

ARTICLE

THE SENATE'S SHADOW DOCTRINE

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ABSTRACT

When Congress is highly polarized and closely divided between the two parties, the majority party will often lack the votes to overcome a Senate filibuster on controversial matters. Majorities have tried to circumvent the filibuster by using the budget reconciliation process—which allows a simple-majority to close debate and move to a final vote—to make major policy on topics ranging from immigration to labor to climate. These efforts sometimes fail on account of the Byrd rule, a rule of legislative procedure that serves as a gatekeeper for the reconciliation process. The most important part of the rule is brief and somewhat cryptic, providing that a provision violates the rule and can be struck from a reconciliation bill if the provision “produces changes in outlays or revenues which are merely incidental to the nonbudgetary components of the provision.”

This Article excavates and critically examines the body of law that implements this provision of the Byrd rule. First, a key part of the Byrd rule inquiry is an all-things-considered balancing of a provision’s budgetary effects as compared to its policy effects. Second, the Senate parliamentarian’s office, which administers the Byrd rule, has developed other principles to implement the rule. The office is more likely to find consistent with the rule provisions that, for example, involve direct rather than indirect budgetary impacts, do not impose mandates on private parties, do not target particular entities, and do not concern certain substantive topics. Third, precedent plays a significant role in the Byrd rule inquiry: past decisions carry great weight, though the parliamentarian’s office may narrow or depart from precedent in rare but important cases. Recently published materials and original interviews with Senate staffers reveal how these decisional rules shape the operation of the Byrd rule in practice.

In addition to its descriptive contribution, this Article also subjects each aspect of Byrd rule doctrine to critical analysis. Some aspects of the doctrine stem naturally from the text of the rule, further a plausible purpose, and are sensible ways of implementing the rule’s open-ended language. Other aspects of the doctrine risk being over- or under-inclusive relative to the plausible purposes of the Byrd rule, generate internal tensions in the doctrine, or can give rise to gamesmanship by the parties. But normatively evaluating Byrd rule doctrine on the whole is challenging because there is no present consensus about the rule’s purpose, given that doctrine departed from the rule’s initial goal of promoting deficit reduction efforts more

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than two decades ago. Understanding how the Byrd rule works on the ground holds important lessons for the operation of the contemporary Congress, the development of an underappreciated area of law, and the content of public policy.

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I. INTRODUCTION

Rules of legislative procedure matter. In the contemporary Senate, it is often impossible to garner sixty votes to break a filibuster on politically divisive topics.¹ Congress therefore often passes major legislation through the budget reconciliation process, which has the principal advantage (for the party in power) of allowing the Senate to proceed to a final vote and enact legislation supported by only a bare majority of the chamber.² As a result, there are enormous stakes for whether a proposed change to the law can be made through reconciliation. On the many issues that divide the two parties, a change that can be enacted through reconciliation may well become law, while one that falls outside of reconciliation's scope almost certainly will not.

¹ See *infra* notes 28–30 and accompanying text (discussing the filibuster).

² See *infra* notes 31–40 and accompanying text (discussing the reconciliation process and providing examples of reconciliation measures).

This political reality vests critical importance in the gatekeeping process for budget reconciliation. The Byrd rule is the rule of legislative procedure that defines what is and is not permitted through reconciliation.³ The most important part of the rule is brief and somewhat cryptic, providing that a provision “produces changes in outlays or revenues which are merely incidental to the nonbudgetary components of the provision.”⁴

This Article examines the body of Byrd rule doctrine that the Senate parliamentarian's office has developed in adjudicating disputes and advising the parties on its understanding of the rule. I take Byrd rule doctrine seriously as a type of law and subject the internal logic, latent assumptions, and implications of Byrd rule decisions to critical scrutiny. In taking this approach, I reject the view—sometimes proffered by members of Congress, legislative staffers, interest groups, and journalists—that there is no coherent body of Byrd rule doctrine, and that the parliamentarian's office is simply making things up as it goes along.⁵ Byrd rule doctrine exists, and understanding it is necessary to understanding (and critiquing) the contemporary legislative process.

In excavating Byrd rule doctrine, this Article's primary contribution is to examine how the parliamentarian's office decides what is and is not permissible through reconciliation. Part of the Byrd rule inquiry is an all-things-considered balancing of a provision's budgetary effects as compared to its nonbudgetary policy effects.⁶ But the parliamentarian's office has (often unofficially) developed other principles to implement the rule. The office is more likely to find consistent with the rule provisions that involve direct rather than

³ See 2 U.S.C. § 644; see also *infra* notes 41–75 and accompanying text (discussing the Byrd rule).

⁴ 2 U.S.C. § 644(b)(1)(D). This provision is one of six in the Byrd rule, but it is by far the most controversial. This Article's analysis focuses almost exclusively on the “merely incidental” language of section 644(b)(1)(D) and mentions other parts of the Byrd rule only in passing. References in this Article to the Byrd rule refer, unless otherwise noted, only to section 644(b)(1)(D).

⁵ See, e.g., Jessica Wehrman, *DeFazio Looks To Try Again on His Progressive Transportation Agenda*, ROLL CALL (Aug. 20, 2021), <https://rollcall.com/2021/08/20/defazio-looks-to-try-again-on-his-progressive-transportation-agenda/> [<https://perma.cc/C2YM-K4BE>] (quoting Rep. Peter DeFazio (D-Or.) arguing that applying the Byrd rule involves the parliamentarian having “a seance with a guy [former Senator Robert Byrd (D-W. Va.)] who has been dead for 11 years”); Adam Jentleson, *When Will Biden Join the Fight for Voting Rights?*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/2021/08/29/opinion/biden-voting-rights.html> [<https://perma.cc/J35S-FWAD>] (arguing that “the standard that determines which bills receive majority votes is effectively arbitrary”); Seth Hanlon, *Budget Reconciliation Is a Critical and Regularly Used Tool*, CAP ACTION (Feb. 5, 2021), <https://www.americanprogressaction.org/article/budget-reconciliation-critical-regularly-used-tool> [<https://perma.cc/R5G7-WPJV>] (characterizing Byrd rule decisionmaking as “arbitrary”); Igor Derysh, *Senate Parliamentarian's Surprise Decision Threatens to Derail Democrats' Infrastructure Plans*, SALON (June 2, 2021), <https://www.salon.com/2021/06/02/senate-parliamentarians-surprise-decision-threatens-to-derail-democrats-infrastructure-plans/> [<https://perma.cc/94P8-9PZC>] (quoting one journalist's view that “the parliamentarian is just making up random [expletive]” and that some applications of the Byrd rule are not “remotely stated in the law”).

⁶ See *infra* Part III.

indirect budgetary effects,⁷ that do not impose mandates on private parties,⁸ that make use of existing programs or channels,⁹ that do not target particular entities,¹⁰ that do not concern certain substantive topics,¹¹ and that resemble provisions that the office has permitted in the past.¹² The Byrd rule itself does not expressly dictate these (or any) criteria, but each has become an important part of how the rule operates in practice.

In this sense, Byrd rule doctrine is analogous to the practice of courts “rulifying” what would otherwise be standard-like legal requirements or “implementing” open-ended legal provisions through multi-part tests.¹³ This mode of doctrinal implementation is inevitable and not inherently problematic. After all, adjudicators need to develop some way to apply open-ended legal provisions to individual cases. But the particular approaches that they develop to do so should be subject to critical examination. What choices has the parliamentarian’s office made in the course of doctrinal elaboration? What are the advantages and disadvantages of those choices? How might the doctrine have developed differently?

In answering these questions, this Article draws on two novel sets of sources. The first is a collection of extensive Byrd rule materials, most never before released to the public, that were published by the Senate Budget Committee in 2022.¹⁴ This publication marks a break from the longstanding norm that most decisions that the parliamentarian’s office renders to Senate staff via email are not made publicly available.¹⁵ But the materials released by the

⁷ See *infra* Part IV.A.

⁸ See *infra* Part IV.B.

⁹ See *infra* Part IV.C.

¹⁰ See *infra* Part IV.D.

¹¹ See *infra* Part IV.G.

¹² See *infra* Part V.

¹³ See *infra* notes 48–49 and accompanying text (discussing relevant scholarship and applying it to the Byrd rule context).

¹⁴ See STAFF OF S. COMM. ON THE BUDGET, 117TH CONG., THE CONGRESSIONAL BUDGET PROCESS 619–734 (Comm. Print 2022) [hereinafter CONGRESSIONAL BUDGET PROCESS 2022]. The primary author of this publication, which is an invaluable resource for students of parliamentary precedent, is then-Budget Committee Chief Counsel Bill Dauster. The Budget Committee’s 2022 publication collects many previously unpublished Byrd rule materials, including the text of decisions rendered by the Senate parliamentarian by email. It includes significantly more materials than the previous attempt to collect and make publicly available Byrd rule content, which took place three decades prior. See STAFF OF S. COMM. ON THE BUDGET, 103D CONG., BUDGET PROCESS LAW ANNOTATED 208–12 (Comm. Print 1993) [hereinafter BUDGET PROCESS LAW ANNOTATED 1993].

¹⁵ Byrd rule decisions rendered on the Senate floor have always been public, and there have been periodic leaks of individual Byrd rule decisions rendered off the floor, especially on high-profile issues. See, e.g., *U.S. Senate Referee Says Democrats Cannot Include \$15 Minimum Wage in COVID Bill*, REUTERS (Feb. 25, 2021), <https://jp.reuters.com/article/us-health-coronavirus-usa-wage/u-s-senate-referee-says-democrats-cannot-include-15-minimum-wage-in-covid-bill-idUSKBN2AQ01U/> [<https://perma.cc/592C-2QHR>]. These public materials are only a relatively small share of the total volume of Byrd rule decisions, however, most of which are rendered away from the Senate floor and are either not made public at all or are made public only in their bottom line, not in their reasoning.

Budget Committee were mainly in raw form—as summaries of decisions, mainly in chronological order—with little to no analysis of many individual decisions, and without much by way of highlighting key themes or doctrinal logic.¹⁶ The second set of sources are original interviews with senior Senate staffers from both parties who have worked on Byrd rule issues in recent Congresses.¹⁷ Because developing and applying the Byrd rule often happens out of the public eye—in closed-door meetings between the parliamentarian's office and Senate staff—these interviews provide critical insight into how the Byrd rule plays out in practice. Taken together, these primary source materials and original interviews allow for a novel account of Byrd rule adjudication on the ground.

This Article is, in some respects, a sequel to my first foray into writing about parliamentary precedent, in an article entitled *Law Within Congress*.¹⁸ There, I focused on the character of parliamentary precedent as law, the institutional role of the parliamentarians, the general decisional principles that the parliamentarians follow, and the delicate politics governing the relationships of the parliamentarians with both the majority and minority parties. This Article's focus is considerably more legalistic and more targeted: the content of parliamentary precedent on one rule of procedure, the Byrd rule's "merely incidental" clause. This narrower inquiry is important in its own right, given the Byrd rule's significant influence on legislative outcomes in recent Congresses. So long as the filibuster remains in place, Senate majorities will have incentives to seek to shoehorn as much as possible through reconciliation bills. This makes the Byrd rule—as the gatekeeper of the reconciliation process—especially important. But understanding the Byrd rule also matters beyond its impact on specific policy outcomes, as a window into how legal rules and doctrines develop within Congress.

By focusing on the content of Byrd rule doctrine, this Article fills a gap in the scholarly understanding of the rule. Existing legal scholarship on the rule is written mainly by tax scholars, who document and evaluate the rule's effects on fiscal policy, and who at times propose reforms to the rule.¹⁹ Smaller

¹⁶ The main exception to this general characterization is a short section collecting materials on the doctrine of "targeting." See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 697–702; see also *infra* Part IV.D (discussing targeting).

¹⁷ See *infra* note 86 (discussing interview methodology).

¹⁸ See generally Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020).

¹⁹ See, e.g., Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99, 101–02 (2018) (arguing that the Byrd rule has some desirable effects (prompting fiscal discipline, encouraging legislative compromise, and mitigating special interest capture) and some undesirable effects (encouraging the use of temporary provisions, preventing legislation that would impose fiscal discipline or simplify the tax code, and reducing the transparency of the tax legislative process)); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 215–24 (2009) (criticizing the Byrd rule in arguing that legislative procedure rules are inadequate to prevent legislation increasing long-term deficits); Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 HARV. J. ON LEGIS. 187, 194–95 (2004) (noting that the Byrd rule encourages the use of legislative sunset provisions); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L.

literatures have examined how the Byrd rule allocates power between the majority and minority parties²⁰ and debated whether the rule should be used to inform statutory interpretation.²¹ Scholars have largely not attempted to canvass the content of Byrd rule adjudications outside the tax policy context, nor have they focused on the doctrinal details of how the “merely incidental” clause is implemented in practice.²²

In examining Byrd rule doctrine, I treat the office of the Senate parliamentarian as akin to a judicial office. This analogy is apt enough to be useful, even if imperfect. Like American judges, the parliamentarian considers many disputes in an adversarial context, with the two political parties playing roles in Congress comparable to the roles that plaintiffs and defendants play in a courtroom.²³ Like judges, the parliamentarian often renders judgment after hearing arguments advocating for the (im)permissibility of a given action. As I have previously argued, “most of the [interpretive] methods employed by the House and Senate parliamentarians mirror those employed by judges in common-law systems.”²⁴ And both Senators and Senate staff view the role of the parliamentarian as a quasi-judicial one.²⁵ To be sure, the parliamentarian differs from a judge in several meaningful respects, some of which Part V

REV. 1007, 1020–21 (2011) (same); Brian Galle, *The American Rescue Plan and the Future of the Safety Net*, 131 YALE L.J. FORUM 561, 585 (2021) (arguing that automatic stabilizers and perhaps long-run investments more generally ought to be exempt from the Byrd rule).

²⁰ See Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 303–08 (2013) (discussing the Byrd rule and the allocation of power).

²¹ Compare, e.g., Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1677–78 (2020) (arguing that the Byrd rule should inform statutory interpretation), with, e.g., Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1141–47 (2021) (arguing against using the Byrd rule as an aid to statutory interpretation). I have proposed and defended an intermediate position, under which the Byrd rule should inform statutory interpretation if—but only if—a Byrd rule issue was litigated through a point of order on the Senate floor. See Gould, *supra* note 18, at 2021–24.

²² The closest to this sort of doctrinal analysis is Ellen Aprill and Daniel Hemel’s article tracing the history of the Byrd rule, including the results of many particular adjudications, from its inception to 2017. See Aprill & Hemel, *supra* note 19, at 108–26. While that article is organized chronologically, this one is organized thematically and critically examines the doctrinal mechanisms that the parliamentarian has developed to implement the rule. The only other scholarship that I know of that treats the Byrd rule in jurisprudential terms is a short essay by Ansel Richards arguing that provisions should be treated as budgetary or nonbudgetary for Byrd rule purposes “based on substance rather than form,” and making that argument through an extended case study of the application of the Byrd rule to proposed immigration legislation in 2021. See Ansel S. Richards, *Functional and Formal Byrd Rule Compliance*, 55 CREIGHTON L. REV. 499, 499 (2022).

²³ See Gould, *supra* note 18, at 1965–66, 1971–73.

²⁴ See *id.* at 1980.

²⁵ See, e.g., Niels Lesniewski, *Cruz: Senate Umpire Works for Us*, ROLL CALL (Oct. 22, 2015), <https://rollcall.com/2015/10/22/cruz-senate-umpire-works-for-us/> [<https://perma.cc/M7XQ-EU6W>] (quoting Sen. John Cornyn (R-Tex.) analogizing the parliamentarian to a judge); Ronald Weich, *Don’t Fire the (Senate) Umpire*, JUST SECURITY (Dec. 13, 2021), <https://www.justsecurity.org/79533/dont-fire-the-senate-umpire/> [<https://perma.cc/6Z7S-WHAH>] (former chief counsel to the Senate Majority Leader arguing that the parliamentarian “effectively functions as a judge” who “interpret[s] statutes and Senate rules”).

revisits.²⁶ Despite these differences, however, the judicial analogy is sufficiently close so as to make a doctrinal examination of the parliamentarian's Byrd rule doctrine a fruitful exercise.

Debates about the filibuster lurk just behind the curtain of contestation over the Byrd rule. Those who view the filibuster as an anachronistic impediment to effective democratic governance may be tempted to endorse permissive Byrd rule interpretations, as a means of chipping away at the filibuster. Conversely, those who view the filibuster as a vital protector of the rights of the minority party may be inclined toward a more restrictive interpretation of the Byrd rule, as a means of shoring up the filibuster. Critical as the filibuster debate is, it is not this Article's focus. To be sure, an important way of evaluating any aspect of Byrd rule doctrine is by reference solely to whether it advances or inhibits one's preferred outcomes with respect to the filibuster. But there is more to Byrd rule doctrine than merely as one front in the filibuster wars, and this Article seeks to explain and evaluate Byrd rule doctrine on its own terms.

The remainder of the Article proceeds as follows. Part II provides an overview of the Byrd rule and its importance to the contemporary Congress and frames the doctrinal inquiry to come. I then turn to the substance of Byrd rule doctrine. Part III discusses how the parliamentarian's office goes about balancing a provision's budgetary versus nonbudgetary effects; Part IV presents over a half dozen implementing principles that the parliamentarian's office uses to decide Byrd rule disputes; Part V discusses the role of *stare decisis* in Byrd rule decisionmaking. For each of these discussions, the Article explicates the content of the relevant interpretive approach, provides examples of its operation in practice, normatively evaluates it, and (when relevant) suggests reforms. Part VI zooms out to discuss some broader interpretive and normative issues involving the Byrd rule and consider the rule's relevance in our polarized times.

²⁶ There are three main differences between the parliamentarian and U.S. federal judges. First, the parliamentarian can be ignored, overruled, or removed from office by the majority party, which makes the parliamentarian (unlike a judge) effectively subordinate to one of its litigants. *See infra* notes 51, 59–62 and accompanying text. Second, in addition to adjudicating disputes, the parliamentarian's office also advises the parties on an *ex parte* basis, a role that would be seen as inappropriate if undertaken by a judge. *See infra* note 53 and accompanying text. Third, the parliamentarian's office serves some functions, most notably making committee referrals, that are bureaucratic in character and do not involve responding to arguments from the parties or rendering decisions in an adversarial context. *See* Gould, *supra* note 18, at 1969–71.

II. FRAMING THE INQUIRY

A. Preliminaries

The federal legislative process in the United States is defined by its difficulty. Passing a law typically requires clearing a bevy of veto points—committee consideration, floor consideration in the House and Senate, agreement on final bill text by both chambers, and presidential approval—that make it challenging for nearly all legislative proposals to become law.²⁷ Among the most important and well-known legislative veto points is the Senate filibuster. Under Senate Rule XXII, to close debate (“invoke cloture”) and move to a final vote requires the support of “three-fifths of the Senators duly chosen and sworn,” i.e., sixty votes when all Senate seats are filled.²⁸ The majority party can almost never garner sixty votes without winning the votes of some members of the minority party.²⁹ And in an age of sharply divided parties, such bipartisanship will typically not be forthcoming on the most contested public policy issues.³⁰

Enter the budget reconciliation process. Because the three-fifths cloture rule limits legislative action, Congress has over the decades created specified categories of legislative action not subject to supermajority cloture, categories that Molly Reynolds has called “majoritarian exceptions” to the cloture rule.³¹ Reconciliation is the most important of those majoritarian exceptions. Developed as part of the Congressional Budget Act of 1974, and originally intended to ease the passage of deficit-reduction legislation, the reconciliation process

²⁷ See Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSPS. POLS. 841, 844 (2011) (comparing the United States to twenty-three other democracies and finding that “the United States is politically exceptional in the high number of electorally based veto players who potentially can block social change, by blocking key bills or amendments”). Some of these veto points (bicameralism and presentment) are constitutionally required, while others (consideration by the committees of jurisdiction and by conference committees) can be bypassed under particular circumstances.

²⁸ See STANDING RULES OF THE SENATE, r. XXII(2), S. DOC. NO. 113-18 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/D37Z-QWSC>].

²⁹ See *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/ZW75-FAST>] (documenting that over the past half-century, Republicans have never held sixty Senate seats and Democrats have done so for only two short windows of time, during the entire 94th Congress (1975–77) and a portion of the 111th Congress (2009–11)).

³⁰ See generally NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 22–49 (2019) (discussing elite polarization, with a focus on Congress); Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 225–30 (2016) (presenting data on rising congressional polarization). Major legislation that has passed on either near- or total-party line votes includes the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); the American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4 (2021); and the Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

³¹ See MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE 2–3, 18–37 (2017) (defining majoritarian exceptions, discussing their histories, and providing examples).

is a fast-track procedure that allows passage of certain types of legislation under special rules.³² Most notably, the reconciliation process allows a simple majority of the Senate to pass a reconciliation bill without first clearing the three-fifths cloture threshold necessary to close debate and proceed to a final vote on ordinary legislation.³³ Reconciliation is appealing to whichever party holds the majority in the Senate because of this limitation on debate, which as a practical matter functions as a lower vote threshold for enacting reconciliation measures. A unified majority party in the Senate cannot typically enact legislation through regular order without support from the minority party, but the reconciliation process requires no such bipartisanship if the majority party is uniformly supportive. As a result, the majority party is incentivized to use the reconciliation process to enact legislation on controversial topics.

