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The Closed Rule

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THE CLOSED RULE

Michael Doran*

The closed rule constitutes a critical component of managerial power in the contemporary House of Representatives and an increasingly important element of the legislative process. Subject to approval by the full membership, the closed rule allows managers to block all amendments to a measure when bringing that measure to the floor. Despite objections from the minority, both Republicans and Democrats regularly use the closed rule when in the majority, and rank-and-file members ordinarily approve any closed rule put to a floor vote. Once rarely used, the closed rule has become managers' preferred instrument for controlling the House floor agenda.

This Article presents the first comprehensive analysis of the closed rule in the legal literature. After situating the closed rule within its institutional and theoretical context, this Article examines the use of the closed rule by the Republican majority in the 109th Congress and the Democratic majority in the 110th Congress. The Article then undertakes both a positive and normative analysis. The positive analysis generalizes three prominent accounts of the closed rule from political theory and argues that the closed rule can more accurately be understood as a broadly managerial instrument for maintaining order on the House floor. The normative analysis identifies and discusses several undesirable effects of the closed rule—its tendency to increase legislative fragmentation and redundancy, its facilitation of third-party capture, and its weakening of bipartisan cooperation and compromise. But the normative analysis rejects claims that the closed rule is inherently undemocratic, arguing instead that the closed rule represents a deliberate, rational, and legitimate attempt by the rank and file to locate the House at the optimal point between too much managerial power and outright chaos on the floor.

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INTRODUCTION

In his diary entry for December 11, 1985, President Ronald Reagan recorded his frustration with the Republicans in the House of Representatives by using the coarsest language he could bring himself to put on paper. After noting the Democratic Speaker's acid comment that the House Republicans "had 'humiliated the man who led them to victory' (me)," he bitterly agreed: "d—n it they had."¹ Earlier that day, the Republicans had rebelled against the President and joined a coalition of Democrats to defeat House Resolution 336, which would have provided for consideration of the President's tax-reform measure on the House floor.² That outcome was remarkable. Measures such as House Resolution 336—known as "special rules" or simply "rules"—rarely fail in the House. Special rules establish the conditions for bringing controversial legislation to the House floor, and they reflect the considered judgment and determined will of House managers. In this case, the special rule also reflected President Reagan's cooperation with the Democratic majority on tax reform, and he rightly understood defeat of the resolution as an affront to his own leadership.³

House Resolution 336 set out a "modified closed rule"—that is, a special rule allowing "a very limited number of amendments"⁴—for what would be the most extensive reform of the nation's tax laws in three decades. During debate on the resolution, members objected that the special rule allowed only three floor amendments—two "perfecting amendments" offered by Democrats and one "amendment in the nature of a substitute" offered by Republicans.⁵ In effect, House Resolution 336 provided a carefully structured and deliberately

¹ RONALD REAGAN, *THE REAGAN DIARIES* 376 (Douglas Brinkley ed., 2007). The bowdlerized entry is not unusual in the diaries; President Reagan apparently was not one to turn the page blue.

² The vote was 202 to 223. 131 CONG. REC. 35,957 (1985).

³ After the vote on the resolution, the Speaker reportedly said to an aide that the defeat made the President "a lame duck on the floor of the House." JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* 165 (1987). But the President's setback did not endure; during its next session, Congress passed the tax-reform measure. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 16 U.S.C., 19 U.S.C., 25 U.S.C., 26 U.S.C., 28 U.S.C., 29 U.S.C., 42 U.S.C., 46 U.S.C., and 49 U.S.C.). The glow of that victory did not endure either. Just over two weeks after he signed the tax-reform measure, the press broke what President Reagan, again writing in his diary, at first called "a wild story" about his Administration selling arms to Iran in exchange for hostages held in Lebanon. REAGAN, *supra* note 1, at 448.

⁴ These remarks are the characterization of House Resolution 336 made by its sponsor. 131 CONG. REC. 35,945 (1985) (remarks of Rep. Bonior).

⁵ *See, e.g.*, 131 CONG. REC. 35,948 (1985) (remarks of Rep. Lott and Rep. Kemp); *id.* at 35,949 (remarks of Rep. Wolf); *id.* at 35,951 (remarks of Rep. Taylor); *id.* at 35,952 (remarks of Rep. Miller and Rep. Traficant); *id.* at 35,954 (remarks of Rep. Green).

controlled set of choices for the House floor: members could accept the tax-reform measure as approved by the House Committee on Ways and Means;⁶ members could accept the Ways and Means measure as modified by either or both of the Democratic amendments; members could accept the Republican substitute measure;⁷ or members could retain the status quo by rejecting both the Ways and Means measure and the Republican substitute measure. Under the resolution, rank-and-file members could not offer any amendments beyond those that the resolution specifically permitted.⁸ Passage of House Resolution 336 by the full House generally would have “closed” the tax-reform measure to amendment on the floor.⁹

The defeat of House Resolution 336 was exceptional, but the intended effect of the rule—to define the floor choices available to members—was entirely familiar. For decades, the House Committee on Rules has reported special rules that, once adopted by the full House, control the amendment process on the floor. At one extreme, an “open rule” permits any floor amendment that satisfies the standing rules and precedents of the House. At the other extreme, a “closed rule” prohibits all floor amendments. Special rules falling between these extremes—often referred to as “structured rules,” “modified open rules,” or “modified closed rules”—allow certain amendments but disallow all others.

The closed rule plays a critical role in the contemporary House. For much of the twentieth century, open rules were the norm, and House managers reserved closed rules primarily for tax legislation. But open rules, with their potential for disorder on the House floor, generally have fallen into disuse for consideration of controversial measures. House managers now bring most such measures to the floor under a closed rule or, failing that, under a special

⁶ House Resolution 336 also included a “self-executing” provision that would have treated a particular amendment as though it had been adopted. That amendment was itself controversial. See BIRNBAUM & MURRAY, *supra* note 3, at 162.

⁷ House Resolution 336 also allowed a specific perfecting amendment to the Republican substitute measure. 131 CONG. REC. 35,944 (1985).

⁸ In addition to the specific amendments that it allowed, House Resolution 336 made in order any “amendments to the bill recommended by the Committee on Ways and Means,” thereby allowing the chair of that committee to propose further changes on the floor. *Id.*

⁹ President Reagan certainly knew what was at stake with House Resolution 336. Four years earlier, House Republicans had joined a coalition of House Democrats to vote down a special rule that likely would have prevented passage of a tax measure that had been the highest domestic-policy priority of President Reagan’s first year in office. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 180–81 (1990); GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 117–18 (2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*].

rule that so tightly limits amending activity as to have nearly the same effect as a closed rule.¹⁰ Each closed rule must be put to a vote of the full House, but, with rare exceptions (such as the vote that galled President Reagan), the floor ratifies the closed rules proposed by managers. The closed rule now constitutes one of the most important parts of the legislative process.

Use of the closed rule elicits strong reactions from members of the minority. When Republicans introduced the first special rule in 1883, Democrats called it “a monstrous proposition,” a “fraud,” and a “revolutionary” move.¹¹ After the legislative reforms of the 1970s, the majority Democrats turned to closed and modified closed rules to manage an increasingly unruly House floor, and the minority Republicans denounced the development as undemocratic,¹² “the most serious and scandalous blow struck against democratic procedures in the House to date,”¹³ and an occasion to “mourn . . . the freedoms we have lost.”¹⁴ When Republicans held the majority in the 1990s and the 2000s, the minority Democrats complained that closed and modified closed rules, which they had been using with increasing frequency until they lost control of the House in 1995, were “an affront to the democratic process” and an “attack[] on democracy.”¹⁵ They charged that closed rules under Republican hegemony had led to “democracy’s utter collapse,”¹⁶ and they labeled the closed rule an “outrageous tactic[] that trample[s] the rights of the minority and rig[s] the rules of . . . debate.”¹⁷ Although they too had used the closed rule regularly throughout their twelve years in the majority, the Republicans renewed their own attacks on the closed

¹⁰ See *infra* Part II.

¹¹ COMM. ON RULES, 97TH CONG., A HISTORY OF THE COMMITTEE ON RULES 63 (Comm. Print 1983) [hereinafter RULES COMMITTEE HISTORY].

¹² See 134 Cong. Rec. 12,179–80 (1988) (remarks of Rep. Lott, arguing that closed and modified closed rules exposed the minority “to the caprice of the majority leadership”).

¹³ Robert E. Bauman, *Majority Tyranny in the House*, in VIEW FROM THE CAPITOL DOME (LOOKING RIGHT) 11 (John H. Rousselot & Richard T. Schulze eds., 1980).

¹⁴ Stanley Bach, *The Structure of Choice in the House of Representatives: The Impact of Complex Special Rules*, 18 HARV. J. ON LEGIS. 553, 580 n.72 (1981) (quoting 123 CONG. REC. 5888 (1977) (remarks of Rep. Frenzel)).

¹⁵ The remarks, quoted in BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 171 (2007) [hereinafter SINCLAIR, UNORTHODOX LAWMAKING] (internal quotation marks omitted), were made by Representative Slaughter of New York in 2003. Representative Slaughter apparently revised her views several years later. As chair of the Rules Committee in the 110th Congress, she was responsible for bringing seventy-six closed rules to the floor. See *infra* Part II.A.

¹⁶ H. RULES COMM. MINORITY OFFICE, 108TH CONG., BROKEN PROMISES: THE DEATH OF DELIBERATIVE DEMOCRACY 15 (2005), available at http://www.citizen.org/documents/Broken_Promises.pdf.

¹⁷ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 189 (quoting Rep. Hoyer).

rule—calling it “offensive to the spirit of representative democracy”¹⁸—once the Democrats regained control of the House in 2007.

Despite its increasingly important role in the legislative process and extensive study by political theorists and congressional scholars, the closed rule has received very little attention in the legal academic literature.¹⁹ This Article examines the closed rule in the contemporary House and analyzes its implications for the allocation of legislative power, the development of substantive policy, and the scope and character of representative democracy. As demonstrated here, the closed rule represents a rational decision by the rank and file to give managers broad discretionary authority over the House floor agenda. That has important consequences for the House, for federal statutory law, and for government.

This Article proceeds in three parts. Part I situates the closed rule within its relevant institutional and theoretical context. It shows, first, where the closed rule fits within the broader structure of House governance and procedure and, second, how the closed rule serves the function of agenda control, thereby contributing to the stability of legislative outcomes. Part II examines in detail how the closed rule was used in two consecutive Congresses: the 109th Congress, which met from 2005 until 2007 under Republican control; and the 110th Congress, which met from 2007 until 2009 under Democratic control. It directly challenges two claims made by political scientists: that the closed rule is infrequently used and that a recent increase in the use of the closed rule is specific to Republican control of the House. Part II shows that there is currently no appreciable difference between the use of the closed rule by a Republican majority and its use by a Democratic majority. At this point, House managers from both parties employ the closed rule for approximately half of all controversial measures that they bring to the full membership.

Part III undertakes a broader positive and normative examination of the closed rule. Political scientists locate the closed rule in three different theories of legislative organization: distributive, informational, and partisan. After reviewing how the experience with the closed rule in the 109th and 110th Congresses suggests possible qualifications to those explanations, Part III incorporates and generalizes the explanations into an account of the closed rule

¹⁸ 154 CONG. REC. 10,044 (2008) (remarks of Rep. Diaz-Balart).

¹⁹ References in the legal literature to the closed rule normally are made by way of background to specific federal statutes. See, e.g., Michael Montano, Note, *Who May Be Tried Under the Military Commissions Act of 2006?*, 61 STAN. L. REV. 1281, 1322 (2009).

as broadly managerial. Part III then turns to a normative evaluation of whether the closed rule, so understood, should be reformed. It argues that the closed rule has certain undesirable effects on substantive policy—that it leads to legislative fragmentation and redundancy, facilitates capture by interest groups and agents of the Executive Branch, and undermines bipartisan cooperation and compromise. But Part III also rejects the more serious criticism that the closed rule is inherently undemocratic. Instead, it argues that the closed rule represents a deliberate, rational, and legitimate effort by the rank and file to locate the House at the optimal point between too much managerial control and outright chaos on the floor. Whether or not the rank and file are successful in this effort, the closed rule is not inherently less democratic than its polar opposite, the open rule.

I. INSTITUTIONAL AND THEORETICAL CONTEXT

The significance of the closed rule derives from the operation of basic House floor procedures and the importance of agenda control in legislative voting. This Part sets out the institutional and theoretical background for understanding the use of the closed rule in the 109th and 110th Congresses and for assessing the broader implications of the closed rule for law and government.

A. *Overview of House Procedures*

The Constitution provides little detail about the internal structure of the House. After vesting “[a]ll legislative Powers” in the House and the Senate, the Constitution sets the “Quorum to do Business” in the House at a simple majority of members and requires that the House choose a “Speaker and other Officers,” “keep a Journal of its Proceedings,” and record “the Yeas and Nays . . . on any question . . . at the Desire of one fifth of those Present.”²⁰ Beyond these and similar minima, the Constitution simply states that the House “may determine the Rules of its Proceedings.”²¹

The most salient “Rules of . . . Proceedings” are published at the beginning of each Congress as “standing rules” of the House.²² The standing rules

²⁰ U.S. CONST. art. I, §§ 1–2, 5.

²¹ U.S. CONST. art. I, § 5.

²² The standing rules, which set out general House procedures, are distinct from special rules, which allow or facilitate floor consideration for individual measures. See COMM. ON RULES, U.S. H.R., FLOOR PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES (1999) [hereinafter FLOOR PROCEDURE], available at http://rules.house.gov/Archives/floor_man.htm. The 111th Congress has adopted the most recent version of

describe the powers and duties of the speaker and other officers, designate committees and allocate jurisdiction among them, establish a regular order of business on the floor and procedures for overriding the regular order, set out floor debate and voting rules, and prescribe ethical standards for House members.²³ The standing rules are supplemented by recorded precedents of parliamentary decisions and by unwritten institutional norms.²⁴

Under these rules, precedents, and norms, the House organizes itself into a hierarchical structure that distinguishes between members serving as managers and members constituting the rank and file. Managers—comprising the leadership of the majority party²⁵ and the committee chairs²⁶—exercise extensive control over the legislative process.²⁷ They determine what policy issues the House will address, the content of specific measures reported out of committee, when measures will be brought to the floor, and the conditions for floor debate, amendment, and voting.²⁸ Although it is possible for legislation to advance without the approval of House managers, that outcome is not common. Managers cannot always secure passage of measures that they support, but they can almost always block passage of measures that they oppose.²⁹

the standing rules. OFFICE OF THE CLERK OF THE U.S. H.R., RULES OF THE HOUSE OF REPRESENTATIVES, ONE HUNDRED ELEVENTH CONGRESS (2009) [hereinafter STANDING RULES]. The standing rules are reproduced in the “House Manual,” which also includes the Constitution and *Jefferson’s Manual of Parliamentary Practice*. JUDY SCHNEIDER, CONG. RESEARCH SERV., ORDER CODE 98-262 GOV, HOUSE RULES MANUAL: SUMMARY OF CONTENTS (2007), available at <http://www.rules.house.gov/archives/98-262.pdf>.

²³ STANDING RULES, *supra* note 22, rs. I–II, X–XXI, XXIII–XXVII.

²⁴ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 6–7 (7th ed. 2007). For certain legislative matters (such as the budget), federal statutes provide additional rules of proceeding. *Id.* at 7.

²⁵ This includes the speaker, the majority leader, the majority whip, and the chair of the Rules Committee (among others).

²⁶ The reference to “committee chairs” should be understood to include subcommittee chairs. In both cases, a chair of a committee or a subcommittee of jurisdiction should be considered a manager only for measures that fall within that committee’s or subcommittee’s jurisdiction. For example, the chair of the Committee on Agriculture would be a manager as to a farm measure but not as to a defense measure.

²⁷ Although there is a parallel structure on the minority side—a minority leader, a minority whip, and ranking members of committees—the House’s strong commitment to majority rule generally is not consistent with considering those members to be “managers” as that term is used in this Article.

²⁸ See generally SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15.

²⁹ Since initiation of the discharge petition in 1931, only three measures discharged by petition from a House committee of jurisdiction have become law. RICHARD S. BETH, CONG. RESEARCH SERV., ORDER CODE 97-552 GOV, THE DISCHARGE RULE IN THE HOUSE: PRINCIPAL FEATURES AND USES 4–5 (2003); OLESZEK, *supra* note 24, at 144.

Managers hold their positions as agents of the full membership.³⁰ The rank and file elect the managers and reserve authority to remove them,³¹ and the rank and file can change managers' powers and duties by amending the standing rules.³² Such events are rare but momentous: in the "Cannon Revolt" of 1910, progressive Republicans joined Democrats to impose sharp limits on the powers of the speaker;³³ in the early 1970s, the House made significant organizational changes to shift power from committee chairs to leadership and the rank and file;³⁴ and, in 1998, the Republican majority effectively deposed Speaker Newt Gingrich.³⁵ In the ordinary course, then, the rank and file delegate broad control over the legislative process to managers, but the rank and file retain the power to discipline managers through reversal of their decisions, contraction of their authority, or removal from their positions.

Central to House management is the regulation of debate, amendment, and voting on the floor. The 435 members of the House introduce thousands of bills and resolutions during each Congress,³⁶ and granting every member unrestricted authority to call up any measure at any time would push the House into chaos.³⁷ To avoid that outcome, the standing rules initially assign each measure to one or more committees³⁸ and prescribe limited procedures for bringing a measure from committee to the floor.³⁹ These two steps effectively block many measures from consideration by the full House—committees refuse or fail to report most measures referred to them, and leadership may decline to call up reported measures on the floor.⁴⁰

³⁰ BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 8–18* (1995) [hereinafter SINCLAIR, *LEGISLATORS*]; see also STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* 168, 234 (1989); Morris P. Fiorina & Kenneth A. Shepsle, *Formal Theories of Leadership: Agents, Agenda Setters, and Entrepreneurs*, in *LEADERSHIP AND POLITICS: NEW PERSPECTIVES IN POLITICAL SCIENCE* 17, 20–21 (Bryan D. Jones ed., 1989).

³¹ U.S. CONST. art. I, § 2; *STANDING RULES*, *supra* note 22, r. X; OLESZEK, *supra* note 24, at 21, 92; SINCLAIR, *LEGISLATORS*, *supra* note 30, at 64–67.

³² U.S. CONST. art. I, § 5.

³³ Lawrence C. Dodd & Bruce I. Oppenheimer, *The Politics of the Contemporary House: From Gingrich to Pelosi*, in *CONGRESS RECONSIDERED* 23, 24 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2005).

³⁴ SINCLAIR, *UNORTHODOX LAWMAKING*, *supra* note 15, at 110–11; SMITH, *supra* note 30, at 24–35.

³⁵ Dodd & Oppenheimer, *supra* note 33, at 28.

³⁶ OLESZEK, *supra* note 24, at 79.

³⁷ SMITH, *supra* note 30, at 253.

³⁸ *STANDING RULES*, *supra* note 22, rs. X & XII.

³⁹ *Id.* rs. XIII–XVI.

⁴⁰ OLESZEK, *supra* note 24, at 90–91. In both cases, however, the measure is subject to discharge by petition of a majority of the full membership. *STANDING RULES*, *supra* note 22, r. XV; OLESZEK, *supra* note 24, at 143–46. See generally BETH, *supra* note 29.

A measure approved by committee and by leadership can be brought to the floor under one of four main procedures: the regular order of business, unanimous consent, suspension of the rules, or a special rule.⁴¹ For the regular order of business, the standing rules distinguish between privileged and non-privileged measures.⁴² Privileged measures (such as appropriations measures) can be called up on the floor at any time.⁴³ Non-privileged measures can be called up by chronological position on one of the House calendars or under a weekly “call of committees.”⁴⁴ But the House normally does not use the regular order.⁴⁵ The unanimous-consent procedure is practicable only for non-controversial measures because, as the term implies, a single member can defeat the procedure.⁴⁶ Suspension of the rules allows for expeditious consideration. A measure called up under the suspension procedure is debatable for only forty minutes, is not subject to amendment (other than by the member who calls it up), and requires a two-thirds vote for passage.⁴⁷

⁴¹ WM. HOLMES BROWN & CHARLES W. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 857 (2003) [hereinafter HOUSE PRACTICE]; see also *Methods of Obtaining House Floor Consideration*, PARLIAMENTARY OUTREACH PROGRAM, COMM. ON RULES, U.S. H.R., http://www.rules.house.gov/POP/obt_floor_consider.htm (last visited Mar. 2, 2010) (explaining procedures for bringing measures to the House floor). There are separate procedures for bringing discharged measures and private measures to the floor. *Id.*

⁴² STANDING RULES, *supra* note 22, rs. XIII–XIV. Rule XIV sets forth the daily order of business, and Rule XIII grants certain committees privilege to report certain measures. A measure called up through the regular order generally is debatable only for one hour and is subject to amendment only by the member who calls up the measure. CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., ORDER CODE 95-563, THE LEGISLATIVE PROCESS ON THE HOUSE FLOOR: AN INTRODUCTION 4 (2006). The standing rules require, however, that most tax or spending measures first be considered in the Committee of the Whole House on the state of the Union (the “Committee of the Whole”). STANDING RULES, *supra* note 22, r. XVIII. The Committee of the Whole—which also considers other measures, either by motion or by special rule—comprises the full membership of the House but allows for more flexible debate and amendment procedures than does the House. OLESZEK, *supra* note 24, at 156–58. Any measure passed in the Committee of the Whole must pass in the House as well. *Id.* at 180; see also DAVIS, *supra*, at 6. For background on the Committee of the Whole, see STANLEY BACH, THE AMENDING PROCESS IN CONGRESS 23–40 (2003).

⁴³ STANDING RULES, *supra* note 22, r. XIII, XXII; JAMES V. SATURNO, CONG. RESEARCH SERV., ORDER CODE RS20067, HOW MEASURES ARE BROUGHT TO THE HOUSE FLOOR: A BRIEF INTRODUCTION 2–3 (2005); OLESZEK, *supra* note 24, at 122.

⁴⁴ STANDING RULES, *supra* note 22, rs. XIV–XV; SATURNO, *supra* note 43, at 4; OLESZEK, *supra* note 24, at 115, 125–26, 146; SMITH, *supra* note 30, at 253.

⁴⁵ SATURNO, *supra* note 43, at 4; STANLEY BACH, CONG. RESEARCH SERV., SPECIAL RULES IN THE HOUSE OF REPRESENTATIVES 1 (1991); OLESZEK, *supra* note 24, at 146.

⁴⁶ ELIZABETH RYBICKI & STANLEY BACH, CONG. RESEARCH SERV., ORDER CODE 97-236 GOV, FLOOR PROCEDURE IN THE HOUSE OF REPRESENTATIVES: A BRIEF OVERVIEW 2 (2003); OLESZEK, *supra* note 24, at 116.

⁴⁷ STANDING RULES, *supra* note 22, r. XV; SATURNO, *supra* note 43, at 4–5; OLESZEK, *supra* note 24, at 118. See generally ELIZABETH RYBICKI, CONG. RESEARCH SERV., ORDER CODE 98-314, SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPAL FEATURES (2006) (explaining suspension procedure); THOMAS P. CARR,

Although the House passes many measures under the suspension procedure, the supermajority requirement limits its usefulness.⁴⁸ By default, then, non-privileged controversial measures—those measures that lack privileged status under the standing rules and that do not have unanimous or supermajority support—require a special rule for successful floor consideration.⁴⁹

B. Special Rules and the Rules Committee

This need for a special rule allows the Rules Committee, acting on behalf of leadership, to control floor access when measures are too divisive for the unanimous-consent and suspension procedures.⁵⁰ The Rules Committee stands between the committees of jurisdiction and the floor. By reporting a special rule, the Rules Committee can make a non-privileged measure “in order” for floor consideration⁵¹ and can waive points of order that otherwise might be raised on the floor against a measure, whether or not the measure is privileged.⁵² A special rule can also allow or disallow any floor amendment to any measure.⁵³ For these reasons, the special rule is often the procedure of choice—and, sometimes, of necessity—for bringing a privileged or non-privileged measure to the full House.

In the past, the Rules Committee regularly used its gatekeeper role to block measures without regard to the preferences of leadership or the rank and file.⁵⁴ That practice was most prominent during the “committee era” that ran from 1910 through the early 1970s, although the rank and file began to curb the practice as early as 1961.⁵⁵ Over the last three decades, however, the Rules

CONG. RESEARCH SERV., ORDER CODE RL 32474, *SUSPENSION OF THE RULES IN THE HOUSE OF REPRESENTATIVES* (2005) (same). Because a measure brought up under the suspension procedure cannot be amended other than by the member making the suspension motion, the procedure effectively acts as a closed rule with a supermajority requirement. KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 155 (1991) [hereinafter KREHBIEL, *INFORMATION*].

⁴⁸ OLESZEK, *supra* note 24, at 118; SINCLAIR, *UNORTHODOX LAWMAKING*, *supra* note 15, at 23–25.

⁴⁹ BACH, *supra* note 45, at viii; OLESZEK, *supra* note 24, at 123; SMITH, *supra* note 30, at 259.

⁵⁰ JAMES A. ROBINSON, *THE HOUSE RULES COMMITTEE* 1–2 (1963).

⁵¹ *See generally* RICHARD S. BETH, CONG. RESEARCH SERV., ORDER CODE 98-354 GOV, *HOW SPECIAL RULES REGULATE CALLING UP MEASURES FOR CONSIDERATION IN THE HOUSE* (2005).

