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Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process

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ARTICLE

ARE CONGRESSIONAL COMMITTEES CONSTITUTIONAL?:

RADICAL TEXTUALISM, SEPARATION OF POWERS, AND THE ENACTMENT PROCESS

John C. Roberts†

INTRODUCTION ................................................................. 490
I. THE RADICAL TEXTUALIST POSITION .................. 496
II. PRELIMINARY ISSUES ............................................... 501
III. THE NON-DELEGATION DOCTRINE AND
LEGISLATIVE HISTORY ............................................. 503
   A. Introduction .................................................... 503
   B. Origin and Purposes of the
      Non-Delegation Doctrine .................................. 504
   C. Supreme Court Treatment of the
      Non-Delegation Doctrine .................................. 505
   D. Recent Doctrinal Developments ...................... 507
   E. The Principle of Self-Delegation ...................... 509
   F. Summary ........................................................ 511
IV. THE SUPREME COURT’S ARTICLE I
    CASES AND LEGISLATIVE HISTORY ..................... 511
   A. The Theory of Separation of Powers ............... 512
   B. The Supreme Court’s Approach to
      Separation of Powers ...................................... 513
   C. The Relevance of Chadha and Bowsher .......... 514
   D. Chadha, Bowsher, and Self-Delegation ........... 519
   E. Summary ........................................................ 521
V. ARTICLE I AND THE ENACTMENT PROCESS .......... 522
INTRODUCTION

The proper role of legislative history materials in the interpretation of ambiguous statutes has been the subject of vigorous debate in both law reviews and judicial opinions. The traditional view—represented by judges like Stephen Breyer, John Paul Stevens, and Patricia Wald and by scholars like William Eskridge and Daniel Farber—is that judges and administrative agencies should make use of all available interpretive materials, including congressional committee reports and floor statements, in trying to understand ambiguous statutes.¹ Traditional

¹ Professor of Law and Dean Emeritus, DePaul University College of Law. I am indebted to Christopher Carmichael for his outstanding research assistance, and to Dean Teree E. Foster and the DePaul Faculty Research Fund for their support. William Eskridge, Charles Tiefer, Stanley Bach, Jeffrey Shaman, Stephen Siegel, and Harold Krent made helpful suggestions on the manuscript, for which I am grateful. Any mistakes remain my own. I learned how to read and write statutes during three years as General Counsel to the United States Senate Committee
tionalists often concede that such use should be tempered by commonsense concerns about reliability, but their position is usually characterized by an overriding respect for and understanding of the legislative process. Their approach has been dominant in the federal courts for most of the last one hundred years, and certainly in the period since World War II. Textualists, on the other hand—represented by judges like Antonin Scalia and Frank Easterbrook and scholars such as John Manning and Adrian Vermeule—rely almost exclusively when construing legislation on statutory words, related statutory provisions, statutory structure, and certain canons of interpretation. The extreme version of this position, rejecting nearly all uses of legislative history, has won over few federal judges, though it is relentlessly championed by Justice Scalia.

Textualists have particularly argued against the use of written committee reports and floor statements by legislators in determining the meaning of a statute in a particular legal dispute. Several justifications for declaring this material off-limits to judges have been articulated. It has been argued that the use of materials outside the text assumes that the “intent” rather than the words of a statute is the touchstone in establishing statutory meaning and that the “intent” of the legislature is both irrelevant and unknowable. It has also been argued


3 Max Radin is often considered the leading intellectual exponent of this view. See Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930). Textualists frequently argue this point as if it were self-evident. In fact, contemporary writing by philosophers has recognized the idea of group “intent” as a valid one, even though it may be difficult to divine the subjective states of mind of individual members. See, e.g., M.B.W. Sinclair, Statutory Reasoning, 46
that legislative history materials should be ignored because they are unreliable, either because they are contrived for political purposes and do not reflect genuine attempts to clarify meaning, or because they are drafted by staff members and thus do not represent the views of elected senators and congressmen at all. Textualists contend, in addition, that legislative history is confusing and contradictory and thus not helpful to one searching for meaning in an ambiguous phrase. Some have occasionally taken the position that legislative history is

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4 Textualists typically offer only anecdotes to support this cynical vision of the committee process. As to committee reports, leading scholars of Congress such as Steven S. Smith and Barbara Sinclair have confirmed to me that there is no published empirical research on how reports are written. Judges who have first-hand experience with the legislative process, like Patricia Wald, Abner Mikva, and Stephen Breyer, do not share the textualists' view of the committee process. Likewise, legal scholars who have worked in Congress, like Steven Ross, Charles Tiefer, and James Brudney, dispute the Public Choice stereotype repeatedly invoked in Justice Scalia's writings. A particularly useful review of the issues, critical of Justice Scalia's views, can be found in Daniel Farber & Philip Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 438-46 (1988).

4 My experience in the late 1970s as General Counsel to the Senate Armed Services Committee was that the process of creating crucial report language was tightly controlled. The really important bits of language are typically a very small proportion of the whole, since much of the committee report details the bill's history, explains the committee's process, and complies with Senate rules on clarifying changes in existing law, etc. Key language directing the Department of Defense ("DOD") to act in a certain way or explaining the meaning of a statutory change could come initially from a member of the committee or from a member's staff, from DOD legislative liaison offices, from defense contractors' lobbyists, or outside groups. Invariably, it was considered by the committee or subcommittee chair. When I wrote key report language, it was most often at the specific direction of a member. Often bits of report language were actually duplicated and circulated to members during markup, and occasionally even voted on (though usually just accepted by assent). The staff director and general counsel were charged by the chairman with the job of carefully assembling those approved bits of language for the report. Minority staff members saw drafts of the report, and if necessary, additional or dissenting views could be added to the report by members. I remember no occasion in over three years when a staff member had the temerity to insert his or her own unapproved language into a committee report, though I have no doubt that it has happened on rare occasions on some committees. As will be argued more fully in Parts VI and VII, the Rulemaking Clause gives Congress the power to select its own legislative methods, and this sometimes imperfect process of working with committee staff has been chosen. Therefore, it must be respected by judges, not demeaned and caricatured.

5 This argument is undoubtedly true for some legislative history. Traditionalists surely do not argue that such materials always clarify the interpretive point raised by the case. If they do not, the judge must do the best she can with the resources at hand.
Finally, textualists frequently take the position that refusal to go outside the four walls of statutory text and structure (except perhaps to use dictionaries or canons of construction) encourages lawmakers to be sloppy in writing statutes. On this theory, those who write statutes would react to a uniformly textualist mode of interpretation in the courts by considering statutes more carefully and articulating their meaning more precisely.  

6 Inaccessibility is certainly the weakest argument for not consulting legislative history materials. By far the most important legislative history components are published committee reports and floor statements. Despite its editorial problems, the Congressional Record has been easily available for decades. Published committee reports have likewise been easy to find, and are now even more accessible. Hearings are sometimes published late, but are available at federal depository libraries. Markup records were harder to find in the past but are now available on various on-line services. At least since the advent of the Congressional Information Service ("CIS") in about 1970, all of the primary legislative sources have been easy and inexpensive to find. Today the excellent Thomas database of the Library of Congress, CIS, the authoritative reference publications of Congressional Quarterly and subscription services such as Legi-Slate contain all the legislative history a lawyer or judge could want, including un-passed bills and markup records. The excellent index materials on CIS for passed bills gives the researcher a clear history of each piece of legislation, as a starting point for research.

The deeper problem, of course, is that many lawyers and judges do not feel comfortable with legislative history materials, and probably were not introduced to legislative research methods in law school.

Other kinds of cases can be dauntingly complex for the lawyer and judge. There can be no doubt that objectively it is much more difficult to work through the rulemaking record in a complex Clean Air Act case from the EPA, with voluminous comments and scientific studies, than to find the appropriate legislative history materials to illuminate a difficult statutory interpretation problem.

Arguing that strict construction of statutes will force legislative drafters to behave differently raises a host of unexplored empirical questions, as Professor Garrett and others have pointed out. Textualists typically offer no evidence for their assertion. In my experience, there are several obvious problems with this argument. First, members and their staffs do not have a sophisticated knowledge of the courts' interpretive habits, and frankly don't pay much attention to them. Second, even assuming the ablest draftsmen and members' best efforts to be comprehensive, legislation simply cannot anticipate and solve all of the possible problems that may arise later in application. Third, and more important, the argument assumes that "problems" in statutory text—ambiguities, inconsistencies, and the like—are the result of inadvertence or incompetence. In fact, they usually represent compromises necessary to assemble the votes needed for passage or to avoid contentious issues that would doom the bill in question. Certainly it would be helpful if legislators always wrote absolutely clear statutes. But those who chide Congress for its failures do not understand that each additional clarifying amendment means another debate on the floor, another opportunity for delay or another vote lost, making it more difficult to enact the bill. It is emphatically not for the courts to say whether such items should have been given priority in constructing the legislation and guiding it through the House and Senate, while keeping the White House happy as well. Because Congress has the constitutional power both to control its enactment process and to make policy decisions, the courts must do the best they can with the result, and not attempt to "correct" members' sloppy drafting practices.

Perhaps the textualists would also support legislation to "correct" the way the Supreme Court writes its opinions. We would be better off if the Court always addressed the merits of important questions, without taking refuge in justiciability arguments. We would benefit from more care in using the same language to describe the same legal doctrine each time it is invoked. The Court's decisions would be better if they always articulated a clear basis of decision and were consistent with one another. But of course, the Congress has no such power to affect the
All of these justifications have an air of pragmatism about them. Whatever the underlying aims of the textualists, their standard critique of the use of legislative history suggests that it is not helpful, that it can be misleading, and that it is not as reliable an indicator of what the legislature wanted as the text itself. In recent years, however, a new kind of attack on the use of legislative history has emerged. Popularized by Justice Scalia, this line of argument is that the use of legislative history materials to determine the meaning of an ambiguous statute is actually inconsistent with Article I of the Constitution. As described in more detail below,\(^8\) this position seems to have two components. First, substitution of a committee report or a floor statement for the statutory text in order to settle a disputed question of meaning would in effect constitute a delegation by the Congress to an individual or to a committee, and is inconsistent with the non-delegation doctrine. Second, since a judge would arguably be giving legal effect to committee statements or floor statements in the same way one does to enacted text, such use would run afoul of the Supreme Court’s structural separation of powers cases, which established that Congress can only act by bicameral passage and presentment to the President. These new arguments, like the standard textualist ones, are deeply rooted in a suspicion of legislators and their motives that is derived from Public Choice theory.\(^9\)

What seems different about these new justifications for ignoring legislative history materials is that they strike at the very legitimacy of the committee reports and other interpretive evidence gleaned from the enactment process. This position, which I shall characterize for the purposes of this Article as “radical textualism,” does not depend on whether using legislative history produces an answer to the interpretive problem before the court, or whether it accurately reveals the intentions of those who wrote the statute. Indeed, Justice Scalia and Professor Manning apparently do not care whether reference to a committee report indisputably clarifies an ambiguous statutory phrase. Even if it did, its use would be prohibited by concerns over non-delegation of legislative power and by more general separation of

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\(^8\) See infra Part II.

\(^9\) Public Choice and Social Choice theories impose an economic model on the legislative process, in which legislators act solely to maximize their chances of re-election and special interest groups seek legislation benefiting their interests. Social Choice advocates argue, building upon Arrow’s Theorem, that the legislative product rarely represents the wishes of a majority of legislators, and that there can be no such thing as legislative intent. For an analysis of how these gloomy views of legislative behavior have affected textualism, see Schacter, supra note 1; Zeppos, supra note 1.
powers principles. The radical textualists are not content with argu-
ing that their approach yields "better" interpretive results, but rather
contend that the traditional use of legislative history is out of bounds
constitutionally and thus not permitted regardless of its efficacy.
Their newer formalist argument, then, is aimed at the very heart of the
legislative enactment process—contending that use of committee ma-
terials, floor statements, and similar references lack constitutional le-
gitimacy. It is obviously a more powerful argument against the use of legis-
late history than earlier realist ones, because it is invulnerable to
such practical responses as distinguishing between authoritative and
non-authoritative floor statements, or adopting measures to improve
the reliability and authority of committee reports. It is a final exten-
sion of Public Choice theories about legislative behavior, culminating
in a rejection of the legislative process itself.

It is therefore not too much of an exaggeration to assert, as I have
done in the title of the Article, that the question before us is whether
congressional committees are constitutional. Admittedly, Justice
Scalia would not contend that committees themselves are unconstitu-
tional, but his rhetorical assaults on the committee process and espe-
cially committee reports, as we shall see in Part II, bring him peril-
ously close to that position. At the very least he argues that one of the
committee's most important functions—creating authoritative expla-
nations of legislation it sends to the floor—is unconstitutional. Statu-
tory text, say the radical textualists, has legitimacy because it rests
solidly on Article I bicameral enactment and presentment to the Presi-
dent. Language in committee reports has not been voted on by both
houses or presented to the President and is therefore without constitu-
tional legitimacy.

This Article attempts to demonstrate that the radical textualist
view of the enactment process, and its relationship to Article I, is pro-
foundly wrong. My aim is not to elevate legislative history materials
to a higher position of authoritativeness and deference, but rather to
establish the constitutional legitimacy of the current widespread prac-
tice of using such resources as good contextual evidence of what an
ambiguous statutory provision means. I will first argue (in Parts II

10 Justice Stevens made this point during his dialogue with Justice Scalia in Conroy v.
11 While the approaches of traditionalists and textualists on matters of statutory interpreta-
tion are often predictable, the Supreme Court's recent decision in Food and Drug Administra-
tion v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), denying the Food and Drug Ad-
ministration the power to regulate cigarettes, is puzzling, to say the least. Advocates of regula-
tion, led by Justice Stevens, relied heavily on the plain language of the statute, and opponents,
including Justice Scalia, used legislative history materials extensively. Justice Scalia omitted his
usual scolding about the use of such materials.
through V) that the latest formalist attack of the radical textualists is deeply flawed, and that both the non-delegation doctrine and the Supreme Court's structural Article I cases have no relevance to the constitutional position of the congressional committee. I will then demonstrate (in Parts VI and VII) that the committee process, indeed the entire enactment process, rests on its own independent Article I footing—the Rulemaking Clause of Section 5. Contrary to the arguments of the radical textualists, pre-enactment legislative history materials are created pursuant to Congress's constitutional power to determine the rules of its own proceedings. While not as binding as statutes, committee reports are entitled to respect and should be used as authoritative aids in interpretation because they are an integral part of the process by which Congress creates and explains the substance of statutes. We will also examine in Part VII the extensive use of committee reports by the executive branch, lending further support to the argument for their authoritative use by courts.

The Article is therefore guided by the principle that one's theory of statutory interpretation should be rooted in a coherent and defensible general theory of government, and should be consistent with what Professor Mashaw has called "the constitutional order." I would add, as many judges, former legislators, and former legislative staff members have argued, that above all a theory of statutory interpretation should be firmly anchored in a coherent and nuanced understanding of the legislative process. Only then can the proper place of committees and committee reports as necessary contextual aids in giving meaning to ambiguous statutory text be properly understood.

I. THE RADICAL TEXTUALIST POSITION

Before proceeding further, it is perhaps wise to look more carefully at the radical textualist position, ensuring that the arguments presented here accurately represent it as they attempt a coherent response.

The notion that an arm of Congress, like a committee or even one house, cannot exercise the lawmaking power of Article I was articulated in INS v. Chadha, as we shall see in Part V. Justice Stevens

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13 Perhaps the best exposition of this "Positive Political Theory" approach, and one of the best analyses of how legislative history is created, is McNollgast, supra note 1. More recently, Charles Tiefer, one the country's ablest experts on legislative procedure, has exhaustively examined the process of creating legislative history. See Tiefer, supra note 3. Another excellent view from within the legislative process is James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response? 93 MICH. L. REV. 1 (1994).
later stated the point clearly in his *Bowsher v. Synar* concurrence (though the majority took a different tack):

Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office.\(^\text{15}\)

Adapting this fundamental principle to the constitutional legitimacy of legislative history, however, took place over some years, beginning in the mid-1980s. Criticism of the overuse of legislative history, based on both realist and functionalist concerns, became more common during this period. Articles by Judges Easterbrook and Starr began to articulate the Article I analysis, but without explicit use of the non-delegation doctrine. While sitting as a court of appeals judge, Justice Scalia developed his own arguments against reference to legislative history. After his arrival on the Supreme Court in 1988, the attacks on legislative history intensified, and increasingly included formalist arguments based on *Chadha* and Article I.\(^\text{16}\) In 1990, Professor Eskridge comprehensively traced these various intellectual strands of what he called “the new textualism,” and noted the emerging importance of arguments based on *Chadha* and Article I of the Constitution.\(^\text{17}\) At that point, explicit use of the non-delegation doc-


> All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law.... [W]e should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports.

*Id.* at 621.

*See also* Conroy v. Aniskoff, 507 U.S. 511, 520 n.2 (1993) (Scalia, J., concurring) (“It is to be assumed—by a sort of suspension of disbelief—that two-thirds of the Members of both Houses of Congress (or a majority plus the President) were aware of these statements and must have agreed with them; or perhaps it is to be assumed—by a sort of suspension of the Constitution—that Congress delegated to that personage or personages the authority to say what its laws mean.”).

trine as a separate analytical tool was not yet in vogue among the textualists.

Later in the 1990s, Justice Scalia strengthened and clarified his developing Article I critique of references to legislative history, as he continued his practice of objecting to each and every instance of it in opinions by other justices. A particularly good example is the 1996 case of Bank One Chicago, N.A. v. Midwest Bank & Trust Co. In their concurring opinions, he and Justice Stevens debated the use of legislative history. In response to Justice Stevens’ view (with which this Article agrees) that we should use legislative history because Congress intends for it to express the views of the body during the enactment process, Justice Scalia wrote:

But assuming Justice Stevens is right about this desire to leave details to the committees, the very first provision of the Constitution forbids it. Article I, §1 provides that “all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” . . . No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon only by the cognizant committees.

In his 1997 book, A Matter of Interpretation, Justice Scalia enlarges somewhat on his basic idea. After arguing that committee reports can’t actually represent the intent of the entire legislative body, he wrote:

Another response simply challenges head-on the proposition that no legislative history must reflect Congressional thinking: ‘Committee reports are not authoritative because the full house presumably knows and agrees with them, but rather because the full house wants them to be authoritative—that is, leaves to its committees the details of its legislation.’ It may or may not be true that the houses entertain such a desire. . . . But if it is true, it is unconstitutional. . . . The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize

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19 Id. at 280 (Scalia, J., concurring). As explained more fully in Part VI, this Article argues that Congress could come very close to doing under the authority of the Rulemaking Clause exactly what Justice Scalia finds so inconceivable.
one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws.\footnote{\textcite{20}}

It fell to Professor John Manning, who clerked for Justice Scalia during the 1988-89 Term of the Supreme Court, to give this new theory a full scholarly exegesis.\footnote{\textcite{21}} In his 1997 article, Manning reiterates the usual textualist attacks against the use of legislative history, but then adds two interesting new arguments.

First, Manning recognizes that the general non-delegation doctrine cannot easily be applied to the use of legislative history materials.\footnote{\textcite{22}} He notes, as discussed in Part IV below, that broad delegations to executive agencies and courts have routinely been upheld against a non-delegation attack. He also recognizes that the use of other extrinsic materials in interpretation is widely accepted by all sides in the interpretive debate. Some way must be found, then, for the committed textualist to distinguish the use of legislative history by courts from more traditional delegations of legislative power and from the use of materials like dictionaries and canons. Manning finds that distinction in the new concept of "self-delegation." Use of legislative history to substitute for enacted text in determining the meaning of a statute is actually more dangerous and more constitutionally suspect, in his view, than traditional delegation of legislative power.

