

TRICAMERAL LEGISLATING: STATUTORY INTERPRETATION IN AN ERA OF CONFERENCE COMMITTEE ASCENDANCY

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I.

INTRODUCTION

Congress is in an era of conference committee ascendancy. Over the past twenty-five years, and particularly during the last decade, the process of congressional lawmaking has fundamentally changed. Conference committees once functioned as agents of the House and

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Senate, charged with serving their needs by reconciling competing versions of legislation passed by the two chambers. In recent years, however, these committees have become sites of independent lawmaking. Conference committees increasingly add provisions to the “reconciled” versions of legislation that were not passed by either house, remove provisions that were passed by both houses, and even write completely new legislation entirely independent of the bills committed to them by the parent chambers. The resulting conference committee reports are almost invariably enacted by Congress, due largely to the manipulation of chamber rules and the growing use of unorthodox legislating practices. This development has shifted the center of legislative power away from the House and Senate and toward conference committees—and particularly toward the few members of the congressional leadership who typically control them.

This radical shift in how Congress creates legislation—and its implications for the type of statutes Congress produces—has received little consideration in the political science literature and has been essentially ignored in the legal literature. Although political scientists have periodically acknowledged the potential power of conference committees, they have devoted surprisingly limited attention to this institution over the years, particularly when compared to the extensive examinations devoted to less significant legislative institutions that pervade their work.¹ The analysis that political scientists have done in

1. The earliest major work on conference committees was published in 1927. ADA C. McCOWN, *THE CONGRESSIONAL CONFERENCE COMMITTEE* (1927). Other major works on conference committees by political scientists are cited *infra* notes 2–4. The most recent political science work on conference committees, which itself largely adopts the narrow focus of its forerunners (see *infra* notes 2–4), nonetheless uniformly notes the relatively little attention that has been paid to this institution. See, e.g., Lawrence A. Becker, Re-Opening the “Who Wins?” Debate: An Individual-Level Analysis of Conference Committee Outcomes 2 (Apr. 3–6, 2003) (unpublished paper prepared for presentation at annual Midwest Political Science Association meeting, on file with *NYU Journal of Legislation and Public Policy*) (noting “[w]hile conference committees have become more and more important in recent years, they remain a remarkably under-studied and under-appreciated institutional structure in Congress” and that even the “most thorough treatment of conference committees . . . leaves much work to be done before we completely understand conference committee dynamics”) (citations omitted); Jamie L. Carson & Ryan J. Vander Wielen, Legislative Politics in a Bicameral System: Strategic Conferee Appointments in the U.S. Congress 1 (Nov. 7–9, 2002) (unpublished paper prepared for presentation at annual Northeastern Political Science Association meeting), <http://www.msu.edu/~pipc/confereselection.pdf> (“Compared with other areas of congressional research, however, the subject of conference committees has received a disproportionately small share of scholarly attention. While we know a great deal about some elements of congressional behavior such as committee organization, congressional elections, and legislative voting behavior, we can speak far less definitively about the important role conference committees play in reconciling House-Senate differences in legislation.”);

this area was long characterized by its excessively narrow focus. Well into the second half of the twentieth century, political scientists almost exclusively explored a limited range of issues: whether the House or Senate “wins” when they go to conference,² how the power of naming conferees shapes conference outcomes,³ and how the relationship between the chambers and their respective standing committees is mediated through conference committees.⁴ While more current works have expanded the horizon of their examinations, they still largely underestimate how dominant conference committees have become in recent years and have failed to offer any accounts that explain conference committees’ ascendancy.⁵ In doing so, they have ignored the clear political reality—a reality which is widely discussed among members

Seung Jin Jang, *The Politics of Bicameral Resolution: Strategic Choice of Conference Committee in the U.S. Congress 1–2* (Apr. 30, 2004) (unpublished paper prepared for presentation at annual mini-American Political Science Association meeting at Columbia University, on file with author) (“In spite of its institutional importance, however, the bicameral bargaining processes have not been paid much attention. . . . Setting aside general accounts of conference committee in textbook-like discussion on Congress, existing literature about the conference committee is surprisingly limited.”).

2. See, e.g., RICHARD F. FENNO, JR., *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 661–76* (1966); DAVID J. VOGLER, *THE THIRD HOUSE: CONFERENCE COMMITTEES IN THE UNITED STATES CONGRESS 49–78* (1971); John Ferjoh, *Who Wins in Conference Committee?*, 37 J. POL. 1033 (1975); Gilbert Y. Steiner, *The Congressional Conference Committee: Seventieth to Eightieth Congresses*, 32 ILL. STUD. SOC. SCI. 1, 170–76 (1951); Gerald S. Strom & Barry S. Rundquist, *A Revised Theory of Winning in House-Senate Conferences*, 71 AM. POL. SCI. REV. 448 (1977); Becker, *supra* note 1, at 2 (“For the most part, scholars have focused on the so-called ‘Who Wins?’ question at the institutional level.”); Carson & Vander Wielen, *supra* note 1, at 4–6.

3. See, e.g., Jonathan Nagler, *Strategic Implications of Conferee Selection in the House of Representatives: “It Ain’t Over Till It’s Over,”* 17 AM. POL. Q. 54 (1989).

4. See, e.g., STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 170–73* (1989); Keith Krehbiel, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 929, 929–31 (1987); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 94–95 (1987) [hereinafter Shepsle & Weingast, *The Institutional Foundations of Committee Power*]; Kenneth A. Shepsle & Barry R. Weingast, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 935, 937–43 (1987).

5. In part, this shortcoming can be attributed to the fact that much of the literature was published before or shortly after 1994, when the trend of conference committee ascendancy began to accelerate in earnest. See, e.g., LAWRENCE D. LONGLEY & WALTER J. OLESZEK, *BICAMERAL POLITICS: CONFERENCE COMMITTEES IN CONGRESS* (1989); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE 767–848* (1989); STEPHEN D. VAN BEEK, *POST-PASSAGE POLITICS: BICAMERAL RESOLUTION IN CONGRESS* (1995). The best of the recent accounts, Barbara Sinclair’s *Unorthodox Lawmaking*, still provides an incomplete picture of the extent of conference committees’ power in modern lawmaking. See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (2d ed. 2000).

of Congress and others who work on Capitol Hill.⁶ Moreover, no work, in either the political science or legal field, has devoted any attention to how the changes in the lawmaking process engendered by the rise of conference committees should affect how courts interpret statutes.

This Article, which addresses this profound gap in the political science and legal literature, has a threefold purpose: (1) to make clear that the lawmaking process has fundamentally changed as a result of the unprecedented power now exercised by conference committees and to explain how this change came about; (2) to demonstrate that conference committee-dominated lawmaking is more likely than traditional lawmaking to produce legislation that benefits special interest groups; and (3) to argue that these changes in the legislative process require courts to take a fresh approach to interpreting statutes shaped by conference committees and to propose such an approach.

To achieve this purpose, this Article explains how, through a combination of the manipulation of chamber rules designed to constrain the power of conference committees and the use of unorthodox lawmaking practices, conference committees have evolved from subordinate agents of the parent chambers to the equals of the House and Senate in terms of authority over legislation. It then shows how this accrual of power by conference committees, and particularly the few individuals who now typically control such committees, is often exploited for the benefit of special interests. In light of the unprecedented power that conference committees presently enjoy and the tendency for that power to be used to further the agendas of interest groups, this Article proposes a new canon of statutory construction: *When a congressional statute is the result of a House-Senate conference committee, a court should narrowly construe any provision of the enacted measure which was not included in the versions passed by each chamber individually.* This Article asserts that, through the application of this canon, the process of statutory construction can serve

6. This gap between the academic literature and actual lawmaking practices is part of a long historical trend in which political scientists pay little heed to sitting members' of Congress insights into the functioning of conference committees. Although modern conference committees' power and the effects they have on legislation is unprecedented, conference committees have been abused in other, albeit less pernicious, ways for many years. It is often representatives and senators, and not political scientists, who draw attention to and analyze these abuses. See, e.g., Albert Gore, Sr., *The Conference Committee: Congress' Final Filter*, WASH. MONTHLY, June 1970, at 3; George W. Norris, *The One-House Legislature*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 53-54 (1935); see also *infra* notes 154-59 and accompanying text for examples of similar arguments made by current members of Congress.

to cabin the unprecedented power now exercised by conference committees and to limit the effects of the rent-seeking measures this power is frequently used to enact. Moreover, the incentives the canon creates will encourage Congress to re-embrace traditional lawmaking procedures and thus will facilitate the restoration of the proper balance of power among conference committees, the House, and the Senate.