⁵² *See generally* JAMES V. SATURNO, CONG. RESEARCH SERV., ORDER CODE 98-433 GOV, *SPECIAL RULES AND WAIVERS OF HOUSE RULES* (2007).

⁵³ *See generally* JAMES V. SATURNO, CONG. RESEARCH SERV., ORDER CODE 98-612 GOV, *SPECIAL RULES AND OPTIONS FOR REGULATING THE AMENDING PROCESS* (2006).

⁵⁴ ROBINSON, *supra* note 50, at 23–42; SINCLAIR, *LEGISLATORS*, *supra* note 30, at 26. For an account of how the chair of the Rules Committee obstructed floor consideration of the Civil Rights Act of 1964, see Nicole L. Guéron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 *YALE L.J.* 1201, 1229 (1995).

⁵⁵ RULES COMMITTEE HISTORY, *supra* note 11, at 187–95; ROBINSON, *supra* note 50, at 71–80.

Committee has fallen under the firm control of leadership, and leadership maintains that control through the speaker's power to appoint and remove the majority-party members of the committee.⁵⁶ Thus, in the contemporary House, the special rule enables leadership, acting through the Rules Committee, to control when and how important measures reach the floor.

As a formal matter, the chair of a committee that has reported a measure ordinarily requests that the Rules Committee issue a special rule for the measure.⁵⁷ The Rules Committee then reviews submissions and testimony from House members (including those not serving on the reporting committee) concerning what type of special rule members consider appropriate and the amendments members want to offer on the floor.⁵⁸ In close consultation with leadership, the Rules Committee reports (or decides not to report) a resolution setting forth the special rule.⁵⁹ This resolution is privileged for floor consideration and generally cannot be amended.⁶⁰ Upon passage of the resolution by a majority vote, the special rule controls the floor procedure for the underlying measure.⁶¹ The House almost always approves the special rules put before it.⁶²

House Resolution 587 in the 111th Congress, which set out the special rule for the June 2009 floor consideration of the "cap-and-trade" energy legislation, provides a useful example.⁶³ The resolution made consideration of the

⁵⁶ See OLESZEK, *supra* note 24, at 125; ROBINSON, *supra* note 50, at 78; SINCLAIR, LEGISLATORS, *supra* note 30, at 71, 314; Bruce I. Oppenheimer, *The Rules Committee: New Arm of Leadership in a Decentralized House*, in CONGRESS RECONSIDERED 96, 96–105 (1977); Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED, *supra* note 33, at 141. Leadership's control may have begun to erode the committee's institutional prestige. See James M. Curry & Jill L. Gloekler, *I'm Your Puppet: The Changing Role of the House Committee on Rules* (APSA Toronto Meeting Paper, Working Paper, 2009), available at http://www.bsos.umd.edu/gvpt/jcurry/docs/curry_gloekler_rules.pdf.

⁵⁷ BACH, *supra* note 45, at 139–40; RULES COMMITTEE HISTORY, *supra* note 11, at 10; HOUSE PRACTICE, *supra* note 41, at 859; SINCLAIR, LEGISLATORS, *supra* note 30, at 150.

⁵⁸ See generally JAMES V. SATURNO, CONG. RESEARCH SERV., ORDER CODE 98-313 GOV, HOUSE RULES COMMITTEE HEARINGS ON SPECIAL RULES (2006); see also FLOOR PROCEDURE, *supra* note 22.

⁵⁹ FLOOR PROCEDURE, *supra* note 22.

⁶⁰ BACH, *supra* note 45, at 143–44; HOUSE PRACTICE, *supra* note 41, at 861–64. However, if the House rejects the motion for the previous question (that is, the motion to proceed to a vote on final passage) for a special rule, control over the rule passes to a member who opposed the motion. BACH, *supra* note 45, at 40, 144; HOUSE PRACTICE, *supra* note 41, at 865.

⁶¹ FLOOR PROCEDURE, *supra* note 22.

⁶² BACH, *supra* note 45, at 2–3; OLESZEK, *supra* note 24, at 142; SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 36–37.

⁶³ H.R. Res. 587, 111th Cong. (2009). Appendix 1 sets forth the text of the resolution.

otherwise non-privileged measure in order,⁶⁴ set time limits for floor debate and designated the “floor managers” to control the debate,⁶⁵ and generally waived possible points of order that opponents might have raised to block the measure.⁶⁶ The resolution also included a “self-executing” provision that replaced the cap-and-trade measure reported by the committee of jurisdiction with a substitute measure, as further modified by amendments set out in the resolution.⁶⁷ Finally, the resolution tightly controlled the amending process on the floor by allowing only one member to offer only one amendment, thereby disallowing more than two hundred other amendments that members wanted to offer.⁶⁸

Special rules provide leadership with a wide range of possibilities for controlling the amendment process on the floor. The most permissive special rule is the open rule, which allows any amendment that satisfies the precedents and the standing rules of the House.⁶⁹ When it provides an open rule, leadership effectively disclaims tight control over floor amendments.⁷⁰ By contrast, the closed rule maximizes leadership control over the amendment

⁶⁴ Specifically, House Resolution 587 provides that “upon the adoption of this resolution it shall be in order to consider in the House the bill (H.R. 2454) to create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean economy.” *Id.*

⁶⁵ House Resolution 587 allows “three hours of debate, with two and one-half hours equally divided and controlled by the chair and ranking minority member of the Committee on Energy and Commerce and 30 minutes equally divided and controlled by the chair and ranking minority member of the Committee on Ways and Means.” *Id.*

⁶⁶ House Resolution 587 waives “[a]ll points of order against consideration of the bill . . . except those arising under clause 9 [requiring the disclosure of earmarks] or 10 [requiring that any measure increasing the federal deficit be offset by a tax increase or spending decrease] of rule XXI.” *Id.*

⁶⁷ House Resolution 587 provides that “[i]n lieu of the amendment recommended by the Committee on Energy and Commerce now printed in the bill, an amendment in the nature of a substitute consisting of the text of H.R. 2998, modified by the amendment printed in part A of the report of the Committee on Rules accompanying this resolution, shall be considered as adopted.” *Id.* As special rules commonly do, House Resolution 587 also treats the “previous question . . . as ordered on the bill,” eliminating the need to move for a vote on final passage for the underlying measure. *Id.* For a discussion of “self-executing rules,” see OLESZEK, *supra* note 24, at 137–38.

⁶⁸ House Resolution 587 makes in order (in addition to the amendments treated as adopted by the resolution) a “further amendment in the nature of a substitute printed in part B of the report of the Committee on Rules, if offered by Representative Forbes of Virginia or his designee, which shall be . . . separately debatable for 30 minutes equally divided and controlled by the proponent and an opponent.” H.R. Res. 587.

⁶⁹ SATURNO, *supra* note 53, at 1; BACH, *supra* note 45, at 9–17.

⁷⁰ There are variants on the open rule, including one that requires amendments to be preprinted in the *Congressional Record*. HOUSE PRACTICE, *supra* note 41, at 868. That variant generally is justified as giving members an opportunity to study amendments before they are offered. For that reason, however, it also eliminates the tactical advantage of offering a surprise amendment.

process; a completely closed rule precludes all floor amendments.⁷¹ Between these extremes are special rules that permit certain amendments but prohibit others. In the past, the Rules Committee often designated these as “modified open rules” or “modified closed rules,” depending on whether the committee judged the rule to be more open than closed or more closed than open.⁷² In recent years, the Rules Committee generally has preferred the bland and uninformative term “structured rules” for special rules that are not completely closed.⁷³

However, many special rules designated as “structured” are so restrictive that they effectively close off the floor amendment process. The special rule for the cap-and-trade measure, although called a “structured rule” by the Rules Committee, allowed only one out of more than two hundred amendments submitted to the committee,⁷⁴ and that one amendment proposed a weak substitute measure that lacked formal support even among the senior members of the minority.⁷⁵ In effect, House managers handpicked the amendment for floor consideration so that the minority could offer an alternative measure

⁷¹ SATURNO, *supra* note 53, at 2; BACH, *supra* note 45, at 39–46. A closed rule nonetheless usually allows the minority to offer one amendment by way of a motion to recommit the measure with instructions. Such a motion, if successful, sends the underlying measure back to the substantive committee and directs the committee to return the measure immediately to the floor with whatever changes are set forth in the motion to recommit. In short, the motion to recommit with instructions has the effect of amending the underlying measure. The standing rules do not allow the Rules Committee to report a special rule that prevents the minority from offering a motion to recommit. STANDING RULES, *supra* note 22, r. XIII, cl. 6(c); SATURNO, *supra* note 53, at 2; HOUSE PRACTICE, *supra* note 41, at 858.

⁷² DAVIS, *supra* note 42, at 9; SATURNO, *supra* note 53, at 1–2. For example, House Resolution 336, the special rule on which the Republicans in the House rebelled against President Reagan, allowed only three floor amendments and was designated by the Rules Committee as a “modified closed rule.” H.R. Res. 336, 99th Cong. (1985); *see also supra* note 4.

⁷³ OLESZEK, *supra* note 24, at 133. Both academic and non-academic commentators often use the term “restrictive rule” to refer to a special rule that is not labeled as either open or closed. *See, e.g.*, BACH, *supra* note 45, at 6, 47–55. But that term is not fully satisfactory. In certain cases, a non-open rule may allow substantially all the amendments that members have submitted to the Rules Committee. A rule with such minimal limitations on floor amendments should not be regarded as restrictive. Additionally, a rule that commentators might designate as restrictive could allow so few amendments that it really should be regarded as a closed rule. And even a restrictive rule allowing votes on several versions of a measure might effectively constrain floor outcomes through a “king-of-the-hill” or “queen-of-the-hill” voting procedure. Those procedures typically ensure that the version preferred by the Rules Committee will prevail. *See* BACH, *supra* note 45, at 57–70; OLESZEK, *supra* note 24, at 138–40.

⁷⁴ *Summary of Amendments Submitted to the Rules Committee for H.R. 2454—American Clean Energy and Security Act of 2009*, COMM. ON RULES, U.S. H.R. (June 25, 2009, 4:58 PM) http://www.rules.house.gov/amendment_details.aspx?NewsID=4341.

⁷⁵ Rep. Forbes of Virginia offered an amendment to The American Clean Energy and Security Act of 2009, H.R. 2454, 155 Cong. Rec. H7672–7680 (daily ed. June 26, 2009), which was defeated by a roll call vote of 172 to 256, with 5 representatives not voting. *Id.* at H7685.

posing no genuine risk of adoption by the full House. A special rule that so sharply limits the amendment process is a closed rule in all but name. To account accurately, then, for special rules during the 109th and 110th Congresses, this Article adopts the following classifications: “open rule” designates a rule that allows all floor amendments without any preselection by the Rules Committee; “closed rule” designates a special rule that allows no floor amendments; “effectively closed rule” designates a special rule that allows substantially no floor amendments; and “limiting rule” designates any other special rule, whether it leans more toward the open side or more toward the closed side.⁷⁶

Before the 1980s, the Rules Committee issued very few closed rules during each Congress.⁷⁷ Members of both parties generally accepted that tax measures would come to the floor under closed rules because it was thought that difficult compromises made in the Ways and Means Committee might easily unravel under an open amendment process.⁷⁸ The Rules Committee also protected many of the measures passed during the first 100 days of President Franklin Roosevelt’s first term with closed rules.⁷⁹ But those and similar uses of the closed rule were considered exceptional; for the most part, the House historically maintained an open process for floor amendments.⁸⁰ In the last three decades, however, the majority in the House has greatly increased its use of the closed rule, despite protests from the minority.⁸¹ And, during periods when the majority has set it aside, the minority has effectively justified the

⁷⁶ More specifically, a rule is designated as “effectively closed” if it both allows three or fewer amendments and disallows more than half the amendments submitted to the Rules Committee. Any rule (other than a closed rule or an effectively closed rule) will be designated as “limiting” if it preselects the amendments that may be offered on the floor. Thus, a rule may be designated as “limiting” even if it allows all or substantially all the amendments submitted to the Rules Committee. In such cases, the Rules Committee exercises agenda control by preselecting the amendments that may be offered and by precluding an open amendment process. Finally, a rule will be designated as “open” even if it requires that amendments be preprinted in the *Congressional Record* (or if it gives priority to such amendments).

⁷⁷ ROBINSON, *supra* note 50 at 44–45.

⁷⁸ John C. Blydenburgh, *The Closed Rule and the Paradox of Voting*, 33 J. POL. 57, 57–58 (1971); *see also* RULES COMMITTEE HISTORY, *supra* note 11, at 14; ROBINSON, *supra* note 50, at 44–45. President Herbert Hoover blamed the defeat of a measure setting out his 1932 tax proposals on Speaker John Nance Garner’s decision to bring the measure to the floor under an open rule. HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER: THE GREAT DEPRESSION 137–38*, 160 (1952).

⁷⁹ RULES COMMITTEE HISTORY, *supra* note 11, at 126–27.

⁸⁰ BACH, *supra* note 14, at 567.

⁸¹ OLESZEK, *supra* note 24, at 129; SINCLAIR, *UNORTHODOX LAWMAKING*, *supra* note 15, at 26; SMITH, *supra* note 30, at 74–75, 188–90; *see also infra* Part II.

majority's reliance on the closed rule by offering numerous floor amendments intended to delay or prevent passage of the majority's legislative program.⁸²

The immediate practical effect of the closed rule is straightforward: a measure called up under a closed rule is put to a simple up-or-down vote before the full House. Thus, the closed rule allows House managers first to determine the exact terms of the measure and then to pair the measure against the status quo. The closed rule bars competing versions of the measure, including versions that a majority of the rank and file might prefer to the version called up by managers. In short, the closed rule constitutes an important tool for House managers to set the floor agenda.

C. Agenda Control Under the Closed Rule

Political theory has long recognized the possibility that an agenda setter may influence—and, in certain cases, control—voting outcomes.⁸³ The agenda setter for a committee or a legislature may determine which policy options will be put to a vote, which options will be excluded from consideration, the order of voting on different options, the time allowed for consideration of each option, and whether other committee members or legislators can propose amendments to the options prior to voting. House managers, acting as agents of the rank and file, exercise this agenda-setting role through their control over the content of measures reported by the committees of jurisdiction and their control over the special rules under which measures reach the floor. The closed rule represents the most ambitious reach of managerial agenda setting and the point at which control over the floor agenda most closely approaches control over voting outcomes.

Agenda control in the House can be separated into two dimensions: spatial agenda control (a topic much discussed by political theory) and temporal agenda control (a topic less discussed by political theory). House managers control the spatial agenda by determining the content of measures and amendments brought to the floor and by deciding voting order and amendment procedures. They control the temporal agenda by regulating how many

⁸² SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 29, 39, 112.

⁸³ WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 137–39, 169–95, 200, 237 (1982). More generally, legislative process helps to determine legislative outcomes. KREHBIEL, INFORMATION, *supra* note 47, at 1–2, 151; *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983); Charles J. Finocchiaro & David W. Rohde, *War for the Floor: Partisan Theory and Agenda Control in the U.S. House of Representatives*, 33 LEG. STUD. Q. 35, 37 (2008).

amendments may be offered and the time available for debate on those amendments. In both cases, the ability to control floor activity encourages managers to make heavy use of the closed rule.

Managers setting the spatial agenda can facilitate passage of their preferred measures over competing measures, even those that stand closer to the floor median. To see this possibility in a simple case, consider the familiar problem of the Condorcet paradox, which demonstrates that social preferences may be intransitive even though individual preferences are transitive.⁸⁴ Assume, for example, that the members—A, B, and C—of a three-member committee have preferences among three competing policy options— x , y , and z —as shown below (in declining order).⁸⁵

Table 1
Ordinal Preferences of Members

Member A	Member B	Member C
x	z	y
y	x	z
z	y	x

The principle of straightforward majority rule among paired options, if implemented without restriction, will prevent the committee from selecting any one of the three options. In pairwise voting between option x and option y , option x would win (members A and B would vote for it). But in pairwise voting between option x and option z , option z would win (members B and C would vote for it), and in pairwise voting between option y and option z , option y would win (members A and C would vote for it). Thus, whatever option wins in one round of voting will be defeated by a different option in a subsequent round of voting, and the committee will cycle indefinitely without settling on a winner.⁸⁶

⁸⁴ PETER C. ORDESHOOK, *A POLITICAL THEORY PRIMER* 24–25 (1992).

⁸⁵ These individual preferences are all assumed to be transitive, such that member A prefers option x to option z , member B prefers option z to option y , and member C prefers option y to option x .

⁸⁶ This assumes that the members vote sincerely.

That indeterminate outcome is not inevitable. A notable, although uncommon, exception occurs when the options include a Condorcet winner—that is, an option that prevails over every other option in pairwise majority voting.⁸⁷ The committee or legislature will always select the Condorcet winner if the Condorcet winner is not excluded from the voting process.⁸⁸ However, Arrow's Theorem indicates that, in the absence of a Condorcet winner, cycling is a general possibility for collective decision making,⁸⁹ and McKelvey's Theorem implies that virtually any available option can prevail.⁹⁰

Nonetheless, institutional structures in the legislature constrain such otherwise chaotic outcomes.⁹¹ A principal determinant of which option ultimately wins is voting order, and a principal determinant of voting order is the preference of the agenda setter.⁹² Assuming that all members of the committee or the legislature vote sincerely, the member who sets the voting agenda effectively may determine which option wins.⁹³ Continuing with the example above, member B, if given the power to set the voting agenda, can ensure that option *z* (her preferred option) prevails by setting the voting order as follows: first, pairing option *x* against option *y*; then, pairing the winner against option *z*. Under that voting order, option *x* would defeat option *y* in the first round (members A and B would vote for option *x*), and option *z* would defeat option *x* in the second round (members B and C would vote for option *z*). Likewise, member A could set the agenda to ensure a victory for option *x*, and member C could do so to ensure a victory for option *y*.⁹⁴

⁸⁷ ORDESHOOK, *supra* note 84, at 80–81.

⁸⁸ *Id.* at 81.

⁸⁹ See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 62 (1986). A Condorcet winner does emerge in the case of unidimensional space and single-peaked preferences held by an odd number of voters. RIKER, *supra* note 83 at 126; see also Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, in *POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS* 5 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995) [hereinafter Shepsle & Weingast, *Positive Theories*].

⁹⁰ Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); see also ORDESHOOK, *supra* note 89, at 76–82, 281–82; Fiorina & Shepsle, *supra* note 30, at 28–29.

⁹¹ See Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEG. STUD. Q. 259 (1988) [hereinafter Krehbiel, *Spatial Models*]; Shepsle & Weingast, *Positive Theories*, *supra* note 89 at 8. The relevant literature began with Shepsle's classic article demonstrating that exogenous institutional mechanisms can produce stable legislative outcomes—what he called “structure-induced equilibrium.” Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979).

⁹² See ORDESHOOK, *supra* note 89, at 65–66 (explaining effect of agenda-setting power on voting outcomes); RIKER, *supra* note 83, at 65, 69–73 (same); Fiorina & Shepsle, *supra* note 30, at 29 (same).

⁹³ ORDESHOOK, *supra* note 89, at 65–66.

⁹⁴ For simplicity of presentation, this example assumes that the members vote sincerely. But assuming that the members vote strategically does not significantly change the result. ORDESHOOK, *supra* note 89, at

Table 2
Winners Under Different Agenda Setters

Agenda Setter	Member A	Member B	Member C
Voting Agenda	y vs. z; winner vs. x	x vs. y; winner vs. z	x vs. z; winner vs. y
Winner	x	z	y

In the same manner, the authority of the closed rule allows House managers to influence or control voting outcomes.⁹⁵ The closed rule enables managers to limit floor action to a simple pairwise vote of their selected version of any measure against the status quo, thereby blocking all competing versions of the measure from consideration. At the extreme, managers can use the closed rule even to prevent floor consideration of a Condorcet winner.⁹⁶ Consider another example, using a simple one-dimensional model. Assume that the House is taking up immigration reform and that members have introduced three measures. Measure 1 corresponds to the floor median; Measure 2, which is to the left of Measure 1, corresponds to the preferences of House managers and is the measure reported by the committee of jurisdiction; and Measure 3, which is

281–83; Fiorina & Shepsle, *supra* note 30, at 30–31. Also, political theory suggests that agenda control becomes more tenuous with incomplete and asymmetric information about the preferences of individual legislators. ORDESHOOK, *supra* note 84, at 227–34. House managers, however, mitigate such information problems through an extensive whip system. See SINCLAIR, LEGISLATORS, *supra* note 30, at 116–35 (explaining the House whip system).

⁹⁵ As such, the closed rule is properly located among the institutional mechanisms that produce stability in the House. See Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUBLIC CHOICE 503, 514 (1981); Shepsle, *supra* note 91, at 54–55. This point was recognized even before Shepsle introduced the concept of “structure-induced equilibrium.” See Blydenburg, *supra* note 78. It should be noted that even the open rule is embedded in particular institutional constraints on floor activity that stabilize outcomes (helping to prevent the outright chaos implied by McKelvey’s Theorem). See generally Barry R. Weingast, *Floor Behavior in the U.S. Congress: Committee Power Under the Open Rule*, 83 AM. POL. SCI. REV. 795 (1989) [hereinafter Weingast, *Floor Behavior*].

⁹⁶ There remains, however, the possibility that a Condorcet winner blocked by a closed rule may emerge as the floor winner if the minority offers the Condorcet winner in a motion to recommit with instructions. See *supra* note 71. For a broader argument that “negative agenda power”—the ability to block measures from floor consideration—constitutes a critical function of House managers, see COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 3–5, 37–197.

to the right of Measure 1, corresponds to the preference of a significant faction in the majority party.

Measure 2 (managers)	Measure 1 (floor median)	Measure 3 (faction)	status quo
+	+	+	+
<i>a</i>	<i>b</i>	<i>c</i>	<i>d</i>

Whip counts confirm that any of the three measures would defeat the status quo. That is, the three measures all stand closer to the floor median than does the status quo (so: $|a - b| < |b - d|$ and $|b - c| < |b - d|$). The whip counts also confirm that, in pairwise voting, Measure 1 would defeat either Measure 2 or Measure 3 (because Measure 1 is the floor median) and that Measure 3 would defeat Measure 2 (so: $|b - c| < |a - b|$).⁹⁷

After the committee of jurisdiction reports Measure 2, leadership must determine what type of special rule the Rules Committee will report for the measure. If Measure 2 comes to the floor under a rule allowing members to offer Measure 1 and Measure 3 as amendments, Measure 1 (as the floor median) will prevail.⁹⁸ If Measure 2 comes to the floor under a rule allowing a member to offer Measure 3 but not Measure 1 as an amendment, Measure 3 will prevail: it will first defeat Measure 2 and then will defeat the status quo. But if Measure 2 comes to the floor under a closed rule, Measure 2 will prevail: it will defeat the status quo in a simple pairwise vote.⁹⁹ Using the closed rule in this case ensures that the House managers can protect Measure 2, their preferred version, from the two competing versions that otherwise would defeat it.¹⁰⁰ And, in fact, House managers often use closed rules for precisely this purpose.¹⁰¹

⁹⁷ See JAMES M. ENELow & MELVIN J. HINICH, *THE SPATIAL THEORY OF VOTING: AN INTRODUCTION* 8–13 (1984) (explaining one-dimensional models of spatial voting).

⁹⁸ Krehbiel, *Spatial Models*, *supra* note 91, at 305.

⁹⁹ *Id.* If Measure 2 comes to the floor under a closed rule, the minority can potentially secure passage of either Measure 1 or Measure 3 by offering Measure 1 or Measure 3 as a motion to recommit with instructions. See *supra* note 71.

¹⁰⁰ Manager preferences on measures likely will reflect, in part, the preferences of the rank-and-file members of the majority party. See generally COX & McCUBBINS, *SETTING THE AGENDA*, *supra* note 9 (arguing that party leaders aggregate and promote preferences of party rank and file). Because the relationship between managers and the rank and file is an agency relationship, however, manager preferences likely diverge from the preferences of the majority-party rank and file in non-trivial respects. See Fiorina & Shepsle, *supra* note 30, at 18–21 (discussing the principal's difficulty in controlling an agent). Of course, manager preferences do not always have sufficient support to prevail on the floor. When the House initially passed its measure for health care reform on November 7, 2009, for example, the Democratic leadership determined that

The closed rule also facilitates control over the floor temporal agenda. Spatial voting models generally assume that a committee or legislature remains in session indefinitely, such that time presents no constraint on the passage of measures.¹⁰² However, the Constitution sets the duration of each Congress at two years, thereby fixing a temporal boundary on the authority of any one Congress to enact legislation.¹⁰³ With thousands of measures introduced in each Congress, many of which are reported favorably by the committees of jurisdiction, floor time in the House is a scarce resource that must be allocated carefully among the measures making up the majority's legislative program. The minority potentially can block passage of the last measures on the majority's program by consuming so much floor time on the first measures that the constitutional time limit expires before the last measures reach the floor. Proposing, debating, and voting on floor amendments take time, and the minority may pursue amendments that have little or no prospect of passage simply to delay progress on the floor.¹⁰⁴

The closed rule enables House managers to block the dilatory floor moves of the minority.¹⁰⁵ By preventing all floor amendments on a measure, the closed rule expedites floor consideration of the measure and conserves time. Even very complex legislation—such as the cap-and-trade measure passed by the House in June 2009—can be brought to the floor, debated, and passed within a few hours under the protection of a closed or effectively closed rule. Thus, by asserting control over the temporal agenda on the floor through the

its preferred version—which did not include the strict limits on federal funding of abortions sought by a faction of the Democratic party—would not pass on the floor. The leadership, therefore, allowed a floor amendment that included those limits. David M. Herszenhorn & Jackie Calmes, *Abortion Was at Heart of Wrangling*, N.Y. TIMES, Nov. 8, 2009, at A24. Even then, however, House managers used an effectively closed rule for the measure to ensure that the floor amendment setting out the abortion funding limitations would be exactly as negotiated by the House managers and the faction seeking the limitations. *Id.* For further discussion of manager preferences, see *infra* note 283.

