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## The Constitution and Legislative History

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## ARTICLES

### THE CONSTITUTION AND LEGISLATIVE HISTORY

*Victoria F. Nourse\**

“Text without context often invites confusion and judicial adventurism.”

Senator Orrin Hatch (R-Utah)<sup>1</sup>

“I think when justices disregard that kind of material [legislative history], it is just another way to write their own law . . .”

Senator Arlen Specter (then R-Penn.)<sup>2</sup>

“Justice Scalia is of the opinion that most expressions of legislative history . . . are not entitled to great weight . . . Now, obviously, I have great regard for Justice Scalia, his intellect and legal reasoning. But, of course, . . . I don’t really agree with his position.”

Senator Chuck Grassley (R-Iowa)<sup>3</sup>

Until the late 1980s, few questioned judges’ use of legislative history to resolve statutory ambiguity.<sup>4</sup> The Constitution says nothing

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\* Victoria Nourse, Professor of Law, Georgetown Law Center. Thanks to those at workshops at Yale, Minnesota, DePaul, and Georgetown who, over the past two years, have listened to parts of this argument. Special thanks to William Eskridge, Lawrence Solum, Louis Seidman, and Randy Barnett.

1 Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. L. & PUB. POL’Y 43, 43 (1988).

2 Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress’ Will*, 48 Cong. Q. Wkly. Rep. 913, 917 (1990).

3 Transcript: Day Three of the Roberts Confirmation Hearings, WASH. POST (Sept. 14, 2005, 1:45 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html> (speaking at the confirmation hearing of Chief Justice John Roberts).

4 Textualists and their critics agree upon the hundred-year reign of legislative history. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 679

barring courts from using any aid helpful and relevant to interpretive decisions. Since the Founding, Supreme Court lawyers have cited the journals of the House and Senate.<sup>5</sup> As Chief Justice John Marshall once explained “[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.”<sup>6</sup>

Beginning in the late 1980s and continuing through the 1990s, agencies, academics, and judges began to assert, with increasing stridency, the notion that using legislative history is unconstitutional.<sup>7</sup> Textualism’s most insistent advocates<sup>8</sup> decried recourse to legislative

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(1997) (“For more than a century, the Supreme Court has consulted a further text—the legislative history—to determine intent when the statutory text is unclear.”); John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 491 (2001) (arguing that the use of legislative history has been “dominant in the federal courts for most of the last one hundred years . . .”).

- 5 The *Venus*, Rae, Master, 12 U.S. (8 Cranch) 253, 264 (1814) (counsel citing the statement of “Mr. Russell in a committee report” from the House journal); *Id.* at 261 (counsel citing an amendment in the Senate for the proposition that Congress did not mean to authorize the capture of property belonging to mere inhabitants of a hostile country because the law had been amended in the Senate to cover “subjects” of hostile nations). *See also* Menard v. Aspasia, 30 U.S. (5 Pet.) 505, 509 (1831) (counsel referring to journals of Congress on knowledge of slavery in passing northwest ordinance); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 214 (1821) (counsel referring to House and Senate Journals on the practice of issuing contempt orders); Commonwealth v. Franklin, 4 U.S. (4 Dall.) 255, 261 (1802) (counsel citing journals of old Congress on question of land grant). Even Justices cited the journals. *See, e.g.*, Roach v. Commonwealth, 2 U.S. (2 Dall.) 206 (1793) (Justice M’Kean referring to a “legislative construction” of a statute—a series of statutes, in fact—as to the amount to be paid for a military uniform, citing to state legislative journals). For more cases on citation to the journals for statutory and constitutional interpretation, see *infra* notes 131-35.
- 6 United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); *see also* Gardner v. The Collector, 73 U.S. (6 Wall.) 499, 511 (1867) (“[O]n principle as well as authority . . . whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to *any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer* to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.”) (emphasis added).
- 7 *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84 n.52 (2006) [hereinafter, Manning, *Divides*] (“In previous writing, I have argued that textualists’ rejection of legislative history is best explained by reference to the constitutional norm against legislative self-delegation.”) (citing Manning, *supra* note 4 at 710-25); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35 (1997) (purporting that reliance on legislative history is unconstitutional) (“The legislative power is the power to make laws, not the power to make legislators. It is nondelegable.”).
- 8 See Roberts, *supra* note 4, at 493 (“In recent years . . . 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 . . . is actually inconsistent with Article I of the Constitution.”). Professor Roberts recounts the history of the emergence of the critique of legisla-

history as “illegitimate” and “shameful.”<sup>9</sup> In fact, this constitutional question has produced far less analysis than it merits. It is one thing to reject unreliable snippets of legislative history, or the use of legislative history to find “intent”;<sup>10</sup> it is quite another to decree that legislative history shall *never* be considered as a *constitutional* matter—a position not seriously entertained until Justice Antonin Scalia made it a *cause célèbre* in the late twentieth century.<sup>11</sup> To make matters even odder, the constitutional arguments against legislative history are for the most part ignored by federal courts, including the Supreme Court, which continues to cite legislative history.<sup>12</sup>

In this Article, I provide an extended analysis<sup>13</sup> of the constitutional claims against legislative history, arguing that, under textualists’ own preference for constitutional text, the use of legislative history should be constitutional to the extent it is supported by Congress’s rulemaking power, a constitutionally enumerated power.<sup>14</sup>

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tive history. *Id.* at 497. Professor William N. Eskridge also recounts the critique. Professor William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998).

9 As Justice Antonin Scalia has explained: “The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (quoting *Aldridge v. Williams*, 44 U.S. 9, 24 (1845)); *see also ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting in part) (“We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history . . . .”).

10 *See Manning*, *supra* note 4, at 677 (“[T]extualists contend that . . . a multi-member legislature has no actual collective intent on the (ambiguous) points it has not explicitly resolved . . . .”). *But see Victoria Nourse, Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014) (arguing that this claim is wrong and misleading, that Congress plans (and in this sense has intent) through its procedures, and that the term “intent” is a misleading proxy for gaining meaning through “context”).

11 SCALIA, *INTERPRETATION*, *supra* note 7 at 31 (“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law.”); *Id.* at 34 (“It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it.”).

12 *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (rejecting the Scalia position).

13 Others have made significant but partial arguments. *See James J. Brudney, Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1218–24 (2010) (mentioning Section 5, focusing on the Journal Clause as supporting reference to legislative history) [hereinafter Brudney, *Shortfalls*]; Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1473 (2000) (rejecting textualists’ nondelegation argument). This Article differs because it deals with all of the constitutional objections—bicameralism, nondelegation, and the separation of powers—and does so on the basis of textualists’ own constitutional theories. Beyond this, it applies my structural analysis of the Constitution, *see infra* notes 205–31 and accompanying text, which has never been brought to bear on this particular problem.

14 U.S. CONST. art. I, § 5, cl. 2 (“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.”).

This Article has five Parts. In Part I, I explain the importance of this question, considering the vast range of cases to which this claim of unconstitutionality could possibly apply—after all, statutory interpretation cases are the vast bulk of the work of the federal courts. I also explain why these claims should be of greater concern to a variety of constitutional theorists, particularly those who embrace theories of popular and common law constitutionalism, but as well to originalists.

In Part II, I consider the textualist arguments against the constitutionality of legislative history. Article I, Section 7 provides that any bill must pass the House and the Senate and be presented to the President for veto or signature.<sup>15</sup> As a number of textualists have argued, legislative history is not passed by both houses or signed by the President.<sup>16</sup> Call this the “bicameralism argument.”<sup>17</sup> My answer to the bicameralism argument lies in a constitutional text that statutory textualists seem to have forgotten: Article I, Section 5 gives explicit power to Congress to set its own procedures, a power that gives legitimacy to legislative history created pursuant to those procedures.<sup>18</sup> In fact, new developments in statutory interpretation theory (decision process theory) suggest that, in some cases, the only way to resolve textual conflict is to consider legislative procedure.<sup>19</sup>

In Part III, I consider a second prominent argument against the constitutionality of legislative history: non-delegation. Critics argue that Congress may not delegate the “legislative power” granted under the Constitution to members or committees, as only *the entire Congress* may constitutionally exercise that power. Call this the “non-

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15 U.S. CONST. art. I, § 7, cl. 2 (“Every Bill . . . shall, before it becomes 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 . . .”).

16 Manning, *supra* note 4, at 695 (“[T]extualists argue that crediting *unenacted* expressions of legislative intent contravenes the constitutional requirement of bicameralism and presentation.”).

17 U.S. CONST. art. I, § 7, cl. 2 (“Every Bill . . . shall, before it becomes 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 . . .”). See John Manning, *The New Purposivism*, 2011 S. CT. REV. 113, 167–68 (2011) (“Simply put, if the statute and the legislative history genuinely conflict, Article I, Section 7 of the Constitution itself gives the text a greater claim to authoritativeness.”).

18 U.S. CONST. art. I, § 5, cl. 2 (“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.”).

19 See generally Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012).

delegation” argument.<sup>20</sup> Again, my response is based on constitutional text: Article I, Section 5 specifically sanctions delegation to less than the whole of Congress; more importantly, there is no general norm against self-delegation stated explicitly or even implicitly in the Constitution. Finally, I suggest that there is a certain inconsistency in the assertion of these claims: the non-self-delegation and bicameralism arguments can both be used to indict canons of construction, which textualists offer as the leading alternative to legislative history, but which have no supporting text comparable to Article I section 5 in the Constitution.

In Part IV, I consider arguments that judges’ use of legislative history violates the separation of powers because it allows the legislature to exceed the bounds of the “judicial power.”<sup>21</sup> This argument can rather easily be turned on its head: in the quotations offered at the beginning of this article, members of Congress argue that judges are exercising the “legislative power” when they rewrite statutes without considering legislative history. As has been argued at length elsewhere, the use of “adjectival” argument in structural controversies—relying upon the terms “legislative, executive, and judicial”—perpetuates a weak understanding of the separation of powers, and one that the Constitution’s own text belies.<sup>22</sup> The separation of powers does not prevent recourse to legislative history; in fact, as the Article explains, blindness to legislative history may create different kinds of structural risks—risks to federalism, rather than risks to the separation of powers.

Finally, in Part V, I conclude by suggesting that we should retire the strong form of the legislative history unconstitutionality argument, by which I mean the claim that the constitution bars any and

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<sup>20</sup> Manning, *supra* note 4, at 675 (“[T]extualism should be understood as a means of implementing a central . . . element of the separation of powers—the prohibition against legislative self-delegation.”). The full scholarly exegesis of this argument appears in Manning. *Id.* As a matter of fact, this happens, but in reverse order: the whole body has the opportunity to reject or amend the bill precisely because of any statements made in the committee report about its meaning. *See* Siegel, *supra* note 13, at 1459 (2000).

<sup>21</sup> The most prominent constitutional debate in statutory interpretation has centered around the nature of the “judicial power,” an approach which I reject here, as incapable of either resolving the question or of asking the correct question. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation 1776-1806*, 101 COLUM. L. REV. 990 (2001) (explaining that judicial statutory interpretation takes into account the “spirit of the law” and fundamental values); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 42–43 (2001). *See infra* text accompanying notes 169–70 (arguing against an adjectival view of the separation of powers).

<sup>22</sup> Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 470–71 (1996); *see* discussion *infra* Part IV.

all legislative history. Instead, we should far more actively interrogate serious questions about the use of legislative history in particular cases. Can it really be wise—or even constitutional—for a judge to impose a meaning on an ambiguous statute with reference to the statements of a filibustering minority, or privilege some texts in ways that violate Congress's rules?<sup>23</sup> Fidelity to Congress, and the importance of Congress's constitutional rules—what Francis Lieber once called the “common law” of the Congress<sup>24</sup>—has yet to be theorized within this more pressing, but particular, sphere.

## I. STATUTORY INTERPRETATION AND CONSTITUTIONAL THEORY

Many scholars have asserted that the legislative history question is a constitutional one,<sup>25</sup> yet there has been a relative lack of extended constitutional analysis. Dozens of articles mention arguments against the constitutionality of legislative history, but fewer than a handful examine arguments supporting its constitutionality.<sup>26</sup> Most lawyers, scholars and judges simply assume, without articulating precisely why, the use of legislative history is constitutional. This reflects the bare

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<sup>23</sup> These claims are all supported in Nourse, *supra* note 19, at 106–09 (describing an opinion in which Justice Rehnquist relies upon a minority report and statements of those who filibustered the 1964 Civil Rights Act; describing a case in which Justice William Brennan and Justice Anthony Kennedy discussed a term that would have been ignored by Congress).

<sup>24</sup> FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 188–89 (3rd ed. 1877).

<sup>25</sup> For some of the scholars suggesting that the matter is a constitutional question, see Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843 (1991) (arguing that constitutionally oriented arguments explain “why this court takes that approach with respect to those issues in a way that legitimates its stance . . . ”); Manning, *supra* note 4 at 695 (arguing that textualism emphasizes aspects of constitutional structure); Daniel Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281, 284 (1989) (arguing that one must consider a statutory interpretation method that is consistent with this country’s constitutional government); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing Congress’s power to codify a particular interpretive method is a constitutional question). This is so despite the fact that there is serious disagreement about whether there is a constitutional question to be answered. Some scholars insist that “[c]ourts must choose interpretive doctrines on largely empirical grounds . . . .” Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 77 (2000).

<sup>26</sup> See Roberts, *supra* note 4, at 566–67 (arguing that delegation to committees is constitutional); Siegel, *supra* note 13, at 1527 (2000) (arguing against the non-delegation claim). See also James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 42–47 (1994) (considering legislative supremacy and the separation of powers as supporting references to legislative history) [hereinafter Brudney, *Commentary*]; Brudney, *Shortfalls*, *supra* note 13, at 1218–24 (mentioning Section 5, focusing on the Journal Clause as supporting reference to legislative history).

bones fact that legislative materials remain a tool routinely used in federal courts everyday. As the Supreme Court has written:

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it . . . . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past.<sup>27</sup> We suspect that the practice will likewise reach well into the future.<sup>27</sup>

At the outset, it is important to understand that more is at stake in the legislative history debate than constitutionalists typically imagine. Despite the rather assertive claims made by legislative history's critics, constitutionalists have never weighed in on the issue with great vigor. This should seem surprising for a number of reasons. First, statutes are the life-blood of the judicial caseload; legislative history's opponents concede the importance of statutory law.<sup>28</sup> Second, statutory interpretation and judicial review, in the constitutional sense, are tethered: if statutory practice becomes untethered from legitimate deference to Congress, that imperils the legitimacy of judicial review more generally. Third, a court that rewrites a statute contrary to Congress's meaning may not only create a counter-majoritarian difficulty (typically associated with constitutional law), but also a *supermajoritarian* difficulty.<sup>29</sup> Fourth, the textualist argument against the constitutionality of legislative history poses serious challenges to leading constitutional theories, such as common law<sup>30</sup> and popular constitutionalism.<sup>31</sup>

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<sup>27</sup> Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 612 (1991) (citing United States v. Fisher 6 U.S. (2 Cranch.) 358, 386 (1805)); *see, e.g.*, Wallace v. Parker 31 U.S. (6 Pet.) 680, 687–90 (1832) (providing an example of the Ohio Supreme Court engaging in statutory interpretation).