Though reconciliation has been used for decades, rising polarization and increased use of the filibuster have made reconciliation more important as a mode of lawmaking on contested issues.³⁴ This is especially true when one party holds unified control of the federal government. During periods of Republican control, Congress has successfully used reconciliation to enact multiple major tax cuts³⁵ and nearly succeeded in using reconciliation to repeal much of the Affordable Care Act.³⁶ Under Democratic control, Congress has used reconciliation to enact a major COVID-19 relief and social safety net bill³⁷ and legislation that invested in green energy and lowered prescription drug prices.³⁸ Democrats have also fallen narrowly short of using reconciliation to enact major social welfare legislation.³⁹

³² See *id.* at 81–92 (discussing the origins of reconciliation).

³³ For detailed accounts of the mechanics of the reconciliation process, see CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES (2005), https://www.everycrsreport.com/files/20050810_RL33030_fb910a65893f2a53ec2760647ed-d7ade6720ffb4.pdf [<https://perma.cc/J6KR-CU5E>]; Richard Kogan & David Reich, *Introduction to Budget “Reconciliation,”* CTR. ON BUDGET & POL’Y PRIORITIES (May 6, 2022), <https://www.cbpp.org/research/introduction-to-budget-reconciliation> [<https://perma.cc/9DNB-ZEBJ>].

³⁴ See CONG. RSCH. SERV., BUDGET RECONCILIATION MEASURES ENACTED INTO LAW SINCE 1980 (Nov. 2, 2022), <https://sgp.fas.org/crs/misc/R40480.pdf> [<https://perma.cc/LGM2-SDL5>] [hereinafter RECONCILIATION MEASURES SINCE 1980] (cataloging and describing all enacted reconciliation legislation).

³⁵ See Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, 115 Stat. 38 (2001); Jobs and Growth Tax Relief Reconciliation Act, Pub. L. No. 108-27, 117 Stat. 752 (2003); Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

³⁶ See Timothy Jost, *The Obamacare Repeal Reconciliation Act: What Repeal and Delay Would Mean for Coverage, Premiums, and the Budget*, HEALTHAFFAIRS (July 20, 2017), <https://www.healthaffairs.org/content/forefront/obamacare-repeal-reconciliation-act-repeal-and-delay-would-mean-coverage-premiums-and> [<https://perma.cc/R8FV-N7KE>].

³⁷ See American Rescue Plan Act, H.R. 1319, 117th Cong. (2021).

³⁸ See Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022). Though the Affordable Care Act itself was enacted through regular order, with Democrats invoking cloture during a brief period in which they held a sixty-seat majority in the Senate, an important companion bill was enacted through the reconciliation process. See *infra* note 152 (discussing the two measures).

³⁹ The Biden administration’s failed “Build Back Better” legislation, which was never voted upon on the Senate floor, was a \$3.5 trillion bill that featured expansive social welfare spending,

The limitation on debate under the reconciliation process creates an obvious incentive for Senate majorities: to include as much material as possible in reconciliation bills, especially on matters for which it is not politically viable to garner sixty votes for cloture. The problem with this incentive from the standpoint of Senate traditionalists—those who think that the usual three-fifths cloture rule serves an important purpose—is that expansive use of reconciliation can circumvent the cloture rule and erode the character of the Senate. (For filibuster critics, by contrast, this sort of circumvention is desirable.⁴⁰) To prevent the reconciliation exception from swallowing the regular-order rule, the Senate unanimously adopted an amendment containing the language of the Byrd rule in 1985.⁴¹ The rule is an internal rule of legislative procedure, though one that Congress has enacted via statute rather than cameral rule.⁴² The rule defines six different categories of provisions that are “extraneous” and therefore can be stricken from reconciliation bills if an objection is lodged against them.⁴³ It provides, for example, that a provision is extraneous if it does not produce a change in outlays or revenues,⁴⁴ if it would produce a change in outlays or revenues beyond the so-called “budget window,”⁴⁵ or if it makes changes to Social Security.⁴⁶

The most contested part of the Byrd rule—section 644(b)(1)(D)—reads in its entirety as follows:

[A] provision shall be considered extraneous if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision.⁴⁷

including policies to guarantee access to prekindergarten and community college, reduce the cost of childcare, and expand access to home health care for older Americans and persons with disabilities. See Jim Tankersley, *Biden's Entire Presidential Agenda Rests on Expansive Spending Bill*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/09/18/business/economy/biden-spending-bill.html> [<https://perma.cc/4SJZ-DYQ3>].

⁴⁰ For a general discussion of this and other workarounds, see Daniel A. Farber, Jonathan S. Gould & Matthew C. Stephenson, *Workarounds in American Public Law* (Aug. 29, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4555933 [<https://perma.cc/K7L7-JKSD>]).

⁴¹ See BILL HENIFF JR., CONG. RSCH. SERV., *THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE"* 2 (2022), <https://sgp.fas.org/crs/misc/RL30862.pdf> [<https://perma.cc/E5EF-257R>]. The text of the Byrd rule has not been meaningfully changed since 1990. See *id.*

⁴² See 2 U.S.C. § 644 (enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, § 20001, Pub. L. No. 99-272, 100 Stat. 82, 390 (1986)). For a discussion of Congress's practice of sometimes enacting rules of legislative procedure as statutory provisions, rather than as cameral rules that are enacted only by the House or Senate acting alone, see Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (discussing, largely through the lens of constitutional law, the reasons for and implications of Congress's choice to sometimes enact “statutized” rules of legislature procedure).

⁴³ 2 U.S.C. § 644(b).

⁴⁴ See *id.* § 644(b)(1)(A).

⁴⁵ See *id.* § 644(b)(1)(E).

⁴⁶ See *id.* § 644(b)(1)(F); see also *id.* § 641(g).

⁴⁷ *Id.* § 644(b)(1)(D).

This brief command gives rise to more questions than it answers. What constitutes a “merely incidental” change? How would one go about weighing budgetary and nonbudgetary components of a provision against each other? Do attempts to compare the magnitudes of budgetary and nonbudgetary components run headlong into well-documented problems of incommensurability? Does Congress’s intent matter, or is the test strictly about effects?

The difficulty of these questions means that doctrinal elaboration is necessary to apply the “merely incidental” clause in practice. The problem of how to operationalize the Byrd rule evokes similar challenges from more familiar areas of law. Richard Fallon, for example, has documented and defended the ways in which the Supreme Court “implements” the Constitution’s open-ended provisions through the creation of multi-part tests, tiers of scrutiny, and other devices for turning broad constitutional mandates into judicially administrable law.⁴⁸ In a similar register, Frederick Schauer has described how courts convert standard-like legal requirements into subsidiary rules that can more easily be applied by judges, a process he calls “rulification.”⁴⁹ Just as studying the text and original meaning of the First Amendment’s free speech clause does not yield the complex body of law that governs in that domain—multiple tiers of scrutiny, special categories like commercial speech, unprotected types of speech like incitement to violence and obscenity, and so forth—so too with the Byrd rule’s “merely incidental” language. That language calls for doctrine that allows the “merely incidental” clause to be administrable in practice.

The task of developing Byrd rule doctrine falls on the Senate parliamentarian, the procedural referee responsible for interpreting the chamber’s rules. Critically, the Byrd rule is not self-enforcing: the parliamentarian’s office only weighs in on the permissibility of a provision if the issue is raised by a Senator or staff.⁵⁰ This can happen in three different contexts. First, and most formally, sometimes a Senator raises a point of order on the floor alleging that a given provision violates the Byrd rule. The Senator serving as the chamber’s presiding officer, on the advice of the parliamentarian, either sustains or overrules

⁴⁸ See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (arguing that constitutional norms “are too vague to serve as rules of law,” which in turn justifies the Supreme Court having “developed a complex, increasingly code-like sprawl of two-, three-, and four-part tests” in order “to implement the Constitution successfully” (emphasis in original)).

⁴⁹ See Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805–06 (2005) (arguing that “interpreters and enforcers have systematically resisted standards [. . .] sharpening the soft edges of standards” through “importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests”).

⁵⁰ See BUDGET PROCESS LAW ANNOTATED 1993, *supra* note 14, at 200 n.563 (“Congressional Budget Act prohibitions are not self-enforcing . . .”); see also, e.g., 141 CONG. REC. S17,285 (daily ed. Nov. 17, 1995) (statement of Sen. Harry Reid (D-Nev.)) (“We have a [Byrd rule] point of order that would lie against this bill, but we are not going to offer it.”). At times this Article refers as shorthand to provisions that the Byrd rule would or would not permit; the more precise formulation is that there are provisions that the rule would or would not permit *if* an objection were to be lodged against them.

the point of order.⁵¹ The decision of the chair is usually the last word, as a practical matter, though it can be appealed to the full Senate and overruled by a vote of the chamber.⁵² Second, and most informally, Senators and staff frequently seek the advice of the parliamentarian's office about the permissibility of particular provisions during the bill development process, and the parliamentarian's office makes recommendations about which provisions are permissible, which are impermissible, and which could become permissible if they were modified in particular ways.⁵³ Third, the parliamentarian's office organizes closed-door adjudications as reconciliation bills are being drafted, colloquially called "Byrd baths."⁵⁴ Staffers from both parties meet with the parliamentarian's office, discuss the content of proposed legislation, and generate a significant paper trail providing background information on possible provisions and arguing for and against their permissibility under the Byrd rule. Senior legislative staff then convene to argue for and against the inclusion of particular provisions in a proceeding that roughly resembles an oral argument before an appellate court. The parliamentarian's office then rules on the issue, instructing the parties on whether it views challenged provisions as compliant with the Byrd rule.⁵⁵

In any of these contexts, the parliamentarians' decisions are typically either a very short statement of their bottom-line decision or perhaps a paragraph of brief explanation; only rarely are Byrd rule decisions accompanied by a more sustained explanation.⁵⁶ This brevity is often attributable to the constraints under which the office works: making a high volume of challenging decisions under considerable time pressure does not lend itself to lengthy written opinions of the sort that courts produce. Whether or not this is justifiable—an issue I return to below⁵⁷—the lack of detailed explanation is a feature of the Byrd rule process.

⁵¹ See Gould, *supra* note 18, at 1965–66 (describing adjudication on the floor). The chair is formally permitted to ignore the parliamentarian, but doing so is extraordinarily rare. See 167 CONG. REC. S209 (daily ed. Feb. 1, 2021) (statement of Sen. John Cornyn (R-Tex.)) (stating that “the last time either party ignored the Parliamentarian’s ruling was 1975” and that “[s]ince then, both Republicans and Democrats have understood the dangers of such reckless action and have respected the advice of the Parliamentarian, even when it punches a hole in their own legislation”).

⁵² Generally, decisions of the chair can be overridden by a simple-majority vote of the Senate. See Gould, *supra* note 18, at 1966–67 (discussing appeals generally). Waiving a Byrd rule point of order, by contrast, requires the support of three-fifths of the Senate. See HENIFF, *supra* note 41, at 4, 12 (discussing Byrd rule waiver).

⁵³ See Gould, *supra* note 18, at 1967–69 (describing the parliamentarian's advisory role).

⁵⁴ *Id.* at 1971.

⁵⁵ See *id.* at 1971–73 (describing the Byrd bath process); see also Email from Senate personnel to Author (Jan. 22, 2024) (providing additional detail on the process).

⁵⁶ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 690–734 (collecting recent Byrd rule decisions, the vast majority of which run only a single paragraph). *But see id.* at 721–24 (containing the lengthy 2021 decision on extending lawful permanent resident (“LPR”) status through reconciliation).

⁵⁷ See *infra* Part V.B.

The Senate parliamentarian has forged a degree of functional independence from the parties, despite the majority party's power to select and remove the parliamentarian.⁵⁸ Majority parties have very rarely removed or circumvented the parliamentarian.⁵⁹ New parliamentarians have almost always been civil servants elevated from within the office.⁶⁰ There have been a few important exceptions to each of these general norms,⁶¹ but for the most part the parliamentarians have seen themselves and been seen by others as assiduously nonpartisan. The office has a strong self-conception of working to apply congressional rules with fidelity to their text and purposes, irrespective of the politics of the day.⁶²

While the Byrd rule was first formulated in 1985, its modern version dates to the mid-1990s, when the parliamentarian's office issued interpretations that shifted the rule's focus from deficit reduction in particular to fiscal matters more generally. At the time of the rule's inception, its namesake, Senator Robert Byrd (D-W. Va.), made clear his view that a provision's permissibility "is determined by whether or not the language contributes to reducing the deficit and balancing the budget; otherwise, it is extraneous."⁶³ This view was shared by others, including Senate Majority Leader George Mitchell (D-Me.), who, on behalf of a bipartisan group of senators, declared on the Senate floor that "[t]he purpose of the reconciliation process is to reduce the deficit."⁶⁴ Consistent with these statements, a leading observer of the budget process wrote that the drafters of the Byrd rule's "merely incidental" clause "wished to prohibit provisions in which policy changes plainly overwhelmed deficit changes."⁶⁵

⁵⁸ See CONG. RSCH. SERV., THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE 2 (2018), <https://crsreports.congress.gov/product/pdf/RS/RS20544> [<https://perma.cc/DLU5-RAYT>] ("Organizationally, the office of the Senate Parliamentarian is within the office of the Secretary of the Senate, whom the Senate elects at the recommendation of the Senate majority leader.").

⁵⁹ See Gould, *supra* note 18, at 1965–66 n.70 (discussing circumvention); *id.* at 2005–06 (discussing removal).

⁶⁰ See *id.* at 2006–07.

⁶¹ See, e.g., CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 15 ("[W]hen Senator Bob Dole [(R-Kan.)] regained the job of Majority Leader in 1995, he reinstated a former Parliamentarian [who had subsequently joined Dole's staff] with a consequential result for the budget process. Not long thereafter, Majority Leader Trent Lott [(R-Miss.)] fired that same Parliamentarian.").

⁶² I have previously argued that even with a high degree of functional independence, the office's lack of formal independence shapes its general approach to decisionmaking. See Gould, *supra* note 18, at 1994–2004 (using this frame to analyze the office's use of strong stare decisis, preference for decisional minimalism, and willingness to look to purpose and legislative history in interpreting congressional rules).

⁶³ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 651 (quoting 131 CONG. REC. S14,034–35 (daily ed. Oct. 24, 1985)).

⁶⁴ *Id.* at 631 (quoting 135 CONG. REC. S13,349 (daily ed. Oct. 13, 1989) (statement of Sen. George Mitchell (D-Me.))).

⁶⁵ BUDGET PROCESS LAW ANNOTATED 1993, *supra* note 14, at 208 n.580.

Both the parliamentarian's office and the Senate more broadly developed changed understandings of reconciliation's scope in the 1990s and 2000s. Rather than being about deficit reduction, reconciliation became a vehicle for enacting fiscal legislation—changes in taxing and spending—regardless of how those changes impacted the deficit. In 1996, the parliamentarian advised the chair in ruling that the budget reconciliation process could be used for legislation that increased the deficit.⁶⁶ The first major successful use of reconciliation for that purpose was the 2001 tax cuts,⁶⁷ which were enacted through reconciliation with the blessing of the parliamentarian's office.⁶⁸ It has subsequently been clear that the key line demarcating what can and cannot be done through reconciliation is based on the budgetary character of a provision, not whether it is deficit-reducing.⁶⁹ Despite the origins of reconciliation as concerned with deficit reduction, enforcement of the Byrd rule's "merely incidental" clause evolved into a way of policing the line between budgetary and nonbudgetary matters more generally. The Senate Budget Committee summarizes the state of the law as providing that "reconciliation does not have to generate savings; Congress can spend money in reconciliation as long as the legislation is within its budget instructions; and reconciliation can merely shift the budgetary landscape."⁷⁰

In policing that line, the parliamentarian's office relies on estimates of budgetary effects assembled by the Congressional Budget Office ("CBO") and, for tax bills, Congress's Joint Committee on Taxation ("JCT").⁷¹ Partisans will often either lack the ability to independently derive accurate budgetary estimates or have incentives to distort estimates in order to influence a Byrd rule adjudication. The result is that the parliamentarian's office relies

⁶⁶ See 142 CONG. REC. S5,417–18 (daily ed. May 21, 1996) (colloquy between the minority leader, Sen. Thomas Daschle (D-S.D.), and the presiding officer); see also 152 CONG. REC. S4,439 (daily ed. May 11, 2006) (statement of Sen. Maxwell Baucus (D-Mont.)) ("From 1985 through 1996, [the Byrd rule] meant that budget reconciliation bills could not worsen the deficit. Then, in 1996, the [Republican] majority chose to overturn that understanding of the rule . . . [and] began the process of using reconciliation for legislation that worsens the Nation's fiscal balance.").

⁶⁷ Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, 115 Stat. 38 (2001).

⁶⁸ See David Rogers, *Bush's Biggest Ally in Tax-Cut Battle Is Nonvoting Senate Parliamentarian*, WALL ST. J. (Mar. 1, 2001), <https://www.wsj.com/articles/SB983399278336976883> [<https://perma.cc/AWA8-692N>].

⁶⁹ Cf. CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 693 ("[A] Senator can find it easy to defend as budgetary a provision that does nothing but spend a great deal of money. On the other hand, a provision that actually reduces the deficit but does so through the device of an extensive policy change will receive strict scrutiny.").

⁷⁰ *Id.* at 482–83 (summarizing the view of the Senate parliamentarian as of 2022); see also Kogan & Reich, *supra* note 33 (noting that though reconciliation was historically not used to change discretionary spending levels, no rule bars its use for such purposes, and "[s]ome reconciliation bills have included additional funding for programs that are traditionally funded through the annual appropriations process," though "that extra funding was treated as mandatory" because it was authored by authorizing committees rather than appropriations committees).

⁷¹ See Aprill & Hemel, *supra* note 19, at 105–06 (discussing the role of information from CBO and JCT in Byrd rule adjudication); Gould, *supra* note 18, at 1972 (same).

exclusively upon estimates by the nonpartisan staff at CBO and JCT. Those offices, which are staffed by economists and other experts, provide estimates of the likely impacts of proposed legislative provisions.⁷² Estimates of larger budgetary effects will, all else equal, make it more likely that a given provision survives a Byrd rule challenge; conversely, smaller budgetary effects make it more likely that a provision is struck from a reconciliation bill.⁷³ Though Byrd rule decisions typically provide little by way of reasoning, they often cite CBO and JCT projections as justifications for their decisions.⁷⁴ Because the Byrd rule makes budgetary effects central to the inquiry, CBO and JCT are critical to the parliamentarian's decisionmaking process.

The difficulty of adjudicating Byrd rule disputes is longstanding. A budget policy treatise published in 1993 observed that the rule's "merely incidental" language "contributes much of the ambiguity" created by the Byrd rule and emphasized that "[t]he Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits."⁷⁵ Decades later, this largely remains true. But the parliamentarian's office has developed a range of decision rules to help implement the Byrd rule.

B. *Normative Foundations?*

Before proceeding to explore Byrd rule doctrine, a word of caution is in order on the relationship between that doctrine and the normative foundations for the budget reconciliation process. Much of what follows presupposes that there is normative value to a two-track lawmaking system wherein it is easier for Congress to enact provisions that affect the federal budget (both taxing and spending) and harder to enact other types of provisions (such as regulatory provisions). This is the overriding assumption of the contemporary reconciliation process, as policed by the Byrd rule, under which only certain provisions are exempt from ordinary supermajority cloture rules. The bulk of this Article examines whether—if budget-related provisions should indeed be easier to enact than other sorts of provisions—the body of Byrd rule doctrine that the parliamentarian's office has developed is a desirable way of implementing that goal. This line of inquiry allows for critical evaluation of many aspects of Byrd rule doctrine. Even those who disagree about the ultimate normative

⁷² See *Frequently Asked Questions About CBO Cost Estimates*, CONG. BUDGET OFF., <https://www.cbo.gov/about/products/ce-faq> [<https://perma.cc/CV3W-DAKZ>]; *Overview*, JOINT COMM. ON TAXATION, CONG. OF THE U.S., <https://www.jct.gov/about-us/overview> [<https://perma.cc/7BRN-AY6X>].

⁷³ This holds under the "merely incidental" clause of the Byrd rule. 2 U.S.C. § 644(b)(1)(D). Under a different clause of the Byrd rule, a provision is extraneous if it "does not produce a[ny] change in outlays or revenues." *Id.* § 644(b)(1)(A).

⁷⁴ See, e.g., CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 645, 698, 709, 714–15, 721–24, 725–26, 727 (providing examples of Byrd rule decisions that note CBO estimates).

⁷⁵ BUDGET PROCESS LAW ANNOTATED 1993, *supra* note 14, at 208 n.580.

grounding for a two-track lawmaking system that treats budgetary and non-budgetary matters differently should often be able to agree about the virtues or vices of particular doctrinal principles.

A fuller normative evaluation of the Byrd rule, however, requires engaging with *why* it might be reasonable to create a two-track lawmaking system in the first instance. For example, one doctrinal argument that I make in the analysis that follows is that some applications of the Byrd rule are either over- or under-inclusive. Making this argument requires having at least some sense of the underlying rationale for the rule. By way of analogy, consider whether the classic hypothetical rule “no vehicles in the park” should be read to prohibit bicycles.⁷⁶ There are multiple possible justifications for a no-vehicles rule—ensuring pedestrian safety, preventing pollution, minimizing noise, and so forth—which may point in opposite directions on the question of whether the rule should be read to encompass bicycles.⁷⁷ The same holds for reconciliation and the Byrd rule. In order to critically evaluate how the parliamentarian’s office goes about implementing the rule, it is helpful (and at times necessary) to know what justification the rule serves.