By using legislative history to interpret ambiguous statutory texts, argues Professor Manning, courts encourage the Congress to use broad language and to evade its responsibility to be precise in statutory drafting.\footnote{\textcite{23}} The problem is more serious than with delegation to executive

\footnotetext{\textcite{20}}\textcite{ANTONIN SCALIA, A MATTER OF INTERPRETATION 35 (1997) (citations omitted)}.\footnotetext{\textcite{21}}\textcite{John F. Manning, Textualism As a Nondelegation Doctrine, 97 COLUM. L. REV. 673 (1997).}\footnotetext{\textcite{id} at 690-97, 725-27. "The nondelegation rationale, however, leads to a potential paradox requiring explanation." \textcite{id} at 695.}\footnotetext{\textcite{22}}\textcite{Id. at 690-97, 725-27. "The nondelegation rationale, however, leads to a potential paradox requiring explanation." Id. at 695.}\footnotetext{\textcite{23}}\textcite{This Article does not purport to give a detailed refutation of Professor Manning's arguments. I must add a word on this important point, however. Manning argues that Congress enacts vague statutes because courts allow it to, through their consideration of explanations found in committee reports. He also argues that Congress uses this process to evade its responsibility to enact detailed text. He offers no empirical support for either proposition, and I am aware of none. As noted in Parts VI and VII infra, there are many reasons why members might choose one level of detail over another in enacting legislation. There is no "correct" level of detail. Manning even goes so far as to say that any idea which can be expressed in legislative history could have been written into the statute in the first place. Manning, supra note 21, at 728-30. This astounding assertion is also offered without support. Legislative drafters know that it is often difficult to encompass all future possibilities within the formal strictures of statutory text, and that much legislative history is intended to record background principles, not details that could just as easily be in the text. Finally, Manning writes as if all legislative history were written for an audience of judges, when in fact the principal audience is most often the relevant executive branch agency.}
agencies of the power to make future policy decisions, because there Congress has a strong incentive to specify its meaning as clearly as possible, lest it lose control over the formulation of the policy. Self-delegation, including the making of legislative history intended to influence later interpretation, allows Congress to have its cake and eat it too. It can make vague legislative decisions, and it can keep control of the interpretive process through the use of legislative history. It can evade its important responsibility to openly make tough policy choices. Thus, in Manning’s view, delegation to the executive branch agencies or the courts is constitutionally permissible, while delegation to committees or to individual members through legislative history (a form of self-delegation) is not.

Professor Manning’s second contribution to the refinement of the radical textualists’ Article I arguments involves a re-interpretation of the Supreme Court’s Article I cases, chiefly INS v. Chadha and Bowsher v. Synar. He reads those cases as an acceptance by the Court of his concept of self-delegation. Chadha must stand for something more profound than a violation of Article I procedural requirements for law making, Manning argues. He concludes that it supports a more general proposition, that Congress cannot under our constitutional structure participate directly in the process of law application (law elaboration, he calls it), but is confined strictly to enacting legislation in conformance with Article I procedures. Therefore, legislative history, since it attempts to control the way in which a statute is applied by the courts, runs afoul of the self-delegation principle.

Professor Manning sees Bowsher as an even stronger rejection by the Court of Congress’s attempt to participate in execution of the laws. The overriding idea is that law elaboration is an executive or a judicial function, not a congressional one, and authoritative use of legislative history involves the Congress, through self-delegation, trying to interpret the laws as well as to enact them.

In short, Professor Manning attempts, through the concept of self-delegation, to reorient the textualists’ Article I argument, arguing that legislative history is an unconstitutional attempt by Congress to par-

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26 Manning, supra note 21, at 716-18. "The Chadha Court’s deceptively simple reasoning cannot be taken at face value.... Indeed, Chadha delivers a subtler more precise constitutional message: Congress will find it too attractive to sidestep bicameralism and presentment if it can delegate power and retain power over the delegatee." Id. at 719.
27 Id. at 718-19 ("Legislative history gives rise to a similar concern.... Using legislative history to that end allows Congress to shift law elaboration from the full legislative process to the less cumbersome process of generating legislative history.")
participate in the process of law elaboration. Though his arguments are sometimes a confusing amalgam of Article I separation of powers arguments and non-delegation theory, his overall thrust is clear, and it substantially deepens the earlier textualist analysis.

II. PRELIMINARY ISSUES

Before turning to a detailed analysis of the radical textualists’ arguments, I should deal with some preliminary issues in order to clarify my arguments and render the discussion more manageable.

First, I must set out some limitations to my exploration of the constitutional legitimacy of legislative history materials. For clarity and in deference to the reader’s patience, I will confine my argument to the most important type of legislative history—the written reports of legislative committees and conference committees. This is not because I do not believe a good case can be made for the constitutional legitimacy of drafting history, or of certain floor statements by bill managers or committee chairs in the enactment process. Rather, it is because floor statements, hearing transcripts, drafting history and the like, raise other reliability questions, and are not used even by many judges who support the authoritative use of committee reports. As we shall see in Part VII, the written products of committee deliberation in the House and Senate occupy a unique position in the enactment process. In addition, empirical studies of the use of legislative history by courts show that they are by far the most heavily used among the various interpretive items available to judges. They will therefore pro-

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28 It is not entirely clear whether Manning is arguing unconstitutionality in the strong or the weak sense. Indeed, his use of phrases like “in tension with” suggests that he is not sure how far his arguments can go in declaring legislative history materials “unconstitutional.” Id. at 716-27. It is not even clear from his writings whether he is arguing ultimately that Congress should not be permitted to create legislative history materials, or that courts should be prohibited from using them. Either alternative presents serious analytical problems. If he argues that Congress shouldn’t be permitted to make legislative history, he must contend with the obvious fact that it has many other legitimate uses aside from controlling future court interpretations of statutory text. If he argues that courts shouldn’t be permitted to use it, difficult problems of enforcement are raised. Despite all of his sophisticated constitutional arguments, Manning ends his article by arguing that some legislative history is acceptable, so long as it is not “concocted” to influence courts. See id. at 731-38. He does not explain how we (or federal judges, for that matter) are to tell the difference between good and bad committee language, and his acceptance of some legislative history severely undermines his fundamental idea that legislative history can be thought of as unconstitutional self-delegation.

29 See, e.g., Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351 (1994) (noting Judge Wald’s data, cited below); Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 36 (1998) (noting a resurgence in the use of legislative history from an analysis of the cases of the Supreme Court’s 1996 term); Tiefer, supra note 3, at 225 (surveying 17 cases from 1995-99 where the Court made significant use of legislative history); Wald, supra note 1, at 277 (noting that one-third of the
vide the vehicle for my exploration of the Article I legitimacy of committee materials.

Second, in exploring the constitutional position of the committee report, I will confine my defense to pre-enactment materials. My theory of constitutional legitimacy applies to written committee reports that are produced in the process of enacting a statute, explaining the committee’s action on the bill text. Committee reports occasionally try to re-interpret the language of previously enacted statutes outside the context of reporting amendments to the statute (e.g., through the vehicle of an unrelated appropriation or budget reconciliation bill), or to direct the application of the previously enacted statute without further legislative action. Both of these types of committee activity, though, are properly vulnerable to the very Article I objections raised by the radical textualists to all committee action. They represent instances where Congress is indeed trying to change the law without bicameral enactment or presentment to the President. In the arguments that follow, I will confine my discussion to language in written committee reports that accompany and explain a reported bill and were written prior to its passage.

Finally, I should clarify exactly what I mean by use of committee reports in the interpretive process. If I am correct that the Constitution, properly understood, supports the use of written pre-enactment committee language in statutory interpretation, but also that such language does not rise to the level of enacted law, in what sense is it binding or authoritative? Traditionalist judges would find that point excessively academic, to be sure. Legislative history is what it is, and its value derives from its clarity and its persuasiveness under all the circumstances. It is part of a system of practical reasoning, in the words of Professors Eskridge and Frickey. Since I am attempting to establish the affirmative constitutional legitimacy of this widely accepted practice, however, it seems only fair to specify as clearly as practicable the level of authoritativeness I am arguing for. When I use the term “authoritative reference” in this Article, therefore, I am advocating a degree of deference to the clearly expressed views of a pre-enactment legislative committee document that is more than casual. Use of such material by judges and agencies as a contextual aid in

Supreme Court's 1988-89 term cases made substantial use of legislative history); Nicholas Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 Tex. L. Rev. 1073, 1092-93 (1992) (noting that in a random sample of 413 Supreme Court majority decisions the Court used legislative sources in 87.7%).

30 See infra Part VII.

31 Eskridge & Frickey, supra note 1, at 321.
resolving statutory ambiguity is not wholly discretionary. My theory requires judges to defer to clearly expressed legislative history not as a matter of law but of comity, in recognition of Congress' separate power to determine its own rules of proceedings in Article I, Section 5. It is similar to the deference accorded to the views of administrative agencies in interpreting federal statutes before *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* It places pre-enactment legislative statements in written committee reports in a position of primacy among the available interpretive materials, second only to the text of the enacted statute itself. As noted above, this level of respect is not new, but represents the current practice of most federal judges, recognizing that many contested statutory problems benefit from contextual analysis in order to resolve otherwise inexplicable inconsistencies or ambiguities.

### III. THE NON-DELEGATION DOCTRINE AND LEGISLATIVE HISTORY

#### A. Introduction

What then are we to make of the radical textualist attack on legislative history based on the non-delegation doctrine? As we have seen, the thrust of this argument is that Congress, when it creates legislative history, engages in a sort of self-delegation of legislative power to committees (or to individuals during floor debate). Giving power to a committee or an individual to fix the meaning of an ambiguous statutory term is like delegating excessive power to administrative agencies or the President to decide what the law shall be.

The non-delegation doctrine would seem a curious choice of tools to employ against the practice of using legislative history. As any law student who has taken administrative law can attest, the history of the non-delegation doctrine proves conclusively that it has in actual practice restrained very little delegation of legislative power. Even when

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taken seriously, as we shall briefly see below, it requires only a specification by the legislature of an intelligible principle to guide the discretion delegated; a complete prohibition against any delegation of discretion by the legislature is not even advocated by conservative judges like Justice Scalia, and in any event is completely impractical in the complex legal world of the twenty-first century. One is tempted to dismiss this argument by simply observing, as demonstrated in Part VII of this Article, that Congress gives ample guidance to its committees when it refers legislation to them, and therefore meets the "intelligible principle" requirement of case law.

A more fundamental response to the attack of the radical textualists based on the non-delegation doctrine, however, is that the doctrine has always been understood to refer to delegations by the legislature of power to make policy in the future. What Justice Scalia, Professor Manning, and their allies are really describing is not self-delegation at all. I would readily agree that delegation to a congressional committee to make legally binding policy choices without guidance at some future time would implicate the non-delegation doctrine. What they argue against is actually something never discussed in the vast literature on the non-delegation doctrine—not self-delegation but backward delegation by the legislature. Confusion over the difference between events taking place after enactment and those taking place before enactment leads the radical textualists into a logically and historically indefensible position. Also, from the broader standpoint of theory, since Congress takes formal Article I action after the creation of the legislative history that so disturbs the radical textualists, that fact would seem to correct any perceived problem of accountability or democratic control, concerns that lie at the heart of the traditional delegation doctrine.

### B. Origin and Purposes of the Non-Delegation Doctrine

The notion that the legislature is the only branch of our national government permitted to make binding policy for the society is an old one. Though it is now thought of as a doctrine that reinforces broader separation of powers concepts, it actually pre-dates separation of powers and has different roots. Professors Peter Aranson, Ernest Gellhorn, and Glen Robinson, in their influential article on the doctrine, point out that "[t]he delegation of legislative power is an old concern, older than the Constitution or even than the separation-of-powers princi-
They quote John Locke to illustrate that delegation actually springs from the idea that legislatures are direct agents of the people, and thus are not empowered to give away their policy-making authority to any other body in government:

_The Legislative cannot transfer the Power of Making Laws_ to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.35

C. Supreme Court Treatment of the Non-Delegation Doctrine

The history of the non-delegation doctrine in the Supreme Court is too well known to require detailed exposition here. The Court has struggled since the days of the Framers to reconcile the agency idea expressed above—that Congress cannot give away policy-making power received directly from the citizenry—with the obvious fact that all administration, all “execution of the laws,” requires some discretion. The Court developed a number of different doctrines or linguistic formulations to avoid the inevitable conclusion that Congress delegates a certain amount of discretion every time it makes a law, and cannot possibly include in the text all of the details necessary to control every application of each of its laws. In the early case of the _The Brig Aurora v. United States_36 in 1813, for example, the Court upheld a statute giving power to the President to lift a statutory embargo under certain conditions on the theory that the President did not exercise legislative discretion in deciding to lift the embargo, but only found

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35 Id. at 4 (quoting JOHN LOCKE, _Two Treatises of Government_ 380-81 (Cambridge Univ. Press 1960) (1690)).
36 11 U.S. (7 Cranch) 382 (1813).
certain prerequisite facts described in advance by Congress.\textsuperscript{37} In \textit{Wayman v. Southard},\textsuperscript{38} in 1825, the Court was able to uphold the power to make rules delegated to the federal courts by finding that the legislature itself had made the important policy choices, leaving the judicial branch only the power to “fill up the details” of the statutory scheme.\textsuperscript{39} In the celebrated case of \textit{Field v. Clark}\textsuperscript{40} in 1892, the justices were able to reconcile broad power given to the President to impose tariffs in the future by saying that his principal role was to find facts triggering the imposition that was really authorized in advance by Congress.\textsuperscript{41} And in \textit{J.W. Hampton, Jr. & Co. v. United States}\textsuperscript{42} in 1928, the Court first articulated the important notion that delegations of policy-making power to the President do not offend the non-delegation doctrine so long as Congress provides an “intelligible principle” to guide the President’s use of the discretion given to him.\textsuperscript{43}

To be sure, in two celebrated New Deal cases the Supreme Court used the non-delegation doctrine to strike down portions of the National Industrial Recovery Act.\textsuperscript{44} But those cases are exceptions that prove the rule. Whatever their doctrinal validity at the time, they are the only instances in the Court’s history in which the non-delegation

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\item \textsuperscript{37} See \textit{id.} at 387 (“The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.”).
\item \textsuperscript{38} 23 U.S. (10 Wheat.) 1 (1825).
\item \textsuperscript{39} \textit{id.} at 42-43, 45 (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightly exercise itself.... The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.”).
\item \textsuperscript{40} 143 U.S. 649 (1892).
\item \textsuperscript{41} \textit{id.} at 693 (“Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”).
\item \textsuperscript{42} 276 U.S. 394 (1928).
\item \textsuperscript{43} \textit{id.} at 409 (“Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law.... If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).
\item \textsuperscript{44} See \textit{A.L.A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935) (holding that part of the Act authorizing the President to approve codes of fair competition was invalid because it attempted an unconstitutional delegation of legislative power); \textit{Panama Refining Co. v. Ryan}, 293 U.S. 388 (1935) (holding that executive orders and regulations issued prohibiting the transportation of petroleum invalid because they transcended constitutional limits on delegation of power).
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doctrine was used to invalidate a federal statute. Since that time the
Supreme Court has been much more deferential, repeatedly upholding
broad delegations of policy-making discretion to the President or to
administrative agencies under vague and sweeping congressional lan-
guage.\textsuperscript{45} The non-delegation doctrine has been employed more subtly
on occasion as an excuse to narrow delegations of authority, avoiding
possible constitutional issues,\textsuperscript{46} but it has not been a significant im-
pediment to the rise of the administrative state.

\section*{D. Recent Doctrinal Developments}

Chief Justice Rehnquist stands almost alone among Supreme
Court Justices in advocating a re-invigoration of the non-delegation
doctrine. In doing so, he has articulated with clarity the underlying
functions that a meaningful doctrine could serve. Three such func-
tions were discussed in his well-known concurring opinion in \textit{Industrial Union Department v. American Petroleum Institute}\textsuperscript{47} (the "Benzene" case) in 1980, which argued that the OSHA statute's guidance to the agency in exercising its power to control toxic substances in the workplace was too vague to pass constitutional muster. First, a work-
ing non-delegation doctrine would ensure "that important choices of
social policy are made by Congress, the branch of our Government
most responsive to the popular will."	extsuperscript{48} Second, it would provide,
through the requirement of a meaningful "intelligible principle" in the
statute, guidance for bureaucrats in carrying out the purposes of a stat-

\textsuperscript{45} More recent examples of broad delegations upheld range from \textit{Yakus v. United States},
321 U.S. 414 (1944) (standards for setting price controls) to \textit{Mistretta v. United States}, 488 U.S.
361 (1989) (authority to create sentencing guidelines). Though not often thought of in this con-
text, the Court's seminal decision in \textit{Chevron U.S.A., v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984), may rank as the most liberal of all delegation cases, in that it requires
federal judges to defer to the decisions of administrative agencies construing ambiguous statu-
tory provisions. In the recent line-item veto case, \textit{Clinton v. City of New York}, 524 U.S. 417
(1998), Justices Scalia, O'Connor, and Breyer would have upheld the statute under review be-
cause it was not really a veto, but rather a delegation to the President to decline to spend certain
items, and was accompanied by appropriate standards. The majority rejected the non-delegation
approach, opting instead to see the case as involving Article I bicameralism and presentment

\textsuperscript{46} See, e.g., \textit{National Cable Television Ass'n v. United States}, 415 U.S. 336 (1974) (distin-
guishing between "taxes," which only Congress has the authority to levy, and "fees," which the
FCC could levy provided the correct standard is used); \textit{Kent v. Dulles}, 357 U.S. 116 (1958)
(reading Secretary of State's power to refuse to issue a passport narrowly to avoid constitutional
problems).


\textsuperscript{48} Id. at 685.
ute, minimizing arbitrariness.\textsuperscript{49} Third, it would create a standard by which courts can determine whether an agency has over-stepped its policy-making boundaries.\textsuperscript{50} Most importantly for our purposes, even Justice Rehnquist did not argue that no delegation of legislative power should be permitted under the non-delegation doctrine, but only that the "intelligible principle" requirement be taken seriously.

The wide-ranging modern debate among scholars over the wisdom of the non-delegation doctrine centers on its relationship to the administrative process, addressing the need to curb executive and agency discretion exercised pursuant to the statutes delegating administrative policy-making power. For some, like Professor Davis, the focus is on the control of arbitrariness by administrators, though Davis' solution is to abandon the non-delegation doctrine as unworkable and concentrate on the requirement that agencies themselves articulate clear safeguards to guide their exercise of discretion.\textsuperscript{51} For other critics, like David Schoenbrod, the issue is reversing the tendency of Congress to shirk its policy-making function and to bestow too much discretion on unresponsive and unelected bureaucrats.\textsuperscript{52}

The Supreme Court's most recent excursion into non-delegation jurisprudence was written by Justice Scalia for a unanimous Court in Whitman v. American Trucking Associations, Inc.\textsuperscript{53} Justice Scalia, in rejecting the misguided attempt by Judge Williams in the D.C. Circuit to create a new delegation doctrine focusing on the duty of agencies themselves to clarify vague grants of legislative power, summarized the "intelligible principle" cases in a most traditional way, strengthening the view that there is no imaginable statutory delegation language that would be found unconstitutional on these grounds today.\textsuperscript{54}

\textsuperscript{49} Id. at 685-86 ("Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion.").
\textsuperscript{50} Id. at 686 ("Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.").
\textsuperscript{51} KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 50 (1969) ("[T]he emphasis should not be on legislative clarification of standards but on administrative clarification . . . ").
\textsuperscript{52} DAVID SCHONBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9, 14 (1993) ("When Congress delegates, it tends to so only half its job—to distribute rights without imposing the commensurate duties. . . . Delegation shortcircuits [the democratic process] by allowing our elected lawmakers to hide behind unelected agency officials.").
\textsuperscript{53} 531 U.S. 457 (2001).
\textsuperscript{54} See id. at 472-78.
E. The Principle of Self-Delegation

But we must also contend with Professor Manning's more subtle argument, that the sophisticated radical textualist relies not on the general non-delegation doctrine discussed above, but on the more specialized concept of self-delegation.

My first response to the self-delegation theory is that the making or use of legislative history cannot qualify as any species of delegation, whether classified as "self-delegation" or the garden variety. As Professor Siegel points out in his analysis of Manning's position, the timing is all wrong. All of the judicial and scholarly analysis of the delegation concept for more than two hundred years speaks to Congress giving away power to act in the future. But legislative history is created before legislation is passed. As we have seen, the idea that Congress may not delegate its legislative power is actually distinct from and predates the theory of separation of powers. How can one argue that a principle which rests on the notion that Congress's policymaking power belongs to the people, and thus cannot be given away, can be violated by Congress's reliance on one of its own internal components? The writing of a committee report is always followed by floor action on the bill itself. Even if one were to view legislative history as delegation, it cannot be argued that Congress is thereby giving away its power to an entity outside of the legislative branch. Certainly delegating power to make national environmental policy to the Environmental Protection Agency ("EPA") feels very different indeed from creating legislative history to explain Congress's understanding of complex provisions of the Clean Air Act. The most important difference is that legislative history is not legally binding on anyone, while validly promulgated rules under the Administrative Procedure Act are. Yet Manning would conflate the two, and would even find legislative history the more constitutionally suspect. It is therefore not surprising that the creation and use of legislative history as a species of non-delegation has escaped every scholar and judge who has written about the doctrine up until 1997.