Part II lays out how conference committees are intended to operate in theory and the rules each chamber has promulgated in an effort to constrain conference committees to this limited role. Part III describes how the leadership and senior members of the majority party in recent Congresses managed to establish what is essentially a tricameral system of legislating by subverting chamber rules and utilizing unorthodox legislative practices. Part IV shows how the unprecedented power accrued by modern conference committees, and particularly the limited number of officials who actually control them, is often employed to further the causes of special interests. Part V offers a case study of a recent piece of legislation that highlights the unprecedented power of conference committees in the modern lawmaking process and the tendency for that power to be employed on behalf of interest groups. Part VI proposes a new canon of statutory construction and argues it is a valuable and realistic means of addressing the problems created by the ascendancy of conference committees. Then, using a case that turned on the interpretation of a statutory provision added during a conference committee, this part demonstrates how the canon would change the way courts approach such cases. Part VII concludes.

II.

CONFERENCE COMMITTEES IN THEORY

For a bill to become law, both chambers of Congress must pass identical versions of it.⁷ When the two chambers of Congress pass different versions of the same legislation, they have three options. First, either the House or Senate can simply accept the other chamber's version of the legislation. Second, they can send amended versions of the bill back and forth between the two houses until they reach agreement on a single version. Third, the two houses can decide to establish a "conference committee" made up of members from both

7. See U.S. CONST. art. I, § 7.

the House and Senate, whose job it is to reconcile the competing versions of the bill and send it back to each house for approval.⁸

Although the majority of legislation is reconciled using one of the first two procedures, most major legislation is reconciled using the third method. One study found that in the 103rd, 104th, and 105th Congresses, seventy-eight percent of the “major measures that got to the resolution stage” went to a conference committee.⁹ Other political scientists have similarly found that conference committees are used to resolve inter-chamber differences for the vast majority of major legislation.¹⁰ Moreover, not only are most major pieces of legislation sent to conference committees, but most bills that go to conference committee are ultimately approved by Congress.¹¹

The high approval rate for bills reported out of conference committees can be attributed largely to the special rules that regulate floor consideration of such bills, particularly the rule that conference reports are unamendable.¹² Unlike other types of legislation, which members of Congress can shape through floor amendments that eliminate undesired aspects of a bill or add dimensions they believe are needed, representatives and senators must either accept conference committee-

8. See STANLEY BACH, CONFERENCE COMMITTEE AND RELATED PROCEDURES: AN INTRODUCTION, CRS REP. NO. 96-708, at 1–5 (2001).

9. See SINCLAIR, *supra* note 5, at 59.

10. See, e.g., WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 271 (4th ed. 1996) (“Of the 465 public laws enacted by the 103d Congress, 13 percent (or 62) went through conference. It is usually major and controversial legislation that requires conference committee action.”); Shepsle & Weingast, *The Institutional Foundations of Committee Power*, *supra* note 4, at 95 (“While as many as three-fourths of all public laws manage to avoid the conference stage, nearly all major bills—appropriations, revenue, and important authorizations—end up in conference.”).

11. See, e.g., TIEFER, *supra* note 5, at 768, 805 n.90 (“Congress has an extraordinary record of approving outcomes of conferences. . . . [T]he vast majority of bills that go to conference come back from conference and pass both Houses.”).

12. See, e.g., OLESZEK, *supra* note 10, at 293 (“[The] chief reason conference reports pass is the basic rule that such reports must be adopted or rejected as a whole.”) (citation omitted). Another important aspect of conference committee reports is that they are “privileged” for consideration in both the House and the Senate. As a result, conference committee reports can be called up for consideration on the floor of either chamber at virtually any time another matter is not pending. See LEWIS DESCHLER & WILLIAM HOLMES BROWN, DESCHLER-BROWN PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, Ch. 33, § 16.1 (2002); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 471–72 (rev. ed. 1992). Moreover, in the Senate, the motion to consider a conference committee report is not debatable (although the motion for its adoption is debatable and thus can be filibustered). *Id.* at 472. These features of conference committee report consideration mean “[i]t is very difficult for a minority in the Senate to stop a conference report as they can with other legislation.” 146 CONG. REC. S11,687 (daily ed. Dec. 7, 2000) (statement of Sen. Wellstone).

crafted legislation as a whole or reject it in its entirety.¹³ This feature of conference reports dramatically affects how they are crafted and the calculus that members of Congress apply in deciding whether or not to approve them. Taking advantage of the all-or-nothing characteristic of conference reports, conference committees often add unpopular measures to highly popular or “must-pass” legislation in order to secure the passage of the former. Despite the fact that a majority of representatives and senators would have voted against the unpopular elements of the conference report if they were allowed to consider those elements individually, they often vote for such measures in order to secure passage of the broader conference report.¹⁴ Therefore, because conference reports typically include attractive, important, or necessary legislation and such reports are unamendable, they are almost always approved even though they also frequently contain unattractive or unpopular features. By forcing members of Congress to consider various programs and policies as an indivisible whole, conference committee procedures greatly increase the odds that measures contained in conference committee reports will be enacted into law.

The House and Senate have each enacted rules intended to rein in the power of conference committees and thus ensure that such committees remain the agent of the two chambers instead of their equal—or even their superior. These rules have three major purposes: first, to make conference committees’ work open and transparent; second, to regulate the timing of considerations of conference committee reports on the floors of the House and Senate; and—most significantly—third, to limit the discretion of conference committees to add or remove items from the final version of a bill. These rules are enforced

13. See Bach, *Conference Committee and Related Procedures*, *supra* note 8, at 8–9. The first house to vote on a conference committee report does have a third option besides approving or rejecting it—that chamber can also recommit it to the conference. However, that option is only available to the first house that votes on the conference report for once one chamber approves of the report, it is considered to have discharged its conferees. This means that the second chamber to vote on the report cannot vote to recommit because the conference committee will have disbanded by the time it does so. *Id.*

14. See TIEFER, *supra* note 5, at 818.

No matter how distasteful any particular provision is, or how desirable some amendment would be, generally there is no way to amend a conference report; it can only be accepted or rejected as a whole. Thus, the question for Members is not how they feel about any particular provision, but how they feel about the bill as a whole

Id.

through “points of order” that can be raised on the floor during consideration of a conference report.¹⁵

Both chambers require conference committee meetings to be open to the public, unless the conferees vote to close them, in order to prevent conference committees from conducting their work in secret. This also ensures that outside observers, including members of Congress not on the conference committee, the public, and the press, can monitor their work.¹⁶ House rules mandate that the full House vote to authorize a conference committee to close its meetings before the House conferees themselves can do so.¹⁷ The House and the Senate adopted these “sunshine” rules relatively recently. For many years, conference committees were completely closed and shielded from outside scrutiny.¹⁸ In fact, until the 1970s, only two conference committees had been open (one in 1789 and one in 1911).¹⁹ However, this lack of transparency surrounding conference committees’ work provoked increasing suspicion, leading the House to enact rules mandating that the work of conference committees be conducted openly

15. Another way in which the chambers influence the work of conference committees is through the use of instructions to the conferees. Either house can vote to issue instructions to the conferees from its chamber. However, these instructions are not binding—neither representatives nor senators can raise a point of order against a conference report on the grounds that it violated the House or Senate instructions to the conferees. See Bach, *Conference Committee and Related Procedures*, *supra* note 8, at 5. Nonetheless, it is interesting to note that in the House, “*recognition to propose this motion to instruct is a prerogative of the minority party*. The Speaker is likely to give first preference in recognition to the minority leader or the ranking minority member of the committee that originally had reported the bill to the House.” ELIZABETH RYBICKI & STANLEY BACH, *INSTRUCTING HOUSE CONFEREES*, CRS REP. NO. 98-381, at 2 (2004) (emphasis in original).

