislators embracing the prescriptive conclusion that a statute ought to create a standard might nonetheless believe that the standard should be tempered by a limited-scope rule forcing the allocation of some resources to a particular function. Instrumentally, the “cost” of a legislative bargain achieving a fairly discrete rule (one that, unlike a standard, would make it harder for some legislators to assume some probability that their preferred outcome would be consistent with the standard) could be a side-payment in the form of an earmark or one of its analogues.

Understand that my claim here is a limited one. I am not arguing that all earmarks are justified on the basis of broader separation of powers concerns. But if legislators have both the incentive and (at least in many accounts) a responsibility to exercise meaningful oversight on what agencies do, then ruling out all or most earmarks takes some explaining. That explanation would need to be especially compelling if we find that executive authorities use broad funding allocations for political advantage through geographically targeted spending involving disaster relief funds, infrastructure spending, or grants. In fact, the executive branch also seeks to control the flow of funds, and does so with considerable success.¹³⁹ Notice, moreover, that presidents

¹³⁶ *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹³⁷ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (listing a variety of broad delegations upheld by the Court).

¹³⁸ 462 U.S. 919 (1983).

¹³⁹ See Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 658 (2009) (discussing President Roosevelt’s interest in controlling grants to be allocated by the new Federal Security Agency, and directing that the White House be consulted in their approval). Berry, Burden, and Howell’s findings on presidential control of spending are interesting in light of their example. See Christopher R. Berry, Barry C. Burden & William G. Howell, *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783 (2010). While their approach does relatively little to disentangle presidential sensitivity to external constraints from presidential policy goals distinct from political constraints, it nonetheless underscores the role of the President as a major actor in the prevailing fiscal regime, particularly post-legislation. In many respects, despite their capacity to control some aspects of bureaucratic activity, legislators’ competitive environment creates difficulties when specific lawmakers seek to use funding as a means of asserting some control over agencies.

have a variety of tools to defuse the political tensions and concerns involving earmarks, even when the executive branch engages in allocations of resources that amount to earmarks. Presidents exert some control over organizations with considerable bureaucratic capacity to reframe specific objectives in general terms by tweaking funding formulas and administrative arrangements. The president's incentives probably favor allocations to multiple jurisdictions, thereby making it harder for critics to argue that only a narrow band of constituents benefit. The logic of the administrative state allows agencies to claim that they are allocating resources on the basis of broad principles derived from agency technical competence and expertise. Moreover, by responding to (some) legislator preferences (whether expressed in report language, letters, or phone calls), they help mollify congressional opposition.

Executive power over agencies' funding allocations thus interacts with the broad jurisprudential trend legitimizing far-reaching legislative allocations of authority. In a system premised on some participation in policymaking by the executive and Congress (and reflecting considerable concern about executive power), it is staggering to see how little discussion of the separation of powers occurs in the context of earmarking reform. With a Congress deprived of using the legislative veto and often engaging in broad delegations, earmarks become (if anything) more important than they otherwise would be. In effect, even if one believed that earmarks are not ideal, they may be advisable or even necessary to preserve a certain extent of legislative engagement that is hard to dismiss from any account that embraces the importance of separation of powers. This view does not legitimize every earmark, but it implies that the right amount of earmarking is far from zero.

C. *The Value (and Cost) of Specificity*

For much of the history of congressional budgeting, lawmakers appropriated amounts for specific goals; sweeping appropriations measures were the exception.¹⁴⁰ Given this historical backdrop, perhaps it would be somewhat surprising if a consensus developed sharply against virtually any legislative specificity in funding allocations. Indeed, even otherwise harsh critics of earmarks, such as President Obama, note that "some of these earmarks support worthy projects in our local communities. But many others do not."¹⁴¹

¹⁴⁰ See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 48–49 (2004) ("Generally called supply bills in the early Congresses, appropriations measures had narrow purposes: to provide specific sums of money for fixed periods and stated objectives.").

¹⁴¹ See Obama, *supra* note 19. President Obama's threat to veto legislation containing earmarks has put him sharply at odds with some of the Democratic leadership on Capitol Hill. See Toeplitz, *supra* note 2. In addition, President Obama's own approach to earmarking has fluctuated somewhat over the preceding years. After having spoken out against earmarks during the transition, he later commented on earmarks' role as follows: "Let me be clear, done

Left undefined, however, is the yardstick against which we should measure “worthy projects,” particularly if one leaves aside the procedural criterion that a bill is enacted at all. At the start of the 112th Congress, Senator Jon Kyl (R-Ariz.) supported the new earmark reforms but recently advocated for an earmark including nearly a quarter-of-a-billion-dollar settlement for the White Mountain Apache Tribe in Arizona in light of policies that devastated the tribe’s land in order to increase runoff into the river and stream system providing water for greater Phoenix.¹⁴² In doing so, Senator Kyl insisted on using a bill containing funds for an entirely unrelated settlement involving Black farmers and the United States Department of Agriculture, and he appeared to ignore his own statements criticizing earmarks.¹⁴³ Perhaps the problem was in Senator Kyl’s earlier statements, however, if they implied that somehow legislators’ local knowledge and jurisdiction-specific incentives should play no role in their legislative agenda.

If it is appropriate for legislators to support some local projects, it is not so hard to imagine that some legislators and other participants in the political process would think it prescriptively valid to consider the geographic distribution of scarce resources such as university research funds. Geographic targeting is what allows for the implementation of demonstration projects. American electoral rules condition access to federal legislative power on winning local elections. Accordingly, we can expect legislators to face incentives for acquiring unique knowledge about their communities’ needs and to hone arguments about how those needs fit into the broader context of political competition over national priorities.¹⁴⁴ In principle, earmarks pro-

right, earmarks have given legislators the opportunity to direct federal money to worthy projects that benefit people in their districts, which is why I oppose their outright elimination.” See Susan Davis, *Obama Calls for Greater Earmark Reform*, WALL ST. J. BLOGS: WASH. WIRE (Mar. 11, 2009), <http://blogs.wsj.com/washwire/2009/03/11/obama-calls-for-greater-earmark-reform>.

These changes underscore not only some of the analytical complexities in deciding whether a certain instance of targeted funding is justifiable but also the tensions generated among legislators—including his fellow Democrats—over earmarking. See generally Michael Grunwald, *Obama’s Budget: Earmarks Aren’t the Real Problem*, TIME (Mar. 5, 2009), <http://www.time.com/time/politics/article/0,8599,1883160,00.html>.

¹⁴² See Andrew Taylor, *GOP’s Promise to End Use of Earmarks Meets Its Demise; Kyl Says Effort to Secure Funds Isn’t a Violation*, BOS. GLOBE, Nov. 28, 2010, at 17.

¹⁴³ Senator Jon Kyl, *Statement on Earmark Moratorium* (Nov. 16, 2010), available at <http://kyl.senate.gov/record.cfm?id=328566> (“I do not intend to request any [earmarks] in the coming year. I support the moratorium.”).

¹⁴⁴ The classic work developing the theme of legislators’ local knowledge, and their work to translate that knowledge into both favorable local perceptions as well as congressional policies likely to garner support in their districts is RICHARD FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (Longman ed., 2002). See also DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). More recent work persuasively argues that implicit and explicit models of congressional activity often presume, without sufficient support or nuance, that legislators respond to median voters in their districts. Nonetheless, even scholarship emphasizing the relative importance of national issues or institutions in legislator activity still recognize that local constituencies—and legislators’ knowledge of these constituencies—play a pivotal role in the electoral process. See, e.g., Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 151 (2001) (discussing changing

vide a low-cost way for legislators to convince each other of those needs without having to design a costlier program of general application to address a local need.

These scenarios compete for attention with the ideal of allocating funding on the basis of merit. In most settings involving the allocation of scarce public financial resources, defining merit implicates some decisions about how to prioritize among competing considerations. Critics of congressional earmarks allocating discrete funding amounts for projects at specific institutions (what might be termed “academic earmarks”¹⁴⁵) begin from the presumption that research funding has essentially a single purpose—to advance research itself—without considering the multiple ways in which targeted university research funding could interact with local economic and social conditions, or with the capacity of Congress to support the vast amount of non-geographically targeted research funding.