¹⁰¹ John H. Aldrich & David W. Rohde, *Congressional Committees in a Partisan Era*, in CONGRESS RECONSIDERED 249, 253–54 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005); see also STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES 55, 57, 91 (1988); COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, at 126–27; OLESZEK, *supra* note 24, at 127; ORDESHOOK, *supra* note 84, at 79–80; SINCLAIR, LEGISLATORS, *supra* note 30, at 32–33, 70, 136–62, 219, 303; SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 30–31, 112, 199, 203–04, 211; SMITH, *supra* note 30, at 76, 191; Dodd & Oppenheimer, *supra* note 33, at 49; Guéron, *supra* note 54, at 1211–12.

¹⁰² COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, at 44.

¹⁰³ U.S. CONST. art. I, § 2.

¹⁰⁴ BACH & SMITH, *supra* note 101, at 54; COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, at 55–56; SINCLAIR, LEGISLATORS, *supra* note 30, at 77–78; SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 29; SMITH, *supra* note 30, at 36, 40.

¹⁰⁵ *Cf.* SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 279.

closed rule, House managers ensure, to the greatest extent possible, that every measure on the majority's legislative program will reach final vote before the Congress expires.¹⁰⁶

The closed rule locates this control over both the spatial and temporal floor agenda in the managers as agents of the full House. No one member among the managers holds control over the floor agenda to the exclusion of the other managers, and the managers as a group must submit each closed rule to the rank and file for ratification. In the first instance, the chair of the committee of jurisdiction reporting a measure has extensive influence—and, often, outright control—over the substantive content of the measure.¹⁰⁷ Once the measure leaves the committee of jurisdiction, other managers—particularly the members of the majority-party leadership—may or may not rewrite the measure before bringing it to the floor.¹⁰⁸ In any event, those managers decide whether to honor a request from the chair of the reporting committee to call up the measure under a rule disallowing floor amendments.¹⁰⁹ By using the closed rule, managers ensure that the version of the measure approved by the committee chair and by leadership will be put to a vote on final passage and that the vote cannot be delayed by floor amendments. In short, the spatial and temporal agenda control that the closed rule grants to House managers is shared among the managers.¹¹⁰

Still, this managerial control is not absolute. The chair of the reporting committee and the leadership decide together on the policy content of a measure and decide to call it up under a closed rule, but the closed rule itself must be approved by a majority vote of the full House.¹¹¹ The rank and file thus retain the power to reject the floor agenda proposed by managers. But that point should not be overstated. In general, the rank and file exercise

¹⁰⁶ See *infra* Part II.B. Democratic managers used the closed rule to control the temporal agenda on the floor during the self-imposed “100 Hours” time limit at the beginning of the 110th Congress. See OLESZEK, *supra* note 24, at 139; SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 286–87. Similarly, Republican managers used the closed rule to control the temporal agenda on the floor during consideration of the “Contract with America” legislation. SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 29.

¹⁰⁷ OLESZEK, *supra* note 24, at 89–107.

¹⁰⁸ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 20–23.

¹⁰⁹ OLESZEK, *supra* note 24, at 123–28.

¹¹⁰ However, the leadership, which holds the ultimate influence over the decisions of the Rules Committee, likely enjoys a much larger share of that agenda control than does the chair of the reporting committee. For an account of agenda-setting power as a “cartel” controlled by House managers, see COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, at 9.

¹¹¹ OLESZEK, *supra* note 24, at 155–56; cf. Fiorina & Shepsle, *supra* note 30, at 31–32 (arguing that a “full-blown theory of agenda setting” should account for “the institutional constraints (incentives and monitoring) that followers impose on their leaders in their agenda-setting activities”).

limited oversight over managerial decisions to use the closed rule; outright rejection of a special rule of any kind—whether or not closed—is very rare.¹¹² Voting down a rule is understood as a sharp rebuke to House managers. It was for this reason that President Reagan, after cooperating with the Democratic managers of the House to advance his tax-reform measure, felt “humiliated” when House Republicans engineered a floor defeat of the modified closed rule for the measure.¹¹³ The requirement that House managers obtain ratification of a closed rule on the floor thus presents only a weak constraint on their use of the closed rule. Although managerial power over the spatial and temporal agenda on the floor is held in an agency relationship, the rank and file, as principals, grant managers significant latitude in using that power.¹¹⁴

II. THE CLOSED RULE IN THE 109TH AND 110TH CONGRESSES

The closed rule provides House managers with a potentially important instrument for agenda control, but that does not necessarily imply that managers use the closed rule for that purpose. The standard claim in the academic literature is that House managers normally exercise their agenda

¹¹² OLESZEK, *supra* note 24, at 155–56. Consider, for example, the voting outcomes associated with the initial attempt to pass the economic bailout measure in the House during the fall of 2008: the full membership approved the special rule for consideration of the measure by a vote of 220-198 and then defeated the measure itself by a vote of 205-228. 154 CONG. REC. H10335, H10410 (daily ed. Sept. 29, 2008).

¹¹³ See *supra* Introduction; see also OLESZEK, *supra* note 24, at 142.

¹¹⁴ This Article generally does not consider the Senate, and it thereby sets aside important questions that would have to be addressed in considering agenda control within Congress as a whole. The Senate does not have a closed rule, and agenda control in the Senate generally is exercised through ad hoc unanimous consent agreements (which obviously require the approval of all senators). OLESZEK, *supra* note 24, at 203–11. One might argue that legislative processes in the Senate provide a natural experiment for considering the effect of the closed rule in the House. In other words, one might argue that what happens in the Senate is suggestive of what would happen in the House absent the closed rule and that, accordingly, claims about the closed rule can be tested by reference to the Senate. But the comparison does not hold. The Senate and the House differ in several important respects apart from the closed rule. First, the Senate, unlike the House, is not organized around the principle of simple majority rule. The de facto need for a supermajority of senators on many measures normally means that the majority party cannot assume that it will have its way on the floor. Second, the Senate recognizes substantially greater privileges for individual senators than does the House for its members. Third, the Senate does not have the germaneness requirement that the House does for floor amendments; thus, an unwelcome amendment cannot be avoided in the Senate simply by refusing to call up a measure for which the unwelcome amendment would be in order. Those points (and others) imply that the legislative proceedings in the Senate do not reliably reflect how the House would operate without the closed rule. A Senate with a closed rule likely would have stronger managerial agenda control than does the current Senate, and a House without a closed rule likely would have weaker managerial agenda control than does the current House. But a House without a closed rule likely would not look very much at all like the current Senate.

control through limiting rules rather than through closed rules.¹¹⁵ Many scholars writing before the Republicans took control of the House in 1995 generally considered the closed rule to be of secondary importance; they considered the closed rule to be an exceptional instrument that managers largely had abandoned in favor of limiting rules.¹¹⁶ Even more recent analyses significantly understate the incidence of the closed rule. For example, one prominent political scientist flatly maintained as late as 2003 that the closed rule “is seldom invoked.”¹¹⁷ In 2001, two scholars argued that “[c]urrently, some intermediate type of restrictive rule is used for most bills.”¹¹⁸ And, at the start of the 110th Congress, another political scientist acknowledged the increased use of the closed rule but attributed it to Republican hegemony in the House, arguing that “Republicans . . . made extremely restrictive floor procedures standard operating procedure, using closed rules much more frequently than Democrats ever did.”¹¹⁹ Similarly, legal academics have identified greater use of the closed rule with Republican control of the House.¹²⁰

This Part contests those claims. It reviews the legislative record of the closed rule in the Republican House of the 109th Congress (2005 through 2007) and the Democratic House of the 110th Congress (2007 through 2009). The comparison of back-to-back Congresses under different majorities establishes that House managers regularly use the closed rule for controversial measures and that there is no appreciable difference between Republicans and Democrats on this point. This Part also shows the importance of the closed rule to managerial agenda control by establishing that the closed rule has a genuinely restrictive effect on the amending activity of the rank and file of both the minority and the majority, that managers in fact use the closed rule to

¹¹⁵ Political scientists normally would refer to such rules as “restrictive rules.” See, e.g., BACH & SMITH, *supra* note 101, at 50–74; *supra* note 73.

¹¹⁶ See, e.g., ARNOLD, *supra* note 9, at 103; BACH & SMITH, *supra* note 101, at 55–57; SINCLAIR, LEGISLATORS, *supra* note 30, at 140–41, 161.

¹¹⁷ GERRY MACKIE, DEMOCRACY DEFENDED 170 (2003).

¹¹⁸ Vijay Krishna & John Morgan, *Asymmetric Information and Legislative Rules: Some Amendments*, 95 AM. POL. SCI. REV. 435 (2001).

¹¹⁹ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 280; see also Dodd & Oppenheimer, *supra* note 33, at 49. Even now, Sinclair continues to emphasize restrictive rules over closed rules. Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 393 (2009) (“Thus, special rules . . . that bar all amendments except those explicitly allowed by the . . . Rules Committee [i.e., limiting rules] have become routine.”).

¹²⁰ Erica Rosenberg, *Life Under the Republicans: The Subversion of Democracy in the House Resources Committee*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 233, 243–45 (2007); Charles Tiefer, *Congress’s Transformative ‘Republican Revolution’ in 2001–2006 and the Future of One-Party Rule*, 23 J.L. & POL. 233, 256–63 (2007).

control both the spatial agenda and the temporal agenda, and that the need for ratification of closed rules by rank-and-file members imposes only weak constraints on House managers.

A. *Counting the Closed Rules*

Consistent with longstanding practice, House managers brought up many of the measures passed during the 109th and 110th Congresses under the unanimous-consent and suspension-of-the-rules procedures. Time is limited for each Congress,¹²¹ and floor time is a particularly scarce resource that managers must allocate with care. Bringing a non-controversial measure to the floor for unanimous consent or by a motion to suspend the rules allows for quick disposition and, importantly, conserves floor time for measures that cannot win unanimous or supermajority support. By contrast, managers in the 109th and 110th Congresses brought controversial measures to the floor under special rules, and the type of special rule that they used most often was the closed rule.

Members of the House introduced 8,152 measures during the 109th Congress, of which 1,277 passed.¹²² About half of the successful measures were passed by unanimous consent or by suspension of the rules;¹²³ most of the remaining measures came to the floor under special rules reported by the Rules Committee or were themselves special rules. Legislative activity in the 110th Congress was comparable, although the numbers were larger. House members introduced 9,409 measures during the 110th Congress, of which 1,964 passed.¹²⁴ Again, approximately half of the successful measures were passed by unanimous consent or suspension of the rules,¹²⁵ and most of the other successful measures came to the floor under special rules or were themselves special rules.

During the 109th Congress, the Rules Committee reported 187 resolutions that, together, set forth 143 special rules.¹²⁶ As shown in Table 3, the plurality

¹²¹ U.S. CONST. art. I, § 2.

¹²² These data were provided by the Georgetown Law Library. All data are on file with the author.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See infra* Appendix 2-A and note 337 (explaining that the Rules Committee also reported resolutions not bearing on the floor-amendment process, such as general debate rules and rules for consideration of conference reports).

of special rules, 38% of the total, were closed rules, and 50% of the special rules were either closed or effectively closed rules.

Table 3
Special Rules in the 109th Congress

Type of Rule	Number	Percentage (Rounded)
Closed	55	38
Effectively Closed	17	12
Limiting	48	34
Open	23	16
Total	143	100

The numbers are comparable for the 110th Congress. The Rules Committee reported a total of 221 resolutions, setting forth 185 special rules.¹²⁷ As shown in Table 4, the plurality of special rules, 41%, were closed rules, and 54% of the special rules were either closed or effectively closed rules.

¹²⁷ See *infra* Appendix 3-A and note 358 (explaining that the Rules Committee also reported resolutions not bearing on the floor-amendment process, such as general debate rules and rules for consideration of conference reports).

Table 4
Special Rules in the 110th Congress

Type of Rule	Number	Percentage (Rounded)
Closed	76	41
Effectively Closed	24	13
Limiting	62	34
Open	23	12
Total	185	100

Thus, in both the Republican House of the 109th Congress and the Democratic House of the 110th Congress, fully *half* of all controversial measures—those that could not be brought to the floor for unanimous consent or under suspension of the rules—were called up under rules that prevented or effectively prevented the rank and file from offering floor amendments. In each of those cases, House managers paired their selected version of a measure against the status quo in a simple up-or-down vote.¹²⁸ The rank and file could accept or reject the measure as proposed by House managers, but they could not modify it.

The prominence of the closed rule during these two Congresses is underscored by locating it within the full spectrum of special rules. Well under one-fifth of the special rules during this period—16% in the 109th Congress and 12% in the 110th Congress—were entirely open to floor amendments. Between the extremes of the completely closed rules and the completely open rules, most special rules imposed moderate or severe limitations on floor amendments. The effectively closed rules constituted 12% of the special rules in the 109th Congress and 13% of the special rules in the 110th Congress. For the seven effectively closed rules in the 109th Congress with respect to which

¹²⁸ Special rules reported by the Rules Committee are not subject to amendment on the floor except in the rare case when the House defeats a motion to order the previous question on the rule. *See supra* note 60.

the Rules Committee provides a record of amendments submitted to the committee, the effectively closed rules disallowed a total of fifty amendments—an average of more than seven disallowed amendments for each effectively closed rule. In the 110th Congress, there were fourteen effectively closed rules for which the Rules Committee provided a record of submitted amendments. These rules disallowed a total of 140 amendments—an average of ten disallowed amendments per effectively closed rule. Even the limiting rules had very restrictive effects. They often kept more than half the amendments submitted to the Rules Committee off the floor¹²⁹ and in some cases disallowed dozens of amendments that members wanted to offer.¹³⁰

As would be expected, the resolutions from the Rules Committee offering closed rules often were contested on the House floor; nonetheless, House managers enjoyed outstanding success rates when the full House voted on closed rules. For more than 80% of the closed rules in the 109th Congress and more than 94% of those in the 110th Congress, members demanded either a record vote or a counting of the yeas and nays, whether on ordering the previous question for the rule or on its final passage.¹³¹ Nonetheless, not a single closed or effectively closed rule failed to pass during the 109th and 110th Congresses (although nine in the 109th Congress and five in the 110th Congress were tabled by House managers).¹³² In short, House managers in the 109th and 110th Congresses generally could expect the rank and file to ratify the closed and effectively closed rules that managers brought to the floor.¹³³

B. Characterizing the Closed Rules

Close review confirms that House managers in the 109th and 110th Congresses used the closed rule to control the floor agenda precisely when

¹²⁹ *E.g.*, *infra* Appendix 2-A, lines 4, 30, 80; Appendix 3-A, lines 13, 41, 64.

¹³⁰ *E.g.*, *infra* Appendix 2-A, lines 101, 104; Appendix 3-A, line 78.

¹³¹ *See infra* Appendices 2-B & 3-B. The demand for a recorded floor vote, whether on the motion to order the previous question or on final passage, provides only an imperfect indicator of the controversial character of a special rule. As indicated particularly in Appendix 3-B, the minority in the 110th Congress demanded recorded votes for the majority of all closed, effectively closed, limiting, and even open rules. Because special rules of any kind often waive points of order, a member may rationally vote against a special rule even if the member does not object to the special rule's treatment of floor amendments. BRYAN W. MARSHALL, *RULES FOR WAR: PROCEDURAL CHOICE IN THE U.S. HOUSE OF REPRESENTATIVES 5* (2005); *see also* BACH & SMITH, *supra* note 101, at 105.

¹³² *See infra* Appendix 2-B, lines 12, 13, 50, 66, 104, 116, 118, 132, 134; Appendix 3-B, lines 48, 104, 111, 171, 174.

¹³³ This success rate reflects the general success that managers have on the floor with special rules, including limiting rules and open rules (although open rules are somewhat less likely to be challenged).

such control was most important. The Republican and Democratic managers' regular use of the closed rule for divisive measures allowed them to preempt unwanted amendments, including amendments that would have pulled measures away from the positions they had approved or that would have caused unstable coalitions to unravel on the floor. The Republican and Democratic managers also used the closed rule to prevent the minority from drawing out floor votes when managers began to run up against the end of a legislative session or against a self-imposed deadline for completing their legislative program.

The correspondence of closed rules to divisive measures during the 109th and 110th Congresses was not one-to-one. That is, not every divisive measure brought to the floor had a closed rule, and not every closed rule protected a divisive measure. But most of the legislative topics brought up under closed rules in the 109th and 110th Congresses—ranging from the war in Iraq and flag desecration to oil exploration in the Arctic National Wildlife Refuge and permanent repeal of the estate tax—readily stand out as controversial matters that marked significant policy differences within the House. In those cases, the closed rule allowed managers to bring their selected version of a measure to the floor without any threat that it would be changed by floor amendments.

Both the Republican and the Democratic managers regularly called up measures concerning national security, the military, and immigration under closed rules. In the 109th Congress, Republican managers used closed rules for measures supporting military operations in Iraq,¹³⁴ declaring that “the United States will prevail in the Global War on Terror and the struggle to protect freedom from the terrorist adversary,”¹³⁵ supporting anti-terrorism intelligence and law-enforcement programs,¹³⁶ expressing the “sense of the House” on the fifth anniversary of September 11, 2001,¹³⁷ and endorsing military recruiters' access to colleges and universities.¹³⁸ On the highly charged matter of immigration, Republican managers brought four separate measures—the Secure Fence Act of 2006,¹³⁹ the Border Tunnel Prevention Act of 2006,¹⁴⁰ the Community Protection Act of 2006,¹⁴¹ and the Immigration Law Enforcement Act of 2006¹⁴²—to the floor under closed rules.

¹³⁴ H.R. Res. 619, 109th Cong. (2005).

¹³⁵ H.R. Res. 868, 109th Cong. (2006).

¹³⁶ H.R. Res. 896, 109th Cong. (2006).

¹³⁷ H.R. Res. 996, 109th Cong. (2006).

¹³⁸ H.R. Res. 59, 109th Cong. (2005).

¹³⁹ H.R. Res. 1002, 109th Cong. (2006).

¹⁴⁰ H.R. Res. 1018, 109th Cong. § 1 (2006).

Once Democrats took control of the House in the 110th Congress, their new managers also used the closed rule to prevent floor amendments on these subjects. Thus, Democratic managers brought to the floor under closed rules a measure disapproving of President George W. Bush's "troop surge" in Iraq¹⁴³ and two measures providing for the withdrawal of U.S. troops from Iraq.¹⁴⁴ Democratic managers also used closed rules for other measures affecting the military¹⁴⁵ and for the 2008 amendments to the Foreign Intelligence Surveillance Act (which, among other matters, granted telecommunications companies immunity from civil liability for their cooperation in the federal government's "warrantless wiretapping" program).¹⁴⁶

In both Congresses, managers brought up measures concerning social issues, public health and welfare, and governmental operations under closed rules. In the 109th Congress, Republican managers used an effectively closed rule for consideration of the Broadcast Indecency Act of 2005, which increased sanctions for indecent television broadcasts (the measure was prompted by the notorious halftime program at Super Bowl XXXVIII).¹⁴⁷ Republican managers wrote closed rules for two measures concerning possible federal intervention in the matter of Theresa Schiavo, an incapacitated Florida woman whose family was locked in a bitter dispute over removal of her life support.¹⁴⁸ Republican managers also used an effectively closed rule for floor consideration of a constitutional amendment banning desecration of the U.S. flag¹⁴⁹ and closed rules for the Marriage Protection Amendment¹⁵⁰ and the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.¹⁵¹

Democratic managers brought corresponding measures to the floor under closed rules during the 110th Congress. Thus, managers used closed rules for measures to provide the District of Columbia with voting representation in the House,¹⁵² a measure on hate crimes,¹⁵³ a measure on "lobbying

¹⁴¹ *Id.* § 2.

¹⁴² *Id.* § 3.

¹⁴³ H.R. Res. 157, 110th Cong. § 1 (2007).

¹⁴⁴ H.R. Res. 533, 110th Cong. § 1 (2007); H.R. Res. 387, 110th Cong. § 1 (2007).

¹⁴⁵ H.R. Res. 601, 110th Cong. § 1 (2007); H.R. Res. 387, 110th Cong. § 2 (2007).

¹⁴⁶ H.R. Res. 1285, 110th Cong. (2008).

¹⁴⁷ H.R. Res. 95, 109th Cong. (2005).

¹⁴⁸ H.R. Res. 182, 109th Cong. (2005); H.R. Res. 162, 109th Cong. (2005).

¹⁴⁹ H.R. Res. 330, 109th Cong. (2005).

¹⁵⁰ H.R. Res. 918, 109th Cong. (2006).

¹⁵¹ H.R. Res. 1038, 109th Cong. (2006).

¹⁵² H.R. Res. 317, 110th Cong. (2007); H.R. Res. 260, 110th Cong. (2007).

transparency,”¹⁵⁴ a measure on paid parental leave for federal employees,¹⁵⁵ a measure on employment of persons with disabilities,¹⁵⁶ and measures on stem-cell research,¹⁵⁷ Medicare,¹⁵⁸ children’s health insurance,¹⁵⁹ and insurance coverage for mental health and addiction.¹⁶⁰ Democratic managers also used closed rules for floor consideration of measures citing two officials in President Bush’s Administration for contempt of Congress and authorizing the Judiciary Committee to pursue litigation against them.¹⁶¹

Republican and Democratic managers relied on the closed rule to protect potentially unstable compromises negotiated between legislators and interest groups. Managers know that, even if the content of a measure is not inherently divisive, a compromise made at the pre-floor stages might unravel if floor amendments begin to modify particular parts of the deal. The closed rule forecloses that possibility by disallowing any amendments once the compromise measure has left the direct control of House managers. The credible promise—or threat—that a measure will come to the floor under a closed rule encourages interest groups to negotiate with managers during the pre-floor stages and signals that neither side will be able to repudiate the deal by means of a floor amendment.

Thus, managers of both parties brought almost every tax measure to the floor during the 109th and 110th Congresses under closed and effectively closed rules. Tax legislation can often be divisive and, in any event, often entails complex compromises struck between the Ways and Means Committee and interest groups.¹⁶² The closed rule protects those compromises. In the 109th Congress, only one amendment was permitted for the Death Tax Repeal Permanency Act of 2005,¹⁶³ and no amendments were permitted for the Pension Protection Act of 2005,¹⁶⁴ the 527 Reform Act of 2005,¹⁶⁵ the

¹⁵³ H.R. Res. 364, 110th Cong. (2007).

¹⁵⁴ H.R. Res. 437, 110th Cong. (2007).

¹⁵⁵ H.R. Res. 1277, 110th Cong. (2008).

¹⁵⁶ H.R. Res. 1299, 110th Cong. (2008).

¹⁵⁷ H.R. Res. 464, 110th Cong. (2007).

¹⁵⁸ H.R. Res. 594, 110th Cong. (2007).

¹⁵⁹ H.R. Res. 774, 110th Cong. (2007).

¹⁶⁰ H.R. Res. 1014, 110th Cong. (2008).

¹⁶¹ H.R. Res. 982, 110th Cong. (2008).

¹⁶² ROBINSON, *supra* note 50, at 44–45.

¹⁶³ H.R. Res. 202, 109th Cong. (2005).

¹⁶⁴ H.R. Res. 602, 109th Cong. (2005).

¹⁶⁵ H.R. Res. 755, 109th Cong. (2006).

Permanent Estate Tax Relief Act of 2006,¹⁶⁶ the Estate Tax and Extension of Tax Relief Act of 2006,¹⁶⁷ or the Pension Protection Act of 2006.¹⁶⁸ In the 110th Congress, no amendments were allowed for the Estimated Tax Safe Harbor Act,¹⁶⁹ the AMT Relief Act of 2007,¹⁷⁰ the Taxpayer Assistance and Simplification Act of 2008,¹⁷¹ the Emergency Extended Unemployment Compensation Act of 2008,¹⁷² the Alternative Minimum Tax Relief Act of 2008,¹⁷³ or the Renewable Energy and Job Creation Tax Act of 2008.¹⁷⁴ In that Congress, Democratic managers allowed only one floor amendment each for the Temporary Tax Relief Act of 2007¹⁷⁵ and the Renewable Energy and Energy Conservation Tax Act of 2008.¹⁷⁶

Managers in the 109th and 110th Congresses also used closed rules to protect compromise legislation that pitted interest groups directly against each other. In the 109th Congress, Republican managers used closed and effectively closed rules for measures addressing bankruptcy reform,¹⁷⁷ small businesses,¹⁷⁸ energy production,¹⁷⁹ refinery permitting,¹⁸⁰ oil exploration in the Arctic National Wildlife Refuge,¹⁸¹ and tort reform.¹⁸² In the 110th Congress, Democratic managers used closed and effectively closed rules for measures addressing equal pay for women,¹⁸³ commodities-market reform,¹⁸⁴ consumer protection,¹⁸⁵ economic assistance to the domestic automobile industry,¹⁸⁶ and several measures addressing renewable energy.¹⁸⁷

¹⁶⁶ H.R. Res. 885, 109th Cong. (2006).