16. *STANDING RULES OF THE SENATE*, S. DOC. NO. 106-15, R. XXVIII(6), at 51 (2000) [hereinafter *STANDING RULES OF THE SENATE*] (“Each conference committee between the Senate and the House of Representatives shall be open to the public except when managers of either the Senate or the House of Representatives in open session determine by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.”); *RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 103-432, R. XXII(12)(a)(1), at 859 (2001) [hereinafter *RULES OF THE HOUSE*] (“[A] meeting of each conference committee shall be open to the public.”).

17. *RULES OF THE HOUSE*, *supra* note 16, R. XXII(12)(a)(2), at 859.

18. During this period, certain members of Congress took great offense when this norm of secrecy was breached in any way. See Steiner, *supra* note 2, at 35 (describing one senator’s comment that “[t]he sacredness of the conference ha[d] been violated, where those who had no right to come into the conference came into the conference” when President Hoover’s liaison with Congress brought news to a conference committee about president’s decision to drop his opposition to piece of legislation).

19. See TIEFER, *supra* note 5, at 802.

(subject to certain exceptions) in 1975.²⁰ The Senate followed suit later that year.²¹ As a result, absent a vote to the contrary, conference committees are required to be open under both chambers' rules.

To ensure that its members have sufficient opportunities to learn what measures are contained in conference reports, the House has instituted timing rules regulating when the full chamber can consider these reports. Under Rule 22, a conference report cannot be considered in the House until three days after it and the accompanying explanatory statement have been published in the *Congressional Record*.²² The rule also requires that copies of the report and the accompanying statement be available to representatives for at least two hours before they consider it.²³ If these rules have been violated, a member of the House can raise a point of order that, if sustained, will defeat the conference report. However, these "layover" rules can be ignored if the conference manager obtains a special rule from the Rules Committee that waives them or has the conference report considered under suspension of the rules or by unanimous consent.²⁴

Although the sunshine and timing rules are important elements of the control that the House and Senate exert over conference committees, the most significant constraints, at least theoretically, are the rules which limit conference committees' discretion to those issues which are within the scope of the legislation passed by the two chambers. Under both House and Senate rules, conference committees are prohibited from adding anything to a conference report not approved by either the House or Senate or deleting anything approved by both chambers.²⁵ According to Senate Rule 28, "[c]onferees shall not in-

20. *Id.* at 802–03.

21. *Id.*

22. RULES OF THE HOUSE, *supra* note 16, R. XXII(8)(a)(1)(A), at 845–46. This rule does not apply in the last six days of a session of Congress. *Id.* R. XXII(8)(a)(2), at 846.

23. *Id.* R. XXII(8)(a)(1)(B), at 846.

24. See DESCHLER & BROWN, *supra* note 12, at §§ 22.6–8. The Senate previously had a rule that required a conference report be read before it could be considered by that chamber (although it usually dismissed such readings by unanimous consent). However, at the end of the 106th Congress, the Senate adopted a rule that the reading of a conference report is not required when the report is "available in the Senate," which effectively removed this timing requirement altogether. See JAMES V. SATURNO, FLOOR CONSIDERATION OF CONFERENCE REPORTS IN THE SENATE, CRS REP. NO. 98-737, at 1 (2003).

25. The latter limitation had one of its earliest expressions in *Jefferson's Manual*. JEFFERSON'S MANUAL, H.R. DOC. NO. 107-284, 107th Cong., 1st Sess., § 527 at 271 (2001) ("So the Commons resolved that it is unparliamentary to strike out, at a conference, anything in a bill which hath been agreed and passed by both Houses. . . . The practice of the two Houses has confirmed this principle of the parliamentary law and

sert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.”²⁶ Similarly, House Rule 22 states:

[A] conference report may not include matter not committed to the conference committee by either House and may not include a modification of specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific matter as committed to the conference committee.²⁷

If a conference report violates these rules, it is subject to a point of order which, if sustained, would essentially defeat the conference report.²⁸ The rules limiting the scope of conference reports therefore function as the most important bulwark against conference committees’ discretion.²⁹ Because conference reports cannot be amended and are virtually always passed, conferees would enjoy almost unfettered power to write legislation of their own choosing if it were not for these rules about the extent of conference committees’ authority.

It is important to note that conference committees wield greater authority when reconciling a bill from one house and an “amendment in the nature of a substitute” from the other. However, even under these conditions, the conference committees are still constrained by the bills that the two houses passed. This situation occurs when the

established the rule that managers of a conference may not change the text to which both Houses have agreed.”).

26. STANDING RULES OF THE SENATE, *supra* note 16, R. XXVIII, at cl. 2; *see also* CLEAVES’ MANUAL OF THE LAW AND PRACTICE IN REGARD TO CONFERENCES AND CONFERENCE REPORTS, in SENATE MANUAL, S. DOC. 100-1, 107th Cong. 1st Sess. (2001), at 191 (“Conferees may not include in their report matters not committed to them by either House”); RIDDICK & FRUMIN, *supra* note 12, at 450 (“The language of any measure which has been approved by both Houses is never in conference, nor may the conferees amend any part of a bill which has been approved by both Houses.”).

27. RULES OF THE HOUSE, *supra* note 16, R. XXII, at cl. 9.

28. If the chamber in which the point of order is raised and sustained is the first one to act, then the conference report would instead be recommitted to the conference committee. If, however, it is the second chamber to act, the conference report is in fundamentally the same position as if the chamber had voted against the report. *See* Saturno, *supra* note 24, at 2.

29. As Walter Oleszek noted:

During the bargaining process conferees are aware that their completed product may be subject to points of order in either chamber if it violates certain rules and precedents. . . . [C]onferees can consider only the matters in disagreement between the two chambers; they may not reconsider provisions agreed to in identical form by both houses. . . . [T]hey may not insert in the conference version of the bill provisions on new subjects—such as new programs or amendments to laws not already amended by the bill.

OLESZEK, *supra* note 10, at 286–87.

amending house enacts an amendment which strikes the entire text of the bill passed by the first house (usually leaving only the title of the legislation) and replaces it with completely new text instead of using a series of amendments to reshape the legislation issue-by-issue. Consequently, when the legislation goes to conference, the conference committee is technically considering only one amendment in dispute between the two houses. However, because this amendment is functionally the same as an entirely new bill, different from the legislation enacted by the first house, the two houses are technically not in agreement on any issue. As a result, under the chambers' rules, a conference committee dealing with such legislation has the power to consider and offer its own approach as to the entire piece of legislation.³⁰

Nonetheless, even when legislation is passed by the two houses using this type of procedure, a conference committee's discretion is not unfettered under chamber rules. According to Senate rules, a conference committee considering legislation in which one house passed an amendment in the nature of a substitute may "include in their report in any such case matter which is a germane modification of subjects in disagreement," but "may not include in the report matter not committed to them by either House."³¹ On the House side, the rules dictate that when a conference committee considers a disagreement as to an amendment (which in the case of an amendment in the nature of a substitute means a disagreement over the entire text of the legislation), the conference committee may "propose a substitute that is a germane modification of the matter in disagreement."³² The House rules, though, note that conference committee substitutes for the legislation passed by the two houses are not germane when they introduce "any language presenting specific additional matter not committed to the conference committee by either House"³³ Violations of these rules are subject to a point-of-order objection.³⁴ Accordingly, even when the two houses are technically in disagreement about the entire legislation and the conferees enjoy the widest latitude to reshape the

30. SATURNO, *supra* note 24, at 2 ("When one house strikes everything after the enacting clause and inserts a substitute for the entire bill the conferees have wide latitude to effect a compromise, and may report any germane modification as long as it does not include new matter entirely irrelevant to the subject of the bill sent to conference.").