<sup>28</sup> *See* ROBERT A. KATZMANN, JUDGING STATUTES 3 (2014) (“[A] substantial majority of the Supreme Court’s caseload involves statutory construction (nearly two-thirds of its recent docket by one estimate.”); *see also* SCALIA, *supra* note 7.

<sup>29</sup> Victoria F. Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1165 (2011).

<sup>30</sup> *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

<sup>31</sup> Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism* in Heller, 122 HARV. L. REV. 191 (2008) (arguing that a certain understanding of *Heller* illustrates discipline and discretion in constitutional interpretation that originalism precludes); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

*A. A Republic of Many, Many Statutes<sup>32</sup>*

Although one might not know it from the law reviews or even the first year law school curriculum, statutory interpretation is important. It is *very* important. Statutes are the lifeblood of American law. Although the legal curriculum still prizes a heavy dose of the common law, there has been a glacially slow but noticeable move to teaching statutes and regulations in the first year. This reflects what Justice Scalia has declared—that “we live in age of legislation”,<sup>33</sup> the common law having been overtaken by what Professors William Eskridge and John Ferejohn have dubbed a “republic of statutes.”<sup>34</sup> If this is correct, then, it behooves those who care about the Constitution to pay attention to arguments that affect almost every statutory case. If Justice Scalia is correct, then vast numbers of lawyers and judges are violating the Constitution in statutory cases. Presumably, constitutionalists should care about what could be the most significant (in terms of number of cases) constitutional claim made in decades. Forget about the legislative veto or the right to die, in terms of the raw number of cases, the legislative history question deserves greater constitutional attention.

*B. Judicial Review and Statutory Interpretation*

Even if the sheer volume of cases affected did not favor such attention, constitutional theory should. Although it is generally not conceived of in this way, judicial review and statutory interpretation are tethered in practice. Statutory cases are common; they are the baseline from which constitutional cases are thought to diverge. They are also the baseline of legitimacy from which judicial review is often justified. To those who find these debates mundane as a constitutional matter, it must be remembered that statutory interpretation cannot be disengaged from the performance of the Supreme Court as a whole, and that includes constitutional review. The very deference granted to Congress in statutory interpretation cases gives credibility to the claim that the Supreme Court only exercises its greatest power to strike down laws in the odd constitutional, not the normal statutory, case. A court that rewrites law in the statutory realm risks

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<sup>32</sup> WILLIAM ESKRIDGE, ABBE GLUCK & VICTORIA NOURSE, *A REPUBLIC OF STATUTES: CASES AND MATERIALS ON THE ADMINISTRATIVE STATE* (2014).

<sup>33</sup> SCALIA, *supra* note 7, at 12.

<sup>34</sup> WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

disturbing the “economy of trust”<sup>35</sup> needed to permit it to exercise more dramatic exercises of judicial review.

### C. The Supermajoritarian Difficulty

The entire question of judicial review has been framed as justifying judicial “overruling” of the legislature and its counter-majoritarian effect.<sup>36</sup> There has been no comparable attention to statutory interpretation even though the cases are more frequent and the effects may be even more disrespectful of majorities. In statutory interpretation cases, “courts have no long or overt tradition of self-conscious constitutional self-control,”<sup>37</sup> despite the obvious danger that interpretive review, just like judicial review, may create not only a counter-majoritarian difficulty, but also a “supermajoritarian difficulty.”<sup>38</sup> As I have described at length elsewhere, it is possible (and more than possible, one can demonstrate this in particular cases) that judges have sought to enforce counter-majoritarian meanings—the meaning asserted by the statute’s *opponents*.<sup>39</sup> If this is correct, given the fact that all legislation requires a supermajority in the Senate,<sup>40</sup> it is possible that a court in a statutory interpretation case, when it errs, is erring on the side of a very distinct minority (in theory as little as less than 15 percent of the population and even less of the electorate).<sup>41</sup> A court that rewrites a statute contrary to the will of the people is in one sense no different than a court that exercises judicial review: it writes its own laws with no popular mandate—but in another sense (given the supermajoritarian difficulty) it may be acting in ways that may be more grievously inconsistent with majoritarianism, if it assumes that it is simple for Congress to reverse the courts’ errors.

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35 SCOTT SHAPIRO, LEGALITY 331–52 (2011).

36 See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

37 Nourse, *supra* note 29, at 1165.

38 *Id.* at 1128–33 (discussing and naming the “supermajoritarian difficulty”).

39 Nourse, *supra* note 19, at 120 (explaining that Justice Stevens’s opinion in *Bock Laundry*, to the extent it advocated the common law rules, was advocating for a position rejected in conference); *id.* at 107 (explaining that Justice Rehnquist’s opinion in *United Steelworkers v. Weber* relied upon opponents to the bill).

40 See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012).

41 This follows from the fact that there is equal state representation without regard to population. So, in theory, the eleven smallest states can block any bill in the Senate. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 49–62 (2006).

It is often assumed that the risk of statutory interpretation is less serious than the question of judicial review because Congress may reverse the results of an improper judicial decision based on statutory grounds but not in constitutional cases. In fact, this misunderstands the legislative process. No court's statutory ruling fails to change the legislative calculus. When the parties return to Congress to plead their case, the court's decision will brand one side of the congressional debate with the mark of legal legitimacy. When the losing party in court is a detested minority, or even a latent majority or super-majority, the court's decision may be just as fatal as a constitutional ruling.<sup>42</sup>

This argues for more, rather than less, concern about judicial power to rewrite statutes. Indeed, it argues for greater rather than lesser attention to the constitutional implications of statutory interpretation. In this sense, Justice Scalia's textualist critique has done an enormous service to the field of statutory interpretation, raising the constitutional profile of an issue that has not been seen as particularly important. By the same token, purposivists and other critics of textualism have done themselves no good deed by marginalizing the constitutional arguments, rather than meeting them head on with serious arguments taken from constitutional text and structure.

#### D. Importance for Constitutional Theory

Constitutional theorists should be more interested in this debate from purely selfish perspectives. Common law constitutionalists,<sup>43</sup> those who rely upon stare decisis to constrain judges, should be concerned that a longstanding practice—a common law of statutory interpretation—is under assault.<sup>44</sup> From their vantage point, textualists'

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<sup>42</sup> Even when the court invites congressional intervention, it may not occur for decades. *See* *Flood v. Kuhn*, 407 U.S. 258, 276–77 (1972) (inviting Congress to change the courts' own rulings exempting baseball from antitrust law, after 50 years of invitations which were declined). WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 637 (4th ed. 2007) (explaining that Congress did not react to this invitation for decades). Of course, it is also possible that, in politically marginal cases, the Court's ruling can spur congressional action by signaling the weakness of a minority position. In *FDA v. Brown & Williamson Tobacco Corp.*, the court refused to uphold the Administration's attempt to regulate use of tobacco, referring the matter to Congress, which in fact then acted, despite the traditional strength of the tobacco lobby. 529 U.S. 120, 161 (2000); Melissa Healy, *The Tobacco Law: What the FDA Can and Can't Do*, L.A. TIMES, June 29, 2009, at E1.

<sup>43</sup> STRAUSS, *supra* note 30; *see* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452 (2010).

<sup>44</sup> Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013) (“[F]ederal courts have spent the last century en-

refusal to look at legislative history should stand as a radical form of judicial activism, since it seeks to overturn a practice textualists acknowledge has at least one hundred years of precedent to support it.<sup>45</sup> As Thomas Merrill has written, Congress has not only enumerated powers, it has the common law “disposing power,” by which he means the power to “determine[] who has the authority to make law and under what circumstances.”<sup>46</sup> Yet it is unclear whether textualists or purposivists are willing to respect something far less grand—Congress’s procedural power to set the rules of decision by which law is made and interpreted.

Popular constitutionalists, as well, should be interested in the debate because it raises issues about the role of the courts relative to Congress. Popular constitutionalism holds that Congress’s constitutional determinations should be given great weight and that courts should not have supreme power in the field of constitutional law.<sup>47</sup> In the field of statutory interpretation, popular constitutionalists, like common law constitutionalists, should be concerned that existing theories of statutory interpretation—whether textualism or purposivism—erode Congress’s role in statutory interpretation. Neither textualists nor purposivists pay much attention to congressional procedure—the means by which the legislature makes its decisions. A popular constitutionalist should worry, as I suggest here, that Congress’s constitutional constituencies—the people—are being cut out of the process of *statutory* as well as constitutional interpretation, which may be a far more serious assault on a republican legal order.<sup>48</sup>

Originalists, whether those who support a living version or not,<sup>49</sup> should as well be concerned with this issue. Recent developments in statutory interpretation theory, such as decision process theory, reveal the importance of legislative rules of proceedings in interpreting text. Some originalists have invoked analogous rules of proceedings in the context of the creation of the Constitution to support their theories of originalism.<sup>50</sup> Although the traditional “originalist” debate about

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gaged in an under-the-radar enterprise of fashioning and applying what are arguably hundreds of federal common law doctrines to questions of federal statutory interpretation, without acknowledging that they are doing so . . .”).

<sup>45</sup> See Manning, *Delegation*, *supra* note 4, at 759.

<sup>46</sup> Merrill, *supra* note 43, at 454.

<sup>47</sup> For full arguments supporting this claim, see Siegel, *supra* note 31, at 191; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006); *see also* KRAMER, *supra* note 31; TUSHNET, *supra* note 31.

<sup>48</sup> Compare JOHN O MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013), with JACK M. BALKIN, LIVING ORIGINALISM (2011).

<sup>49</sup> MCGINNIS & RAPPAPORT, *supra* note 48, at 1-18.

legislative history has been about the meaning of “judicial” power,<sup>50</sup> these recent developments suggest that the originalist question may have been misphrased, which is to say that the question is not whether legislative history is within the “judicial” power historically, but whether the founding recognition of the importance of rules of proceedings<sup>51</sup> should affect the legislative history debate.

Finally, constitutionalists in general should be concerned that while they have been spending an inordinate amount of time on the question of constitutional fidelity,<sup>52</sup> there is a relative dearth of constitutional analysis on legislative fidelity.<sup>53</sup> In fact, legislative supremacy in statutory matters is a wildly undertheorized constitutional principle, although it traces to the Founding. At its most stringent, legislative supremacy suggests that courts must assiduously seek to put themselves in the place of the legislature in deciding questions of statutory ambiguity—acting as if they were the legislature.<sup>54</sup> At its most lenient, legislative supremacy means that courts may exercise a fair amount of discretion, but may not “disobey” Congress.<sup>55</sup> Somewhere in the middle is “deference as respect,” whereby deference amounts to a “judicial attitude of respectful attention to the reasons which are or could be offered in support of a legal authority’s decision.”<sup>56</sup> Almost all such theories have been stated at such a level of generality, however, that they do not seem particularly helpful in answering the far more specific constitutional claims against legislative history, examined below.

## II. THE BICAMERALISM ARGUMENT RECONSIDERED

Those decreeing legislative history unconstitutional typically begin by invoking Article I, Section 7—the Bicameralism Clause.<sup>57</sup> They ar-

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<sup>50</sup> See generally William N. Eskridge, Jr., *All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Textualism and the Equity of the State*, 101 COLUM. L. REV. 1 (2001).

<sup>51</sup> For discussion of the early recognition of the importance of legislative rules of proceeding, see *infra* Part II.A.

<sup>52</sup> See, e.g., *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

<sup>53</sup> There are, of course, exceptions. See William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2460 (1990) (discussing the relational agent).

<sup>54</sup> Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 432 (1989) (pointing out that Aristotle called on judges to “imagine how the legislators would have addressed [an] issue had they foreseen it . . .”).

<sup>55</sup> See generally Farber, *supra* note 25.

<sup>56</sup> DOUGLAS E. EDLIN, *JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW* 158 (2008).

<sup>57</sup> See, e.g., Manning, *supra* note 4, at 676, 695-96.

gue that legislative history is not passed by both Houses of Congress or signed by the President and therefore violates the Bicameralism Clause.<sup>58</sup> The first and most obvious answer to this claim is to turn to another relevant and more specific constitutional text: the Rules of Proceedings Clause. In Article I, Section 5, the Constitution specifically grants to each house of Congress the power to set its own rules: “Each House may determine the Rules of its Proceedings . . .”<sup>59</sup> No one seriously contends that Congress acts unconstitutionally when it creates legislative history, when Senators speak or committees write reports—such a rule could entirely disable the body.<sup>60</sup> Nor do courts seriously contend that the Constitution does not commit to Congress, and, even more particularly, each House of Congress, the power to create its own rules.<sup>61</sup> Put in other words, the Constitution recognizes the principle of bicameralism in some cases and its opposite in other cases—that each House has constitutional authority to act independently of the other.

#### A. *The Constitutional Text Statutory Textualists Forgot: The Rules of Proceedings Clause*

From the very Founding, when the constitutional convention created rules, and delegated authority to committees for important drafting tasks, legislative bodies have been held to have wide power to create their own procedures.<sup>62</sup> Justice Joseph Story once explained:

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58 See, e.g., John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1530, 1538-40; John F. Manning, *Second Generation Textualism*, 98 CAL. L. REV. 1287, 1292 (2010).

59 U.S. CONST. art. I, § 5.

60 The major empirical studies confirm that, at least as far as staffers are concerned, Congress is not about to give up legislative history. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013). For a comprehensive explanation of why legislative history matters to members of Congress and why members do in fact rely upon things like committee reports for making decisions, see Brudney, *Commentary*, *supra* note 26, at 27-28. See also Nourse & Schacter, *supra* note 60, at 607.

61 See *infra* note 153 and accompanying text.

62 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 xxii-xxiv (Max Farrand ed., 1937) (mentioning the formation of general principles and regulations in the early sessions of the Constitutional Convention). The Committee on Detail added many provisions to the Constitution now considered vital, including the Vesting Clauses, the Necessary and Proper Clause, and the Rulemaking Clause. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937); see also *id.* at 177, 185, 186 (vesting clauses); *id.* at 180 (Rulemaking Clause); *id.* at 182 (Necessary and Proper Clause).

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.<sup>63</sup>

The Rulemaking Clause sanctions procedures determined by each individual House.<sup>64</sup> The Constitution thus embraces deviations from bicameralism—*each* House of Congress may set its *own* rules. In fact, the bicameralism clause acknowledges that there is a difference between a “Law”—a status achieved only after the President has given his approval—and the “Bill” created prior to such approval.<sup>65</sup> Textualists have argued that legislative history is not “law,”<sup>66</sup>—but *neither is the text of the bill that has passed both Houses*. Bill text is text, but does not become “Law” until it is signed by the President.

If this is correct, then the Constitution provides an affirmative textual argument for Congress’s procedures and, to this extent, the products of those procedures (i.e. legislative history).<sup>67</sup> Imagine if the Constitution gave courts the express power to create “rules for X.” Could another department constitutionally blind itself to the rules the judiciary had created pursuant to such a constitutional authorization? There can be no question that the courts would, if given an express power to create rules or procedures, demand respect for that power from other branches, namely the President and the Congress. So, too, should the judicial branch respect and understand Congress’s rules and proceedings.