A challenge of this approach is that there are a variety of possible justifications for drawing a line between budgetary and nonbudgetary lawmaking.⁷⁸ On one view, a two-track system is justified by the need to ease deficit reduction efforts, given that both public choice theory and historical experience suggest that Congress will often succumb to pressures to tax less and spend more. As noted above, this view about deficit reduction was held by some of the creators of the reconciliation process and the Byrd rule.⁷⁹ The deficit-reduction justification for the Byrd rule will be more or less appealing, as a normative matter, based on one’s views about justice in the domains of taxing and spending policy. But the bigger problem with resting Byrd rule doctrine on the deficit-reduction justification is that it is discordant with realities on the ground: for a quarter century, the parliamentarian’s office has interpreted the Byrd rule to permit reconciliation to be used to enact legislation that leads to substantial increases in the deficit.⁸⁰ Without the deficit-reduction justification, the Byrd rule is a rule in search of a rationale.

⁷⁶ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (“A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles?”).

⁷⁷ I assume for purposes of this example that there are plausible textual arguments for either including or excluding bicycles from the rule’s coverage.

⁷⁸ Some of the arguments presented in this paragraph and the subsequent one are developed in greater detail in Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. (forthcoming 2024) (Part III).

⁷⁹ See *supra* notes 32, 63–65 and accompanying text.

⁸⁰ See *supra* notes 63–70 and accompanying text (discussing the opening up of the reconciliation process for legislation that would increase the deficit); see also, e.g., *How did the TCJA Affect the Federal Budget Outlook?*, TAX POL’Y CTR. (updated May 2020), https://www.tax-policycenter.org/sites/default/files/briefing-book/how_did_the_tcja_affect_the_federal_budget_outlook_1.pdf [<https://perma.cc/8FB5-C7P8>] (summarizing various CBO and JCT estimates

There are other possible justifications for the Byrd rule, but each is significantly mismatched with the realities of how the legislative process plays out on the ground.⁸¹ One approach would be to defend a two-track system on the grounds that spending legislation is typically less coercive than other sorts of legislation, paradigmatically legislation that imposes binding legal obligations on private parties. But this coercion rationale does not explain why the Byrd rule bars the reconciliation process from being used to relax regulatory requirements, grant immigrants legal status, or enact other sorts of provisions that do not impose new regulatory mandates on private parties.⁸² A second justification rests on the short-term nature of most spending provisions—in contrast with the more enduring nature of much other legislation—which in turn could justify a process that makes it easier for Congress to spend than to enact other sorts of legislation. But though the temporal justification helps explain the time limits imposed on reconciliation measures,⁸³ it does not explain why the Byrd rule prohibits making short-term changes to regulatory law that are not budgetary in character. A third view maintains that greater flexibility in the budgetary domain is necessary to give Congress the tools to make fiscal policy in a nimble manner, especially in response to emergencies. But this view is at odds with the reality that both parties have used reconciliation measures to enact longstanding partisan priorities, whereas emergency fiscal legislation responding to crisis conditions can often pass through regular order with bipartisan support.⁸⁴ Fourth, and finally, one might argue that it is normatively appropriate to make it more difficult to pass the most controversial or divisive legislation, and the current system could be justified on the grounds

showing that the Tax Cuts and Jobs Act of 2017 would substantially reduce federal revenues, thereby increasing deficits by between \$1 trillion and \$2 trillion over a decade-long period).

⁸¹ While I focus here on the mismatch problem, a separate line of critique focuses on how each of these justifications takes a side on a contested issue of political theory. For example, the coercion rationale places one value (minimizing government coercion) over others (such as increasing social welfare, advancing certain forms of equality, or preventing private coercion).

⁸² See Gould, *supra* note 78, at Part IV.B (discussing this and other problems with coercion-based arguments).

⁸³ The provision of the Byrd rule immediately following the “merely incidental” clause dictates that “a provision shall be considered to be extraneous if it increases, or would increase, net outlays, or if it decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by such reconciliation bill or reconciliation resolution” 2 U.S.C. § 644(b)(1)(E); see also HENIFF, *supra* note 41, at 5 n.12 (noting that “the longest budget window that has applied to a budget resolution and associated reconciliation legislation covered 11 years, including the current year”). The requirement that reconciliation legislation not make changes beyond the budget window explains why the Bush- and Trump-era tax cuts included sunset provisions. Cf. Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 667–68 (2007).

⁸⁴ The two most prominent twenty-first century examples, as of this writing, are the Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified as amended in scattered sections of 12 and 26 U.S.C.) (bipartisan response to Great Recession that included the creation of the Troubled Asset Relief Program), and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (bipartisan response to start of the COVID-19 pandemic that included significant emergency economic aid to individuals, businesses, and subnational governments).

that it excludes much of the most controversial legislation from fast-track procedures. But this principle is in tension with both the fact that the Byrd rule bars even mundane regulatory lawmaking and the fact that both parties have used the reconciliation process to pass party-line legislation on spending and taxing that is highly politically divisive but squarely compliant with Byrd rule doctrine. In short, none of these possible justifications for the two-track lawmaking system created by reconciliation and the Byrd rule can justify the way that system operates in practice.

Where does this leave us? Different justifications for the Byrd rule will support different outcomes in different cases. No single rationale is immune from normative criticism on its own terms. Nor is any single rationale a perfect fit with how Byrd rule doctrine has developed. In practice, Byrd rule doctrine serves multiple rationales, each imperfectly. To the extent that Byrd rule doctrine can appear confused, one reason is that it is not obvious what its underlying purpose is. This Article will seek to parse Byrd rule doctrine despite that challenge, but the issue of normative underpinnings lurks behind the doctrinal discussion.

This problem of competing justifications for a given legal rule is not by any means unique to the Byrd rule. Consider an analogy to First Amendment free speech jurisprudence. Scholars have advanced various justifications for constitutional protection of free speech, highlighting the role of free speech in facilitating individual autonomy, allowing for a functioning democracy, enabling a marketplace of ideas, promoting civic equality, and preventing tyranny, among other justifications.⁸⁵ Often, multiple justifications will point toward the same outcome in a single case. But at other times, different justifications will be at cross-purposes: one justification might counsel toward striking down a given restriction on speech, while another justification might counsel toward upholding it. To identify as contested the normative underpinnings of a rule—the First Amendment, the Byrd rule, or otherwise—is not to say that the doctrine that results from the rule is necessarily incoherent or not worthy of study. To the contrary, careful doctrinal analysis can be fruitful even in the face of disagreement about normative groundings. But in such a setting, normative disagreement about a rule's purpose can complicate doctrinal analysis.

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⁸⁵ For examples of major work presenting and defending different justifications for free speech, see generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); John Stuart Mill, *Of the Liberty of Thought and Discussion*, in *ON LIBERTY AND OTHER ESSAYS* 20, 20–61 (John Gray ed., Oxford Univ. Press 1991) (1859); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. REV. 1055 (1999).

The remainder of this Article examines the various approaches that the parliamentarian's office has taken in deciding which provisions are and are not consistent with the "merely incidental" clause of the Byrd rule. In implementing the Byrd rule's mandate that provisions that produce budgetary changes that are "merely incidental" to their policy impacts cannot be included in reconciliation bills, the parliamentarian's office takes several approaches. It engages in case-by-case balancing, but it has also developed a set of more categorical principles to implement the Byrd rule's general mandate. These principles are nowhere present in the text of the Byrd rule—which provides virtually no guidance on how it is to be applied—but they have become central to how the rule operates in practice.

For each decisional approach, I explain its basic contours, provide examples of applications, and offer some normative reflections on virtues and vices. For some, I also draw analogies to better-known judicial doctrines. As already noted, this discussion draws on both recently released Byrd rule materials and on interviews with Senate staffers who have worked on reconciliation bills and, in many cases, argued Byrd rule disputes before the parliamentarian's office.⁸⁶

III. BYRD RULE BALANCING

To decide if a given provision is permissible under the Byrd rule, the parliamentarian's office often conducts an all-things-considered balancing of the provision's budgetary effects as compared to its nonbudgetary policy effects. This Part first describes how Byrd rule balancing works in practice, and then proceeds to document the conceptual and practical challenges associated with such balancing. The difficulties of Byrd rule balancing matter both in their own right and as a means of explaining why the parliamentarian's office has developed implementing principles to supplement case-by-case balancing.

The Byrd rule's text invites balancing between budgetary and non-budgetary effects.⁸⁷ The rule calls for a comparison between a provision's

⁸⁶ Interviewees included current and former senior legislative staff from both parties with experience arguing before the parliamentarian's office on Byrd rule issues. Offices represented include party leadership offices and the following Senate committees: Appropriations; Budget; Finance; Health, Education, Labor and Pensions ("HELP"); and Environment and Public Works ("EPW"). Positions represented include staff directors, deputy staff directors, chief counsels, and other comparable roles. In identifying interviewees and conducting interviews, I followed best practices for elite political science interviews. See Gould, *supra* note 18, at 1955 n.23 (discussing methodology and citing sources on best practices). Interviewees were granted anonymity to promote candor. In order to ensure anonymity, citations do not specify the interviewee's committee, party affiliation, or whether the interviewee is a current or former staffer. Whenever possible, I cite publicly available materials identified by the interviewees, rather than the interviewees' statements themselves.

⁸⁷ While the test is primarily an effects test, I consider the role of intent *infra* at notes 106–109 and accompanying text.

budgetary impact (its “changes in outlays or revenues”) and its “non-budgetary components.”⁸⁸ This language calls for an inquiry not into which types of impacts are more important (however one would judge such a thing), but rather whether budgetary impacts are “merely incidental” to nonbudgetary impacts. Presumably this means that a provision the impact of which is 60% nonbudgetary and 40% budgetary should be permitted under the rule, since 40% of a provision’s impact is not a “merely incidental” amount, even if it is decidedly secondary.⁸⁹ In addition to being consistent with the Byrd rule’s text, balancing budgetary and nonbudgetary effects furthers the purpose that the rule has come to serve: drawing a line of demarcation between budgetary and nonbudgetary policymaking.⁹⁰

The current Senate parliamentarian has summarized the effects of balancing as requiring a decision about whether a proposed provision “is a policy change that substantially outweighs the budgetary impact of that change.”⁹¹ Two former congressional staffers have similarly written that the Byrd rule implements a “balancing test” under which “the more budgetary effect, the more policy change is permissible under the Byrd rule.”⁹²

As a practical matter, this sort of balancing will often be straightforward. Many changes to the law are so overwhelmingly fiscal in nature that there is no question that they are permitted under the Byrd rule. The vast majority of provisions spending money or changing the tax code fall into this category. Conversely, some changes have such a minimal impact on the federal fisc, as compared to their large policy impacts, that they are clearly impermissible under the rule. The parliamentarian’s office has consistently found that the rule prevents provisions with minimal budgetary impacts from being included in reconciliation measures.⁹³

Even when budgetary impacts are not minimal, they often pale in comparison to the policy effects of a provision. For example, the parliamentarian’s office found that a provision related to homeschooling violated the Byrd rule

⁸⁸ 2 U.S.C. § 644(b)(1)(D).

⁸⁹ This example is a simplification, because the parliamentarian’s office does not (and could not) assign numerical values to budgetary and nonbudgetary impacts of a given provision, but it helps illustrate the point that an effect can be more than “merely incidental” even if it is secondary. One Senate staffer expressed the view that “the parliamentarian gives less value to the meaning of these words than the statute would warrant,” arguing that “budgetary effects that are plainly not incidental have been insufficient to allow inclusion of provisions.” Email from Senate personnel (Dec. 28, 2023).

⁹⁰ This differs from the rule’s original purpose, which focused on deficit reduction. *See supra* notes 63–65 and accompanying text.

⁹¹ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 690 (quoting email from Senate parliamentarian).

⁹² Greg Dotson & Dustin Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ENV’T L. REP. 10017, 10034 (2023).

⁹³ *See, e.g.*, 149 CONG. REC. S7,084 (daily ed. May 23, 2003) (statement of Sen. Charles Grassley (R-Iowa)) (noting that a legislative requirement that company chief executives personally sign corporate tax returns could not be considered through reconciliation because it “has a negligible revenue effect and could possibly violate the Byrd rule”).

because it “ha[d] a modest budget impact, but the impact [was] vastly outweighed by the profound impact, as a matter of social and education policy, of providing Federal support for homeschooling for the first time.”⁹⁴ Similarly, the parliamentarian’s office agreed with a challenge arguing that a provision was extraneous under the Byrd rule when it made “major changes to Medicaid, the Emergency Medical Treatment and Labor Act . . . and even State medical malpractice liability policy, [but] it only generate[d] net savings of \$11 million over 5 years.”⁹⁵ These examples show that when policy effects are large but budgetary effects are either negligible or small, balancing provides an easy way of finding that a provision violates the Byrd rule.

In many cases, however, balancing will be more difficult. This is especially true when a provision makes major nonbudgetary policy changes but also has large budgetary impacts. Consider, for example, Democratic efforts to use a reconciliation bill to provide a pathway to lawful permanent resident (“LPR”) status for various populations of immigrants, including but not limited to “Dreamers” who were brought to the United States as children. In the early 2020s, Democrats sought to include a pathway to LPR status in reconciliation legislation. Proponents of the change argued that it should be permitted under reconciliation because of the massive economic impact the change would have, including through making new classes of individuals eligible for a host of federal benefits.⁹⁶ The CBO estimated that the legislation would have adjusted 8 million people to LPR status, thereby making them newly eligible for various social safety net benefits, which in turn would have increased the deficit by \$140 billion over four years.⁹⁷ Opponents, by contrast,

⁹⁴ See 163 CONG. REC. S8,139 (daily ed. Dec. 19, 2017) (statement of Sen. Ronald Wyden (D-Or.)).

⁹⁵ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 702–03 (quoting 151 CONG. REC. S14,204 (daily ed. Dec. 21, 2005) (statement of Sen. Maxwell Baucus (D-Mont.))). Opponents of the provision argued that the provision would “allow[] States to impose new higher costs for Medicaid patients seeking emergency room care,” “allow[] hospitals to turn patients away if they cannot pay when the hospital says there is no emergency,” “deter emergency room use by Medicaid beneficiaries and make it harder to enforce the Federal guarantee of access to emergency care for all,” and “make[] it harder for patients to sue hospitals and doctors for poor treatment decisions about whether they need emergency care.” *See id.*

⁹⁶ See Michelle Hackman & Siobhan Hughes, *Dreamers’ Await Senate Parliamentarian’s Ruling on Reconciliation Package*, WALL ST. J. (Sept. 11, 2021), <https://www.wsj.com/articles/dreamers-await-senate-parliamentarians-ruling-on-reconciliation-package-11631377730> [<https://perma.cc/V4P4-K9E5>] (noting that Senate Democratic staff “argued that creating a legalization program should qualify [for inclusion in reconciliation legislation] because doing so would make the immigrants eligible for federal benefits, including Affordable Care Act subsidies, Medicaid and food stamps”).

⁹⁷ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 721 (quoting email from Senate parliamentarian). The \$140 billion figure from the CBO that the parliamentarian cited in her decision seems to account only for changes in benefits paid out to those newly eligible for LPR, but not for the other possible impacts of the legislative change on the federal fisc. Economists have calculated that the federal government receives significant tax revenue from DACA recipients. *See, e.g.,* Nicole Prchal Svajlenka & Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, CTR. FOR AM. PROGRESS (Apr. 6, 2020), <https://www.americanprogress.org/issues/>

emphasized that the provision would facilitate a legal change in *status* for particular individuals, which is not the sort of change that ought to be allowed under reconciliation.⁹⁸ The parliamentarian agreed with the latter argument and disallowed several efforts by Democrats to include provisions in reconciliation bills that would effectuate a change in status. “Changing the law to clear the way to LPR status,” one decision noted, “is [a] tremendous and enduring policy change that dwarfs its budgetary impact.”⁹⁹ In justifying this decision, the parliamentarian noted that, though changes in LPR status would mean changes in benefits eligibility, which have a direct budgetary impact, changes in LPR status also have many impacts that are not budgetary in nature.¹⁰⁰ The parliamentarian concluded that those nonbudgetary effects were so significant as to render the budgetary effects “merely incidental” by comparison, despite the large magnitude of the budgetary effects.

This example points toward a more general principle: even provisions that implicate large quantities of money will at times be found to violate the Byrd rule. When Senate Republicans sought to modify the Johnson Amendment, a provision of the tax code that prevents nonprofit organizations (including religious institutions) from participating in political campaigns or advocating for or against the election of political candidates,¹⁰¹ the parliamentarian’s office rejected their efforts. The decision concluded that “the policy implications

immigration/news/2020/04/06/482676/knowdemographic-economic-impacts-daca-recipientsspring-2020-edition [https://perma.cc/M2Y5-PV5E] (“DACA recipients and their households pay \$5.6 billion in federal taxes, and \$3.1 billion in state and local taxes, each year. That money comes on top of the contributions that DACA recipients make to the health of the Social Security and Medicare funds through their payroll tax contributions.”); Logan Albright, Ike Brannon & M. Kevin McGee, *A New Estimate of the Cost of Reversing DACA 1* (CATO Inst., Working Paper No. 49, Feb. 15, 2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/working-paper-49.pdf [https://perma.cc/TPZ2-9ZJB] (“We estimate that reversing DACA would cost the U.S. economy \$351 billion from 2019 to 2028 in lost income and that the U.S. Treasury would lose \$92.9 billion in tax revenue.”). One effect of providing LPR status to DACA recipients legislatively would have been to secure tax revenue from DACA recipients into the future. Without such legislation, a future presidential administration could end the program, which in turn would likely reduce federal tax receipts—if the end to the program led former DACA recipients to leave the country voluntarily, to leave on account of deportation, or to remain in the country but suffer from limited employment opportunities because of the end of the program.

⁹⁸ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 721 (quoting email from Senate parliamentarian).

⁹⁹ *Id.* at 723–24 (quoting email from Senate parliamentarian).

¹⁰⁰ *See id.* at 723 (quoting email from Senate parliamentarian) (“LPR status comes with a wide range of benefits far beyond the social safety net programs (Medicare, Medicaid, SNAP, CHIP, SSI, etc.) that generate the CBO score. Broadly speaking, as most of the beneficiaries of this policy change are not in status, there will be other, lifechanging federal, state and societal benefits to having LPR status, for example: the ability to work anywhere in almost any job, the ability to obtain a driver’s license in any state, in-state tuition in any state, the ability to sponsor family members under the INA, the ability to make campaign contributions, the freedom from the specter of deportation to the very country from which they fled.”).

¹⁰¹ 26 U.S.C. § 501(c)(3) (defining nonprofit organizations to include only those that “do[] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office”).

of this change are significant and outweigh the budgetary impact,”¹⁰² despite JCT projections of a loss of \$2.1 billion in government revenue over five years if the provision were to go into effect.¹⁰³ The parliamentarian reasoned that “[c]hanging the way in which [501(c)(3) entities] operate is a consequential policy change.”¹⁰⁴ Similarly, initial efforts by Senate Republicans to repeal the Affordable Care Act’s individual mandate through budget reconciliation were found to violate the Byrd rule despite projections of massive budgetary effects. The parliamentarian’s office reasoned that “while the dollars associated with repeal [of the individual mandate] are large (a net savings of approximately 147 billion dollars over 10 years if combined with the employer mandate repeal), they are dwarfed by the scope and impact of this mandate on the 270 million Americans who are covered by it.”¹⁰⁵ These decisions stand for the proposition that even very large amounts of money can be “merely incidental” for purposes of Byrd rule balancing if a provision’s nonbudgetary policy effect is sufficiently major.

One lesson of these decisions is that the term “merely incidental” in the Byrd rule context has grown to encompass more than the term’s plain meaning. Even if one could reasonably argue that the nonbudgetary effects of changes to LPR status or the Johnson Amendment are *greater than* the budgetary effects of those changes, it is harder to argue that those budgetary effects are *merely incidental* to the policy change. In the case of LPR status, expanded benefits eligibility for a large class of individuals was a key motivation for and effect of the provision. In the Johnson Amendment case, a change to the tax code would have had predictable and significant effects on individual behavior, with implications for tax receipts. Neither example fits the straightforward case of a merely incidental budgetary effect—say, a regulatory policy change that would have a small budgetary impact solely based on new paperwork-related requirements. But the parliamentarian nonetheless judged the budgetary effects of each to be “merely incidental” to policy effects for purposes of the Byrd rule.

Another feature of Byrd rule balancing is that it is primarily an effects test, though considerations of legislative intent may at times influence the analysis. By describing the Byrd rule as an effects test, I mean that the parliamentarian’s office typically allows or disallows provisions in reconciliation based on those provisions’ policy effects. In each case just discussed, for

¹⁰² CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 718.