31. SENATE RULE XXVIII, *supra* note 16, at cl. 3(a).

32. HOUSE RULE XXII, *supra* note 16, at cl. 9.

33. *Id.*

34. SENATE RULE XXVIII, *supra* note 16, at cl. 3(b); HOUSE RULE XXII, *supra* note 16, at cl. 10(a)(1).

bill, they are still constrained by the limits imposed through the original bills passed by the two houses and the requirements that any modifications be germane.

III.

TRICAMERAL LEGISLATING: MODERN CONFERENCE COMMITTEES IN PRACTICE

The rules described in the above section are critical to controlling the work of conference committees and ensuring they remain agents of the House and Senate instead of independent sites of lawmaking. In recent years, however, through the manipulation of these rules and the increasing use of unorthodox lawmaking procedures, each of the constraints has been systematically undermined to the point where they no longer impose any meaningful limits on the work of conference committees. The result is that conference committees now enjoy almost uncontrolled power, essentially making them a third house of Congress. This section explains how each of the rules constraining the discretion of conference committees has been eviscerated in recent years and how the lawmaking process has been fundamentally changed as a result.

A. *Manipulation of the Rules Constraining Conference Committees* 1. *Sunshine Rules*

Although the intent of the rules requiring open conference committee meetings was to remove the shroud of secrecy that had historically surrounded the work of such committees, in recent years the sunshine rules have been manipulated to the point where most conference committee work is done entirely in private. Over the last decade,³⁵ the leadership of the majority party in Congress has increasingly engaged in practices that satisfy the letter but violate the spirit of the sunshine rules. Their tactics take two general forms. In one approach, the conference committee chairs limit the public meetings to pro forma opening sessions at which no substantive work is done. The chairs then retreat behind closed doors with only a few senior members of the committee—who are usually exclusively of the majority party or members of the minority party who support the majority party's position—to actually generate the conference report.³⁶ Then, a public closing session is held at which the already finalized conference report is presented to the rest of the conferees, which a

35. Richard E. Cohen, *The Third House Rises*, 33 NAT'L J. 2394, 2395 (2001).

36. *Id.*

sufficient majority of the conferees invariably vote to adopt.³⁷ Alternatively, conference committee chairs occasionally will hold public sessions at which actual negotiations take place among all the members of the committee, but will then engage in secret sessions with only a few members of the committee and rewrite many of the agreements the full committee had reached.³⁸ Both of these approaches result in conference reports written in secret by only a few members of the conference committee.

The effects of flouting the sunshine rules can be seen in the approach to two major pieces of legislation in 2003: the Medicare³⁹ and energy bills. The conference committees for both measures each held two public meetings—the opening and closing sessions of the committees.⁴⁰ However, reportedly little substantive work took place at those meetings; the bills were reported to have been written largely in secret sessions, which only senior conferees belonging to the majority party were allowed to attend.⁴¹ These conferees justified their prac-

37. *Id.*; see also *infra* note 92 for a description of conference committee voting procedures. This practice of a few members of the majority party writing a conference report behind closed doors has provoked criticism among members of the minority party. One senator, for instance, objected to the Bankruptcy Reform Act of 2000 on the ground that the conference committee for the legislation had adopted these practices. He stated, “four Senators do not constitute the Senate. Yet absent Senate rules to restrain them, small groups of Senators meeting secretly in conference committees can arrogate much—if not most—of the Senate’s power.” 146 CONG. REC. S11,396 (daily ed. Oct. 31, 2000) (statement of Sen. Feingold).

38. Senator Byron L. Dorgan, for example, objected to the Fiscal Year 2004 Omnibus Appropriations conference report on the ground that the conference committee had engaged in these practices. He described how the House and Senate both passed measures limiting national levels of broadcast station ownership, and then the conference committee, of which he was a part, adopted the measure in a meeting involving both Democrats and Republicans. However, later on, a few members of the conference rewrote the conference report and rejected the measure passed by the House and Senate and agreed to by the conferees. Senator Dorgan stated, “Somewhere in a closed room, with just a few folks deciding, they abridged the decision by the House, the decision by the Senate, and explicit decision by the conference committee of which I was a member, with respect to broadcast ownership in television. . . . [I]n my judgment, it casts aside all the rules as to how we do business.” 150 CONG. REC. S68 (daily ed. Jan. 21, 2004) (statement of Sen. Dorgan). This Fiscal Year 2004 Omnibus Appropriations measure is explored in greater detail *infra* Part V.

39. See *infra* notes 111–115 and accompanying text.

40. See Susan Milligan, *Back-Room Dealing a Capitol Trend: GOP Flexing Its Majority Power*, BOSTON GLOBE, Oct. 3, 2004, at A1.

41. While fifty-five conferees were appointed to the conference committee on the energy bill, the conference report resulted primarily from secret negotiations between the senior member of the majority party from each chamber. See Richard E. Cohen et al., *The State of Congress*, 36 NAT’L J. 82, 101 (2004) (“Although 34 Republicans and 21 Democrats served on the conference committee, the two chief GOP chairmen—House Energy and Commerce Committee Chairman Billy Tauzin, R-La., and Senate

tices by claiming that the secret meetings did not constitute “official” conference sessions and thus were not covered by the sunshine rules, yet the conference committee reports were shaped almost entirely in these meetings. According to one report, an energy bill conferee from the minority party, who, like others in his party, was barred from all but the opening and closing sessions of the conference committee, stated he found out what the conference report contained only by talking to lobbyists privy to the work of the majority party conferees.⁴² Such practices were not unique to the conferences on the Medicare or energy bills or to the 108th Congress. In recent years, conference reports for major legislation have been generated through secretive negotiations between senior members of the conference committee from the majority party.⁴³ As a result, modern conference committee practices serve to enhance the power and influence of the senior members of the majority party who control conference committees at the expense of their colleagues and the House and Senate chambers.

2. *Timing Rules*

In a similar vein, the House majority leadership has undermined the chamber rules regarding timing for floor consideration of conference reports over the last decade. The timing rules, which prevent consideration of conference reports until three days after they are published in the *Congressional Record*, are intended to ensure that members of the House have sufficient time to review the conference reports.⁴⁴ These rules, enforced through a point of order raised during floor consideration of a conference report, are important controls on the discretion of conference committees.⁴⁵ In recent years, conference reports often have differed dramatically from the original legislation passed by the House and, as a result, representatives are frequently unfamiliar with the report’s various provisions.⁴⁶ Additionally, as described above, the work of conference committees is often conducted in secret making it difficult for representatives to track the changes to

Energy and Natural Resources Committee Chairman Pete Domenici, R-N.M.—conducted most of the negotiations.”).

42. See Milligan, *supra* note 40.

43. See, e.g., Andrew Mollison, *Democrats Say GOP Bars Committee Doors*, ATLANTA J.-CONST., Nov. 16, 2003, at A5 (“Members of Congress spend long hours debating bills, but the final details of major legislation are almost always worked out behind closed doors by senior members appointed to a House-Senate conference committee.”).