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<sup>63</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 837, at 588 (4th ed. 1873).

<sup>64</sup> U.S. CONST. art. I, § 5 (“Each House may determine the Rules of its Proceedings . . . ”).

<sup>65</sup> U.S. CONST. art. I, § 7, cl. 2 (“Every Bill . . . 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 . . . ”).

<sup>66</sup> SCALIA, *supra* note 4, at 31 (“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law.”)

<sup>67</sup> In theory, one might distinguish between evidence of a change in text, or procedural or statutory history, from statements about the text or legislative history. In fact, the easiest way to find procedural or statutory changes is through reference to legislative history explaining those changes.

*B. Section 5 and Decision Process Theory: Why Congress's Rules are Important In Interpreting Congress's Texts*

Others have noted the importance of the Rulemaking Clause,<sup>68</sup> but this clause has suffered the more general fate of theories of statutory interpretation, which largely ignore Congress. As Jerry Mashaw has explained, neither purposivism nor textualism have a positive theory of Congress.<sup>69</sup> For purposivists, Congress's rules perform little role in disciplining the use of legislative history.<sup>70</sup> Textualists, as a general matter, find Congress's procedures unfathomable, "arbitrary," and "idiosyncratic,"<sup>71</sup> even as they concede that failure to attend to text "disrespects the legislative process."<sup>72</sup> Neither textualists nor purposivists focus on the overt textual basis for congressional decisionmaking: Section 5 of Article I of the Constitution.

Section 5 gives express authority to create legislative materials and in this sense sanctions legislative history.<sup>73</sup> More importantly for my purposes, it gives express authority to congressional "rules of proceedings"—to a sequential process of decisionmaking subject to procedures created by each House of Congress. Developments in statutory interpretation theory show that textual interpretation depends, crucially, on seeing how the rules affect the creation of statutory text,

<sup>68</sup> Brudney, *Shortfalls*, *supra* note 15, at 1218–24 (mentioning Section 5, focusing on the journal clause); Brudney, *Commentary*, *supra* note 26, at 41–47 (discussing the separation of powers and legislative supremacy, mentioning Section 5); see Roberts, *supra* note 4, at 496 (stating that Section 5 is integral to the enactment process and provides authority to committee reports).

<sup>69</sup> Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123–60 (1989) (arguing that without a positive theory of politics, normative theories may be unavailing).

<sup>70</sup> Nourse, *supra* note 19, at 87 ("Purposivists are as oblivious of congressional rules as are textualists . . .").

<sup>71</sup> John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005) ("Legislative outcomes necessarily hinge on arbitrary (or at least nonsubstantive) factors such as the sequence in which alternatives are presented."); *id.* at 432 ("[I]f a bill's final shape depends to a large extent on these varied procedural idiosyncrasies . . ."); *id.* at 441 ("Textualists . . . chalk up statutory awkwardness to the (unknowable) exigencies of a legislative process with many and diverse veto points."); *id.* at 450 ("The legislative process is untidy and opaque.").

<sup>72</sup> Manning, *Divides*, *supra* note 7, at 73, 74, 77 (describing Congress's procedures as "untraceable," subject to "manipulation," "strategic" behavior, "often messy").

<sup>73</sup> Roberts, *supra* note 4, at 503 (asserting Congress's Article I Section 5 power to determine its own rules of proceedings); Brudney, *Shortfalls*, *supra* note 13, at 1218 (describing the Section 5 requirement that each House record both votes and overall proceedings); Brudney, *Commentary*, *supra* note 26, at 79–80 (considering the institutional importance of committee reports and the fact that members of Congress regularly rely on them when deciding how to vote).

a theory known as “decision process theory” or “decision theory.”<sup>74</sup> To the extent that Section 5 gives constitutional legitimacy to congressional procedures, it provides explicit constitutional support for that theory. Decision process theory argues that courts cannot understand statutory text and statutory history (history typically embraced by textualists) and in some cases it cannot even find the proper text without recourse to legislative procedure and legislative context. In fact, it makes the unconventional claim that (at least in some cases) legislative history may be necessary to interpret statutory text.

Consider the following example of the basic proposition that recourse to procedure is relevant to understanding the priority of statutory texts. Knowing something as simple as whether statutory text entered the process as an amendment can be important to textual interpretation. Text amending the original bill may take precedence,<sup>75</sup> not only because it is later in the sequential process, but also because it reflects an important qualification to the underlying bill. There should be nothing particularly controversial about this since courts have recognized that later, more specific, statutes qualify earlier ones.<sup>76</sup> But this basic principle has not been applied to understanding textual construction.

Consider *United Steelworkers v. Weber*, a leading anti-discrimination case, perhaps one of the most fraught statutory interpretation cases ever decided. In that case, there were three relevant texts, sections 703(a), 703(d), and 703(j) of the Civil Rights Act of 1964.<sup>77</sup> Knowing that 703(j) was the last text passed on the issue in the case (affirmative action) immediately before closing debate on a filibuster, should be crucial in statutory interpretation, qualifying inferences from other texts—703(j) was a crucial price for bill passage.<sup>78</sup> And, yet, rather than focusing on sequence, the *Weber* majority and dissent relied upon isolated statements from members, supporters, and opponents

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<sup>74</sup> Nourse, *supra* note 19, at 73–74 (arguing that an empirically sound reading of legislative history necessitates an understanding of Congress’s rules).

<sup>75</sup> This assumes a substantive change in existing germane text. Sequence cannot be divorced from substance.

<sup>76</sup> *FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”); *see also United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998).

<sup>77</sup> See Nourse, *supra* note 19, at 105–09.

<sup>78</sup> *Id.*

alike, including statements by members who filibustered the bill.<sup>79</sup> Decision process theory concedes that legislative history can be abused, but that it is most violently abused when judges ignore Congress's constitutionally sanctioned rulemaking power.

### C. The Insufficiency of Bicameralism in Cases of Conflicting Texts

Decision process theory goes further, however, and argues that, in some cases it is impossible to know the proper text of a bill without considering legislative process. Bicameralism alone cannot be an answer to statutes that involve contradictory or absurd texts.<sup>80</sup> In well-known statutory interpretation cases like *Public Citizen v. Department of Justice*, *Green v. Bock Laundry Machine Co.*, and *United Steelworkers of America v. Weber*,<sup>81</sup> (all major cases taught in statutory interpretation courses) *there was no “plain” bicameral text; there were texts deemed “absurd”<sup>82</sup> or in conflict.* In *Public Citizen* there was a choice between the statutory terms “establish” and “utilize.” In *Green v. Bock Laundry*, there was a choice between the statutory terms “witness” and “defendant.”<sup>83</sup> In such cases, the Bicameralism Clause gives us nothing by which to choose one text over another. By contrast, the Rulemaking Clause, Article 1, Section 5, can.

To see this, consider the problem that arises when new text is added in conference committee. In *Public Citizen v. Department of Justice* and in *Green v. Bock Laundry Machine Co.*,<sup>84</sup> the Supreme Court found the statutes “absurd”—even “unthinkable”—because of statu-

<sup>79</sup> *Id.* (noting Justice Rehnquist's reliance on committee reports drafted before the bill was debated, opinions of the filibustering minority, and other irrelevant documents).

<sup>80</sup> In such cases, canons of construction, which some judges prefer to legislative history, are unavailing. *See, e.g.*, *Green v. Bock Laundry Mach. Co.* 490 U.S. 504 (1989); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440 (1989) (noting the failure of a “plain meaning” approach to interpretation, which in both cases led to an inconsistent or absurd result). For an explanation about why canons should be subordinate to legislative history, see *infra* text accompanying note 98 (arguing that canons, unlike legislative rules, are not specifically embraced by the constitutional text).

<sup>81</sup> *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

<sup>82</sup> In both *Public Citizen* and *Green*, the court found the language “absurd.” In *Green*, even Justice Scalia concurred that the statutory language appeared “unthinkable.” *Green*, 490 U.S. at 527 (“We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result.”) (Scalia, J., concurring). *Pub. Citizen*, 491 U.S. at 454 (“[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of . . . the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”).

<sup>83</sup> *Green*, 490 U.S. at 509-24.

<sup>84</sup> *Pub. Citizen*, 491 U.S. at 454; *Green*, 490 U.S. at 527 (Scalia, J., concurring).

tory text added during conference committee.<sup>85</sup> The “absurdity” conclusion assumes that, for Congress, all text is created alike, but given the sequential ordering of text, this is simply not true. Under Congress’s rules, no member would believe that text added in conference committee should be given priority or even the same status as text passed by both houses.<sup>86</sup> If conference committees could make substantive changes in bills, they would have more power than the bodies entire. Members act in ways that recognize this basic procedural fact.<sup>87</sup>

Ignoring the procedural status of the text disregards not only Congress’s rulemaking power, *but also the Bicameralism Clause*. Take *Public Citizen*: there, both the House and the Senate—535 members—had passed language that easily resolved the case. No conference committee had the authority to change that text. And yet, the Supreme Court found mind-warping ambiguity and absurdity from a phrase added by a conference committee.<sup>88</sup> Congress’s rules tell us that members are entitled to interpret material added in conference committee as not substantially changing text passed by both Houses,<sup>89</sup> precisely to avoid the problem that a part of the Congress will trump the agreed upon judgments of the whole.

If this is correct, *then the argument textualists use to indict legislative history becomes a reason courts should look to legislative history*. Textualists complain that much legislative history represents the work of the few<sup>90</sup> and thus raises bicameralism problems: committee reports were not adopted by both Houses. But if textualists are worried about legislative history adopted by “the few,”<sup>91</sup> they should be just as, if not

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<sup>85</sup> For reference to absurdity in these cases, see *supra* note 82.

<sup>86</sup> SENATE RULE XXVIII, STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, 112<sup>th</sup> Cong., 1st Sess. 52 (2011) (“Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.”); Victoria F. Nourse, *Decision Theory*, *supra* note 19, at 94–95 (“Conference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language. Both House and Senate rules bar such changes. These rules limit opportunism by conference committees’ members . . . .”) (emphasis omitted).

<sup>87</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 580–81 n.10 (2006) (discussing how Senators took names off a conference report that was changed in significant ways, prompting its revision).

<sup>88</sup> See *Pub. Citizen v. United States Dep’t. of Justice*, 491 U.S. 440, 454 (1989) (discussing the absurdity of the phrase added by the conference committee).

<sup>89</sup> See Nourse, *supra* note 19, at 94 n.97 (citing the rules and their application to *Public Citizen*).

<sup>90</sup> Manning, *supra* note 4, at 689 (“Textualists . . . argue that committee reports and sponsors’ statements speak only for a minority of Congress . . . .”).

<sup>91</sup> As Justice Scalia has explained: “Thus, if legislation consists of forming an ‘intent’ rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the

more, worried about *text adopted by the “few.”* In *Public Citizen*, 535 members voted on bills that covered only advisory committees “established” or “organized” by the executive,<sup>92</sup> a text that resolved the case before the Supreme Court quite easily. A conference committee—the “few”—inserted the textual term “utilized” creating interpretive problems so significant it forced the case to the Supreme Court. If one is worried that both Houses do not embrace legislative history, surely one should worry that both Houses did not embrace *key text*.<sup>93</sup>

Skeptics will reply that the term “utilize” (the key text causing all the trouble in *Public Citizen*) was bicamerally approved language when the Conference Committee Report’s text<sup>94</sup> was returned and passed by both Houses. This argument simply repeats the original bicameralism claim but says nothing about the impact of the Rulemaking Clause. The rules provide that conference committees cannot significantly change bills. If a court is to honor Article I, Section 5 of the Constitution, it must respect Congress’s Rules of Proceeding, and if one respects those rules, one will know that Congress’s members will view new conference committee language as not significantly altering the language already passed by both Houses.

Critics might argue that Section 5 is somehow insignificant compared to bicameralism. In fact, Section 5 has central structural significance for Congress as a whole. Engage in a simple intellectual experiment: what happens if we eliminate Article I, Section 5 from the Constitution? Well, the President or the courts might try to set Congress’s rules. And if the President or the courts were to set those rules, what would happen to Congress? Just imagine the President standing up tomorrow and eliminating the Senate’s filibuster rule (as President Obama is surely tempted to do). He who sets the rules, sets

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formation of that intent to a *small band of its number*, but must, as the Constitution says, form an intent of the *Congress*.” *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (emphasis added).

<sup>92</sup> Nourse, *supra* note 19, at 94 (“[T]he votes in both the House and the Senate prior to the conference were for ‘establish’ and at the most ‘established or organized.’”).

<sup>93</sup> Senate Rule XXVIII “prohibits new components of legislation from being inserted into a conference report.” DAVID M. PRIMO, RULES AND RESTRAINT: GOVERNMENT SPENDING AND THE DESIGN OF INSTITUTIONS 7 (2007); see also CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE 780–83, 811 (1989) (“Congress limits [the conferees’] authority to the differences between the House and Senate versions of the bill . . . by allowing points of order on both the House and Senate floors against conference reports that exceed that scope.”); *id.* at 812–13 (“Conferees cannot remove language both chambers agree on, or insert new provisions not in either chamber’s version.”).

<sup>94</sup> Conference Committee Reports are statutory text; they are often accompanied by joint explanations of the resolution of differences between the House and the Senate.

the agenda;<sup>95</sup> Section 5, by giving the rule-setting power to members of Congress themselves, bars others from such control. This not only protects each House, it protects the Congress as a whole from constitutional assault by the other departments.

Section 5 also has significance for bicameralism: it not only protects the Congress from the other departments, it also protects the other departments from the Congress by reinforcing bicameralism. Without allowing each House to set their own rules, their distinctiveness as legislative bodies could be reduced substantially. James Madison famously argued in Federalist No. 51 that bicameralism was the insurance policy against legislative power dominating the other departments.<sup>96</sup> Modern observers agree that one of the very real ways that legislative power is divided is by the different rules in the House and the Senate—the Senate operates by supermajority, the House by majority.<sup>97</sup> Indeed, one of the arguments made in the Senate against changing current filibuster rules is that such a rule change would transform the Senate into the House. To the extent that internal rules create distinctive entities,<sup>98</sup> the Rulemaking Clause supports the overarching structural reasons for having two houses, or a bicameral legislature.

Finally, giving Section 5 its due, both as a structural provision and a coequal text, helps us solve what textualists have long recognized about the bicameralism argument—what Professor Manning has called the bicameralism “paradox.”<sup>99</sup> One of the easiest responses to

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95 KENNETH A. SHEPULSE, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 374 (2d ed. 2010) (arguing that “[p]rocedures are required to cut through all this instability,” given that “there is no equilibrium to majority voting”).

96 THE FEDERALIST NO. 51 (James Madison) (“[B]y so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”).

97 “[F]ilibuster threats are an everyday fact of life, affecting all aspects of the legislative process . . . . The Senate is not a majority-rule chamber like the House. In the House the majority can always prevail; in the Senate minorities can often block majorities.” BARBARA SINCLAIR, UNORTHODOX LAWMAKING 5, 50 (4th ed. 2012).