¹⁶⁷ H.R. Res. 966, 109th Cong. (2006).

¹⁶⁸ H.R. Res. 966, 109th Cong. (2006).

¹⁶⁹ H.R. Res. 317, 110th Cong. (2007).

¹⁷⁰ H.R. Res. 861, 110th Cong. (2007).

¹⁷¹ H.R. Res. 1102, 110th Cong. (2008).

¹⁷² H.R. Res. 1265, 110th Cong. (2008).

¹⁷³ H.R. Res. 1297, 110th Cong. (2008).

¹⁷⁴ H.R. Res. 1501, 110th Cong. (2008); H.R. Res. 1502, 110th Cong. (2008).

¹⁷⁵ H.R. Res. 809, 110th Cong. (2007).

¹⁷⁶ H.R. Res. 1001, 110th Cong. (2008).

¹⁷⁷ H.R. Res. 211, 109th Cong. (2005).

¹⁷⁸ H.R. Res. 379, 109th Cong. (2005).

¹⁷⁹ H.R. Res. 481, 109th Cong. (2005).

¹⁸⁰ H.R. Res. 842, 109th Cong. (2006).

¹⁸¹ H.R. Res. 835, 109th Cong. (2006).

¹⁸² H.R. Res. 508, 109th Cong. (2005).

¹⁸³ H.R. Res. 579, 110th Cong. (2007).

¹⁸⁴ H.R. Res. 1449, 110th Cong. (2008).

¹⁸⁵ H.R. Res. 1476, 110th Cong. (2008).

¹⁸⁶ H.R. Res. 1534, 110th Cong. (2008).

¹⁸⁷ H.R. Res. 1212, 110th Cong. (2008); H.R. Res. 1433, 110th Cong. (2008); H.R. Res. 66, 110th Cong. (2007); H.R. Res. 615, 110th Cong. (2007).

Appropriations measures provide an instructive counterpoint. Unlike zero-sum legislation such as bankruptcy reform and consumer protection that confers gains on one interest group and imposes corresponding losses on another interest group, appropriations measures often simply distribute government largesse. In many cases, an appropriation made for the benefit of a particular group does not require or precipitate an offsetting reduction in an appropriation made for the benefit of another group. Additionally, lawmakers of both parties rely on the pork-barrel opportunities presented by appropriations measures to promote their incumbency. Thus, House managers have little reason to shield appropriations measures from floor amendments, and managers normally call them up on the floor with open rules. In fact, resolutions bringing appropriations measures to the floor accounted for twenty of the twenty-three open rules in the 109th Congress and twelve of the twenty-three open rules in the 110th Congress.¹⁸⁸

House managers during the 109th and 110th Congresses also used the closed rule to exercise temporal agenda control. As each Congress drew to a close, managers relied more heavily on closed and effectively closed rules. The last fifteen special rules in the 109th Congress and twenty-one of the last twenty-five special rules in that Congress were closed. In the 110th Congress, the last eleven special rules and twenty-six of the last thirty-three special rules were closed or effectively closed. With the constitutional time limit on each Congress approaching, the closed rule allowed managers to conserve the floor time available for the remaining items on the majority's legislative program. Amendments offered by the minority—even those that the majority could safely defeat on the floor—would have presented problems for the majority if they had consumed too much floor time and thereby had prevented the majority from bringing up measures that it otherwise could have passed.¹⁸⁹

¹⁸⁸ In the 109th Congress, the following resolutions provided open rules for appropriations measures: H.R. Res. 151; H.R. Res. 287; H.R. Res. 291; H.R. Res. 298; H.R. Res. 303; H.R. Res. 314; H.R. Res. 315; H.R. Res. 337; H.R. Res. 341; H.R. Res. 342; H.R. Res. 725; H.R. Res. 818; H.R. Res. 821; H.R. Res. 830; H.R. Res. 832; H.R. Res. 836; H.R. Res. 851; H.R. Res. 865; H.R. Res. 877; and H.R. Res. 890. In the 110th Congress, the following resolutions provided open rules for appropriations measures: H.R. Res. 473; H.R. Res. 480; H.R. Res. 481; H.R. Res. 498; H.R. Res. 514; H.R. Res. 517; H.R. Res. 547; H.R. Res. 558; H.R. Res. 562; H.R. Res. 581; H.R. Res. 596; and H.R. Res. 1384.

¹⁸⁹ House managers used the closed rule to exercise temporal agenda control again at the end of the first session of the 111th Congress. On the morning of December 16, 2009, the Rules Committee reported House Resolution 976, setting forth closed rules for four separate measures. H.R. Res. 976, 111th Cong. (2009). The resolution, which was approved by the floor the same day, allowed consideration of the four measures before Speaker Nancy Pelosi left Washington to participate in the final hours of an international meeting in Copenhagen regarding global warming. Tory Newmyer, *House Dashes for the Finish; Leaders Aim to Exit Tonight*, ROLL CALL, Dec. 16, 2009, at 1.

Managers likely considered temporal agenda control to be particularly important at the end of the 109th Congress and the beginning of the 110th Congress. The 109th Congress wound down during a lame-duck session held after the Democrats won a majority of House seats for the 110th Congress. Not surprisingly, all three special rules reported by the Rules Committee during that period—the last opportunity for the Republican managers to push their legislative program—were closed rules.¹⁹⁰ By comparison, the new Democratic Speaker of the House had designated the beginning of the 110th Congress as the “100 Hours” during which she promised passage of six prominent measures from the new majority’s legislative program.¹⁹¹ Recalling, no doubt, their own efforts to obstruct the Republican majority’s enactment of the “Contract with America” during the first “100 Days” of the 104th Congress,¹⁹² the Democratic managers directed the Rules Committee to report closed rules¹⁹³ for two of the measures, one concerning interest rates on student loans¹⁹⁴ and the other concerning clean energy.¹⁹⁵ The other four measures—implementing the recommendations from the National Commission on Terrorist Attacks Upon the United States,¹⁹⁶ increasing the federal minimum wage,¹⁹⁷ providing for stem-cell research,¹⁹⁸ and requiring the federal government to negotiate the prices of prescription drugs purchased through Medicare¹⁹⁹—were brought to the floor pursuant to House Resolutions 5 and 6.²⁰⁰ Although not reported by the Rules Committee, those resolutions provided that none of the four measures could be amended on the floor. Thus, the new Democratic managers brought every item on their “100 Hours” program to the floor under closed rules or the equivalent of closed rules. By blocking all floor amendments, the managers ensured that they would meet their self-imposed but short time limit for passage of the six measures.

¹⁹⁰ H.R. Res. 1092, 109th Cong. (2006); H.R. Res. 1100, 109th Cong. (2006); H.R. Res. 1105, 109th Cong. (2006).

¹⁹¹ Victor H. Fazio, *It's Really About '08, Nancy*, WASH. POST, Jan. 7, 2007, at B1; “100-Hour” Agenda Is Completed, WASH. POST, Jan. 20, 2007, at A6.

¹⁹² OLESZEK, *supra* note 24, at 128.

¹⁹³ H.R. Res. 65, 110th Cong. (2007); H.R. Res. 66, 110th Cong. (2007).

¹⁹⁴ H.R. 5, 110th Cong. (2007).

¹⁹⁵ H.R. 6, 110th Cong. (2007).

¹⁹⁶ H.R. 1, 110th Cong. (2007).

¹⁹⁷ H.R. 2, 110th Cong. (2007).

¹⁹⁸ H.R. 3, 110th Cong. (2007).

¹⁹⁹ H.R. 4, 110th Cong. (2007).

²⁰⁰ H.R. Res. 5, 110th Cong. (2007); H.R. Res. 6, 110th Cong. (2007).

C. *Assessing the Closed Rules*

The review set out above suggests several points about the use of the closed rule in the 109th and 110th Congresses. Specifically, it appears reasonably clear that the Republican managers of the 109th Congress and the Democratic managers of the 110th Congress used the closed rule in substantially the same way, that the closed rule imposed genuine constraints on the floor activities of the rank and file, and that the closed rule gave managers broad discretionary control over the spatial and temporal agenda of the House. The claim made here is not that the review conclusively proves these points; rather, the claim is that the review supports these points as reasonable characterizations of the House legislative process during these two Congresses.

1. *Similar Use by Republicans and Democrats*

The record in the 109th and 110th Congresses confirms that managers from both parties have established the closed rule as a routine element of the legislative process. Although the minority Republicans bitterly resented the Democrats' increased reliance on the closed rule throughout the 1980s,²⁰¹ they quickly learned to appreciate its usefulness when they gained control of the House in the mid-1990s.²⁰² And, in perfect balance, the Democrats first denounced the closed rule during the period of Republican hegemony²⁰³ but then rediscovered its virtues once they recovered their status as the majority party.²⁰⁴ Thus, the distribution of closed and effectively closed rules was similar across the 109th and 110th Congresses. Under the Republicans, 38% of special rules were closed, and 12% were effectively closed;²⁰⁵ under the Democrats, 41% of special rules were closed, and 13% were effectively closed.²⁰⁶

Additionally, Republican and Democratic managers used the closed rule for similar types of measures. Often, the measures addressed ideological or otherwise divisive legislative subjects, such as the continuation of military action in Iraq, federal funding of stem-cell research, or oil exploration in the Arctic. In other cases, the measures set out compromises among competing

²⁰¹ Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 355–58 (1994).

²⁰² See, e.g., SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 29.

²⁰³ *Id.*; *supra* note 15, at 171–72.

²⁰⁴ See Appendix 3-A.

²⁰⁵ See *supra* Table 3.

²⁰⁶ See *supra* Table 4.

interest groups and their legislative allies, and the closed rule was used to protect those compromises from unraveling on the floor. By contrast, non-divisive measures—such as those naming a post office,²⁰⁷ condemning the use of prison labor in the People’s Republic of China,²⁰⁸ honoring a deceased president,²⁰⁹ or congratulating the winner of the college football championship game²¹⁰—did not require the protection of the closed rule. Managers also set aside the closed rule when the House opened up its pork barrel during the appropriations process: most appropriations measures considered on the House floor during the 109th and 110th Congresses were brought up under open rules allowing any member to offer any amendment.

There is little reason to think that the similar use of the closed rule in the 109th and 110th Congresses is an aberration. Rather, these parallel records appear to reflect what has become a normal legislative procedure in the House: regular use of the closed rule for the most divisive legislative measures.²¹¹ Although broad use of the closed rule originated with the Democratic managers of the 1980s and was initially tagged by the Republican minority as an abuse peculiar to the Democratic majority,²¹² the subsequent management of the House floor first by the Republican majority and then by the reestablished Democratic majority confirms that regular use of the closed rule is now a practice of House managers *qua* managers. Heavy use of the closed rule no longer aligns with party identity.

2. Constraints Imposed by the Closed Rule

It also appears reasonably clear that the constraints imposed by the closed rule during the 109th and 110th Congresses were genuine—that the closed rule had real “bite” on the amending activity of the rank and file. The sincerity and strength of members’ preferences regarding disallowed floor amendments cannot be ascertained directly.²¹³ However, several aspects of the record from

²⁰⁷ See, e.g., H.R. 3770, 109th Cong. (2006) (recorded vote number 576).

²⁰⁸ H.R. Con. Res. 294, 109th Cong. (2005) (recorded vote number 647).

²⁰⁹ H.R. Res. 15, 110th Cong. (2007) (recorded vote number 21).

²¹⁰ H.R. Res. 39, 110th Cong. (2007) (recorded vote number 25).

²¹¹ See, e.g., Solomon & Wolfensberger, *supra* note 201, at 356 (“It seems that the most important and controversial bills are the most likely to be considered under highly restrictive rules.”).

²¹² See, e.g., SMITH, *supra* note 30, at 44–45 (describing the Republican minority’s protest against closed and other restrictive rules); Solomon & Wolfensberger, *supra* note 201, at 355–58 (noting that Republicans generally believed there were too many limitations on floor amendments in 1993).

²¹³ See SMITH, *supra* note 30, at 12, 169 (explaining that “gathering systematic data on members’ policy preferences over many issues and years is not possible” and that “even if such a complex analysis were feasible, its conclusions still could be quite misleading”).

the 109th and 110th Congresses strongly imply that the use of the closed rule was not superfluous or irrelevant—that it did not operate simply to prevent rank-and-file members from offering amendments about which they had only weak preferences.

First, it appears that reporting a closed rule had the effect of disallowing a very large number of amendments. The Rules Committee usually did not make publicly available the amendments that members submitted for measures that received closed rules, but the committee often rejected many or even most of the amendments that members submitted for measures that received limiting rules.²¹⁴ The unrestricted amending activity that rank-and-file members otherwise would have pursued on the measures covered by closed rules should have been comparable to the unrestricted amending activity that those members otherwise would have pursued on measures covered by limiting rules. Thus, the record on specific amendments disallowed by the limiting rules implies that the closed rules preempted as many as several dozen amendments for each measure.

Second, the record of amendments disallowed by limiting rules suggests that the closed rules likely blocked substantial numbers of amendments from both parties. In the 109th Congress, limiting rules allowed about 28% of the amendments submitted by the Democratic minority and about 47% of the amendments submitted by the Republican majority; in the 110th Congress, limiting rules allowed about 20% of the amendments submitted by the Republican minority and about 42% of the amendments submitted by the Democratic majority.²¹⁵ Although the low numbers of amendments allowed on the minority side are unremarkable, the limiting rules in both Congresses disallowed more than half the amendments submitted on the majority side.²¹⁶ Again, if one assumes that the blocked amending activity for measures covered by limiting rules provides a fair indication of the blocked amending activity for measures covered by closed and effectively closed rules, it appears that the closed and effectively closed rules in the 109th and 110th Congresses cut sharply against *all* members of the rank and file, whether in the minority or the majority.

²¹⁴ See Appendices 2-A & 3-A.

²¹⁵ Author's calculations from amendment records provided by the Rules Committee.

²¹⁶ Interestingly, bipartisan amendments fared much better in both Congresses: in the 109th Congress, just over 50% of amendments with bipartisan sponsorship were allowed by limiting rules; in the 110th Congress, about 56% of such amendments were allowed.

Third, the minority's protests about closed and effectively closed rules during these two Congresses make little sense unless those rules precluded amendments that members sincerely wanted to offer. Just as Republicans had complained about the closed rule throughout the 1980s and the early 1990s, Democrats denounced the closed rule throughout the years of Republican control, including during the 109th Congress.²¹⁷ And, of course, Republicans again found the closed rule strongly objectionable during the 110th Congress.²¹⁸ The consistency of minority complaint about the closed rule as an abuse of the majority's power suggests that the closed rule was highly effective in disallowing amendments that reflected members' genuine policy preferences.

3. *Discretionary Agenda Control*

The experiences in the 109th and 110th Congresses demonstrate not only that the Republican and Democratic managers used the closed rule to exercise control over the spatial and temporal agenda on the House floor but also that the rank and file conferred substantial discretionary authority on the managers to decide when and how to use the closed rule. In both Congresses, managers enjoyed very impressive success rates when they brought closed rules (and, for that matter, other special rules) to the House floor for ratification. Although both the Republican and the Democratic managers tabled a handful of closed and effectively closed rules, not a single closed or effectively closed rule was defeated in a floor vote.²¹⁹ That success rate exceeded the managers' success rate in passing underlying measures. In other words, although managers were highly likely to secure passage of any particular measure that they brought before the full House, they were still more likely to obtain ratification of the special rule that established the terms and conditions under which that measure would be considered on the floor.

Thus, both the Republican managers in the 109th Congress and the Democratic managers in the 110th Congress had expansive authority to determine what measures could be amended on the floor and what measures would be closed to the amendment process. Certainly the managers' high success rates reflect their attentiveness to the preferences of the rank and file.²²⁰ But these rates also reflect a standing delegation of broad discretionary

²¹⁷ See, e.g., SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 171–72.

²¹⁸ *Supra* note 18.

²¹⁹ See Appendices 2-B & 3-B.

²²⁰ See SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 270.

authority from the rank and file to the managers: during the 109th and 110th Congresses, the rank and file never overturned a managerial decision to use or not to use the closed rule, even when the rank and file ultimately rejected the underlying measure that their managers put before them. During those two Congresses, the Republican and Democratic managers could choose among the variety of special rules—from fully open to fully closed—with confidence that their principals very likely would ratify the choice. That broad discretionary authority over the closed rule allowed managers to exercise control over the floor agenda precisely when such control was most important to the managers. The closed rule perfected their power to define the policy options that could be considered on the floor, to determine the time available for considering those options, and, consequently, to manage substantive policy outcomes.

III. IMPLICATIONS FOR INSTITUTIONAL REFORM

Explaining why Congress structures itself as it does is the domain of political theorists; for legal academics, the more relevant point is whether existing institutional structures should be reformed. Addressing the reform question requires both an assessment of the systemic effects that institutional structures have on the development of statutory law and, more broadly, an evaluation of the democratic character of those structures. To date, legal scholars have effectively ignored the closed rule, even though political theorists have long understood that the closed rule and other agenda-control mechanisms may determine legislative outcomes and even though many critics argue that the closed rule is inherently undemocratic. Building on insights from political theory, this Part addresses important positive and normative questions about the closed rule that the legal literature has not considered.

This Part first evaluates three positive theories of the closed rule developed by political scientists and then offers a different account that emphasizes the closed rule's broadly managerial character. Turning to the normative inquiry, this Part argues that the closed rule has several undesirable effects on the development of substantive statutory law, but it rejects the more serious criticism that the closed rule is inherently undemocratic. Although regular use of the closed rule in the contemporary House reflects an institutional preference among the rank and file for strong internal control by House managers, that preference is both rational and consistent with representative democracy. The House, like any legislative body, must locate its affairs along the continuum between chaos and control, and members of the House for good reason currently prefer more control and less chaos. Curtailment or

elimination of the closed rule raises the prospect of sustained disequilibrium in the House and a diminished institutional capacity to pursue constituent interests. At a minimum, the regular use of the closed rule is not inherently less democratic than the regular use of its polar opposite, the open rule.

A. *Managerial Agenda Control Within the House*

All else equal, the closed rule affects the allocation of power within the House by shifting discretionary agenda control from the floor to managers. Positive political theorists have tried to explain why the rank and file, who must approve any closed rule, would surrender their power to amend measures on the floor. The theoretical accounts are rich and provocative, but they generally are drawn from behavior that occurred when the open rule was still the norm. This section examines the accounts and generalizes them into a broader explanation—one recognizing that, as demonstrated in Part II, the House now considers one of every two controversial measures under a closed or effectively closed rule.²²¹

1. *Three Theories of the Closed Rule*

Three general theories—distributive, informational, and partisan—explain the institutional structure of Congress, and all three specifically account for the closed rule.²²² Although often presented as competing accounts, cogent analysis suggests that they are better seen as complementary.²²³

²²¹ Two methodological notes should be made at the outset. First, the three theories discussed are grounded in detailed formal models and rigorous empirical testing, and there is no pretense here of that type of modeling and testing or, for that matter, of refuting any of the three theories. Rather, the objective here is to offer qualifications on how the theories explain the closed rule and to suggest a different explanation that takes account of the points made in Part II. Second, the three theories and the broader explanation developed in this Article arguably ignore the important point that internal legislative rules and structures, determined as they are by institutional decision processes, may reflect the same pathologies of preference aggregation that plague legislation generally. For example, it may be that the current use of the closed rule reveals not a rational preference by a majority of the House membership but successful agenda manipulation by House managers. This Article brackets that concern and, rightly or wrongly, follows the lead of political theory in treating House rules and structures as reflecting, more or less, the aggregated preferences of the House membership.

²²² The theories normally refer to “restrictive rules,” the term often used by political scientists to describe any rule that is neither open nor modified open. See *supra* note 73. The term “restrictive rules” maps onto what this Article calls “closed rules,” “effectively closed rules,” and “limiting rules.” As such, these theories’ explanations of restrictive rules apply, *a fortiori*, to closed and effectively closed rules.

²²³ See Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 22–23.

a. *Distributive Theory*

Distributive theory argues that Congress organizes itself to produce legislative benefits, such as pork-barrel spending, valued by constituents.²²⁴ Vote trading can yield gains from trade among members with heterogeneous preferences, but institutional structures are needed to facilitate both the formation and the enforcement of such deals.²²⁵ Distributive theory argues that Congress solves this problem by establishing a system of committees with independent jurisdictional authority over specific policy areas and by granting those committees procedural privileges on the floor.²²⁶ According to this theory, the House uses the closed rule to protect distributive deals made among its members.²²⁷ By blocking floor amendments, the House ensures that logrolls and other agreements cannot be undone by floor amendment. Closed rules “deter [a] faction from tempting one of the parties to the original bargain to defect and support a new amendment.”²²⁸ In short, the closed rule precludes a member’s unilateral repudiation of a deal.

Although other theorists have expressed skepticism,²²⁹ distributive theory offers a striking explanation of particular legislative structures—most notably, the persistence of a robust committee system. Still, there are reasons to question its particular account of the closed rule.²³⁰ Empirical studies generally have failed to support the claim that the House imposes greater

²²⁴ C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEG. STUD. Q. 605, 608–09 (1999).

²²⁵ Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 12–13.

²²⁶ Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; Or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143–48 (1988); *see also* Krehbiel, *Spatial Models*, *supra* note 91, at 43–44 and 160–64.

²²⁷ David P. Baron, *A Noncooperative Theory of Legislative Coalitions*, 33 AM. J. POL. SCI. 1048 (1989) [hereinafter Baron, *Noncooperative Theory*]; Krehbiel, *Spatial Models*, *supra* note 91, at 43–44, 160–64. Distributive theory has also advanced the position that closed rules are more likely to lead to greater inefficiency in distributive legislation; that position, however, is grounded in the counter-intuitive proposition that legislators take into account both the benefits and the costs of distributive legislation. David P. Baron, *Majoritarian Incentives, Pork Barrel Programs, and Procedural Control*, 35 AM. J. POL. SCI., 57 (1991) [hereinafter Baron, *Majoritarian Incentives*]. For a suggestion that distributive theory’s implications for the closed rule may be ambiguous, *see* Barbara Sinclair, *House Special Rules and the Institutional Design Controversy*, 19 LEG. STUD. Q. 477, 481 (1994) [hereinafter Sinclair, *House Special Rules*].

²²⁸ Barry R. Weingast, *Fighting Fire with Fire: Amending Activity and Institutional Change in the Postreform Congress*, in THE POSTREFORM CONGRESS 142, 161 (Roger H. Davidson ed., 1992) [hereinafter Weingast, *Fighting Fire*].

²²⁹ *See, e.g.*, KREHBIEL, INFORMATION, *supra* note 47, at 247–48.

²³⁰ Those reasons may or may not justify tagging the account as “[a]t best . . . a chronic hope.” Keith Krehbiel, *Restrictive Rules Reconsidered*, 41 AM. J. POL. SCI. 919, 940 (1997) [hereinafter Krehbiel, *Restrictive Rules*].

restrictions on floor amendments for distributive legislation than for non-distributive legislation.²³¹ Additionally, as shown in Part II, the House regularly used open rules for appropriations legislation during the 109th and 110th Congresses. Distributive legislation does take other forms, but appropriations measures arguably constitute the paradigmatic form of legislative distributive activity. It is hard to see why, if distributive theory's account were correct, the House would have considered most appropriations measures during the 109th and 110th Congresses under open rules and few non-appropriations measures under open rules. The objective on those measures appears to have been precisely the opposite of what distributive theory predicts. Rather than shelter those measures from floor amendments that might disturb pre-floor deals, the House seemingly wanted to allow as many members as possible to offer floor amendments and thereby participate in the distribution of federal funds.

b. Informational Theory

Informational theory argues that Congress organizes itself into committees so that the full membership can benefit from committee members' investments in developing and maintaining policy expertise.²³² This theory stands on two sound assumptions: first, that institutional structures are subject to the general principle of majoritarianism and, second, that legislators work under conditions of uncertainty about the relationships between legislative policy choices and non-legislative outcomes.²³³ These two assumptions yield the insight that the House rationally organizes itself to realize informational efficiencies. Thus, the House establishes committees with independent jurisdictions so that the members of those committees will develop policy expertise and will provide policy-specific information to the full House.²³⁴

Informational theory accounts for the closed rule as a mechanism by which the House can protect the incentives of its committees to gather and to reveal specialized information. By precluding floor amendments, the House effectively commits not to exploit a committee's revealed information to the

²³¹ KREHBIEL, INFORMATION, *supra* note 47, at 173–86; Krehbiel, *Restrictive Rules*, *supra* note 230, at 932–40; Bryan W. Marshall, *Explaining the Role of Restrictive Rules in the Postreform House*, 27 LEGIS. STUD. Q. 61, 67–78 (2002); Sinclair, *House Special Rules*, *supra* note 227, at 484–85.

²³² This theory is set forth throughout KREHBIEL, INFORMATION, *supra* note 47; *see also* Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990).

²³³ KREHBIEL, INFORMATION, *supra* note 47, at 15–20.

²³⁴ *Id.* at 66–81; *see also* Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 15–16.

committee's disadvantage (for example, by amending a measure to strip out provisions conferring disproportionate benefits on the committee members' constituents).²³⁵ This account argues that, "under the closed rule, the committee can, in effect, credibly transmit its private information to the floor actor" such that "neither . . . loses utility from uncertainty."²³⁶ Thus, the informational theory of legislative organization accounts for the closed rule as a "device[] . . . chosen by the House to get the most out of its committees."²³⁷

There are reasons to question both the formal modeling of informational theory and the strength of its empirical support.²³⁸ Additionally, the precise relationship of informational theory to distributive theory has been disputed.²³⁹ Nonetheless, the apparent power of the theory to explain the closed rule is impressive: informational theory acknowledges that the closed rule allows the committees of jurisdiction to exploit protection from floor amendments for their own advantage but simultaneously demonstrates that the full House rationally could judge itself better off with the closed rule than without it.