44. See *supra* notes 22–23 and accompanying text.

45. See SATURNO, *supra* note 24, at 2.

46. See, e.g., *infra* note 125 and accompanying text.

the legislation as they are made.⁴⁷ Consequently, representatives have no way of knowing what is in legislation without reading the conference report. However, the House leadership has made it virtually impossible to enforce the timing regulations. They routinely request, and the Rules Committee routinely issues, rules waiving all points of order against the consideration of conference reports.⁴⁸ As a result, the leadership can violate the timing rules with impunity and drastically limit the time members of Congress have to review and understand the contents of a conference report before voting on it.

The implications of this disregard for the timing rules are dramatic. As a report for the minority office of the House Rules Committee found, “the [majority] leadership regularly jammed conference reports on major legislation totaling hundreds and hundreds of pages through the Rules Committee and the House in a matter of hours.”⁴⁹ The conference committee report for the Fiscal Year 2003 Omnibus Appropriations measure, for example, exceeded 1,500 pages, yet members were provided only twelve hours to review it between the time the conference report was reported from the Rules Committee and its final passage on the House floor.⁵⁰ Representatives had similarly limited time to consider the Department of Defense Authorization for fiscal year 2004. That report reached almost 900 pages, and yet only five hours elapsed between its being reported from the Rules Committee and final floor passage.⁵¹ As the House Rules Committee Minority Office report notes, this practice meant “members interested in the [Fiscal Year 2004] Defense Authorization . . . would have had to have perused the conference report at a three-pages-a-minute rate between the time the rule was reported and the final vote” in order to learn what was in the report.⁵² Such restrictive schedules for the consideration of conference reports are not the exception but the norm in the House, which means that representatives often vote for major leg-

47. See *supra* notes 37–43 and accompanying text.

48. See, e.g., 149 CONG. REC. H10,170 (daily ed. Oct. 30, 2003) (waiving points of order against conference report on H.R. 2115, Vision 100-Century of Aviation Reauthorization Act); 149 CONG. REC. H11,379 (daily ed. Nov. 18, 2003) (waiving points of order against conference report on H.R. 6, Energy Policy Act of 2003); 146 CONG. REC. H9816 (daily ed. Oct. 11, 2000) (waiving points of order against conference report on H.R. 4392, Intelligence Authorization Act for Fiscal Year 2001); see also HOUSE RULES COMMITTEE MINORITY OFFICE, BROKEN PROMISES: THE DEATH OF DELIBERATIVE DEMOCRACY, A REPORT TO THE HOUSE COMMITTEE ON RULES 38 (2005).

49. *Id.* at 39.

50. *Id.*

51. *Id.* at 39–40.

52. *Id.* at 39.

islation without knowing all, or even many, of the provisions of the measure.⁵³ This dynamic facilitates the ability of conference committees to secure the enactment of otherwise unpassable measures benefiting special interests by burying them in long conference reports that no member will be able to read before voting.

3. *Rules on Scope Limitations*

The shift in power from the House and Senate chambers to conference committees has been further exacerbated by the erosion of the rules limiting the scope of conference committees' discretion. In both the House and Senate, the leadership of the majority party has, in recent years, diluted chamber rules that prevent conference committees from adding measures to the conference report not approved by either the House or Senate or deleting any measures approved by both chambers. Unconstrained by meaningful limitations on the scope of their discretion, conference committees—or, more accurately, the leaders of conference committees—enjoy almost complete freedom to rewrite legislation. This section explains how the chamber rules, which once served as effective checks on conferees' power, now do little to cabin unfettered conference committee discretion.

The leadership in the House undermined the chamber rule limiting the scope of conference committees' authority in much the same way it subverted the rules on timing—they made it all but impossible for members to raise a point of order that the conferees had exceeded their authority in violation of House rules. According to the House Rules Committee Minority, the Rules Committee now systematically issues rules for the consideration of conference reports that waive all points of order against the reports and the consideration of them.⁵⁴ For instance, in the 108th Congress, the Rules Committee reported twenty-eight rules that allowed for the consideration of conference reports and all twenty-eight waived all points of order against each con-

53. *See id.* at 39–40 (“Because it was just not possible to read through the hundreds of pages of complex statutory language in the time they were given, Members found themselves in the uncomfortable position of having to vote up-or-down on legislation that was not familiar to them.”); *see also* Milligan, *supra* note 40 (“The defense authorization bill, a complicated package that lays out the Pentagon’s spending and program priorities for the following year, once commanded extended discussion in the House; in 1994, the last year Democrats held the majority, the measure was discussed for three weeks, and House members had several days to read the Rules Committee version before they began debating the measure. This year, the defense authorization bill was ushered through the House in two days, with members having just a few hours to examine the bill before the full House considered it.”).

54. HOUSE RULES COMMITTEE MINORITY OFFICE, *supra* note 48, at 38.

ference report and its consideration.⁵⁵ Because the rules cabin-
ing conference committees' discretion are enforced through points of
order raised during floor consideration of a conference report, the prac-
tice of giving all conference reports blanket waivers makes it
impossible for any member of the House to enforce the limitations on
the conference committees' authority required by House rules.⁵⁶ As a
result, House rules no longer provide any meaningful constraint on the
discretion of conference committees. The leaders of such committees
can rewrite legislation without any fear that other House members will
be able to insist they act within the scope of their delegated authority.

In the Senate, the leadership has systematically interpreted its
rules regulating the discretion of conference committees in a manner
that makes it difficult for individual senators to raise successful points
of order.⁵⁷ Historically, Senate rules imposed effective limitations on
the authority of conference committees through what is now Senate
Rule 28.⁵⁸ The severity of these limitations varied depending upon
the legislative procedure that preceded the reconciliation process. If
one chamber had passed the other chamber's bill with multiple
amendments, the standard used to judge the conference committee's
discretion in reconciling the two bills was, according to the Senate
parliamentarian, "quite restrictive"—the conference committee was
only permitted to resolve differences between the provisions explicitly
passed by the House and the Senate.⁵⁹ On the other hand, if one
chamber had passed the other's bill with only one amendment (i.e., an
amendment in the nature of a substitute), the conference committee
enjoyed greater, but certainly not unlimited, leeway to include in its
report matters that were "not entirely irrelevant" to the subjects of the
bill even if they were not explicitly included in the legislation passed
by either house.⁶⁰ A 1948 ruling by the Senate chair, however, indi-

55. *Id.*

56. *See, e.g.*, 144 CONG. REC. H6516 (daily ed. July 29, 1998) (statement of Rep. Slaughter) (stating during debate over granting blanket waiver to conference report, "[a]s we all know, conference committees have enormous power to shape legislation. The only checks on that power are the handful of points of order that individual Members can raise against the consideration of the conference report. . . .").

57. Because the Senate leadership does not exercise the same control over floor debates as their counterparts in the House, the systematic weakening of the Senate's limitations on conference committees' authority has been achieved through a different route.

58. *See supra* note 26 and accompanying text.

59. Letter from Alan S. Frumin, Senate Parliamentarian, to Sen. J. James Exon (Aug. 23, 1994), in 140 CONG. REC. S24,029 (daily ed. Aug. 25, 1994) [hereinafter Letter from Alan S. Frumin]; *see also supra* notes 25–28 and accompanying text.