¹⁰³ See Aprill & Hemel, *supra* note 19, at 123–24 (noting that this revenue loss would have occurred because “donors who otherwise might have made nondeductible contributions to social welfare and political organizations [would] instead [make] deductible gifts to 501(c)(3) entities”) (citing STAFF OF J. COMM. ON TAX’N, JCX-49-17, 115TH CONG., ESTIMATED REVENUE EFFECTS OF THE CHAIRMAN’S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1 (Comm. Print 2017)).

¹⁰⁴ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 719.

¹⁰⁵ *Id.* at 704. For additional discussion of this decision, see *infra* notes 152–160 and accompanying text.

example, the office examined the challenged provision's effects, both budgetary and nonbudgetary. The office did not, at least expressly, focus on intent—i.e., whether the enacting coalition's primary goal was to make budgetary changes or to enact nonbudgetary policy changes.¹⁰⁶

Though legislative intent is not officially part of the Byrd rule inquiry, numerous observers have argued that, in practice, intent matters for the Byrd rule balancing. One Senate staffer has said simply that “I think intent matters and . . . everyone in the process knows it matters.”¹⁰⁷ Other staffers, commentators, and even one former parliamentarian have sounded similar notes.¹⁰⁸ One way to understand the LPR holding—and holdings in other cases of Byrd rule violations despite large budgetary effects—is that the enacting coalition's nonbudgetary policy objectives counted as a strike against the provision for purposes of Byrd rule analysis. But to the extent that congressional intent is relevant to Byrd rule balancing, it remains a background consideration rather than one that is an express part of the analysis.¹⁰⁹

¹⁰⁶ On this approach, there would be a Byrd rule problem when the party proposing a provision intends to make nonbudgetary changes to federal policy, and the budgetary changes associated with those nonbudgetary reforms are “merely incidental” in the sense that they are not the primary goal (or even a secondary goal) of the enacting coalition.

¹⁰⁷ Author interview with Senate personnel.

¹⁰⁸ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 621 (quoting former Senate Parliamentarian Robert Dove stating, in 2010, that the “merely incidental” clause is hard to administer because “[y]ou are trying to judge peoples’ motives”); Author interview with Senate personnel (arguing that intent was one reason Democrats were not permitted to raise the minimum wage through reconciliation in 2021, saying that the parliamentarian asks “fundamentally, what is going on here?” and, the staffer speculated, in the minimum wage case, “she could never really cross the Rubicon of primarily, this is about lifting the wages for millions of Americans”); David Super, *What the Senate Parliamentarian Could Learn from Justice Scalia*, BALKINIZATION (Dec. 18, 2021), <https://balkin.blogspot.com/2021/12/what-senate-parliamentarian-could-learn.html> [<https://perma.cc/8D7X-RPUR>] (arguing that the parliamentarian justified barring immigration reforms from proceeding under reconciliation during the Biden administration on the grounds that “sponsors’ purposes are primarily non-fiscal even if the language and [fiscal] effect of the provision is quite large” (emphasis in original)). *But see* Author interview with Senate personnel (arguing that intent plays a minimal role in Byrd rule adjudication because the parliamentarian’s office “understand[s] there’s probably an ulterior motive or a policy intent for ninety-eight percent” of Byrd rule issues).

¹⁰⁹ The Senate parliamentarian’s office has a deep institutional understanding of the Senate, which makes the office especially well-suited to judge matters of intent. In some instances, it will be possible for the office to make reasonable inferences about the intent of the coalition that supports enacting a given provision. But an inquiry into legislative intent has significant drawbacks. First, any given proponent of a particular provision may have multiple goals in supporting that provision, and at times some of those goals will be budgetary in character while others will not be. Second, the enacting coalition as a whole might well be comprised of legislators who have different goals—some budgetary, some nonbudgetary—in enacting the same provision. Third, even if intent were uniform, it can be hard to discern, and legislators will at times have incentives to obscure their true intent (either for electoral reasons or to game the Byrd rule process). For these reasons, bringing intent into the Byrd rule process implicates the same critiques that scholars of statutory interpretation have lodged against the use of legislative intent in that context. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which

The foregoing discussion highlights the primary challenge of a Byrd rule balancing: outside of easy cases, it is extremely difficult to engage in balancing in a consistent and principled manner. Byrd rule balancing is a species of what legal theorists call “ad hoc” balancing, under which an adjudicator must balance competing considerations—here, budgetary and nonbudgetary policy effects—on a case-by-case basis.¹¹⁰ But this sort of balancing gives rise to the risk that there might be no principled way in which to engage in it. The risk arises from the inevitability that incommensurable variables must be weighed against each other. In the constitutional law context, this concern typically manifests in the form of weighing different values—liberty, equality, democracy, public safety, and so forth—that are hard (if not impossible) to weigh against one another in a principled way.¹¹¹ In the Byrd rule context, the weighing is of budgetary impact against one or several nonbudgetary impacts. This balancing does not typically implicate deep values in the way that some constitutional cases do, but it does give rise to challenging problems. For any given provision, when should a budgetary impact be characterized as “merely incidental” to nonbudgetary policy impacts? This question is at least a very difficult one, if not one that is impossible to answer coherently for reasons of incommensurability.

Alongside this theoretical concern is a more practical one: the discretion that Byrd rule balancing allows. The primary advantage of case-by-case balancing is that it allows adjudicators to make individualized determinations carefully calibrated to the facts of the case at hand. But, for this very reason, case-by-case balancing is vulnerable to the critique that it is prone to “undermin[ing] the development of stable, knowable principles of law.”¹¹² If every Byrd rule decision were made based on case-by-case balancing, parties would struggle to reliably predict which provisions will be permitted under the rule and which will be disallowed. This harms legislators and their staffs, most directly, by making planning difficult. But it also harms the perception among the public—to the extent that the public is attentive to internal dynamics in Congress—that our legislative institutions are indeed rule-bound.¹¹³

many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”).

¹¹⁰ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 948 (1987) (describing “ad hoc” balancing and providing the example of balancing under the Supreme Court’s decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and comparing it with “definitional balancing,” under which courts engage in balancing in formulating a general rule, which is in turn applied without balancing in individual cases).

¹¹¹ See Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 *HASTINGS L.J.* 785, 794–95 (1994) (providing examples both of cases that pit individual rights against other sorts of interests and of cases that pit multiple rights against one another). For an optimistic view of the potential to balance different sorts of values in a systematic way, framed in terms of the promise of proportionality-style review, see generally Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094 (2015).

¹¹² See Aleinikoff, *supra* note 110, at 948.

¹¹³ Public opinion will almost never be relevant in the Byrd rule context, since the application of Senate rules nearly always falls below the public radar. In very rare instances, however,

Even if the parliamentarian's office was indifferent to these concerns from the standpoint of good governance, it would still have a self-interested reason to worry about unpredictability. As I have previously argued, the parliamentarian's office has strong institutional reasons to project an image of being constrained, since excessive discretion can lead to conflicts with the elected officials who have the power to remove, ignore, or circumvent the parliamentarian.¹¹⁴ Case-by-case balancing risks giving rise to precisely what the parliamentarian's office seeks to avoid: Senators and their staffs perceiving parliamentary decisionmaking as arbitrary or biased. It is unsurprising, then, that the parliamentarian's office has supplemented case-by-case balancing with a set of implementing principles. The next Part turns to those principles.

IV. IMPLEMENTING PRINCIPLES

The challenges associated with case-by-case balancing have led the parliamentarian's office to develop principles to help implement the Byrd rule. Case-by-case balancing still plays an important role in some cases, as discussed above, but in many instances Byrd rule disputes can be resolved by reference to one of several principles that the parliamentarian's office has devised.¹¹⁵ These principles are part of a body of common law, having evolved over the course of years of adjudications to implement a seemingly open-ended rule.¹¹⁶

A. *Direct Versus Indirect Budgetary Impacts*

One way of concretizing an effects test of the sort described in Part III is to look more favorably, for purposes of Byrd rule analysis, on policies with

a high-profile Byrd rule decision will capture media attention, *see supra* note 5 (providing examples), which in turn gives rise to concerns about perceptions of arbitrary decisionmaking.

¹¹⁴ *See* Gould, *supra* note 18, at 1994–2004 (arguing that the parliamentarians' jurisprudence has developed in the shadow of their partisan superiors).

¹¹⁵ These implementing principles are an alternative to the case-by-case judgments that are the hallmark of ad hoc balancing. But those principles are themselves a form of categorical balancing—the creation of legal categories based on an assessment of the benefits and costs of permitting entire categories of action, rather than an assessment of benefits and costs in particular cases. *Cf. supra* note 110 (contrasting “ad hoc balancing” with “definitional balancing”); Steven H. Shiffrin, *Qualified Absolutism, Categorical Balancing, and New Categories*, 85 ALBANY L. REV. 37, 94 (2022) (noting that First Amendment free speech doctrine “has created unprotected categories by weighing free speech interests against government interests together with the impact on each by the regulation under review” and characterizing the creation of these categories as “not ad hoc balancing” but rather “a form of categorical balancing”).

¹¹⁶ One description of the common law—which applies to Byrd rule doctrine as well—is the view that the common law “consist[s] of all the rules that could be generalized out of judicial decisions” and requires that earlier decisions should “be followed in future cases of the same sort.” Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424–25 (1967); *see also supra* notes 48–49 and accompanying text (discussing how open-ended legal provisions are “implemented” or “rulified” in the course of judicial decisionmaking).

direct as opposed to indirect budgetary impacts. There is a plausible objective behind this approach, but it has the limitation of being both over- and under-inclusive relative to the goal of drawing a line between budgetary and nonbudgetary legislative provisions.

When a legal change would have a budgetary impact, that impact could be direct, indirect, or a combination of the two. Direct impacts are easy to identify. A provision has a direct budgetary impact when it changes how much money flows into the federal fisc (through tax receipts) or out of the federal fisc (through either direct spending or tax expenditures). Indirect budgetary impacts occur when a legal change affects something in the world that in turn has a downstream effect on federal revenue or expenditures. Consider, for example, a hypothetical increase in the minimum wage for private sector workers. Such an increase would be a regulatory change, in that it would require private employers to pay their employees at or above a given floor. It would not directly cause any funds to flow into or out of federal accounts.¹¹⁷ But a minimum wage increase would have multiple indirect fiscal effects. When workers are paid more, government receives more revenue in the form of income and payroll taxes.¹¹⁸ Workers who are paid higher wages by their employers would also be eligible for fewer federal benefits, which in turn could reduce federal expenditures on social programs.¹¹⁹ Evidence also suggests that workers making higher wages have better health outcomes, which in turn leads to lower government expenditure through Medicare, Medicaid, and the Veterans Administration.¹²⁰ And, to the extent that a higher minimum wage leads to lower employment (a point that is contested in the economic literature¹²¹), that too would have downstream effects on the federal fisc, in terms

¹¹⁷ This stylized example puts aside the fact that a change in the private-sector minimum wage might change the prices of goods that the federal government purchases from private-sector entities.

¹¹⁸ See MICHAEL REICH, CTR. ON WAGE & EMP. DYNAMICS, INST. FOR RSCH. ON LAB. & EMP., EFFECT OF A FEDERAL MINIMUM WAGE INCREASE TO \$15 BY 2025 ON THE FEDERAL BUDGET 1, 3–4 (2021), <https://irle.berkeley.edu/wp-content/uploads/2021/02/Effect-of-a-federal-minimum-wage-increase-to-15-dollars-by-2025-on-the-federal-budget-1.pdf> [<https://perma.cc/WEJ8-2KQX>] (estimating that raising the federal minimum wage to \$15 per hour would have resulted in an increase in federal tax receipts of \$19.4 billion per year in payroll taxes and \$21.2 billion per year in income taxes).

¹¹⁹ See Ben Zipperer, David Cooper & Josh Bivens, *A \$15 Minimum Wage Would Have Significant and Direct Effects on the Federal Budget*, ECON. POL'Y INST. (Feb. 2, 2021), <https://www.epi.org/publication/a-15-minimum-wage-would-have-significant-and-direct-effects-on-the-federal-budget/> [<https://perma.cc/Z4K4-ZV9P>] (noting that, by one estimate, enacting the 2021 proposal to raise the federal minimum wage to \$15 per hour over four years would lead to “a \$31 billion reduction in [federal] benefits: \$20.7 billion is due to reduced refundable tax credits (the EITC and CTC) and the rest is due to reduced spending on SNAP and other transfer programs”).

¹²⁰ See *id.* (citing a “growing body of research . . . showing positive public health effects from higher minimum wages,” which in turn reduce federal health expenditures).

¹²¹ See David Neumark & William Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research* (Nat'l Bureau of Econ. Research, Working Paper No. 12663, 2007), <http://www.nber.org/papers/w12663> [<https://perma.cc/CEE4-9YL7>]

of both tax receipts and benefits paid out. All of these would be indirect rather than direct budgetary effects of raising the private sector minimum wage.¹²²

If a provision has indirect rather than direct budgetary effects, that fact is a considerable strike against the parliamentarian's office finding the provision to be compliant with the Byrd rule. The approach that the office has taken in evaluating attempts to change the minimum wage through reconciliation illustrates the importance of the distinction between direct and indirect budgetary effects. During consideration of the American Rescue Plan Act,¹²³ Senate Democrats attempted to include in the bill a provision that would have raised the federal minimum wage to \$15 over five years.¹²⁴ The parliamentarian's office concluded (without explanation) that such a change would violate the Byrd rule.¹²⁵ In conjecturing as to the reasoning behind this decision, staffers posited that the difference between direct and indirect impacts played an important role. As one interviewee put it, the parliamentarian's office gives "secondary effects" less weight, "even if the dollars are significant."¹²⁶

There is a plausible reason to be more permissive toward legislation with direct rather than indirect budgetary effects. Virtually any meaningful legal change will have at least some indirect effects on federal outlays and revenues, so allowing changes with such impacts through reconciliation could significantly expand the scope of budget reconciliation to allow policymaking on many topics that have historically been subject to supermajority cloture rules. While this is desirable for opponents of the filibuster, it runs counter to the idea—orthodoxy among many in the Senate, including the parliamentarian's office—that the reconciliation process ought to be a narrow exception to regular order. If the idea behind reconciliation is that budgetary decisions should be treated differently than other sorts of policy decisions, a strict separation

(literature review finding "a wide range of existing estimates and, accordingly, a lack of consensus about the overall effects on low-wage employment of an increase in the minimum wage").

¹²² Raising the minimum wage would also have some direct effects on the federal budget, though those direct effects are smaller in magnitude and less often discussed than the indirect effects. See CONG. BUDGET OFF., *THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME* 13 (2014), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/44995-MinimumWage.pdf> [<https://perma.cc/7HGX-3WQ8>] (noting that increasing the federal minimum wage would affect the federal budget by "requiring the government to increase wages for a small number of hourly federal employees" and "by boosting the prices of some goods and services purchased by the government").

¹²³ Pub. L. No. 117-2, 135 Stat. 4 (2021).

¹²⁴ 167 CONG. REC. S1,219 (daily ed. Mar. 5, 2021) (statement of Sen. Bernard Sanders (I-Vt.)).

¹²⁵ See *id.* at S1,230 (chair sustaining Byrd rule point of order against the minimum wage increase without explanation); see also CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 721 (noting that the month before the question was litigated on the Senate floor, the parliamentarian had advised, without explanation, that the minimum wage increase would violate the Byrd rule); Caitlin Emma, Burgess Everett & Marianne Levine, *Biden's Minimum Wage Increase Runs Afoul of Budget Rules*, POLITICO (Feb. 25, 2021), <https://www.politico.com/news/2021/02/25/minimum-wage-senate-parliamentarian-471688> [<https://perma.cc/KUM7-LHB4>] (providing additional background).

¹²⁶ Author interview with Senate personnel.

between provisions with direct budgetary effects (generally permitted in reconciliation measures) and those with indirect budgetary effects (generally not permitted) is both administrable and sensible.

Despite this logic, there are problems with placing too much weight on the distinction between direct and indirect effects. Doing so risks allowing some policy changes that seem like a poor fit for reconciliation's purposes, while disallowing other changes that seem to further reconciliation's purposes. Two examples illustrate the point, one showing the risk of being overly permissive and the other showing the risk of being overly restrictive. First is the example of efforts to defund Planned Parenthood through reconciliation. A provision to deny federal funding to Planned Parenthood would have a direct effect on the budget, since fewer funds would be drawn from the federal treasury with the defunding provision than would be without it. Yet the parliamentarian's office has concluded that, despite this direct budgetary effect, defunding Planned Parenthood is mainly about a contested nonbudgetary policy issue, namely reproductive health care, and the budgetary impact of defunding is therefore "merely incidental."¹²⁷ Second, and conversely, imagine a hypothetical statute increasing the criminal sanctions for tax evasion, which (if well designed) would have the effect of reducing the rates of tax evasion and thereby increasing tax receipts. Such a provision would have only indirect budgetary effects, since the budgetary effects would result from changes in private behavior, not from the provision itself. But those budgetary effects are the most important consequence of the provision, and it would be odd to call them "merely incidental" to the provision imposing the criminal penalty. These examples show that, whatever the virtues of a sharp line between direct and indirect effects, that line alone risks being both over- and under-inclusive relative to the types of provisions that seem like they ought to be permitted in reconciliation measures.¹²⁸

B. Voluntary Versus Compulsory Provisions

The parliamentarian's office is more likely to allow a voluntary program to proceed through reconciliation as compared to a provision that imposes a mandate on private parties. The parliamentarian's office frequently allows the reconciliation process to be used for a program or tax credit that private parties

¹²⁷ See *infra* notes 161–165 and accompanying text (discussing this decision in greater detail, in the context of the doctrine of "targeting").

¹²⁸ It bears mention that the distinction between direct and indirect effects was central to pre-1937 Commerce Clause jurisprudence but was subsequently abandoned as unworkable. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 87–88 (2001) (describing the distinction between direct and indirect effects in the Commerce Clause context among a "graveyard of failed distinctions" in that area that proved not workable in practice); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2175–76 (2001) (noting that "[t]he [pre-1937] Court distinguished between direct and indirect connections to interstate commerce, but the distinction proved unworkable given the realities of an integrated national economy").

can voluntarily opt into. By contrast, the parliamentarian's office strongly disfavors using reconciliation to impose a regulatory mandate on individuals, corporations, or other organizations.

This principle helps explain some of the most high-profile decisions made by the parliamentarian's office. Consider again the minimum wage example just discussed. The parliamentarian rejected efforts to raise the minimum wage through reconciliation, despite the very large budgetary impacts of such a move.¹²⁹ One understanding of that decision is that it stands for the principle that the Senate cannot impose a straightforward regulatory mandate through the reconciliation process. Though the parliamentarian's office did not explain its reasoning for why the minimum wage increase violated the Byrd rule, perhaps the simplest possible justification for that conclusion is that the rule bars using the reconciliation process to impose regulatory mandates on private parties—regardless of budgetary impact. One Senate staffer noted that they were not surprised by the parliamentarian's decision on the minimum wage “given the enormous impact that has on the private sector.”¹³⁰ Another noted that though the effect of the minimum wage increase on the federal budget was “very significant,” it mattered to the decision that the effect on the federal budget “was much smaller than . . . the effect that was going to be felt in the private sector” because of the mandate that it imposed on private businesses.¹³¹

There is a plausible normative basis for the line between mandates and other sorts of policymaking. Government sometimes needs to coerce private parties in the interest of the public good, and coercion is necessary for a functional state.¹³² But because of the dangers of wrongful coercion,¹³³ one could plausibly argue that Congress should have to clear a more challenging procedural gauntlet (such as a higher vote threshold) before imposing mandates on private parties. This view rests on the idea that regulatory mandates are coercive towards private parties whereas spending is not, or, more modestly, that regulatory mandates are more coercive than spending, as a relative matter.¹³⁴ If this view is accepted, then the Byrd rule can be justified as policing the line

¹²⁹ See *supra* note 125 and accompanying text (describing the decision).

¹³⁰ Author interview with Senate personnel.

¹³¹ Author interview with Senate personnel.

¹³² See, e.g., David A. Reidy & Walter J. Riker, *Introduction*, in *COERCION AND THE STATE* 1, 2 (David A. Reidy & Walter J. Riker eds., 2008) (describing state coercion as a “ubiquitous feature of our institutional, political world,” as playing “a needed and important role in realizing and maintaining that world as orderly and humane,” and as justified “at least sometimes and in some institutional and political contexts”).

¹³³ See, e.g., *id.* (noting that coercion may fail to deliver utility gains or may “so offend[] against freedom, equality, independence, respect[,] or some other value affirmed by those acting within the relevant institutional or political context [such] that it cannot be morally redeemed”).

¹³⁴ See Gould, *supra* note 78 (Part III.C) (discussing the relationship of coercion to spending and regulatory legislation). While it is true that spending is not directly coercive, in that it does not compel any private party to take or not take any particular action, some critics of spending have argued that spending can be coercive in either of two ways: because spending requires taxation, which is itself coercive, or because spending often comes with conditions attached, which

between less coercive spending provisions (requiring only a simple majority) and more coercive regulatory provisions (subject to supermajority cloture).