A focus on the value of peer-reviewed funding allocations is certainly defensible.¹⁴⁶ But it is not unassailable in a policy context. In the lively Senate debate during the 1980s over an amendment designed by Senator Danforth to eliminate all earmarks, a senator opposing the measure pointed out a mere sixteen elite universities received half of all federal research funding.¹⁴⁷ If one believes that universities should be geographically dispersed and universities in a variety of different states should have access to research funding, then one would expect that multiple considerations would weigh in the allocation of research funding—including considerations that could lead legislators to set aside funds for specific universities. In the event that some dedicated funding seems hard to reconcile with national goals that depend on large amounts of non-targeted research funding, we should also consider how targeted allocations probably help reconcile national goals with the local constraints legislators face in their districts. A legislator from the rural Midwest facing a hostile town hall meeting over how much money the gov-

levels of legislator responsiveness to local concerns in the 1980s and 1990s relative to the preceding decades beginning in the 1940s); Robert M. Stein & Kenneth N. Bickers, *Congressional Elections and the Pork Barrel*, 56 J. POL. 377, 394–95 (1994) (discussing local interest groups’ awareness of targeted “pork barrel” projects, even in the absence of national public knowledge of the projects).

¹⁴⁵ For additional discussion of specific funding to universities, see generally John M. de Figueiredo & Brian S. Silverman, *Academic Earmarks and the Returns to Lobbying*, 49 J. LAW & ECON. 597 (2006).

¹⁴⁶ See Hennessy, *supra* note 31.

¹⁴⁷ KAISER, *supra* note 50, at 169. In response to Senator Danforth’s exhortation to use peer review as the exclusive means for allocating research funding, Senator Russell Long (D-La.) offered this colorful rejoinder:

When did we agree . . . that the peers would cut the melon or decide who gets this money? . . . Am I to understand that this is a situation, which is certainly without my knowledge, where Congress said that we are not going to have any say about who gets this money? Are we going to have some peers decide who gets the money? I have been around here for a while. I do not recall that I ever agreed to that. . . . The question then is, how do you get to be one of the peers?

Id. at 170.

ernment spends on research is in a different position if she can explain how some of that funding directly bolsters her district's welfare.¹⁴⁸

Indeed, a geographic focus may be appropriate even in something close to a first-best (or idealized) world. Surely it makes sense to think that an Arizona legislator would know more than her colleagues about the case for repairing a local military installation or the implications of failing to settle a long-running legal battle with an American Indian tribe adversely affected by policies designed to increase water availability for a thirsty Maricopa County. A geographic focus can yield an appropriate balance between policy implemented through highly general principles written into statutory enactments and attention to genuine needs in particular communities identified through a normatively acceptable process of deliberation (or at least quasi-deliberative pluralist politics). The fact that the geographically specific policy needs are difficult to state in general terms may rightly give us pause, but they should not automatically disqualify such an enactment from being viewed in a positive light. In effect, deliberation can result in an equilibrium producing statutes with a mix of general provisions coupled with attention to geographic areas with needs not otherwise included or easy to define in more general terms.¹⁴⁹

The fact that local regions may exhibit distinctive needs that are difficult for outsiders to observe does not imply that all jurisdictions are entitled to receive anything they request. In some cases, we might argue that political competition is occasionally an adequate way of allocating scarce discretionary appropriations. Political competition often conveys some information about intensity of preference that can be normatively important. It would be hard to justify entirely rejecting pluralist political competition as a partial criterion for allocation in some appropriations contexts without rejecting it in virtually every other domain, such as foreign policy decisionmaking with respect to Latin America or the Middle East.

The implication of this discussion is not that all targeted spending is unproblematic. Nonetheless, some targeted spending is not inherently inconsistent with plausible, normatively attractive visions of law and democracy. It is far harder to argue categorically against all earmarks if one takes into account separation of powers concerns (e.g., avoiding a world where only the executive branch gets to earmark), the plausibility of a need for some geographic specificity in funding, and a role for pluralist political bargaining. A categorical argument against earmarks would require, instead, a more dynamic and nuanced account of how earmarks are capable of corrupting the political process over time.

¹⁴⁸ For an interesting preliminary analysis of university lobbying and its returns indicating the enhanced interest of appropriators in funding institutions in their districts, see generally de Figueiredo & Silverman, *supra* note 145.

¹⁴⁹ See Eric Alterman & George Zornick, *Think Again: Out, Out, Damned Earmark*, *CTR. FOR AM. PROGRESS* (Sept. 18, 2008), www.americanprogress.org/issues/2008/09/damned_earmark.html.

If prevailing accounts of earmarking problems spend little time discussing the potential decision-theoretic basis for targeted spending, far more attention seems focused on the idea of corruption. Two corruption-related critiques often appear to blur: (1) that earmarks are of particular interest to lobbyists and are produced through a transactional process that amounts to “corruption”¹⁵⁰ (irrespective of whether it explicitly violates criminal statutes or ethical standards); and (2) that earmarks are more likely to involve criminal violations. These propositions are far from self-evident.

It is useful first to distinguish between corruption in the narrow sense that prevails in existing criminal law doctrine from the critique that certain forms of activity involving legislation and the political process “amount to” corruption.¹⁵¹ As an example of episodes involving earmarks that appear to result in transgressions of federal criminal law, consider the *Stadd* case as an example of where earmarks and corruption (defined at least in positivistic terms) explicitly meet.¹⁵² Senator Thad Cochran (R-Miss.) included an appropriations provision allowing NASA to fund geosciences research—a specialty of Mississippi State University—but without removing the statutory language granting NASA discretion to allocate funds through a national competition.¹⁵³ Senator Cochran then sought to pressure the agency into awarding the funds to Mississippi State University, leveraging both the Senate’s role in the confirmation of an incoming NASA Administrator and Senator Cochran’s status as a senior legislator on the Senate Appropriations Committee.¹⁵⁴ That pressure was amplified by the Acting Associate Administrator of NASA, Courtney Stadd, who slid into that position after having spent time as a lobbyist and included Mississippi State among his roster of clients.¹⁵⁵ Despite Stadd’s ethics agreement with NASA, which required his recusal from decisions involving his clients, Stadd involved himself in decisions concerning the allocation of funds for geophysical research.¹⁵⁶ After career agency officials initially resisted, Stadd successfully pressed his subordinates to allocate a substantial chunk of the total available funds directly to Mississippi State.¹⁵⁷ As a result, Stadd was convicted of using his official position for private gain and lying to federal investigators.¹⁵⁸

While the term “earmark” appears throughout the trial court proceedings and the United States Court of Appeals for the District of Columbia Circuit’s decision in *Stadd*, it is ironically Senator Cochran’s unwillingness

¹⁵⁰ See, e.g., LESSIG, *supra* note 30, at 226–48.

¹⁵¹ See, e.g., *id.*

¹⁵² *United States v. Stadd*, 636 F.3d 630 (D.C. Cir. 2011). See also *supra* notes 181–182 and accompanying text (discussing narrower meaning of public corruption in the context of federal criminal law, and criminal justice more generally).

¹⁵³ *Id.* at 633.

¹⁵⁴ *Id.* at 633, 635.

¹⁵⁵ *Id.* at 635.

¹⁵⁶ *Id.* at 634.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 636.

to write a specific allocation for Mississippi State that set the stage for the events in the case. Suppose legislators simply enact a broad funding provision with a few phrases to convey a particular interest (but not a requirement) involving funding certain university programs (or perhaps even report language). In any such situation, they would be taking a risk that agency officials will behave precisely as NASA's officials initially did before Stadd intervened—when the agency was prepared to ignore Senator Cochran's wishes. That Stadd's meddling made him a federal felon underscores the risks involved for players who have a direct financial interest in the outcome as opposed to agency officials who weigh the more routine, pragmatic political consequences of disappointing an important legislator.¹⁵⁹ Moreover, essentially the same legal constraints that ensnared Stadd would apply if a legislator sought to either write in an explicit earmark or engaged in any other kind of legislative activity, including more subtle tactics to pressure agency funding decisions as part of a quid pro quo.¹⁶⁰ In short, explicit *quid pro quo* corruption is difficult to achieve even in a world where earmarks are familiar tools of the legislative process.