98 It is not an overstatement that many Senators believe that the Senate filibuster rules render the Senate an entirely different body from the House of Representatives. *See* 157 CONG. REC. S302-04, S313 (daily ed. Jan. 27, 2011) (statement of Sen. Harkin) (“I often hear opponents of reform claim that what I am proposing [reform of the filibuster] would turn the Senate into the House of Representatives because . . . 51 votes could move something.”); *id.* at S300-02 (statement of Sen. Alexander) (arguing that Sen. Harkin’s proposal would make legislation as it would in the House). In fact, whether or not there were a cloture rule, the modes of election of the body would create differing incentives. This is not to say that the rules do not help to make the bodies different in character.

99 Manning, *supra* note 4, at 695 (“The nondelegation rationale . . . leads to a potential paradox requiring explanation . . . . [T]extualists accept that the details of statutory meaning may derive from sources outside the text of the enacted legislation . . . . [A]gencies and

the bicameral argument is its overreach. Vast amounts of lawmaking do not satisfy the Bicameralism Clause. Agency rules do not satisfy it, nor do canons or common law.<sup>100</sup> Under an expansive reading of the Bicameralism Clause, the courts' own precedents (as lawmaking) might even be unconstitutional. However, if we limit bicameralism to actions taken under Article I, including the Rulemaking Clause, then the paradox disappears. Only legislative law-making, leading to legislative "bills," according to the Rulemaking Clause, requires bicameral approval.

#### D. Answering the Critics

Advocates of the bicameralism argument will reply with a variety of claims. First, they will argue that the Rulemaking Clause does not authorize courts to second-guess or look behind text to see how it is created. Second, they will argue that the case of textual conflict is an anomalous case, the more troubling one where courts look behind plain meaning and trump the text with legislative history. Third, they will contend that looking behind the text violates the "enrolled bill doctrine." Finally, they will argue that there is no historical basis for judicial recourse to legislative history. I treat each of these claims in turn before proceeding to arguments based on non-delegation and the separation of powers.

##### 1. Congress's Rules Are Not to be Ignored as Matter of Comity

It has been said that the Rulemaking Clause renders Congress's rules plenary and not subject to judicial review.<sup>101</sup> It is certainly true

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courts, acting pursuant to explicit or implied delegations of authority, routinely define the specific meaning of general statutory texts. In those instances, specific and binding legal rules emerge from a process other than bicameralism and presentment.... [T]extualists often rely on extrinsic sources, such as judicial decisions and legal treatises, to determine the specific meaning of codified terms of art. There too, textualists derive meaning from sources that have not undergone the legitimating process of bicameralism and presentment. Despite their devotion to bicameralism and presentment, textualists hardly believe that every detail of statutory meaning must emerge from the constitutionally-prescribed legislative process.”).

<sup>100</sup> *Accord id.* at 706 (discussing how agency rules and common law are forms of law making that do not satisfy the Bicameralism Clause).

<sup>101</sup> See, e.g., *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1171–72 (9th Cir. 2007) (holding that the fact that Congress did not hold a hearing is a nonjusticiable question). See generally, Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990) (arguing that courts accord special deference to procedural rules). Here, of course, the political question doctrine is not applicable because one is not asking a court to invalidate congressional rules, simply to use them in cases of textual conflict or ambiguity.

that courts have generally deferred to Congress's rulemaking, suggesting in their earliest cases on the topic that "all matters of method are open to the determination of the house" at issue.<sup>102</sup> One might think from this proposition that courts have announced a principle of comity and respect for the rules.<sup>103</sup> There is nothing inconsistent with that principle, and the judicial use of legislative history, however. In fact, it can be argued that this principle of comity supports judicial rule-deference. Presumably, one does not defer to a rule by ignoring or disobeying it. The very idea that courts may not violate the presumption of regularity of Congress's process,<sup>104</sup> suggests that there is nothing odd, much less unconstitutional, about deferring to Congress's "regular order" as an interpretive device.

Recourse to congressional procedure as interpretive "context" does not require courts to judge the validity of a congressional rule or practice. To be sure, scholars have advocated more aggressive procedural review, urging that Congress be held to a "due process" of law-making.<sup>105</sup> But the claim being made in this Article is about interpretation, not validity. When a statute is ambiguous, when choices need to be made about conflicting texts, a court should not plead ignorance of legislative procedure that may resolve the interpretive gap.<sup>106</sup> If, after all, Congress is presumed to know the existing state of the law, including judicial interpretations,<sup>107</sup> should not the courts be presumed to know the basic law of congressional procedure? It is one thing for courts to defer to the rules in a case challenging their validity; it is another for courts to disregard the very existence of basic rules that any congressman would know and which help to resolve interpretive problems. There is a difference between deference and

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102 United States v. Ballin, 144 U.S. 1, 5 (1892).

103 To be sure, one of the reasons (rightly) that courts have deferred is because they recognize that Section 5 has important structural implications. *See, e.g.*, *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1981), *cert. denied*, 464 U.S. 823 (1983) ("[N]either [the Court] nor the Executive Branch may tell Congress what rules it must adopt.").

104 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 48 (1891) ("As all particulars of compliance with the constitution are not specially required to be entered on the journals, such compliance will be presumed in the absence of proof to the contrary. . . .").

105 Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199, 239–42 (1976); Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1927–36 (2011).

106 Textualists have admitted that they do not deny that judges exercise policymaking authority. *See, e.g.*, Manning, *supra* note 4, at 701 ("[T]extualist judges allow that statutory indeterminacy, and the resulting need for norm-specification, may at times involve judges in the exercise of substantial policymaking discretion.").

107 Manning, *supra* note 4, at 706 ("[T]extualist judges presume that Congress is aware of special usage or special interpretive norms found in pre-enactment case law or treatises. . . .").

blindness; Courts have not in fact chosen blindness as a general practice in the area of congressional rules; they have not hesitated to judge whether Congress has followed its own rules<sup>108</sup> when those rules affect the “legal rights, duties and relations of persons outside the legislative branch.”<sup>109</sup> That same principle should govern the use of rules to resolve statutory interpretation cases.

## 2. *The Non-Problem of Clear Text*

Critics are likely to reply that I have emphasized anomalous cases: textual conflicts are one thing; the use of legislative history to supplement the text is another. Textualists have emphasized this “substitution” problem in arguing that recourse to legislative history is unconstitutional, as the legislative history is the work of the few contrary to the whole emphasized by the Bicameralism Clause.<sup>110</sup> Superficially, the problem with this argument is empirical. We have every reason to believe that the hardest cases, the ones finding their way to appellate courts, are not cases of clear text but cases of ambiguity, cases involving the choosing of texts or the ambiguities or incompleteness of key terms. Even if this empirical claim were incorrect, however, it should bear little normative weight: *no one believes that legislative history should in fact replace or supplant clear text*. On the other hand, if there is

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<sup>108</sup> See *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (reviewing whether the line-item veto was consistent with the Constitution’s procedural provisions governing legislative power); *INS v. Chadha*, 462 U.S. 919, 952–58 (1983) (reviewing a procedural statute to determine whether it was consistent with the Constitution’s procedural provisions governing legislative power); *Powell v. McCormack*, 395 U.S. 486, 506–09 (1969) (reviewing a challenge to Congress’s procedures for expulsion under Section 5 of Article I); *Yellin v. United States*, 374 U.S. 109, 110 (1963) (considering whether a committee complied with its own rules); *Christoffel v. United States*, 338 U.S. 84, 88–89 (1949) (considering the quorum rules of the House); *United States v. Smith*, 286 U.S. 6, 30–33 (1932) (considering the application of Senate Rule XXXVIII on a nomination).

<sup>109</sup> Manning, *supra* note 4, at 716 (quoting *Chadha*, 462 U.S. at 952). The internal citation to *Chadha* is an attempt to define Congress’s “legislative power.” The implicit idea here is that anything extending outside the internal workings of the Congress, as statutes do, should be considered an exercise of “legislative power.”

<sup>110</sup> “[T]extualist judges emphasize that courts simply do not know whether most legislators . . . have read, or are even aware of, the pre-enactment interpretations contained in the legislative history.” Manning, *supra* note 4, at 686; Manning, *supra* note 4, at 684 (when relying on a committee report, “the legislative history can be authoritative evidence of *congressional* intent only if the Court can somehow attribute the committee’s or sponsor’s expression of intent to Congress as a whole. That supposition, largely unexamined in the Court’s older cases, has become a focal point of the textualist critique.”). Manning, *supra* note 4, at 684 (“[T]he authoritative force of such legislative history [committee reports] stems from the identity of its source, a subset of Congress . . . ”).

no clear text, the bicameralism argument disappears for *there has been no bicamerally approved solution to the interpretive problem.*

Of course, this does not answer the objection frequently made that use of legislative history substitutes vague notions of “intent” for text. No one would, in fact, choose such a substitution. Arguments about intent, as I have written elsewhere, are confused and confusing.<sup>111</sup> They are rhetorically compelling because they suggest something internal and private. But legislative history is neither internal nor private. Committee reports do not exist within the privacy of a single mind; they are public records. Even more importantly, the rules themselves are certainly not the province of a single mind, but a publicly stated product of each House. Even if the idea of intent is not philosophically ineliminable when talking about individuals, it can be quite easily, and for good reasons, eliminated from the debate about legislative history. Try it: substitute for the term “legislative intent,” the term “legislative decision” in any statutory construction argument, and you will see that little meaning is lost, except the negative (and often misleading) connotations of subjectivity associated with the term “intent.”<sup>112</sup>

### *3. The Irrelevance of the Enrolled Bill Doctrine*

Nothing in the somewhat arcane and embattled “enrolled bill doctrine”<sup>113</sup> undermines this claim. That ancient, much criticized, and recently cabined,<sup>114</sup> doctrine holds that a court may not second guess the text of a bill when a claimant argues that the law passed by both Houses was in fact different from the “enrolled” text—that legislative clerks had made an error in compiling the final bill.<sup>115</sup> In general, the “enrolled bill doctrine” applies in a very limited set of cases in which a litigant is claiming that a clerk made an error in transcription. In such cases, the court typically turns a blind eye to such claims, presuming the correctness of the “enrolled” bill.

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<sup>111</sup> See generally, Nourse, *supra* note 10.

<sup>112</sup> *Id.*

<sup>113</sup> See Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 GEO. L.J. 323, 378 (2009); see also *Field v. Clark*, 143 U.S. 649, 672 (1892).

<sup>114</sup> See *United States v. Munoz-Flores*, 495 U.S. 385, 396–97 (1990) (rejecting the enrolled bill doctrine in an origination clause case).

<sup>115</sup> Although the constitutional basis of this doctrine is somewhat obscure, its principal doctrinal foundation is not Article I, Section 5. See, Bar-Siman-Tov, *supra* note 113, at 378 (“[T]he *Field* Court itself did not base [the Enrolled Bill Doctrine] on . . . the Rulemaking Clause. . . .”).

Questioning clerks' transcription skills is a far cry from decreeing legislative history unconstitutional. Using legislative context to determine contested or unclear meaning does not require one to conclude that clerks have made a scrivenors' error. Everyone agrees that "context" is important to judicial interpretation; as Justice Scalia has written, "in textual interpretation, context is everything."<sup>116</sup> Textualists focus on "semantic context"; purposivists focus on "policy context."<sup>117</sup> Decision process theory<sup>118</sup> focuses on the "procedural context" as central to understanding textual choices as well as the virtues and vices of different kinds of legislative history.

To be sure, Justice Scalia has suggested that the enrolled bill doctrine bars any judicial review of the legislative process.<sup>119</sup> Intrusion and ignorance are two different things. Even in the case where a judge finds that a conference committee has added text, he or she is not questioning the validity of the "enrolled bill." Instead, this reference to Congress's rules makes sense in the cases we have seen, *Public Citizen* and *Green*, when the statute appears utterly irrational and absurd. This approach does not intrude on Congress's processes, it requires that they be understood and applied: presumably, this is far more respectful of Congress than assuming, as the Supreme Court did in *Public Citizen* and *Green*, that 535 men and women had voted for an absurd text, implicitly suggesting that members had collectively lost their minds.

#### 4. *The Originalist Case for Knowing Congress's Rules*

Finally, there are those who will claim that looking to legislative history, even in the most sympathetic cases, has no originalist claim to legitimacy in interpretive matters.<sup>120</sup> This argument cannot be that there is no originalist claim for legislative procedure.<sup>121</sup> The Found-

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<sup>116</sup> SCALIA, INTERPRETATION, *supra* note 7, at 37.

<sup>117</sup> Manning, *Divides*, *supra* note 7, at 91.

<sup>118</sup> Nourse, *supra* note 19, at 73–75.

<sup>119</sup> Munoz-Flores, 495 U.S. at 409 (Scalia, J., concurring).

<sup>120</sup> The Rules of Proceedings clause was added to the Constitution by a committee, the Committee on Detail. *See*, 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 339 (G. Hunt, Ed. 1987); WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787 92 (1900).

<sup>121</sup> So, too, there is evidence of medieval British practice in which courts referred to "intention" of the legislature quite openly, by which was meant the history of Parliament's decision. *See, e.g.*, THEODORE F.T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 49 (1922) (giving an example of a case in

ers were quite savvy about deliberative process. Thomas Jefferson not only wrote an important, and still relevant, procedural manual<sup>122</sup> but believed that legislative procedures were part of the “natural right” of self-government.<sup>123</sup> Committees were well known at the Founding and, without them, we would have no constitution. In fact, the first thing the Founders did was to set the rules of their own convention.<sup>124</sup> The first Congress, sitting in New York in March of 1789 provided a set of rules for its own governance, based on those used in the Continental Congress and various State legislatures.<sup>125</sup> As David Currie has explained, “Deliberative bodies can scarcely function without procedural rules, and one of the first acts of each House was to adopt them.”<sup>126</sup> Not surprisingly, the first Congresses adopted rules for committees, and even for conference committees “for reconciliation and correction of errors.”<sup>127</sup>

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which a judge explicitly resolved a statutory problem by reference to his own experience in the legislature).

- 122 While he served as Vice President, from 1797 until 1801, Jefferson prepared a manual on parliamentary procedure for his own use, as presiding officer of the Senate. It was an “attempt by its learned author to describe the essentials of the English parliamentary practice of his time, [and] still forms the basis for the rules of procedure of the American legislature.” BERNARD SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 60 (1955).
- 123 He wrote:  
Every man, and every body of men on earth, possesses the righ[t] of self-government: they receive with their being from the hand of nature . . . . [T]he law of the *majority* is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in it's [sic] exercise, by their own consent, or by the law of those who depute them . . . but so far as it is not abridged or modified, they retain it as a natural right, and may exercise it in what form they please . . . .  
17 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 195 (Julian P. Boyd ed., 1965) (first alteration in the original) (emphasis in original).
- 124 See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 62, at 8–10. (demonstrating the early establishment of the rules of the Convention).
- 125 SCHWARTZ, *supra* note 122, at 60 (citing Galloway).
- 126 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 9 (1997).
- 127 Jefferson’s Manual included specific reference both to committees and conference committees. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 56, § XXVII (1873) (“Report of Committee” making reference to the existence of a committee); *Id.* at 98, § XLVI (“Conferences”); *Id.* (stating “[i]t is on the occasion of amendments between the Houses that conferences are usually asked: but they may be asked in all cases of difference of opinion between the two Houses on matters depending between them.”); CURRIE, *supra* note 126, at 10 n.25 (noting that Senator Maclay, at the first Congress, objected on the grounds that the existence of committees usurped the legislative function. Maclay’s argument never persuaded any subsequent Congress for the next 200 years).