That said, the use of the closed rule during the 109th and 110th Congresses raises several points about this account. The original empirical tests supporting the account used data from the 98th and the 99th Congresses (which met from 1983 to 1987), and the tests distinguished only between open rules and "restrictive rules"—that is, rules that were neither open nor modified open.²⁴⁰ During the 98th and 99th Congresses, more than half the special rules in the House were open rules, and almost all of the remaining ones were

²³⁵ KREHBIEL, INFORMATION, *supra* note 47, at 90–92, 97–98; *see also* Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogeneous Committee*, 33 AM. J. POL. SCI. 459 (1989); Thomas W. Gilligan & Keith Krehbiel, *Collective Decisionmaking and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures*, 3 J.L. ECON. & ORG. 287 (1987) [hereinafter Gilligan & Krehbiel, *Collective Decisionmaking*].

²³⁶ Krehbiel, *Spatial Models*, *supra* note 91, at 305.

²³⁷ KREHBIEL, INFORMATION, *supra* note 47, at 191.

²³⁸ For example, informational theory counterfactually assumes that the floor decides between a closed rule and an open rule *before* a committee reports a measure. Gilligan & Krehbiel, *Collective Decisionmaking*, *supra* note 235, at 300. For additional criticism of the formal model, see David P. Baron, *Legislative Organization with Informational Committees*, 44 AM. J. POL. SCI. 485 (2000); Krishna & Morgan, *supra* note 118; Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 24–25. For criticism of the empirical support, see Douglas Dion & John D. Huber, *Procedural Choice and the House Committee on Rules*, 58 J. POL. 25, 35–41 (1996); Marshall, *supra* note 231, at 67–78; Sinclair, *House Special Rules*, *supra* note 227, at 484–85. For counterarguments on the empirical point, see Krehbiel, *Restrictive Rules*, *supra* note 230. For the original empirical results supporting the theory's explanation of the closed rule, see KREHBIEL, INFORMATION, *supra* note 47, at 173–91.

²³⁹ Gilligan & Krehbiel, *Collective Decisionmaking*, *supra* note 235, at 328; Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 25–26.

²⁴⁰ KREHBIEL, INFORMATION, *supra* note 47, at 167–68.

restrictive.²⁴¹ In the 109th and 110th Congresses, by contrast, only 16% and 12% (respectively) of the special rules were open rules, and the remaining 84% and 88% (respectively) were rules that would have been considered restrictive under informational theory.²⁴² There is at least a question, then, about whether the results obtained in the original empirical tests, using data in which fewer than half the special rules were restrictive, would still be obtained using data from the 109th and 110th Congresses, in which close to nine out of ten special rules were restrictive.²⁴³

Intuitively, the experience of the closed rule in the 109th and 110th Congresses suggests that informational theory's account may indeed be correct. The basic insight of the account is that the House uses closed rules to encourage committees to develop and divulge specialized policy information. Legal scholars certainly can appreciate that federal statutory law has become more complex over the last two decades and that the complexity reflects increasingly intricate and sophisticated policy considerations. It may be, then, that the marked movement away from open rules since the 1980s reveals that the House has behaved as informational theory generally predicts: With a greater need for policy expertise in discharging its legislative function, the House has expanded the incentives for committees to invest in that expertise and to bring it to bear on their work product by expanding the use of the closed rule.

But informational theory's explanation of the closed rule does not always fit. In the 109th and 110th Congresses, for example, managers brought several straightforward measures to the floor under closed rules. For example, managers used closed rules to stage up-or-down votes on withdrawing U.S. troops from Iraq, amending the Constitution to ban flag desecration, allowing federal funding of stem-cell research, and other measures to which the committee-expertise story seems orthogonal.²⁴⁴ The policy parameters of

²⁴¹ BACH & SMITH, *supra* note 101, at 51. The remaining special rules did not address floor amendments. *Id.*

²⁴² Mapping Krehbiel's distinction between open and restrictive rules onto the terms used in this Article, the original empirical tests would be said to have separated "open rules" (as used in this Article) from all "closed," "effectively closed," and "limiting" rules (as used in this Article). Other studies on the closed rule present the same methodological issue. *See, e.g.,* Marshall, *supra* note 231, at 80; Sinclair, *House Special Rules*, *supra* note 227, at 478.

²⁴³ For example, would new testing confirm that, as implied by informational theory, KREHBIEL, INFORMATION, *supra* note 47, at 165, the committees of jurisdiction in the 109th and 110th Congresses were significantly more specialized and heterogeneous than were the committees of jurisdiction in the 98th and 99th Congresses?

²⁴⁴ *See* Part II.B, *supra*.

those highly charged issues were well known by the full House, and committee specialization likely added little to the full membership's understanding and deliberation. It seems very doubtful that either managers or the rank and file chose to use closed rules for those measures as a way of encouraging the committees of jurisdiction to reveal important information to the floor. Rather, other considerations must have driven the selection of those closed rules.

c. Partisan Theory

Partisan theory argues that the central principle of legislative organization is the advantage of the political party.²⁴⁵ Parties provide a solution to collective-action problems confronting individual legislators who must form coalitions to advance their policy preferences.²⁴⁶ With a membership having preferences that are more homogeneous than the legislature as a whole, each party constitutes a relatively stable coalition.²⁴⁷ Importantly, the majority party promotes the policy preferences of its membership not by controlling votes but by controlling the legislative agenda.²⁴⁸ Specifically, the majority party cartelizes agenda control among senior party members and exercises both negative agenda control—blocking measures that divide the party—and positive agenda control—promoting measures favored by a majority within the party.²⁴⁹ Partisan theory therefore accounts for the closed rule as an instrument used by cartel members to exercise negative and positive agenda control in the interests of the party.²⁵⁰ Under partisan theory, the closed rule is a “device[] the majority party leadership uses to advance the goals of its membership.”²⁵¹ Stated more forcefully, the closed rule is a “tool[] of the majority

²⁴⁵ Evans, *supra* note 224, at 609.

²⁴⁶ COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 17–18; *see also* GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (2d ed. 2007) [hereinafter COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*]. A different version of partisan theory, conditional party government (which argues that party control in the legislature is contingent and generally increases as both the parties become more homogeneous and the party medians become more distant), has slightly different implications for the closed rule. *See generally* Finocchiaro & Rohde, *supra* note 83 (explaining implications of conditional-party-government thesis for closed rule).

²⁴⁷ COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note 246, at 99–125; COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 19, 23; Shepsle & Weingast, *Positive Theories*, *supra* note 89, at 18.

²⁴⁸ COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 6.

²⁴⁹ *Id.* at 9, 19–20, 24.

²⁵⁰ *Id.* at 125, 146.

²⁵¹ Sinclair, *House Special Rules*, *supra* note 227, at 483.

party . . . deployed to trample on minority rights”²⁵² or simply a “weapon” that the majority party uses to disenfranchise the minority party on the floor.²⁵³

Unlike distributive and informational theory, partisan theory expressly accounts for the high salience of political parties in Congress and credibly explains how and why party members form or reform legislative processes for their own advantage. Perhaps because of this intuitive appeal, partisan theory’s explanation of the closed rule has been characterized as the “conventional wisdom.”²⁵⁴ All the same, there are reasons to question partisan theory’s account. As with distributive theory and informational theory, the empirical evidence for partisan theory’s explanation of the closed rule is contested.²⁵⁵ Even if the existing evidence in its favor is accepted, the same question arises here that arises with respect to the empirical evidence for informational theory: would partisan theory correctly predict the low incidence of open rules in the 109th Congress (only 16% of all special rules) and the 110th Congress (only 12% of all special rules)? It may be that the agenda-cartelizing behavior found by partisan theory in prior Congresses was even stronger among the Republicans of the 109th Congress and the Democrats of the 110th Congress than it had been in the past, or it may be that the partisan theory can explain rule choice for earlier periods but not for more recent periods. This question will remain open until new empirical studies are conducted.

More importantly, there is a basic anomaly in partisan theory’s account of the closed rule. If indeed the majority party uses its cartelized agenda control to advance its own interests, it seems very odd that the majority party employs the closed rule rather than overtly partisan limiting rules. The closed rule

²⁵² KREHBIEL, INFORMATION, *supra* note 47, at 167.

²⁵³ COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, at 126. For related arguments that the closed rule is used by the majority party for its own advantage, see BACH & SMITH, *supra* note 101, at 5; MARSHALL, *supra* note 131, at 25–45, 61–85; DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 102–03, 109 (1991); SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 30, 42, 280. Certainly members of the minority party have long understood the disempowering effect that the closed rule has on them, and they regularly complain that the closed rule effectively locks them out of the legislative process. *See supra* notes 12–18.

²⁵⁴ Keith Krehbiel, *Rejoinder to ‘Sense and Sensibility,’* 41 AM. J. POL. SCI. 958, 958 (1997).

²⁵⁵ For evidence supporting this explanation, see COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 9, Finocchiaro & Rohde, *supra* note 83, at 44–55; Sinclair, *House Special Rules*, *supra* note 227, at 485–86; Douglas Dion & John D. Huber, *Sense and Sensibility: The Role of Rules*, 41 J. POL. SCI. 945, 946–56 (1997); and Dion & Huber, *supra* note 238, at 35–41. (Although Dion and Huber do not specifically tag their model as fitting within partisan theory, it is rightly regarded as such. *See* Evans, *supra* note 224, at 628.) For evidence against partisan theory’s explanation of the closed rule, see Krehbiel, *Restrictive Rules*, *supra* note 230, at 932–36.

binds *all* members of the rank and file equally, allowing amendments neither from the minority party nor from the rank and file of the majority party. One would expect that a majority party intent on advancing the policy objectives of the majority party *qua* majority party and on blocking the floor activity of the minority party *qua* minority party would use limiting rules that selectively disallow amendments offered by the minority party and that selectively allow those offered by the majority party. But neither Republicans nor Democrats pursued that approach during the 109th or 110th Congress. Instead, as shown in Part II, both Republicans and Democrats had a clear preference for the closed rule. When they did use limiting rules, both Republicans and Democrats readily blocked more than half the amendments submitted by members of their own party along with most amendments submitted by members of the other party. It appears that the choice to use the closed rule must be informed by considerations beyond simply promoting the legislative agenda of the majority party.

2. *The Closed Rule as Managerial Agenda Control*

None of the three accounts of the closed rule presented by political theory offers a precise fit. Distributive theory's explanation stumbles when it confronts the high incidence of open rules for appropriations measures; informational theory does not explain the use of the closed rule for technically simple but politically charged measures; and partisan theory cannot account for the strong intraparty constraints imposed by the closed rule. Yet even if none of the three accounts seems entirely right, none seems entirely wrong either. Collectively, they suggest that the closed rule can be understood as a generically managerial tool that managers at times use to serve distributive, informational, or partisan objectives and at other times use for other purposes.

Thus, the explanations of the closed rule provided by distributive theory, informational theory, and partisan theory can be expanded and generalized into an alternative thesis: the closed rule constitutes a mechanism of agenda control by House managers in their broad capacity as managers. On this account, the point of the closed rule is not specifically to enforce logrolls, to enhance the informational efficiency of the committee system, or to promote the narrow interests of the majority party. Rather, the point of the closed rule is to strengthen general managerial control over the floor agenda and thereby to provide for a House that is orderly, predictable, and productive. Certainly the closed rule has many of the *effects* that the distributive, informational, and partisan theories ascribe to it. But the argument here is that, however

important, those are second-order consequences made possible by the exercise of effective and competent managerial agenda control. In other words, the closed rule is better understood not as narrowly or exclusively distributive, informational, or partisan. Rather, it is better understood as broadly managerial.

This thesis is grounded in, but is nonetheless more expansive than, the explanation of the closed rule offered by Stanley Bach and Steven Smith. Bach and Smith argue that managers in the House increased their use of non-open rules to counter the rise of disorder in the House after the reforms of the 1970s.²⁵⁶ However, Bach and Smith also regard the development as distinctly (although not exclusively) partisan.²⁵⁷ The same point applies to the account offered by Barbara Sinclair. Although she sees the closed rule as embedded within the agency relationships of the House, she nonetheless specifically associates the closed rule with partisanship.²⁵⁸ As explained further in this section, the partisan effects of the closed rule should be seen as derivative: the point of the closed rule is to manage the House, not to roll the minority. In the final analysis, the closed rule takes nothing from the minority that the minority otherwise would have in a majoritarian institution.

The need for a certain level of managerial agenda control in the House is obvious. The Constitution establishes a state of nature under which all House members have equal status;²⁵⁹ although it provides for a speaker and other officers, the Constitution does not confer any specific authority on them.²⁶⁰ As a decision-making institution with 435 coequal members, the House must have an internal structure for its proceedings because the absence of such a structure would make the House inefficient at best and completely ineffective at worst.²⁶¹ To solve this problem and to create internal order, House members

²⁵⁶ BACH & SMITH, *supra* note 101, at 69; *see also* Evans, *supra* note 224, at 627; Weingast, *Fighting Fire*, *supra* note 228, at 143.

²⁵⁷ BACH & SMITH, *supra* note 101, at 5, 70–71, 112; *see also* Evans, *supra* note 224, at 627. For their argument about the non-exclusivity of partisan motivations, *see* BACH & SMITH, *supra* note 101, at 69, 82.

²⁵⁸ Sinclair, *House Special Rules*, *supra* note 227, at 482–83.

²⁵⁹ *See* SINCLAIR, *LEGISLATORS*, *supra* note 30, at 13 (“In a preorganizational legislative ‘state of nature,’ the membership as a whole possess all decision-making authority.”). Section 5 of Article I simply states that the House (like the Senate) “may determine the Rules of its Proceedings.” U.S. CONST. art. I, § 5. Thus, the constitutional starting point is that the House has the power to determine how it will exercise its share of the legislative authority granted under Article I. Consistent with this, the full membership of the House votes on the standing rules at the beginning of each Congress, with each member casting one vote equally weighted with that of every other member.

²⁶⁰ U.S. CONST. art. I, § 5.

²⁶¹ Even groups nominally committed to radical egalitarianism eventually figure that point out. *See, e.g.*, GEOFFREY HOSKING, *THE FIRST SOCIALIST SOCIETY: A HISTORY OF THE SOVIET UNION FROM WITHIN* 39

maintain a system of agency relationships under which rank-and-file members delegate important responsibilities and powers to managers. These agency relationships inevitably confer a measure of agenda control on managers. The question answered by the closed rule is how great that measure should be.

The current ascendancy of the closed rule represents the culmination of a movement, begun in the late 1970s, both to increase the agenda control of House managers and to divide that control between the committee chairs and leadership. Before the reforms of the early 1970s, most special rules were open.²⁶² Even so, floor-amending activity was modest, and House managers normally obtained the voting outcomes that they anticipated through the less formal agenda-control mechanisms provided by a powerful committee system.²⁶³ The reforms of the 1970s enabled the rank and file to reclaim discretionary legislative authority that had long been delegated to committee chairs, and, for several years following the reforms, they used that authority to exercise direct control over the House floor agenda.²⁶⁴ The rank and file substantially increased their floor-amendment activity,²⁶⁵ and the result was a markedly less orderly, less predictable, and less productive House. Measures brought to the floor often bogged down in numerous amendments; floor time for debate and voting increased; and ad hoc minority coalitions were able to delay and, occasionally, prevent passage of measures to which they objected.²⁶⁶ After securing the institutional reforms that they had thought would improve the House, the rank and file discovered that they were unable to discipline themselves. Frustrations with the disarray led the rank and file in 1979 to ask House managers to exercise greater authority over the floor.²⁶⁷

The first response of managers was to move only a half step away from the open amendment process then prevailing in the House. Managers began to

(1992) (describing centralization of authority within 1917 Petrograd Soviet); MURRAY MORGAN, *SKID ROAD: AN INFORMAL PORTRAIT OF SEATTLE* 201 (1982) (describing centralization of authority within Seattle labor unions' 1919 general strike committee).

²⁶² SINCLAIR, *UNORTHODOX LAWMAKING*, *supra* note 15, at 122–24.

²⁶³ SMITH, *supra* note 30, at 31; Weingast, *Floor Behavior*, *supra* note 95, at 797–98.

²⁶⁴ SMITH, *supra* note 30, at 24–28. Reformers associated the closed rule, which was used sparingly, with the excessive power of committee chairs (most notably, the chair of the Ways and Means Committee), and the Democratic caucus in 1973 put sharp restrictions on the use of the closed rule. RULES COMMITTEE HISTORY, *supra* note 11, at 216.

²⁶⁵ SINCLAIR, *LEGISLATORS*, *supra* note 30, at 48; SMITH, *supra* note 30, at 28–35.

²⁶⁶ BACH & SMITH, *supra* note 101, at 30–31; SINCLAIR, *LEGISLATORS*, *supra* note 30, at 77; SMITH, *supra* note 30, at 35–40.

²⁶⁷ BACH & SMITH, *supra* note 101, at 31, 33; SINCLAIR, *LEGISLATORS*, *supra* note 30, at 78; SMITH, *supra* note 30, at 40–45.

replace open rules with limiting rules that structured and bounded—but did not preclude—floor amendments.²⁶⁸ The rank and file endorsed this initially limited assertion of managerial control over the floor agenda.²⁶⁹ As managers became bolder and tested the limits of floor support during the 1980s and the 1990s, they found that the rank and file were willing to allow them greater control over the House agenda, including tolerance for regular use of the closed rule. Within three decades, then, the position occupied by the rank and file on agenda control became almost the polar opposite of what it had been. During the 1970s, the floor insisted on setting its own agenda and allowing almost unlimited amending activity; now, the rank and file delegate extensive discretionary control over the floor agenda to House managers and allow the managers to block amendments on half the controversial measures brought to the full House. The current concentration of managerial power no doubt will persist until the rank and file reassert self-governance on the floor.

The closed rule thus represents a rational (but nonetheless contingent) extension of the underlying agency relationships between the rank and file and House managers. Even without the closed rule, managers hold substantial agenda-setting power. By controlling the decisions of the Rules Committee, the speaker and the other members of leadership can refuse to bring an unprivileged measure to the floor, grant privileged status to an otherwise unprivileged measure, waive points of order that might otherwise derail a measure on the floor, and determine the time allowed for debate on a measure.²⁷⁰ The committee system allows the committees of jurisdiction, particularly their chairs,²⁷¹ to determine the policy content of whatever measures the committees report.²⁷² The additional authority to use the closed rule expands the power held by these managers. By causing the Rules Committee to report a closed rule, the speaker and other members of leadership determine that the version of a measure approved by them will be put to the full House in an up-or-down vote, subject only to the requirement that the rank and file ratify the rule. The closed rule magnifies the authority of committee chairs by sharply increasing the prospects that the policy decisions made

²⁶⁸ BACH & SMITH, *supra* note 101, at 50–74.

²⁶⁹ SMITH, *supra* note 30, at 74–83.

²⁷⁰ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 25–35.

²⁷¹ OLESZEK, *supra* note 24, at 90–93; Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 245–56 (1992).

²⁷² OLESZEK, *supra* note 24, at 81–90.

within the reporting committees will be the *only* policy decisions on the matter brought to a floor vote.²⁷³

Although the explanation offered here—that the closed rule constitutes a mechanism of general managerial agenda control—bears a resemblance to the explanation provided by partisan theory, the two accounts should be distinguished. According to partisan theory, the closed rule is an instrument for advancing the legislative program of the majority party and for disenfranchising the minority party. The rank and file of the majority party give the leadership of the majority party the power, as the rank and file's agent, to use the closed rule against the minority party, and the closed rule therefore operates to shift power from the minority to the majority. By contrast, the argument here is that the closed rule operates principally to shift power from the floor—where all members have equal status under the Constitution—to House managers as agents of the floor. By including the closed rule within the authority delegated to managers, the rank and file enlarge the power of managers at the expense not just of the minority but of the rank and file *as a whole*. Within the strictly majoritarian setting of the House, the point of the closed rule is as much to curb the amendment activity of the majority rank and file as it is to curb the amendment activity of the minority.

Partisan theory accounts for the greater use of the closed rule in the contemporary Congress as a function of increasing homogeneity among majority-party members. More homogeneity, partisan theory argues, implies less divergence of positions among members of the majority party and, accordingly, greater tolerance by the majority rank-and-file for use of the closed rule. But the record of the 109th and 110th Congresses indicates otherwise. As shown above, even the limiting rules in those Congresses

²⁷³ SMITH, *supra* note 30, at 188–95. Even so, the committees may not have sufficient power to roll the floor median. See Krehbiel, *Spatial Models*, *supra* note 91, at 280–81. Also as one game-theoretic analysis argues, because the House votes on the special rule after the committee proposes a measure, “the outcome that would occur under the open rule acts as a constraint on the degree to which the committee can bias the [measure] toward its preferred outcome.” Jeffrey S. Banks, *Committee Proposals and Special Rules*, 96 PROC. NAT’L ACAD. SCI. 8295 (1999). Taking a different approach, Jacob Gersen and Eric Posner argue that “delay rules” (such as multiple-reading requirements) can be understood in part as weakening the agenda control otherwise exercised by committee chairs; their point is that delay rules allow the rank and file to review the work of committees and organize floor opposition. Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 568–69 (2007). But “delay rules” (as well as many of the other legislative rules that Gersen and Posner describe) are routinely waived by special rules. Although Gersen and Posner acknowledge the possibility that Congress might waive its own timing rules, they argue (apparently without having examined legislative practice) that waiver is unlikely because it “can be costly in terms of reputation.” *Id.* at 556. That simply mischaracterizes the practice in the contemporary House.

disallowed more than half the amendments offered by members of the majority party.²⁷⁴ If homogeneity itself curbed floor amendment activity as well as partisan theory assumes it does, there should have been many fewer amendments submitted to the Rules Committee by the majority rank and file, and it should have been possible for managers to permit many more of those submitted amendments to be offered on the floor.

In fact, the shift by managers over the last twenty years from heavy reliance on limiting rules to heavy reliance on closed rules probably has burdened the rank and file of the majority more than it has burdened the minority. Over 40% of the limiting rules of the late 1970s and the early 1980s permitted amendments exclusively from the rank and file of the majority.²⁷⁵ Thus, the amendment activity of the majority was much less constrained during that period than was the amendment activity of the minority. By contrast, the closed rules used so frequently during the 109th and 110th Congresses allowed no amendments from either the majority or the minority, thereby putting greater restraints on the majority rank and file (relative to prior practice) than on the minority.²⁷⁶ In other words, the status quo in the 1970s and the 1980s, which depended heavily on limiting rules, effectively bridled the amendment activity of the minority; the movement toward the closed rule in the 1990s and the 2000s bridled the amendment activity of the majority rank and file as well.

Certainly House managers use the closed rule for partisan purposes; nonetheless, the closed rule is inherently managerial, not partisan. Even a House without parties (perhaps legislating for the faction-free republic envisioned by Madison) would need managers empowered with a certain level of agenda control to impose order. Such a House rationally could grant its managers the authority to use the closed rule; the question is only one of degree. Although the minority members in the House generally feel the effects of the closed rule more sharply than do the majority rank and file, that does not render the closed rule inherently partisan. When used, it binds all members of the rank and file equally.²⁷⁷ Put differently, the closed rule is fundamentally a mechanism for defining the relationship of the rank and file to their managers rather than one for defining the relationship of the majority party to the minority party.

²⁷⁴ See Part II.C.2.

²⁷⁵ BACH & SMITH, *supra* note 101, at 70–71.

²⁷⁶ Arguably, the minority is better off under a closed rule than the majority rank and file. Even though a closed rule blocks all floor amendments, the minority may offer a motion to recommit the underlying measure with instructions. See *supra* note 71.

²⁷⁷ See, e.g., ROHDE, *supra* note 253, at 112–13.

3. *Managerial Agenda Control and the Rank and File*

Granting managers the power to use the closed rule regularly requires the rank and file to surrender both their collective authority to manage the floor agenda directly and their individual power to offer amendments, but the rank and file derive compensating benefits from the arrangement.²⁷⁸ Most importantly, the rank and file ensure that the House as a whole is more orderly, predictable, and productive than it would be without the closed rule. In certain cases, this may enable individual members to capture gains from trade, just as distributive theory suggests. Furthermore, it seems highly likely that, as indicated by informational theory, the closed rule encourages the committees of jurisdiction to invest in the acquisition of policy expertise and to report measures informed by that policy expertise. By strengthening the sovereignty of the separate committees and their chairs, the closed rule allows the committees to act as micro-legislatures that produce the policies they judge best, subject only to the possibility of a veto by the full chamber.

That the full House derives genuine advantages from the consolidation of agenda control among managers explains the rank and file's tendency to ratify closed rules in almost all cases.²⁷⁹ That point has eluded certain political scientists who maintain that legislative agenda control in Congress likely "exist[s] either in very limited forms or not at all."²⁸⁰ Their argument is straightforward. Manipulations of the legislative agenda by managers—for example, through the closed rule—generally move policy outcomes away from the floor median and toward the managerial median. Therefore, the rank and file, in setting the institutional structure of the House, should not rationally confer on managers discretionary authority over the House floor agenda

²⁷⁸ Krehbiel, *Restrictive Rules*, *supra* note 230, at 942.