Even if Stadd turns out *not* to be a good example of earmarks' specific contributions to conventional corruption, are earmarks nonetheless implicated in broader forms of "institutional corruption"? Professor Lawrence Lessig and a few other observers have lately focused considerable attention on the question of what, beyond an explicit violation of existing criminal laws, should nonetheless be viewed as "corrupt" in some sense.¹⁶¹ Indeed, some might suggest that the problem with earmarks is in fact that they make it easier for individuals to engage in essentially corrupt behavior without transgressing existing laws. The problem here is defining what that concept precisely means, an issue I take up in Part IV. For the moment, it is worth simply noting that cases such as *Stadd* provide little basis to conclude that earmarking creates greater risks of conventional corruption than, say, changes in a complex regulatory statute yielding potentially vast economic benefits to private entities.

Outside the heartland of cases involving flagrant violations of explicit fiduciary duties as in *Stadd*, close scrutiny of the corruption label inevitably raises a persistent question regarding the limits of acceptable political activity. The answer to that question seems doomed if it does not provide some room for "legitimate" political trades, which again should raise questions about why the key distinction should be between trades that involve earmarks and those that involve, say, modifications to USDA crop insurance programs or federal authority to regulate tobacco. In those cases and countless others, all or some of the benefits may be concentrated in a particular

¹⁵⁹ See *D.C. Fed'n of Civic Ass'ns v. Volpe*, 434 F.2d 436 (1970) (leaving considerable room for legislators to communicate with agencies on pending policy matters without rendering the decision legally suspect).

¹⁶⁰ See *infra* Part IV.B.

¹⁶¹ See, e.g., LESSIG, *supra* note 41.

sector of the economy or region of the country. Indeed, a variety of approaches to understanding legislative politics would predict that those benefits would be concentrated without passing directly through the appropriations process.¹⁶² Potentially troubling political transactions could also generate extraordinary gains for parties that happen not to be geographically co-located (e.g., certain taxpayers or corporations).

D. A Procedural Rejoinder?

We have seen how legislators sometimes pursue the goal of earmarking without using statutory language. Perhaps, then, the problem is not with the substance of what an earmark achieves, but with the method sometimes used to achieve it. To wit: legislators sometimes fail to enact into statute an earmark but place it in report language. Beyond the simple formalist point that reports are not statutes,¹⁶³ there is a contingent quality to these concerns, in the following sense: one could agree that earmarks are not inherently problematic in principle, but that legislators should have to write them into specific statutes rather than including them in report language. On formalist grounds, this objection is a sensible one. Legislators expecting to achieve specific fiscal goals should be required, presumably, to do so by enacting statutes. A sensible reading of *Chadha* would seem to address the situation. The Constitution erects a variety of barriers for Congress to hurdle in order to act, such as bicameralism and presentment.¹⁶⁴ Like the legislative veto, earmarks in committee reports fail to run this constitutionally prescribed gauntlet, allowing legislators to enact measures without paying the mandated political costs.¹⁶⁵ That simple principle may be enough for some to decry the report-language practice.

But if the question is whether the practice of including earmarks in report language is likely to produce adverse social welfare consequences, then we need to consider a few more details. Specifically, the concern might be that there is a separation between the capacity of report-writing legislators to include the earmark in the report and their ability to secure passage of such legislation through the chamber. Here one might fairly draw a split conclusion: on the one hand, legislators clearly benefit from using report

¹⁶² See Jason A. MacDonald, *Agency Design and Postlegislative Influence over the Bureaucracy*, 60 POL. RES. Q. 683, 692 (2007); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policymaking*, 12 J.L. ECON. & ORG. 119, 161–62 (1996).

¹⁶³ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31–37 (Amy Gutmann ed., 1997) (objecting to the use of legislative history on formalist grounds).

¹⁶⁴ U.S. CONST. art. I, § 7.

¹⁶⁵ See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707 (1997) (making a similar argument against using committee reports and other legislative history in statutory interpretation).

language because they have increasingly done so,¹⁶⁶ suggesting (at the margin) some diminished legislative transaction cost for using report language rather than enacting a statute.¹⁶⁷ At the same time, the executive branch's compliance with such report language may in many cases reflect a judgment that the organization of Congress (and particularly the degree of specialization and disaggregated power vested in committees and subcommittees) essentially lets the report-writers credibly threaten to pass a statutory version.

But restricting report language has consequences, too. In the end, report-writing legislators would probably have to expend greater effort at managing the legislative process if they sought to enact every earmark as a statute, but the respect for the report-writing language probably reflects a political judgment from executive authorities that they would have to contend with these constraints one way or the other. That recognition is unlikely to satisfy those with formalist concerns, but they should consider three points that at least partially offset the formalist critique. First, even if there's a gap between the earmarks that could be enacted through reports and through statutes, there is little reason to think that gap covers anywhere near all the report-based earmarks (otherwise it is difficult to explain the executive branch's willingness to take them so seriously). Second, legislators using report language do face some risks that the executive branch will heed the constraint somewhat less seriously. Third, to the extent that the resulting earmarks (whether included in report language) play a critical role in the broader production of statutes, we may need to consider those effects in order to make a more coherent evaluation of the practice.

To summarize, I have embraced several arguments in tension with the increasingly prevalent skepticism of earmarking. First, some earmarks are substantively defensible. Second, on balance, conventional earmarks—even if some of them are aptly described by the moniker of socially wasteful pork barrel spending when considered in isolation—are probably more transparent than many other political deals. Even if many individual earmarks are not defensible by themselves, the role they almost certainly play in legislative logrolls could be occasionally useful and sometimes genuinely constructive. Finally, reforms blocking the production of lower-transaction-cost legislation focused on directing resources to particular geographic constituencies could force legislators to substitute measures involving complex regulatory statutes where distortions could have higher costs.

Juxtaposed against these arguments, critiques of legislative earmarking remain remarkably under-theorized. Such critiques, for example, fail to rec-

¹⁶⁶ See Kysar, *supra* note 33, at 534.

¹⁶⁷ *Id.* at 532 (noting increased public scrutiny of earmarks as a result of rules mandating disclosure).

ognize the complicated relationship between earmarking and so-called pork barrel spending. Although some earmarking activity may overlap with the conceptual category of pork, there is no good reason to think that all targeted spending, in principle, involves logrolling over pork. Instead some legislative decisions to spend targeted funds may reflect reasonable choices regarding local jurisdictions where spending has broad spillover effects or a response to the difficulty of writing general legislative enactments that address every single case that requires attention. In addition, the almost unquestionably large proportion of earmarks that all but certainly involve pork barrel spending may deliver important benefits—and in some cases, those benefits may be better delivered through earmarks than through alternative arrangements for legislative bargains.

More generally, the critiques often depend on implicit theories of democracy that need defending. Ironically, discussions of earmarking problems sometimes run the risk of “earmarking” the problem—viewing it in isolation, outside the context that makes it far more legally and politically intricate. Careful observers should therefore respond both analytically and in terms of potential policy prescriptions. Given the centrality of the side-payments issue and the ease with which observers from across the political spectrum have come to condemn earmarks, we almost certainly have something to gain from investigating the political economy of the earmarking problem to explain *why* earmarks seem so problematic (or, at least, easy to critique), and what (if any) elements of the earmarking critique might be salvaged or reconceived through a more detailed analysis.