It is also apparent that legislative history does not raise any of the policy concerns that underlie the delegation doctrine and were so carefully explained by Chief Justice Rehnquist in the Benzene case. Some

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55 See Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 VAND. L. REV. 1457, 1460 (2000) ("It is true that the Constitution specially condemns congressional self-aggrandizement, but this new argument overlooks a simple yet critical point about legislative history: most of it is created before a statute's passage, not afterwards. This crucial detail takes most legislative history out of nondelegation doctrine, which is concerned with grants of power to act in the future, not the past.").
other forms of self-delegation might certainly raise those concerns. So, if Congress attempts to empower a committee to decide important questions of law in the future and treats those future determinations as legally binding, one could argue that constitutionally suspect self-delegation has taken place, though a more coherent constitutional objection would be the bypassing of Article I procedural constraints as in *Chadha*. But empowering a committee to specify binding legal norms in the future is not the same as the creation of pre-enactment legislative history.

Moreover, even if the creation and use of legislative history can be thought of as "self-delegation," there is no logical reason for treating it differently from other forms of delegation, and it should therefore be constitutionally acceptable. Professor Manning argues that self-delegation evades the constitutional checks of bicameral passage and presentment, but so do other types of delegation. Though the Court has come to accept delegation to agencies, for example, of the power to create clean air standards evades the same constitutional safeguards—the binding standards that emerge from rulemaking are created by unelected bureaucrats and not by members of Congress. While Manning is concerned that self-delegation in the form of legislative history allows members to evade responsibility, that is also true of all delegations—it is the core of Professor Shoenbrod's powerful appeal for a return to an effective non-delegation principle.56 Quite often Congress lacks the political nerve or the time to deal with difficult issues, and leaves them to agencies to resolve. We do not find that process unconstitutional, though it is sometimes deplorable.

In fact, if I were to concede that the creation of legislative history can be seen as an instance of "self-delegation," which I do not, I would argue that it should be treated with more, not less, respect and deference than traditional delegation to executive branch agencies or courts. This is partly because the creation of legislative history is subject to its own internal rules and constraints,57 ensuring control by the elected representatives of the people. But more important, it is because the process of creating and relying on legislative history in the enactment process is carried out pursuant to Congress's affirmative constitutional power under Article I, Section 5, as argued in Parts VI and VII.

57 *See infra* Part VII.
F. Summary

There are many reasons, therefore, why attempting to use the non-delegation doctrine to constrain the use of legislative history is so unsatisfying. Analogies involving traditional delegation to agencies seems strained. Applying the doctrine to events taking place during the enactment process is clearly inconsistent with the basic purposes of the doctrine, to ensure that policy decisions are made by the legislature and to constrain the activities of the executive branch. Even if the non-delegation doctrine were to apply, it does not act as a prohibition on any delegation, but merely requires that standards to guide discretion be enacted with the delegation, a notion that seems hard to apply to Congress itself. Professor Manning's articulation of a special self-delegation principle does not seem to rescue the underlying argument about the relevance of non-delegation to legislative history.

All of these arguments make the non-delegation doctrine an inadequate doctrinal weapon for someone wishing to battle against the rising tide of legislative history in statutory interpretation. Even more important, as Parts VI and VII will demonstrate, there is another kind of delegation argument pointing strongly in the opposite direction—that Congress's power to delegate to committees is a key part of its Article I authority over the enactment process, which provides a constitutional basis for the authoritative use of legislative history. Therefore, not only are traditional principles counseling against the delegation of legislative power irrelevant in this context, but they should be replaced in our thinking by a quite separate affirmative delegation that is at the heart of the committee process in the House and Senate.

IV. THE SUPREME COURT'S ARTICLE I CASES AND LEGISLATIVE HISTORY

While the arguments of the radical textualists make important use of the concept of "self-delegation," as well as the policies underlying the non-delegation doctrine, they also stress the relevance of the Supreme Court's recent cases concerning structural separation of powers and Article I of the Constitution.

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58 It is important to understand that "delegation" in the sense that Article I delegates to Congress the power to determine its own enactment process, and to further delegate power to its committees, is very different from the traditional "delegation" of the non-delegation doctrine. Thus, Justice Stevens in his Bank One opinion can discuss the delegation by members to their committee system, and still refuse the accept the argument that creating or using legislative history violates the non-delegation doctrine. See Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring).
A. The Theory of Separation of Powers

Any argument that the use of pre-enactment committee reports to resolve statutory ambiguities violates separation of powers principles must be evaluated in light of our general understanding of those principles. In fact, deeper analysis leads to the conclusion that the doctrine of separation of powers in our Constitution is not by itself an effective weapon to invalidate specific structural innovations, let alone to justify a completely new way of understanding the role of congressional committees.

It is worth noting, to begin with, that our Constitution does not contain any language mandating the separation of the three branches of government. Some state constitutions, such as Virginia's, have very specific provisions prohibiting one branch of government from exercising the powers of the other. By contrast, the federal Constitution states affirmatively the powers of each branch, without any prohibition on exercise by one of the powers of the other. As is well understood, the Framers were concerned about preventing abuses of power by any of the branches, and so created a system of numerous specific checks and balances—veto power for the President, override power for the Congress; appointment power for the President, confirmation power for the Senate; and so forth. Those gathered at Philadelphia sought to construct a working government, in contrast to the hopelessly weak and ineffectual one created by the Articles of Confederation. The powers of the three branches are thus mixed in a very pragmatic way. As Professor Tribe puts it:

In understanding the division of authority among the branches of the federal government or between the states and the federal government, one must take into account how each of these entities engages (and often shares) the powers of the others. Although it is a misnomer as a matter of intellectual history, "separation of powers" is often used as a shorthand phrase for the complex system of checks and balances created by the Constitution—checks and balances that in fact mingle the different types of governmental power. . . . [T]he Constitution does not itself define "legislative," "executive," or "judicial" powers, and the functions assigned to each branch belie

59 See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 150-51 (1969) ("[T]he legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other.") (quoting MD. DECLARATION OF RIGHTS, art. IV (1776)).
any suggestion that the Constitution establishes a strict separation.\textsuperscript{60}

Historians of the period have established that the Framers had very complicated views about the notion of separation of powers, and did not act from any overarching theory about the proper relationship between the three parts of their new government. Professor Martin Flaherty, in his review of the work of Forrest McDonald and other intellectual historians, concludes that the Framers had abandoned any formalistic notion of complete separation of functions in favor of a system that relied on creating a balance among them.\textsuperscript{61} Given this background, it is difficult to argue that Congress’s use of committees “violates” this amorphous separation of powers principle, particularly given the independent grant of power to Congress under the Rulemaking Clause.\textsuperscript{62}

\textbf{B. The Supreme Court’s Approach to Separation of Powers}

The Supreme Court, despite occasional lofty rhetoric, has recognized that our government is not one of strict separation of powers, and that specific provisions limiting the exercise of each branch’s powers are far more important than any general theory of separation. It has dealt with these issues in an important group of modern cases, most of which involve efforts by Congress to create unusual governmental bodies or hybrid decision making structures. In \textit{Buckley v. Valeo}\textsuperscript{63} the Court rejected Congress’s effort to create a Federal Election Commission in which some of the members were directly appointed by Congress. In \textit{INS v. Chadha},\textsuperscript{64} the Court struck down the device of the one-house legislative veto of executive branch action. And in \textit{Bowsher v. Synar},\textsuperscript{65} the Justices struck down still another hybrid congressional scheme, this time giving important decision making powers under Gramm-Rudman-Hollings to the Comptroller General. On the other hand, the Court approved of Congress’s decision to give decision making power over common law counterclaims to the Commodity Futures Trading Commission in \textit{Commodity Futures Trading Commission v. Wickham}.\textsuperscript{66}

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\textsuperscript{60} Laurence H. Tribe, \textit{American Constitutional Law} §§ 2-5, at 136-37 (3d ed. 2000).
\textsuperscript{62} See infra Parts VI and VII.
\textsuperscript{63} 424 U.S. 1 (1976).
\textsuperscript{64} 462 U.S. 919 (1983).
\textsuperscript{65} 78 U.S. 714 (1986).
Commission v. Schor.\textsuperscript{66} It upheld the independent counsel statute against separation of powers attacks in Morrison v. Olson.\textsuperscript{67} And it allowed Congress to create another unusual governmental body, the Sentencing Commission, in Mistretta v. United States.\textsuperscript{68}

Scholars have struggled to explain and harmonize these decisions, all of which arguably deal with the structural separation between the branches of government and the degree to which the traditional functions of one can be exercised by another. If they all rest on separation of powers theory, how can we explain the divergent outcomes? The most convincing explanation is that given by Professor Krent. He argues that what leads the Court to strike down structural experimentation in Chadha and Bowsher and to approve of it in Schor and Morrison is the fact that in the first two cases, specific provisions in the Constitution detailing how the Congress must act were violated.\textsuperscript{69} By contrast, the Court was able to take a more forgiving and flexible approach to innovation in Schor and Morrison because no such specific constitutional constraints were involved. In those cases, the Court could engage in a more general balancing, using separation of powers as a background principle rather than a rigid set of requirements. The harder question, which the radical textualists have not satisfactorily answered, is how these cases are relevant to the question whether committee reports may be used to help interpret ambiguous statutory language.

C. The Relevance of Chadha and Bowsher

Justice Scalia and Professor Manning place most of their reliance in arguing that the use of legislative history violates separation of powers in two cases—Chadha and Bowsher. Therefore, the cases are worth examining in some detail.

INS v. Chadha involved a one-house legislative veto provision in the Immigration and Nationality Act, by which either the House or the Senate could veto the suspension of an alien’s deportation after it had been ordered by the Attorney General. Chief Justice Burger’s opinion for a seven-to-two majority was a model of simplicity, and swept away all related legislative veto provisions in the U.S. Code. There was no broad rhetoric about the separation of powers principle in the Constitution. Rather, the Chief Justice simply pointed to the require-
ment in Article I that legislation must be enacted by a vote of both houses of Congress and presented to the President for signature or possible veto. All actions by the Congress having the effect of legislation, reasoned Burger, must meet these explicit constitutional requirements. The legislative veto, which required only the vote of one house, clearly did not, and therefore was unconstitutional.

The obvious linchpin to this argument is the conclusion that the action of one house to reverse the suspension decision of the Attorney General was "legislation;" for if it was not, then it was not subject to the requirements of Article I. The Chief Justice offers this test for determining whether some unconventional action taken by the Congress is "legislation" for Article I purposes:

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to "establish an uniform Rule of Naturalization," the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. . . . The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha's status.

There was no suggestion in the case that Congress's delegation of its legislative power to a single house violated the non-delegation doctrine, though the radical textualists might surely make that argument today, and of course there was no mention of any concept such as the "self-delegation" principle now articulated by Justice Scalia and Professor Manning.

How, then, could the Chadha reasoning be applied to the act of either creating or using legislative history? We should note here that the radical textualists have never been clear as to whether the constitutional violation they complain of occurs when legislative history is first created or later when a court makes reference to it in a published opinion. Since the idea that a court violates the Constitution by dis-

70 See INS v. Chadha, 462 U.S. 919, 951 (1983) (citation omitted) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

71 Id. at 952.
cussing legislative history raises a whole host of new questions, let us assume for our purposes they would argue that the violation occurs at the time a committee report purporting to explain the purpose and meaning of a statutory text is written. The radical textualists repeatedly say that Congress is attempting to substitute committee report text that has not met the bicameralism and presentment requirements for legally binding enacted text. But they are forgetting Chief Justice Burger's key point—this can only run afoul of the \textit{Chadha} rule if the action in question alters the legal rights of persons outside the legislative branch. Committee report language simply cannot meet this test. At the time of its creation, it affects no one's legal rights, because the bill it accompanies has not yet been enacted, and may never be enacted.\footnote{Professor Eskridge made this important observation in his 1990 article. See \textit{Eskridge, supra} note 17, at 674 ("Nothing said or done in the legislative process \textit{before} the statute is enacted can be fairly said to invade judicial functions, so long as judges are free to consider all the evidence of statutory meaning.").} Even if one were to focus on later use of the language by judges to clarify the meaning of the statute it accompanies, the use of committee language is not itself "law" and judges do not treat it as "law," any more than dictionaries and canons of interpretation used to interpret statutory text are "law."\footnote{Many critics of radical textualism have made this point. \textit{See}, e.g., Breyer, \textit{supra} note 1, at 863 ("No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.'"); Schacter, \textit{supra} note 1, at 639-40 ("[I]t is inappropriate for courts to regard themselves as \textit{bound} in any legal sense by words spoken or written during Congress' consideration of legislation . . . ."); Strauss, \textit{supra} note 1, at 250 ("If, as at times the argument hints, Professor Manning means only to say that it is inappropriate for courts to regard themselves as bound in any legal sense by words spoken or written during Congress' consideration of legislation, his case is easily made.").} It does not by itself and independent of statutory text alter anyone's rights. Finally, I would observe, as we have seen elsewhere, that committee report language rests upon its own independent constitutional base\footnote{See discussion of the Rulemaking Clause of Art. I, Section 5 \textit{infra} Parts VI, VII.} and has several other constitutionally legitimate purposes, such as informing members of the content of a proposed bill, creating a permanent public record of the bill's course through Congress, and guiding executive branch agencies. It is therefore extremely hard to accept the argument that pre-enactment committee reports meet the \textit{Chadha} test for legislative action, a prerequisite to a finding that the bicameralism and presentment clauses have been violated.

Turning to \textit{Bowsher}, it is difficult to see how the holding or reasoning in that case can be applied to the creation of legislative history, as the radical textualists would have us do. \textit{Bowsher} involved efforts by Congress to create an automatic deficit-reduction mechanism in the
Gramm-Rudman-Hollings law, to compensate for their own inability to control spending. At issue was Section 251, which provided that the Office of Management and Budget and the Congressional Budget Office would make periodic reports to the Comptroller General on whether spending exceeded the agreed-upon budget ceilings. If the Comptroller General found that spending had in fact exceeded the caps, he would report that fact to the President, who was required to institute across-the-board spending cuts in the executive branch.  

Though Justice Scalia was not on the Supreme Court at the time *Bowsher* was decided, he was a member of the three-judge court that found the statute unconstitutional below, and did not signal any disagreement with the *per curiam* opinion filed by that court. That opinion, which was referred to favorably by Chief Justice Burger in the Court’s opinion, found that the Comptroller General exercised executive powers under this provision of Gramm-Rudman-Hollings. Since the Comptroller General was removable at the initiation of Congress, he was not an appropriate officer in whom to entrust executive powers. Even though it was unnecessary to their disposition of the case, Judge Scalia and his colleagues went on to discuss the non-delegation doctrine, concluding that Congress had not violated that principle when it enacted the statute. Congress had, they concluded, given the Comptroller General sufficient guidance in the carrying out of his statutory duties to satisfy the requirements of the non-delegation cases. The opinion, presumably concurred in by Judge Scalia, does not mention that delegation to an arm of Congress presents any special Article I problem. Needless to say, it does not introduce the concept of self-delegation either.

Chief Justice Burger, in his last opinion for the Court, agreed with the lower court’s analysis, finding in effect that Congress could not tamper with the specific appointment and confirmation provisions for appointment of executive officers in the Constitution. He concluded: “The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.” He also found support in *Chadha* for the Court’s holding. The vice of the legislative veto—allowing one house to act later to change the law after its enactment—is analogous to Congress’s retention of its removal power over the Comptroller General: “[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation,

its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.\(^{78}\)

Many commentators have found the Court’s rationale in *Bowsher* unsatisfying, and prefer the more subtle analysis offered by Justice Stevens in his concurring opinion. Articulating an extremely nuanced view of the origin and operation of the separation of powers doctrine, Justice Stevens is critical of the Court’s finding that the powers exercised by the Comptroller General in this case were executive. The Constitution gives us no test for determining which powers are executive or legislative, he argues, and the same power can be seen as legislative when exercised by the legislature and executive when exercised by the executive branch. The power at issue here, to trigger the across-the-board spending cuts, is a case in point. Justice Stevens sees it as the power to put into place an important national policy, and thus essentially legislative. He finds support for this conclusion in the fact that Congress enacted a fall-back procedure in case Section 251 were found unconstitutional, and that procedure involved Congress itself making the decision. Justice Stevens thus concludes that the constitutional flaw in this case is that Congress has delegated power to do a legislative act to a separate body, which is a functional part of the legislative branch. Citing *Chadha*, he writes:

> Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office.\(^{79}\)

On this theory, of course, Justice Stevens sees *Bowsher* as a close analog to *Chadha*—both involved Congress attempting to change the law without following the specific requirements set down by Article I for legislating.

Considering either the reasoning of the majority or of Justice Stevens, does *Bowsher* have any relevance to the question at hand, whether pre-enactment committee reports run afoul of these separation of powers concerns? First, *Bowsher* rests on the same fundamental premise as *Chadha*, that in order to create constitutional questions these “acts” have to be legislative acts under *Chadha* (which we have seen they are not) or perhaps executive acts under *Bowsher*. The

\(^{78}\) *Id.* at 733-34.

\(^{79}\) *Id.* at 737 (Stevens, J., concurring).
Court does not tell us what an executive act is, except to observe that the Comptroller’s action involves carrying out Congress’s instructions, akin to applying any law. Are the radical textualists arguing that each time a committee writes a legislative report on a pending bill it is exercising the executive power? That seems highly illogical in light of the fact that a statute does not exist at the time the committee report is written. Moreover, courts have consistently held, and Congress has conceded, that even after enactment its pre-enactment committee reports only guide the executive branch, but do not have the force of law. If the test of an executive act is similar to the Chadha test for legislative acts—binding effect on the legal rights of persons outside the legislative branch—pre-enactment committee reports would clearly fail it.

A more fundamental point to emphasize in this effort to apply Chadha and Bowsher to legislative history is that both of those cases involved efforts by a governmental body to alter the legal status quo at some time after the enactment of legislation empowering it to act. Legislative history, on the other hand, is created before the measure in question becomes law. The underlying concern, explicitly articulated by Justice Stevens in his Bowsher opinion, is that by delegating to a part of itself the power to change the effect of a law in the future, Congress could evade the Constitutional restraints on its action (bicameralism and the veto) and thus undermine democratic accountability. But the analogy to legislative history creation simply fails. Legislative history is not treated by any of the actors as binding in the legal sense. Taking the time of enactment as the constitutionally crucial point for our analysis, the making of legislative history looks backward, not forward as in Chadha and Bowsher. Legislative history may be an attempt by the relevant committees to clarify and explain Congress’s action during the process of passage, but it is legally superseded by the enactment of the legislation that follows. Analytically, therefore, it cannot be made subject to the separation of powers arguments made by the radical textualists, and is simply unaffected by the Court’s reasoning in Chadha and Bowsher.

D. Chadha, Bowsher, and Self-Delegation

Professor Manning relies on Chadha and Bowsher to argue that legislative history is self-delegation of a special sort, and is inconsistent with Article I. He sees those two cases as validation by the Su-

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80 See infra Part VII.E.1.
81 See Bowsher, 478 U.S. at 714, 737-41, 748-59 (1986).
The Court is saying, in his interpretation, that Congress cannot use the delegation of interpretive power to committees or individual legislators to circumvent Article I requirements, and participate directly in application of the laws. That law elaboration function is reserved to the executive branch, and when statutes must be interpreted, to the courts.

But Manning simply ignores the inconvenient fact that the Court in *Chadha* and *Bowsher* does not mention self-delegation, let alone adopt it as its rationale. As we have seen, the majority in *Chadha* rests on non-compliance with the procedural requirements for legislation in Article I, and the *Bowsher* Court relies on the specific method of appointing executive branch officers in Article II. In the one case where the theory now advocated by Scalia and Manning might have been relevant, *Nixon v. United States*, the Court, in an opinion concurred in by Justice Scalia, never mentions the issue of self delegation, even though it would seem to be relevant in a case where Senate delegated its power to try an impeachment to a committee.

Even if one were to concede that self-delegation of the power to elaborate the law is the “real” rationale of these cases, application of the principle to pre-enactment legislative history would be illogical. As already noted, a self-delegation principle under Article I would indeed be violated if Congress were to empower one of its committees to make legally binding policy determinations in the future. That would clearly seem to violate the intention of the Framers that legislation should have to run the gamut of two quite different legislative chambers and a possible Presidential veto. But though Professor Manning writes as if it is binding “law,” legislative history carries no such binding effect. It certainly does not alter legal rights like the action of the House in overriding the Attorney General’s decision to allow Chadha to remain in the country. And it does not make an important determination of national budget policy like the decision of the Comptroller General to trigger budget reductions in *Bowsher*. Once the Congress has created its committee reports as aids to statutory interpretation, and for other reasons, it possesses no power to direct how they shall be used, and courts may and do ignore them. It is still the judge, not a congressional committee, who decides the application of a statute to the facts of the case at hand.