The earliest Congresses, moreover, kept a journal as the Constitution requires in the Journal Clause.<sup>128</sup> At a minimum, these journals revealed congressional procedure. As Justice Story explained, the Journal Clause “insure[s] publicity and responsibility in all the proceedings of Congress, so that the public mind may be enlightened, as to the acts of the members.”<sup>129</sup> The treatise writer Sutherland embraced legislative journals as “records in dignity and . . . of great importance.”<sup>130</sup> As I showed at the beginning of this article, lawyers in the Supreme Court cited to legislative journals as early as 1814; the Supreme Court Justices did so in statutory and constitutional cases as early as 1832; lawyers relied upon committee reports as well as statutory history.<sup>131</sup> As Sutherland explained: “In *Blake v. National Banks*,<sup>132</sup> the journals of congress were referred to, and the court said they were compelled to ascertain the legislative intention in that way.”<sup>133</sup> Whether uniform or not,<sup>134</sup> a variety of early state court decisions cit-

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128 U.S. CONST. art. I, §5, cl.3. (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . .”). A legislative “journal” is different from a verbatim recording of debate. A journal sets forth votes, amendments, and dates of consideration. The early Congress’s journals were more elaborate, however, than mere vote counts.

129 JOSEPH A. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES CONTAINING A BRIEF COMMENTARY 92 (1865).

130 SUTHERLAND, *supra* note 104, at 46 § 44.

131 See *The Venus*, Rae, Master, 12 U.S. (8 Cranch) 253, 264 (1814) (“Mr. Russell’s statement in the report of the committee of congress . . . journal of H. of Rep . . .”); see also *Roach v. Commonwealth*, 2 U.S. (2 Dall.) 206, 207 (1793) (citing a progression of statutes as a “construction of a Resolve of the General Assembly” on the question of the amount a soldier would have to pay for a uniform). The journals were referred to in constitutional cases as well. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832) (Marshall, C.J., dissenting) (“The early journals of congress exhibit the most anxious desire to conciliate the Indian nations.”); *The Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 60 (1831) (Thompson, J., dissenting) (“The journals of congress, from the year 1775 down to the adoption of the present constitution, abundantly demonstrate this fact.”); see *id.* at 63 (“[O]n examining the journals of the old congress . . . the terms ‘nation’ and ‘tribe’ are frequently used indiscriminately . . .”); *Wheaton v. Peters*, 33 U.S. 591, 681 (8 Pet.) (1834) (Thompson, J., dissenting) (referring to journals of the 1783 Congress to determine that copyright was a common law right).

132 *Blake v. Nat'l Banks*, 90 U.S. (23 Wall.) 307 (1874).

133 SUTHERLAND, *supra* note 104, at 384 § 300.

134 Treatises reflected some disagreement over this question. Compare SUTHERLAND, *supra* note 104, at 384 § 300 (citing several cases for the proposition that legislative journals may be used to “aid in the interpretation of doubtful or ambiguous language in the law,” contending this was the practice in Illinois, Alabama, and Kentucky, and distinguishing it from reference to “declarations of members of legislative bodies”) with THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 205 (2d ed. 1874) (“[T]he intention of the Legislature is to be found in the statute itself.”) and *id.* at 218 (the intent is to be “learned from the language” and can not be proven by “mere extrinsic facts”), with *id.* at 219 (when there is no other aid to interpretation, “[t]he office of the judge then

ed legislative journals as well, some suggesting this was the “clear weight” of authority.<sup>135</sup>

Journals reveal a bill’s sequential process. Of course, nineteenth century journals were far from today’s congressional record. The earliest Congresses did not require the journal to be “a verbatim transcript of proceedings,”<sup>136</sup> even if they did show the sequence of bill proceedings. Over the course of the nineteenth century, concerns were raised both inside and outside of Congress that the reporting of its proceedings was not available on a consistent or reliable basis.<sup>137</sup> If early nineteenth century American courts resorted to legislative history selectively,<sup>138</sup> (and there is mixed historical evidence),<sup>139</sup> it may

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necessarily changes its character, and he assumes to a certain extent the duties of a legislator . . . [o]f the mode of exercising this power . . . and of its frequent abuse, we shall speak more fully . . . ”).

<sup>135</sup> State *ex rel.* City of Cheyenne v. Swan, 7 Wyo. 166, 209, 213 (1897) (“We cannot but regard the clear weight of authority in this country as sustaining the propriety of consulting the journals in reference to a matter which the constitution expressly requires to be recorded therein, concerning the constitutional procedure for the passage of an act . . . .”); *see* State *ex rel.* Coleman v. Kelly, 71 Kan. 811 450, 453 (1905) (“The respective journals of the Senate and House of Representatives, containing the proceedings in reference to a bill enacted into a statute, may be looked to by the courts to ascertain the intention of the Legislature in enacting such a statute, if it be ambiguous.”); Edger v. Bd. of Com’rs of Randolph Cnty., 70 Ind. 331, 338 (1880) (“[F]or the purpose of construction or interpretation, and with the view of ascertaining the legislative will and intention in the enactment of a law, the courts may not properly resort to the journals of the two legislative bodies to learn therefrom the history of the law in question . . . .”); Sisk v. Smith, 6 Ill. 503, 518 (1844) (“In [this] case, the intention of the legislature is manifest, and perpetuated by the record of their proceedings in the legislative journals.”); Hill’s Adm’rs v. Mitchell, 5 Ark. 608 (1844) (“In the construction of all doubtful statutes, and even constitutional provisions, the history of the enactment, as furnished by the rolls or journals, is the very best evidence as to its meaning and intention.”).

<sup>136</sup> CURRIE, *supra* note 126, at 10.

<sup>137</sup> *See, e.g.*, United States v. Ballin, 144 U.S. 1, 6 (1891) (discussing the uncertainty surrounding the constitutional requirements of denoting congressional majority opinions).

<sup>138</sup> Even an inconsistent historical practice should present no normative objection to those inclined toward originalism. Originalism itself has not been the consistent judicial practice in constitutional cases in the Supreme Court. For seventy-five years from the 1880s through the 1930s, the Supreme Court engaged in what most scholars agree amounts to common law constitutionalism, which is to say that the Supreme Court used common law principles to develop judicial doctrines.

<sup>139</sup> As the Supreme Court’s discussion in *Mortier* makes clear, there is some dispute about the earliest uses of matters we might call “legislative history.” Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610–12 n.4 (1991); *id.* at 621–23 (Scalia, J., concurring) (distinguishing between the way legislative history was used by Justice Marshall in 1832 from the modern use of legislative history “to provide an authoritative interpretation of a statutory text”). As we have seen above, there are very early examples of the use of legislative and statutory history by Justices and in state courts. *See supra* notes 131 & 135. *See generally* Eskridge, *supra* note 21 (describing legislative history as one of a few factors used to aid statutory interpretation); Manning, *supra* note 21 (describing a famous case of legislative history being used to interpret ambiguity in a statute).

well have resulted from the simple fact that there were no reliable reports of legislative deliberations until the last decades of the nineteenth century.<sup>140</sup> Even as early as the 1830s, however, the Supreme Court referred to lawyers' arguments about committee reports.<sup>141</sup>

Finally, it should be remembered that legislative journals were intended at a minimum to report procedure. Even if the early journals did not report debate fully, there is an ancient precedent revealing that legislative law was indeed important to, and recognized by, the Framers. As we have seen, Jefferson decreed the rules necessary to the "natural right" of self-government. Frances Lieber, the great theorist of statutory interpretation (and many other things), called the rules of any legislative body its "law" essential to legislative "liberty" and part of the "common law" of legislative bodies.<sup>142</sup> If this is correct, the committed originalist must consider that there is an ancient, common law sanction for "legislative law," or Congress's Rules of Proceedings. Put in other words, the originalist cannot dismiss the argument for legislative procedure as something invented by modern

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<sup>140</sup> As early as 1792, Founder Elbridge Gerry called for the recording of congressional debates, not only for the purposes of informing the public, but also the Administration and the Judiciary. Brudney, *Shortfalls*, *supra* note 13, at 1219. Newspaper reporters performed this function; they were first permitted entry in 1789 and by 1795 were in both Houses. *Id.* at 1220.

By the 1840s, a series of commercial printers employed by Congress had moved toward verbatim and nonpartisan accounts of floor discussion, with a congressional requirement that legislators receive copies of these published reports. After 1873, when the Government Printing Office began publishing the Congressional Record, there was a complete and comprehensive method for recording congressional proceedings and debates.

*Id.* at 1221–22; *see also id.* at 1222–23 ("[B]y the time of the Civil War and Reconstruction, Congress had ordered daily publication and delivery of full chamber proceedings to all members, and distribution of committee reports to members had become prevalent.").

<sup>141</sup> *See Kendall v. United States*, 37 U.S. 524 (1838) ("The petition refers to the reports of the judiciary committee of the senate, of January 20th 1837, and February 17th, 1837, and to the correspondence between the postmaster general and the chairman of the committee copies of which are annexed to the petition.").

<sup>142</sup> LIEBER, *supra* note 24. The development of parliamentary practice, or rules of proceeding and debate—such as it has been developed by England, independently of the executive, and like the rest of the common law, been carried over to our soil—form a most essential part of our Anglican constitutional, parliamentary liberty. *See id.* ("Of far greater importance is the body of the rules of procedure and that usage which has gradually grown up as a part of common law, by which the dispatch of parliamentary business and its protection against impassioned hurry are secured, and by which the order and freedom of debate, fairness, and an organic gestation of the laws are intended to be obtained."); *see also id.* at 516 (outlining how the Constitution of the United States says that "[e]ach house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member," but if, however, the parliamentary practice had not already been spread over the colonies, like the common law itself, this power, justly and necessarily conferred on each house, would have been of comparatively little advantage.).

legislatures, but must consider the ancient American common law of parliamentary procedure. Certainly there is no comparable history suggesting that the Bicameralism Clause has been lurking in the background as a constitutional challenge either to learning Congress's rules or using them to understand legislative context.

### III. THE NON-DELEGATION ARGUMENT

Some constitutionalists have recognized that the bicameralism argument is implausible or at least overbroad<sup>143</sup>: if taken to its logical extreme it appears to make the courts' own interpretive materials unconstitutional since canons and prior cases and common law are not "passed" by both houses. Legislative history critics reply that there is a way to resolve that matter by referring to non-delegation doctrine.<sup>144</sup> Assume a statutory gap: Congress may delegate to an agency or a court the ability to fill that gap but it cannot delegate this power to itself, to its own bill sponsors, or committees.<sup>145</sup> As John Manning has explained:

It is the *very fact of congressional involvement* in the creation of legislative history that justifies textualists' rejection of such materials. When a court assigns legislative history decisive weight because of the speaker's status, it permits a committee or sponsor to interpret a law on Congress's behalf. This practice effectively assigns legislative agents the law elaboration function—the power to 'say what the law is.'<sup>146</sup>

It is certainly true that Congress would risk violating the Constitution if it were to delegate *de jure* lawmaking to its subparts. If, for example, Congress passed a law saying that Arizona, or the Senate Committee on Agriculture, could decide the nation's immigration

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<sup>143</sup> Professor Manning himself argues that there are problems with the bicameralism claim since agency regulations and court cases are extrinsic evidence that are used by courts but do not satisfy the bicameralism clause. *See* Manning, *supra* note 4, at 695; *accord*, Siegel, *supra* note 13, at 1459-60 (discussing Manning's argument on bicameralism).

<sup>144</sup> Manning, *supra* note 4, at 675 ("[T]extualism should be understood as a means of implementing a central and increasingly well-settled element of the separation of powers—the prohibition against legislative self-delegation.").

<sup>145</sup> *See* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in judgement) ("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 '[a]ll 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 cognizant committees.").

<sup>146</sup> Manning, *supra* note 4 at 706 (emphasis added).

policy, that action would most certainly be unconstitutional. In fact, it would undermine individuals' and states' most fundamental right to be represented. Vast portions of the Constitution deal with representation, and the representational clauses<sup>147</sup> caution against such a delegation. In fact, the Supreme Court has, in *INS v. Chadha*,<sup>148</sup> rejected such delegations.

Legislative history skeptics concede, however, that such a *de jure* delegation is not at stake in the legislative history debate.<sup>149</sup> The argument is subtler: critics claim that legislative history exacerbates Congress's tendency to control the interpretive game. Self-delegation breeds a conflict of interest. The *self*-part of the *self-delegation* poses the problem. “[L]egislative history is endogenous to the legislative process,”<sup>150</sup> and this distinguishes it from delegation by Congress to agencies or courts. “Although neither a pre-enactment Supreme Court case nor a committee report formally goes through bicameralism and presentment, crediting a legislatively created source of meaning offers Congress a more substantial temptation to shift the specification of detail outside the legislative process.”<sup>151</sup>

#### A. Section 5: A Constitutional License for Delegation

On its surface, this argument cannot supplant the clear import of the Rulemaking Clause. That clause amounts to a *constitutional license for Congressional self-delegation*. Indeed, to the extent the Constitution gives each house the power to decide their own rules, it performs delegation—it delegates to a part of Congress (“each House”) what might otherwise require bicameralism (that all rules would have to be passed by both Houses and submitted to the President). It is simply not accurate to say, as a matter of *constitutional text*, that “the” legislative power under Article I cannot be delegated if in fact Article I, Section 5 delegates power to a part of the Congress to create its own rules and procedures.<sup>152</sup>

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<sup>147</sup> See U.S. CONST. art. I, §§ 2 & 3, *amended* by U.S. CONST. amend. XVII (authorizing the people to vote for the House and Senate); *id.* art. II, § 1, cl. 2–3, *amended* by U.S. Const. amend. XII (authorizing the people to vote for a President and Vice President through an electoral college). For an explanation of these provisions, see *infra* Part IV.C.

<sup>148</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>149</sup> Manning, *supra* note 4, at 683 (“[T]he Court . . . did not purport to give the relevant committee report the status of legislation *de jure*.”)

<sup>150</sup> *Id.* at 707.