Thoughtful observers can certainly disagree about the value of taking some risks of perverse consequences, including the potentially harmful effects of legislative bargaining that could arise from even more determined efforts to disrupt earmarking. Only a fairly thin and under-theorized analysis, however, can cast aside even the possibility of those risks or (more broadly) the trade-offs that might be entailed in pursuing explicit policies designed to curb legislators’ capacities to enforce earmarking-related bargains. Any effort to add nuance to the analysis would underscore the extent to which the size of earmarking problems one perceives depends heavily on conceptions of appropriate deliberation and on how scarce cognitive attention is allotted to intricate legal and policy problems, to which we turn next.

IV. THE POLITICAL ECONOMY OF EARMARKING EARMARKS

Earmarking reform efforts ultimately raise difficult questions about the nature of pluralist democracy, its relation to law, and the viability of strategies to address various limitations to reforms. By the same token, specific earmarks delivering money to a particular jurisdiction often reflect legislative outcomes that are far from perfect or routinely desirable. In the discussion that follows, I consider why political actors and their audiences nonetheless often take a less nuanced perspective on earmarks. I then turn to

whether and how critiques of earmarking might be recast along more defensible lines.

A. *Salience, Specificity, and Statutory Production*

Lawmaking in a democracy is driven in no small measure by institutional rules such as bicameralism, the threat of a presidential veto, or a parliamentary vote of no confidence. Individual preferences also matter, along with the success or failure of particular groups in organizing around particular causes. Another important factor with the potential to affect the lawmaking process and its legitimacy involves the psychological process through which individuals perceive their world. Earmarking, for example, is salient because of a series of features in our cognition, our interest group environment, and our political institutions. But the salience does not appropriately convey the size or scope of the problem relative to others, or the complexities inherent in even defining earmarks as problems.

The psychological purchase of earmarking critiques almost certainly reflects a variety of factors that create a “witches’ brew” of frustration. For starters, earmarks constitute vivid examples of targeted legislative action that have a clear price attached to them, which makes them loom larger in public discussions. It is easy for most people outside the most directly benefited jurisdiction or constituency to see the costs and fail to appreciate the benefits of geographically targeted (or otherwise narrowly focused) spending.¹⁶⁸ The financial cost is built directly into the earmark, along with information about the specific beneficiary. In contrast, the spillover benefits for other regions or parties are opaque. People fail, for example, to appreciate the value of spending to secure critical infrastructure in regions distant to where they live, even though they may depend on that very infrastructure.¹⁶⁹ Instead, earmarks slip easily into a narrative of legislator corruption capable of galvanizing widespread public scorn.

Not so with regulatory statutes. Most observers fail to appreciate the regulatory costs associated with disrupting complex regulatory schemes involving public health, environmental protection, or infrastructure. Often these costs are larger and more disruptive than the costs of individual ear-

¹⁶⁸ Cf. M.V. Rajeev Gowda, *Heuristics, Biases, and the Regulation of Risk*, 32 POL’Y SCI. 59, 65 (1999) (discussing the impact of reference points when different constituencies evaluate risk).

¹⁶⁹ For an example drawn from the trajectory of spending on critical infrastructure in the United States, see STEPHEN FLYNN, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (2007) (discussing the extent to which the public fails to recognize the value of securing infrastructure in a particular region of the country despite the impact of that infrastructure on a far wider geographical area). See generally Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2007) (discussing the impact of private firms’ often-suboptimal decisions regarding infrastructure security relative to the impact for the larger public, and discussing the extent to which the resulting externality reflects a *de facto* delegation of decisionmaking authority to private actors).

marks (and in some cases they may approximate the size of groups of earmarks or even most earmarks combined). This feature arguably cuts in favor of creating an arrangement of legislative organization that counterbalances our cognitive tendency to focus on easily seen costs rather than subtler but arguably even more important problems (the same logic underlying cost-benefit analysis).

Second, earmarks' specificity (often in geographic terms) makes it clearer in the political debate that a discrete, identifiable entity is benefiting from targeted money.¹⁷⁰ The obvious existence of a delimited political community receiving funds or organizational beneficiary may routinely crowd out analysis of any potential spillover benefits, or the reciprocal benefits that could be obtained in principle even by an angry, anti-earmark voter who nonetheless ends up in a better position because of the transportation funding or regulatory provisions facilitated by logrolls. In addition, earmarks are sometimes understood by the public (and described by their critics) as reflecting a presumption that no better use for the money could possibly be found (hence the ease of ridiculing them) rather than providing yet another example that lawmaking is imperfect and neither the authorization nor appropriations process is free of some constraints and drawbacks.

Whether to systematically rewire legislative organization to counter cognitive biases is a complicated question. But sensitivity to how problems are sorted (and how that sorting can be distorted) is critical in any defensible analysis. In the meantime, many political actors' incentives are shaped by the fact that the mass public can be easily primed towards anger about earmarks that do not obviously or directly benefit their specific jurisdictions. In a democracy, public frustration tends to track the distribution of public attention rather than carefully reasoned conclusions about public organization.¹⁷¹ Hence, the mere fact that legislators want to hide earmarks does not necessarily establish that they are devoid of prescriptive merit.

B. *Reconstructing the Earmarking Critique?*

The contradictory tendency of legislators to simultaneously seek to hide earmarks in a vast omnibus bill while taking credit for the funds at the district level illustrates how intriguing earmarks are when viewed from a sociological perspective. The ability of legislators and presidents to decry earmarks at the very same time that they pursue them sheds light on the epistemic jujitsu that often epitomizes pluralist politics. Earmarks ultimately deemed desirable, as measured by the efforts of legislators or presidents to enact them and then to trumpet them widely, are often identified with causes

¹⁷⁰ Cf. George Loewenstein, Deborah A. Small & Jeff Strnad, *Statistical, Identifiable, and Iconic Victims*, in BEHAVIORAL PUBLIC FINANCE 32 (Edward J. McCaffery & Joel Slemrod, eds., 2006).

¹⁷¹ See SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION 4 (1987).

broadly supported by the general public, such as military safety, and reflect explicit political efforts to link targeted needs to popular causes. The erstwhile critics of earmarking who then advocate them in specific contexts may sometimes want to emphasize their superior knowledge of local conditions. Also intriguing is the apparent variation in number and amount of earmarks; transportation-related bills are heavily laden with earmarks, and biomedical research is relatively less subject to slicing and dicing by legislators.¹⁷² These realities validate, at a minimum, earmarking reformers' academic interest in the topic. More difficult to resolve are the social welfare issues regarding the practice of earmarking when considered in context.

Accordingly, if the case for treating legislative earmarks as suspect is relatively weak, what would it take to reconstruct the critique along more defensible lines? To address this question, we need to reflect on several ideas that would become particularly important in justifying a world without, or at least with sharply curtailed, earmarking. We should consider, for example, whether it is feasible to construct a workable technocratic alternative to earmarking and, for that matter, to the legislative dealmaking and representation of interests fueling earmarks. And even if earmarks are not inherently any more or less susceptible to the conventional application of criminal statutes governing public integrity, perhaps they run afoul of an expanded (but nonetheless coherent) conception of corruption that should govern political dealmaking.

To begin, earmarks would stand out like a sore thumb if Americans replaced their existing framework for pluralist politics that disrupted the link between geography—or indeed, particularized interests—and representation. Specifically, the case for treating earmarks as problematic would be far more compelling if Americans succeeded in achieving a very particular restructuring of pluralist politics denigrating geographically focused policymaking but accepting pluralist influences impacting class-based, or economic or political interests (as long as they were non-geographic in nature). This approach also depends on dismissing the potential for destabilizing political compromises in the absence of side-payments.¹⁷³

We can, for example, reconstruct the problem through a persuasive case for an intensely strong faith in technocracy with no inter-agency problems that would otherwise lead toward earmarking. An appealing prospect, indeed: we might imagine how the legislative process could play out through an institution analogous to the Federal Reserve, with changes in social policy or national security pursued in response to changing domestic or global conditions (or perhaps in careful, econometrically calibrated anticipation of domestic political responses). The ideal of a mechanism for precisely calibrated, technocratically sound policy decisionmaking across issue do-

¹⁷² See David Malakoff, *Legislators Get Creative With New Crop of Earmarks*, 281 *Sci. 1436* (1998).