60. *Id.*; *see also supra* notes 30–34 and accompanying text. A June 1932 ruling from the Senate chair defined the scope of a conference committee's authority for the

cated that conference committees' authority under Senate rules in situations in which one house passed an amendment in the nature of a substitute was not as great as it may have seemed. The chair held that a conference committee had exceeded its authority when "the legislative provision inserted in the conference report, while germane to the general subject, was not contained in any form in either the Senate bill or the House substitute, and is therefore a matter not in disagreement between the two Houses."⁶¹

Over the last twenty-five years, however, the Senate, through a series of rulings on points of order, has gutted this 1948 ruling and effectively eliminated any restrictions on conference committees' authority. This process began in 1982, when the Senate essentially removed any limitations on the power of conference committees when they consider a single amendment in the nature of a substitute. In August 1982, the Senate was considering a tax reconciliation bill.⁶² The conference committee was to reconcile a single amendment that had been substituted for the bill passed by the other house. A senator raised a point of order alleging that the conference committee had exceeded its authority by including a provision that had not been part of either the House or Senate bill submitted to the conference.⁶³ The chair overruled the point of order, stating, "The conferees went to conference with a complete substitute, which gives them the maximum latitude allowable to conferees. The standard is that matter entirely irrelevant to the subject matter is not in order. That standard has not been breached."⁶⁴ As a result of this ruling, it became very difficult to enforce any limitations on conference committees' authority when they were reconciling a bill with a single amendment in the nature of a substitute.

In 1985, the Senate further weakened its rule limiting conference committee discretion when it extended to *all* conference reports the highly permissive standard it had previously applied only to conference reports involving a single amendment in the nature of a substitute. On December 11, 1985, the Senate was considering the conference report for the Balanced Budget and Emergency Deficit

second type of reconciliation. Under this ruling, a conference committee was within the scope of its authority as long as all matters were "not entirely irrelevant" to the legislation sent to the committee by the House and Senate. *Id.*; see also RIDDICK & FRUMIN, *supra* note 12, at 484 (citing 72 CONG. REC. 554 (1932)).

61. RIDDICK & FRUMIN, *supra* note 12, at 464.

62. 128 CONG. REC. 22,396-97 (1982).

63. 128 CONG. REC. 22,398 (1982).

64. *Id.*, cited in TIEFER, *supra* note 5, at 814.

Control Act of 1985.⁶⁵ The conference committee for this legislation was charged with reconciling a series of amendments (in other words, this conference committee was not considering a single amendment in the nature of a substitute).⁶⁶ As a result, when a senator raised a point of order that the conference committee had exceeded its authority by including matters not in the version of the legislation passed by either the House or Senate, the presiding officer applied the more restrictive standard and upheld the point of order.⁶⁷ However, his ruling was appealed to the full Senate, which overturned the chair's decision.⁶⁸ This vote effectively extended the more permissive standard to all conference committee reports.⁶⁹

During the 104th Congress, the Senate went so far as to effectively eliminate Rule 28 altogether. In the course of a 1996 debate over a Federal Aviation Administration reauthorization bill (FAA bill), a senator raised a point of order asserting that conferees had exceeded their authority by including language in the conference report amending the Railway Labor Act, although no such language had been included in either the House or Senate versions of the bill.⁷⁰ The chair sustained the point of order,⁷¹ but then-Majority Leader Trent Lott appealed the ruling to the full Senate, which voted to overturn the chair.⁷² The consequences of this vote resonated far beyond the FAA bill—it created a precedent that eliminated any restrictions on conferees' power imposed by Rule 28.⁷³ Although the Senate formally reinstated Rule 28 at the end of the 106th Congress in 2000, it did so with the restriction that “the Presiding Officer of the Senate shall apply all of the precedents of the Senate under Rule XXVIII in effect at the conclusion of the 103d Congress.”⁷⁴ As a result, it revived only the severely weakened form of the rule that had existed at the time of the

65. Letter from Alan S. Frumin, *supra* note 59.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. 142 CONG. REC. S12,229 (daily ed. Oct. 3, 1996) (statement of Sen. Lott).

71. *Id.* at S12,231 (“[I]t is the opinion of the Chair that the conference report exceeds the scope, and the point of order is sustained.”).

72. *Id.* at S12,231–32.

73. See 146 CONG. REC. S11,396 (daily ed. Oct. 31, 2000) (statement of Sen. Feingold) (“The Senate used to have rules to prevent this sort of thing. Rule 28 of the Standing Rules of the Senate addresses conference committees. . . . Then . . . on October 3, 1996, in what seemed like almost a whim, the Senate cast aside this century-old Standing Rule . . .”).

74. Consolidated Appropriations for Fiscal Year 2001, Pub. L. No. 106-554, § 903, 114 Stat. 2763, 2763A–198 (2000).

vote on the FAA bill.⁷⁵ As one leading senator recently noted, although the rule “may still appear in the printed rule book,” it is “clear that for all intents and purposes rule 28 regarding the scope of conference is now dead. The majority plainly observes rule 28 only in the breach.”⁷⁶ Therefore, much like in the House, Senate rules no longer provide any meaningful constraint on the discretion of conference committees.

B. Changes in Lawmaking Procedures

The increase in conference committee power is also a result of the rise of unorthodox legislative procedures, particularly the growing practice of legislating through “omnibus legislation” or “megabills.”⁷⁷ These measures are highly complex pieces of legislation that combine numerous provisions on a wide range of often unrelated subjects.⁷⁸ Congress increasingly uses this type of lawmaking to enact major legislation.⁷⁹ While this trend has been attributed to numerous factors,⁸⁰ one important implication of omnibus legislation is that it has characteristics which make it an attractive vehicle for provisions that would be difficult to pass as stand-alone measures. Such bills are often considered “must-pass” legislation because they contain elements which, “if not signed into law, may cause severe consequences” such as shutting down the government.⁸¹ Even when not considered “must pass,”

75. Highlighting the weakened force of this rule during the period preceding the vote on the FAA bill, one senator at the time noted that although “many, if not most of the conference reports considered in this body would be subject to this same point of order” for violating Rule 28’s limitation on conference’s scope, the rule is rarely enforced “[b]ecause all Members know full well that this is how we conduct our business” 142 CONG. REC. S12,231 (daily ed. Oct. 3, 1996) (statement of Sen. Pressler).

76. 150 CONG. REC. S9562 (daily ed. Sept. 23, 2004) (statement of Sen. Baucus).

77. In this sense, this Article intersects with the burgeoning literature on omnibus legislating, much of which is cited in the following footnotes in this section.

78. See SINCLAIR, *supra* note 5, at 71 (describing omnibus legislation as that which “addresses numerous and not necessarily related subjects, issues, and programs, and therefore is usually highly complex and long”); VAN BEEK, *supra* note 5, at 6 (characterizing “megabills” as bills that are “big” with components that are “varied and numerous”).

79. VAN BEEK, *supra* note 5, at 23 (“Today, more and more significant legislation is being packaged into large omnibus bills”). Barbara Sinclair noted how Republicans relied on this type of lawmaking to enact much of the “Contract with America” when they first regained control of Congress in 1994. SINCLAIR, *supra* note 5, at 64–65.

80. See, e.g., Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP 3–6 (2002), <http://bepress.com/ils/iss3/art1> (describing various factors that fuel the increasing use of omnibus legislation).

81. VAN BEEK, *supra* note 5, at 13–14.

such bills frequently contain very popular elements which lawmakers want to see enacted (or do not want to be on the record as voting against).⁸² As a result, even independent of the conference committee process, omnibus legislation presents a potent method of lawmaking.⁸³

The interaction of the two trends—the dilution of House and Senate rules limiting the authority of conferees and the growth in omnibus legislation—has served to increase the power of conference committees and, in particular, conference committee leaders. Conferees can often ensure the enactment of provisions they favor by including them during the conferences on highly complex legislation, even if such provisions are entirely unrelated to the subject of the bill and were not included in the versions passed by the House or the Senate, for three reasons. First, members of Congress may not even be aware that the unpopular provisions are included in the legislation at issue. Because the process of negotiating and drafting a conference report is shrouded in secrecy despite the nominal existence of the “sunshine rules,” it is often difficult for members to identify and assess all the various provisions of highly complex legislation, especially provisions added by the conference committee.⁸⁴ As discussed above, in the House, representatives are typically not given enough time to actually read a conference report, much less examine its contents.⁸⁵

Second, due to the fact that conference reports are unamendable, members of Congress are unlikely to vote against a conference report that includes must-pass or popular elements simply because it also contains unpalatable provisions.⁸⁶ This means the power of conference committees considering megabills is particularly strong—complex legislation often contains numerous popular elements which

82. See Garrett, *supra* note 80, at 2 (“[A] gigantic omnibus bill can be constructed with enough goodies to gain majority support It thus becomes a way to enact politically controversial programs, as well as other policies that could not be enacted in stand-alone bills.”).