There are significant problems, however, with treating coerciveness as the north star of the Byrd rule inquiry. First, doing so is inconsistent with the longstanding practice of permitting Congress to make changes to the tax code through reconciliation. It is well established that Congress can use the reconciliation process to raise a tax rate, eliminate an exemption or deduction, or otherwise act in a way that will result in individuals or organizations facing a higher tax bill.¹³⁵ But a legal requirement to pay taxes is, of course, coercive, because paying taxes is legally required and both civil and criminal law impose penalties for failing to do so.¹³⁶ So long as the parliamentarian's office permits changing tax law through reconciliation, there is a potent rejoinder to an interpretation of the Byrd rule that bars imposing regulatory mandates through reconciliation—since longstanding interpretations of the rule permit changes in tax law that are unquestionably coercive.¹³⁷

Nor does a focus on government coercion explain other key features of Byrd rule doctrine. If coercion were a master principle, then the government would be permitted to use reconciliation to remove or loosen regulatory requirements, just not to impose or tighten them. But this is decidedly not the direction that Byrd rule doctrine takes. Instead, the doctrine is symmetrical, in that it bars legal changes that make regulatory requirements either more or less stringent.¹³⁸ Further, some nonbudgetary legal changes are not coercive. Extending LPR status to new individuals is not (directly) a budgetary change, but it is also not a conventional regulatory provision in that it does not impose new obligations on private parties. It too, however, is not permitted under current Byrd rule doctrine.

Drawing a sharp line between voluntary versus compulsory provisions in Byrd rule jurisprudence also gives rise to an obvious opportunity for gamesmanship—at least so long as making changes to the tax code is permitted.

themselves are plausibly coercive, at least under certain circumstances. *See id.* (discussing these arguments).

¹³⁵ *See supra* note 35 (citing major tax legislation enacted through reconciliation).

¹³⁶ *See generally* OFF. OF CHIEF COUNS., CRIM. TAX DIV., INTERNAL REV. SERV., TAX CRIMES HANDBOOK (2009), https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf [<https://perma.cc/6YSG-PJZM>].

¹³⁷ This discussion has assumed a clear division between tax and regulatory provisions for the sake of simplicity, but in practice distinguishing the two can be difficult. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court was divided on whether the Affordable Care Act's minimum coverage provision could, for constitutional purposes, fairly be characterized as a tax rather than a penalty for failure to comply with a mandate. *Compare id.* at 563–74 (opinion of Roberts, C.J.) (arguing that it could), *with id.* at 661–69 (opinion of Scalia, Kennedy, Thomas & Alito, JJ.) (arguing that it could not). Similar issues have not often come up in prominent Byrd rule adjudications, but it is easy to imagine a Byrd rule dispute in which proponents of a given provision present that provision as a tax, opponents present it as a regulatory mandate, and there is not an especially clean principle through which the parliamentarian's office can distinguish between the two.

¹³⁸ *See infra* Part IV.E.

While a legislative provision imposing a regulatory cap on methane emissions would not be consistent with the Byrd rule, the Inflation Reduction Act did include a methane emissions fee (presumably blessed by the parliamentarian) that imposed a charge on each metric ton of methane emitted.¹³⁹ Similarly, while the parliamentarian found that the Byrd rule prohibited a provision to raise the minimum wage through reconciliation, existing precedent appears to allow Congress to use the reconciliation process to impose a tax on employers who pay less than a given wage floor and use the revenue from that tax to provide a subsidy to workers who earn less than that floor. This tax-plus-subsidy strategy would mimic the effects of a minimum wage mandate.¹⁴⁰ These examples show that, within the contours of what Byrd rule doctrine allows, Congress can often approximate the effects of a regulatory mandate through taxes and/or spending.¹⁴¹ To read the Byrd rule as barring the imposition of a direct regulatory mandate, then, is to read it as imposing a formalist constraint that can easily be circumvented.¹⁴² For those who think the Byrd rule ought to make regulatory lawmaking difficult, this possibility of circumvention is a reason to worry; for those who think that Congress should more easily be able to regulate the conduct of private parties, the possibility of circumvention is desirable. Either way, because tax provisions are presumptively permitted under the Byrd rule, the rule is not well-tailored to serving an interest in minimizing coercion.¹⁴³

¹³⁹ See JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R47206, INFLATION REDUCTION ACT METHANE EMISSIONS CHARGE: IN BRIEF 1 (Aug. 29, 2022), <https://crsreports.congress.gov/product/pdf/R/R47206> [<https://perma.cc/7MHH-2ETN>] (describing the methane charge and noting that it “is the first time the federal government has directly imposed a charge, fee, or tax on [greenhouse gas] emissions”).

¹⁴⁰ For this proposal, see Emmanuel Saez & Gabriel Zucman, *Increasing the Minimum Wage through Tax Policy* 8 (Univ. of Cal. Berkeley Working Paper) (Mar. 18, 2021), <https://eml.berkeley.edu/~saez/SZ21-minwage-tax.pdf> [<https://perma.cc/XJ2P-Q8XR>] (noting that such a policy “is formally a tax and a credit with direct budget impact” but that it “increases take-home pay of low wage workers and makes their employers pay for it, just like a minimum wage increase”).

¹⁴¹ In an extreme case, if a tax intended to induce a particular action by private actors were to be sufficiently high, it is possible that few if any private actors would allow themselves to be subject to the tax, since it would be cheaper to take the relevant action instead. In that case, the tax would raise little or no revenue, and the parliamentarian’s office might find that its budgetary effects are “merely incidental” to the change in private behavior that it induces. Neither a review of written materials nor interviews with Senate staffers reveals a real-world example of this sort, however.

¹⁴² It is possible that the parliamentarian’s office would respond to an obvious attempt to circumvent the Byrd rule by announcing some sort of “anti-circumvention” principle that disallows in reconciliation bills even provisions that involve changes to taxing and spending of the sort that would otherwise be permitted. Cf. Farber et al., *supra* note 40, at 7 n.38 (citing sources on comparable principles in constitutional law).

¹⁴³ One rejoinder to this line of argument is that even if it is formally possible to circumvent the Byrd rule’s limit on enacting regulatory legislation through reconciliation by imposing taxes on targeted conduct, Congress may be hesitant to do so because of the political costs of increasing taxes. This perhaps explains why the tax-and-subsidy workaround in the minimum wage domain was never seriously attempted, despite having received media attention after it was first proposed. See, e.g., Christopher Ingraham, *How to Raise the Minimum Wage with Only 51 Senate Votes*, WASH. POST (Mar. 23, 2021), <https://www.washingtonpost.com/business/2021/03/23/>

A possible way to solve this problem would be to attempt to distinguish between taxes that aim to raise revenue (which would be permitted under reconciliation) and taxes that are intended to change behavior (which would not be permitted). But the parliamentarian's office has not taken this approach—and for good reason. Many taxes have the dual goal of raising revenue and changing behavior, with taxes on gasoline¹⁴⁴ and tobacco products¹⁴⁵ providing two prominent examples among many. The task of disentangling which taxes are primarily revenue-raising and which are primarily behavior-focused would lead to the very same type of line-drawing problems that make administering the Byrd rule difficult in the first instance.

A decisional rule prohibiting changes to regulatory law through reconciliation has the virtue of being clear, easy to administer in a consistent manner, and intuitively appealing. But a closer look at the logic of that line reveals significant problems with such an approach, at least so long as the parliamentarian's office interprets the Byrd rule to permit changes to the tax code through reconciliation and bar status changes like extensions of LPR status that are not coercive (and in fact grant a benefit). For these reasons, coercion is a poor fit with existing Byrd rule doctrine and cannot be the guiding principle of such doctrine.

C. *Existing Versus New Programs*

Another factor relevant to Byrd rule decisionmaking is the distinction between existing and new programs. The parliamentarian's office is more likely to permit a provision in reconciliation if it makes changes to an existing program or policy rather than creating a new one. One manifestation of this principle is that if a provision only changes the amount of an existing tax or subsidy—either upward or downward—that provision is likely to survive Byrd rule scrutiny.¹⁴⁶

There are several reasons for a permissive approach to changes to existing programs or policies. Most importantly, some changes to existing programs can be made simply by adjusting a number. Legislators might, for example, seek to change the amount of a tax rate or subsidy, or change the eligibility criteria for a given program. These sorts of changes can have significant budgetary effects and will sometimes not have major nonbudgetary policy effects. By contrast, creating a new program will often require a variety of nonbudgetary provisions, such as new regulatory language binding on private parties or new delegations of authority to administrative agencies. These

senate-filibuster-minimum-wage [<https://perma.cc/XCK2-ELHB>] (discussing a tax-and-subsidy workaround to raising the minimum wage).

¹⁴⁴ See 26 U.S.C. § 4081.

¹⁴⁵ See *id.* § 5701.

¹⁴⁶ See, e.g., Author interview with Senate personnel (noting that a provision is in “better territory” with respect to the Byrd rule if it is “changing a dial of an existing program”).

sorts of provisions may not score as having any budgetary impact, or they may score as having a budgetary impact so small that is “merely incidental” to its nonbudgetary policy impact. The Byrd rule operates at the level of the individual provision,¹⁴⁷ and it will often be impossible to create a new program without at least some provisions that flunk the Byrd rule—even if the program as a whole has major budgetary impacts. On this view, the line between existing and new programs is not independently relevant to the doctrinal analysis, but rather it just so happens that changes to existing programs are more likely to contain exclusively provisions that pass Byrd rule muster.

A separate reason for distinguishing new and existing programs looks to the purpose of the Byrd rule. One justification for the rule, endorsed by some of its authors, is that the reconciliation process is not intended to permit major policy changes.¹⁴⁸ All else equal, modifying an existing policy or program (rather than creating a new one) is less likely to be a major change of the sort that the creators of the reconciliation process viewed as outside the process’s scope. The result is a (mostly) safe harbor for language in reconciliation bills that adjusts existing policies.

This feature of Byrd rule doctrine shapes legislative design. Senate staffers often try to shoehorn policy changes into existing programs. Efforts to change health care policy through reconciliation, for example, often proceed through changes to Medicaid.¹⁴⁹ Democrats seeking to use reconciliation to significantly expand federal support for childcare have attempted to use the preexisting Child Care Development Block Grant as the vehicle for doing so.¹⁵⁰ Republicans attempting to restrict the availability of abortion through reconciliation have similarly sought to do so through making changes to the availability of existing tax credits for health care providers.¹⁵¹ The prevailing understanding of the Byrd rule encourages efforts like these, which do not create new programs but instead modify existing ones.

The line between provisions that modify existing programs and those that create new ones can quickly become fuzzy, however. It can be challenging to decide when a modification to an existing program is so significant as to

¹⁴⁷ See 2 U.S.C. § 644(b)(1)(A) (providing that “a *provision* of a reconciliation bill or reconciliation resolution . . . shall be considered extraneous if such *provision*” falls into any of six specified categories, including the “merely incidental” clause that is the focus of this Article (emphases added)).

¹⁴⁸ See *infra* notes 199–200 and accompanying text (discussing the view of Sen. Robert Byrd (D-W. Va.) that the reconciliation process was not intended to permit major policy changes).

¹⁴⁹ See Author interview with Senate personnel (describing changes to the tax code and Medicaid as the two paradigmatic types of changes permitted through reconciliation).

¹⁵⁰ See *id.*

¹⁵¹ See Emily Crockett, *The GOP Obamacare Replacement Defunds Planned Parenthood and Restricts Abortion Coverage*, Vox (Mar. 13, 2017), <https://www.vox.com/identities/2017/3/6/14836998/obamacare-repeal-replace-bill-defund-planned-parenthood> [<https://perma.cc/W8RH-JVX9>] (“Under the new Republican plan, any insurance plans that cover abortion—unless the woman became pregnant through rape or incest, or if the abortion is needed to save her life—won’t be eligible for tax credits.”).

constitute a more fundamental change. Republicans' efforts to repeal the individual mandate to purchase health insurance contained in the Affordable Care Act ("ACA") illustrate this difficulty. The ACA was enacted in 2010 through regular order, not reconciliation.¹⁵² The statute contained a requirement that all individuals not covered by a specified exemption must purchase minimum essential health coverage or else face a tax penalty.¹⁵³ When Republicans subsequently took control of the Senate, they quickly went about trying to repeal this requirement, commonly called the individual mandate. The parliamentarian's office rejected an effort to directly repeal the mandate through reconciliation, reasoning that the mandate "constitutes a massive, national policy change the primary purpose of which is not budgetary."¹⁵⁴ But less than a month later, the parliamentarian's office permitted Republicans to include in reconciliation legislation a provision to zero out the penalty for noncompliance with the individual mandate, effectively eliminating the mandate while formally keeping it on the books.¹⁵⁵ In so deciding, the office emphasized that adjustments in penalties can be made through reconciliation (and had previously been so made); that an adjustment to zero had significant budgetary effects; and that even with a zero-dollar penalty, "the mandates remain, the incentives for purchasing and maintaining health insurance remain, [and] the insurance reforms remain."¹⁵⁶

At one level, this decision makes sense, since a tax penalty can be adjusted up or down through reconciliation and, at least arguably, an adjustment to zero is just one type of adjustment. But at another level, allowing the tax penalty to be adjusted to zero through reconciliation—while not allowing the mandate to be repealed outright—represents a triumph of formalism. Eliminating the mandate and zeroing out the penalty have nearly identical effects (an end to a

¹⁵² See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). A companion bill, the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), was enacted through reconciliation and played an important role in partially amending the main statute after Democrats lost their sixty-vote supermajority. See John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIB. J. 131, 159–66 (2013). The distinction between these two bills has at times been a source of confusion. See, e.g., *King v. Burwell*, 576 U.S. 473, 491–92 (2015) (erroneously stating that "Congress passed much of the [ACA] using a complicated budgetary procedure known as 'reconciliation'").

¹⁵³ See Patient Protection and Affordable Care Act §§ 1501, 5000A, 124 Stat. at 242–50.

¹⁵⁴ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 703 (quoting email from Senate parliamentarian); see also *id.* at 704 (explaining that the mandate "was designed to change behavior by requiring Americans to join an insurance pool (presumably to lower premiums) and to effectuate universal health care coverage," that "[t]he condition of the federal budget was not the target of this legislation," and that "while the dollars associated with repeal are large . . . they are dwarfed by the scope and impact of this mandate on the 270 million Americans who are covered by it").

¹⁵⁵ See *id.* at 705 (citing email from Senate parliamentarian). The provision did not become law until several years later, when it was included in another reconciliation matter, the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092.

¹⁵⁶ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 705 (quoting email from Senate parliamentarian).

legally enforceable mandate), and their budgetary effects are presumably also comparable.¹⁵⁷ Yet current Byrd rule doctrine does not allow the outright repeal of the mandate but does allow the penalty to be zeroed out. This result seems to prioritize the formalism of allowing adjustments (even to zero) over the functionalism of consistent treatment of two changes to the law that are quite difficult to distinguish on substantive policy grounds.¹⁵⁸ One Senator argued against allowing the zeroing out through reconciliation by noting that “[t]he complete elimination of all penalties is tantamount to repeal of the mandates.”¹⁵⁹ On this view, “[b]y deleting the penalties, the proposal fundamentally alters the character and operation of the law,” resulting in a statute that is akin to “having speed limits but not fines for violating.”¹⁶⁰ If this logic is right, then it seems odd to say that repealing the mandate involves a budgetary change that is “merely incidental” to the policy change while zeroing out the mandate does not.

This line of thinking points toward either of two approaches to Byrd rule doctrine, each of which would be more internally consistent than the status quo. Put simply, a more functionalist approach to the rule would require that the two policies—repealing the mandate and zeroing out the penalty—should either both be permitted or both be barred by the Byrd rule.

On a more permissive approach, the parliamentarian’s office was right to allow the zeroing out of the mandate, but wrong to disallow the outright repeal of the mandate, given the substantive similarities of the two changes. While this permissiveness has the benefit of consistency, the parliamentarian’s office likely resisted it because it would have opened the door to the repeal of other regulatory provisions. And, if the parliamentarian’s office had permitted the repeal of regulatory mandates through reconciliation, it would have likely faced pressures to also allow the imposition of regulatory mandates

¹⁵⁷ In deciding a challenge to the individual mandate after the penalty was set to zero, the Supreme Court found that individual plaintiffs lacked standing because “the statutory provision, while it tells them to obtain [insurance] coverage, has no means of enforcement,” emphasizing that “[w]ith the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply.” *California v. Texas*, 141 S. Ct. 2104, 2114 (2021).

¹⁵⁸ Difficult, but not impossible. Even after the penalty was zeroed out, some might have felt an obligation to comply with the law, so long as it was formally on the books. See CHRISTINE EIBNER & SARAH A. NOWAK, *THE COMMONWEALTH FUND, THE EFFECT OF ELIMINATING THE INDIVIDUAL MANDATE PENALTY AND THE ROLE OF BEHAVIORAL FACTORS* 4 (July 2018), https://www.commonwealthfund.org/sites/default/files/2018-07/Eibner_individual_mandate_repeal.pdf [<https://perma.cc/3NYX-LJ4X>] (noting that empirical analysis of responses to the zeroing out of the penalty “did not rule out the possibility that a ‘taste for compliance’—that is, a desire to comply with the law regardless of penalties or other enforcement mechanisms—led to a general increase in enrollment”).

¹⁵⁹ 161 CONG. REC. S8,232 (daily ed. Dec. 1, 2015) (statement of Sen. Ronald Wyden (D-Or.)).

¹⁶⁰ *Id.*; see also *id.* at S8,232–33 (“I think this would set a very dangerous precedent for this body. These penalties can be eliminated in a reconciliation bill. The door is going to be open to all kinds of proposals to strip away penalties in a future reconciliation bill. For example, you could keep an environmental law on the books, but you could just say: Let’s strip away the penalties for violating. That would allow a majority to fundamentally undermine a nonbudgetary law in a reconciliation bill.”).

through reconciliation. Doing so would have dramatically expanded the scope of reconciliation in a way that the parliamentarian's office (and some Senators) would likely not have been comfortable with.

The alternative approach is a more restrictive one, under which the parliamentarian's office was right to disallow the outright repeal of the mandate, but wrong to then allow the workaround of setting the penalty to zero. This restrictive approach also has the benefit of consistency, but it too has a downside. Namely, disallowing the zeroing out of the penalty would have required the parliamentarian's office to draw difficult lines between different types of changes. If reducing the penalty from hundreds of dollars to zero is treated as a de facto repeal (and thus not permitted), what about setting it to one dollar? Ten dollars? Fifty dollars? The parliamentarian's office had good reasons to avoid these questions, but in doing so it embraced a formalism that leads to the seemingly anomalous result of forbidding formal repeal of the mandate but permitting its de facto repeal through setting the penalty to zero. The challenge of how best to resolve these cases shows that, whatever the appeal of a safe harbor for changes to existing policies in theory, it gives rise to challenging issues of implementation.

D. Targeting

The parliamentarian's office typically finds that a provision violates the Byrd rule if the provision targets a single entity or a very narrow class of entities. The doctrine of targeting bars including such provisions in reconciliation bills, even if those provisions have a direct budgetary impact and do not pose other obvious Byrd rule problems. An anti-targeting principle is a useful alternative to all-things-considered balancing, but it also gives rise to some challenging line-drawing questions and creates opportunities for gamesmanship by the parties.

The most prominent recent example of the doctrine of targeting at work is the parliamentarian's office's resistance to Republican efforts to use budget reconciliation to bar Planned Parenthood from receiving federal funding. On the principles described above, such a bar would seem to have favorable odds of surviving Byrd rule scrutiny: it would have a direct effect on the budget, it would not impose new regulatory mandates, and it would concern existing streams of federal funding. Despite these facts, the parliamentarian's office has disallowed efforts to restrict funding to Planned Parenthood through reconciliation. In 2017, for example, Republicans sought to include a provision in a reconciliation bill that would have prevented federal funds from being made available to any entity that satisfied a list of specified conditions.¹⁶¹

¹⁶¹ Those conditions were that the entity must be a 501(c)(3) nonprofit primarily engaged in providing family planning and reproductive health services (including abortions) and that it had expenditures under the Medicaid program that exceeded \$350 million in fiscal year 2014. CONG. BUDGET OFF., COST ESTIMATE: AMERICAN HEALTH CARE ACT 23 (Mar. 13, 2017), <https://www.cbo.gov/publications/2017/03/170301-ahca>.

CBO concluded that “only Planned Parenthood Federation of America and its affiliates and clinics would be affected” by the provision.¹⁶² Based on this conclusion, the parliamentarian’s office found that the provision violated the Byrd rule.¹⁶³ The decision reasoned that “the policy of singling out one person/company/organization for a benefit or penalty outweighs the small budgetary change that it makes.”¹⁶⁴ One senior Senate Budget Committee staffer describes the doctrine of targeting as having originated with the Planned Parenthood issue: “In the wake of Republican efforts to defund Planned Parenthood in reconciliation legislation,” he writes, “the Parliamentarian erected a procedural doctrine in which the Parliamentarian will regard provisions that unduly target a narrow group to violate the ‘merely incidental’ test.”¹⁶⁵

The parliamentarian’s office has applied similar anti-targeting logic in a range of contexts. It has repeatedly found that it would violate the Byrd rule for Congress to enact, through reconciliation, provisions that would affect only one of a given type of entity—including provisions that would affect only one state,¹⁶⁶ pipeline,¹⁶⁷ or transit system.¹⁶⁸ Though the doctrine of targeting is relatively new,¹⁶⁹ it seems clear that current doctrine bars inclusion in reconciliation measures of provisions that target a single entity for a benefit or penalty.