<sup>151</sup> *Id.*

<sup>152</sup> One might argue that the “legislative” power in the vesting clause is limited to the full Congress. But even if we say that the “rules and proceedings” power is not “legislative”

In fact, courts have gone so far as to suggest that the Rulemaking Clause authorizes *self-delegation*: that Congress will be the judge of its own rules, short of a constitutional rights violation.<sup>153</sup> This clause simply reflects what the Constitution's text makes clear in a number of cases: the departments created by our Constitution are not free of conflict of interest. For example, Congress may set its own rules; and the courts may create prudential limits on their jurisdiction.<sup>154</sup> Presumably, if one wanted to have a viable check against Congress or the judiciary abusing these privileges, then one would set up a check against such practices. In fact, there are good reasons to believe just the opposite about the Constitution—that in some cases, departments are the judges in their own cause. This, after all, is the claim of unitary executivists who argue that the President has the right to remove his subordinates, for any and all reasons. If self-delegation is appropriate there, why not in the case of Congress?<sup>155</sup>

More importantly, the self-delegation argument should fail because it does not in fact distinguish legislative history from other forms of interpretive tools used by judges or administrators. Let us assume that Congress does have a conflict of interest when it comes to legislative history. On what ground does this distinguish legislators from judges or members of the executive branch? When executive agents rely upon their own interpretation of rules, they have a conflict of interest, and they have an incentive as well to push their authority to its limits. When judges rely upon their own canons or common law, they have a conflict of interest. Departments tend to rely upon the materials they themselves produce and this applies whether the department is legislative, executive, or judicial.<sup>156</sup>

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power in this sense, it is still a power to do something, and it is still delegated to a part of Congress.

153 *See, e.g.*, United States v. Ballin, 144 U.S. 1, 5 (1892) (describing how the Constitution allows each House of Congress to determine its own rules).

154 See BICKEL, *supra* note 36, at 111-98.

155 I use this particular example because Justice Scalia is widely believed to be a supporter of both the unitary executivist position, *see Morrison v. Olson*, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting), and the position that Congress may not self-delegate. *See isupra* note 145.

156 There is nothing in *Bowsher v. Synar*, 478 U.S. 714 (1986), that supports this position. *But see* Manning, *supra* note 4, at 717, that is contrary. *Bowsher* was correctly decided for the same reasons that Justice Scalia's dissent in the independent counsel case, *Morrison v. Olson*, is correct. 487 U.S. at 725-27 (Scalia, J., dissenting). *Bowsher* involved the delegation to an independent agent the power to set the American budget. For an analysis of *Bowsher*, see Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 793-95 (1999) (discussing that *Bowsher* struck down an act that mixed executive and legislative powers). *Bowsher* in this sense argues for, not against, Congress's procedures.

Ultimately, the conflict of interest argument is less a constitutional argument than a pragmatic one: the argument is that if courts use “legislative history,” Congress will have a greater incentive to put materials in legislative history rather than text. The empirical assumption here—that Congress actually creates legislative history in response to what courts say about interpretive rules—is belied by what we know about Congress and most collective bodies. Whatever rules courts create, Congress will continue to create legislative history, just as any corporation delegates and creates records of its delegations.<sup>157</sup> Every empirical study to date, the most recent being the comprehensive Gluck-Bressman study,<sup>158</sup> supports the claim that Congress’s procedures have little to do with courts; they are created to allow a large group of 535 to manage its business.

### B. Misunderstanding Congressional Process

But even if this were not true, the nondelegation argument remains both overinclusive, indicting other kinds of lawmaking action, and underinclusive, saying nothing about conflicting texts. The claim is that if Congress puts material in legislative history it is evading the Bicameralism Clause, so that this practice increases the likelihood of constitutional violations. This form of the bicameralism argument is no better than the more overt one we have seen before. It is overbroad because it applies as well to agencies: they too have an incentive to evade bicameralism by writing rules and regulations, and no constitutionalist believes agency rules are unconstitutional because of the Bicameralism Clause. More importantly, it does nothing to solve the problem of conflicting legislative texts—these texts have all passed the bicameral process. The only argument that could be made is against recourse to Congress’s sequential process to resolve textual conflicts, an argument belied by the Rulemaking Clause.

In the end, the nondelegation argument simply misunderstands congressional process—indeed, it imagines a process that does not exist. The delegation argument posits, in essence, that Congress passes a bill and then delegates to a committee to interpret that bill. In fact, as Jonathan Siegel long ago explained, this has Congress in

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<sup>157</sup> THOMAS CONYNGTON ET AL., CORPORATION PROCEDURE: LAW, FINANCE, ACCOUNTING 245 (Hugh R. Conyngton ed., 1922) (discussing the “[p]ower of the Board to Delegate Authority to Committees”); *id.* at 250–51 (“[M]inutes should be kept containing a faithful record of all committee proceedings.”).

<sup>158</sup> Gluck & Bressman, *supra* note 60 (affirming original findings of Nourse and Schacter on the question whether Congress is capable of not using legislative history).

reverse.<sup>159</sup> There is a reason that the whole body reviews the work of committees: to check their excesses. A bill that will not pass the majority will fail the Rules Committee in the House and will be ignored by the Majority leader in the Senate. Floor time is scarce.<sup>160</sup> The process moves forward from a committee report to a final product, not in reverse from a final report to a committee review. The proper analogy here would be the review of a statute by the judiciary, and certainly textualists cannot be claiming that judicial construction of a statute violates the bicameralism clause or amounts to an improper delegation.<sup>161</sup> Finally, the nondelegation argument runs up against textualists' avowed affection for the common law. Since this country's beginning, legislative rules have been considered a form of "common law."<sup>162</sup> As the great early theorist of statutory interpretation, Frances Lieber, made clear, the rules of any legislative body amount to its "law."<sup>163</sup> The rules governing Parliament were called parliamentary law and considered part of the "common law" of legislation.<sup>164</sup> In fact, Lieber wrote eloquently about legislative procedure, deeming it essential to Anglo-American "liberty":

Parliamentary practice, or rules of proceeding and debate, such as it has been developed by England, independently of the executive, and like the rest of the common law, been carried over to our soil, form a most essential part of our Anglican constitutional, parliamentary liberty.<sup>165</sup>

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159 See Siegel, *supra* note 13, at 1479 ("For a statute's interpretation to be influenced by texts that existed prior to the statute's adoption cannot violate the rule against self-delegation, because it does not involve delegation at all. The concept of delegation of power is inherently forward-looking; it involves the granting of power to act in the future.")

160 Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1383 (2010) ("[F]loor time in the House is a scarce resource . . .").

161 It is precisely for this reason that Professor Manning is at some pains to distinguish congressional self-delegation from delegation to agencies and the judiciary. See Manning, *supra* note 4, at 695–705.

162 See 59 AM. JUR.2D *Parliamentary Law* §§ 9, 14 (2014) (describing as "common law" rules of proceedings such as the quorum rule and motion and amendment practice); see also Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971, 976–77 (1989) (tracing the customary evolution of "parliamentary law" from English parliamentary procedure, alteration by colonial legislatures, to Jefferson's Manual of Parliamentary Practice).

163 See LIEBER, *supra* note 24 ("Of far greater importance is the body of the rules of procedure and that usage which has gradually grown up as part of common law, by which the dispatch of parliamentary business and its protection against impassioned hurry are secured and by which the order and freedom of debate, fairness, and an organic gestation of the laws, are intended to be obtained.").

164 *Id.*

165 LIEBER, *supra* note 24, at 188–89.

#### IV. THE SEPARATION OF POWERS

It is time to turn from text to larger constitutional principles, namely the separation of powers. If there is a legal basis to the claim against a conflict of interest it is a form of argument about the “separation of powers.” Some scholars have asserted, for example, that conflict of interest principles drive the separation of powers.<sup>166</sup> This is not the only form of separation of powers argument made by critics of legislative history: some have argued that recourse to legislative history lies outside the “judicial power”,<sup>167</sup> others that there is a mismatch of function implicit in a Congress that both passes and interprets text.<sup>168</sup> There are, however, substantial questions about the assumptions underlying the “checking” principle and the functional mismatch principle. Neither describes the constitution’s text nor what matters for our system of separated powers.<sup>169</sup>

The Constitution itself provides no functional purity in the departments. For example, the President’s veto power exists not in Article II, governing the Executive power, but in Article I, governing the legislative power, a functional mismatch mirrored by others.<sup>170</sup> The Constitution does provide quite clearly that the departments are created by different forms of the “electoral connection” or representa-

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<sup>166</sup> For the seminal work making this association, see Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 309 (1989) (discussing the rationale for the separation of powers, which prevents a judge from acting “in its own cause”). Modern scholars have simply taken this for granted. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1015 (2006) (associating the separation of powers with “conflicts of interest”).

<sup>167</sup> Eskridge, *supra* note 21; Manning, *supra* note 21.

<sup>168</sup> See Manning, *supra* note 4, at 706 (arguing that judicial reference to legislative history “effectively assigns legislative agents the law elaboration function . . .”) (emphasis added); *id.* at 707–31 (arguing that the separation of powers separates the “lawmaking” and law “elaboration” functions).

<sup>169</sup> Nourse, *supra* note 22, at 470–71 (1996); *see also* Nourse, *supra* note 156, at 793–95 (1999–2000) (discussing the vertical nature of the separation of powers, requiring one to look “not only where power goes to, but also where it comes from”); *see generally* Victoria Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2004) [hereinafter Nourse, *Anatomy*] (discussing the effects that the separation of powers has had on federalism); Victoria Nourse & John Figura, *Toward a Representational Theory of Executive Power*, 91 B.U. L. REV. 273 (2011) (differentiating between formalist separation of powers and functionalist separation of powers).

<sup>170</sup> For example, the veto power, which one would expect to find in Article II governing the President, is instead located in Article I. So, too, Congress’s power to create inferior courts does not appear in Congress’s Article I, but in Article III. The Senate’s power to conduct a trial in cases of impeachment does not exist in Article III involving the judiciary, but instead in Article I.

tive constituencies.<sup>171</sup> Moving power moves constituency. When power is shifted away from the Congress toward a court, the shift raises questions about moving from a body with strong representative constituency and local ties (the House and Senate) to a body that has no constituency (courts). Judicial power is the only power to decide unfettered by constituency. The question in the legislative history debate is whether using legislative history risks too great a severance of ties to the electorate; put in more colloquial terms, the question is whether courts aggrandize or undermine central constituency relationships when they use legislative history.

#### A. *The Inadequacy of Checking and Conflict of Interest Theory*

One way to rehabilitate the non-delegation argument is to rephrase it as a separation of powers claim. There is a long tradition in the separation of powers relying upon the principle that “no man may be a judge in his own cause.”<sup>172</sup> Some scholars have urged that this principle drives the separation of powers.<sup>173</sup> Under this theory, Congress has a conflict of interest in creating legislative history, one that only the court can “check.”

One rather serious problem with the “checking” theory on which this claim is based is that it cannot explain the Constitution we have: it may explain the need to separate powers, but it is not sufficient to explain our Constitution.<sup>174</sup> The term “checks and balances” sums up this most common, but misleading, ideal of the separation of powers. The idea is simple enough: when one department exceeds its powers, a rival department will use its specified constitutional authority to bring the first department back into line. In this sense, the paradigmatic checking power is the presidential veto, which allows the executive to reject, and thus restrain, excess legislative zeal. Although common, this vision has proved troubling: if pushed, it seems either to swallow or to erase the idea of separation. If checks do the work of

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<sup>171</sup> See U.S. CONST. art. I, §§ 2–3 (establishing the process by which members of the House of Representatives and the Senate are elected); U.S. CONST. art II, § 1, cls.2–3 & amend. XII (creating the process by which Presidents are elected); U.S. CONST. amend. XVII (providing for direct election of Senators).

<sup>172</sup> See Nourse, *Federalist Papers* *supra* note 22, at 470–71 (discussing The Federalist Nos. 49 and 50 as proposals aimed at dealing with the issue of individual branches of government judging the constitutionality of their own actions).

<sup>173</sup> See, e.g., articles cited *supra* note 166.

<sup>174</sup> See generally Nourse, *supra* note 156; Nourse, *Anatomy* *supra* note 168.

separation, then what independent purpose does the ideal of separation serve?<sup>175</sup> Perhaps we simply have a government of “checks.”<sup>176</sup>

Despite the prevalence of the “checks” interpretation, the Framers knew that checks were only as good as the structural incentives to use them. So-called “checking powers” offer us no protection—indeed they may even encourage departmental collapse—if those who wield them have a personal incentive to undermine separate institutional identities.<sup>177</sup> At best, checks represent a necessary, rather than a sufficient, description of the Madisonian separation of powers. In *Federalist No. 48*, Madison reminds us that, despite all precautions, including express separation of powers clauses,<sup>178</sup> the state legislatures had made substantial encroachments on executive power. In Virginia, the “judiciary and the executive members were left dependent on the legislature for their subsistence in office, and some of them for their continuance in it.”<sup>179</sup> The danger had not been created by the delineation of power on paper; the danger was created because those in power had no personal incentive to maintain separation. If the legislature were to assume “executive and judiciary powers, no opposition is likely to be made . . . ”<sup>180</sup> Checks in the hands of a “dependent” executive or judiciary were of no use because they would not be used.<sup>181</sup>

Indeed, checks may become tools to undermine the separation of powers. During the Constitutional Convention, Madison and others voiced considerable fear that the presidential veto, for example, would not be used and that disuse might lead to usurpations by the

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<sup>175</sup> See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 232 (noting that modern views on the separation of powers become “indistinguishable from a free-floating checks and balances” theory).

<sup>176</sup> See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177–79 (1994) (arguing that the checking function is the essential “principle” of the separation of powers).

<sup>177</sup> See *supra* text accompanying notes 149–51.

<sup>178</sup> A specific “separation of powers” clause was inserted in some colonial constitutions, including that of Virginia. See THE FEDERALIST NO. 48, at 247 (James Madison) (Lawrence Goldman ed., 2008) (discussing Virginia’s emphasis on the importance of the separation of powers).

<sup>179</sup> *Id.* at 248 (quoting Thomas Jefferson).

<sup>180</sup> *Id.* at 248 (quoting Thomas Jefferson).

<sup>181</sup> A similar argument appears in The Federalist Nos. 49 and 50, in which Madison warns that any proposal to decide constitutional breaches would be distorted if left to those who have an “interest” in the outcome. THE FEDERALIST NO. 49, at 251–53 (James Madison) (Lawrence Goldman ed., 2008); THE FEDERALIST NO. 50, at 254–55 (James Madison) (Lawrence Goldman ed., 2008). See also Nourse, *supra* note 22, at 470–71 (discussing Madison’s rejection of Thomas Jefferson’s proposals because he feared they posed “the risk that constitutional structure [would] be determined by private, not public, interest”).

legislature.<sup>182</sup> Others feared that it could be abused: Dr. Benjamin Franklin explained that “[h]e had had some experience of this check in the Executive on the Legislature, under the proprietary Government of [Pennsylvania where t]he negative of the Governor was constantly made use of to extort money.”<sup>183</sup> According to Franklin:

No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition [of the veto]; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed . . . .<sup>184</sup>

History, ancient and modern, cautions that “adding” checks to avoid conflicts of interest can turn out rather badly. Consider the Tenure of Office Act, passed after the Civil War to permit the Senate to “check” President Andrew Johnson’s efforts to remove pro-Lincoln, pro-Reconstruction executive officers.<sup>185</sup> The Act certainly “checked” the President, but proved disastrous. Ultimately deemed unconstitutional, it led to the nation’s first presidential impeachment.<sup>186</sup> Or consider the Independent Counsel law, a new “check” if there ever was one, which again turned out rather badly—impeaching a President over radically inappropriate personal misconduct many believed irrelevant to the running of the country and leading to a bipartisan consensus against reauthorizing the law.<sup>187</sup> In short, conflict of interest is an important principle, but insufficient to describe our Constitution, nor one that justifies blithely “adding” checks to the Constitution.