¹⁷³ See *supra* Part III.A.

mains also plays a central role in the regulatory policy reform prescriptions advanced by Cass Sunstein¹⁷⁴ and (even more so) then–Professor Stephen Breyer, who pursued this theme not only in his classic tome *Breaking the Vicious Circle*,¹⁷⁵ but also accepts the idea as foundational in his role designing and advocating for the now-advisory¹⁷⁶ United States Sentencing Guidelines.¹⁷⁷

The limitations of this vision in a pluralistic democracy, however, should be just as clear as its appeal. Broad social agreements on policy goals are exceedingly difficult in some domains, such as health policy or immigration. While few aspects of economic policy command anything approaching complete consensus, growing agreement by supermajorities regarding the value of economic growth without widespread inflation unquestionably bolsters the power of a central bank in the role of technocratic decisionmaker.

Moreover, the difficulty of achieving workable political consensus (at least sufficient for the continued operation of technocratic, bureaucratized decisionmaking as an alternative to the pluralistic politics that earmarking epitomizes) almost certainly increases as the domain of technocratic decisionmaking expands. Put differently, assuming that a technocratic bureaucracy can resolve all or most questions about transportation policy is difficult enough. Assuming that such a scenario can work when other aspects of infrastructure are similarly constrained (and therefore potentially unavailable to resolve political concerns not sufficiently anticipated by bureaucracies designed *not* to respond to politics in the first place) should strike one as even more unlikely. Finally, believing that appropriations (and perhaps much of legislative authorization, for that matter) can work through a highly technocratic bureaucratic model also requires one to assume away a host of other complexities, such as the broader public's willingness to defer to the relevant bureaucracies, or the problems arising if other branches are left with little or no role yet who are structurally likely to want a role to play in the process, are expected to play such a role, and arguably are constitutionally required to do so.¹⁷⁸ These problems would be exacerbated if super-strong versions of administrative deference and presidential non-interference norms in administrative law accompanied the existence of bureaucracies to

¹⁷⁴ See, e.g., Robert H. Hahn & Cass R. Sunstein, *A New Executive Order For Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 3 (1995); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

¹⁷⁵ See generally BREYER, *supra* note 38.

¹⁷⁶ See *Booker v. United States*, 543 U.S. 220, 245 (2005).

¹⁷⁷ Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 28 (1999) (noting Breyer's role in crafting the Guidelines).

¹⁷⁸ See generally Peter Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive's Power to Say What the Law Is*, 116 YALE L.J. POCKET PART 59 (2006); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000).

resolve most policy problems. Yet such norms may be indispensable to moving forward with anything like a vision that replaces legislative bargaining with a maximally technocratic process built around an institution akin to the Federal Reserve but with far more capacious jurisdiction.¹⁷⁹

Leaving aside this ambitious vision, the more modest goal of pursuing what I have called “analytical earmarking” depends on minimizing the dynamic impact of earmarking as side-payments. Admittedly, the empirical picture here is complicated. It is chronically difficult to tell with quantitative precision what the relevant effects could be. On the other hand, the incentives pushing towards “earmarks as side-payments” are substantial, suggesting that cutting out the soul of those earmarks without some change in underlying incentives or the distribution of power could lead to problematic distortions.

Analytical earmarking also calls for a theory of political change, contending that changes in earmarks would unleash other forms of positive changes. Presumably the theory of change is that heightened public expectations cutting against political dealmaking, once established and given some greater effect in the context of earmarking, would change what the public expects when legislators write regulatory statutes. The likelihood of this scenario depends at least as much on the dynamics of attitude change and allocation of cognitive effort among the larger public as it does on legislators. It is at least remotely possible that public expectations could evolve as a result of stricter limits on earmarking, but it is at least as likely that political bargaining substituting for earmarking and involving harder-to-follow regulatory statutes would simply not be subject to the same degree of scrutiny as earmarks by the larger public. To the extent that the argument means to rely on organized groups to police political dealmaking involving regulatory statutes, the scenario begins to resemble the status quo where such groups play a pivotal role (however imperfectly) in scrutinizing legislative dealmaking.

Absent some additional explanation for why the pro-earmark reform theory of political change is more likely, it is hard to simply accept the idea that changes in an aspect of federal budgeting that implicates only a tiny fraction of the budget would produce widespread political change. Any sustained move in this direction makes it important to contend with the possibility that the changes unleashed would be more problematic. In some cases, legislators and other political actors with an interest in the status quo would mobilize more emphatically to protect it, creating consequences for legislative organizations. And many specific legislative bargains might be adversely affected by cutting out side-payments as discussed above. Deciding on the merits of these reforms thus makes the most sense in relation to more explicit goals regarding statutory production.

We can expect little progress if those explicit goals are defined only around the broad ideal of reducing corruption. As we have seen, the rela-

¹⁷⁹ One approach endorsing steps in this direction is found in BREYER, *supra* note 38.

tively narrow definition of corruption deployed in the interpretation of criminal statutes turns out not to track earmarks very well at all, since not all earmarks involve the kind of “quid pro quo” that is often at the heart of a conventional criminal prosecution involving corruption.¹⁸⁰ And if such corruption does occasionally emerge in cases involving earmarks,¹⁸¹ it is certainly not confined to that setting. If we expand the definition of corruption to encompass some version of what observers might call “institutional corruption,” with overly crass, self-regarding motives by legislators at its core, then any serious effort to address the issue would need to take on far more than earmarks.¹⁸² Political deals are at the heart of statutory production. If the deals are suspect simply because someone receives something in return, much of pluralist politics would be implicated, and the stakes would involve far more than earmarks.¹⁸³

Indeed, the friction that would arise between conventional pluralist politics and an expanded conception of corruption is almost certainly one reason prosecutors handling corruption cases shy away from the idea that they are targeting a widespread phenomenon. Instead they focus on the purportedly exceptional nature of the case being tried. The following exchange is instructive. It occurred during the press conference held by United States Attorney for the Northern District of Illinois Patrick Fitzgerald to announce charges against Governor Rod Blagojevich (D-Ill.) for (among other things) allegedly attempting to obtain financial and other benefits in connection with his appointment of an interim United States Senator:

Q: When politicians get together and cut deals—and certainly, appointing somebody to the Senate seat is a deal—it’s not uncommon for everybody to consider the self-interest of all the parties involved.

FITZGERALD: [Y]ou know, there’s politics and there’s crime. And sometimes, I think, when people get in trouble, they try and blur those lines. I think, when you start having quid pro quos, where there’s a deal, if you give me this and I will give that, *in exchange for rewards*; if you tell someone—if you read the com-

¹⁸⁰ For a discussion of the broad doctrinal similarities as well as key statutory and doctrinal distinctions shaping prosecutorial strategies for emphasizing their public corruption cases’ distinctiveness relative to conventional political bargaining, see Coleen B. Dixon et al., *Twenty-Fourth Annual Survey of White Collar Crime: Public Corruption*, 46 AM. CRIM. L. REV. 927 (2009).

¹⁸¹ See, e.g., *United States v. Stadd*, 636 F.3d 630 (D.C. Cir. 2011).

¹⁸² Or, perhaps, the critique would have to offer a theory of behavioral and institutional change that would explain why reform in one domain is more likely to spur subsequent changes consistent with the reform’s prescriptive goals (rather than substitution of politically dealmaking to “unreformed” domains). For a discussion of an analogous problem in the context of campaign finance reform, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

¹⁸³ Cf. Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSP. ON POL. 1125 (2010) (describing the adverse consequences for a pluralist system of apparent public as well as elite skepticism of political compromise).

plaint carefully, one of the conversations describes how the job that Governor Blagojevich wanted for himself with the union couldn't be just given to him by the union because they already have people doing that job. So, when you say you want a job in four years; you want a salary of about \$300,000, and you basically want to work on behalf of a union and cost them \$1.2 million to basically add no value, because people are already doing your job, and part of that is an exchange where . . . if you don't get that job, no one's getting the appointed Senate seat, we're comfortable in the law that someone who schemes to do that has broken the law.¹⁸⁴

Notice the work the word “rewards” is doing in Fitzgerald's response. It tracks precisely the ambiguity in bribery statutes. In principal a quid pro quo can involve virtually anything, including political benefits. In practice, whether because of implicit interpretations of the word “corruptly” that qualifies the federal statutory prohibition or because of the strategic imperative of distinguishing public corruption cases from ordinary political dealmaking, prosecutors argue that something *unique*—such as money or a job requested or offered in exchange for a public decision—is occurring in the case. The intense determination of prosecutors to distinguish legally actionable cases from conduct they describe as involving ordinary political transactions arises despite the textual breadth of the relevant statutes.¹⁸⁵ Hence, principled invocation of a goal such as “reducing corruption” in relation to earmarks policy starts rather than ends a conversation—and it quickly becomes more about corruption than about earmarks.