A bar on provisions that target a single entity has a straightforward and appealing logic to it: if a provision would grant or deny funding to only a single entity, that provision will typically have only a minimal budgetary effect, and in many cases that budgetary effect will be dwarfed by a larger

[cbo.gov/sites/default/files/115th-congress-2017-2018/costestimate/americanhealthcareact.pdf](https://perma.cc/Y85Q-MQW2) [https://perma.cc/Y85Q-MQW2].

¹⁶² *See id.*

¹⁶³ Senate Budget Committee Minority Staff, Background on the Byrd Rule Decisions 1 (2017), https://www.budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions_7.21%5B1%5D.pdf [https://perma.cc/J7FG-2X62] (committee memorandum summarizing parliamentarian’s decision).

¹⁶⁴ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 699 (quoting email from Senate parliamentarian); *see also id.* at 710.

¹⁶⁵ *Id.* at 697.

¹⁶⁶ *See id.* at 699 (“[T]his provision has been shown to affect only one state and the manner in which that state meets its payment obligation using its own dollars . . .”) (quoting email from Senate parliamentarian).

¹⁶⁷ *See id.* at 701 (discussing an amendment concerning expediting construction permits, about which the parliamentarian concluded “it seems possible that there is a targeting issue since it deals with a single named pipeline along with a very low score”) (quoting email from Senate parliamentarian).

¹⁶⁸ *See id.* at 700 (noting that the Federal Transit Administration had advised that only one system would qualify for the program at issue and responding that “[w]e [the parliamentarian’s office] have previously counseled against targeting one entity for a benefit”) (quoting email from Senate parliamentarian).

¹⁶⁹ In earlier periods, provisions that targeted particular entities survived Byrd rule challenges. *See, e.g.*, Aprill & Hemel, *supra* note 19, at 122 (“[A] provision that conveyed several hundred acres of public land to the Texas Plains Girl Scout Council in exchange for one dollar—arguably the epitome of a special interest measure—survived a Byrd rule challenge during the debate over the Balanced Budget Act of 1995.” (citing 141 CONG. REC. S17,247 (daily ed. Nov. 17, 1995))).

nonbudgetary policy effect. This is almost certainly the case for efforts to defund Planned Parenthood, which had only minimal budgetary effect but sought to weigh in on politically divisive questions. The Planned Parenthood example shows how the doctrine of targeting can help the parliamentarian's office reach sensible answers to Byrd rule questions without having to engage in case-by-case balancing.

Despite this appeal, the doctrine of targeting gives rise to possible problems. The first is that the doctrine might be overinclusive, in that it might foreclose at least some types of provisions that ought to be permissible under the Byrd rule. It is at least possible that a provision could target one particular entity but still have a budgetary effect that is more than "merely incidental." This would likely require that the amount of funding at stake be large, which is rare when a provision affects only one recipient. But one could imagine a change in a tax provision that affects only a single large company (perhaps Apple or Amazon) but that has large budgetary effects that are not "merely incidental" to the change's nonbudgetary policy impacts. Such a provision should pass Byrd rule muster but would risk being excluded by the doctrine of targeting.

A second type of problem arises from an issue of line-drawing: What is the numerical threshold of entities that triggers a valid targeting objection? Should the doctrine of targeting apply just to provisions that affect only a single entity, or also to provisions that affect a small number of entities? The easiest case for targeting is when only one entity is affected, but in several instances the parliamentarian's office has applied the doctrine to provisions affecting multiple entities. During Senate consideration of the Tax Cuts and Jobs Act, for example, the office invoked the doctrine of targeting to disallow a provision for providing disaster relief for "only 3 of the 26 states covered by presidentially declared disasters this year,"¹⁷⁰ and another for having been "targeted to impact 3 airlines only."¹⁷¹ Consistent with these decisions, one interviewee observed that the principle that a provision targeting three or fewer entities cannot survive Byrd rule scrutiny "is one of the fewer hardline rules that I've ever been able to glean out of this entire [Byrd rule] process."¹⁷² But the parliamentarian's office has never publicly articulated a bright-line rule of how many entities is enough to defeat a targeting challenge. Even if it did, any possible numerical threshold (other than perhaps one) would necessarily be arbitrary.

This problem of line-drawing suggests an additional concern: gamesmanship. If there is a numerical threshold above which a provision is not vulnerable to a targeting challenge, legislators could simply craft provisions to circumvent that threshold. Suppose, for example, that the parliamentarian's

¹⁷⁰ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 699 (finding extraneous Relief for Mississippi River Delta Flood Disaster Area, S. Amend. 1618, 115th Cong. § 11029 (2017)).

¹⁷¹ *Id.* (finding extraneous Repeal of Exclusion Applicable to Certain Passenger Aircraft Operated by a Foreign Corporation, S. Amend. 1618, 115th Cong. § 14505 (2017)).

¹⁷² Author interview with Senate personnel.

office were to make clear (whether expressly or implicitly) that targeting will not preclude the inclusion of any provisions that affect five or more entities. Those wishing to defund Planned Parenthood could simply come up with a criterion for denying funding that encompasses both Planned Parenthood and four other entities, for a total of five. The doctrine of targeting risks encouraging this sort of gamesmanship. To be sure, the parliamentarian's office could find such a provision to be impermissible based on the general balancing test described in Part III, provided that the provision's budgetary effects were "merely incidental" to its nonbudgetary policy impacts. Even so, the doctrine of targeting risks promoting a sort of gamesmanship that does not serve any discernable public purpose.

Despite these problems, the doctrine of targeting gets at something important: a provision that targets either one entity or only a few entities will typically (even if not always) have a budgetary effect that is "merely incidental" relative to its nonbudgetary policy effect. While using targeting in Byrd rule adjudication is imperfect, it will often yield intuitive results and lends itself to consistent application much more so than case-by-case balancing.

E. Symmetry

A key feature of Byrd rule doctrine is symmetry: anything that can be done through the reconciliation process can also be undone through the same process. This principle departs from one of the original purposes of the Byrd rule (promoting deficit reduction), but it has become a central part of contemporary Byrd rule doctrine. A principle of symmetry has important advantages, especially given the partisan nature of the Senate.

The parliamentarian's office has at times expressly stated its understanding of the principle of symmetry. The following description of the principle, provided by the office in the context of efforts to grant LPR status through reconciliation, is worth quoting at length:

[A]n obvious corollary of a finding that this proposal is appropriate for inclusion in reconciliation would be that it could be repealed by simple majority vote in a subsequent reconciliation measure. Perhaps more critically, permitting this provision in reconciliation would set a precedent that could be used to argue that rescinding any immigration status from anyone—not just those who obtain LPR status by virtue of this provision—would be permissible because the policy of stripping status from any immigrant does not vastly outweigh whatever budgetary impact there might be. That would be a stunning development but a logical outgrowth of permitting this proposed change in reconciliation . . .¹⁷³

¹⁷³ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 724 (quoting email from Senate parliamentarian).

Similar logic holds in other contexts: to find that the Byrd rule permits a given type of change through reconciliation is, in the eyes of the parliamentarian's office, to also find that the opposite change is also permissible.

The doctrinal basis for a symmetry principle stems from the fact that making and unmaking a given change will often have at least roughly commensurate effects on both the budget and nonbudgetary policy. Immigration status provides a good example. Extending a given status to a specified class of immigrants has both a policy effect (granting the noneconomic benefits of the status) and a budgetary effect (impacting tax receipts and social program spending). By the same token, stripping that same status from the same group of individuals would likewise have both a policy effect (retracting the noneconomic benefits of the status) and an economic one (again, impacting tax receipts and social program spending). These two sets of effects will not necessarily be mirror images of each other.¹⁷⁴ But the effects will often be at least similar in kind and magnitude, even if not identical. As a result, the sort of effects test that the Byrd rule implements—whether through balancing or through the implementing principles described above—ought to be symmetric in taking the same approach (either permissive or restrictive) toward both a policy and its opposite.

A symmetry principle also has advantages from the standpoint of the Senate as an institution. Most practically, it attempts to mitigate possible bias of the Byrd rule in favor of either party's policy agendas.¹⁷⁵ There is a principled reason for seeking to "debias" the Byrd rule, so that it sets rules of the political game (here, the legislative process in the Senate) that bind both parties equally, at least formally. There is also a prudential reason for a symmetric approach, at least for those interested in stability of the system of congressional rules. If the parties were to view Byrd rule jurisprudence as systematically favoring one party's agenda over the other's, the disadvantaged party would, when they gain power, be more likely to seek to reform the system—through either changing, circumventing, or ignoring the rules.

Importantly, the principle of symmetry in Byrd rule adjudication does not date to the rule's inception. Instead, a principle of symmetry could arise only after the parliamentarian's office began allowing the rule to be used for

¹⁷⁴ For one account of how this might be so, see Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014). That article argues that when government responds to dynamics implicating path dependence, a temporary law—that is, a legal requirement that goes into effect at one time but ceases to have effect at a later time—will not result in a reversion to the status quo ante but will rather “often be both necessary and sufficient to move behavior to the more efficient outcome.” *Id.* at 296; see also *id.* at 302–25 (illustrating this point with the example of imposing and then later removing a ban on smoking in public places, such as restaurants and bars).

¹⁷⁵ Cf. Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022) (discussing the ways in which public law rules can be biased in favor of particular parties or policy agendas).

provisions that either raise or lower the deficit.¹⁷⁶ Prior to that change, the Byrd rule was decidedly asymmetric: it permitted net changes to taxing or spending reported by an instructed committee that reduced the deficit, but not those that increased it. As a result, for example, raising a tax rate from *X* to *Y* would be permitted under the Byrd rule, but lowering the rate from *Y* to *X* would not be absent sufficient offsetting increases in revenue. However, the shift in the approach that the parliamentarian's office took to deficit reduction marked the end of the Byrd rule as seeking to accomplish deficit reduction or any other particular policy goal. Instead, the rule became understood—by the parliamentarian's office and more broadly—as setting out subject-matter guardrails around the reconciliation process. On this approach, certain types of measures are off the table in reconciliation, but the rule does not seek to limit whether policy change can move in one direction or the other for those types of measures that are permitted.

F. Conditional Spending

Byrd rule doctrine squarely allows Congress to attach conditions to funds that it appropriates. This is one of the more permissive areas of Byrd rule doctrine, and for good reason: a more restrictive approach would give rise to significant conceptual difficulties and would unduly restrict congressional power.

The parliamentarian's office has repeatedly upheld efforts to attach conditions to appropriated funds in reconciliation. Congress can use reconciliation legislation to designate funds for social welfare programs, education, highway construction, or virtually any other purpose. And, in so doing, Congress can specify which types of social welfare programs, educational initiatives, and highway construction projects are eligible for its largess. Congress can also attach conditions to spending or tax credits that leverage government money to accomplish objectives seemingly separate from the core goal of the expenditure. For example, the Inflation Reduction Act included language providing that, to fully receive certain tax credits, energy projects must pay prevailing wages as defined by Labor Department regulations.¹⁷⁷ The prevailing wage language was challenged as “merely incidental,” but the parliamentarian's office rejected the challenge.¹⁷⁸

The principle that Congress can impose conditions on its spending through budget reconciliation has several advantages. First, it avoids the conceptual challenge that nearly every form of spending could be framed as either conditional or unconditional spending. Challengers to the prevailing

¹⁷⁶ See *supra* notes 63–70 and accompanying text (discussing this shift in the 1990s and early 2000s).

¹⁷⁷ See Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 13101(f), 13102(k), 13104(d), 13105(a), 136 Stat. 1818, 1907–08, 1918–20, 1926–28, 1931.

¹⁷⁸ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 729.

wage language in energy tax credits could frame the “core” spending as an energy tax credit, with the language about prevailing wages as a “supplemental” regulatory requirement grafted on. Defenders of the prevailing wage language could respond that this is an artificial division, and in fact Congress was simply establishing a tax credit with two types of eligibility requirements—some related to energy production, and some related to prevailing wages. Adjudicating which of these interpretations of the provision is superior would require the parliamentarian’s office to make highly contestable judgments about the “core” or the “real” purpose of a given provision. A bright-line rule permitting multiple conditions on funding obviates the need for those sorts of difficult judgments.

A permissive approach to spending conditions also rightly acknowledges that Congress often has multiple goals in spending money. To continue with the tax credit example, the enacting Congress evidently had (at least) two different goals: promoting certain types of energy production and encouraging private employers to pay prevailing wages. It chose to pursue those goals together through a tax credit only available to entities that complied with both types of conditions. Nothing about the text or purpose of the Byrd rule prevents Congress from spending money in pursuit of multiple goals simultaneously. Further, disaggregating Congress’s goals in enacting any given provision would run headlong into familiar problems with discerning legislative intent.¹⁷⁹ For these reasons, the jurisprudence developed by the parliamentarian’s office is right to permit multiple spending conditions under reconciliation.

G. Subject-Matter Limitations

The parliamentarian’s office has never expressly taken certain subject-matter areas off the table in budget reconciliation, but certain types of provisions are strongly disfavored in reconciliation. The parliamentarian’s office disfavors using reconciliation to amend earlier statutory law enacted through regular order, to override judicial decisions, or to legislate in specific topic areas (such as criminal justice). These categorical exclusions have significant advantages, but a problem with each exclusion is that it is possible to think of provisions that would fall into the excluded category but nonetheless seem consistent with the plausible purposes of reconciliation.

First, the parliamentarian’s office looks unfavorably on efforts to use budget reconciliation to amend earlier statutory law that was enacted through regular order. During consideration of the Inflation Reduction Act, for example, the parliamentarian’s office sustained Republican challenges to provisions that appropriated funding to the Environmental Protection Agency (“EPA”) “to carry out, with respect to greenhouse gases” (a term not defined

¹⁷⁹ See *supra* note 109 (discussing the perils of intent-focused inquiries in the Byrd rule context and analogizing those difficulties to the familiar problem of discerning legislative intent in the field of statutory interpretation).

in law), a long litany of named provisions of the Clean Air Act.¹⁸⁰ The parliamentarian's office agreed with the Republican challengers' argument that this language amounted to Congress using reconciliation to amend the regulatory provisions of the Clean Air Act and was therefore not permissible under the Byrd rule.¹⁸¹ Democrats were ultimately able to remedy the issue by creating new definitions that listed the particular greenhouse gases covered by various new provisions of the Inflation Reduction Act, a cure blessed by the parliamentarian's office.¹⁸² One conclusion from this episode is that attempting to use reconciliation to change (or even arguably change) the meaning of an earlier statute enacted through regular order is likely to run afoul of the Byrd rule.

Second, the parliamentarian's office often (but not always) looks with skepticism upon attempts to use budget reconciliation to enact legislative overrides of judicial decisions.¹⁸³ A 1993 publication by the Senate Budget Committee noted that the parliamentarian's office "casts a particularly suspicious eye on language that . . . overturns court decisions."¹⁸⁴ A 2022 publication by that same committee repeated this statement nearly verbatim, but added a disclaimer that it was not absolute, noting that the parliamentarian's office allowed the inclusion of a provision in a reconciliation bill that seemed to override a Ninth Circuit case decided two years prior.¹⁸⁵ In that case, the Ninth Circuit interpreted a provision of federal law governing funding for foster care¹⁸⁶ to require that children who receive the Aid to Families with Dependent Children Foster Care benefits receive those benefits so long as they are eligible for them in the home in which they reside, even if they were not eligible for such benefits in the home from which they were initially removed.¹⁸⁷ When Congress tried to change the law to reverse the result of that decision, it was challenged on several grounds, including that "any changes in outlays or revenues . . . are merely incidental to the nonbudgetary components."¹⁸⁸ Defenders of the provision did not deny that it would overturn a court decision.¹⁸⁹ The chair nonethe-

¹⁸⁰ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 732 (discussing these decisions).

¹⁸¹ See *id.* This decision was the exception rather than the norm, as nearly all climate-related provisions of the Inflation Reduction Act survived Byrd rule scrutiny. See Dotson & Maghamfar, *supra* note 92, at 10019 n.26.

¹⁸² See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 732–33.

¹⁸³ Along similar lines, one interviewee noted that the parliamentarian's office looks unfavorably on provisions that would use budget reconciliation to preempt state law. Author interview with Senate personnel.

¹⁸⁴ BUDGET PROCESS LAW ANNOTATED 1993, *supra* note 14, at 212 n.580.

¹⁸⁵ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 696.

¹⁸⁶ 42 U.S.C. § 672.

¹⁸⁷ See *Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 857 (9th Cir. 2003). In *Thompson*, the minor would have been eligible for the benefit in the home of his grandmother, with whom he was living after removal, but not in the home of his mother, from which he had been removed. See *id.* at 839.

¹⁸⁸ 151 CONG. REC. S14,204 (daily ed. Dec. 21, 2005) (statement of Sen. Kent Conrad (D-N.D.)).

¹⁸⁹ See *id.* at S14,207 (statement of Sen. Richard Santorum (R-Pa.)) (describing the provision as "restor[ing] long-standing foster care eligibility criteria relating to the *Rosales v. Thompson* decision").

less rejected the point of order and allowed the provision to be included in the reconciliation bill.¹⁹⁰

Third, provisions on some substantive topics are highly disfavored in reconciliation. Perhaps the clearest example is provisions changing the criminal law. A longstanding precedent established that a provision adding criminal penalties for specified violations of the Occupational Health and Safety Act¹⁹¹ would violate the Byrd rule, even though the challenged provision would have had a direct budgetary impact (in the form of increased criminal penalties collected).¹⁹² Interviewees did not identify any proposed changes to federal criminal law that were objected to on Byrd rule grounds but that the parliamentarian's office found to be permissible. A murkier example is immigration law. Changes to immigration law have been made through the reconciliation process, but the parliamentarian's office has indicated that changes to immigration status through reconciliation are disfavored. Given the language of the parliamentarian's 2021 ruling on LPR issues,¹⁹³ it is hard to imagine the office permitting any change in the law governing immigration status through reconciliation, even if changes to other aspects of immigration law might be permissible. Finally, though there is not precedent directly on point, it is difficult to imagine the parliamentarian's office allowing Congress to make major national security or foreign policy decisions through reconciliation. Imagine if a Senate majority sought to include a provision authorizing the use of military force abroad in a reconciliation bill, reasoning that authorizing the use of force would have predictable and massive effects on future federal spending.¹⁹⁴ Despite these projected budgetary effects, it is difficult to imagine the parliamentarian's office allowing an authorization for the use of military force under the Byrd rule; such a provision would, by virtue of its subject matter, almost certainly be excluded as having budgetary effects that are "merely incidental" to its nonbudgetary policy effects.

These sorts of categorical exclusions play a useful role in administering the Byrd rule. As with any sorts of categorical exclusions, there is a risk that at times a bright-line rule against including a particular type of content in a reconciliation bill will lead to the exclusion of a provision that should in fact be Byrd rule compliant—that is, one that would have budgetary effects that are not "merely incidental" to its nonbudgetary policy effects. But such cases

¹⁹⁰ *Id.* at S14,205 (presiding officer concluding that "[t]he point of order is not sustained against section 7404," the provision concerning foster care); *see also* CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 696 (discussing this example).

¹⁹¹ Pub. L. No. 91-596, 84 Stat. 1590 (1970).

¹⁹² CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 692, 702 (discussing 136 CONG. REC. S15,771 (daily ed. Oct. 18, 1990)).

¹⁹³ *See supra* note 173 and accompanying text (quoting from this decision).

¹⁹⁴ I have in mind provisions like the authorization for the use of military force passed (not through reconciliation) after the September 11 attacks, *see* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and the authorization of the invasion of Iraq, *see* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498.

will likely be relatively rare, and the cost of occasional error may be justified by the benefit of making the Byrd rule considerably more administrable and predictable in its application.

H. Political Controversy

A final implementing principle is a thumb on the scale against allowing politically controversial matters in reconciliation legislation. Many politically controversial matters—such as tax cuts and climate-related spending—are squarely permitted by current Byrd rule doctrine. But in closer cases, political controversy may count against finding that a provision passes Byrd rule muster. Though the parliamentarian's office has never endorsed this principle (or even expressly hinted at it), numerous interviewees emphasized that they perceived political controversy to be a relevant factor operating in the background of Byrd rule decisionmaking.

The area in which interviewees most highlighted the importance of political controversy is abortion. The parliamentarian's office has consistently rebuffed other efforts to make abortion policy, even indirectly, through budget reconciliation. The office has rejected attempts to use reconciliation to apply Hyde Amendment restrictions to federal funding¹⁹⁵ and to allow parents to open 529 savings accounts on behalf of fetuses.¹⁹⁶ It has also, as discussed above, repeatedly rejected Republican efforts to defund Planned Parenthood through reconciliation.¹⁹⁷ The parliamentarian's office has likewise rejected efforts to make policy on other contested social issues through reconciliation.¹⁹⁸

A focus on the political divisiveness of a provision is atextual, as the Byrd rule makes no express distinction between more and less controversial issues. The focus of the rule is on the effects of a provision—both budgetary and nonbudgetary policy effects—not on whether those effects happen to be politically divisive. The most plausible argument for accounting for political divisiveness rests not on the rule's text but rather on either the intent of its designers or the relationship of the rule to the structure of the Senate as a whole. The reconciliation process was envisioned by its creators mainly as a tool for deficit reduction, or at least for fiscal policymaking, and its creators would not have approved of it becoming an all-purpose filibuster exception that would

¹⁹⁵ CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 690.