Finally, the entire law elaboration argument articulated by Professor Manning is simply carried too far. Despite Chief Justice Burger’s comment in *Bowsher* that “once Congress makes its choice in enacting legislation, its participation ends,” that limitation cannot be taken lit-

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82 506 U.S. 224 (1993). See infra the discussion in Part VI.D.
erally. The Framers contemplated that Congress would participate in the administration of the laws in many ways, including confirmation of executive branch appointments and withholding funds. As is widely known, Congress is involved daily in the application of the laws it passes—by oversight hearings, investigations by the Comptroller General, meetings with executive branch officials, public excoriation of policies, and individual pressure. As noted in Part VII, the entire budget and appropriations process abounds in informal mechanisms for Congress to influence executive branch action, and the legality of this process has never been questioned by the Court. If there is a doctrine prohibiting Congress from participating in law elaboration, it is restricted to efforts by one house or a committee to make legally binding applications of a statute after it has been passed. No one suggests that committee reports and other kinds of legislative history are binding on courts or agencies in the legal sense.

E. Summary

Like the non-delegation argument, to which it is closely connected, the separation of powers arguments of the radical textualists are ultimately unconvincing. The legislative schemes condemned in Chadha and Bowsher are too different from the familiar process of creating a committee report to sustain the analogy. Moreover, the softness of the overarching separation of powers theory on which our system is based fatally weakens a more general argument that use of legislative history violates that theory.

We have now seen that the effort by radical textualist scholars and judges to attack the constitutional legitimacy of legislative history materials is unpersuasive. But that does not leave the issue of the legitimacy of committee reports in constitutional limbo. It remains now to look at the affirmative case for the legitimacy of legislative history in our constitutional system. We will focus particularly on the neglected Rulemaking Clause of the Constitution as a source of Congress's power to create and utilize an authoritative committee process, and ultimately as a solid justification for a judge's reliance on committee reports in the interpretation of ambiguous statutory provisions.

83 One of the most perceptive students of Congress, Louis Fisher, has often made this point in arguing against the reasoning of Chadha. See, e.g., Louis Fisher, Micromanagement by Congress: Reality and Mythology, in FOUNDATIONS OF ADMINISTRATIVE LAW 252-53 (Peter H. Schuck ed., 1994) (characterizing notion that Congress' participation in executing laws is limited to enacted new legislation as "nonsense").
V. ARTICLE I AND THE ENACTMENT PROCESS

A. Overview of Article I

Radical textualist judges like Justice Scalia and scholars like Professor Manning, as we have seen, rest one of their principal objections to the authoritative use of committee reports in statutory interpretation squarely on the Constitution. More particularly, they argue that only the language of legislation itself can be considered by a judge in the process of statutory interpretation, because only the text has been subject to bicameral passage and presentment to the President as required by Article I, Section 7. This is fundamentally an argument about the constitutional legitimacy of committee reports and the congressional committee process itself. It draws a stark distinction between legislative text as voted on by both legislative chambers and committee language contained in the reports accompanying the legislation. In the preceding parts of the Article, we have seen that the radical textualist arguments premised on the non-delegation doctrine and more general separation of powers concerns are analytically weak. We now turn to the second half of my response, that the Rulemaking Clause of Article I, Section 5 is an important independent source of constitutional legitimacy for written committee reports that accompany reported bills (and, even more clearly, for conference committee reports). My overall purpose is to arm those who advocate careful use of legislative history sources as a necessary contextual device to explain vague statutes with a new and explicitly constitutional justification.

So now we turn to Article I of the Constitution. Before proceeding to look closely at the Rulemaking Clause, we would do well to pause for a moment to seek a clearer understanding of the principles of bicameral passage and presentment to the President that are relied upon so heavily by textualists. As the Supreme Court in Chadha and other cases has observed, these principles are derived from Sections 1 and 7 of Article I; the Court’s opinions have spoken of them as two of the most important and inflexible requirements of our written Constitution. While an enormous analytical weight has been placed on bi-

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84 See supra Parts I and II.
85 See, e.g., Clinton v. New York, 524 U.S. 417, 436-42 (1998) ("Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'"); INS v. Chadha, 462 U.S. 919, 944-51 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."); See also Buckley v. Valeo, 424 U.S. 1, 118-25 (1975) (per curiam) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").
cameral passage and presentment in our orthodox constitutional thinking, it is surprising to read the words themselves and observe their context. As for Article I, Section 1—the very first sentence of the body of the Constitution—the Framers were content to simply state that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,” without any specific provision detailing the relationship between the houses or the manner of enacting statutes. We know that the decision to create two separate houses of different sizes, modes of election, terms, and qualifications was one of the most important made at the Constitutional Convention, but little attention was given to the process of creating legislation. Article I, Section 7, by contrast, has been the subject of much academic and judicial analysis, and begins as follows:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The text then continues to set out at some length the mechanics of veto and override, key elements in the Constitution’s system of checks and balances between the branches. What is interesting about this portion of Article I is that the ideas of bicameralism and presentment are not set out as independent principles, subjects in their own right, but rather are mere procedural incidents to the real subject of Section 7—the Presidential veto and congressional override mechanism. Thus, even though it is often stated that the Constitution requires that a bill pass both houses in identical form before presentation to the President, no explicit language to that effect can be found in Article I. One might at least conceive of a system in which both houses passed

86 The Framers desired to make it difficult to pass legislation because they feared the excesses that had plagued past Colonial legislatures. To make the House closer to the people, direct election, shorter terms, and smaller districts were created. To make the Senate representative of the states, election by state legislatures and longer terms were created.

87 U.S. CONST. art I, § 7. See also THE FEDERALIST NO. 69 (Alexander Hamilton). Even the Supreme Court has tacitly recognized what the Constitution and the Federalist Papers make clear, that Art. I, § 7 is an intricate procedural clause explaining the process by which the President can veto a bill and Congress can override it. See Chadha, 462 U.S. at 948-49 (“The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent.”) (emphasis added).
bills that differed slightly in their language, with the differences reconciled by the President before signing; or one in which the last house to act on a bill controlled the final language, with no second vote by the first house. Over the years, courts and commentators have simply assumed that since we have two "Houses" and only one "Law" signed by the President, the two houses are required to devise some system for agreeing on the same language in a single "Bill."

Even though scholars and the Supreme Court have treated bicameralism and presentment as clear and immutable ideas, both have actually developed as more flexible concepts. Consider the key word "passed" in Article I, Section 7, for example. One might suppose that it requires members of each chamber to vote in person, with a quorum of a majority plus one actually present, on each bill, with some requirement that the members understand the bill text. Reading Justice Scalia's criticisms of congressional standing committees, and his reverence for actual floor votes on the text of a bill, one might fairly conclude that he clings to such a naive interpretation of the term "passed."

The reality of passage, of course, is quite different. There is no requirement in our law that legislators have a reasonable factual basis for the legislation they pass, that they understand the text of the bill, or even that they have read it at all. The key principle of a presumptive quorum—that a quorum exists until someone asks for proof—means that many bills are passed with only a minority of members present and voting. Indeed, by long-standing practice, not specifically addressed in House or Senate rules, bills are passed with only one member of the majority present, by unanimous consent. Hardly "passage" in the commonsense meaning of that word, yet allowed under

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88 See Towsend v. Yeomans, 301 U.S. 441, 451 (1937) (noting that "[t]here is no principle of constitutional law which nullifies action taken by a legislature in the absence of a special investigation"). See also Palladio v. Diamond, 321 F. Supp. 630, 633 (S.D.N.Y. 1970), aff'd, 440 F.2d 1319 (2d Cir. 1971) ("[T]here is no constitutional requirement that the legislature conduct hearings and build a record when it passes a law."); id. ("[A] statute must be judged constitutional if any set of facts which can reasonably be conceived would sustain it."); id. ("No case has ever held that a [legislative] record is constitutionally required."). Using this legal principle and reasoning, numerous other cases have held that government need not hold hearings and allow for those persons affected by legislation to address the legislature. See, e.g., Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 285 (1984) (holding that the Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy); Atkins v. Parker, 472 U.S. 115, 130 (1983) (holding that food stamp recipients had no special right to advance notice of eligibility amendment to Food Stamp Act); Nat'l Amusements v. Town of Dedham, 43 F.3d 731, 746 (1st Cir. 1995) (noting the impracticability of allowing the public a direct voice in the adoption of a general state statute). Granted, saying that there is no general rationality requirement for legislation is somewhat of an over-simplification. Courts sometimes inquire into purpose and motivation where invidious discrimination or violation of fundamental rights is alleged. See generally WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 966-92 (3d ed. 2001) (discussing the "deliberative model" of legislative rationality).
the vitally important corollary to the Rulemaking Clause of Article I, Section 5—that any rule either house is free to make, it is equally free to amend, repeal, suspend, ignore, or waive. Legislative bodies could hardly function at all without such shortcuts. Moreover, one might as an original proposition assume that "passed" implies a process by which a majority may bring any measure it wishes to a vote, and obtain a vote on any proposed amendment to the text. But procedural barriers in both houses, and particularly the functioning of the filibuster in the Senate and Rules Committee in the House, create a much more restricted, less majoritarian system.

Perhaps most startling, in light of the Court's language about the procedural requirements of legislating in Article I, the enrolled bill rule prevents a judge from going behind the certified text of a bill, even when it may be apparent that the text as passed by the House or the Senate is not the same text as that signed by the President.

In truth, we have no idea how far Congress might push the constitutional concept that a bill must be "passed," because House and Senate rules are actually quite conservative on this score. Certainly, voting by proxy, though not now allowed on the floor of the House and Senate, could be done on regular legislation if a majority chose to adopt it by rule. In my view, House and Senate rules could provide that a bill approved by a standing committee, and subject to unanimous consent objections, could be passed without any actual event taking place on the floor at all and still be valid under the Rulemaking

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89 The Senate has three different types of votes—roll call, voice (in which no actual count is made) and division (the equivalent of a show of hands, with only the result announced and not the names or numbers of those voting for and against). In actuality, however, there is a fourth voting mechanism, usually used for unimportant matters. Former Senate Parliamentarian Floyd Riddick notes that bills can also be passed by a much quicker method, which requires only one member to be present: "Frequently, the Chair will state, 'Without objection the amendment, bill, resolution, motion etc. is agreed to (or not agreed to).'" FLOYD RIDDECK, RIDDICK'S SENATE PROCEDURE, S. Doc. No. 101-28, at 1397 (1992). "This is merely an abbreviated way of putting the question on a voice vote, and does not imply that the proposition can be defeated by one objection. However, any Senator may object to putting the question in this manner, in which case the vote will occur by one of the other methods . . ." Id. at 1397. Occasionally, important bills are approved by unanimous consent. A recent example is the package of bills known as the Contract With America Advancement Act of 1996, P.L. 104-121, 110 Stat. 847, approved March 29, 1996. This legislation included, in Title II, the provisions for review and disapproval of agency rules, which were used by Republicans to block rules promulgated in the waning weeks of the Clinton administration. The entire legislative package was passed in the Senate by unanimous consent under a previous agreement, and there is no actual moment of passage recorded in the Congressional Record. 104 CONG. REC. S6808 (daily ed. Mar. 29, 1996). One wonders how a radical textualist would evaluate the legitimacy of this statutory text.

90 See Field v. Clark, 143 U.S. 649 (1892) (holding that various importers protesting against government assessment could not present evidence from congressional sources to assert that the act creating the assessments was not contained in the bill authenticated by congressional officers and approved by the President). See also discussion at Part VI.C. infra.
Clause.® The only bedrock requirement, it seems, is that the presiding officer of each chamber must certify to “passage” and a formal text must be prepared for the other house or the President to act on.®

In light of the unmistakable primacy accorded to committee reports by congressional rules and practices, which I demonstrate in Part VII, one could logically argue that an additional reason for consulting committee reports in interpreting ambiguous statutes is that the constitutional term “passed” includes the entire enactment process adopted by Congress under the Rulemaking Clause. Such a conclusion would certainly be no more of a stretch than the other practices deemed compatible with passage under Article I, as discussed above.

Likewise, the constitutional notion of “presentment” does not necessarily mean what it seems to mean. It certainly does not require a physical presentation to the actual President by the actual presiding officer of the originating chamber. Courts have found that a bill may be presented by a standing committee of the originating house, and that it may be done by staff members after the house has adjourned.® Indeed, the entire veto mechanism so carefully set down in Article I, Section 7 has been considerably streamlined by the federal courts over the years to recognize modern legislative realities regarding recesses and adjournments.®

® During the all-too-frequent chaos over unpassed spending bills at the beginning of the 2001 fiscal year, the New York Times reported that the Senate, with only the presiding officer and one other member present, adopted a resolution that would “deem” any one-day spending measure adopted by the House and sent to the Senate in the following twelve days as automatically approved. The Senate then went out of session until November 15. Such a procedure would seem to violate anyone’s interpretation of the word “passed.” See Steven A. Holmes, Half Open Congress Keeps Money Flowing, N.Y. Times, Nov. 3, 2000, at A20. As note 89 supra points out, the Contract With America Advancement Act of 1996 passed the Senate under a previous unanimous consent agreement with no actual moment of passage recorded.

® An interesting state case carrying deference to legislative voting practices very far is Heimbach v. State, 454 N.Y.S.2d 993 (N.Y. App. Div. 1982). The case involved the state senate’s “fast roll call” procedure, under which a member who had checked in as present during the legislative day could be voted in favor of any bill by the leadership. The bill in question passed by one vote, and Senator Nolan alleged that he had erroneously been counted as a vote in favor although he in fact opposed the bill and had not been on the floor for the vote. Confusion about the working of the fast roll call procedure was the culprit; had Nolan been counted as absent the bill would have been defeated under New York’s constitutional majority requirement. The New York court refused to declare the bill void, arguing that the senate had broad power to decide on the meaning of the state constitution’s roll call provision, even when, as here, it resulted in “erroneous” passage of the bill.

® See, e.g., Mester Mfg. Co. v. INS, 879 F.2d 561, 570-71 (9th Cir. 1989) (holding that the Immigration Reform and Control Act of 1986 was properly presented to the President after Congress adjourned sine die); United States v. Kapsalis, 214 F.2d 677, 679-83 (7th Cir. 1954) (holding that although three criminal statutes were presented to the President after Congress had adjourned, the President’s approval of the bills within ten days of presentation complied with the presentment requirements of U.S. Const. art. I, §7, cl. 2).

® See Barnes v. Kline, 759 F.2d 21, 35-36 (D.C. Cir. 1985) (“The principle that we believe
Bicameral passage and presentment, then, may not be the unchangeable constitutional principles we so often suppose them to be, but somewhat more flexible requirements. The so-called "requirement" that a bill be passed in identical language by both houses does not appear in the Constitution; it is a practical conclusion derived from the existence of two legislative chambers juxtaposed against the requirement in a rational legal system that there be a single agreed-upon text for a law imposing duties on citizens.

While there has been surprisingly little thoughtful analysis by judges or scholars of the bicameralism and presentment requirements of Article I, Section 7, virtually no attention has been given to the Rulemaking Clause of Article I, Section 5, at least in the context of the debate over the authoritativeness of committee reports. Yet the Rulemaking Clause, unlike bicameral passage and presentment, is not an adjunct to another more crucial principle (the veto, one of the key checks in the Constitution) but a separate clause explicitly setting out Congress's unfettered power to control the enactment process. The full text is as follows: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."95

The text of Article I contains a few specific procedural requirements—for voting, keeping a journal, etc.—but the Rulemaking Clause is an unmistakable delegation by the Constitution to the House and Senate to devise their own enactment processes. Consequently, it provides constitutional legitimacy to rules later adopted by both houses establishing a committee system and relying on it to craft legislation, explain its meaning, and manage its consideration on the floor. To fully understand the constitutional position of the legislative committee process and the written reports stemming from it, one must look not only at the traditional bicameralism and presentment language, as the textualists do, but at the Rulemaking Clause as well. For if Congress, exercising its own constitutional power to devise an enactment process of its choosing, vests authoritative power in its committee system and uses committee reports to explain its legislative acts, then

runs through Pocket Veto [Pocket Veto Case, 279 U.S. 655 (1929)] and Wright [Wright v. United States, 302 U.S. 583 (1938)] is a simple one: whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective only if, under the circumstances of that type of adjournment, such a procedure would not occasion undue delay or uncertainty over the returned bill's status."); Kennedy v. Sampson, 511 F.2d 430, 440 (D.C. Cir. 1974) (returning a bill by the President under veto mechanism is not prevented by an intrasession adjournment, so long as the originating house is capable of receiving the message). These cases effectively amended the pocket veto in the Constitution.

95 U.S. CONST. art. I, § 5, cl. 2.
the courts should respect that decision and should consult committee reports as aids in establishing the meaning of ambiguous statutory texts. Because this is a key element in my overall argument, I now turn to an in-depth exploration of the Rulemaking Clause.

B. History of the Rulemaking Clause

The notion that a legislative body has the inherent power to create enactment processes that satisfy its own needs must have seemed self-evident and non-controversial to the Framers. Representative bodies have created rules to govern their proceedings for centuries. Several of the early state constitutions had provisions similar to the Rulemaking Clause. The Articles of Confederation did not contain such language, but the legislative body it created adopted its own rules as a matter of course. Incidentally, Article IX of the Articles of Confederation explicitly gave that legislature the power to appoint committees.

Compared with the great issues facing the Framers in Philadelphia in the summer of 1787, something as basic as the power of a legislature to determine its own enactment process was probably seen as unworthy of debate. Most of the delegates had been active members of their respective colonial legislatures and were familiar with the procedures of the English Parliament; they probably took for granted


97 See, e.g., VA. CONST. (1776); 1 THE PAPERS OF GEORGE MASON, 1725-1792, 299-310 (Robert A. Rutland ed., 1970) Mason's final draft of the Virginia Constitution, which was enacted verbatim, contained the following provision: "[E]ach House shall choose its own speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election for supplying intermediate vacancies." Id. at 305.


99 THE ARTICLES OF CONFEDERATION, art. IX (1781) ("The [U]nited [S]tates in congress assembled shall have authority . . . to appoint such other committees and civil officers as may be necessary for managing the general affairs of the [U]nited [S]tates . . . ").

100 This point is borne out by Jefferson's Manual, the remarkable procedural guide written by Thomas Jefferson to assist in the performance of his duties as presiding officer of the Senate from 1797 to 1801. Even today his manual is printed as part of the official volume containing House rules and precedents, and in the House it still serves as a source of parliamentary rulings when other explicit rules do not resolve the question at hand. In the preface to his manual, Jefferson explicitly acknowledges that his procedural principles are derived from the English and colonial practices and that he repeatedly refers to them to resolve procedural questions. See THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE (1797), in CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED
much of the basic structure and procedure of legislative bodies. We know that the Framers formed a committee to draft rules for their own deliberations on the Convention’s first day, and adopted rules several days later.\footnote{See Arthur Taylor Prescott, Drafting the Federal Constitution 37-42 (1941); 1 The Records of the Federal Convention of 1787, 2-10 (Max Farrand ed., Yale Univ. Press 1937) (1911) [hereinafter Records of the Federal Convention].} A Rulemaking Clause was not included in the Virginia Plan as originally presented to the Convention, though a version of it was in Pinckney’s draft plan: “Each House shall appoint its own Speaker and other Officers, and settle its own Rules of Proceeding . . . .”\footnote{3 Records of the Federal Convention, supra note 101, at 605.} The language of the final constitutional provision appears first in the report of the Committee of Detail on August 6, in Article VI, Section 6.\footnote{See 2 Records of the Federal Convention, supra note 101, at 180 (“Each House may determine the rules of its proceedings . . . .”).} The Committee of Style and Arrangement, led by Gouverneur Morris, rearranged the provisions and made minor adjustments, and when presented to the Convention for final debate and adoption, the Rulemaking Clause rested in Article I, Section 5.\footnote{Id. at 592.}

There is no record of discussion in the Convention on the inherent powers of the House and Senate to control the details of the enactment process or on the need for an explicit Rulemaking Clause for the national legislature. Likewise, no references to the Rulemaking Clause appear in the Federalist Papers. Again, such a self-evident point was unlikely to be discussed in light of the great issues of representation of the states, the status of slaves in counting population for the House, the powers of the Congress, and the like. By the same token, there was apparently no discussion in Philadelphia or in the Federalist Papers of bicameral enactment as a separate constitutional principle—the subject is touched upon only in the context of the veto mechanism.\footnote{See 1 Records of the Federal Convention, supra note 101, at 334-68. The desirability of a balanced legislature of two quite different houses was of course a major topic of debate, as the Framers had experience with runaway legislative bodies. The discussion of bicameralism at the Convention consisted largely of debate over the necessity of a two-house legislature and the methods of election (direct or through state legislatures) of the members of the legislature. See id. at 585-87; The Federalist Nos. 10, 48, 58, 62 (James Madison), Nos. 67, 73 (Alexander Hamilton).}

Early scholarly explanations and analyses of the Constitution likewise devote little attention to the Rulemaking Clause or to bicameral enactment as a separate constitutional principle. The most influential of these, Joseph Story’s Commentaries, makes it clear that the
power to control internal proceedings is inherent in the legislative power in Article I:

No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.1

C. Judicial Interpretations of the Rulemaking Clause

Federal courts have only infrequently had the opportunity to interpret the Rulemaking Clause of Article I, Section 5, and thus to discuss the scope of Congress's power to determine the rules of its own proceedings. The few relevant Supreme Court cases, and a larger number of court of appeals opinions, show both doctrinal confusion and an understandable reluctance to judge the internal rules of the House and Senate. Most often, courts have used a variety of doctrines, including political question, standing, equitable discretion, and general separation of powers concerns, to avoid ruling on the validity of such rules and practices. On the narrower question I pose—whether Congress has the power under the Rulemaking Clause to create an authoritative committee system and rely on it as a source of help in interpreting statutes—the answer from case law is somewhat clearer. Both the Supreme Court and the U.S. Court of Appeals for the District of Columbia have stressed the breadth of the Rulemaking Clause, and no court has struck down a congressional rule involving the enactment process itself.