²⁷⁹ Other explanations are possible as well, of course. It may be that managers have significant institutional strength and that individual members are hesitant to challenge them when voting on closed rules. *See, e.g.*, SINCLAIR, *LEGISLATORS*, *supra* note 30, at 136–37, 156. Another possibility is that managers shrewdly calculate exactly how much agenda control they can exercise without suffering a reversal on the floor and then calibrate their decisions to use the closed rule accordingly. *See, e.g., id.* Yet another possibility is that managers effectively make procedural votes a point of party discipline—a possibility that is more likely to the extent that votes on procedure have lower salience for constituents than do votes on underlying measures. ARNOLD, *supra* note 9, at 121, 272; COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 29. But those explanations simply move the relevant question one step back: as a majoritarian institution, the full House always has the authority to curb its managers, and it rationally would do so if that were advantageous.

²⁸⁰ GERALD S. STROM, *THE LOGIC OF LAWMAKING: A SPATIAL THEORY APPROACH* 83–85 (1990). Mackie makes the same point in his argument that Riker overstated the importance and incidence of agenda control in Congress. MACKIE, *supra* note 117, at 166–68.

because the rank and file should not institutionalize arrangements that generally make themselves worse off.

But that argument ignores entirely the rational preference of the rank and file for order, predictability, and productivity. By endorsing managerial power to use the closed rule, the rank and file trade off non-manipulated floor agendas (which, presumably, would produce more substantive outcomes closer to the floor median) against well ordered floor proceedings (which likely produce fewer substantive outcomes closer to the floor median). Legislators may rationally prefer order, predictability, and productivity to chaos on the floor, even if they fully understand and anticipate that delegating discretionary agenda control to managers facilitates managerial agenda manipulation.²⁸¹ In any event, the reserved authority to reject a closed rule for any particular measure ensures that the rank and file do not leave themselves entirely unprotected against managerial agenda manipulation.²⁸²

B. Development of Substantive Policy

Normative assessment of the closed rule must take into account how its use may affect the substantive policy of measures passed by the House. Most prominently, the closed rule enables managers to move measures toward their own policy preferences; that may or may not be objectionable, depending on one's view about those preferences.²⁸³ Apart from that, the closed rule has

²⁸¹ David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181, 1198–1200 (1989) (discussing reasons the legislature might choose to adopt an open or closed rule).

²⁸² Cf. Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in POLITICAL SCIENCE: THE SCIENCE OF POLITICS 51, 72–73 (Herbert F. Weisberg ed., 1986) (“[N]ot knowing how conflicts will shape up, now or in the future, [political agents] develop mechanisms which enable positive collective action, on the one hand, but which possess aspects of insurance against renegeing, opportunism, and other adverse circumstances, on the other hand.”).

²⁸³ This point should not be misconstrued. The claims made in this Article are fundamentally agnostic about the *formation* of managerial policy preferences. That is, the claims here do not turn on whether managers come to a measure with strong policy preferences of their own rather than with the intent of simply aggregating the policy preferences of the rank and file. The important point is that the agency relationships in the House commit substantial discretion to managers and allow them to exercise outsized influence over what policy positions are passed by the House. Even if managers see their job as simply aggregating the rank and file's preferences into a legislative product, the agenda-setting power allows the managers to determine *how* the rank and file's preferences will be aggregated and enables the managers to ensure that the aggregated preferences (as determined by the managers) will have substantial advantages on the floor. That claim is distinct from any claim that the managers necessarily privilege their own policy preferences over the policy preferences of the rank and file. Stated differently, one can posit three sets of preferences: (1) the aggregate policy preferences of the rank and file, as determined by unmanaged floor voting; (2) the aggregate policy preferences of the rank and file, as determined by managers; and (3) the policy preferences of managers. Existing agency relationships and institutional structures preclude the preferences in (1) from controlling floor

other important effects that may be often or consistently undesirable. First, it reinforces the tendency of the committee system to produce fragmented policy and redundant legislation. Second, it facilitates capture of the legislative process by interest groups and by agents of the Executive Branch. Third, it polarizes the policy options offered on the floor, thereby impeding bipartisan cooperation and compromise. Each of these effects is considered below.

1. *Legislative Fragmentation and Redundancy*

The House committee system creates strong, largely autonomous committees with separate but often overlapping jurisdictions.²⁸⁴ That, in turn, generally leads to fragmentation of substantive policy and redundancy in federal statutory law. Committees of jurisdiction can pursue their own policy preferences while disregarding the preferences of other committees, and separate committees can report measures that fail to produce a coherent whole. In certain cases, two or more committees with overlapping jurisdiction report measures that yield duplicative or even inconsistent statutes; in other cases, the committees report measures on a single subject that leave significant gaps in federal law.²⁸⁵ Whatever may be the advantages and disadvantages of such legislative fragmentation and redundancy,²⁸⁶ the closed rule produces more of both.

Fragmentation and redundancy can be seen throughout federal legislation.²⁸⁷ Federal poverty relief, for example, is pursued through several non-coordinated programs.²⁸⁸ Three of those programs—the Supplemental Nutrition Assistance Program (commonly known as food stamps),²⁸⁹ Medicaid,²⁹⁰ and the earned income tax credit²⁹¹—have entirely separate rules

outcomes. The claim made here is that the agency relationships—as strengthened by the closed rule—strongly privilege the preferences in (2). Ultimately, the argument is indifferent as to whether the preferences in (2) do or do not coincide with the preferences in (3) in all or even very many cases.

²⁸⁴ See generally DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* (1997).

²⁸⁵ For examples involving tax and public welfare policy, see Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1204–08 (2006) (detailing how different congressional committees create conflicting programs aimed at alleviating poverty) and David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1830–36 (2006) (providing examples of redundancy in tax and spending programs).

²⁸⁶ See Weisbach, *supra* note 285, at 1843–49 (discussing benefits of redundancy).

²⁸⁷ Weingast, *Fighting Fire*, *supra* note 228, at 162.

²⁸⁸ Staudt, *supra* note 285, at 1197–99.

²⁸⁹ 7 U.S.C. §§ 2011–2036 (2006).

²⁹⁰ 42 U.S.C. §§ 1396–1396v (2006).

²⁹¹ 26 U.S.C. § 32 (2006).

for eligibility and assistance and are administered by three separate cabinet departments—the Department of Agriculture (food stamps), the Department of Health and Human Services (Medicaid), and the Treasury Department (the earned income tax credit). Rather than set up a comprehensive program providing the poor with food, medical care, and a cash subsidy for work, Congress has structured each of these three programs almost as though the other two did not exist. The redundancy can be attributed in part to the overlapping jurisdictional interests of different legislative committees. By dividing federal poverty relief into three distinct programs, three separate House committees of jurisdiction—Agriculture, Energy and Commerce, and Ways and Means—can exercise independent control over it.²⁹² Similarly, Congress fragments federal education policy, setting up programs administered and funded by the Department of Education²⁹³ but also providing an elaborate system of education-related tax credits, deductions, and exclusions administered by the Treasury Department.²⁹⁴ This confers jurisdictional power on both the Education and Labor Committee and the Ways and Means Committee.²⁹⁵ In these and many other areas, policy fragmentation and statutory redundancy allow multiple committees to claim legislative sovereignty over a single subject and to enjoy the power and prestige that attend oversight of federal programs and of the agencies that administer those programs.²⁹⁶

²⁹² STANDING RULES, *supra* note 22, r. X. The Appropriations and Budget Committees also have jurisdiction (although less directly). *Id.* For a political-economy argument that committee jurisdiction entrenches legislative redundancy, see Staudt, *supra* note 285, at 1214–22.

²⁹³ See, e.g., 20 U.S.C. §§ 1070a to 1070a-1 (2006) (Federal Pell Grant program).

²⁹⁴ See, e.g., 26 U.S.C. § 25A (2006) (tax credit for certain education expenses); *id.* § 127 (tax exclusion for certain employer-provided education assistance); *id.* § 221 (tax deduction for interest on certain education loans). Congress recently took a small step toward addressing the fragmentation of federal education policy. Section 1004(f)(1)(A) of the American Recovery and Reinvestment Act of 2009 requires the Secretary of the Treasury and the Secretary of Education to “study how to coordinate the credit allowed under section 25A of the Internal Revenue Code of 1986 with the Federal Pell Grant program under section 401 of the Higher Education Act of 1965 to maximize their effectiveness at promoting college affordability.” Pub. L. No. 111-5, § 1004(f)(1)(A), 123 Stat. 115, 315 (2009).

²⁹⁵ STANDING RULES, *supra* note 22, r. X. Again, both the Appropriations and Budget Committees also have jurisdiction. *Id.*

²⁹⁶ Consider the following example of the benefits to legislators. When asked about his aggressive efforts to raise campaign contributions from businesses regulated by his committee, Representative Barney Frank, the chair of the Financial Services Committee, flatly replied: “Financial services companies are inclined to give to me because I’m chairman of the committee important to their interests.” Jeffrey H. Birnbaum & John Solomon, *Democrats Offer Up Chairmen for Donors; Party’s Campaigns Had Faulted GOP for “Selling Access,”* WASH. POST, Feb. 24, 2007, at A1. Obviously, fragmentation increases the number of committee chairs who can seek contributions from the same interest groups.

The closed rule promotes legislative fragmentation by reinforcing the autonomy of committees and the managerial power of committee chairs.²⁹⁷ A measure brought to the floor under a closed rule generally reflects the policy preferences of the reporting committee and its chair, and other members who do not serve on the reporting committee cannot offer floor amendments to harmonize the measure with existing law or with the pending work of other committees. For example, the Ways and Means Committee might report a measure providing tax credits for certain educational expenses, and those tax credits might duplicate direct spending programs administered by the Department of Education. If the measure were brought to the floor under an open rule, a member (such as the chair of the Education and Labor Committee) could offer a floor amendment that would reduce or eliminate the duplication. But if the measure is brought up under a closed rule, no such amendment can be offered. This represents a downside of the effect, identified by distributive theory and informational theory, that the closed rule has in strengthening the committee system.

In theory, House leadership could reduce legislative fragmentation and redundancy by revising measures between committee reporting and floor consideration. A committee chair normally seeks a special rule for a measure reported by the committee, either to make the otherwise unprivileged measure in order or to protect the measure from potentially fatal points of order.²⁹⁸ Thus, leadership, acting through the Rules Committee, typically has leverage over the reporting committee and can demand changes to the measure before allowing the Rules Committee to report a rule for it. For example, when three separate committees—Education and Labor, Energy and Commerce, and Ways and Means—reported different versions of a measure for health-care reform in the summer of 2009, leadership merged the three measures into one before having the Rules Committee report an effectively closed rule for it.²⁹⁹

But leadership generally modifies measures in this way only when different committees, following multiple referral, report different versions of a single measure.³⁰⁰ Fragmentation and redundancy are less likely to be mitigated

²⁹⁷ Positive political theory supports this point. See Arthur T. Denzau & Robert J. MacKay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Voting Behavior*, 27 AM. J. POL. SCI. 740 (1983); see also Krehbiel, *Spatial Models*, *supra* note 91, at 306; Krishna & Morgan, *supra* note 118, at 436; Weingast, *Fighting Fire*, *supra* note 228, at 161.

²⁹⁸ OLESZEK, *supra* note 24, at 125–35.

²⁹⁹ H.R. Res. 903, 111th Cong. (2009).

³⁰⁰ See, e.g., SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 21 (describing leadership modification following multiple referral).

when committees report entirely separate measures. The Agriculture Committee, for example, might authorize a subsidy program to increase the amount of corn produced for ethanol, and the Ways and Means Committee might later create a tax credit for ethanol production that duplicates the subsidy. Even if leadership believed that, ideally, the federal government should provide corn farmers with only one subsidy, leadership would be unlikely to demand that the Ways and Means Committee withdraw the proposed ethanol tax credit. Leadership might not have the expertise to determine the extent to which the tax credit overlaps with the existing subsidy; more importantly, leadership might see little point in provoking the Ways and Means chair on a measure that does not, strictly speaking, require reconciliation with another measure. Such a move would rightly be understood by the Ways and Means chair as an encroachment on the committee's jurisdiction, and the chair almost certainly would fight leadership over the demand.³⁰¹

2. *Capture of the Legislative Process*

The closed rule also facilitates capture of the legislative process by interest groups and by officials and agencies of the Executive Branch. As recognized by distributive theory and informational theory, the closed rule strengthens House committees, increasing the likelihood that a measure passed by the House will reflect the policy preferences of whichever committee has jurisdiction over the measure.³⁰² It also reduces the number of House members exercising direct control over the policy content of the measure. This allows interest groups and Executive Branch agents to form stable, long-term relationships with committee chairs and other managers, and it reduces the chance that any deal struck with those legislators will unravel on the floor.

Legislators often rely on outside parties for information about matters of legislative interest.³⁰³ Even though committee members and their professional

³⁰¹ Although, in this example, the chair of the Agriculture Committee might bring the policy duplication or discontinuity to the attention of the Rules Committee by submitting a perfecting amendment to the Ways and Means measure when that measure is under review, the chair of the Agriculture Committee may rationally determine that her long-term interests are better served by allowing the Ways and Means Committee to do as it pleases so that the Ways and Means Committee will not interfere with her own exercise of jurisdiction in the future.

³⁰² See, e.g., Denzau & MacKay, *supra* note 297, at 759 ("Under the closed rule, . . . more sophisticated committee behavior, based on compromise and a careful crafting of committee bills, is shown to move legislative outcomes closer to the committee's preferred outcome.").

³⁰³ KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 297-300 (1986).

staffs have expertise about the subjects within their jurisdiction, the legislative function is too general for them to acquire and maintain the very detailed information available to interest groups and Executive Branch agents.³⁰⁴ Recognizing this, legislators regularly seek the views of outside parties through formal mechanisms (such as public testimony) and informal mechanisms (such as closed-door meetings), and they often form standing relationships with those parties.³⁰⁵ Whether and to what extent interest groups and Executive Branch agents successfully leverage this access to capture the legislative process depends on the particular terms and characteristics of their dealings with legislators. Nonetheless, with all other aspects of the legislative process held constant, the closed rule should make capture more likely.

Most significantly, the closed rule, in conjunction with the committee system, reduces the number of legislators over whom outside parties must gain and exercise influence. Rather than capture the entire membership—or even a majority of the membership—of the House, outside parties need only capture those managers on whom the closed rule confers discretionary authority to determine the policy content of legislative measures. By channeling legislation through committees, the House effectively channels the lobbying activities of interest groups and Executive Branch agents in the first instance to the relevant committee chairs. Because it prevents floor amendments, the closed rule minimizes the need for outside parties to deal with the floor. Consistent with this, political theory predicts that the size of winning coalitions on the floor will be smaller under a closed rule than under an open rule.³⁰⁶

Assume, for example, that the Department of Agriculture wants Congress to authorize a farm subsidy program that disinterested observers would regard as wasteful. Assume also that, through skillful lobbying, officials from the department have influenced the chair of the Agriculture Committee so that the chair is willing to defer to the department's opinion on the propriety of the program. The committee reports a measure authorizing the department's activities, including the subsidy program requested by the department. If the measure comes to the floor under an open rule, members who have not been influenced by the department's lobbying may remove the program from the measure by means of a floor amendment. To avoid that outcome, the department might have to expand its lobbying to include not only members of the Agriculture Committee but also a coalition on the floor large enough to

³⁰⁴ *Id.* at 297.

³⁰⁵ *Id.* at 290–94; SINCLAIR, LEGISLATORS, *supra* note 30, at 236.

³⁰⁶ Baron, *Noncooperative Theory*, *supra* note 227, at 1082.

defeat any unwelcome amendment. By contrast, if the measure comes to the floor under a closed rule, no such amendment would be in order. The subsidy program would stand or fall along with all the other programs authorized by the measure. Rather than having to persuade a majority of the House that the wasteful program should be authorized, under the closed rule the department need only persuade a majority of the committee members to include the program in the authorizing measure.

The combined effect of the committee system and the closed rule is to establish a bilateral monopoly between the managers who make policy decisions in the House and the interest groups and Executive Branch agents affected by those policy decisions. The two sides are locked into dealing with each other in a series of repeated interactions. Interest groups representing farmers and officials from the Department of Agriculture deal primarily with members of the Agriculture Committee; interest groups representing financial institutions and officials from the Securities Exchange Commission deal primarily with members of the Financial Services Committee; and parallel relationships exist between other interest groups and Executive Branch agents and other House committees. Such repeated interactions provide a foundation for long-term cooperation, and, over time, the two sides may be more willing to trade favors to perpetuate a mutually beneficial relationship.³⁰⁷ Certainly interest groups understand this, and they target their financial contributions to the managers with jurisdiction over matters important to them.³⁰⁸ Although the possibility of long-term cooperation between outside parties and managers does not ensure that the outside parties will be successful in capturing the managers, it does make capture more likely. The closed rule then insulates any deals between outside parties and managers from amendment on the floor.³⁰⁹

In certain cases, however, the closed rule may strengthen a committee chair who resists capture by forcing outside parties to accept whatever terms the chair offers. If a committee chair can credibly indicate that she expects a

³⁰⁷ See, e.g., DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 172–74 (1994); MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 66–67 (1987).

³⁰⁸ For example, as political interest in healthcare reform grew in recent years, “hospitals, insurers, and other medical interest groups hoping to shape the legislation to their advantage” made substantial campaign contributions to the Democratic chair of the Senate Finance Committee. Dan Eggen, *Industry Cash Flowed to Drafters of Reform; Key Senator Baucus Is a Leading Recipient*, WASH. POST, July 21, 2009, at A1.

³⁰⁹ That said, interest groups and Executive Branch agents can still enjoy legislative success under open rules without the need to capture a majority on the floor to the extent that legislators themselves enter into vote-trading arrangements. In other words, the closed rule does not provide a necessary condition for legislative capture.

measure to come to the floor under a closed rule, the interest groups or Executive Branch agents with an interest in the measure will have to work with the chair on the chair's terms. Still, the relationships between legislators on one side and interest groups and Executive Branch agents on the other appear to be characterized more by coziness than by antagonism. Public choice theory recognizes the possibility that legislators will use their positions to extract rents from interest groups,³¹⁰ but the eagerness of legislators to confer benefits on those groups presents the greater concern.³¹¹ Even when dealing with the Executive Branch, committee chairs have incentives to give officials and agencies more programs, more resources, and more authority. By enlarging the functions in the Executive Branch over which they exercise jurisdiction, committee chairs enhance their own power and prestige within Congress. Positive political theorists confirm that the closed rule enables the committees of jurisdiction to secure disproportionate benefits from the measures they report—benefits that they can confer on favored interest groups and Executive Branch agencies.³¹² On the whole, then, measures passed by the House with regular use of the closed rule should be more to the liking of interest groups and Executive Branch agents than they otherwise would be.³¹³

3. *Polarization of Policy Options*

The closed rule also weakens bipartisan lawmaking. Many observers have noted a general decline in cross-party cooperation and compromise in the contemporary House. The popular press has repeated this observation to the point of banality, and both Republican and Democratic members—including those with long service—report that the legislative process has become more

³¹⁰ See, e.g., J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155 (1989) (arguing that legislators use tax-reform proposals to extract rents from interest groups).

³¹¹ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21–33 (1991) (describing the economic theory of legislation).

³¹² See Denzau & Mackay, *supra* note 297; Guillaume R. Frechette, et al., *Bargaining in Legislatures: An Experimental Investigation of Open Versus Closed Amendment Rules*, 97 AM. POL. SCI. REV. 221, 230 (2003); Krehbiel, *Spatial Models*, *supra* note 91, at 296. Relatedly, political theory argues that distributive legislation will be more inefficient under the closed rule than under the open rule. See generally Baron, *Noncooperative Theory*, *supra* note 227; Baron, *Majoritarian Incentives*, *supra* note 227.

³¹³ The closed rule may also strengthen the position of the Legislative Branch as a whole relative to the Executive Branch. As argued in Part III.A.2 and Part III.C, the post-reform House leans more toward disorder when it uses the closed rule sparingly, thereby increasing the difficulty for Congress to assert its power vis a vis the Executive. To the extent that the closed rule enhances the inter-branch status and strength of Congress, the Executive Branch might suffer a net loss from the closed rule. However, if agents of the Executive Branch are nonetheless able to capture committee chairs and other managers on a case-by-case basis, any effects the closed rule has in strengthening Congress would only increase the payoff to those agents.

partisan over the last two or three decades.³¹⁴ More significantly, political scientists have substantiated the point: close observers of the House have documented an appreciable increase in partisan voting since the legislative reforms of the 1970s.³¹⁵

Regular use of the closed rule by House managers reinforces that movement away from bipartisan lawmaking, even if not by design. When managers bring a measure to the floor under a closed rule, they offer the rank and file a choice between ratifying the version of the measure that managers have approved and retaining the status quo. By blocking all amendments, the closed rule makes bipartisan compromise on the floor more difficult. The claim here is not that the regular use of the closed rule by House managers accounts for the decline of bipartisan cooperation and compromise in the contemporary House. Rather, the claim is that, with bipartisan lawmaking otherwise in decline, the regular use of the closed rule makes such cooperation and compromise even more difficult. Partisan theory, of course, argues that, because the majority party uses the closed rule for partisan advantage, greater polarization of positions between the parties leads to more closed rules. Whether or not that claim is correct, it is certainly the case that greater use of the closed rule effectively leads to greater polarization of the positions on which legislators are permitted to vote.

C. Effects on Democratic Government

A more serious normative criticism is the charge that the closed rule is inherently undemocratic. One version of this position, echoing the partisan theory account, considers the closed rule to be an instrument by which the majority stifles floor activity of the minority, thereby undermining deliberative lawmaking.³¹⁶ As shown above, however, that position mischaracterizes the role of the closed rule in the contemporary House.³¹⁷ Regular use of the closed rule binds the majority as well as the minority; it precludes floor amendments by all members and, as such, does not materially change the position of the minority within a majoritarian institution. Stated differently, the majority could routinely defeat unwanted floor amendments offered by the minority even in the absence of the closed rule. In the House, the floor position of the

³¹⁴ See, e.g., Joel Achenbach, *Bipartisan? Ha. Congress Creates a Desert Aisle; Left-Right Divide Is Now a "Hyperpartisan" Chasm*, WASH. POST, Sept. 5, 2009, at C1.

³¹⁵ ROHDE, *supra* note 253, at 14–15.

³¹⁶ See, e.g., OLESZEK, *supra* note 24, at 132; SMITH, *supra* note 30, at 44–45; Solomon & Wolfensberger, *supra* note 201, at 321–22, 349; Tiefer, *supra* note 120, at 259, 261; see also *supra* notes 12–18.

³¹⁷ See *supra* Part III.A.

minority is weak because the majority has more members, not because the majority uses the closed rule.

A stronger version of this criticism, drawing in part from the distributive theory and informational theory accounts, might argue that the closed rule undermines democratic government by centralizing discretionary agenda control in committee chairs and other managers. Framed narrowly, the argument is that the closed rule allows managers to preempt floor amendments, to foreclose meaningful deliberation among the rank and file, and even to manipulate the floor agenda to secure passage of the managers' policy preferences.³¹⁸ Framed broadly, the argument would be that *all* mechanisms of agenda control—as institutional structures that induce equilibria, in the language of positive political theory³¹⁹—frustrate democracy. As William Riker put the point: “[W]hen institutional stability is imposed on what would otherwise be a disequilibrium of tastes, the imposed equilibrium is necessarily unfair. That majority which would, were it not institutionally restrained, displace the current outcome is denied the opportunity to work its will.”³²⁰ If Riker is generally correct that institutionalized agenda control undermines democratic processes, the closed rule must itself be democratically suspect.³²¹

Without challenging Riker's fundamental insight that nominally democratic institutions have very serious problems when measured against democratic ideals, this Part offers a qualified defense of the democratic status of the closed rule. If Riker's point about the deficiency of democratic institutions is taken as given, the question about the legitimacy of the closed rule can be restated as whether the closed rule is less democratic than the open rule. This Part argues that, viewed from an *ex ante* perspective, even regular use of the closed rule is not inherently less democratic than regular use of the open rule precisely because of the closed rule's broadly managerial character. Without a concentration of discretionary legislative authority in managers, the activities of the House could quickly devolve into disorder, as they nearly have for brief periods in the recent past. The closed rule and other procedural tools for centralizing power ensure that the full membership can function as a body.

³¹⁸ See, e.g., Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1300, 1304 (2001) (arguing that non-open rules preclude public deliberation).

³¹⁹ Shepsle, *supra* note 91, at 35–37.

³²⁰ RIKER, *supra* note 83, at 192; see also *id.* at 137–39, 169–95, 200, 237.

³²¹ Indeed, Mackie, one of Riker's most prominent critics, does not even attempt to reconcile the closed rule to democratic ideals. Rather, Mackie argues that Riker overstated the incidence of agenda control in Congress and brushes aside the closed rule on the erroneous assumption that it is “seldom invoked.” MACKIE, *supra* note 117, at 169–71.

Certainly there is a tradeoff in practice: avoiding the turbulence of an entirely decentralized institution requires a delegation of managerial power to a subset of legislators, and too much managerial power threatens the democratic character of the House.³²² The regular use of the closed rule represents a considered effort by the rank and file to locate floor activity at the best point along a continuum between comprehensive managerial control and total legislative chaos.

1. The Chaos-Control Problem

Any democratic institution must confront the twin challenges of chaos and control. At one extreme, all members of a legislative body have equal authority, and no member or group of members has formal control over the institution's process or agenda. Any member can make any proposal at any time, and all questions are decided by majority vote. But this model inevitably tends toward chaos, with members potentially cycling through competing policy options and with the institution potentially unable to approve legislative measures.³²³ At the other extreme, members delegate key powers—such as agenda-setting power—to managers who establish the conditions for proposing and considering measures. That model inevitably tends toward dictatorial control, with managers potentially able to manipulate substantive outcomes.