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<sup>182</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 62, at 107 (statement of James Madison of Virginia, June 4, 1787) (questioning whether the veto power would be used “because no man will dare exercise it wh[e]n[] the law was passed almost unanimously”).

<sup>183</sup> *Id.* at 99 (statement of Benjamin Franklin of Pennsylvania, June 4, 1787).

<sup>184</sup> *Id.*

<sup>185</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 181-83 (2008).

<sup>186</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926) (declaring the Tenure of Office Act invalid “in so far as it attempted to prevent the President from removing executive officers who had been appointed by him”); Nourse & Figura, *supra* note 169, at 299 (discussing this episode in history).

<sup>187</sup> See Nourse, *supra* note 156, at 774-77 (discussing the balance of power issues created by the Independent Counsel statute); Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2195 (1998) (same); see also Nourse & Figura, *supra* note 169, at 287 (2011) (explaining that the independent counsel law “died an easy congressional death”).

### B. Functional Understandings Run Amok

If checking theory is not sufficient to reject judicial reliance on legislative history, nor are claims based on the separation of powers reconceived in functional terms. When it comes to legislative history, there are two identifiable claims based on overt functional analysis: first, there is the claim that the “judicial power” cognizes only reference to the text, not legislative history;<sup>188</sup> second, there is the claim that there is a functional mismatch between congressional “lawmaking” and “interpretation.”<sup>189</sup> As a matter of theory, these claims suffer from a major problem: the schoolboy view of the separation of powers as a separation of functions is incomplete. The Constitution itself does not provide for functional separation.<sup>190</sup> If this is correct, then it is surely unwise to move up a level of generality to try to find a separation of generalized functions in some sort of idealized, and non-textual, vision of functional purity.<sup>191</sup>

Even if we assume that functional purity can in fact play a role in separation of powers analysis, there is no clear answer offered by functional analysis in the case of legislative history. For example, there has been a great debate about the history of the nature of “judicial power”; textualists arguing that, in America, text prevailed at the turn of the 19<sup>th</sup> century, while their opponents arguing that “judicial power” included such English doctrines as “the equity of the statute,” allowing courts considerable power to deviate from the text.<sup>192</sup>

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<sup>188</sup> Cf. Eskridge, *supra* note 21, at 991–92 (critiquing claims by textualists that the use of legislative history is outside the boundaries of the “judicial power” as originally understood); Manning, *supra* note 21, at 9, 57–58 (arguing that the Constitution intended to “draw sharp lines” between legislative and judicial functions, thereby limiting the “judicial power” to considerations within the enacted text and not such outside considerations as “the equity” of the statute).

<sup>189</sup> Manning, *supra* note 4, at 706–07.

<sup>190</sup> For example, the veto power, which one would expect to find in Article II governing the President, is instead found in Article I. So, too, Congress’s power to create inferior courts does not appear in Congress’s Article I, but in Article III. The Senate’s power to conduct a trial in cases of impeachment does not exist in Article III involving the judiciary, but instead in Article I. There are other examples. See Nourse & Figura, *supra* note 169, at 291 (discussing these and other examples, such as the fact that the “power of the Chief Justice to preside over a presidential impeachment appears in Article I and not Article III, with other ‘judicial’ powers”).

<sup>191</sup> The leading textualist in the academy recognizes that there are serious problems with imagining that the separation of powers has a specific textual pedigree. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011) (“Because the structural provisions come in many shapes and sizes, no one-size-fits-all theory can do them justice.”).

<sup>192</sup> Compare Manning, *Divides*, *supra* note 7, at 108 n.137 (arguing against a broad historical understanding of “judicial power” that would include considerations extrinsic to the stat-

There are decent arguments on both sides of the historical claim and, until further evidence is unearthed, we must be satisfied with the answer that the historical record is mixed.<sup>193</sup> No one who reads Blackstone, the leading legal authority in America at the Founding, can possibly believe that text was not of primary importance. On the other hand, Blackstone also openly embraced the “reason and spirit” of the law, yes “spirit”—a term that textualists view with “antipathy” as a basis for statutory interpretation.<sup>194</sup>

There are more subtle functional, but equally unsatisfying, debates enmeshed in constitutional arguments against the use of legislative history. Some complain that it is not the job of the legislature to “say what the law is,”<sup>195</sup> an obvious reference to *Marbury v. Madison*,<sup>196</sup> but surely this cannot mean what it says: legislatures’ job is in fact to say what the law is, quite literally, to make law. A narrower, and more specified claim, is that legislatures are aggrandizing their authority by asserting what amounts to a “judicial” or “interpretive” function. If legislative history is authoritative (if courts use it to fill gaps), Congress will have an incentive to put more of its work in legislative history, rather than the text, aggrandizing the legislative function.<sup>197</sup> Note that both of these claims “saying what the law is” and “aggrandizing the interpretive function” depend upon implicit visions of a proper functional division between courts and Congress—that courts are “interpreters” (a term that is nowhere in the Constitution) and Congress is not.

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utory text), *with* Eskridge, Jr., *supra* note 21, at 995–96 (arguing that, historically, “judicial power” included the power to go beyond the “words of the statute and the letter of the law,” and incorporated discretionary interpretive techniques derived from English common law tradition).

193 I am currently in the process of compiling a large database on founding statutory interpretation. *See* Eskridge, *supra* note 21, at 995–96; Manning, *Divides*, *supra* note 7, at 108 n.137 (demonstrating the conflicting accounts).

194 1 WILLIAM BLACKSTONE, COMMENTARIES \*61 (“[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it.”). *But see* Manning, *supra* note 71, at 425 (“I will focus my attention on the textualists’ antipathy towards sacrificing the letter of the law to its spirit . . . ”).

195 *See* Manning, *supra* note 4, at 706 (arguing that a court’s practice of giving weight to legislative history in statutory interpretation allows legislative agents to “say what the law is,” a function traditionally reserved for the judiciary).

196 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to [s]ay what the law is.”).

197 *See* Manning, *supra* note 4, at 706 (“If . . . Congress can effectively delegate law elaboration authority to its own committees or members, th[e] structural incentive [to resolve important issues in the enacted text] is substantially undermined . . . ”).

Such claims are likely to be most persuasive to those who have already attached themselves to a position in the grand debates for or against legislative history. The functional terms are simply too slippery, too general, to build a convincing constitutional argument. Yes, courts interpret law, but so does Congress. Indeed, courts keep telling Congress that it should know more law.<sup>198</sup> And, then, of course, we return to our bicameralism problem: if Congress interprets law, so does the President. Is all legal interpretation done by the executive branch now unconstitutional because it should be done by the courts? Functionalism, express or implied, cannot supply a firm ground on which to base an argument against legislative history for much the same reasons the bicameralism argument fails: both are wildly over-generalized and for that reason fail to distinguish legislative history from precisely analogous actions in the judicial and executive branches.

In its best light, the functional argument turns out to be a complaint against abusive forms of legislative history, not all legislative history. In some cases, legislatures pass laws and then attempt to tell courts how to interpret laws contrary to the agreed upon text. The post-enactment colloquy is a “legislative history” outlier in terms of legislative process, but is the prototypical example of this complaint.<sup>199</sup> Consider the legislative history used and abused in the case of *Hamdan v. Rumsfeld*.<sup>200</sup> The issue was whether the Defense Authorizations Act stripped the Supreme Court of jurisdiction over all pending habeas cases including Hamdan’s case.<sup>201</sup> The author of an early

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198 See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694–703 (1979) (presuming Congressional knowledge of existing law and judicial interpretations in construing ambiguous provision of Title IX); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (presuming Congressional knowledge of the universal notion that intent is a necessary element of a crime in construing criminal statute where Congress did not explicitly mention intent); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) (per curiam) (presuming Congressional knowledge of existing law and judicial interpretations in construing ambiguous provisions of Title II and Section 504 where Congress enacted preexisting remedial scheme without change); *United States v. Prof'l Air Traffic Controllers Org. (PATCO)*, 653 F.2d 1134, 1138 (7th Cir. 1981) (presuming Congressional knowledge of existing law and judicial interpretations in construing text of Title VII where Congress codified the language of a previously construed provision without change).

199 See Manning, *supra* note 4, at 688 (arguing that if courts recognize legislative history, “legislators [will] be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept” (quoting Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring))).

200 *Hamdan v. Rumsfeld*, 548 U.S. 557, 667 (2006) (Scalia, J., dissenting) (“These statements were made when Members of Congress were fully aware that our continuing jurisdiction over this very case was at issue.”).

201 *Hamdan*, 548 U.S. at 574.

disputed amendment engaged in a faked colloquy, written to appear as if it were given “live,” but only *after the bill had passed*.<sup>202</sup> And, in this particular case, although the law was framed generally, it was widely known in Congress and elsewhere, that it was directed at stripping jurisdiction from the Supreme Court in Hamdan’s own case.<sup>203</sup>

Courts are perfectly free to ignore such legislative history if they find, as they rightly should, that such colloquies have as their sole purpose the attempt to influence interpretation in particular cases. No member of Congress (who are most savvy about these kinds of abuse) would believe that this was the meaning of the bill, so why should courts? Congress would violate the separation of powers, in my view, if it were to take on the task of litigating individual cases. In *Chadha*, the Supreme Court at least implicitly recognized this problem.<sup>204</sup> No one really believes that Congress should judge individual cases because its incentives to represent majorities’ fleeting prejudices are likely to oppress individuals and minorities. Indeed, as the history of the Alien and Sedition Acts shows, Congress’s electoral connection, once applied to individual cases, becomes the power to put one’s political enemies in jail.<sup>205</sup>

To concede that Congress should not judge individual cases, and that legislative history can be abused is not to say that all legislative history is constitutionally suspect. In *Hamdan*, there is no question but that the Court should have rejected the post-passage attempt to revise the meaning of the text of the bill. A decision process approach in that case would have relied upon the amendment’s text and changes to the text as conclusive.<sup>206</sup> That there are abuses of any

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202 See *id.* at 580 n.10 (discussing statements made by Senators Kyl and Graham). Justice Scalia argued that these statements were “delivered (like Demosthenes’ practice sessions on the beach) alone into a vast emptiness.” *Id.* at 666 (Scalia, J., dissenting). In fact, ninety-three Senators were on the floor for the passage of the Conference Committee Report, where the statements were alleged to be made. Of course, the statements of Kyl and Graham, and others, were not made “live.” My thanks to Daniel Michelson-Horowitz, Georgetown class of 2012, for discovering the attendance figures.

203 See *id.* at 667 (Scalia, J. dissenting) (“These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue.”).

204 See *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment) (“[T]he separation-of-powers doctrine generally, reflect[s] the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.”).

205 See Victoria F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1698 n.30 (2003) (describing the passage of the Alien and Sedition Acts as “an attempt by some of the ‘founders’ to use the criminal law to punish members of the dissenting party”).

206 The original amendment’s text would have stripped jurisdiction; the amendment changed the original bill’s effect upon pending cases. See *Hamdan*, 548 U.S. at 578–80

power does not mean that the power does not exist. Nor can such a case mean that judges can confidently claim that the separation of powers bars recourse to all legislative history and process.

### C. Applying Representational Theory

One of the great mistakes of those who seek to understand our Constitution's structure is their failure to recognize that its structure is not like an architecture, which is static, nor is it like a poem whose words may be parsed, but that it is a powerful engine, run by textual principles that unleash power. By this I mean that it is a mistake to think that one can understand the separation of powers by a few descriptive phrases, like executive, legislative, and judicial, which is the standard way of understanding constitutional structure. The Constitution is a blueprint for an engine, the engine of representation. Representation drives separation, because it creates incentives for those in office—"the man," as James Madison put it in Federalist No. 51—to "identify with the constitutional interests of the place."<sup>207</sup>

If we want to understand the structure of the Constitution or the power of the branches, the most important words in the Constitution are not those in the Vesting Clauses or even the words "executive," "legislative," or "judicial;" they are the words that create government by consent of the governed—that create representation. Indeed, most of Articles I and II are devoted to creating relationships of governed to governing. Article I authorizes people to vote for a House of Representatives and a Senate in lengthy provisions specifying who shall vote for whom.<sup>208</sup> Article II authorizes the people to vote for a President, through the Electoral College, again specified in rather lengthy detail.<sup>209</sup> Those elected in this way in turn must agree to appoint executive officers and Supreme Court Justices.<sup>210</sup> These are central constitutional doings that quite literally "constitute" our government.

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(noting Congress's rejection of an earlier proposed amendment which would have made the jurisdictional directive apply to pending cases as well).

<sup>207</sup> THE FEDERALIST NO. 51, *supra* note 96, at 257. Some have doubted this identification works as well as it might in practice to safeguard all sorts of constitutional provisions. *See* LEVINSON, *supra* note 41. But for our purposes here, the claim is only that it provides those inside the departments with an incentive to identify relatively more with their department as opposed to others.

<sup>208</sup> *See* U.S. CONST. art. I, §§ 2–3, *amended* by U.S. CONST. amend. XVII (articulating the process by which the House of Representative Members and Senators shall be elected).

<sup>209</sup> *See* U.S. CONST. art. II, § 1, cl. 2–3, *amended* by U.S. CONST. amend. XII (articulating the process by which the President shall be elected).

<sup>210</sup> *See* U.S. CONST. art. II, § 2, cl. 2 (articulating the President's appointment powers).

One can appreciate the importance of the Constitution's representational provisions by conducting an intellectual experiment. Strike the first sentences of the Vesting Clauses, eliminating any reference to "executive" or "legislative" or "judicial" powers. Will the government be without power? Will the President stop issuing executive orders? Will Congress stop making laws? Will the judiciary shut its doors? No. People will still vote, Congress will still convene, the Supreme Court will still issue opinions, and the President will still direct his administration. Now strike the clauses in Article I providing for representation and voting; strike the same clauses in Article II, including those that provide for the appointment of Supreme Court Justices. Now we have no government. It is the representational and appointment provisions, not the Vesting Clauses,<sup>211</sup> that are the most important in our Constitution.

Of course this is not the standard story of the separation of powers, but it is one that holds up under intellectual experimentation. Ask a lawyer to take out a pen and paper and to write down something about the separation of powers. No doubt she will write down something resembling the Vesting Clauses or a list of governmental functions, emphasizing the executive, legislative, and judicial. But think about that for a moment. Nothing in that list will actually create a working government—there will be no one running it, no one voting for it, and no one representing anyone else. How then can the Vesting Clauses or functional descriptions be as important as they are so often claimed to be?