1. Supreme Court Opinions

There have been few Supreme Court cases that directly pose questions about the scope and effect of the Rulemaking Clause of Article I, Section 5. The first and most important of the Court's forays into this sensitive area came in 1892, in two contemporaneous cases involving tariff legislation.

In Field v. Clark,107 importers challenged the validity of particular tariff legislation because a key provision contained in both the House

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107 143 U.S. 649 (1892).
and Senate versions was somehow omitted from the enrolled bill presented to the President for his signature. The justices conceded that whether the bill passed by Congress is the same as that signed by the President raises a valid issue under the Constitution. But they went further to hold that courts are not permitted to look behind the official signatures of the two chambers’ presiding officers in deciding such a question. Under this so-called “enrolled bill rule,” also common in many states, judges may not examine the written journal of the chamber, or consider any other extrinsic evidence of procedural flaws in the enactment process. They must accept the enrolled bill at face value, since any other conclusion would plunge a court into the difficult process of evaluating legislative procedures. Powerful separation of powers concerns, then, counsel the adoption of such a prophylactic rule, which blocks all inquiry into the alleged procedural flaws in a bill’s adoption.

Decided the same day as *Field, Ballin v. United States* involved a direct challenge to congressional voting procedures used at the time. The tariff statute at issue had been passed by a vote of 138 in favor, 3 against, with 189 present but not voting. As the Court notes, the Constitution requires that a quorum be present when a roll call vote is taken. In order to counter the tactic of blocking legislative action by refusing to answer the quorum call even while present, House rules at the time allowed the presiding officer to count toward the quorum members who were in the chamber but not voting. Justice Brewer noted that the Constitution is silent as to the method of computing or determining a quorum, and that the Rulemaking Clause gives Congress the power to resolve such questions. Despite *Field*, which

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108 See id. at 672 (addressing the contention "that [an act] cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President").

109 See id. at 673 (rejecting a rule that would make “the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them").

110 See ABNER MIKVA & ERIC LANE, LEGISLATIVE PROCESS 592-98 (1995). "The enrolled bill rule creates less opportunity for judicial review of legislative proceedings." Id. at 596.

111 144 U.S. 1 (1892).

112 Id. at 5-6. See U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business . . . .").

113 See Ballin, 144 U.S. at 5 ("On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business.") (quoting the House Journal, 230, Feb. 14, 1890).

114 See id. at 6 ("But how shall the presence of a majority be determined? The Constitution
would seem to bar examination of the journal to determine the vote, the Court did look at the journal.

The Ballin opinion has created confusion because of the apparent inconsistency between its holding and some of its language. On the question presented, Justice Brewer is clear. The Court may not second-guess the House’s choice of a quorum rule: “Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings.”115 But the opinion goes on to add three limitations, even though none was at issue in this case: “It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”116 The first two examples—rules that may violate other specific limitations in the Constitution, and rules that violate the rights of persons outside the Congress—figure in a number of later cases. The third—rules that may be unreasonable—apparently was not taken seriously by the Court because it has never been applied in a subsequent case. Indeed it would allow deep and wholesale intrusion into the affairs of Congress, conflicting with these additional words of Justice Brewer:

[W]ithin these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.117

Thus, despite the looseness of some of its dicta, Ballin supports a very expansive interpretation of the Rulemaking Clause. It has not always been so read by judges of the courts of appeals, as we shall see.

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115 Id. at 5.
116 Id.
117 Id.
The Court did not return to these issues for 40 years, until *United States v. Smith*. There, the Justices considered the effect of a Senate rule that permitted the chamber to reconsider its vote to advise and consent to a nomination, even after its approval had been forwarded to the President and the appointment made. The Court here construed the Senate rule, despite *Ballin*, on the ground that what was involved was not a rule affecting only the Senate. Rather, it implicated the President's appointment power and the validity of a federal office. It was therefore not inconsistent with the general position that rules and practices effecting only the internal enactment process itself are completely within Congress's discretion.

Likewise, the next two cases the Court decided—*Christoffel v. United States* and *Yellin v. United States*—also involved the Court's interpretation of House and Senate rules, but are not inconsistent with *Ballin*. Both cases involved the rights of witnesses before congressional committees, and therefore fell under the fundamental rights exception discussed in *Ballin*. For this reason, they are not directly relevant to the narrower question under discussion here.

On two occasions in the 1990s, the Supreme Court again took up the question of the scope of the Rulemaking Clause in cases involving aspects of the enactment process itself. In *United States v. Munoz-Flores*, the Court was faced with the question of whether a particular piece of legislation complied with the constitutional requirement that all bills for the raising of revenue originate in the House. It found that the issue was justiciable. Again, this is consistent with *Ballin* and the more general principle that Congress has complete discretion over its own enactment rules, because *Munoz-Flores* involved a separate constitutional requirement, explicitly set out in Article I. On the merits, Justice Marshall found that the measure in question was not a revenue bill and therefore the constitutional provision did not apply.

The case is particularly interesting for our purposes because of Justice Scalia's concurrence. He argued forcefully that the enrolled
bill rule articulated in *Field v. Clark* prevented the Court from deciding the case—the bill on its face indicated that it had originated in the House.\textsuperscript{126} He would thus support judicial deference to congressional decisions on procedure even in a case where a specific constitutional requirement is involved, broadening the apparent holding in *Ballin*. Despite his disdain for the committee system and Congress’s reliance on it in interpreting statutes, Justice Scalia states most strongly that in this context:

> We should no more gainsay Congress’ official assertion of the origin of a bill than we would gainsay its official assertion that the bill was passed by the requisite quorum . . . . Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value.\textsuperscript{127}

It could well be pointed out that the thrust of this argument is inconsistent with his assertions that despite Congress’s reliance on the committee system and its written product, the Supreme Court is entitled to ignore them in the process of giving meaning to ambiguous statutory provisions.

The Supreme Court’s most recent discussion of these issues came in *Nixon v. United States*,\textsuperscript{128} a case involving a challenge by an impeached federal judge to the use of a trial committee in the Senate. Despite the constitutional duty to “try” impeachment cases,\textsuperscript{129} the Senate had adopted a rule leaving fact finding to a small hearing committee, with debate and final vote in the full Senate.\textsuperscript{130} This case is thus particularly relevant to the question of the authoritativeness of the committee system in statutory interpretation. Chief Justice Rehnquist, in an opinion Justice Scalia joined, held the challenge to be non-justiciable. He found the constitutional delegation to the Senate of the “sole power” to try impeachment to warrant complete judicial deference. The Court thus allowed a Senate committee to try Judge Nixon. While the case did not technically involve the more general rulemaking power of Article I, Section 5, the larger point is the same. Interestingly, despite the later argument advanced by the radical textu-

\textsuperscript{126} *Id.* at 408-09 (Scalia, J., concurring).

\textsuperscript{127} *Id.* at 410.

\textsuperscript{128} 506 U.S. 224 (1993).

\textsuperscript{129} See U.S. CONST., art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

\textsuperscript{130} See *Nixon*, 506 U.S. at 227-28.
alists about self-delegation, the Court did not discuss the non-delegation doctrine in this case, even though it would seem relevant under the theory articulated by Justice Scalia and Professor Manning. More significantly, Nixon rejects the formalist notion now advocated by the radical textualists, that there is a constitutional prohibition against Congress's vesting its committees with considerable legislative power.

In sum, the Supreme Court has stayed reasonably close to its original analysis of these issues in Ballin for over 100 years, and has steadfastly refused to judge any rule of the House or Senate dealing with the enactment process unless another specific constitutional limitation was involved or individual rights were threatened. Though given many opportunities over the years, as we shall see, it also declined to review a number of other cases from the courts of appeals that would have allowed the justices to reevaluate this fundamental position.

2. Court of Appeals Opinions

Over the past thirty years, there have been a number of attempts to challenge in federal court the validity of particular rules and practices of the Congress. With the exceptions discussed above, these cases have not reached the Supreme Court, but have been dealt with by the courts of appeals. Most have been decided in the D.C. Circuit. These cases do not form a coherent whole, but viewed together they show extreme reluctance on the part of the judiciary to intrude into the internal affairs of the Congress because of deference to the powers of a coordinate branch of government. Since they ordinarily do not involve the rights of persons outside the legislative branch, or violate other clear constitutional provisions, one would have thought that fidelity to Ballin would have made these easy cases. In fact, the doctrinal confusion has been substantial, and three different theories have been used to avoid decisions that interfere with the rulemaking power of Congress. The first is standing, a frequently employed ground for dismissing suits challenging congressional rules and practices, particularly when the plaintiff is a legislator. The second is the political

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132 See, e.g., Raines v. Byrd, 521 U.S. 811 (1997) (finding that members of Congress did not present a sufficient personal stake or concrete injury to challenge the Line Item Veto Act);
question analysis of *Baker v. Carr*, and more particularly the "textual commitment" prong of that test, which rests solidly on the Rule-making Clause. The third is more general separation of powers concerns, often expressed by the D.C. Circuit under the rubric of "equitable discretion." Together, these doctrines have been an effective barrier to victory for plaintiffs challenging congressional practices.

Judges in the D.C. Circuit have continued to insist that, as a general matter, challenges to congressional rules and practices are justiciable, even in light of *Ballin* and *Baker*. Despite this provocative posture, which is probably inconsistent with a proper reading of the Supreme Court’s decisions, the court’s actual disposition of cases has been quite deferential, affirming a broad scope for the rulemaking power embodied in Article I, Section 5, Clause 2.

In the 1970s, the D.C. Circuit decided several cases dealing with congressional rules and practices. *Consumers Union of the United States, Inc. v. Periodical Correspondents’ Association* involved distribution of press passes to the House and Senate galleries, which the court had no trouble finding was insulated by the rulemaking power embodied in Article I, Section 5, Clause 2.

Harrington v. Bush, 553 F.2d 190, 208, 214-15 (D.C. Cir. 1977) (finding that Representative Harrington had suffered no cognizable injury by being denied CIA appropriations information).

See *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582 (D.C. Cir. 1978) (affirming the district court’s refusal to grant injunctive or declaratory relief with respect to divulgence to Congress of trade secrets obtained by the Federal Trade Commission under compulsion of subpoena, and denying a stay pending appeal); *Consumers Union*, 515 F.2d at 1346 (holding that the issue was nonjusticiable because it “involves matters committed by the Constitution to the Legislative Department . . .”).

See, e.g., *Moore*, 733 F.2d at 954-56; *Crockett*, 720 F.2d at 1356-57; *Riegel*, 656 F.2d at 879-82. *Riegel* was the first case to use the doctrine of circumscribed equitable discretion because, in the words of the D.C. Circuit, it “avoids the problem engendered by the doctrines of standing, political question, and ripeness.” *Id.* at 881. However, the doctrine of equitable discretion has recently been called into doubt by the D.C. Circuit. For example, in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), Judge Ginsburg stated that “[t]he practical significance of *Riegel* was also open to question” because “with one exception . . . every decision in which we applied the doctrine of equitable discretion was either reversed upon another jurisdictional ground by the Supreme Court, or reached the same result that would have obtained had we treated separation of powers concerns as part of our inquiry into the plaintiff’s standing.” *Id.* at 114-15. Judge Tatel, concurring, disagreed and found that the doctrine of equitable discretion was still valid and that the majority “read those decisions too broadly.” *Id.* at 118 (Tatel, J., concurring).

See *Vander Jagt*, 699 F.2d at 1172 (“This circuit has previously expressed its reluctance to review congressional rules, though it has never denied its power to do so.”). Judge Ginsburg has stated a similar proposition. *See United States v. Rostenkowski*, 59 F.3d 1291, 1305 (D.C. Cir. 1995) (claiming that “it is perfectly clear that the Rulemaking clause is not an absolute bar to judicial interpretation of the House Rules”).

515 F.2d 1341, 1342-45 (D.C. Cir. 1975).
power of Article I, Section 5. *Harrington v. Bush*\(^{138}\) involved a much more important matter, the congressional practice of hiding the CIA's budget in other appropriations, and severely limiting those in Congress who could look at the relevant numbers. While the judges ultimately decided that Congressman Harrington had no standing, they stated clearly that the appropriations process was solely under the control of the Congress, as were the practices of the House for allowing access to CIA budget information.\(^{139}\)

In the early 1980s, Judge Carl McGowan wrote an influential law review article in which he argued that the traditional doctrines of standing, ripeness, and political question were ill-suited to the special case of members of Congress challenging internal procedures, and that a better ground was "equitable discretion" based on separation of powers.\(^{140}\) Faced with a challenge by members to internal rules or practices of the House or Senate, urged Judge McGowan, the better course for a federal court was simply to refrain from deciding the case out of respect for a coordinate branch of government, while at the same time maintaining the theoretical power to judge them.\(^{141}\) The D.C. Circuit adopted this theory in *Riegle v. Federal Open Market Committee*\(^{142}\) in 1981, and used it in a number of cases thereafter.\(^{143}\)

*Moores v. United States House of Representatives*\(^{144}\) is a particularly interesting use of the equitable discretion doctrine, because it called forth a strong dissenting opinion from then-Circuit Judge Scalia. The case involved a challenge to a tax statute on the grounds that it violated the Origination Clause; the panel dismissed it on the basis of equitable discretion. Judge Scalia condemned the use of that doctrine to dispose of the case because it involves, in the words of Judge Bork, "unconfined judicial power to decide or not to decide cases."\(^{145}\) Judge Scalia argued that the Rulemaking Clause created an area of unfettered congressional decision making; therefore, abstention in cases like these was "the result not of our discretion but of constitutional command."\(^{146}\) He argued that federal judges sit "neither to

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\(^{138}\) 553 F.2d 190, 194-96 (D.C. Cir. 1977).
\(^{139}\) See id. at 214-15.
\(^{142}\) 656 F.2d 873, 879-82 (D.C. Cir. 1981).
\(^{143}\) See *supra* note 135.
\(^{144}\) 733 F.2d 946 (D.C. Cir. 1984).
\(^{145}\) Id. at 959 (Scalia, J., concurring).
\(^{146}\) Id. at 957.
supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless the action of the Congress harmed rights of those outside the legislative branch, “it is not part of our constitutional province,” he argued, to decide the case. Asserting the power to use its equitable judgment as to whether to intervene in a particular dispute revolving around congressional rules or practices, said Judge Scalia, “would not be to decide a judicial controversy, but to assume a position of authority over the governmental act of another and co-equal department, an authority which plainly we do not possess.”

I would suggest that Judge Scalia’s observations in Moore, echoed more recently by Justice Scalia in Munoz-Flores, strongly support the thesis of this Article—that the congressional reliance on an authoritative committee system is delegated to it by the Constitution. They seem inconsistent with the radical textualist position denigrating the committee system and denying any weight to committee reports in the process of arriving at statutory meaning.

A particularly helpful opinion appearing during this period of doctrinal debate in the D.C. Circuit was written by Judge Abner Mikva in Gregg v. Barrett. The case involved a challenge to the lax practices of the Congress in printing the Congressional Record; the plaintiff argued that it must be an accurate record of the floor proceedings. Reviewing the entire area of the law and his circuit’s contributions to it, former Congressman Mikva concluded with regard to congressional plaintiffs that “our analysis precludes this D.C. Circuit from reviewing congressional practices and procedures when they primarily and directly affect the way Congress does its legislative business.” Relying both on the principle of equitable discretion and on more general notions of separation of powers, Judge Mikva argued that how accurately the Record reflected the actual proceedings is for Congress to decide. “[O]ur deference and esteem for the institution as a whole and for the constitutional command that the institution be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem.”

147 Id. at 959.
148 Id. at 959.
149 Id. at 964.
150 771 F.2d 539 (D.C. Cir. 1985).
151 Id. at 541-42.
152 Id. at 549.
Several cases in the 1980s and 1990s relate more directly to the principal arguments being made in this Article, namely the power of Congress to make rules governing the enactment process and to give authoritative weight to its committee system.

*Metzenbaum v. FERC*\(^{153}\) involved the interesting question whether Congress could waive or ignore certain parliamentary rules for amending a particular statute that had been enacted with the statute.\(^{154}\) Congressional plaintiffs asked the judges to decide whether the second legislative action was invalid because Congress had violated its own rules. The Court decided that the two houses had retained complete control over their own rules, even in cases where Congress had written them into a duly enacted statute.\(^{155}\) Resting on the Rulemaking Clause, the court went on to note that the question whether either chamber had followed its own rules was a non-justiciable political question, and that the validity of the law in question turned solely on whether the minimal requirements spelled out in the Constitution were observed (which they clearly were).\(^{156}\)

*Vander Jagt v. O'Neill*\(^{157}\) is one of the few federal cases specifically involving the committee system. Disgruntled House Republicans challenged the allocation of committee seats, arguing that they should receive representation on committees roughly proportional to their membership in the House itself. The D.C. Circuit judges, with Judge Bork strongly objecting,\(^{158}\) decided that the doctrine of equitable discretion precluded entry into that particular political thicket, specifically disclaiming reliance on standing or political question doctrines.\(^{159}\) Again, though it seems inconsistent with the Supreme Court’s teachings in *Ballin*, the judges asserted their power to deter-
mine the validity of congressional rules in general: "This circuit has previously expressed its reluctance to review congressional operating rules, though it has never denied its power to do so."¹⁶⁰ Senior District Judge James F. Gordon, sitting by designation, construed Ballin to command only that judges must not tell Congress what rule it must adopt, not that it must refrain from judging rules at all (except in the specific types of cases noted there).

Michel v. Anderson¹⁶¹ challenged the decision by the House majority to allow the four delegates from the District of Columbia, Puerto Rico, the Virgin Islands, and American Samoa to vote in the Committee of the Whole, with the proviso that if their votes made a difference in the outcome, there would have to be a second vote without their participation.¹⁶² Noting that the Committee of the Whole functions in many respects as a surrogate for the House of Representatives itself, the court of appeals nonetheless held that the Committee was a creature of House rules, and they were within the power of the House to adopt. It argued that the House's action stopped just short of giving the delegates actual membership in the House, which would violate the specific commands of the Constitution on the makeup of that body.¹⁶³ It also acknowledged that the delegates had been given votes in standing committees, even on reporting bills, for many years, and held that practice also within the power of the House under the Rule-making Clause.¹⁶⁴ Michel therefore goes very far in the direction of supporting an extensive congressional power over the committee process, allowing the House to do something that seems intuitively outside the bounds of the Framers' concept of the federal legislature.