Both extremes challenge democratic government. At the control extreme, managers exercise significantly greater influence over legislation than do the rank and file, and the policy preferences of managers carry greater institutional weight than do those of the rank and file. At the chaos extreme, no one member exercises outsized power over institutional decisions, but the institution as a whole is less able to discharge its legislative function. The fact that the House organizes its internal structure around a set of agency relationships does not avoid the chaos-control problem—it simply grounds it. The question is exactly *how* the agency relationships in the House strike the balance between too much autonomy for rank-and-file members and too much control for managers.

Consider first a possible structure with weak managers. Committees would produce initial drafts of legislative measures, but the measures would be routinely brought to the floor under open rules. Floor amending activity would be robust; the decisions of the committee chairs, the speaker, and the other

³²² SINCLAIR, LEGISLATORS, *supra* note 30, at 17.

³²³ See *supra* Part I.C (discussion of Arrow's Theorem and McKelvey's Theorem).

managers would be regularly reviewed and often overturned on the floor. Such a structure would have considerable advantages for the rank and file. Each member would have a genuine say in setting the floor agenda, and each member could offer amendments to any measure. The disadvantage of such a structure would be disorder on the floor. With 435 members equally empowered to participate in legislative activity, floor proceedings would be protracted and unruly. Controversial measures would draw numerous amendments—both those offered to change the policy positions in the measures and those offered simply to delay final passage. Under this structure, it might require weeks (if not months) for the House to dispose of a single measure.³²⁴

Contrast that with a possible structure having strong managers. Committees would report measures crafted to satisfy managers' policy preferences, and all measures would come to the floor under closed rules. The floor activity of the rank and file would be limited to ratifying or rejecting whatever was proposed by managers. The tradeoff under this structure would be clear as well. Although the House would be highly organized, predictable, and productive, it would be considerably more difficult for the rank and file to pursue their own policy preferences. The rank and file would choose the managers, but the managers—not the rank and file—would choose legislative outcomes.

The point here is straightforward. The managerial structure created by the existing agency relationships in the House represents an institutional framework for addressing the chaos-control problem. Just as representative government itself provides an agency-based solution to the difficulties of maintaining a direct democracy in the body politic, the managerial structure in the House provides an agency-based solution to the difficulties of maintaining a direct democracy among 435 otherwise coequal legislators.³²⁵ The extent of discretionary authority delegated to managers determines whether the House leans more toward chaos or more toward control, but the rank and file's delegation of such authority is no more inherently undemocratic than is constituents' delegation of legislative power to their elected representatives.

³²⁴ SINCLAIR, *LEGISLATORS*, *supra* note 30, at 143.

³²⁵ COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 9, at 9, 17–18, 24; OLESZEK, *supra* note 24, at 24; SINCLAIR, *LEGISLATORS*, *supra* note 30, at 9; *see also* Fiorina & Shepsle, *supra* note 30, at 37.

2. *The Closed Rule and the Chaos–Control Problem*

The closed rule represents an integral component of the rank and file's effort to select what they judge to be the best point along the chaos–control continuum. The rank and file understand that, by conferring broad discretionary authority on managers to make regular use of the closed rule, they surrender part of their autonomy as members, but they also understand that regular use of the closed rule enables the House to function effectively. This, of course, is a restatement of the basic proposition that the closed rule is one of the institutional structures allowing the House to reach equilibrium outcomes.³²⁶ The claim here is not that the current use of the closed rule *in fact* optimizes the tradeoff between the autonomy of individual members and managerial power; rather, the claim is that, in giving managers broad authority to make regular use of the closed rule, the rank and file *aim* to optimize the tradeoff. In other words, the current use of the closed rule represents a rational, deliberate decision by the rank and file to locate the floor activity of the House at a particular point along the chaos–control continuum.³²⁷

That said, the current use of the closed rule undoubtedly leans toward the control end of the continuum. As shown above, half the special rules during the 109th and 110th Congresses were either closed or effectively closed, allowing managers to present up-or-down votes on many measures brought to the floor.³²⁸ Nonetheless, the decision to allow regular use of the closed rule appears rational in light of recent periods during which the House, lacking strong managerial control, tended more toward chaos. The procedural reforms of the early 1970s encouraged extensive amending activity on the floor that led to a markedly less orderly, less predictable, and less productive House. In response, the rank and file granted managers expanded authority over special rules. Chaos briefly emerged again following the Republican takeover of the House in 1995. The Republicans had chafed under closed rules in the minority, and the new Republican majority in 1995 pledged that it would use the closed rule sparingly.³²⁹ But the Democratic minority quickly demonstrated the case for managerial control. As the Republicans tried to pass the measures constituting the “Contract with America” during the early days of

³²⁶ Shepsle & Weingast, *supra* note 95, at 514; Shepsle, *supra* note 91, at 54–55.

³²⁷ Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 40 (2000) (arguing that courts, in following the *numerus clausus* principle, aim to optimize standardization in forms of property ownership).

³²⁸ See *supra* Part IIA.

³²⁹ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 29.

the 104th Congress, Democrats offered numerous amendments intended to draw floor debate out as long as possible.³³⁰ The rank and file again made a clear choice for control over chaos and allowed House managers to begin bringing up more measures under closed rules.³³¹

Still, the current structure does not locate the House completely at the control end of the continuum. The rank and file do not give managers unreviewable discretion over when and how to use the closed rule. Instead, the rank and file require that any closed rule be brought to the floor as a proposed resolution subject to debate and a vote by the full membership. Although the rank and file use their authority to overrule managers' decisions about the closed rule sparingly, the retained power to do so on a case-by-case basis remains important. Managers cannot simply disregard the preferences of the rank and file regarding the availability of floor amendments.

3. *The Closed Rule and Representative Democracy*

Because the closed rule narrows the scope of permissible floor activity for the rank and file, it also narrows the range of legislative activity through which the rank and file can pursue the policy preferences of their constituents. Although legislators have complex motivations that inform their conduct,³³² all members of the House must—to a greater or lesser extent—respond to constituent interests. By conferring substantial discretionary authority on managers, the rank and file generally make themselves weaker agents of their constituents. The closed rule in particular enlarges the authority of managers over the House floor agenda, and this results in fewer opportunities for rank-and-file members to pursue constituent policy preferences through floor amendments.³³³ Nonetheless, this structure does not inherently undermine representative democracy; instead, it substitutes one version of representative democracy for another. The rank and file choose to make themselves weaker agents of their constituents precisely so that the House will be orderly, predictable, and productive.³³⁴

³³⁰ *Id.*; OLESZEK, *supra* note 24, at 128.

³³¹ SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 280.

³³² ARNOLD, *supra* note 9, at 121–22; SINCLAIR, LEGISLATORS, *supra* note 30, at 10; Garrett & Vermeule, *supra* note 318, at 1287–90; *see also* John W. Kingdon, *Models of Legislative Voting*, 39 J. POL. 563 (1977).

³³³ This proposition, of course, ignores the more fundamental problems of determining policy preferences of a representative's constituents and of reconciling inconsistent preferences among those constituents. *See, e.g.*, Fiorina & Shepsle, *supra* note 30, at 21.

³³⁴ *Cf.* SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 284.

Although the closed rule generally makes it more difficult for members to pursue constituent policy preferences, there are important exceptions. First, the closed rule increases the institutional power of members who are themselves managers. A member holding a leadership position enjoys much more control over the House floor agenda than she would if such control were evenly distributed among the full membership. Similarly, the chair of a committee of jurisdiction can better influence the policy content of measures produced by the committee than can other members. To the extent that managers are otherwise inclined to advance their constituents' policy preferences, the closed rule strengthens the position of managers to do so. Still, the point should not be overstated. House managers are not numerous; only a few members occupy leadership positions, and even a committee chair exercises managerial control only over the work product of her particular committee.

Second, even rank-and-file members do not completely lose the ability to pursue constituent policy preferences under the closed rule. Rank-and-file members still introduce measures, participate in committee work, and vote on the floor. Even on the question of setting the House floor agenda, the rank and file retain *some* control that can be exercised on behalf of their constituents. Specifically, rank-and-file members can vote down a closed rule, forcing managers to rewrite the rule; if they are truly dissatisfied with a closed rule, they can reject the motion for the previous question on the rule, thereby taking from leadership the authority to write the rule for the underlying measure.

The important point, however, is that the control retained by the rank and file over the House floor agenda is only the residual authority of a principal to monitor its agent and to ratify or reject its agent's decisions. Inevitably, this affects the degree of constituent influence over legislative outcomes. If the rank and file did not delegate such extensive agenda control to managers, constituents attempting to influence their representatives' legislative actions would stand in a simple principal-agent relationship with the members having direct control over the floor agenda. Instead, under the managerial structure in which the closed rule is embedded, constituents stand in a principal-agent relationship with members who in turn stand in a principal-agent relationship with the managers having direct control over the floor agenda. Constituents are thus twice removed from key procedural decisions affecting—and sometimes determining—legislative outcomes.

The closed rule's most significant effect on the constituents of rank-and-file members is the constituents' diminished ability to have their representatives affect the policy content of measures through floor amendments. This does not imply, however, that the closed rule necessarily undermines representative democracy. Rather, the closed rule helps to shape a particular version of representative democracy—one that provides the rank and file fewer opportunities to advance constituent policy preferences on the floor but makes the House as a whole more orderly, predictable, and productive. Again, the rank and file face a tradeoff when they make basic organizational decisions. Making the closed rule generally available expands managerial control over the floor, which narrows the floor activity of the rank and file and diminishes the direct representation of their constituents' interests. But prohibiting closed rules would result in less managerial control and greater chaos. Although the rank and file would be able to offer floor amendments representing the policy preferences of their constituents, it would become more difficult for the House as a whole to move measures to final passage.³³⁵

It is not clear, *ex ante*, that one of those competing institutional structures serves representative democracy better than the other. At one extreme, bringing all measures to the floor under open rules increases the prospects that the rank and file's floor activity will reflect constituent policy preferences; however, it may also reduce that floor activity to an exercise in futility as members become caught up in protracted debate and position cycling. Representative democracy would be poorly served by a House mired in chaos. At the other extreme, bringing all measures to the floor under closed rules enables the House to function more effectively, but it increases the likelihood that measures put before the rank and file will not correspond to the policy preferences of their constituents. Representative democracy would also be poorly served by a House in which the floor activity of the rank and file is limited to ratifying or rejecting the policy decisions of managers.

The degree of discretion that the rank and file confer on managers in their use of the closed rule helps to determine where the House locates itself between these two endpoints. The rank and file in the contemporary House authorize regular use of the closed rule not to undermine representative democracy but to actualize a particular version of it—a version that is not inherently less legitimate than one in which no rules are closed. Nonetheless, the current arrangement remains contingent on the preferences of the rank and

³³⁵ Cf. OLESZEK, *supra* note 24, at 132; SINCLAIR, UNORTHODOX LAWMAKING, *supra* note 15, at 279.

file—however well or poorly aggregated those preferences may be. Future Congresses no doubt will change the equilibrium observed in recent Congresses, either by decreasing or even increasing managerial authority to use the closed rule.

CONCLUSION

When properly situated within its institutional and theoretical context, the closed rule stands out as a critical mechanism by which managers control the floor agenda in the House. The closed rule allows managers to determine which policy positions will be considered on the floor (spatial agenda control) and the time allocated to each measure brought up for debate and voting (temporal agenda control). Managers use this agenda control to move measures toward their preferred policy positions. Although both parties object to the closed rule when numbered as the minority, the record in the 109th and 110th Congresses shows that both parties now make the same use of the closed rule when numbered as the majority. Specifically, both parties use closed and effectively closed rules for half the controversial measures brought to the floor.

Understanding the closed rule is critical for assessing the legislative process. The closed rule reinforces the strong internal agency relationships that the rank and file use to organize the activities of the House. By conferring on managers broad discretionary control over the floor agenda, the closed rule strengthens both leadership and the committee chairs. The rank and file retain final authority to ratify or reject managers' decisions about when and how to use the closed rule, but outright rejection of a closed rule on the floor—such as the defeat of House Resolution 336 that angered President Reagan—is a rare event. The closed rule thus bears directly and importantly on the internal structure of the House: it contributes significantly to the concentration of legislative power among a handful of members holding managerial positions and correspondingly weakens the institutional position of the rank and file. Although positive political theory locates the closed rule in specifically distributive, informational, and partisan theories of legislative organization, the closed rule is more accurately understood, by generalizing those accounts, as broadly managerial.

The closed rule affects the substance of the House's legislative product and the relationship between House members and their constituents. The closed rule contributes to legislative fragmentation and redundancy, increases capture opportunities for interest groups and Executive Branch agents, and makes

bipartisan cooperation and compromise more difficult. Additionally, the closed rule generally diminishes the ability of the rank and file to pursue constituent interests by preventing members from offering floor amendments that might move the policy content of measures closer to their constituents' policy preferences. But that is part of a considered, deliberate, and rational tradeoff: by allowing managers to restrict their amendment activity, the rank and file steer the floor safely away from the chaos that could result from a weaker managerial structure. The closed rule functions within a particular version of representative democracy—a version in which the rank and file delegate substantial discretionary control over the House floor agenda to make the House more orderly, predictable, and productive. Thus understood, the normative case against the closed rule remains doubtful.

APPENDIX 1

HOUSE RESOLUTION 587—SPECIAL RULE FOR THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009³³⁶

Resolved, That upon the adoption of this resolution it shall be in order to consider in the House the bill (H.R. 2454) to create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy. All points of order against consideration of the bill are waived except those arising under clause 9 or 10 of rule XXI. In lieu of the amendment recommended by the Committee on Energy and Commerce now printed in the bill, an amendment in the nature of a substitute consisting of the text of H.R. 2998, modified by the amendment printed in part A of the report of the Committee on Rules accompanying this resolution, shall be considered as adopted. The bill, as amended, shall be considered as read. All points of order against provisions of the bill, as amended, are waived. The previous question shall be considered as ordered on the bill, as amended, and on any further amendment thereto to final passage without intervening motion except: (1) three hours of debate, with two and one-half hours equally divided and controlled by the chair and ranking minority member of the Committee on Energy and Commerce and 30 minutes equally divided and controlled by the chair and ranking minority member of the Committee on Ways and Means; (2) the further amendment in the nature of a substitute printed in part B of the report of the Committee on Rules, if offered by Representative Forbes of Virginia or his designee, which shall be in order without intervention of any point of order except those arising under clause 9 or 10 of rule XXI, shall be considered as read, and shall be separately debatable for 30 minutes equally divided and controlled by the proponent and an opponent; and (3) one motion to recommit with or without instructions.

³³⁶ H.R. Res. 587, 111th Cong. (2009) (enacted).

APPENDIX 2-A

RESOLUTIONS REPORTED BY THE
RULES COMMITTEE IN THE 109TH CONGRESS

Rule Designations:

C – Closed Rule

EC – Effectively Closed Rule

L – Limiting Rule

O – Open Rule

X – Rule Not Addressing Floor Amendment Process³³⁷

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³³⁸	Total Amndts. Permitted
1.	42	109-1	L	3	3
2.	59	109-2	C		0
3.	71	109-3	X		n/a
4.	75	109-4	L	20	5
5.	95	109-6	EC	5	1
6.	96	109-7	EC		1
7.	125	109-10	EC	6	2
8.	126	109-11	EC	12	3
9.	140	109-14	L	34	10 ³³⁹
10.	144	109-15	L	34	12 ³⁴⁰
11.	151	109-18	O		All
12.	154	109-19	L	22	4
13.	162	109-20	C		0
14.	163	109-21	X		n/a
15.	181	109-27	X		n/a
16.	182	109-28	C		0
17.	202	109-35	EC		1
18.	211	109-43	C		0
19.	219	109-43	L	89	30

³³⁷ This designation generally includes resolutions that provide the terms of floor debate, waive standing rules, make in order motions to suspend the rules, or provide for consideration of a conference report. It does not, however, include resolutions that provide for consideration of Senate measures or Senate amendments to House measures; because those resolutions sometimes allow floor amendments, they are included among the resolutions designated as closed, effectively closed, limiting, or open rules. Cf. KREHBIEL, INFORMATION, *supra* note 47, at 166 (excluding such resolutions from consideration).

³³⁸ The Rules Committee makes available summaries of amendments submitted for some, but not all, measures.

³³⁹ House Resolutions 140 and 144 set forth rules for a single underlying measure; together, they allow 22 of the 34 amendments submitted to the Rules Committee for that measure. See H.R. Res. 140, 109th Cong. (2005); H.R. Res. 144, 109th Cong. (2005).

³⁴⁰ House Resolutions 140 and 144 set forth rules for a single underlying measure; together, they allow 22 of the 34 amendments submitted to the Rules Committee for that measure. See H.R. Res. 140; H.R. Res. 144.

	Resolution No.	House Report No.	Rule Type	Total Amdts. Submitted³³⁸	Total Amdts. Permitted
20.	235	109-55	C		0
21.	236	109-56	EC	11	2
22.	241	109-59	C		0 ³⁴¹
23.	242	109-60	X		n/a
24.	248	109-63	X		n/a
25.	254	109-69	EC	8	3
26.	255	109-70	O	3	All
27.	258	109-73	X		n/a
28.	268	109-76	L	26	10
29.	269	109-77	L	13	5
30.	278	109-83	L	89	24
31.	287	109-87	O		All
32.	291	109-94	O		All
33.	293	109-96	L	85	29
34.	298	109-97	O		All
35.	303	109-105	O		All
36.	304	109-106	C		0
37.	314	109-122	O		All
38.	315	109-127	O		All
39.	319	109-132	L	29	28
40.	330	109-140	EC		1
41.	331	109-141	EC	10	1
42.	334	109-144	L	11	5
43.	337	109-148	O		All
44.	341	109-155	O		All
45.	342	109-156	O		All
46.	345	109-159	X		n/a
47.	346	109-160	L	7	7
48.	351	109-163	C, C, C, C		0 ³⁴²
49.	365	109-175	L	68	39
50.	369	109-178	L	63	20
51.	370	109-179	L	9	6
52.	379	109-183	EC		1
53.	380	109-184	L	12	4
54.	385	109-185	C		0
55.	386	109-186	C		0
56.	387	109-187	C		0
57.	392	109-198	X		n/a
58.	393	109-199	X		n/a
59.	394	109-200	X		n/a
60.	395	109-201	X		n/a

³⁴¹ House Resolution 241 is a self-executing rule providing that, upon its adoption, House Resolution 240 is itself adopted. H.R. Res. 241, 109th Cong. (2005). House Resolution 241 is counted as a closed rule because it does not permit any floor amendment to House Resolution 240. *Id.*

³⁴² House Resolution 351 provides closed rules for four separate measures. *See* H.R. Res. 351, 109th Cong. (2005).

	Resolution No.	House Report No.	Rule Type	Total Amdmts. Submitted³³⁸	Total Amdmts. Permitted
61.	396	109-202	X		n/a
62.	399	109-212	X		n/a
63.	400	109-214	X		n/a
64.	401	109-214	C		0
65.	426	109-217	X		n/a
66.	436	109-219	O		All
67.	439	109-221	C		0
68.	440	109-222	O		All
69.	451	109-227	L	8	5
70.	455	109-229	L	25	12
71.	462	109-236	L	50	12
72.	468	109-238	X		n/a
73.	469	109-239	C		0
74.	470	109-240	EC	12	2
75.	474	109-242	X		n/a
76.	481	109-245	EC		1
77.	493	109-248	C		0
78.	494	109-249	L	6	5
79.	508	109-253	EC		2
80.	509	109-254	L	28	9
81.	520	109-257	X		n/a
82.	527	109-266	L	15	11
83.	532	109-270	X		n/a
84.	538	109-277	X		n/a
85.	539	109-278	X		n/a
86.	540	109-279	L		9
87.	542	109-281	C		0
88.	558	109-301	C		0 ³⁴³
89.	558	109-301	L	6	5 ³⁴⁴
90.	559	109-302	X		n/a
91.	560	109-303	C		0
92.	563	109-306	X		n/a
93.	564	109-308	X		n/a
94.	565	109-309	X		n/a
95.	572	109-312	C		0
96.	583	109-328	C		0
97.	588	109-330	EC		1
98.	595	109-343	X		n/a
99.	596	109-344	X		n/a
100.	602	109-346	C		0
101.	610	109-347	L	131	15 ³⁴⁵

³⁴³ The Rules Committee reported two separate resolutions numbered 558 for two separate measures. The resolution referenced here sets forth a closed rule for H.R.J. Res. 72, 109th Cong. (2005), a continuing resolution for fiscal year 2006.

³⁴⁴ The Rules Committee reported two separate resolutions numbered 558 for two separate measures. The resolution referenced here sets forth a limiting rule for H.R. 1065, 109th Cong. (2005), the United States Boxing Commission Act.

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted³³⁸	Total Amndts. Permitted
102.	619	109-348	C		0
103.	620	109-349	X		n/a
104.	621	109-350	L	131	21 ³⁴⁶
105.	623	109-355	X		n/a
106.	631	109-357	X		n/a
107.	632	109-358	X		n/a
108.	639	109-361	X		n/a
109.	640	109-363	X		n/a
110.	653	109-366	C		0
111.	654	109-367	X		n/a
112.	702	109-381	X		n/a
113.	710	109-386	L	11	6
114.	713	109-387	L	25	15
115.	725	109-391	O		All
116.	741	109-399	L	103	15 ³⁴⁷
117.	742	109-401	L	103	8 ³⁴⁸
118.	755	109-404	C		0
119.	766	109-405	X		n/a
120.	767	109-406	X		n/a
121.	774	109-438	L	25	6
122.	783	109-441	L	74	9
123.	789	109-450	L	34	15
124.	805	109-458	X		n/a
125.	806	109-459	L	55	8 ³⁴⁹
126.	810	109-460	X		n/a
127.	811	109-461	L	55	23 ³⁵⁰
128.	815	109-466	X		n/a
129.	816	109-467	L	4	4
130.	817	109-468	EC	22	3

³⁴⁵ House Resolutions 610 and 621 set forth rules for a single underlying measure; together, they allow 36 of the 131 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 610, 109th Cong. (2005); H.R. Res. 621, 109th Cong. (2005).

³⁴⁶ House Resolutions 610 and 621 set forth rules for a single underlying measure; together, they allow 36 of the 131 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 610, 109th Cong. (2005); H.R. Res. 621, 109th Cong. (2005).

³⁴⁷ House Resolutions 741 and 742 set forth rules for a single underlying measure; together, they allow 23 of the 103 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 741, 109th Cong. (2006); H.R. Res. 742, 109th Cong. (2006).

³⁴⁸ House Resolutions 741 and 742 set forth rules for a single underlying measure; together, they allow 23 of the 103 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 741, 109th Cong. (2006); H.R. Res. 742, 109th Cong. (2006).

³⁴⁹ House Resolutions 806 and 811 set forth rules for a single underlying measure; together, they allow 31 of the 55 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 806, 109th Cong. (2006); H.R. Res. 811, 109th Cong. (2006).

³⁵⁰ House Resolutions 806 and 811 set forth rules for a single underlying measure; together, they allow 31 of the 55 amendments submitted to the Rules Committee for that measure. *See* H.R. Res. 806, 109th Cong. (2006); H.R. Res. 811, 109th Cong. (2006).

	Resolution No.	House Report No.	Rule Type	Total Ammdts. Submitted ³³⁸	Total Ammdts. Permitted
131.	818	109-469	O		All
132.	821	109-472	O		All
133.	830	109-477	O		All
134.	832	109-479	O		All
135.	835	109-480	C		0
136.	836	109-481	O		All
137.	842	109-482	C		0
138.	849	109-487	L	7	7
139.	850	109-491	L	27	8
140.	851	109-492	O		All
141.	862	109-498	X		n/a ³⁵¹
142.	862	109-498	X		n/a ³⁵²
143.	865	109-501	O		All
144.	868	109-502	C		0
145.	877	109-507	O		All
146.	878	109-516	EC		2
147.	885	109-517	C		0
148.	886	109-518	C		0
149.	890	109-529	O		All
150.	891	109-530	L	24	16
151.	896	109-539	C		0
152.	897	109-540	L	21	5
153.	906	109-530	L	3	2
154.	907	109-551	EC	3	1
155.	910	109-554	L		4
156.	918	109-573	C		0
157.	920	109-577	L	4	3
158.	924	109-578	C		0
159.	925	109-579	C		0
160.	939	109-595	C	3	0
161.	946	109-598	X		n/a
162.	947	109-599	L	10	6
163.	951	109-602	X		n/a
164.	952	109-603	L	24	6
165.	958	109-606	X		n/a
166.	966	109-613	C, C		0 ³⁵³
167.	981	109-642	L	9	7
168.	996	109-646	C		0
169.	997	109-647	L	9	5
170.	1002	109-653	C		0

³⁵¹ The Rules Committee reported two separate resolutions numbered 862 for two separate measures. The resolution referenced here waives a procedural rule in the standing rules. See H.R. Res. 862, 109th Cong. (2006).

³⁵² The Rules Committee reported two separate resolutions numbered 862 for two separate measures. The resolution referenced here provides for consideration of a conference report. *Id.*

³⁵³ House Resolution 966 provides closed rules for two separate measures. See H.R. Res. 966, 109th Cong. (2006).