¹⁹⁶ *Id.* at 690–91 (rejecting such a provision on Byrd rule grounds, reasoning that the provision “has the legal effect of establishing fetal personhood or individuality, which though it is limited to the tax code, is still significant policy,” and noting that the proposal was a “functionally redundant provision” which did not “make it possible to contribute to a 529 any earlier because anyone can start a 529 any time, years before a baby is born and transfer the benefit”).

¹⁹⁷ See *supra* notes 161–165 and accompanying text.

¹⁹⁸ See, e.g., CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 691 (noting that the chair sustained a point of order against an amendment barring certain federal funds from going to public or private educational institutions that permit transgender students to participate in athletic programs designated for women or girls).

permit legislating on a wide range of contested issues. Senator Robert Byrd (D-W. Va.) himself made this point clearly, observing that “[r]econciliation was never, never, never intended to be a shield . . . for controversial legislation”¹⁹⁹ and emphasizing that “[i]t was not designed to cut taxes . . . to create a new climate and energy regime, and certainly not to restructure the entire health care system.”²⁰⁰ Further, for those who support supermajority cloture as serving important values, construing the Byrd rule to allow policymaking on contested issues would undermine the core character of the Senate.

There are problems with these arguments, however. Most basic is the textualist argument that the Byrd rule itself—not the intent of its designers or the broader purpose of Senate rules—should govern. The rule’s text makes no mention of political contentiousness as relevant to the legal inquiry. Even for those inclined to look beyond the rule’s text, the purpose of the Senate itself is contested. While many argue that supermajority cloture is a defining feature of the Senate, there are reasons to hesitate before drawing this conclusion. The Framers designed the Senate to operate under majority rule principles,²⁰¹ the addition of a supermajority cloture threshold seems to have initially been accidental,²⁰² the normalization of the filibuster such that nearly all legislation requires supermajority support in order to clear cloture and proceed to a final vote is a distinctly modern innovation,²⁰³ and many Senators oppose sixty-vote cloture requirements.²⁰⁴ Supermajority rule in the Senate, in short, is far from a consensus value.

More practically, any attempt to incorporate political controversy or divisiveness into Byrd rule analysis faces an obvious problem of implementation. How should the parliamentarian’s office decide which issues are controversial? Most would likely share the intuition that some legislative provisions, such as those relating to abortion, are fair to characterize as controversial. But it is unclear what the criteria are for categorizing something as controversial.

¹⁹⁹ 156 CONG. REC. S1,423 (daily ed. Mar. 11, 2010) (quoting letter from Sen. Robert Byrd (D-W. Va.)).

²⁰⁰ *Id.* at S1,439 (quoting letter from Sen. Robert Byrd (D-W. Va.)).

²⁰¹ See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 5 (1996) (noting that delegates to the constitutional convention did not include any procedural protections for Senate minorities and arguing that the reason for this omission was an aversion to such protections); see also *id.* at 29–52 (discussing relevant history).

²⁰² See *id.* at 34–39 (describing the filibuster’s origins in an early-nineteenth century change to Senate rules and arguing that those who made that change did not intend to convert the Senate into a body that could only legislate subject to supermajority consensus).

²⁰³ See JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* 329–30 (2016) (collecting statistics on the prevalence of the filibuster over time).

²⁰⁴ See JM Rieger & Adrian Blanco, *Where Democratic Senators Stand on Changing or Eliminating the Filibuster*, WASH. POST (June 22, 2021), <https://www.washingtonpost.com/politics/interactive/2021/filibuster-vote-count> [<https://perma.cc/7DXP-BZMZ>] (collecting statements showing near-universal support among Democratic senators for either eliminating or changing the filibuster).

Political controversy cannot be defined solely based on divisions among members of Congress, since if controversy were defined by close partisan divisions, then no provision garnering a bare majority of the Senate would be appropriate for reconciliation—a conclusion that flies in the face of the idea that reconciliation allows the Senate to enact legislation with a simple majority, rather than having to clear the three-fifths threshold required for cloture on ordinary legislation. The alternative is to define political controversy by reference to divisions outside the Senate, such as by looking to public opinion. But deciding how controversial a provision is with any degree of consistency and rigor would require, first, a clear definition of what makes a provision controversial, and second, provision-by-provision evidence (say, from survey data) establishing which proposals meet the definition's bar. The parliamentarian's office has rightly avoided going down this road, given that any definition would necessarily use an arbitrary threshold and would be extremely difficult to administer in real cases. But the result is that in seeming to apply different standards depending on how controversial a provision is, the parliamentarian's office invites accusations of arbitrary decisionmaking.²⁰⁵

* * *

This Part has presented and critically evaluated the various doctrinal rules that the parliamentarian's office has developed to implement the Byrd rule. Those doctrinal rules come with both advantages and drawbacks. On the positive side, they have benefits over case-by-case balancing in terms of their administrability, ability to discipline decisionmaking, and tendency to generate consistent outcomes across cases. Many of them also seek to keep the budget reconciliation process focused on fiscal policymaking, consistent with the purpose of the two-track lawmaking system created by reconciliation. Yet the doctrinal rules that the parliamentarian's office has developed risk being over- or under-inclusive relative to the plausible purposes of the Byrd rule,

²⁰⁵ This problem is roughly analogous to the issue in the judicial context of how to define a "major question." The Supreme Court has in recent years expanded the major questions doctrine, which in its contemporary form requires that an agency must be able to point to "clear congressional authorization" to regulate on a major question. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (internal quotation omitted). But the Court has nowhere defined what constitutes a major question: whether it must have a given level of economic impact, affect a particular number of people, involve a novel reading of a statutory provision, clear some level of political controversy, or meet some other criteria. As a result, critics have charged the Court with having "failed to provide anything resembling reasonably definite criteria for distinguishing 'major' questions from ordinary questions," noted that "the factors it has offered are highly subjective and inconsistently applied," and further observed that "the Court has failed to provide guidance on whether one of these factors alone, if large enough, is sufficient to trigger the [doctrine]," which in turn "mak[es] it virtually impossible to know when the Court might invoke the doctrine." Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 11 (2023). To the extent that the parliamentarian's office is implicitly using its own version of a major questions doctrine in the Byrd rule context, the same critiques could be leveled against it as well.

generating internal tensions in the doctrine and giving rise to gamesmanship by the parties.

Evaluating Byrd rule doctrine is particularly challenging given the lack of a single, agreed-upon normative justification of the rule.²⁰⁶ If there were such a justification, it could serve as a clear yardstick for evaluating each of the implementing principles just discussed. Without a consensus justification for the rule, however, evaluating individual implementing principles is difficult. A given principle may serve some purposes but not others. To be sure, even without consensus on normative first principles, it is possible to critique some implementing principles for seeming anomalies in what they permit or forbid in reconciliation, and the preceding discussion has done just that. But it is challenging to evaluate implementing principles when there is no agreed-upon normative yardstick with which to do so.

A final issue that cuts across several of these implementing principles is the relationship between effect and intent in the Byrd rule inquiry. Just as the process of Byrd rule balancing is predominantly about policy effects,²⁰⁷ the same is true for many of the implementing principles discussed in this Part. To ask whether a given provision has direct or indirect budgetary impacts, whether it coerces private parties, or whether it targets particular entities is to ask about the provision's effects. But these implementing principles can be understood as proxies for concern about the intent that members of Congress have when legislating through reconciliation. On this reasoning, certain types of provisions are suspect under reconciliation because they are provisions that legislators advance because they are motivated by nonbudgetary considerations. For example: one reason for doctrine to favor provisions with direct rather than indirect budgetary effects is not that direct effects are necessarily larger than indirect ones—they may not be in some important instances—but rather that a provision with indirect budgetary effects suggests that legislators' motives are nonbudgetary in character. Similar arguments can be made about some of the other implementing principles in this Part, which can likewise be understood as oriented toward excluding from the reconciliation process provisions that legislators support primarily because of those provisions' nonbudgetary features. Even accepting that effects are central to the Byrd rule inquiry, concerns about legislative intent might lurk behind various effects tests.

²⁰⁶ See *supra* Part II.B.

²⁰⁷ See *supra* notes 106–109 and accompanying text (discussing the role of intent and effects in Byrd rule balancing).

V. THE BYRD RULE AND STARE DECISIS

A. *The Centrality of Precedent*

Stare decisis plays an important role in Byrd rule jurisprudence. The parliamentarian's office treats its earlier decisions as carrying considerable weight. Its adherence to stare decisis is not absolute, however, and some precedents carry more weight than others. This fact adds uncertainty to the Byrd rule inquiry and opens up the parliamentarian's office to charges of inconsistency. This Part examines the role of stare decisis in the Byrd rule context.

Past practice carries a great deal of weight for the parliamentarian's office. Parliamentarians "have consistently reaffirmed the centrality of strong stare decisis to the system of parliamentary precedent, both for decisions on points of order and in more informal settings."²⁰⁸ In the Byrd rule context, a provision is much more likely to be permitted in a reconciliation bill if it can be closely analogized to something similar that was permitted in the past. A core part of staff advocacy and "Byrd bath" arguments involves drawing analogies and disanalogies to past decisions, in the same way that lawyers and judges do in ordinary litigation. The best way to argue for the inclusion of a challenged provision is to show that similar provisions with similar CBO scores have been permitted in the past; by the same token, the best way to attempt to strike a provision is to show that it resembles ones that have previously been disallowed.

This heavy reliance on precedent has important virtues.²⁰⁹ A core rule of law value is that like cases be treated alike.²¹⁰ If the Byrd rule is to be taken seriously as a legal rule, it must be consistently applied across cases and across time. This concern is especially acute given the partisan dynamics in the Senate. Fair application of the rule demands that permissive precedents established when one party is in power also be applied when control of the Senate passes to the other party. The same holds for restrictive precedents. If a precedent established under one majority party were not to be applied when party control changed, that would undermine the idea that the Byrd rule binds both parties equally.²¹¹

²⁰⁸ See Gould, *supra* note 18, at 1982 (internal footnotes omitted).

²⁰⁹ See Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYC. OF PHIL. § 3 (Spring 2016 ed.), <https://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/> [<https://perma.cc/4827-6DZM>] (discussing the justifications for stare decisis generally).

²¹⁰ This maxim has ancient roots, though some contemporary critics have questioned it. See, e.g., Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMMENT. 437 (2018) (book review).

²¹¹ While my focus here is on how consistent application and stare decisis serve rule of law values, it also bears mentioning that consistent application and stare decisis are strategically important for the parliamentarians themselves, who risk being ignored, overruled, or removed from office if they are not perceived as honest brokers. See Gould, *supra* note 18, at 1994–97

As in the judicial context, reliance interests help explain the embrace of stare decisis by the parliamentarian's office. One reason not to overrule or otherwise depart from past Byrd rule decisions is that the parties have come to expect certain avenues to be available or unavailable in reconciliation. The parties have formulated their legislative agendas based, in part, on an understanding of reconciliation's scope as defined by past precedent. It would be highly disruptive—and would likely lead to charges of partisan bias—if the parliamentarian's office were to depart sharply from precedent. Imagine, for example, if a new parliamentarian believed that the office was wrong to issue guidance in the late 1990s and early 2000s to allow reconciliation to be used for deficit-increasing measures such as tax cuts.²¹² The parties have relied on that shift for over two decades, and Congress has passed multiple major deficit-increasing tax cuts through reconciliation.²¹³ For this reason, even a parliamentarian that viewed the shift as erroneous (in the sense of being contrary to the best reading of the text, history, and purpose of the Byrd rule) might reasonably decide that the passage of time and buildup of reliance interests counsels against changing course.²¹⁴

The parliamentarian's office has developed a hierarchy of how much precedential weight different sorts of decisions carry. The most powerful official precedents are votes taken by the full Senate on whether a given provision is permitted under the Byrd rule. These are followed by another type of official precedents: decisions of the chair in response to a point of order on the Senate floor. The least weighty of official precedents are decisions of the chair in response to a parliamentary inquiry on the floor. Judgments made by the parliamentarian's office away from the floor (such as during a Byrd bath or via informal consultation with members) also carry considerable weight, even though they are not considered by the office to be formal precedents.²¹⁵ Considerably less persuasive are arguments that a provision complies with the rule on the sole grounds that it or something similar was included in a past reconciliation bill. As one parliamentarian has noted, “[i]t is important to note

(discussing how subscribing to a strong version of stare decisis holds advantages for the parliamentarian's office given its tenuous institutional position).

²¹² See *supra* notes 63–70 and accompanying text (discussing the shift in reconciliation to permitting deficit-increasing measures).

²¹³ See *supra* note 35 (citing examples).

²¹⁴ This argument parallels the relevance of reliance interests to stare decisis in the judicial context. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting that “whether [a] rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation” is relevant to the decision of whether to depart from precedent in a system of stare decisis). For varying scholarly perspectives on reliance interests and stare decisis, see generally Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69 (2003); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013); Seana Valentine Shiffrian, *Reliance Arguments, Democratic Law, and Inequity*, 14 JURIS. 317 (2023).

²¹⁵ See Gould, *supra* note 18, at 1999–2001 (discussing this hierarchy); see also CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 652 (discussing the hierarchy of precedent in the context of the Byrd rule in particular).

that the precedential value of [the fact of past inclusion] is reduced where there were no rulings or challenges made or advice given.”²¹⁶

Despite the importance of precedent, Byrd rule precedents are not absolute, even when they take a form that would generally carry great weight. The instances in which the parliamentarian’s office has departed from precedent constitute some of the most contentious Byrd rule disputes. Part of that contentiousness stems from the fact that the parliamentarian’s office has appeared to act in an inconsistent manner by not explaining its decisions to depart from precedent and not articulating criteria for when it is appropriate to narrow or overrule a precedent.

The perils of an undertheorized and inconsistent approach to precedent are clear from the long saga of debates over oil drilling in the Arctic National Wildlife Refuge (“ANWR”). ANWR is a large area of northeast Alaska that is the traditional homeland of certain Alaska Native peoples and is an important ecosystem for a variety of wildlife.²¹⁷ For decades, the question of whether ANWR should be open to oil drilling has been a point of political controversy.²¹⁸ Alongside that controversy has been a question of legislative procedure: whether legislative provisions concerning the legality of drilling in ANWR are consistent with the Byrd rule. From the mid-1980s to the mid-1990s, the parliamentarian’s office held the position that a provision opening up ANWR to drilling violated the Byrd rule, with one former member of the parliamentarian’s office explaining that “authorizing such drilling in a wildlife refuge was a controversial environmental policy issue of the kind whose Senate resolution customarily required broad consensus and was therefore historically protected by the filibuster.”²¹⁹ When a new parliamentarian took office in 1995, he retreated from this position—without public explanation—and began permitting ANWR-related provisions in reconciliation bills.²²⁰

This permissive position has remained the stance of the parliamentarian’s office, which permitted the inclusion of ANWR-related provisions in the Tax Cuts and Jobs Act of 2017 over a Byrd rule objection by the minority party.²²¹

²¹⁶ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 653 (quoting email from Senate parliamentarian); see also *id.* at 653–54 (collecting other decisions making similar points).

²¹⁷ See *Arctic National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV. (last accessed Oct. 17, 2023), <https://www.fws.gov/refuge/arctic> [<https://perma.cc/9RXM-52SK>].

²¹⁸ See Elizabeth Shogren, *For 30 Years, a Political Battle Over Oil and ANWR*, NAT’L PUB. RADIO (Nov. 10, 2005), <https://www.npr.org/2005/11/10/5007819/for-30-years-a-political-battle-over-oil-and-anwr> [<https://perma.cc/3KCZ-SQKN>].

²¹⁹ Email from Senate personnel to Author (Oct. 10, 2023).

²²⁰ See *id.*; see also CONG. RSCH. SERV., ARCTIC NATIONAL WILDLIFE REFUGE (ANWR): VOTES AND LEGISLATIVE ACTIONS, 96TH-114TH CONGRESSES 6 (July 30, 2020), <https://crsreports.congress.gov/product/pdf/RL/RL32838> [<https://perma.cc/A5KM-DL88>] (“There were several attempts to authorize opening ANWR to energy development in the 1990s. In the 104th Congress, the FY1996 budget reconciliation bill . . . would have opened the . . . area to energy development, but the measure was vetoed.”).

²²¹ See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 715.

But it appears that the office's continued permissive approach to ANWR is based on *stare decisis*, not a principled view that the permissive approach to ANWR is the correct one. In fact, the parliamentarian's office has taken the rare step of openly questioning whether the office's permissiveness toward provisions to allow drilling in ANWR precedent was the correct approach. ANWR drilling, the parliamentarian reasoned in 2017, "is not the kind of policy or change in law that lends itself to the reconciliation process and were we considering this matter *de novo* it is hard to imagine finding ourselves [permitting provisions on that topic in reconciliation]."²²² Implicit in this declaration that the office should not have permitted drilling in ANWR through reconciliation in the first instance, and the only reason that it continues to take a permissive posture is *stare decisis*. Indeed, one Senate staffer described the ANWR precedent as "a weird one," "never persuasive," and one that the current parliamentarian inherited and "felt obliged to live by."²²³

The permissive ANWR precedent also has little value outside of its immediate context, perhaps because the parliamentarian's office views it as having been wrongly decided.²²⁴ Another Senate staffer noted that the ANWR precedent is "not considered very good precedent," and emphasized that fact was widely known in the Senate, even if it has never been formally announced.²²⁵ In this sense, the ANWR precedent resembles some judicial precedents that the Supreme Court has not officially overruled but that have been narrowed to have little or no application outside of their immediate factual settings.²²⁶

The weakness of the ANWR precedent creates uncertainty about the role of Byrd rule precedent more generally. Under what conditions, if any, should a precedent that the parliamentarian's office views as wrongly decided be overruled?²²⁷ Under what conditions should such a precedent be narrowed? What does such narrowing mean in practice?

²²² See *id.* (quoting email from Senate parliamentarian's office).

²²³ Author interview with Senate personnel.

²²⁴ Even within the context of ANWR, the parliamentarian's office has construed past decisions narrowly. See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 716 (concluding that a provision in a Senate amendment that stated "Section 1003 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3143) is repealed" is impermissible on the grounds that it "is broader than the rest of the bill which limits activities to the coastal plain" and that "[p]rior ANWR reconciliation bills did not have this provision" (quoting email from Senate parliamentarian)).

²²⁵ Author interview with Senate personnel.

²²⁶ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Flast v. Cohen*, 392 U.S. 83 (1968); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); see also Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1452 & n.84 (2017) (citing these examples).

²²⁷ Efforts to defund Planned Parenthood provide an example of the parliamentarian changing course. The parliamentarian's office blessed efforts to defund Planned Parenthood through reconciliation in 2015 but shifted its view in 2017, finding that efforts to defund Planned Parenthood constituted impermissible targeting, as discussed *supra* notes 161–165. One Senate staffer attributed the parliamentarian's change in position to the inclusion in the CBO estimate in 2017

In most cases, the answers to these questions are simple: past precedent carries great weight and is rarely narrowed or overruled. But for a small number of high-stakes precedents, like ANWR, the lack of clarity on the role of precedent in the Byrd rule inquiry imposes real costs. It would be easy to look at the ANWR precedent and wonder which other precedents will be applied normally, which will apply only narrowly, and which are functionally overruled. The parliamentarian's office has not provided, at least publicly, a framework for determining the force of precedents that it views as misguided but that might nonetheless survive, whether in stronger or weaker form, because of *stare decisis* values. This uncertainty undermines the core values of predictability of outcomes and of treating like cases alike that *stare decisis* is supposed to serve. This is not to say that the parliamentarian's office should either embrace a more absolutist version of *stare decisis* or, conversely, abandon *stare decisis* entirely. An intermediate position may well be the best one. But rule of law values do require a degree of consistency with regard to the office's approach to precedent.²²⁸ It also requires a degree of explanation, which I turn to next.

B. *Precedent and Transparency*

For a system of precedent to operate effectively, participants in that system need to understand the content of past decisions and the weight that those past decisions carry in future decisionmaking. In the judicial context, this function is accomplished by a mechanism that is largely taken for granted: when issuing precedential rulings, courts typically publish opinions explaining those rulings. No comparable mechanism exists in the parliamentarian's office. This poses a challenge both for personnel within the Senate, who draft legislation and litigate Byrd rule disputes, and for the broader public, which has an interest in understanding how consequential decisions about the content of legislation are made.

Current practice is defined by considerable variation in terms of both the level of explanation given for Byrd rule decisions and the extent of publication of those decisions. With respect to explanation, some high-profile decisions have been accompanied by detailed explanations resembling short

(but not in 2015) of an express indication that the provision would affect only one entity. Author interview with Senate personnel.