Even more strongly supporting the broad discretion of the House and Senate over the enactment process is the most recent in this line of cases, Skaggs v. Carle.¹⁶⁵ Skaggs involved the decision of the "new" Republican House after the 1994 election to impose a three-fifths voting requirement on measures that raised income tax rates. Despite the plaintiff members' arguments that they had suffered vote dilution, the D.C. Circuit ruled that they had suffered no injury, and therefore had no standing.¹⁶⁶ Analyzing the House rules in some detail, the court reasoned that a determined majority could change the three-fifths

¹⁶⁰ Id. at 1172-73.
¹⁶¹ 14 F.3d 623 (D.C. Cir. 1994).
¹⁶² Id. at 624-25.
¹⁶³ Id. at 630-32.
¹⁶⁴ Id. at 624-25, 630-32.
¹⁶⁵ 110 F.3d 831 (D.C. Cir. 1997).
¹⁶⁶ Id. at 833-37.
The judges avoided discussing the profound issue of the place of majority rule in the Constitution, which had been loudly and publicly debated by scholars, to rest on a narrower ground that allowed the House to manage the enactment process in any way it chose.

Only a few relevant cases have been decided outside of the D.C. Circuit on these issues. The most interesting for our purposes is *Mester Manufacturing Co. v. INS*, which involved the question of whether the House and Senate could delegate to a committee or to an officer the power to present a passed bill to the President for signature after adjourning. Even though specific language in Article I, Section 7 is involved in this instance, the court found that this practice fell within Congress’s discretion to manage its affairs. Citing the Seventh Circuit case of *United States v. Kapsalis*, the Ninth Circuit concluded that “the ministerial acts of examination, enrollment, and presentation may unquestionably be delegated by Congress to its leadership, or to a standing committee, and these delegated acts may be performed even when Congress stands adjourned sine die.” Citing the Rulemaking Clause, Judge Beezer noted that “[i]n the absence of express constitutional direction, we defer to the reasonable procedures Congress has ordained for its internal business.... The Constitution also requires extreme deference to accompany any judicial inquiry into the internal governance of Congress.”

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167 See id. at 835 (indicating that on at least four occasions during the 104th Congress, the House voted to waive the 3/5 rule in order to allow a simple majority to enact legislation that increased income tax rates).

168 There are many articles and student comments on the issue; however, two pieces in particular stand out. See Comment, An Open Letter to Congressman Gingrich, 104 YALE L.J. 1539 (1995) (arguing that the supermajority rule is unconstitutional). The open letter was signed by seventeen distinguished law professors. But see John O. McGinnis & Michael B. Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense, 105 YALE L.J. 483 (1995) (arguing that the supermajority rule is wholly constitutional and in fact does not prevent a majority from enacting legislation through some procedural maneuvering). It would appear that Professors McGinnis & Rappaport have the better of the argument; then-Judge Ruth Bader Ginsburg essentially agreed with their conclusion that the supermajority rule did not prevent a majority from working its will upon the Congress. See *Skaggs*, 110 F.3d at 835-36. For a further discussion of the constitutionality and utility of the supermajority rule by scholars and students, see also Neals-Erik William Delker, The House Three-Fifths Tax Rule: Majority Rule, the Framers’ Intent, and the Judiciary’s Role, 100 DICK. L. REV. 341 (1996); Brett W. King, Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules, 6 U. CHI. L. SCH. ROUNDTABLE 133 (1999); Robert S. Leach, Comment, House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress, 44 UCLA L. REV. 1253 (1997); Jed Rubenfeld, Essay, Rights of Passage: Majority Rule in Congress, 1996 DUKE L.J. 73.

169 879 F.2d 561, 570-71 (9th Cir. 1989).

170 214 F.2d 677, 679-83 (7th Cir. 1954).

171 Mester, 879 F.2d at 571.

172 Id.
D. Summary

What can be said, then, about the breadth of the Rulemaking Clause based on judicial explorations of the issue? Certainly the federal courts have not interpreted *Chadha* and *Bowsher* as justification for telling the Congress that it may not delegate broad power to its committees, as Justice Scalia and Professor Manning would seem to advocate. To the contrary, one would have to conclude from the case law that Congress's rulemaking power is far-reaching, and that absent the violation of a personal right of a non-legislator or another specific constitutional limitation, courts feel obliged to affirm any congressional rule or practice that involves the enactment process itself. These cases provide a clear basis for deferring to the congressional practice of explaining the meaning and background of its enactments in committee reports and for recognizing those reports as authoritative. If a legislative chamber can allow non-members to vote in its standing committees and even in the Committee of the Whole House, if it can use a committee to hear trial evidence in impeachment cases, if it can reduce the voting effectiveness of minority members in committee, if it can adopt generous interpretations of the quorum rules, if it can keep members in the dark about aspects of the appropriations process, if it can delegate to a committee the function of presenting an enrolled bill to the President during a congressional recess, or if it can adopt super-majority rules to govern certain internal voting processes, then surely it can use standing committees and conference committees to amplify the meaning of ambiguous provisions and provide background principles that illuminate its legislative objectives.

VI. THE CONSTITUTIONAL BASIS OF AN AUTHORITATIVE COMMITTEE PROCESS

If, as I have argued, the Rulemaking Clause of Article I, Section 5 of the Constitution gives Congress the power to create committees as part of the enactment process, and if Congress also has the power to utilize the products of that system, namely committee reports, to elucidate the bare words of its laws, we must still ask whether Congress has in fact made such a delegation.\(^3\) I must acknowledge, of course, that Congress has not adopted rules explicitly providing that commit-

\(^3\) As already noted in the discussion of non-delegation, *infra*, we are not now talking about the delegation of legislative power to agencies or the President under the traditional non-delegation doctrine, but rather about internal delegation of tasks within the legislative branch. Such internal delegation is common and should be non-controversial. Courts have long held that the President can delegate his powers to others in the executive branch, and of course judges can delegate aspects of their power to special masters.
ter reports are authoritative explanations of later enacted laws, though in the case of conference reports they come very close to doing so. Such an explicit delegation to standing committees would buttress my analysis, but would probably seem unnecessary and redundant to veteran legislators. The reality of this delegation to the committee system emerges from the history of the House and Senate, from an institutional analysis of the enactment process itself, and from an understanding of the formal rules of the two chambers. Through such an analysis, we can see the wrongheadedness of Justice Scalia's basic contention that the formal products of the committee system lack constitutional legitimacy in determining the meaning of an ambiguous statute.

A. History of the Committee System

The radical textualist view of the congressional committee—both distrustful and disrespectful—must seem peculiar to the many political scientists who have devoted their careers to studying the committee system. It is all the more peculiar to anyone who has spent a substantial period working inside any large legislative body, for it remains true, as Woodrow Wilson observed so many years ago, that “Congress in its committee-rooms is Congress at work.”174 They are, in the words of one legislator, the “heart and soul” of the Congress.175 Their work cannot be ignored by anyone wishing to understand either the legislative process as a whole or a specific piece of legislation.

The history of representative legislative bodies establishes without doubt that committees are a routine feature of all such groups. Senator Robert Byrd in his history of the Senate traces the first use of legislative committees to the English Parliament in the fourteenth century.176 Professor Ralph Harlow’s classic study dates standing committees in the modern sense to the close of the sixteenth century in Parliament.177 In any case, the American colonists were well aware of the role of committees in studying and debating policy alternatives, and indeed in drafting legislation. Most colonial legislatures had some standing committees and many select committees, and they were especially

175 HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 103-324, at 143 (1994) [hereinafter US HOUSE HISTORY] (quoting Representative Dave Martin of Nebraska). While not a scholarly study, this informal history, prepared by the Congressional Research Service (“CRS”), contains much useful information about the House and its traditions.
177 See RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 3-7 (1917).
vigorous and important in North Carolina and Virginia. Committees continued to play an important role in the revolutionary period, and subcommittees even made their appearance in North Carolina and Virginia after 1776. Indeed, the Declaration of Independence was drafted by a Select Committee of the Continental Congress, composed of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston. In the time-honored tradition of all committees, one member—Jefferson—did most of the work.

When the Framers gathered in Philadelphia to consider changes to the Articles of Confederation in 1787, one of their first acts was to adopt rules of proceeding; the rules were drafted and presented by a committee, of course. They provided that committees of the Convention could be appointed by a vote of those present. As the Framers worked toward creating a new and enduring system of federal government that summer, they made heavy use of committees to propose alternatives on crucial issues and to draft constitutional provisions. A committee carried out the task of refining the final language for adoption by the states' representatives, and eventual presentation to the states themselves for ratification.

It is not surprising then that the first Congress, which included many members of the Philadelphia Convention, interpreted its rule-making power under Article I, Section 5 of the Constitution to allow the formation of select and standing committees. Particularly in the House, they were viewed as indispensable components of the enactment process. As one history of the House puts it:

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178 See id. at 11-21, 75-78, 106-11, app. (Lists of Standing Committees) (discussing that Virginia had a clear idea of the value of the standing committee and was adapting the institution to local needs).
179 Id. at 75, 110-11.
181 See PRESCOTT, supra note 101, at 37-42; 1 RECORDS OF THE FEDERAL CONVENTION, supra note 101, at 9 (the rules provided that various committees could "be appointed by ballot; and that the members who have the greatest number of ballots . . . be the Committee").
182 See PRESCOTT, supra note 101, at 42-45. The main committees in the Constitutional Convention were the Committee of Detail and the Committee on Style and Arrangement. Id. See also 2 RECORDS OF THE FEDERAL CONVENTION, supra note 101, at 129 (Committee of Detail), 565 (Committee on Style and Arrangement).
183 See supra note 182.
184 See PRESCOTT, supra note 101, at 42-45 (stating that "this able Committee on Style and Arrangement nevertheless gave to that document its most enduring qualities—its conciseness, its adaptability, its flexibility, and withal its stability"); 2 RECORDS OF THE FEDERAL CONVENTION, supra note 101, at 129-74 (describing the activities of the Committee of Detail), 565-90 (describing the activities of the Committee on Style and Arrangement).
The Constitution was silent on the organization and structure of the House beyond saying that it should choose its Speaker and other officers, determine the rules of its proceedings, and keep and publish a journal of its business. Once a quorum appeared, the House lost little time in organizing itself in four steps: election of officers, adoption of rules, appointment of committees, and the acceptance of credentials. One of the first bills passed by the Congress, H.R. 15 (introduced on July 22, 1789), required a conference committee to iron out differences between the House and Senate versions. Published committee reports, which often included explanation and background discussion on reported bills, made their appearance very early. To be sure, the role of early committees was limited as compared to modern practice, as was the legislative business of the House itself. But by 1810, the House had ten standing committees, each covering a distinct policy area, as well as other select committees. Written committee reports performing much the same function as they do today were quite common from the beginning. The Senate’s history is similar, though it has always relied less on the committee system in processing and drafting the final form of legislation.

The role of committees in the enactment process and their specific powers were set out in House and Senate rules over the years in varying degrees of detail. Committees increased in number and impor-

185 US HOUSE HISTORY, supra note 175, at 13, 171-73. See also 1 RECORDS OF THE FEDERAL CONVENTION, supra note 101, at 1-10.

186 See An Act for Allowing a Compensation to the President and Vice President of the United States, ch. 19, sec. 1, 1 Stat. 72 (1789). The Senate insisted on certain amendments proposed in a committee report delivered by Morrison on August 7, 1789. See IV DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 480-85 (Charlene Bangs Bickford and Helen E. Veit, eds., Johns Hopkins Univ. Press rev. ed. 1986). On September 8th, the House voted to disagree with the Senate amendments. Also on September 8th, the Senate appointed a conference committee consisting of King, Izard, and Morris. On September 9th, the House appointed Baldwin, Livermore and Goodhue to its conference committee. The conference committee met on September 17th, but failed to reach agreement. The Senate receded from its amendment on September 21st, and the bill was passed by both houses and signed by the President on September 24, 1789. Id.

Interestingly enough, a conference committee was also necessary to resolve House and Senate differences regarding the text of the Bill of Rights. An agreement was reached in conference, and a committee report was issued on September 24, 1789, altering the language of what was then the 5th and 14th amendments, but which became the 1st and 6th amendments. Id. at 1-48.

187 See US HOUSE HISTORY, supra note 175, at 144.

188 Id.

189 See generally IV DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, supra note 186.

190 See 2 BYRD, supra note 96, at 207-65. See also STEVEN J. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 23-56 (2d ed. 1990).
tance as the work of the Congress became more complex and more contentious in the nineteenth century. The amount of control over legislation ceded by the majority to its committee system varied over time, and was the subject of several waves of "reform." The Legislative Reorganization Act of 1946 put committees on a statutory base for the first time, and introduced many of the institutions of the modern Congress.\textsuperscript{191} Committee power probably reached its highest point in the 1950s and slowly declined until the major reforms of the 1970s.\textsuperscript{192} These reforms were designed to break the power of conservative southern Democrats who had dominated Congress through the seniority system and had blocked important legislation. There has followed since a diffusion of committee power, a rise in the importance of subcommittees, and a reassertion of the importance of floor action in the enactment process.\textsuperscript{193}

This brief history makes it clear that committees have always been seen as a natural and absolutely crucial element of the enactment process in any legislative body. In the U.S. Congress, their authority rests on three bases—the Rulemaking Clause in Article I of the Constitution, rules adopted by each chamber, and statutes. They are indeed an integral part of that "finely wrought" process of creating laws in Article I that was alluded to by the \textit{Chadha} majority.\textsuperscript{194} Whether they are relatively more powerful or less so as compared with the floor majority, whether they mirror the policy preferences of the larger body they represent or not, is not legally or constitutionally significant. While Justice Scalia places emphasis on such arguments in asserting the radical textualist position that committee reports should be ignored, it is the thesis of this Article that such arguments are interesting but ultimately irrelevant. Whether committees are more or less pow-

\textsuperscript{191} The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946). Several provisions in the Legislative Reorganization Act of 1946 note that each house of Congress has the power to unilaterally repeal or amend any rule contained in the Act. See id. at 60 Stat 814 ("The following sections of this title are enacted by the Congress . . . [with the full recognition of the constitutional right of either House to change such rules . . . at any time . . . "). See also The Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140, 1143 (stating the same proposition as the 1946 Act). Cf. Metzenbaum v. FERC, 675 F.2d 1282, 1286-89 (D.C. Cir. 1982) (stating that "to invalidate Pub. L. No. 97-93 on the ground that it was enacted in violation of House rules would be to declare as erroneous the understanding of the House of Representatives of rules of its own making, binding upon it only by its own choice").


\textsuperscript{193} See LOOMIS, supra note 192, at 27-32; SMITH, supra note 192, at 1-14; SMITH & DEERING, supra note 190, at 119-62.

erful or representative is entirely within the control of a majority of the chamber concerned, and the majority's institutional choices are made under the authority of the Rulemaking Clause. They therefore must not be questioned, but rather accepted by the judiciary in trying to interpret Congress's handiwork.¹⁹⁵

Before leaving the question of the legal foundation for committees, it is well to say a word about the special place of conference committees. As noted above, conference committees have existed from the beginning of the Congress. Most observers familiar with the enactment process instinctively realize that conference committee actions and their accompanying written statements are the most authoritative possible explanations of the meaning and purpose of legislation.¹⁹⁶ This is because they occur at the last stage of that process, and their comments explain the final form of the language. What is less often commented upon is that conference committees may well have an even stronger constitutional basis than standing committees. This is because they are an important element of the constitutional concept of bicameralism that the Supreme Court, and particularly the radical textualists, have increasingly emphasized in recent years. Since, as the Court has pointed out in Chadha and other cases, legislation must pass both houses in identical form in order to be presented to the President under the familiar Article I procedures, the conference committee is often a vital part of the process. While it is sometimes possible to reconcile differences between the chambers by amendment and thus to avoid a conference, this is rarely the case for important legislation.¹⁹⁷ It is usually the conference committee, a quintessential

¹⁹⁵ Several critics of the textualists' attitude toward committee materials have commented on the lack of respect for Congress inherent in it. Judge Wald, for example, has said that "If we are serious about respecting the will of Congress, how can we ignore Congress' chosen methods for expressing that will?... To disregard committee reports as indicators of congressional understanding... is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes perilously close, in my view, to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle." Wald, supra note 1, at 306-07.

¹⁹⁶ For an insightful analysis of the authoritativeness and usefulness of the various kinds of legislative history by a scholar close to the Congress, see George A. Costello, Average Voting Members and Other "Benign Fictions:" The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 DUKE L.J. 39, 41-42. See also OLESZEK, supra note 192, at 272, 289-94 ("The conference committee... is one of the most critical points in the legislative process."); SMITH & DEERING, supra note 190, at 191 (discussing the important role of conference committees).

¹⁹⁷ See OLESZEK, supra note 192, at 274 ("It is often clear from the outset that controversial measures will end up in conference."); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 767-847 (1989) exploring the use of the conference as the most important means to enact contentious legislation); Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wis. L. REV.
bicameral body, that carries out the crucial constitutional function of preparing from the disparate House and Senate bills one final set of legislative provisions for final passage.\textsuperscript{198} Other aspects of the conference function should also lead even the radical textualist to consider its product authoritative, and rebut some of the textualist critique of standing committees' work. Normally, each house adopts a resolution explicitly authorizing the conference and empowering the Speaker or Majority Leader to appoint conferees.\textsuperscript{199} Conference committees, particularly in the House, are sometimes instructed on how to vote on certain possible compromises, putting strong institutional pressure on conferees and giving their final actions a much more authoritative flavor.\textsuperscript{200} Sometimes a chamber appoints specific individuals as conferees for specific bill provisions, making the agency relationship even clearer.\textsuperscript{201} Explanatory language in the accompanying statement of managers represents the joint work of House and Senate staffs and members, and is subject to closer scrutiny than normal standing committee reports.\textsuperscript{202} In practice, statements of the managers of bills in conference are much more carefully considered by legislators in deciding whether to vote for the final compromise product.\textsuperscript{203} They represent an indispensable record of the detailed bicameral “deal” on the legislation.\textsuperscript{204}

In short, conference committees rest on an even stronger constitutional base than standing committees, and overcome many of the shortcomings of process that lead the radical textualists to ignore the product of committee work. For these reasons, statements by conference managers about the meaning of specific bill provisions should be

\textsuperscript{198} See OLESZEK, supra note 192, at 274-94; SMITH & DEERING, supra note 190, at 191-99; TIEFER, supra note 197, at 767-847; Tiefer, supra note 197, at 233-35.

\textsuperscript{199} See OLESZEK, supra note 192, at 278-80; SMITH & DEERING, supra note 190, at 193-94; TIEFER, supra note 197, at 767-847.

\textsuperscript{200} See OLESZEK, supra note 192, at 282-83; SMITH & DEERING, supra note 190, at 196-98; TIEFER, supra note 197, at 767-847.

\textsuperscript{201} See OLESZEK, supra note 192, at 278-81; SMITH & DEERING, supra note 190, at 195; TIEFER, supra note 197, at 791-847.

\textsuperscript{202} See OLESZEK, supra note 192, at 289-94. See also SMITH & DEERING, supra note 190, at 198; TIEFER, supra note 197, at 825-834; Tiefer, supra note 197, at 237-40, 268-69 (noting the influence of reports on the Supreme Court's decision making).

\textsuperscript{203} See generally OLESZEK, supra note 192, at 289-94; SMITH & DEERING, supra note 190, at 198-99.

\textsuperscript{204} Professor Tiefer has pointed out to me that the U.S. Code Congressional and Administrative News ("U.S.C.C.A.N."), the closest thing we have to official legislative history, always prints conference statements of managers, even though it sometimes omits one or both standing committee reports.
taken as authoritative even by the most hide-bound textualist. In all of
the vast writing about legislative history, the enactment process, and
the appropriateness of considering committee reports, this important
distinction has not been adequately stressed.

B. Committees and the Institutional Culture of Congress

Anyone who has observed or served on a legislative body of even
the most routine sort understands why committees are indispensable.
The House's own informal history sums it up well:

Committees, created to process the workload of a legisla-
ture, are where Congress gathers information; compares and
evaluates legislative alternatives; identifies policy problems
and proposes solutions; selects, revises, and reports out mea-
ures for the full chamber to consider; monitors the executive
branch's performance of its duties; and investigates allega-
tions of wrongdoing.205

Our focus, of course, is on the second and third of these broad func-
tions—the open-ended consideration of problems facing the country
and possible approaches to solving them, and the process of drafting
specific bills and bringing them to the floor. Political scientists and
historians who have considered the operation of congressional com-
mittees stress particularly that the committee system enables the larger
body to develop and draw on specialized expertise, allowing members
who cannot otherwise become expert on each complex piece of pend-
ing legislation to rely on the advice of others who have worked on the
relevant committee.206 By concentrating expert staff resources in the
committees over the long term, Congress creates a repository of
knowledge for all members to draw upon.