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted³³⁸	Total Amndts. Permitted
171.	1003	109-654	C		0 ³⁵⁴
172.	1015	109-670	C		0
173.	1018	109-671	C, C, C		0 ³⁵⁵
174.	1037	109-677	X		n/a
175.	1038	109-678	C		0
176.	1039	109-679	C		0
177.	1042	109-688	C		0
178.	1045	109-690	X		n/a
179.	1046	109-691	X		n/a
180.	1047	109-692	C		0
181.	1054	109-701	C, C		0 ³⁵⁶
182.	1062	109-703	X		n/a
183.	1092	109-718	C		0
184.	1093	109-719	X		n/a
185.	1100	109-723	C		0
186.	1101	109-724	X		n/a
187.	1105	109-727	C		0

³⁵⁴ House Resolution 1003 is a self-executing rule providing that, upon its adoption, House Resolution 1000 is itself adopted. H.R. Res. 1003, 109th Cong. (2006). House Resolution 1003 is counted as a closed rule because it does not permit any floor amendment to House Resolution 1000. *Id.*

³⁵⁵ House Resolution 1018 provides closed rules for three separate measures. *See* H.R. Res. 1018, 109th Cong. (2006).

³⁵⁶ House Resolution 1054 provides closed rules for two separate measures. *See* H.R. Res. 1054, 109th Cong. (2006).

APPENDIX 2-B

FLOOR OUTCOMES FOR SPECIAL RULES IN THE 109TH CONGRESS

Rule Designations:

C – Closed Rule

EC – Effectively Closed Rule

L – Limiting Rule

O – Open Rule

	Resolution No.	Rule Type	Recorded Vote on Floor³⁵⁷	Outcome on Floor
1.	42	L	No	Passed
2.	59	C	No	Passed
3.	75	L	Yes	Passed
4.	95	EC	No	Passed
5.	96	EC	No	Passed
6.	125	EC	No	Passed
7.	126	EC	Yes	Passed
8.	140	L	No	Passed
9.	144	L	No	Passed
10.	151	O	No	Passed
11.	154	L	Yes	Passed
12.	162	C	—	Laid on Table
13.	182	C	—	Laid on Table
14.	202	EC	No	Passed
15.	211	C	Yes	Passed
16.	219	L	No	Passed
17.	235	C	No	Passed
18.	236	EC	No	Passed
19.	241	C	Yes	Passed
20.	254	EC	No	Passed
21.	255	O	No	Passed
22.	268	L	No	Passed
23.	269	L	No	Passed
24.	278	L	Yes	Passed
25.	287	O	No	Passed
26.	291	O	No	Passed
27.	293	L	Yes	Passed
28.	298	O	No	Passed
29.	303	O	No	Passed
30.	304	C	No	Passed
31.	314	O	No	Passed
32.	315	O	No	Passed
33.	319	L	No	Passed

³⁵⁷ A resolution is designated as “yes” if there was a recorded vote either on the motion to order the previous question or on passage of the resolution.

	Resolution No.	Rule Type	Recorded Vote on Floor³⁵⁷	Outcome on Floor
34.	330	EC	No	Passed
35.	331	EC	No	Passed
36.	334	L	Yes	Passed
37.	337	O	No	Passed
38.	341	O	No	Passed
39.	342	O	Yes	Passed
40.	346	L	No	Passed
41.	351	C, C, C, C	Yes	Passed
42.	365	L	Yes	Passed
43.	369	L	Yes	Passed
44.	370	L	No	Passed
45.	379	EC	No	Passed
46.	380	L	No	Passed
47.	385	C	Yes	Passed
48.	386	C	Yes	Passed
49.	387	C	Yes	Passed
50.	401	C	—	Laid on Table
51.	436	O	No	Passed
52.	439	C	Yes	Passed
53.	440	O	No	Passed
54.	451	L	Yes	Passed
55.	455	L	Yes	Passed
56.	462	L	Yes	Passed
57.	469	C	No	Passed
58.	470	EC	Yes	Passed
59.	481	EC	Yes	Passed
60.	493	C	No	Passed
61.	494	L	Yes	Passed
62.	508	EC	No	Passed
63.	509	L	Yes	Passed
64.	527	L	Yes	Passed
65.	540	L	Yes	Passed
66.	542	C	—	Laid on Table
67.	558	C	Yes	Passed
68.	558	L	Yes	Passed
69.	560	C	No	Passed
70.	572	C	Yes	Passed
71.	583	C	No	Passed
72.	588	EC	No	Passed
73.	602	C	Yes	Passed
74.	610	L	Yes	Passed
75.	619	C	Yes	Passed
76.	621	L	Yes	Passed
77.	653	C	Yes	Passed
78.	710	L	No	Passed
79.	713	L	No	Passed
80.	725	O	Yes	Passed
81.	741	L	Yes	Passed

	Resolution No.	Rule Type	Recorded Vote on Floor³⁵⁷	Outcome on Floor
82.	742	L	Yes	Passed
83.	755	C	Yes	Passed
84.	774	L	Yes	Passed
85.	783	L	Yes	Passed
86.	789	L	Yes	Passed
87.	806	L	Yes	Passed
88.	811	L	Yes	Passed
89.	816	L	No	Passed
90.	817	EC	Yes	Passed
91.	818	O	Yes	Passed
92.	821	O	Yes	Passed
93.	830	O	Yes	Passed
94.	832	O	Yes	Passed
95.	835	C	Yes	Passed
96.	836	O	Yes	Passed
97.	842	C	Yes	Passed
98.	849	L	No	Passed
99.	850	L	Yes	Passed
100.	851	O	No	Passed
101.	865	O	Yes	Passed
102.	868	C	Yes	Passed
103.	877	O	Yes	Passed
104.	878	EC	—	Laid on Table
105.	885	C	Yes	Passed
106.	886	C	Yes	Passed
107.	890	O	Yes	Passed
108.	891	L	No	Passed
109.	896	C	Yes	Passed
110.	897	L	Yes	Passed
111.	906	L	Yes	Passed
112.	907	EC	No	Passed
113.	910	L	No	Passed
114.	918	C	No	Passed
115.	920	L	Yes	Passed
116.	924	C	—	Laid on Table
117.	925	C	Yes	Passed
118.	939	C	—	Laid on Table
119.	947	L	Yes	Passed
120.	952	L	Yes	Passed
121.	966	C, C	Yes	Passed
122.	981	L	Yes	Passed
123.	996	C	Yes	Passed
124.	997	L	No	Passed
125.	1002	C	Yes	Passed
126.	1003	C	Yes	Passed
127.	1015	C	Yes	Passed
128.	1018	C, C, C	Yes	Passed
129.	1038	C	Yes	Passed

	Resolution No.	Rule Type	Recorded Vote on Floor³⁵⁷	Outcome on Floor
130.	1039	C	Yes	Passed
131.	1042	C	Yes	Passed
132.	1047	C	—	Laid on Table
133.	1054	C, C	Yes	Passed
134.	1092	C	—	Laid on Table
135.	1100	C	Yes	Passed
136.	1105	C	No	Passed

APPENDIX 3-A

RESOLUTIONS REPORTED BY THE
RULES COMMITTEE IN THE 110TH CONGRESS

Rule Designations:

C – Closed Rule

EC – Effectively Closed Rule

L – Limiting Rule

O – Open Rule

X – Rule Not Addressing Floor Amendment Process³⁵⁸

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³⁵⁹	Total Amndts. Permitted
1.	65	110-1	C		0
2.	66	110-2	C		0
3.	86	110-3	EC		1
4.	116	110-6	C		0
5.	133	110-9	O		All
6.	157	110-12	C		0
7.	161	110-13	X		n/a
8.	195	110-25	O		All
9.	203	110-26	EC	16	3
10.	214	110-31	O		All
11.	215	110-32	O		All
12.	219	110-34	C		0
13.	229	110-36	L	24	6
14.	242	110-49	EC	8	2
15.	254	110-53	L	13	7
16.	260	110-63	C	15	0
17.	261	110-64	C		0
18.	269	110-73	C		0
19.	270	110-74	L	19	8
20.	274	110-78	L	27	12
21.	275	110-79	EC	22	3
22.	301	110-96	O		All
23.	302	110-97	L	6	3
24.	317	110-98	C, C		0 ³⁶⁰

³⁵⁸ This designation generally includes resolutions that provide the terms of floor debate, waive standing rules, make in order motions to suspend the rules, or provide for consideration of a conference report. It does not, however, include resolutions that provide for consideration of Senate measures or Senate amendments to House measures; because those resolutions sometimes allow floor amendments, they are included among the resolutions designated as closed, effectively closed, limiting, or open rules. Cf. KREHBIEL, INFORMATION, *supra* note 47, at 166 (excluding such resolutions from consideration).

³⁵⁹ The Rules Committee makes available summaries of amendments submitted for some, but not all, measures.

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³⁵⁹	Total Amndts. Permitted
25.	318	110-99	L	3	3
26.	319	110-100	L	25	6
27.	327	110-105	L	3	2
28.	330	110-108	L	6	4
29.	331	110-109	O		All
30.	332	110-110	X		n/a
31.	348	110-116	L	22	12
32.	349	110-117	O		All
33.	350	110-118	L	8	5
34.	364	110-120	C		0
35.	370	110-121	C		0
36.	377	110-130	C		0
37.	382	110-136	L	46	21
38.	383	110-137	L	15	8
39.	387	110-143	C, C, C		0 ³⁶¹
40.	388	110-144	L	16	10
41.	403	110-151	L	135	50
42.	404	110-152	O		All
43.	409	110-156	X		n/a
44.	429	110-165	L	3	3
45.	437	110-167	C, L	n/a, 48	0, 5 ³⁶²
46.	438	110-168	EC		2
47.	453	110-174	L	15	11
48.	464	110-179	C		0
49.	465	110-180	C		0
50.	473	110-184	O		All
51.	480	110-189	O		All
52.	481	110-190	O		All
53.	498	110-199	O		All
54.	502	110-201	EC	23	3
55.	514	110-211	O		All
56.	517	110-213	O		All
57.	531	110-224	EC	27	1
58.	533	110-226	C		0
59.	534	110-227	L	23	6
60.	547	110-235	O		All
61.	558	110-242	O		All
62.	562	110-255	O		All
63.	567	110-260	X		n/a
64.	574	110-261	L	112	31
65.	579	110-263	C		0

³⁶⁰ House Resolution 317 provides closed rules for two separate measures. *See* H.R. Res. 317, 110th Cong. (2007).

³⁶¹ House Resolution 387 provides closed rules for three separate measures. *See* H.R. Res. 387, 110th Cong. (2007).

³⁶² House Resolution 437 provides a closed rule for one measure and a limiting rule for a separate measure. *See* H.R. Res. 437, 110th Cong. (2007).

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³⁵⁹	Total Amndts. Permitted
66.	580	110-264	C		0
67.	581	110-265	O		All ³⁶³
68.	594	110-285	C		0
69.	595	110-286	X		n/a
70.	596	110-287	O		All
71.	597	110-288	X		n/a
72.	599	110-290	L		11 ³⁶⁴
73.	600	110-291	X		n/a
74.	601	110-292	C		0
75.	602	110-293	X		n/a
76.	613	110-298	X		n/a
77.	614	110-299	X		n/a
78.	615	110-300	L, C	117, 11	23, 0 ³⁶⁵
79.	633	110-316	O		All
80.	636	110-319	L	14	5
81.	637	110-320	X		n/a
82.	650	110-330	L	10	7
83.	659	110-332	X		n/a
84.	660	110-333	EC	5	2
85.	664	110-335	L	23	8
86.	675	110-346	C		0
87.	677	110-346	C		0
88.	678	110-349	L	2	2
89.	682	110-350	L	3	3
90.	683	110-351	L	26	13
91.	701	110-358	L	6	5
92.	702	110-359	L	6	3
93.	703	110-360	C		0
94.	704	110-361	C		0
95.	719	110-368	C		0
96.	720	110-369	L	15	8
97.	724	110-371	L	10	4
98.	741	110-382	C		0
99.	742	110-383	L	2	1
100.	746	110-385	C		0
101.	763	110-403	L	1	1
102.	764	110-404	L	1	1
103.	765	110-405	C		0
104.	773	110-407	L	14	10
105.	774	110-408	C		0
106.	780	110-416	L	26	7

³⁶³ House Resolutions 581 and 599 set forth separate rules for a single underlying measure. *See* H.R. Res. 581, 110th Cong. (2007); H.R. Res. 599, 110th Cong. (2007).

³⁶⁴ House Resolutions 581 and 599 set forth separate rules for a single underlying measure. *See* H.R. Res. 581, 110th Cong. (2007); H.R. Res. 599, 110th Cong. (2007).

³⁶⁵ House Resolution 615 provides a limiting rule for one measure and a closed rule for a separate measure. *See* H.R. Res. 615, 110th Cong. (2007).

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³⁵⁹	Total Amndts. Permitted
107.	781	110-417	EC		1
108.	793	110-422	EC	7	3
109.	794	110-427	X		n/a
110.	801	110-432	C		0
111.	802	110-433	O		All
112.	806	110-435	X		n/a
113.	809	110-438	EC		1
114.	813	110-440	X		n/a
115.	817	110-447	X		n/a
116.	818	110-448	C		0
117.	824	110-449	C		0
118.	825	110-450	L	24	18
119.	839	110-471	X		n/a
120.	846	110-474	C		0
121.	849	110-475	C		0
122.	850	110-476	X		n/a
123.	859	110-487	X		n/a
124.	860	110-488	X		n/a
125.	861	110-489	C		0
126.	862	110-490	C		0
127.	869	110-492	C		0
128.	873	110-493	X		n/a
129.	876	110-495	X		n/a
130.	877	110-496	C		0
131.	878	110-497	C		0
132.	893	110-498	C, C		0 ³⁶⁶
133.	894	110-499	C		0
134.	918	110-508	L	4	4
135.	922	110-509	L	8	7
136.	940	110-519	EC	7	2
137.	941	110-520	X		n/a
138.	955	110-522	X		n/a
139.	956	110-523	L	61	27
140.	974	110-524	L	4	2
141.	976	110-525	C		0
142.	982	110-526	C, C		0 ³⁶⁷
143.	983	110-527	X		n/a
144.	1001	110-530	EC		1
145.	1014	110-538	C		0
146.	1015	110-539	L	15	11
147.	1031	110-547	C		0 ³⁶⁸

³⁶⁶ House Resolution 893 provides closed rules for two separate measures. See H.R. Res. 893, 110th Cong. (2007).

³⁶⁷ House Resolution 982 is a self-executing rule providing that, upon its adoption, House Resolutions 979 and 980 are adopted. H.R. Res. 982, 110th Cong. (2008). House Resolution 982 is counted as two closed rules because it does not permit a separate vote on any floor amendments to House Resolution 979 or House Resolution 980. *Id.*

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted ³⁵⁹	Total Amndts. Permitted
148.	1036	110-548	EC	22	3
149.	1041	110-549	C		0
150.	1065	110-562	L	11	4
151.	1071	110-563	L	4	3
152.	1083	110-572	O		All
153.	1084	110-573	L	28	8
154.	1092	110-574	X		n/a
155.	1102	110-585	C		0
156.	1103	110-586	L	7	4
157.	1107	110-590	L	13	4
158.	1125	110-603	L	23	17
159.	1126	110-604	L	38	15
160.	1156	110-612	C		0
161.	1157	110-613	EC	7	2
162.	1167	110-614	X		n/a
163.	1174	110-621	L	16	7
164.	1175	110-622	EC		3
165.	1189	110-629	X		n/a
166.	1190	110-630	C		0
167.	1197	110-636	EC		3
168.	1212	110-660	C		0
169.	1213	110-661	X		n/a
170.	1214	110-662	X		n/a
171.	1218	110-666	L	128	58
172.	1233	110-677	L	1	1
173.	1234	110-678	L	30	8
174.	1253	110-703	L	21	8
175.	1257	110-707	L	18	12
176.	1265	110-710	C		0
177.	1276	110-717	EC	11	2
178.	1277	110-718	EC	3	1
179.	1281	110-719	X		n/a
180.	1284	110-720	EC		1
181.	1285	110-721	C		0
182.	1297	110-731	C		0
183.	1298	110-732	C	5	0
184.	1299	110-733	C		0
185.	1304	110-734	L	21	5
186.	1317	110-744	EC	5	2
187.	1318	110-745	C		0
188.	1339	110-758	L	17	4
189.	1343	110-759	L	20	7
190.	1344	110-760	L	21	11
191.	1350	110-761	X		n/a

³⁶⁸ House Resolution 1031 is a self-executing rule providing that, upon its adoption, House Resolution 895 is itself adopted. H.R. Res. 1031, 110th Cong. (2008). House Resolution 1031 is counted as a closed rule because it does not permit a separate vote on any floor amendments to House Resolution 895. *Id.*

	Resolution No.	House Report No.	Rule Type	Total Amndts. Submitted³⁶⁹	Total Amndts. Permitted
192.	1362	110-766	C		0
193.	1363	110-767	C		0
194.	1367	110-368	X		n/a
195.	1368	110-369	X		n/a
196.	1384	110-800	O		All
197.	1388	110-807	L	16	6
198.	1389	110-808	X		n/a
199.	1399	110-816	X		n/a
200.	1419	110-834	EC	9	3
201.	1433	110-853	C		0
202.	1434	110-852	EC		1
203.	1441	110-854	L	15	5
204.	1449	110-859	C		0
205.	1476	110-867	C		0
206.	1488	110-875	C		0
207.	1489	110-876	X		n/a
208.	1490	110-879	X		n/a
209.	1491	110-880	X		n/a
210.	1500	110-883	X		n/a
211.	1501	110-884	C		0
212.	1502	110-887	C		0
213.	1503	110-888	X		n/a
214.	1507	110-891	C		0
215.	1514	110-897	X		n/a
216.	1516	110-902	C, C		0 ³⁶⁹
217.	1517	110-903	C		0
218.	1525	110-907	C		0
219.	1526	110-908	X		n/a
220.	1533	110-918	X		n/a
221.	1534	110-922	EC		1

³⁶⁹ House Resolution 1516 provides closed rules for two separate measures. See H.R. Res. 1516, 110th Cong. (2008).

APPENDIX 3-B

FLOOR OUTCOMES FOR SPECIAL RULES IN THE 110TH CONGRESS

Rule Designations:

C – Closed Rule

EC – Effectively Closed Rule

L – Limiting Rule

O – Open Rule

	Resolution No.	Rule Type	Recorded Vote on Floor³⁷⁰	Outcome on Floor
1.	65	C	Yes	Passed
2.	66	C	Yes	Passed
3.	86	EC	Yes	Passed
4.	116	C	Yes	Passed
5.	133	O	No	Passed
6.	157	C	Yes	Passed
7.	195	O	No	Passed
8.	203	EC	Yes	Passed
9.	214	O	No	Passed
10.	215	O	No	Passed
11.	219	C	Yes	Passed
12.	229	L	Yes	Passed
13.	242	EC	Yes	Passed
14.	254	L	Yes	Passed
15.	260	C	Yes	Passed
16.	261	C	Yes	Passed
17.	269	C	Yes	Passed
18.	270	L	Yes	Passed
19.	274	L	Yes	Passed
20.	275	EC	Yes	Passed
21.	301	O	Yes	Passed
22.	302	EC	No	Passed
23.	317	C, C	Yes	Passed
24.	318	L	Yes	Passed
25.	319	L	No	Passed
26.	327	L	Yes	Passed
27.	330	L	Yes	Passed
28.	331	O	No	Passed
29.	348	L	Yes	Passed
30.	349	O	No	Passed
31.	350	L	Yes	Passed
32.	364	C	Yes	Passed
33.	370	C	Yes	Passed

³⁷⁰ A resolution is designated as “yes” if there was a recorded vote either on the motion to order the previous question or on passage of the resolution.

	Resolution No.	Rule Type	Recorded Vote on Floor³⁷⁰	Outcome on Floor
34.	377	C	Yes	Passed
35.	382	L	Yes	Passed
36.	383	L	Yes	Passed
37.	387	C, C, C	Yes	Passed
38.	388	L	Yes	Passed
39.	403	L	Yes	Passed
40.	404	O	Yes	Passed
41.	429	L	Yes	Passed
42.	437	C, L	Yes	Passed
43.	438	EC	Yes	Passed
44.	453	L	Yes	Passed
45.	464	C	Yes	Passed
46.	465	C	Yes	Passed
47.	473	O	Yes	Passed
48.	480	O	—	Laid on Table
49.	481	O	No	Passed
50.	498	O	No	Passed
51.	502	EC	Yes	Passed
52.	514	O	No	Passed
53.	517	O	Yes	Passed
54.	531	EC	Yes	Passed
55.	533	C	Yes	Passed
56.	534	L	No	Passed
57.	547	O	Yes	Passed
58.	558	O	Yes	Passed
59.	562	O	Yes	Passed
60.	574	L	Yes	Passed
61.	579	C	Yes	Passed
62.	580	C	Yes	Passed
63.	581	O	Yes	Passed
64.	594	C	Yes	Passed
65.	596	O	No	Passed
66.	599	L	Yes	Passed
67.	601	C	Yes	Passed
68.	615	L, C	Yes	Passed
69.	633	O	Yes	Passed
70.	636	L	Yes	Passed
71.	650	L	Yes	Passed
72.	660	EC	Yes	Passed
73.	664	L	Yes	Passed
74.	675	C	Yes	Passed
75.	677	C	Yes	Passed
76.	678	L	Yes	Passed
77.	682	L	Yes	Passed
78.	683	L	Yes	Passed
79.	701	L	Yes	Passed
80.	702	L	Yes	Passed
81.	703	C	Yes	Passed
82.	704	C	Yes	Passed

	Resolution No.	Rule Type	Recorded Vote on Floor³⁷⁰	Outcome on Floor
83.	719	C	Yes	Passed
84.	720	L	Yes	Passed
85.	724	L	Yes	Passed
86.	741	C	Yes	Passed
87.	742	L	Yes	Passed
88.	746	C	Yes	Passed
89.	763	L	Yes	Passed
90.	764	L	Yes	Passed
91.	765	C	Yes	Passed
92.	773	L	Yes	Passed
93.	774	C	Yes	Passed
94.	780	L	Yes	Passed
95.	781	EC	Yes	Passed
96.	793	EC	Yes	Passed
97.	801	C	Yes	Passed
98.	802	O	Yes	Passed
99.	809	EC	Yes	Passed
100.	818	C	Yes	Passed
101.	824	C	Yes	Passed
102.	825	L	Yes	Passed
103.	846	C	Yes	Passed
104.	849	C	—	Laid on Table
105.	861	C	Yes	Passed
106.	862	C	Yes	Passed
107.	869	C	Yes	Passed
108.	877	C	Yes	Passed
109.	878	C	Yes	Passed
110.	893	C, C	No	Passed
111.	894	C	—	Laid on Table
112.	918	L	Yes	Passed
113.	922	L	No	Passed
114.	940	EC	No	Passed
115.	956	L	Yes	Passed
116.	974	L	Yes	Passed
117.	976	C	Yes	Passed
118.	982	C, C	Yes	Passed
119.	1001	EC	Yes	Passed
120.	1014	C	Yes	Passed
121.	1015	L	Yes	Passed
122.	1031	C	Yes	Passed
123.	1036	EC	Yes	Passed
124.	1041	C	Yes	Passed
125.	1065	L	Yes	Passed
126.	1071	L	No	Passed
127.	1083	O	Yes	Passed
128.	1084	L	Yes	Passed
129.	1102	C	Yes	Passed
130.	1103	L	Yes	Passed
131.	1107	L	Yes	Passed

	Resolution No.	Rule Type	Recorded Vote on Floor³⁷⁰	Outcome on Floor
132.	1125	L	Yes	Passed
133.	1126	L	Yes	Passed
134.	1156	C	No	Passed
135.	1157	EC	Yes	Passed
136.	1174	L	Yes	Passed
137.	1175	EC	Yes	Passed
138.	1190	C	Yes	Passed
139.	1197	EC	Yes	Passed
140.	1212	C	Yes	Passed
141.	1218	L	Yes	Passed
142.	1233	L	Yes	Passed
143.	1234	L	Yes	Passed
144.	1253	L	Yes	Passed
145.	1257	L	Yes	Passed
146.	1265	C	Yes	Passed
147.	1276	EC	Yes	Passed
148.	1277	EC	Yes	Passed
149.	1284	EC	Yes	Passed
150.	1285	C	No	Passed
151.	1297	C	Yes	Passed
152.	1298	C	Yes	Passed
153.	1299	C	Yes	Passed
154.	1304	L	Yes	Passed
155.	1317	EC	Yes	Passed
156.	1318	C	Yes	Passed
157.	1339	L	Yes	Passed
158.	1343	L	Yes	Passed
159.	1344	L	Yes	Passed
160.	1362	C	Yes	Passed
161.	1363	EC	Yes	Passed
162.	1384	O	Yes	Passed
163.	1388	L	Yes	Passed
164.	1419	EC	Yes	Passed
165.	1433	C	Yes	Passed
166.	1434	EC	Yes	Passed
167.	1441	L	Yes	Passed
168.	1449	C	Yes	Passed
169.	1476	C	Yes	Passed
170.	1488	EC	Yes	Passed
171.	1501	C	—	Laid on Table
172.	1502	C	Yes	Passed
173.	1507	C	Yes	Passed
174.	1516	C, C	—	Laid on Table
175.	1517	EC	Yes	Passed
176.	1525	C	Yes	Passed
177.	1534	EC	Yes	Passed