Much can be said about continuing projects to refine the ethical principles that should govern political activity, particularly from public officials, in pluralist political systems. One may readily acknowledge that most Americans would prefer to live in a system where ethical obligations governing political activity extend well beyond simply what the criminal law prohibits, or even what administrative systems attempt to regulate. Even with that proviso, defining “corruption” in a pluralist political system that is built in part

¹⁸⁴ *Transcript: Justice Dep't Briefing on Blagojevich Investigation*, N.Y. TIMES (Dec. 9, 2008), <http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html?pagewanted=all> (emphasis added).

¹⁸⁵ Cf. Daniel H. Loewenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985). For a discussion of prosecutorial and investigative strategies in public corruption cases designed to allow the prosecution to underscore distinctions between a public corruption case and conventional political activity, see PETER J. HENNING & LEE J. RADEK, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES* (2011). One could, of course, ascribe the relatively narrow uses of criminal corruption statutes to path dependence arising from existing case law. But a similar phenomenon (e.g., narrower range of prosecutions relative to the extraordinary breadth of the statutory text) arises with illegal gratuity statutes. See Dixon, *supra* note 180, at 929–949 (discussing illegal gratuities).

around harnessing interest and bargaining is, at best, difficult.¹⁸⁶ A major reason why the gap between explicit regulation and ethical aspiration poses interesting questions, however, is because of the difficulty in fully reducing to legally operative form some ethical aspirations and because of potentially unintended consequences.¹⁸⁷

One could decouple from any immediate policy prescription for defining corruption the ethical aspiration that legislators eschew political transactions such as those that give rise to earmarks. After all, what we expect from legislators may relate less to the practical exigencies and constraints of criminal or regulatory enforcement than to the normative yardstick that political theorists should deploy in evaluating legislative behavior. There is no doubt some value in the kind of political theory that devotes itself to articulating fairly abstract normative ideals at the expense of considering institutional questions more relevant to the messy realities of conventional political life in a democracy. Still, political theorists themselves have increasingly questioned the focus on abstract ideals at the expense of work, recognizing the more intricate trade-offs involved in deciding, for instance, whether many political transactions that strike large fractions of the electorate as unpleasant or uncouth are nonetheless worth tolerating. As Professor Philip Pettit puts it:

Many of the classic texts in political theory . . . deal with how institutions should be ordered in the real world of parochial bias, limited resources, and institutional and psychological pathology. . . . [I]t is little short of scandalous that this area of work is hardly ever emulated by political philosophers today.¹⁸⁸

What counts as scandalous in the realm of political theory is less likely to result in a federal prosecution than the sort of scandal that ensnared Congressman Randy “Duke” Cunningham (R-Cal.).¹⁸⁹ While questions about the proper scope of political theory continue to arouse debate, some observers of the legislative process sympathetic to a realist “turn” in political theory could raise the possibility of a tamer, more incremental approach to

¹⁸⁶ For an insightful further discussion, see generally Loewenstein, *supra* note 185.

¹⁸⁷ Cf. David A. Skeel & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006). A core aspect of Skeel and Stuntz’s argument concerns the potential consequences of gaps between the law’s capacity to achieve widespread compliance and its ambition. To the extent that critics of legislators’ ethical practices are concerned about the potential consequences of widespread lack of compliance with expansive legal requirements, they may have second thoughts about using bright-line but difficult to implement rules as a basis for advancing ethical behavior.

¹⁸⁸ Interview with Philip Pettit, Professor of Politics and Human Values, Princeton University, in *POLITICAL QUESTIONS: FIVE QUESTIONS ON POLITICAL PHILOSOPHY* 105, 116 (Morten Ebbe Juul Nielsen ed., 2006).

¹⁸⁹ For a discussion of Congressman Cunningham’s scandal, see STERN ET AL., *supra* note 30.

reforming legislative earmarking.¹⁹⁰ The focus could instead be on a milder procedural and substantive agenda, pivoting on increasing a measure of transparency, promoting deliberation, or finding ways of developing public and private sensitivity to coherently defined ethical principles about the acceptable modes of pluralist politics. Against that backdrop, debates about earmarks could then focus more readily on the substance of what the earmark is attempting to achieve.

One could imagine, more readily, changing procedural rules to govern the timing of passing earmarks. These might force legislators to disclose their authorship of earmarks (not that it is too difficult to guess, sometimes, that it was a legislator from Santa Clara County that included an earmark for additional mass transit funding in Santa Clara County). Procedural changes could limit the use of report language to achieve non-statutory earmarks. Mild changes on this order will probably achieve relatively mild results. Here too, however, one challenge is to ensure that these milder changes do not entirely disrupt the positive value of earmarks as side-payments (at least absent addressing why those side-payments are unimportant).

There is perhaps greater coherence to a reform agenda built on the relationship between transparency and targeted spending than there is for one purely focused on impeding targeted spending. Still, transparency can famously undermine political arrangements.¹⁹¹ The considerable costs of transparency reiterate some of the subtle questions around the trade-offs between consistency with abstract but compelling first principles and a more contextual, institutionally focused evaluation of lawmaking practices. In some cases, where statutory ambiguity does not lend itself to more conventional judicial resolution, courts may be in a suitable position to consider the trade-offs between transparency-supporting interpretations and respect for political dealmaking.¹⁹² A more general version of this trade-off arises between the value of procedural regularity associated with conventional broadly applicable legislation and the value of allowing legislators to strike political deals important to the legislative process. Given these competing concerns, there is probably something to be said for a judicial approach that generally gives effect to accountability-enhancing arrangements at the margin (e.g., where statutes do not otherwise provide a suitable basis for resolving ambiguities),

¹⁹⁰ See generally William A. Galston, *Realism in Political Theory*, 9 EUR. J. POL. THEO. 385 (2010).

¹⁹¹ On the costs of transparency, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997); Michael J. Mongan, Note, *Fixing FACA: The Case for Exempting Presidential Advisory Committees from Judicial Review Under the Federal Advisory Committee Act*, 58 STAN. L. REV. 895 (2005). On the problems associated with excessive regulatory specificity, see Richard A. Merrill, *Food Safety Regulation: Reforming the Delaney Clause*, 18 ANN. REV. PUB. HEALTH 313 (1997).

¹⁹² Cf. Kysar, *supra* note 33, at 562–64 (suggesting one way in which the judiciary may interpret statutes consistent with congressional rules regarding earmarks).

rather than slavishly applying a canon disfavoring any appropriations-driven repeals as articulated in *TVA v. Hill*.¹⁹³

In a somewhat more ambitious vein, another potential alternative would entail further encouragement of the formalization of earmarking by providing legislators with explicit discretionary resource allocations with which to engage in some degree of earmarking.¹⁹⁴ With these resources, members could do at least two things. First, they could address geographically based needs that are difficult for others to observe or support (but appropriate in terms of the shared interests of their constituents). While deliberation is a sensible (if difficult to achieve) norm in many aspects of legislative policymaking, legislators from Mississippi or Minnesota are unlikely to understand the public transit needs of the Bronx as well as the representative whose district includes most of the borough's population.