Professor Burdett Loomis, in his recent examination of the mod-
ern Congress, sums up the institutional culture well. After recounting
the ebbs and flows of committee power over the history of the national
legislature, he notes that:

[C]ommittees remain important and powerful because their
existence makes such good sense, both for individual legisla-

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205 See US HOUSE HISTORY, supra note 175, at 143.
206 See LOOMIS, supra note 192, at 82 ("In short, committees and subcommittees can and do
serve Congress as a whole by providing specialized information to the chamber at large.");
OLESZEK, supra note 192, at 187-88 (stating that "[i]t is nearly impossible for a member to be
fully informed on every issue before the House"); SMITH & DEERING, supra note 190, at 225-28
("Committees provide the division of labor required to handle a large and complex work load.").
tors and for the Congress as a whole. Acting on their own, 435 House members and 100 Senators cannot reasonably be expected to hammer out coherent legislation across the entire spectrum of issues on each year's congressional agenda. . . .

. . . [C]ongressional decentralization through the committee system allows lawmakers to specialize and make informed decisions on a wide range of complex, often conflicting proposals. In fact, by sharing information across committees, Congress as a whole may produce a relatively coherent, consistent set of policies. 207

To be sure, critics of the legislative process have argued that this picture is unrealistic, and that committees have often been unrepresentative of their parent body 208 and obstructionist on key issues such as civil rights. As I have noted, the short answer to such arguments is that, as Professor Loomis notes, "[m]embers construct the kind of committee system they want;" they can and do change it when it does not suit their overall interests. 209 More recent empirical scholarship on the committee system suggests, moreover, that committees are in fact reasonably representative. Kiewiet and McCubbins' study shows that the majority does a good job over time of controlling the national policy agenda by managing the power that it delegates to committees. 210 They find that capture by special interests is most likely to happen on the least important committees; leadership ensures that members on its most important committees, like Budget and Appropriations, mirror the views of the floor majority. 211 Even that cornerstone argument of Public Choice theorists—that legislators seek out committees that allow them to maximize their interest group support and therefore their chances of reelection—has been powerfully challenged by the work of

207 LOOMIS, supra note 192, at 79-80.
208 The classic work arguing that committees are unrepresentative of the parent chamber and that members seek committee assignments to represent special interests and thus ensure their reelection is KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENT IN THE MODERN HOUSE (1978). This view is disputed in KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991). The debate is reviewed in Richard L. Hall & Bernard Grofman, Process and the Conditional Nature of Committee Power, 84 AM. POL. SCI. REV. 1149 (1990).
209 LOOMIS, supra note 192, at 83.
211 Id. at 100-10.
such scholars as Keith Krehbiel and Richard Hall. Krehbiel’s empirical work establishes that other motivations, such as a desire to support the President’s program and to work toward favored policy goals, are more important motivators of both committee preferences and members’ behavior on committees than selfish pursuit of contributions and political survival.

In any case, it is an empirical fact that committees dominate the enactment process in both the House and Senate. The system that Congress has created under the Rulemaking Clause means that it is extremely unlikely for any significant measure not reported by a committee to ultimately be passed, and that most legislation emerges from each chamber roughly in the form reported by the standing committee that worked on it. Again, scholars such as Smith and Deering demonstrate that these truths endure despite fluctuations in the relationship between committees and floor action over time.

Heavy reliance on the committee system is a particular feature of the House of Representatives. Because of its large size, the House must limit floor debate and amendments to bills if it is to pass any legislation at all. As we shall see, its rules particularly favor committees, and in recent decades, specialized subcommittees. Moreover, the House has placed enormous power in the hands of its Rules Committee, which dominates the floor agenda in a way not possible in the Senate.

Because of this institutional structure, the ordinarily legislative work of a member centers around her committees, and very often one committee where she develops special expertise. Professor Hall’s empirical study of participation by members in the legislative process provides a convincing picture of the degree to which the majority relies on its committees. He found that members rely on committee and subcommittee leaders to a surprising degree in the enactment process. For example, about sixty percent of committee members vote on final passage of a bill in committee, but only forty percent participate in the markup debate, less than twenty percent are actively in-

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212 See RICHARD HALL, PARTICIPATION IN CONGRESS 49-85 (1996) (arguing that the “[m]ember-as-reelection-seeker” hypothesis is an insufficient basis on which to analyze congressional member participation); KREHBIEI, supra note 208, at 247-90 (arguing that a growing body of evidence points away from distributive theories of congressional participation).

213 See HALL, supra note 212, at 72-74, 194-95, 210-11; KREHBIEI, supra note 208, at 66-68.

214 See, e.g., SHEPSLE, supra note 208, at 9; SMITH, supra note 192, at 170-96, 240-42; SMITH & DEERING, supra note 190, at 9-14, 179-89, 216-17.

215 See SMITH & DEERING, supra note 190, at 1-19, 213-17.

216 See HALL, supra note 212, at 32-74, 175-214.
volved in the amending process in committee, and about twenty-five percent are involved in behind-the-scenes negotiations on the bill’s provisions. Those included in the percentages will vary with different bills, indicating that members concentrate their work on legislative items important to them or on which they have developed expertise. Likewise on the floor, only about fifteen percent of all members did anything other than casting their votes in the bill sample studied by Hall. Less than five percent offered amendments. Those figures were much higher for committee and subcommittee members, and even higher for committee and subcommittee chairs representing the reporting committee. About fifty percent of the amendment activity on the floor came from members of the reporting committee.

While the textualist viewing the enactment process from afar might see in such statistics evidence of the grossly undemocratic nature of Congress, the student of the legislative process sees evidence of the necessary specialization by members, and a willingness to cede the leading role in developing legislation to a carefully constructed and controlled committee process. It is quite true, as cynics often point out, that most members do not understand the details of most bills they vote on. This is not a result of ignorance or sloth, however, but a manifestation of the overwhelming breadth and complexity of Congress’s work. It was not surprising, then, when John Kingdon, in his landmark study of congressional voting behavior, heard from members that they relied most heavily on their staffs and on other legislators who were members of the reporting committee for advice on whether to support a particular bill.

The printed committee report is an essential part of the process by which committees consider both new legislation and revisions to enacted laws. Reports have many functions, but most importantly for our purposes they “describe the purposes and scope of the bill, explain the committee revisions, [and] note proposed changes in existing law.” While scholars have not focused on the mechanics of report writing, all students of the Congress recognize the centrality of printed committee reports, as the most important means of setting out the committee’s views on the purposes, background, and meaning of statutory text. As Charles Tiefer has observed, the committee report

\[\textit{Id. at 32-47.}\]
\[\textit{Id. at 175-81.}\]
\[\textit{Id. at 181-84.}\]
\[\textit{OLESZEK, supra note 192, at 119.}\]
\[\textit{LOOMIS, supra note 192, at 82.}\]
is in fact "more intelligible than the bill itself," recognizing that bill
text is often highly complex and specialized. Thus, an examination of the unique culture of Congress supports
and strengthens the argument that members intend their committee
system to play a vital role in the enactment process under the Rule-
making Clause of the Constitution, and that in practice they rely on the
committee process almost completely in developing, drafting, and
managing proposed legislation. In the real world, moreover, members
rely on committee reports to help explain their legislative product to
their colleagues, to future congresses, to administrative agencies, and
to judges. In their eyes, it is just as important a part of the enactment
process as legally binding final floor action.

C. A Comment Comparing Committee Process and Floor Action

Now that we have taken a more careful look at the place of com-
mittees in Congress, it may be appropriate to return to one of the tex-
tualists' most important arguments against the use of legislative his-
tory. As we have seen in Part II, Justice Scalia and Professor Manning
reflect in their opposition to legislative history an antipathy toward the
committee process that is rooted in Public Choice and Social Choice
thinking. They speak of voting on the floor of the House and Senate
with almost mystic reverence, but view the activities of committees
with a mixture of horror and disdain. I have argued that Congress
could constitutionally go much further than it has in relying on com-
mittees to pass legislation, and indeed could come close to dispensing
with floor action altogether. Justice Scalia would see this as a perver-
sion of the democratic process, but a careful consideration of the com-
mittee process in comparison with floor debate would show that
committee consideration is in many ways more in line with our over-
riding democratic values.

Legislation may pass on the floor with little or no debate, and
what debate there is can be carefully controlled by the leadership. The
general quality of floor speeches on legislation can be lamentably low,
and members sometimes state key issues incorrectly. Crucial votes
may not be recorded and amendments can be hastily drawn and mis-
understood. Committees, at least on important legislation, hold open
hearings that the press and public can attend, and subject witnesses to

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223 TIEFER, supra note 197, at 180.
224 Such was apparently the case when a resolution disapproving suspension of deportation
came to the floor of the House in a situation similar to that in Chadha, as noted by the Court in
that opinion. Their members seemed hopelessly confused about the effect of the legislative veto.
on-the-record questioning. Committees usually debate and mark up bills in open session and must record their important votes for all to see. They employ both expert policy staff and non-partisan professional drafting experts. Like floor deliberation, committee consideration is subject to pressures from the executive branch and from outside interest groups, but committees publish written “opinions” explaining in detail what the bill does and why. These opinions, in the form of pre-enactment committee reports, often contain additional and dissenting views, they explain how existing laws will be affected, and they provide valuable historical perspective.

Committee processes, then, are actually more open and more deliberative than floor consideration of a bill. It is therefore no accident that the Supreme Court has on several occasions in recent years taken a dim view of particular statutory provisions that were written on the floor without the usual full committee hearings, analysis, and drafting. The Court too understands that legislating on the floor of the House or the Senate can be a very ugly process indeed. The most recent example is the Communications Decency Act, inserted at the last minute in the Telecommunications Act of 1996, despite being poorly thought-out and egregiously drafted.

When Professor Manning argues, then, that the use of legislative history encourages members to be irresponsible and is undemocratic, he is well wide of the mark. I would argue, contrary to the thrust of the textualist view of Congress, that with the single exception that the floor process results in the constitutionally required vote of members, there is hardly a single aspect of it that is not inferior to the committee process in terms of our democratic values of good judgment, deliberation, and openness.

225 Justice Stevens’ majority opinion in Reno v. ACLU, 521 U.S. 844 (1997) made the point that the Communications Decency Act was poorly drafted, vague, and confusing, and suggested that this may be because it had not been considered by committee:

The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V—known as the ‘Communications Decency Act of 1996’ (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case.

Id. at 858.

The Court goes on to note that members in both houses complained on the floor that this important legislation had not been carefully considered. The same point was made regarding another part of the bill, relating to indecency on cable systems, in United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 822 (2000) (stating that “[s]ection 505 was added to the Act by floor amendment, accompanied by only brief statements, and without committee hearing or debate”).
D. The Structure of Congressional Rules

Even stronger evidence of the degree to which members of the House and Senate delegate power to their committees, and thus a justification for honoring that delegation in seeking to establish the meaning of statutory language, lies in the details of the rules of the two chambers. Taken together, they establish beyond doubt that Congress has made a conscious decision, in carrying out its constitutional function to determine the rules of its own proceedings, to establish an authoritative role for the committee.226

1. House Rules

In innumerable ways, the rules of the House of Representatives strengthen the position of its standing committees and give parliamentary advantages to the products of committee work. Taken together, they establish a delegation by the members of the House of policy-making power to their chosen committees. Far from the lawless picture painted by the radical textualists, who would ignore the committee report and consider only the bare floor vote on the bill’s text, the picture emerging here is one of clear delegation of authority to committees.

Since the landmark Legislative Reorganization Act of 1946, House rules have set out with some specificity the number of its committees and their respective substantive jurisdiction. Textualists should consider that at the beginning of each Congress, each chamber elects the chairs and members of its committees, though in practice they are selected by the respective party caucuses.227 Rule XII requires that all legislation be referred to a standing committee,228 and the discharge procedure of Rule XV makes it extremely difficult to dislodge a bill from a committee to which it was referred.229 In prac-

226 The best general sources for understanding congressional rules are CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS (5th ed., 2000) [hereinafter CQ GUIDE]; OLESZEK, supra note 192; and TIEFER, supra note 197. For a cogent description of the legal status of these rules, see generally Stanley Bach, The Nature of Congressional Rules, 5 J.L. & POL 725 (1989).


228 See RULES OF THE HOUSE OF REPRESENTATIVES, supra note 227, at 572-78 (Rule XII, cl. 2).

229 Id. at 637-42 (Rule XV, cl. 2). To discharge a bill from committee is generally an arduous and delicate procedure. First, a bill must remain in committee for thirty legislative days before a motion to discharge can be brought. Id. Second, the motion to discharge itself requires the signatures of two hundred and eighteen members of the House. Id. Finally, significant
tice, such discharge is rarely accomplished. The rules specifically delegate to standing committees the duty to "determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated." They are also empowered to review "conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto)." Each committee is required to adopt written rules and to make them available to the public, and to keep a complete record of its meetings, hearings, and votes. The use of proxy voting is prohibited, and a majority of committee members must be present in order to report a bill to the floor.

In order to prevent a committee chair from bottling up a bill voted on favorably by the committee, the rules require the chair to report each such bill promptly and take steps to bring it to a floor vote. The Clerk then places reported bills on the appropriate House calendar for possible floor action. Showing the preference given to favorable committee action, the rules also provide that bills reported unfavorably are automatically laid on the table.

The written report of the committee on a bill, the focus of debate between radical textualists and others, is required to be prepared by the House rules. The rules outline specific kinds of information that must be included to guide consideration of the reported bill, including a comparison with existing law. Rules require the inclusion of dis-

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230 RULES OF THE HOUSE OF REPRESENTATIVES, supra note 227, at 461-64 (Rule X, cl. 2).
231 Id.
232 Id. at 522-45 (Rule XI, cl. 2).
233 Id. at 518-22 (Rule XI, cl. 1).
234 Id. at 389-93 (Rule VII, cl. 1).
235 Id. at 530 (Rule XI, cl. 2(f)).
236 Id. at 535-36 (Rule XI, cl. 2(b)(1)).
237 Id. at 590 (Rule XIII, cl. 2(b)(1)).
238 Id. at 588-89 (Rule XIII, cl. 2(a)(2)).
239 Id. at 588-602 (Rule XIII, cl. 2, 3).
240 Id. at 592-602 (Rule XIII, cl. 3).
senting or separate views by members of the committee in the printed report.241 Showing the importance placed on the content of reports for floor debate, House rules require that the printed report ordinarily be available to members for three days before floor action.242 Committees are also encouraged to have hearings printed and available for floor debate, but that is rarely possible.243

In addition to this clear structure of delegation to committees, various other parliamentary rules and traditions of the House give the upper hand to committee bills and amendments. These include the tradition of the committee or subcommittee chair managing the bill on the floor, and the practice of giving committee amendments first priority in the amending process.244 More general rules like the requirement that all amendments be germane also strengthen the hand of the committee that drafted the legislation, and the limitation on third-degree amendments has a similar function of making additions to the committee bill difficult.245 This is especially true in the Committee of the Whole, a parliamentary device used by the House to shape legislation on the floor, because in the Committee of the Whole, amendments are taken up section by section, thus favoring the committee bill and its structure.246 More subtle traditions, like that of the chair recognizing the bill manager first during floor consideration, add to the committee’s preferred position.

Central to the operation of the House, however, is its Rules Committee, a body not found in the Senate. The Rules Committee functions as an arm of the House leadership, and exercises strong control over the floor agenda.247 The Rules Committee considers each reported bill and proposes a “rule” setting out the parameters of its floor consideration—whether it may be amended, which amendments will be in order, and how long debate will last. This special rule must be adopted separately before consideration of the bill itself. In practice, the Rules Committee leadership, the majority party leadership, and the Chairs of the Standing Committees work together to control debate,

241 Id.
242 Id. at 602-05 (Rule XIII, cl. 4).
243 Id.
244 See OLESZEK, supra note 192, at 168-69, 175-78 (“House precedents grant priority to amendments recommended by the reporting committee[.]”); SMITH, supra note 192, at 171-72, 241-42.
245 See OLESZEK, supra note 192, at 172-83 (noting that the House rules generally require amendments to be germane); TIEFER, supra note 197, at 767-874.
246 See OLESZEK, supra note 192, at 172-83; SMITH & DEERING, supra note 190, at 181-89.
limit outside amendments, and maximize the chances of the bill's passage in largely the form reported by the standing committee. The effect is to strengthen the overall role of the committee system and privilege its legislative product during floor debate.

2. Senate Rules

Senate rules are fewer and change less often than House rules, which must be adopted anew every two years. Being a smaller body with a tradition of unlimited debate and individualism, the Senate relies more on unwritten rules and comity among its members. For example, the Senate rules do not require that bills be referred to committee, though nearly all are. Senate rules do specify the jurisdictions of its committees, and contain many of the same procedural requirements as found in the House rules.248

While the Senate has no Rules Committee, its practice of devising "unanimous consent agreements" performs many of the same functions.249 Once again, the agreements are arrived at in consultation between the senate leadership and the committee leadership, with the significant caveat that they can be blocked by a single senator. Once agreed to, unanimous consent agreements limit debate and amendments much the same as do resolutions coming from the House Rules Committee.

Many of the same parliamentary traditions, such as recognizing committee chairs and committee amendments first, privilege committees in the Senate as in the House. The difference is that in the Senate there is more of a tradition of open debate and floor consideration of outside amendments. Much of this stems from the lack of a germaneness requirement for amendments in the Senate. While not as strong as in the House, the overall effect of the Senate's rules and traditions also strongly favors the products of its standing committees.

3. Conference Committees

The rules and traditions governing conferences between the House and Senate to iron out differences in similar legislation for final passage illustrate all the more clearly the extent to which the Congress reposes trust and confidence in its committees and their printed reports. This is indicated in two different ways—first, by rules delegat-

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249 See Oleszek, supra note 192, at 210-18, 261-67; Smith & Deering, supra note 190, at 189-91; and Tiefer, supra note 197, at 767-874.
ing great power to the "managers" from each house in the conference committee, and second, by practices strengthening the role of the standing committees in conference.

On important bills, it is usually clear that one house will not simply accept the other's version of the text, though that is the easiest way to arrive at a single bill for final presentment to the President. Each house votes on whether to go to conference after final passage of its version of a bill. House rules require that in selecting conferees, the Speaker must select members favorable to the legislation, including specific provisions in disagreement with the Senate. In the Senate, they are appointed by unanimous consent, usually by agreement between the Majority Leader and the chair of the standing committee involved. The House and Senate as a whole may, and sometimes do, instruct their conferees, making it more difficult for them to compromise on certain provisions. In conference, the managers from each house vote separately, so that a majority of the conferees from each side must vote for the final compromise package. They are not given authority to add other matter to the bill, but must theoretically stay within the scope of disagreement between the House and Senate versions. In practice, this restriction is sometimes hard to follow, and an entirely new matter sometimes creeps in. The conference committee is required by rule to prepare a written statement explaining the report:

Each such report [the compromise bill text] shall be accompanied by a joint explanatory statement prepared jointly by the managers on the part of the House and the managers on the part of the Senate. The joint explanatory statement shall be sufficiently detailed and explicit to inform the House of the effects of the report [the bill] on the matters committed to conference.

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250 See Rules of the House of Representatives, supra note 227, at 342-44 (Rule I, cl. 11).
251 See Senate Manual, supra note 248, at 23-24 (Rule XXIV). See also Cleaves' Manual of the Law and Practice in Regard to Conferences and Conference Reports, in Senate Manual, supra note 248, at 191-206 (containing conference rules as adopted by the 57th Congress in 1900); Oleszek, supra note 192, at 278-84 (discussing several factors important in determining the selection of conferees); Smith & Deering, supra note 190, at 191-96 ("The appointment of conferees is the responsibility of... the presiding officer in the Senate, but [he] generally follows[s] the recommendation of the appropriate committee chair and ranking minority member.").
252 See Rules of the House of Representatives, supra note 227, at 836-60 (Rule XXII); Senate Manual, supra note 248, at 50-51 (Rule XXVII, cl. 2).
253 Rules of the House of Representatives, supra note 227, at 844-45 (Rule XXII, cl.
Emphasizing the degree of delegation to the conference committee, rules of the House and Senate specify that the report may be taken up immediately, and must be accepted or rejected without amendment.\(^\text{254}\)

A good case can be made, as discussed above, that the problems of lack of legitimacy raised against reports of standing committees by Justice Scalia and others lack force when applied to a conference committee. First and foremost, it represents both of the houses of Congress. The more direct relationship between the membership of each house and its managers strongly indicates that the resulting joint written statement of managers deserves to be considered authoritative on questions of meaning. In addition, however, the traditions of conference between the houses strongly show the degree to which the majority reposes trust and confidence in its standing committees.