Thankfully, history bears out the representational approach. The Constitution was not a theoretical project. The new Constitution was not simply a description of a government; it created that government. The Articles of Confederation had failed to produce a working government—there was no executive to execute the laws, there was no way to corral the states into paying their debts, and the Articles' rule of unanimity had made it impossible to govern. Readers of the debates of the constitutional convention or the ratification conventions are maddened by the fact that questions of great moment today, such as the reach of powers of war and commerce, were never defined. The Framers were not drawing an engine for a court, they were not

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<sup>211</sup> See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

describing it; they were building the machine as a blueprint, a plan, for future action.

The real stakes in the separation of powers battle are about which kind of representatives will gain power and lose power when we change the status quo, and what kind of incentives these representatives have under the Constitution. This analysis first requires us to translate what we instinctively call “function” into “representation.” For example, executive power means as a general rule the power of a national constituency; similarly, Congress represents state and local constituencies; finally, the Courts represent no constituency. Next, it requires that this representational view of power should be analyzed in terms of a transfer from an existing baseline practice, the status quo. The proper question is how a shift in power-as-representation shifts key decisionmakers.

Consider a simple example in which the status quo gives the power of removing principal officers to the President. Step one translates that to a national constituency. Step two asks how that constituency changes when we shift power. Assume that the proposed shift moves power away from the President to the Senate, as in the much-reviled Tenure of Office Act. Shifting power from the President to Congress shifts power from a national to a state and local constituency. Shifting power to the Senate more particularly empowers representation based in the states. From this shift, we can reason that the Senate’s constituency gains power over the removal of officers. What will happen? Executive officers will bow to Senators in ways they would not if they were only removable by the President. As Madison once explained:

If it be essential to the preservation of liberty that the Legis: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be *independent* of each other. The Executive could not be *independent* of the Legisltre [sic], if *dependent* on the pleasure of that branch for a re-appointment. Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a *dependence* of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.<sup>212</sup>

Applying this analysis to the question of legislative history, we begin with the notion that Congress creates legislative history. Mem-

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<sup>212</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 62, at 34 (statement of James Madison of Virginia, July 17, 1787) (emphasis added).

bers of Congress have the greatest incentive to represent states and localities within the national government. This does not mean that they will in fact represent those constituencies,<sup>213</sup> only that they have relatively greater structurally-induced incentives to effectuate that representation, as opposed to members of other departments. Now, let us assume that the baseline practice is that courts give meaning to legislative history to understand the procedural posture and meaning of key disputed texts. Now let us assume that courts were to change that practice and refuse to look at legislative history, even to resolve matters of conflicting texts. We have shifted from a practice in which deciding voices come from state and local interests to one in which there are no popular voices, no relevant political constituencies. We have moved the constitutional decisionmaker from one most responsive to the people to the decisionmaker most removed from the people. As Senator Specter put it: the risk is that judges “write their own law,” leaving the people’s law,<sup>214</sup> and the people’s voice, at the side of the road. Let us call this risk to majorities a Type I majoritarian risk.

This risk is not only a risk to national majorities; far more counter-intuitively, *it is a federalism risk*. The risk is that judges fail to respect federalism interests implicit in our national governing structure when engaging in statutory interpretation.<sup>215</sup> A judge asserting the power to “write the law” is a judge not only asserting the power of no constituency, but a judge who prefers a national constituency to one which is the most tied, in our national government, to state and local interests. This may be counterintuitive for those who associate federalism and textualism with “conservative” political positions. In fact, the anti-legislative history position is anti-federalist, where one means by anti-federalist, that courts are taking positions against entities more likely to have state and local interests in mind (which is not to say that they do, just that they are more likely than any other national entity to have such interests directly in mind).<sup>216</sup> In short, if one cares about

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<sup>213</sup> Nor does it mean that the President has no such incentive to attend to state electorates, which the Electoral College clearly provides. As a relative matter, however, we can say confidently that each Senator’s ties to his state and each Member’s ties to the district are stronger than that of the President.

<sup>214</sup> See Senator Specter quote discussed *supra* note 2.

<sup>215</sup> As a general rule, federalism risks have been noted by those who adopt traditionalist views of statutory interpretation. See Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 788–89 (1991) (advocating a traditionalist view, contrary to dynamic and other theories, and noting federalism risks).

<sup>216</sup> There has been a long argument, of course, about whether Congress represents the states-as-states. I do not doubt that, in some cases, members are willing to sacrifice a theoretical right of a state if their own state’s ox is not gored. What I am saying is that, rela-

federalism, one should counsel judges to look at legislative history, at the very least, one should expect that they should not blind themselves to it.

Now, obviously, this analysis is subject to a baseline problem. I am assuming the baseline of current practice in which legislative history is considered. One might argue that the proper baseline should reject history. If we change the baseline and judges decide to consider legislative history, we shift from a practice governed by no constituency to one in which constituency matters. What was not considered a matter to be referred to the people now reflects their input. The people are now in, not out. We know from the question of judicial review that excessive majoritarianism incurs risks to individuals and minorities. Let us call this a Type II minoritarian risk.

How are we to assess these countervailing risks? As an empirical matter we do not know which is more prevalent. We do know which institution has the greater structural incentives to control these risks, however; Type I risks—risks to majorities—are not under judicial control, but Type II risks—risks to minorities—are far more familiar territory for the judiciary (and relatively less likely to be the concern of majoritarian bodies). Courts hold no control over the political effect upon majorities of their statutory decisions; that is ultimately up to Congress. If courts fail to look to legislative history and for that reason write “their own” law, their error may only be reversed with great difficulty, if at all, by returning to Congress. More importantly, courts have no incentive to understand the whims or the substance of popular opinion;<sup>217</sup> their entire job description, and reason for being, is to stand for principle, not majoritarian politics (which is not to say that they exist out of time or are impervious to dramatic political effects). As Justice Scalia himself has argued, “Congress is . . . better equipped to inform itself of the ‘necessities’ of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress” on policy-making matters.<sup>218</sup>

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tive to other departments, members of Congress are closer to the states and more likely than other departments to know and represent the constituents’ view of states’ interests.

<sup>217</sup> As Judge Frank Easterbrook has written, “judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses . . . .” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 548 (1983).

<sup>218</sup> *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting). That this quotation involves the delegation of authority to the executive does not undermine the basic point about courts’ institutional competence more generally.

By contrast, courts have a relatively greater expertise and incentive than Congress to control for risks to minorities and individuals. The courts are the only institution in our constitutional scheme with a structurally-induced incentive (life tenure and no constituency) to protect individuals and minorities—which is not to say that they will but that, as a relative matter, they have a greater incentive than other departments in cases of conflict between majorities and individuals or minorities. The bottom line: even if we were to assume a counter-historical practice in which the courts never looked to legislative history as the proper baseline, if that were the case, the constitutional risks to individuals and minorities of considering legislative history are well within the competence and structural incentives for courts to manage. If the separation of powers is a separation of representation, the practice of referring to legislative history and in particular of legislative rules and procedure, should raise constitutional risks well within the courts' ability to manage.

Critics will argue that this analysis is entirely speculative: we do not know the effect of judicial use of legislative history. Perhaps the effect is to honor some political interest over others, the outliers on a committee,<sup>219</sup> rent-seekers,<sup>220</sup> or special interests who seek special favors.<sup>221</sup> My point is that, for better or worse, even the outliers are constituency-beholden interests, who act within a complex set of legislative procedures; in this sense, the statement of any group of Senators or even a single member has a relatively better, emphasis on *relatively* better, representational pedigree than any single judge or group of

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219 See Manning, *supra* note 4, at 688 (“[L]egislative committees disproportionately include members supported by the most interested interest groups . . .”). In fact, there is a strong argument that this conventional “wisdom” is not true, *see also* KEITH KRIEBEL, PIVOTAL POLITICS 231–34 (1998).

220 In its early days, textualists “decidedly felt the pull of the interest-group branch of public choice theory, which argues that legislation is an economic good purchased by interest groups, and that statutory outcomes often reflect little more than bargains struck among those groups.” Manning, *supra* note 4, at 687.

221 The Agriculture Committee does not necessarily have a “disproportionate” say in the elaboration of details of legislation. Cf. Manning, *supra* note 4, at 719 (arguing that the Agriculture Committee *will* have a “disproportionate say in the elaboration of the details of farm policy”). This precisely is the case because the process works forward from committee reports, not backward to committees. The committee report is subject to a variety of internal and external “checks”; if minority voices disagree, it will be apparent on the face of the report; if the report yields principled objection by another committee, it may yield a different committee report. Such reports may in fact result in amendments on the floor or a refusal to take up a bill. There is no way of knowing, looking at the committee report itself, whether it has been significant in any of these decisions, although later legislative consideration may make it clear. One must see committee reports as part of that process.

judges.<sup>222</sup> Lest one think this a radical position, it is precisely the position the Supreme Court has taken in administrative law, applied to legislative history. The *Chevron* doctrine<sup>223</sup> holds that, when in doubt, the court defers to a few administrators the interpretation of a statute because those administrators ultimately have a relatively better political pedigree<sup>224</sup> than the court. If that doctrine holds for administrative law, there is no reason that it should not hold in the case of legislative history. If a court is willing in one case to defer to the executive branch because of its greater representational pedigree, why should it not do so for the legislative branch?<sup>225</sup> Somewhat mysteriously, “textualists are relatively comfortable with the delegation of detail-filling authority to administrative agencies,”<sup>226</sup> and yet resist reference to legislative history and process.

This argument should not be confused with the position that any and all legislative history deserves a free pass. Purposivists have wrongly minimized the misuse of legislative history. As I have argued elsewhere,<sup>227</sup> unless this history is read with an eye to Congress’s rules and sequential procedures, the court’s version of that history may be pure fantasy. It may even exacerbate the counter-majoritarian problem, by entrenching the position of a set of super-minority filibusterers (for example, using “loser’s history” to support a judicial ruling).<sup>228</sup> Respecting the process requires, at a minimum, understanding that process. At the same time, textualists should not minimize the problem of resolving textual, *emphasis on textual*, conflicts by recourse to canons, common law, and dictionaries. The use

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<sup>222</sup> I do not advocate the position that individual Senators’ or Members’ statements are reliable legislative history. In fact, elsewhere I argue that Members generally ignore these statements unless made by someone the group has granted authority over the bill, such as the bill manager.

<sup>223</sup> *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>224</sup> Sometimes this is referred to as accountability, a somewhat deceptive term. Representational pedigree reflects potential, not actual, accountability. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990) (arguing that representatives have to speculate and anticipate how their constituents will react).

<sup>225</sup> Indeed, to the extent the Supreme Court were to adopt a pro-*Chevron*, anti-legislative history stance, one would in effect be creating the worst position from a federalism standpoint, where federalism is taken to mean the protection of state and local interests. Delegating to administrative agencies, but not to Congress, the power to resolve ambiguities, would increase national power even more than a position in which neither were delegated that power.

<sup>226</sup> Manning, *supra* note 4, at 699.

<sup>227</sup> See Nourse, *supra* note 19, at 87 (arguing that purposivists’ ignorance of congressional rules in evaluating legislative history materials may lead them to make “very serious errors”).

<sup>228</sup> For examples of this, see Nourse, *supra* note 19.

of canons and the “common law,” to the extent they diverge from the outcome dictated by legislative history, risks aggrandizing judicial power.

At the end of the day, the question of legislative history should not be viewed in a vacuum; if courts do not use legislative history, they will use something else to resolve ambiguities and conflicts. Textualists urge that canons and judicial common law are constitutionally preferable to what has been termed “legislative common law.”<sup>229</sup> Let no one be mistaken: *every constitutional argument that has been used to support the use of canons and the common law, rather than legislative history, can in fact be turned against the use of canons and common law.* Canons and “common law” amount to self-delegation; courts are using their own materials in ways that are not easily checked (does Congress really have the time to pass a statute saying do not use “*expressio unius*”? ). Canons and “common law” are not “Law” under the Bicameralism Clause; they were never passed by both Houses or signed by the President (can you imagine Lyndon Johnson signing a “canon” statute?). Canons and the “common law” amount to judging in one’s own cause and thus create a “conflict of interest” in violation of the separation of powers. Canons and the “common law” when used to rewrite statutes amount to an improper use of “judicial power”, and are therefore means of judicial activism and lawmaking. (As Karl Llewellyn explained long ago, picking and choosing the proper canon lies in the eye of the beholder).<sup>230</sup>

It is here that textualists should be compelled to use their own methods. For in the end, there is one difference that cannot be disputed. Canons and the “common law” do not appear in the text of Constitution. If they did, the arguments would be entirely equivalent. If one cares about text, statutory or constitutional, then textualists must respond to the basic claim, supported by more general principles, that Congress’s procedures, at a minimum, are constitutionally protected and should therefore be respected under the Rulemaking Clause. It is simply wrong to say that “the legislative power” does not include, or at the very least permit, the power of each House to create their own rules of proceedings, including rules providing for legisla-

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<sup>229</sup> See LIEBER, *supra* note 24 (“Of far greater importance is the body of the rules of procedure and that usage which has gradually grown up as part of common law, by which the dispatch of parliamentary business and its protection against impassioned hurry are secured . . . ”).

<sup>230</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (illustrating how “there are two opposing canons on almost every point.”).

tive history.<sup>231</sup> If those rules help to resolve difficult constitutional cases, then judges should use them; in fact, they are bound by the Constitution at the very least to respect them enough to know them.

## CONCLUSION

It is time to retire the all-or-nothing 1980s debate about the constitutionality of legislative history. These arguments have been generally ignored by the vast majority of judges and the Supreme Court. New developments in the theory of statutory interpretation, including decision process theory, help to sharpen the critique of legislative history but at the same time retire the constitutional questions as they have been posed. When applied to legislative rules and proceedings, the arguments against the constitutionality of legislative history, are not supported by the text, history or structure of the Constitution.

Questions do remain, but they are different questions than the ones previously asked about legislative history. First, there are important questions about particular practices, “as applied” rather than “facial” attacks on legislative history abuse. For example, can it possibly be constitutional for judges to rely upon claims made by filibustering minorities? Does it violate Article I, Section 5, for a court to ignore Congress’s “rules of its proceedings” in its use of legislative history in a particular case?<sup>232</sup>

Second, these more practical questions invite larger theoretical inquiries. Faithfulness to Congress has been woefully undertheorized in the legislative sphere, even as it has been overanalyzed in the constitutional one. Does faithfulness to Congress require faithfulness to Article I, Section 5? More generally, at a meta-level, it may well be that certain theories of the Constitution, like common law constitutionalism or popular constitutionalism or even originalism, should provide a stronger defense of legislative history or rules as a part of their theoretical missions. Indeed, although it is outside the scope of this paper, once we have put to the side questions of legislative history as an all or nothing proposition, it becomes possible to imagine competing constitutional theories of legislative history, whether popular, common law, or originalist.

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<sup>231</sup> See Roberts, *supra* note 4, at 503 (asserting Congress’s Article I Section 5 power to determine its own rules of proceedings).

<sup>232</sup> For potential examples of these problems, see Nourse, *supra* note 19.