Second, even leaving aside normatively desirable uses of the resources to support projects about whose merits legislators have private (or semiprivate) information, legislators can use their allotment to mollify constituent pressure for benefits that would distort broader policymaking. Legislators from West Virginia, for example, could use their allotments to reduce the cost of adopting a new environmental statutory scheme that would (if implemented in a normatively defensible way) ultimately prove costly to the coal industry in that state. Such a focus would hardly eliminate the pressure to distort complex regulatory statutes but would give legislators an important new tool to respond to constituent pressures without rewiring broader statutory schemes and in a manner that reduces the resources spent on political competition to secure earmark funding under the current system. Special scrutiny and additional procedural hurdles could apply to earmarks directed toward private sector entities.¹⁹⁵

Admittedly, this scheme has some drawbacks. It could simply increase the proportion of the federal budget devoted to earmarking (holding for a moment to the assumption that this is especially problematic) by leaving legislators free to compete over further earmarking beyond their allocated pots of resources. And while it increases transparency for some proportion

¹⁹³ See 437 U.S. 153, 189–93 (1978).

¹⁹⁴ If such an arrangement proved overly destabilizing to the existing allocation of legislative power endowing appropriations committees with outsized power, then members of these committees would obtain a larger allotment—perhaps double that of ordinary members.

¹⁹⁵ Cf. Editorial, *He'll Quit Tomorrow; President Obama Promises to Rein in Earmarks. Soon.*, WASH. POST, Mar. 13, 2009, at A16 (discussing President Obama's articulation of a "principle" that earmarks for private, for-profit companies should be subject to competitive bidding). The distinction between earmarks to for-profit corporations and those (more common ones) benefiting public agencies or jurisdictions may be relatively stable, and perhaps the greater scrutiny for earmarks benefiting private entities is defensible as a prophylactic measure to manage the risks of conventional transgressions of criminal laws governing public corruption. Nonetheless, to the extent that earmarks benefiting for-profit entities do not implicate conventional public corruption, a heightened trade-off with respect to such earmarks will sometimes clearly involve their (familiar) role in facilitating legislative deals against the perception that such legislation has no public benefit.

of earmarks, it does not do so in the case of earmarks produced through the conventional legislative process (this concern could be mitigated, of course, by coupling the formalization of member-based pots of resources for earmarks with more conventional strategies to reduce appropriators' power to earmark). Still, encouraging occasional formal reliance on earmarks rather than opaque combinations of general appropriations coupled with strong legislator expectations that they will be used in a geographically specific fashion could leave legislators free to assemble winning coalitions through the use of earmarks.

Nor should earmarks necessarily remain generally free of *ex post* review.¹⁹⁶ One might even envision an office capable of auditing some proportion of earmarked funds—perhaps along with provisions in regulatory legislation that appears designed to benefit particular constituencies.¹⁹⁷ Analysts there could disentangle the local benefits generated, the competing rationales for those benefits (and their relative merit or lack of it), as well as some of the less obvious but nonetheless potentially important indirect impact on areas or regions beyond those receiving the direct benefit. *Ex post* information of this sort would be unlikely to squelch legislators' incentives to engage in earmarking or the bargains over authorizing legislation that I have argued probably carry even higher transaction costs. But such information could occasionally nudge legislators to look down the game tree and recognize the potential risks of particular courses of action. Lodging this office within the legislative branch could have symbolic value and practical consequences for its access to information, but would almost certainly raise questions about its political independence and organizational capacity.¹⁹⁸

By creating a higher-profile, relatively independent mechanism to review earmarks and other legislative enactments, the system would incorporate some form of technocratic review that would foment members internalizing some of the political costs created by their role in the lawmaking process. Such a mechanism would stop well short of entirely precluding political arrangements (some would say "transactions") that could create social benefits (either through their impact on the overall legislative process or through the substance of the resources delivered to particular communities or policy activities). Consider, for example, an earmark to compensate adversely affected areas for living with changes in immigration policy that have relatively widespread social benefits but geographically and socially concentrated costs. Here too, however, the devil is in the details of the insti-

¹⁹⁶ Not that earmarks are entirely free of *ex post* public scrutiny. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-209, CONGRESSIONAL DIRECTIVES: SELECTED AGENCIES' PROCESSES FOR RESPONDING TO FUNDING INSTRUCTIONS (2008).

¹⁹⁷ If anything, greater importance attaches to the *ex post* monitoring of provisions that could otherwise appear to be relatively uncontroversial or even benign.

¹⁹⁸ Cf. Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* (May 2002) (unpublished Ph.D. thesis, Harvard University) (discussing such problems in the context of the existing Government Accountability Office).

tutional design, such as whether the reform would depend on successful creation of a more independent Government Accountability Office or a new entity altogether.¹⁹⁹

So perhaps there *is* something to gain from procedural changes. Perhaps it is preferable to live in a world of legislators forced to disclose more explicitly their sponsorship of earmarks, blocked from using report language rather than statutory text, and prevented from tacking on these spending measures as a bill careens towards final passage. Notice the difference between the less nuanced condemnations of earmarks, however, and the reformed, milder procedural reform agenda. For one, the milder position begins by recognizing the inevitable trade-off that comes with greater transparency, which is that an earmark becomes less useful in sealing legislative deals if their associated political costs rise. If policymakers believe that price is worth paying, the milder procedural agenda would nonetheless fall far short of drastically restricting legislators' capacity to institute earmarks.

Ultimately, even if a milder procedural agenda of incremental reform is worth pursuing, it is entirely different from an undifferentiated critique of earmarks as among the more pronounced ills threatening the exercise of democracy. Pluralist democracy itself is significantly responsible for earmarks. Ironically, treating earmarking as an urgent problem without considering the broader trade-offs associated with pluralist democracy amounts to a form of analytical earmarking that elides a rather complicated story about the relationship between organized political activity, the definition of interests, and representative institutions.

No one assessing those institutions should treat the familiar American version of pluralist representative democracy as the last word in the evolution of governance. Even casting aside the question of the system's viability in other countries, our species of pluralist democracy has been slow to address long-term structural challenges involving educational achievement, energy and climate change, migration, and health policy. Common-pool problems arise from the intersection of our existing arrangements for collective choices and social norms legitimizing self- (or constituency-) interested political activity. These problems make it costly for legislators to manage a variety of common problems ranging from the confirmation of judges to the closure of military bases.²⁰⁰ Moreover, although my arguments have rehabilitated some aspects of earmarking, it is quite possible that a mismatch exists between the overall scope of earmarking (which probably includes some undesirable earmarking, even in a second-best world) and the socially optimal amount of earmarking in a second-best world. That is why there is almost

¹⁹⁹ See, e.g., *id.* (describing the extent of political influence on the behavior of the ostensibly non-political Government Accountability Office, despite its nonpartisan mandate and its formal independence from individual legislators).

²⁰⁰ Cf. *Dalton v. Specter*, 511 U.S. 462 (1994) (where the Court dismissed a challenge brought by Senator Specter, among others, because judicial review of the President's decision to close the Philadelphia Naval Yard was not available).

certainly a measure of value in some of the reforms instituted as of 2008—and other measures encouraging greater transparency and advanced disclosure of earmarks (though not the further reforms that attempt to ban earmarking outright).

Yet the very system that yields these challenges also allows for collective choices to take account of intensity of preferences and changing public priorities, all against the backdrop of a system injecting a measure of dynamism into policy makers' efforts to garner public support. The system also delivers a means—however imperfect—through which the public can respond to major deviations from prevailing institutional norms regarding limits on official coercion or arbitrary government action.²⁰¹ Whatever else earmarking reformers are attempting, their intellectual ambition is to bracket engagement with the sometimes painful but nearly always intricate trade-offs implicit in pluralist democracy in favor of a stilted conversation about a single example of political action in that system—an example that simply happens to be more visible to the public.²⁰²

Civic republican ideals may be attractive as an alternative to the uncritical embrace of modern American democracy's considerable pluralist tendencies.²⁰³ Subtle questions are inevitable, however, in working through just how much institutional reform and cognitive or cultural change is feasible at a given time, particularly if the goal is also to preserve some of the more desirable features of pluralist democracy. Many observers broadly sympathetic to civic republican ideals would readily acknowledge, for example, some role for claims based on individual, geographic, or sectional interests—even if the ultimate ideal is to offset these claims with a broader set of sociotropic values and national-level commitments. At a more practical level, the fact remains that agreement on those national-level commitments is often profoundly elusive. If there is any consolation for the difficulties built into the lawmaking process, it is perhaps the possibility of an occasionally illuminating (perhaps even productive) tension between ambitious civic aspirations for politics to transcend self-interest on the one hand, and the opportunity for political actors to represent their constituents' interests in a wide-ranging national conversation inherently incapable of responding specifically to each citizen's voice.