²²⁸ By way of comparison: the Supreme Court has been clearer than the parliamentarian's office in setting out factors for when overturning a precedent may be appropriate, *see* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992), though many have criticized the Court's application of those factors and its tendency to narrow precedents without overruling them, *see, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 *GEO. L.J.* 1 (2010); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 *TUL. L. REV.* 1533 (2008).

judicial opinions,²²⁹ while others have been issued without explanation.²³⁰ With respect to publication, there is no mechanism for systematically sharing decisions with either Senate staff or the public that is easily readable and comprehensible. Some proceedings are included in the *Congressional Record*—including decisions of the chair, floor debate over the rule, and some summaries of the results of Byrd baths²³¹—but the chronological (rather than thematic) organization of the *Congressional Record* makes it nearly impossible to glean doctrinal through-lines from that source alone. Decisions made in Byrd baths are sometimes published by Senate staff, but not in any systematic fashion.²³² And the press on occasion obtains and publishes high-profile decisions, but the decisions reported on by the press represent only a small share of Byrd rule judgments.²³³ The Senate parliamentarian's office maintains an online database of precedents for use by Senate staff, but that database omits the results of Byrd baths, and for those decisions that it does contain it often provides only minimal underlying reasoning.²³⁴ The difficulty of understanding the totality of Byrd rule doctrine has led one former Senate staffer to describe Senate precedents as being “as opaque as if I told you it was happening at the National People's Congress.”²³⁵

This lack of explanation and publication persists despite the benefits of those practices identified by legal scholars. A generation ago, in an essay arguing for the virtue of judicial candor, David Shapiro explained that “[a] requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.”²³⁶ This analysis fits the context

²²⁹ See *supra* notes 96–100 and accompanying text (discussing Biden-era immigration decisions).

²³⁰ See *supra* notes 124–125 and accompanying text (discussing the Biden-era minimum wage decision).

²³¹ For examples of material in the *Congressional Record* related to Byrd rule disputes, see *supra* notes 93–95, 124–125, 160, 169, 188 & 192 and accompanying text.

²³² See Senate Budget Committee Minority Staff, *supra* note 163 (citing an example of Senate staff publishing summaries of some Byrd rule judgments). The majority staff of the Senate Budget Committee in 2022 provided the rare example of a more systematic publication of Byrd rule decisions by Senate staff. See CONGRESSIONAL BUDGET PROCESS 2022, *supra* note 14, at 619–734.

²³³ See, e.g., Lisa Desjardins, *Read the Senate Rules Decision that Blocks Democrats from Putting Immigration Reform in Budget*, PBS NEWSHOUR (Sept. 20, 2021), <https://www.pbs.org/newshour/politics/read-the-senate-rules-decision-that-blocks-democrats-from-putting-immigration-reform-in-budget> [<https://perma.cc/C74X-2MKY>].

²³⁴ See SARAH B. SOLOMON, CONG. RSCH. SERV., RL30788, PARLIAMENTARY REFERENCE SOURCES: SENATE 14 (2023), <https://crsreports.congress.gov/product/pdf/RL/RL30788> [<https://perma.cc/JJE3-H3FJ>] (“Senators and their staff may access, via Webster (which is not available to the public), the Electronic Senate Precedents, a catalog of recent precedents compiled by the Office of the Parliamentarian.”).

²³⁵ See Gould, *supra* note 18, at 2009.

²³⁶ David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987). See generally Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265 (2017) (discussing different possible understandings of what a duty of candor requires and providing a novel account of judicial candor).

of parliamentary precedent well, at least for those aspects of Senate procedure (most notably Byrd rule adjudications) that involve the parliamentarian's office rendering decisions in a judge-like manner, after arguments from multiple parties with different (often opposing) perspectives on an issue.²³⁷ In those contexts, failing to explain the reasoning behind Byrd rule decisions has plausible downsides for several different actors. Within the parliamentarian's office, the ability to make decisions without explanation may reduce the quality of decisional outputs, in that the process of drafting decisions with explanations could improve the content of those decisions.²³⁸ Within the Senate, decisions made without an explanation of their reasoning, in a precedent-based system, deny Senators and their staffs the ability to make fully informed arguments as to how past decisions bear on present matters.²³⁹ And, to the extent that the broader public is engaged with Senate procedure, decisions made without explanation are harder to subject to public scrutiny.²⁴⁰

The benefits of reason-giving point toward several reforms. Most obviously, the parliamentarian's office should explain both the bottom-line outcomes of important decisions and also the underlying reasoning for those decisions. Those explanations should include a mention of which precedents (if any) are controlling and which precedents (if any) that seem relevant in fact are distinguishable or lack precedential weight. Explaining a decision will often be possible in only a single paragraph, though at times more explanation might be necessary. When it is not possible to issue a detailed contemporaneous explanation for a judgment—as will often happen on the Senate floor or during a Byrd bath on major legislation—the parliamentarian's office should issue a written explanation after the fact explaining the basis for the decisions that have been made.

Two disclaimers are in order on this call for greater explanation and transparency. First, it should apply only to Byrd rule decisions that resemble judicial decisions—namely, proceedings on the Senate floor and Byrd bath adjudications. In each of those settings, the quasi-judicial role that the parliamentarian's office is playing can justify greater explanation and transparency. The same does not hold when the parliamentarian's office gives

²³⁷ See *supra* notes 23–26 and accompanying text (discussing the various aspects of the parliamentarian's role, some of which are more judge-like than others).

²³⁸ Cf. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995) (explaining that requirements of reason-giving can prevent outcomes that are “the product of bias, self-interest, insufficient reflection, or simply excess haste” and help “drive out illegitimate reasons when they are the only plausible explanation for particular outcomes”).

²³⁹ The willingness of the parliamentarian's office to consult closely with Senate staff during the bill-development process mitigates the problem of unpredictability for staff, since staff can get early indications from the parliamentarian's office of whether and why a given provision is likely to be permitted under the Byrd rule.

²⁴⁰ Though the overwhelming majority of Byrd rule decisions fly entirely beneath the public radar, a small number—such as the immigration and minimum wage decisions early in the Biden administration—do receive considerable press attention. See *supra* notes 96–100 & 124–125 (discussing these decisions).

informal advice to Senators or staff. As noted above, the office, unlike courts, frequently gives the parties informal advice. When the office is advising the parties about whether a particular provision would likely pass muster or suggesting changes to aid legislators and their staffs in crafting a version of their preferred policy that is compliant with the Byrd rule, transparency is inappropriate. In those settings, the parliamentarian's office is acting more as a lawyer than as a judge, and there is value in maintaining a confidential advisory relationship wherein Senators and staff have candid exchanges with the parliamentarian's office, without fear that those conversations will be made available to the other party or the public at large.²⁴¹

Second, greater transparency requires resources. The parliamentarian's office is a relatively small operation, and staff is particularly overstretched when the majority party is pushing a high-profile reconciliation bill through the legislative process. Given how intensive the Byrd rule process can be, it is easy to see how that process could become a significant drain on the time and personnel in the parliamentarian's office. Providing greater explanation for and publication of decisions could require significant staff time, depending on the precise level of explanation required. The parliamentarian's office does not set its own budget and staffing levels, and if the Senate wishes to demand more from the office, it would be incumbent on the Senate to provide the office with the resources necessary to accomplish its charge.²⁴²

VI. LESSONS

A. Procedure and Interpretation in a Partisan Age

Byrd rule doctrine matters because it helps determine legislative outcomes and the content of federal law. The Senate's three-fifths cloture requirement, coupled with political parties that are both highly polarized and closely

²⁴¹ On the advantages and disadvantages of transparency in Congress, see Gould, *supra* note 18, at 2008–10 (discussing transparency and the House and Senate parliamentarians); Cross & Gluck, *supra* note 21, at 1625–28 (discussing transparency and various aspects of the congressional bureaucracy, including the CBO, General Accounting Office, and Congressional Research Service). For a discussion of arguments for and against greater transparency in another context that resembles courts in some but by no means all respects—the Department of Justice's Office of Legal Counsel—see Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 749–51 (2005).

²⁴² Greater transparency might be attractive to the parliamentarian's office, at least to a degree, since explaining the reasons for individual Byrd rule decisions and providing a clearer approach to applying, distinguishing, or overruling precedent could make it less likely that partisans will view decisions as arbitrary. On the other hand, the parliamentarian's office can at times benefit from the asymmetry in knowledge that comes from Byrd rule materials being inaccessible.

One of the few empirical studies of parliamentary precedent in Congress suggests that publication of precedents might also impact the character of floor debate, the frequency of appeals from rulings of the chair, or the relationships between party leaders and members. See generally Eric D. Lawrence, *The Publication of Precedents and its Effect on Legislative Behavior*, 38 LEG. STUD. Q. 31 (2013) (examining the advent of publication of House precedents in 1899).

divided, pushes the parties toward legislating through the reconciliation process. Legislative procedure, including the Byrd rule, therefore pushes the parties toward legislating on fiscal matters—taxing and spending—as opposed to regulatory or other matters. The past decade has seen precious little national legislation (from either party) on some of the most contested issues in American life: voting rights, guns, abortion, immigration, and labor-management relations, among others. Bills on these topics have at times passed the House, but major legislation has typically failed to garner the three-fifths majority necessary under Senate rules for bills not enacted through reconciliation.²⁴³ By contrast, both parties have succeeded in enacting divisive legislation through the reconciliation process. On the Republican side, the Trump administration's most important partisan legislative effort, the Tax Cuts and Jobs Act, was possible only because of Byrd rule doctrine that allows for the enactment of tax cuts through reconciliation.²⁴⁴ Among Democrats, it is telling that after repeated failed efforts to command a filibuster-proof majority for regulatory legislation to curb greenhouse gas emissions, the Democratic Party turned the focus of its climate legislative agenda to spending, culminating in the Inflation Reduction Act, which sought to speed the green energy transition almost entirely through spending (largely in the form of tax credits).²⁴⁵ The reconciliation process and Byrd rule, in short, put some bills on a path to passage while dooming others to failure.

The Byrd rule similarly serves as a key gatekeeper of what provisions can and cannot be included within individual bills. This Article's discussion of Byrd rule decisionmaking has provided repeated examples of provisions that the parties sought to include in reconciliation bills but that were found to violate the rule. In these cases, the judgments of the parliamentarian's office prompted the parties to drop provisions from bills that were en route to passage. For this reason, understanding the content of the key party-line legislation of the last decade—including the Tax Cuts and Jobs Act, American Rescue Plan Act, and Inflation Reduction Act—requires understanding the Byrd rule.

So long as the filibuster remains in place, reconciliation will likely be central to future legislative efforts.²⁴⁶ Republicans will likely seek to use

²⁴³ See, e.g., Development, Relief, and Education for Alien Minors (DREAM) Act, S. 3827, 111th Cong. (2010); For the People Act, H.R. 1, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. (2021); Protecting the Right to Organize (PRO) Act, H.R. 842, 117th Cong. (2021).

²⁴⁴ See *Republicans Pass Historic Tax Cuts Without a Single Democratic Vote*, AXIOS (Dec. 20, 2017), <https://www.axios.com/2018/01/05/republicans-pass-historic-tax-cuts-without-a-single-democratic-vote-1515110718> [<https://perma.cc/QQX7-7L9C>] (discussing the enactment of the Tax Cuts and Jobs Act).

²⁴⁵ See Gould, *supra* note 78 (Part I.C) (discussing the enactment of the Inflation Reduction Act).

²⁴⁶ Though some of the most important legislation in recent years has been reconciliation legislation, see RECONCILIATION MEASURES SINCE 1980, *supra* note 34, at 2–3, it bears emphasis that most enacted legislation—and even most spending legislation—is not enacted through reconciliation.

reconciliation both to enact further tax cuts and to pursue aspects of their social policy agenda. Among Democrats, a likely agenda for future reconciliation legislation includes greater climate-related spending, changes to the tax code, and a host of social welfare spending (such as spending on child care, parental leave, elder care, and community college access).²⁴⁷ When the parties undertake these initiatives through reconciliation, they will also try to insert provisions into reconciliation legislation that are important to their respective constituencies, including some provisions that may not be permissible under the Byrd rule. Byrd rule jurisprudence, in turn, will dictate what sorts of provisions will be able to become law.

A body of Byrd rule doctrine that places certain issues beyond reach of legislative majorities is one that will come under pressure from those majorities. Majorities will find their agendas thwarted by the parliamentarian's interpretation of the Byrd rule. This could lead to increasing pressure to either repeal the rule or to formally leave it in place but circumvent it as a functional impediment to legislative action. Recent years have witnessed Senators of both parties calling for overriding or circumventing the parliamentarian's Byrd rule judgments.²⁴⁸ These calls may become more widespread if either party is able to win a larger and more durable Senate majority, since a majority party may be more willing to countenance restrictive Byrd rule doctrine as an insurance policy if they anticipate soon being in the minority, but not if they anticipate holding the majority on a sustained basis. If these pressures mounted, the parliamentarian's office would face a choice. It could hold the line on the Byrd rule, at risk of either being marginalized or prompting more wholesale filibuster reform, or it could reinterpret the rule to be less of a restraint on majority action, at risk of folding to pressure from the majority party and distorting Byrd rule doctrine. From the standpoint of the parliamentarian's office and Senate traditionalists, neither choice is a good one. Opponents of the filibuster, by contrast, would likely look upon these choices with considerably more optimism, since either represents an erosion of the status quo. Whatever one's normative views, understanding the character of

²⁴⁷ The Build Back Better legislation unsuccessfully pursued early in the Biden administration provides a blueprint for social spending efforts that future Democratic Congresses will likely undertake. See *supra* note 39 and accompanying text.

²⁴⁸ See, e.g., Alexander Bolton, *Sanders Vows to Force Vote on \$15 Minimum Wage*, THE HILL (Mar. 1, 2021), <https://thehill.com/homenews/senate/541114-sanders-to-force-vote-on-15-minimum-wage-urges-democrats-to-ignore> [<https://perma.cc/2STF-7XGS>] ("Senate Budget Committee Chairman Bernie Sanders (I-Vt.) says Democrats should 'ignore' the recent ruling of the Senate parliamentarian and is vowing to force the Senate to vote this week on an amendment to set the federal minimum wage at \$15 an hour."); Sarah Ferris, *Cruz Suggests Ignoring Senate Parliamentarian for ObamaCare Repeal*, THE HILL (Oct. 22, 2015), <https://thehill.com/policy/healthcare/257771-cruz-suggests-ignoring-senate-parliamentarian-to-pursue-obamacare-repeal> [<https://perma.cc/8RT4-3MRK>] ("Sen. Ted Cruz (R-Texas) is suggesting that the GOP could ignore interpretations of the Senate parliamentarian if it means sending a full repeal of ObamaCare to the president's desk.").

the contemporary Senate requires understanding the content of Byrd rule doctrine and the political pressures surrounding the rule.

B. Foundations, Rules and Standards, and Congressional Intent

So long as the Byrd rule remains in place, some discretion will be an inevitable part of implementing the rule. The question is then how the parliamentarian's office should go about exercising that discretion. I close by discussing three cross-cutting issues that have arisen in the course of this Article's analysis: the relevance of normative foundations, the tradeoff between rules and standards, and the place of congressional intent.

First, the problem of normative foundations hangs over Byrd rule decisionmaking. As I discussed at length at this Article's outset, a core problem that besets Byrd rule jurisprudence is the lack of an agreed-upon purpose for the Byrd rule and the reconciliation process as a whole that is both appealing on its own terms and is a reasonable fit with Byrd rule doctrine as it has developed.²⁴⁹ The analysis that makes up the core of this Article shows the challenge of evaluating Byrd rule doctrine without a normative north star. While I have sought to excavate and evaluate existing doctrine, more definitive conclusions about whether particular aspects of Byrd rule doctrine are excessively permissive or restrictive require anchoring that analysis to the rule's purposes. Without such purposes, and in the face of an open-ended provision like the Byrd rule, normative evaluation is necessarily incomplete.

Second, Byrd rule doctrine implicates longstanding debates in legal theory about the relative virtues of standards versus rules.²⁵⁰ Byrd rule balancing, as described in Part III, is a paradigmatic standard: it involves the parliamentarian's office making case-by-case determinations based on a directive—determine whether a provision's budgetary impact is “merely incidental” to its nonbudgetary impact—that provides little guidance in practice. Legal mandates that take the form of standards have the advantage of giving adjudicators, here the parliamentarian's office, the flexibility to make decisions based on the facts of individual cases. But standards also give rise to a risk of unpredictability, inconsistent application, and excessive discretion by the parliamentarian's office.

The alternative to standards—a more rule-like approach to the Byrd rule—comes with advantages and drawbacks that are the mirror image of those that accompany a more standard-like approach. Part IV documented the various implementing principles that the parliamentarian's office has

²⁴⁹ See *supra* Part II.B (discussing this issue and showing the shortcomings of various possible normative bases for the rule).

²⁵⁰ A small sample of the large literature on the topic includes Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

developed to put the Byrd rule into practice. The process of developing such principles, sometimes called the “rulification of standards,” is common to many areas of law.²⁵¹ More rule-like doctrinal principles have the advantage of providing guidance that can be applied relatively easily to particular cases, without the challenges and unpredictability of case-by-case balancing. Rules also promote predictability, consistency across cases, and stability over time. But rules risk denying necessary flexibility to adjudicators, being over- or under-inclusive in particular cases, and sometimes yielding counterintuitive or overly formalistic results.

Describing Byrd rule doctrine in terms of standards and rules shows that at least some of the challenges associated with implementing the Byrd rule are simply a manifestation of the challenges associated with developing doctrine in any area of law. While the Byrd rule implicates some distinctive issues, the trade-offs between standards and rules are anything but unique. To the contrary, the parliamentarian’s office, in combining standard-like and rule-like approaches to evaluating the Byrd rule, has done precisely the same thing that judges have done in implementing a wide range of legal provisions.²⁵²

Third, a final complication of Byrd rule doctrine is the role of intent. While this Article has argued that the Byrd rule is overwhelmingly focused on policy effects, intent has nonetheless cropped up as part of the analysis. Intent may at times play a role in Byrd rule balancing,²⁵³ and one way of understanding the various implementing principles that the parliamentarian’s office has developed is that those principles serve as a rough way of sussing out congressional intent to make policy changes under the guise of budgetary changes.²⁵⁴ To the extent that Byrd rule doctrine can be challenging to parse, one difficulty is that the doctrine contains no express statement of whether and how intent should play a role in the analysis.

²⁵¹ See *supra* note 49 and accompanying text (discussing Frederick Schauer’s work on this topic).

²⁵² For general discussions, see Kaplow, *supra* note 250, at 561 (noting that “legal commands mix [rules and standards] in varying degrees”); Sullivan, *supra* note 250, at 61–62 (providing examples of how “[a] rule may be corrupted by exceptions to the point where it resembles a standard,” “a standard may attach such fixed weights to the multiple factors it considers that it resembles a rule,” “[a] strict rule may have a standard-like exception,” “a standard’s application may be confined to areas demarcated by a rule,” and “[a] rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way”). For examples from particular areas of law, see Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 430 (2016) (noting “judicial cycling between rules and standards” in the separation of powers context); Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 419, 421 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (arguing that “[f]iduciary law’s combination of the primary duties of loyalty and care (open-ended standards) plus specific subsidiary duties (more specific standards and rules) provides the flexibility of standards plus the specification of rules while minimizing their respective disadvantages”).

²⁵³ See *supra* notes 106–109 and accompanying text.

²⁵⁴ See *supra* text following note 207.

Understanding these various challenges associated with implementing the Byrd rule both aid in our understanding of the rule and should prompt detractors of the status quo to sharpen their critiques. Criticism of the Byrd rule itself is of course reasonable, either on the ground that the filibuster should be eliminated (rendering the rule unnecessary) or on the ground that the line between budgetary and nonbudgetary provisions lacks normative significance. Also reasonable is criticism of specific areas of Byrd rule doctrine; indeed, one central premise of this Article is that doctrine in this area should be subject to critical scrutiny. Less reasonable is a generalized critique of Byrd rule doctrine *per se*. So long as the rule exists in its current form, it is inevitable that partisans will push the boundaries of what the rule permits, making it necessary for the parliamentarian's office to develop a body of law that implements the rule. That body of law, in turn, will implicate issues familiar to students of many bodies of legal doctrine: normative foundations, standards versus rules, and intent versus effects. Despite the distinctive setting in which Byrd rule disputes play out—the Senate rather than a courtroom—a close look at Byrd rule doctrine shows the many ways in which it resembles other types of law.

VII. CONCLUSION

The Byrd rule is a critical feature of Senate procedure. It determines the content of our law and shapes legislative politics across a host of issues. Understanding the rule's operation requires understanding the rich and varied body of doctrine that the Senate parliamentarian's office has developed to implement it. That doctrine involves case-by-case balancing, a variety of implementing principles, and a commitment to *stare decisis* that is strong but not absolute. It is complicated by the lack of agreed-upon normative foundations for the Byrd rule and the reconciliation process as a whole. The incentive of the majority party to shoehorn as much of its agenda as possible into reconciliation bills makes the stakes of the Byrd rule especially high, since in a closely divided Senate the majority party will often seek to push the boundaries of existing Byrd rule doctrine. This sort of boundary-pushing will prompt more hard cases on politically salient issues.

This Article has sought to explain and critically evaluate how Byrd rule doctrine operates in practice. Unless the Senate eliminates or significantly reforms the filibuster, the Byrd rule will remain of critical importance. The parliamentarian's office will continue to develop a body of doctrine, Senate staffers will continue to argue that contested provisions are or are not permitted under that doctrine, and all Americans will continue to live with the results of the Byrd rule process. This fact makes it imperative to understand the body of doctrine that implements the Byrd rule. My hope is that this Article can aid in that understanding.