83. As Glen Krutz notes:

Omnibus bills are powerful in that they divert attention from controversial items of certain substantive policy areas to other main items that enjoy widespread support or are necessary or both. The controversial items, if considered alone, would face opposition within Congress or at the president’s desk. Omnibus bills provide a way to evade this opposition and enact the policies; they provide greater certainty.

GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 45 (2001).

84. *Id.* at 2 (“Members at large . . . pay little attention to the main part of the bill as it is processed through Congress. They are seldom aware of the minutiae of omnibus packages.”); see also *supra* notes 37–38 and accompanying text.

85. See *supra* notes 49–53 and accompanying text.

86. See *supra* notes 12–13 and accompanying text.

provide shields for unpopular provisions sought by conferees.⁸⁷ Third, even if members of Congress wanted to enforce their respective chamber's rules constraining the authority of conferees to shape legislation, the rules have been manipulated to the point where it is essentially impossible to do so.⁸⁸ Representatives and senators are left with little recourse to address conference committees' abuse of their authority, which means conferees can add or remove almost any provision with complete impunity. Megabills frequently provide attractive opportunities for them to engage in these practices. These changes in lawmaking procedures, in conjunction with the manipulation of chamber rules regulating conference committees, have thus fueled conference committees' accrual of power.

IV.

CONFERENCE COMMITTEES AS TOOLS OF SPECIAL INTERESTS

The characteristics of the conference committee and the lawmaking processes which fuel conference committees' increasing authority also facilitate their ability to advance the positions of special interests in ways that would otherwise be difficult, if not impossible. This section reviews how the attributes of the newly ascendant conference committees make them particularly well-positioned to promote special interests' causes and how conference committees' newfound powers are often exploited for this purpose.

While conference committees as a whole have always had fewer members than either the House or the Senate,⁸⁹ in recent years an even

87. As political scientist Stephen Van Beek noted:

When a conference report comes to a parent chamber for final action, members face a new restrictive calculus in deciding how they should cast their votes. In a large bill that contains hundreds of pages of legislation, the visibility and relative importance of individual provisions are diminished. Congressional members may feel that the significance of the overall bill outweighs any procedural niceties or objections to smaller portions of the legislation. While some will still vote against the report because of specific objections, the collective effect of these megabills is to lower the incentives for members to cast such votes.

VAN BEEK, *supra* note 5, at 185.

88. See *supra* notes 54–76 and accompanying text.

89. The small size of conference committees relative to either house has long presented the individual conferees with the potential to exercise more significant influence over legislation than they otherwise enjoy. As Longley and Oleszek noted in 1989, "[t]he conference committee is where the individual congressman can wield the greatest influence over legislation It is important to note that fewer people are involved in giving consent there than in any other step in the legislative process." LONGLEY & OLESZEK, *supra* note 5, at 118–19. Tiefer made a similar observation in

smaller subset of congressional officials have assumed the responsibility for drafting conference reports, as discussed above.⁹⁰ Typically, this subset includes the senior members of the conference committee from the majority party and the majority party leadership in both chambers. The officials constituting this subset often draft the conference report with little or no input from other members of the committee (or Congress) and then present the results of their work to the other conferees,⁹¹ who generally approve whatever is generated by the senior officials.⁹² The conference reports are then almost always approved by the House and Senate as a whole.⁹³ Because of this dynamic, the individuals in the subset have almost unfettered power to ensure that measures are enacted into law. In fact, the power of members of this subset is so great that they will often support any version of a bill in committee or on the floor in order to get it to conference, because they know they will be able to rewrite the legislation to their liking once it is there. For instance, in July 2003, when the Senate was deadlocked over an energy bill that had already passed the House, senior Republican officials threw their support behind a Democratic version of the legislation that contained many provisions to which they strongly objected.⁹⁴ Senator Pete Domenici, the chairman of the Senate Energy and Natural Resources Committee who would serve as

1989, writing, "appointment as a conferee is as near an absolute license for a member to write major legislation to one's taste as the Congress ever grants." TIEFER, *supra* note 5, at 791.

90. See *supra* note 41 (describing how conference report for energy bill was largely written by only two senior members of conference committee); see also 144 CONG. REC. S12,808 (daily ed. Oct. 21, 1998) (statement of Sen. Moynihan) ("This deterioration in the process has taken place over about the last half decade . . . Members loudly debate issues on the floor, but the real decisions are made in a closed room by three or four people.").

91. Cohen, *The Third House Rises*, *supra* note 35, at 2395.

92. In order for a conference report to be sent to the House and the Senate, a majority of each chamber's conferees must approve it. As a result, when one party controls both chambers, as the Republicans have for most of the past ten years and Democrats did for most of the forty years before that, the leadership of the majority party can be virtually certain that the conferees will approve whatever is generated by the subset of officials who take control of drafting the conference report, even though most of the conferees had very little role in actually drafting the report themselves. See Mark Wegner & April Fulton, *Crashing the Party*, 45 NAT'L J. 3420, 3420-21 (2003). Because the majority party can appoint more conferees to each conference committee than the minority party, those in charge of creating a conference report can be virtually certain that whatever they generate will be approved even if it receives no support from the minority party. *Id.*

93. See TIEFER, *supra* note 5, at 768, 805 n.90 ("Congress has an extraordinary record of approving outcomes of conferences. . . . [T]he vast majority of bills that go to conference come back from conference and pass both Houses.").

94. *Id.* at 3420.

the senior senator on the conference committee for the energy bill, explained that he supported the Democratic-backed measure only because he intended to write a “completely new bill” in conference.⁹⁵

The aggrandizing of power by the leaders of conference committees and the majority party has made it significantly easier for interest groups to secure enactment of provisions they favor or defeat measures they oppose. In order to do so, they only have to win the support of a single or a few members of the subset responsible for negotiating the conference report, instead of a majority of both chambers as would be required if traditional lawmaking practices were followed. The tendency for this newer system of lawmaking to promote special interests can be seen in numerous recent examples of conferees or members of the majority party leadership inserting provisions benefiting interest groups into conference reports that would have been impossible to enact through traditional lawmaking avenues. In 2002, for instance, a single majority party member of the conference committee for legislation creating the Homeland Security Department added a provision to the conference report immunizing a major drug company, Eli Lilly, from liability for a vaccine preservative it once manufactured and that was alleged to cause autism in children.⁹⁶ The company, which faced numerous lawsuits seeking damages for the harm caused by the vaccine preservative, reportedly donated over a million dollars to congressional candidates, most of them members of the majority party, in the course of the 2000 election cycle.⁹⁷ Another example occurred in 1997, when Senate Majority Leader Trent Lott and House Speaker Newt Gingrich added a provision to the conference report on a tax-cut bill that gave \$50 billion in tax breaks to tobacco companies.⁹⁸ Neither of these provisions had been included in either the House or Senate version of the legislation, and yet both were adopted by the full conference committee and Congress as a whole. These two examples highlight how the control over conference reports exerted by a small subset of the conference committee (often along with the majority party leadership) can easily be exploited to advance the causes of special interests.