²⁰¹ See Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed. 1989).

²⁰² One should also note that dramatic reforms seeking to render socially optimal the amount and type of earmarking implicate at least two problems that reformers ignore at their peril: they could backfire by creating further displacement, or perhaps they would implicate a larger reorganization of the legislature—including a careful rethinking of committees, seniority, and internal procedural rules such as the filibuster—to disaggregate power and ensure that power over earmarks is more uniformly distributed.

²⁰³ See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

V. CONCLUSION: BARGAINING AND BRIDGES TO NOWHERE

In 1791, as the early history of the United States took shape, Thomas Jefferson met John Adams and Alexander Hamilton for dinner. During the conversation, Adams argued that the British system for governing would be perfect if it could only be purged of means the Crown and cabinet had to influence lawmaking, which he termed “corruption.”²⁰⁴ In a poignant reflection of the continually contested relationship between interests, institutions, and civic values in the lawmaking process, Alexander Hamilton disagreed: it was precisely that “corruption” that made the system work with some reasonable measure of efficiency.²⁰⁵ Accordingly, any attempt to purge the system of its “corruption” was bound to create problems.

Today, our society’s uneasy compromise in response to this tension pivots on regulating only some political activities. While civil society groups, members of the public, and even policymakers themselves occasionally articulate demanding aspirations that legislators engage in virtuous behavior, those aspirations must co-exist with a grudging recognition that political bargaining over interests as well as values is nothing short of fundamental to realities of the lawmaking process. The scope of such regulation reflects an uneasy compromise. Hence, individuals cannot simply wire one million dollars to the campaign coffers of a candidate for federal office, nor can they provide a lavish house as a reward for an official action. In contrast, legislators remain generally free to decide whether to vote for an omnibus budget reconciliation package in light of new provisions just added or withdrawn.²⁰⁶ Even where existing statutes arguably cover such political horse-trading, law enforcers tend to use their discretion, their capacity to shape public perceptions, and their interpretive choices to emphasize the permissibility of hard political bargaining amidst competing private interests and sharply differing ideas about national interests.²⁰⁷

Nothing about this description is particularly remarkable, and indeed in some respects it simply acknowledges some long-anticipated consequences of the institutional structure of American politics.²⁰⁸ But the centrality of competitive political activity and bargaining over outcomes in the present system underscores the importance of having a coherent rationale—grounded both in a descriptive understanding of the consequences as well as a prescriptive imperative—before subjecting a particular facet of political bargaining to strict constraints or severe disapproval. Such constraints can

²⁰⁴ See RON CHERNOW, *ALEXANDER HAMILTON* 393 (2004). The exchange is also reported in JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 399 (2010).

²⁰⁵ See CHERNOW, *supra* note 204, at 393.

²⁰⁶ See *supra* notes 183–186 (discussing the scope of public corruption provisions in federal crimes).

²⁰⁷ See *supra* note 184 (discussing Fitzgerald statement and prosecutorial strategy).

²⁰⁸ See, e.g., *THE FEDERALIST* No. 51 (James Madison).

work in undesirable or even perverse ways when policymakers' incentives persist and bargaining migrates to realms evading any newly imposed scrutiny.²⁰⁹ Moreover, a carefully specified rationale for diluting legislators' capacity to direct executive activity is all the more pressing given a context where separation of powers is presumed to matter, yet legislators lack tools such as the legislative veto to manage the broad delegations of authority that are commonplace in modern statutes.

Yet the increasingly widespread condemnation of earmarks is rarely placed in the proper institutional and legal context. Even the stylized facts deployed in discussions of earmarking merit the kind of careful review that earmarking-critics advocate for federal spending. Case in point: the ill-fated Gravina Island bridge proposal is the most frequently cited example of the extent of policymaking distortions engendered by earmarking. Perhaps it deserves the moniker "bridge to nowhere"—in no small measure, though, because in the end no funding was earmarked for it.²¹⁰

The more important issues concern what to make of the earmarks that *do* emerge from the legislative process. At the margin, legislators probably gain flexibility to write legislation at various points on the continuum between rules and standards because of earmarks' role in lawmaking. Even if we relax our acceptance of the desirability of a broadly pluralist system of political competition, radical changes to the existing earmarking institutions are likely to have undesirable effects absent quite stark (and unrealistic) changes in our prevailing legal institutions and expected political behaviors. Ultimately, the principled arguments in favor of targeted appropriations may not outweigh the costs of earmarked foreign aid, for example, that requires U.S. food aid to go through Great Lakes ports²¹¹—but each of those earmarks is best evaluated on its individual merits.

Any reasonable evaluation of legislative earmarking also implicates fundamental questions about pluralist democracy. Instead, critiques of earmarks pivot on an often unarticulated descriptive theory, with implications for both lawmakers and the executive: they presume that reforming one domain perceived as rife with corruption will encourage further reforms rather than squeezing political bargains into a less scrutinized domain. That presumption needs to be defended. They also rely on a somewhat less opaque, but not entirely specified, normative theory privileging generalized legal rules rather than narrower enactments and casting aside separation of powers

²⁰⁹ Cf. Issacharoff & Karlan, *supra* note 182.

²¹⁰ In a similar vein, Lisa Heinzerling criticizes the heavy use of examples from the so-called Morrill Table to make the case that valuations of life in federal regulation are wildly inconsistent, without attention to the fact that many of the most egregious examples involved rules that were never put into effect. See generally Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998).

²¹¹ See U.S. GEN'L ACCOUNTING OFFICE, GAO/NSIAD-90-174, CARGO PREFERENCE REQUIREMENTS: THEIR IMPACT ON U.S. FOOD AID PROGRAMS AND THE U.S. MERCHANT MARINE 23 (1990); Murray A. Bloom, *The Cargo Preference Act of 1954 and Related Legislation*, 39 J. MAR. L. & COM. 289, 294–95 (2008) (describing Great Lakes set-asides).

concerns. At a minimum, even the reformulated, less ambitious critiques depend on empirical suppositions about organizational and political change that deserve greater scrutiny and come nowhere near guaranteeing socially desirable outcomes.

Those suppositions remain largely hidden. Complicated trade-offs implicit in any scheme to organize the state coexist uneasily with a market for confident prescriptions about what ails democracy. In that market, earmarking inspires easy surface-level derision among policymakers, lawyers, and even scholarly observers. Just beneath the surface, however, earmarks raise profound questions about law, information, institutions, and cognition—questions often more interesting than the original conversations about legislative reform where the earmarking issue emerges. Close scrutiny of legal institutions teaches that most meaningful questions about democracy and governance are about a second-best world. Engaging that second-best world tends to require some functional concern for the grainy details of the specific—disputes about concrete legislative agendas, individual cases, or institutional trajectories rather than abstract principles.

Somewhere deep in that thicket of institutional details—linking voters, interests, committee chairs, back-benchers, and agency officials to lawmaking bargains—the conventional earmarking critique begins to break down. Closer scrutiny makes the scale of the alleged earmarking problems loom smaller and the scale of the questions associated with pluralist democracy—the questions that animated the disagreements between Adams and Hamilton—loom larger. The decision to earmark the discussion of earmarks means treating it in isolation from an intricate lawmaking process in some measure both heroic and tragic by focusing only on how a practice compares to some idealized alternative that remains safely vague enough to elude careful scrutiny.