In practice, managers on each side are dominated by the committee and subcommittee leaders that fashioned the bill and brought it to final passage. Given the findings of Hall and others noted above, this should not be surprising—committee leaders are those most knowledgeable about the bill's provisions and most responsible for it. Indeed, some political scientists have argued that the prevalence of committee leaders on conference committees is the ultimate source of their power, since they have the theoretical ability to reverse voting setbacks suffered earlier in the enactment process.\(^\text{255}\) The specific rule requiring conferees to be those primarily responsible for the legislation serves to strengthen the position of the standing committees involved. So do such procedural devices as the requirement of an up or down vote on the floor and the rules against adding extraneous provisions.

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\(^{7(e)}\); **SENATE MANUAL, supra** note 248, at 51 (Rule XXVIII, cl. 4). The explanatory statement is prepared jointly by members and staffs from both houses so that there will be a single explanation of particular statutory language and of actions accepting or rejecting particular provisions from the House and Senate bills.

\(^{254}\) See **RULES OF THE HOUSE OF REPRESENTATIVES, supra** note 227, at 841 (Rule XXII, cl. 7(a)); **SENATE MANUAL, supra** note 248, at 50 (Rule XXVIII, cl. 1).

E. Committee Reports and the Executive Branch

1. The General Authoritativeness of Committee Report Language

We have seen in some detail that the history, culture, and specific procedural rules of the House and Senate support the assertion that Congress uses its committees and the written reports of its committee process as an authoritative source of information and background on the meaning of its laws. Additional support for this proposition can be gained by understanding the use of committee report language by the executive branch. By long tradition, pre-enactment report language specifying the meaning of statutory text or the details of appropriated budget amounts is treated as authoritative by the executive departments and administrative agencies. As expressed simply by Congressional Quarterly’s definitive Guide to Congress, “It has been common practice for committees, including House-Senate conference committees, to write in their reports instructions directing government agencies on interpretation and enforcement of the law.” Instructions can take many forms, from explicit orders to take certain actions pursuant to an accompanying statute, to guidance in interpreting statutory terms. In fact, in order to take seriously the constitutional principle expressed by the Bowsher court and emphasized by Professor Manning—that Congress is confined to passing laws and may not participate in administering them—one must completely ignore the actual relationship between congressional committees and executive branch actors. Any serious student of the relationship knows that congressional committees and individual members of Congress often participate in administration of statutory programs, both formally and informally. Congress’s undoubted power to oversee the operations of the executive branch and to investigate its programs to determine

\[\text{\textsuperscript{256}}\text{I CQ GUIDE, supra note 226, at 485.}\]

\[\text{\textsuperscript{257}}\text{Jessica Korn tells the story of how the Reagan White House, emboldened by Chadha into thinking that even informal actions by committees could be resisted on constitutional grounds, instructed all federal agencies that henceforth they should not follow directives in committee report language. Congressional reaction was quick and effective, threatening both specific bill provisions to restrict agencies and generally tighter oversight. The administration backed down, simply reiterating that such directives were not actually legally binding. See JESSICA KORN, THE POWER OF SEPARATION 36-37 (1996). In City of Alexandria v. United States, 737 F.2d 1022 (Fed. Cir. 1984), the Federal Circuit considered this question in upholding congressional “report and wait” provisions, a close kin to the legislative veto. Observing that our tradition requires executive branch officials to consider and follow the informal dictates of congressional committees, the court concluded that “[c]ommittees do not need even the type of ‘report and wait’ provision we have here to develop enormous influence over executive branch doings. There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.” Id. at 1026.}\]
whether statutory changes may be necessary makes any such strict separation of functions unrealistic. On the level of specific statutory language, both because ambiguity in such language is inevitable and because the conditions under which statutes are carried out always change, this symbiotic relationship cannot be avoided.

Consider then the striking disjunction created by the radical textualist view of legislative history. Justice Scalia and others would argue that committee report language should be ignored by judges even if it supplies clarification for ambiguous statutory language, while at the same time the entire executive branch treats most such statutory language as authoritative in the day-to-day administration of the same statute. Indeed, agencies make special efforts to catalogue and track all such statutory language. They do so not because committee report language is "law" in the same sense as the statute is law, but rather

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258 See, e.g., Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of Congress to conduct investigations is inherent in the legislative process. . . . It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

259 A particularly interesting recent example is the complex interaction between Congress and the Federal Communications Commission ("FCC") concerning the interpretation and implementation of the Telecommunications Act of 1996. The Act presents a number of difficult problems of statutory interpretation, and the FCC has made extensive use of the legislative history of the legislation in implementing it. In one case, Congress actually enacted a later statutory provision requiring the FCC to prepare a Report to Congress on the FCC's interpretation of certain key statutory terms. The Commission held an open administrative proceeding, in which members of Congress participated, and submitted its interpretations to Congress. The FCC took the position that clear Committee language was generally dispositive, along with drafting history, in explicating ambiguous provisions. For the full story of this unique interpretive process, see John C. Roberts, The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act, 53 SMU L. REV. 143 (2000).

Strict adherence to the radical textualist position that use of committee language in interpreting ambiguous provisions is impermissible under Article I would logically lead a court to reject otherwise reasonable agency interpretations of statutes under their jurisdiction if those interpretations relied on committee report language (which they almost always do). I have not seen the textualist argument carried this far, and such an extension would further demonstrate the illogic of the basic position.


261 Both the Congress itself and the Comptroller General have recognized that committee report directives are not legally binding. The Comptroller General has said:
because committee direction is part of the complicated system of communication between Congress and the agencies, involving authorization of new programs, appropriation of funds, and general oversight of agency operations. This stark contrast should be taken into account by those who advocate the radical textualist view, but has never been specifically addressed by them.

2. The Special Case of the Budget and Appropriations Process

The authoritative treatment of committee report language by executive branch agencies is at its apogee in the budget and appropriations process of Congress. In the early years of the nation, Congress typically appropriated funds in specific amounts for each government program, and if changes occurred during the fiscal year, supplemental appropriations laws were passed to alter the amounts to be spent for each program. As Professor Kate Stith explains in her excellent analysis of the budget process, this cumbersome system eventually gave way to a more flexible one:

The massive restructuring and growth of the federal government under Franklin Roosevelt finally forced Congress to refrain from routine, detailed line itemization in appropriation acts. Instead, Congress resorted to lump-sum appropriations,

[T]here is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a nonstatutory context.

....

.... [W]hen Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.

....

.... [T]his does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive Branch ... has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.


See American Hospital Assn. v. NLRB, 499 U.S. 606, 616 (1991) ("Petitioner does not —and obviously could not—contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.").
which consolidated the appropriations for various activities of each federal agency or department

... [A]ppropriations acts fund each broadly defined federal program or activity in one lump sum, termed a budget "account."

Both authorization and appropriations bills are accompanied by detailed committee reports giving the specific amounts the department or agency should spend on each program within the budget account, except in those cases when Congress intends for the agency to have the freedom to determine specific programs under a "lump-sum" arrangement. Needless to say, departments and agencies treat these committee reports as the equivalent of legislation for purposes of their own budget planning. They would be foolish, except in extreme cases where the language is flatly inconsistent with the statute, to defy the committees on which they depend for appropriations by ignoring these instructions. In fact, this complicated process of supplementing the simple terms of the statute goes even farther. Congressional committees and their executive branch counterparts have developed over the years a highly refined process of "reprogramming" review, in which agencies report to the relevant appropriations subcommittees proposed changes to the amounts specified to be spent in the printed committee reports, and receive permission to make the changes. This reprogramming process, in many cases reduced to a formal set of written procedures by the two branches, allows agencies much-needed flexibility to respond to real-world changes and to avoid waste, and at the same time preserves the constitutional spending power of Congress. For our purposes, of course, it illuminates an arena in which Congress itself speaks authoritatively to the executive branch through committees and committee report language, though without the force of law.


263 See FISHER, supra note 262, at 75-98; ROBERT KEITH & ALLEN SCHICK, MANUAL ON THE FEDERAL BUDGET PROCESS 135, 144-45 (Cong. Res. Service, 1998); SCHICK, supra note 262, at 193-229; and Stith, supra note 262, at 613.

264 See Stith, supra note 262, at 614 ("Such spending detail [in a committee report] may be 'politically' binding, since an agency will find it advantageous to 'keep faith' with Congress, but the agency may in its discretion depart from them."); see also sources cited supra note 261.
Congressional efforts to regularize and control spending in the Congressional Budget and Impoundment Control Act of 1974\textsuperscript{265} and in the Balanced Budget and Emergency Deficit Control Act of 1985,\textsuperscript{266} popularly known as Gramm-Rudman-Hollings ("GRH"), raised this long-standing practice of authoritative communication through committee reports to new heights. The automatic sequestration procedure, which is the critical enforcement mechanism of Gramm-Rudman-Hollings, must be carried out across the board, with each budget account reduced by the same percentage. As Professor Stith explains the process:

Accordingly, whether GRH's uniformity requirement applies to a particular item of expenditure is decided by future legislatures in appropriations acts or future appropriations committees in their reports. . . . To make an item of expenditure a "program" for purposes of GRH, it is enough simply to identify the item as such in either an appropriations act or a committee report

. . . . Under GRH, committee reports can be expected to assume greater prominence, for they effectively prescribe how sequestration shall take place.\textsuperscript{267}

This critical role of committee report language is actually written into the law.\textsuperscript{268} Apparently, because of doubts concerning the constitutionality of such a procedure, Congress used the device of a joint resolution (equivalent to regular legislation) to incorporate detailed program designations made by the appropriations committees for the first year of Gramm-Rudman-Hollings' operation,\textsuperscript{269} but it has not repeated that formal incorporation mechanism. The Reagan administration took the position that while budget account designations that accompanied the original appropriations acts were constitutionally permissible, delegating authority to committees to change budget ac-


\textsuperscript{267}Stith, supra note 262, at 646.

\textsuperscript{268}See, e.g., Pub. L. No. 99-177, § 252 (a) (1) (B) (i), 99 Stat. 1037, 1072 (1985) (referring to laws "and accompanying committee reports").

\textsuperscript{269}See Stith, supra note 262, at 648.
counts in the future, and thus control sequestration, ran afoul of Chadha.\textsuperscript{270} The analysis put forth in this Article would support the same conclusion under some circumstances. Because of Congress's power to control its own rules under Article I, Section 5, Appropriations Committee report language that explained in more detail the large sum included in a particular budget account appearing in a later statute would be perfectly proper. Later, free-standing report language purporting to change the contours of budget accounts, outside of subsequent appropriations legislation, would not be entitled to the same constitutional respect. Interestingly, Congress resorted to the same sort of device in the Line-Item Veto legislation,\textsuperscript{271} attempting to give legal standing to certain items of legislative history in subsequent bills that defined specific programs eligible for the President's cancellation.\textsuperscript{272} Again, I would argue that such use of committee reports should not be treated as authoritative unless it is a germane part of some later enactment process.

A full examination of the role of congressional committees in controlling the executive branch and in managing federal expenditures is outside the scope of this Article. Nonetheless, this brief examination supports the general point being made in this section, that Congress has created a system in which the language of committee reports is used as a vehicle to convey important information about subsequently passed statutes—providing background principles, purposes, detailed explanation of the meaning of statutory text, and other vital material of use to both the executive and judicial branches. Radical textualists have advanced no good reason why the authoritativeness of report language should be different for courts and agencies.

\textbf{F. Summary}

What does this review of the history, culture, and rules of the House and Senate ultimately teach us about the authoritativeness of committee reports? It establishes that Congress has in fact delegated broad power to its committees to consider the need for legislation, formulate and explain the legislation, and manage its passage. It shows that Congress has used its power under the Rulemaking Clause

\textsuperscript{270} See id. at 647-51.


\textsuperscript{272} See Elizabeth Garrett, Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act, 20 CARDOZO L. REV. 871, 880-81 (1999) ("LIVA [the Line Item Veto Act] allows the President to cancel programs that are listed separately in any table, chart, or text in the relevant managers' statement or committee report, or any amounts that other legislation requires be allocated to particular projects.").
of the Constitution to fashion a committee system in which it reposes confidence and on which it relies to accomplish the complex business of legislating. A thorough understanding of the rules and traditions surrounding the committee, and particularly the conference committee, make it extremely difficult to accept the arguments of Justice Scalia and Professor Manning that the content of committee reports should be ignored as unreliable and illegitimate. As we have seen, Congress uses its committee reports, and especially conference committee reports, to provide context and explanation for otherwise ambiguous statutory text. In the eyes of members, both the text and the written products of its committees provide necessary information about the meaning of a statute. This is even truer in the context of the budget and appropriations process, in which report language actually supplements and amplifies lump sum numbers in the enacted bill. In short, if a majority of the Congress relies so heavily on the committee system as the best way to conduct its legislative business, and if the executive branch also treats the language in committee reports as authoritative, how can a court justify ignoring and denigrating written committee reports, which are the formal products of that system?

VII. A RADICAL TEXTUALIST RESPONSE

Before leaving the subject of the constitutional position of congressional committee reports, we might do well to ask how a committed radical textualist might respond to these arguments. As to my analysis of Article I, Chadha and Bowsher, Justice Scalia and his colleagues would undoubtedly take issue with my specific interpretations of the cases and their underlying constitutional principles. Fair enough; these are debatable matters.

As to the new argument I make based on the Rulemaking Clause, however, my guess is that the response would be somewhat different.273 So what? Justice Scalia might say. You have proven that Congress has the constitutional power to do just about anything within its own four walls, but haven’t made a case for extending the influence of the Rulemaking Clause to anyone or anything outside the legislative

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273 Justice Scalia might argue that these limitations on use of legislative history are actually limits on judicial behavior, implicit in Article III, and thus sidestep my analysis altogether. But this argument, which Bill Eskridge perceptively suggested to me, completely alters the basis of the radical textualists’ critique. Chadha and Bowsher would be irrelevant. As I have pointed out, Justice Scalia and his followers are not clear on the question of who violates the Constitution when committee reports are referred to, and when the violation occurs. However, the fairest interpretation of their writings is that the committee itself violates Article I at the time the report is created and not the judge at the time of interpretation. The radical textualists are thus likely to stick with their Article I critique.
branch. You particularly haven’t shown why the Rulemaking Clause, a purely procedural provision directed at Congress, has any effect on a judge interpreting a statute. Congress can create all the committees it desires, so long as it does not purport to give them the power to enact statutory text or participate in statutory interpretation.

There are several responses to this point, and discussing them briefly might help to clarify this Article’s most important contentions. First, one might observe that the presentment and bicameralism principles Justice Scalia relies on to exclude consideration of legislative history are also procedural, and are also addressed solely to the legislative branch in the text of the Constitution. How is it that those constitutional principles can be used to control the contours of acceptable interpretive practice, but the Rulemaking Clause cannot? Perhaps it is because they are more essential to the structure of the Constitution, but a persuasive answer is not immediately apparent.

Second, I would contend that the federal case law discussed in Part VI.C. shows that courts have given the Rulemaking Clause a breadth that does in a sense extend to matters outside of the strictly internal concerns of the Congress. The venerable enrolled bill rule itself, which Justice Scalia staunchly defends, insulates even the most egregious misbehavior during the enactment process from challenge, regardless of the effect it might have on the other branches or individuals. So long as a bill is properly enrolled, its procedural validity may not be questioned. Mester\(^\text{274}\) shows that the Rulemaking Clause can even trump the Presentment Clause. Nixon\(^\text{275}\) demonstrates that it must be respected even when the rights of a non-legislator are at stake. Michel\(^\text{276}\) is a case in which the Rulemaking Clause was arguably used to modify other specific provisions in the Constitution about the makeup of the legislative branch. Likewise, in Vander Jagt,\(^\text{277}\) the clause insulates actions that arguably have a profound impact on the rights of voters, whose representatives’ committee votes were diluted. In short, it is simply too facile to insist that the power of Congress to make its own rules derives from a purely procedural constitutional provision, and therefore may not have any effect on the interpretive function of a judge. It has historically had a much more powerful impact; until now, however, the Rulemaking Clause has not been considered as a part of the legislative history debate.

\(^{274}\) Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989). See supra Part VI.C.
\(^{276}\) Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1884). See supra Part VI.C.
Third, I would point to the materials in Part VII.E. on the use of committee reports by agencies and in the budget process to emphasize that committee reports made pursuant to the Rulemaking Clause do, in the real world of government, have profound and tangible consequences. Granted, the persuasive effect of committee report language in that context is not "binding" in the legal sense, but then neither is the authoritative use I argue for in statutory interpretation. Again; it would be anomalous for Justice Scalia to accept the reality of congressional influence on agencies and on the President through committee language, as courts have uniformly done, and to deny it in the case of statutory interpretation.

If the reader rejects these answers, finally, I would take issue with the premise of this hypothetical response, i.e., that I am necessarily arguing that the Rulemaking Clause can have an effect on functions or entities outside of the legislative branch. A better view may be that I am simply arguing for the proper place of the Rulemaking Clause and its products within the legislative branch, not nearly so radical a proposition.

Consider the context in which these disputes arise. A court is faced with a statutory provision that is ambiguous, or perhaps with two provisions that seem to conflict. The judge needs to give a meaning to the statutory words in question because she must resolve the legal dispute between the parties. The question addressed in this Article is whether she can legitimately look to written reports of standing committees or conference committees to assist her in giving meaning to the text. Justice Scalia seems to say that doing so violates Article I of the Constitution. But the focus of legal analysis in such a case is on the content and product of the enactment process. I contend that the Rulemaking Clause lends support to the idea that it is appropriate to look at the entire enactment process—to the written products of the relevant committees as well as the text of the statute—in determining the meaning of ambiguous words. In doing so, I need not argue that the Rulemaking Clause somehow controls or has a legal effect on functions outside the legislative branch. The court is attempting to arrive at meaning by examining what happened inside the legislative branch during the enactment process, and the argument is over what materials may be excluded and for what reason.

Despite Justice Scalia's rhetoric, after all, at the moment of statutory interpretation there is no committee chair or group of members pressing any particular meaning on the judge. The committee report is entirely passive at this point—an item of research to be found and evaluated. It is therefore fanciful to accuse the Congress of violating
the Constitution at the moment of interpretation—the members who wrote both the text of the statute and the committee report may be long departed. And it is also fanciful to conclude that giving effect to the Rulemaking Clause, by respectfully considering the entire process by which Congress arrived at the text, is somehow giving external effect to an essentially internal and procedural command in Article I, Section 5. Considering the Rulemaking Clause only serves to buttress the appropriateness of the practice perceptive and conscientious judges have long engaged in—considering all of the evidence bearing on statutory meaning before making a decision.

CONCLUSION

The radical textualist assault on legislative history materials ultimately founders on the rocks of reality and common sense. Most questions of statutory interpretation are resolved by a careful reading of the text, an examination of its structure, and an analysis of related statutes, just as Justice Scalia says. The vast bulk of these interpretive questions do not reach the appellate courts. Most judges and scholars agree that legislative history should take a secondary position to enacted text in this interpretive process. But faced with a statutory provision which may be susceptible of two meanings, judges will continue to refer to committee reports for guidance as to which was intended by the legislature. Most judges will be quite understandably incapable of ignoring reference materials that may help decide the case before them. Perhaps recognizing this powerful commonsense pull toward the use of committee materials as authoritative aids to interpretation, Justice Scalia and Professor Manning have attempted to move the argument to another plane, by arguing that such use is illegitimate as a matter of constitutional law. This Article attempts to respond to their effort to exclude committee reports from the interpretive arsenal, first by contending that Article I concerns do not preclude such authoritative use, and second by establishing that pre-enactment committee reports rest on an independent constitutional base—the Rulemaking Clause of Article I, Section 5. The core argument of the radical textualists, then—that statutory text has constitutional legitimacy and committee reports do not—is simply untenable. Properly understood, the Constitution provides a solid basis for consideration of committee reports as a primary contextual aid in resolving statutory ambiguities.

Re-establishing the Article I legitimacy of committee reports, however, does not end the debate over their proper use in interpreting statutes. Scholars and judges still must grapple with difficult ques-
tions, even though they are not constitutional questions. Exactly when is it appropriate to turn to legislative history, keeping in mind that clear statutory text must always be given priority? How much weight is to be given to the various items of legislative history? How can a judge detect and avoid the pitfalls created by the occasional abuse of legislative history by legislators and their staffs? Answering these questions involves respect for Congress's prerogatives under the Rulemaking Clause, but it also requires a sophisticated understanding of the enactment process. That understanding is too often lacking in judicial opinions that attempt to resolve difficult questions of statutory interpretation. Ultimately, answering these kinds of questions about the proper use of legislative history will ensure that both the courts and the legislature are allowed to play the full roles assigned to them in our constitutional system.