95. *Id.*

96. *See, e.g.,* JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 105 (2004); Bill Walsh, *Public Votes Can Obscure Congress' Real Work*, *TIMES-PICAYUNE* (New Orleans, LA), Aug. 18, 2003, at 1.

97. *See* BAKAN, *supra* note 96, at 105.

98. *See, e.g.,* Judy Holland, *Lawmakers Burned by Secret Tobacco Tax Break*, *TIMES-PICAYUNE* (New Orleans, LA), Dec. 28, 1997, at A10 (“The tale of the tobacco tax break highlights how special interest legislation is crafted behind closed doors and how a small cadre of high-level political officials can work their way in Congress.”).

The secrecy with which conference committees work also makes them more receptive venues for provisions favored by special interests. While a representative or senator typically must publicly sponsor legislation or amendments, a measure can be added to a conference committee report without anyone having to publicly take responsibility for it. Almost all public conference committee meetings are pro forma,⁹⁹ and no written record is made of the conference committees' negotiations—the only record created is the conference report and the accompanying explanatory statement.¹⁰⁰ Due to the secrecy surrounding conference committee work, the likelihood that a member would be held accountable for advancing an unpopular or controversial provision that is favorable to a special interest group in a conference committee is significantly reduced. As a result, provisions favoring special interest groups, many of which members of Congress would hesitate to associate themselves with publicly, are added to conference reports.¹⁰¹ An example of such a provision is the measure protecting Eli Lilly from liability discussed earlier in this section. When the provision first came to light, no one could determine who had added it to the conference report.¹⁰²

In addition to the identity of members who insert interest group-promoting provisions, the actual provisions themselves also are often not known to members of the House and the Senate at the time they

99. David Broder, *Time for a House-Cleaning*, WASH. POST, Dec. 8, 2005, at A33; see *supra* notes 37–38 and accompanying text.

100. See, e.g., Cohen, *supra* note 35, at 2397 (“No transcripts or summaries of the discussions [of conferees] are made public. The only concrete results are the final version of the legislation—called a ‘conference report’—and an accompanying legislative explanation, which often is murky.”).

101. See, e.g., 146 CONG. REC. S11,395–98 (daily ed. Oct. 31, 2000) (statement of Sen. Feingold) (objecting to inclusion of provisions in bankruptcy bill which benefit “big banks and credit card companies” that were added by “backroom conference committee . . . accountable to none but themselves, and open to observation by none but themselves.”).

102. See Editorial, *Legislation by Stealth*, PLAIN DEALER (Cleveland, OH), Dec. 9, 2002, at B6 (describing Eli Lilly provision as “stealth amendment whose author refuses to come forward”). After the provision came under unrelenting criticism, then-Representative Dick Armey, at that point a lame duck whose term would end the next month, belatedly took responsibility for the measure. Many, though, doubt whether Armey was actually responsible for the provision and, because of the secrecy of conference committee proceedings, no one has been able to confirm who placed the rent-seeking measure in the conference committee report. See Maureen Groppe, *Senate to Repeal Liability Protection for Lilly*, J. & Courier (Lafayette, IN), Jan. 11, 2003, at 1A; Tom Diemer, *GOP Can't Recall Who Slipped Eli Lilly a Favor in Security Bill*, PLAIN DEALER (Cleveland, OH), Dec. 5, 2002, at A1 (“Since minutes are not kept on such matters, it has not been possible to trace the specific author through a paper trail. But Armey’s office says that if responsibility is needed, the retiring Texan will take it.”).

vote on a conference report. This is the result of two trends—the growing practice of legislating through omnibus measures and the increasing tendency to give members, particularly in the House but in the Senate as well, very limited amounts of time to review the massive conference reports before voting on them.¹⁰³ The considerable size and complexity of many conference reports mean that members are often unaware that the reports contain special interest provisions they find objectionable.¹⁰⁴ For instance, the provision giving \$50 billion in tax breaks to tobacco companies discussed above was inserted on page 322 of an 809-page tax bill.¹⁰⁵ It amounted to only forty-seven words.¹⁰⁶ As a result, many members of Congress had no idea that the bill included the highly controversial provision, and were outraged when they later discovered that they had unintentionally voted for it when they approved the overall tax bill.¹⁰⁷ During consideration of an omnibus appropriations bill in 1998, the late Senator Daniel Patrick Moynihan cautioned his colleagues in the House and the Senate about this troubling dynamic. He highlighted how the length of the conference report, which was not particularly notable in comparison to other recent legislation, made it impossible for “any Senator or Representative to know what’s in that monster bill when it is passed—as is now inevitable.”¹⁰⁸ He further noted that the practice of legislating through such omnibus measures meant that “we continue to discover items that mysteriously found their way into—or out of—the text long after the agreement was announced.”¹⁰⁹

103. See *supra* notes 48–53, 77–80 and accompanying text.

104. See Garrett, *supra* note 80, at 6 (“[L]egislative ignorance dominates the consideration of omnibus bills.”); see also 150 CONG. REC. S11,715–16 (daily ed. Nov. 20, 2004) (statement of Sen. Conrad) (noting in discussion of omnibus appropriation bill that “[t]here is nobody here, other than those who have been in the room, who can understand what is in this bill. If we gave our colleagues a quiz on what is contained here, I do not think very many of them would pass.”).

105. Holland, *supra* note 98, at A10.

106. *Id.*

107. See *id.* at A1 (“Sen. Susan Collins, R-Maine, a first-term senator, recalls . . . reading a Capitol Hill newsletter to learn to her shock that she had inadvertently voted for the tobacco tax break. . . . Rep. Robert Matsui, D-Calif., said lawmakers ‘got tricked’ by the Republican leaders and top White House officials who did the deed without telling others in Congress.”).

108. 144 CONG. REC. 27,481 (1998) (statement of Sen. Moynihan). As Krutz recounts, Senator Robert Byrd made a similar statement when someone inquired about the provisions of a Fiscal Year 1998 Omnibus Appropriations measure: “When asked about the contents of the October 1998 omnibus funds package, Senator Robert Byrd (D-WV) replied, ‘Do I know what’s in this bill? Are you kidding? No. Only God knows what’s in this monstrosity.’” KRUTZ, *supra* note 83, at 2.

109. 144 CONG. REC. 27,481 (1998) (statement of Sen. Moynihan).

The problem of omnibus measures obscuring special interest provisions inserted during the conference committees is even more acute in the House, where the leadership ensures that representatives do not have sufficient time to review conference reports by manipulating the chamber rules regulating floor consideration of such reports. As discussed above, the House leadership often has the Rules Committee report rules for the consideration of conference reports that waive all points of order, including those related to the required three-day layover, and thus allow votes on conference reports to be scheduled mere hours after the reports are filed.¹¹⁰ The result is that House members are frequently unaware of the special interest-promoting provisions included in conference reports when voting on them. One of the most egregious examples of this practice involved the Medicare bill enacted in 2003. Various special interest groups, particularly pharmaceutical drug and health insurance companies, were reported to have strongly lobbied members of the conference committee, who satisfied many of their requests.¹¹¹ The committee, for instance, eliminated a provision from the measure which would have permitted drug reimportation (a priority for the drug companies)¹¹² and agreed to dramatically increase Medicare reimbursement rates (a priority for the insurance companies).¹¹³ It issued an 850-page report, which was filed in the House at 1:17 a.m. and passed within twenty-nine hours.¹¹⁴ Almost a year later, members of the House said they were “still finding items in the Medicare package . . . that they find objectionable.”¹¹⁵

Although the timing issues are most pressing in the House because of the control the leadership exercises over floor debate, they

110. See *supra* notes 48–52 and accompanying text.

111. See Christopher Rowland, *Medicare Bill a Study in D.C. Spoils System*, BOSTON GLOBE, Oct. 5, 2004, at A1.

112. See *Fresh Off 2003 Victories, Pharma Faces New Challenges*, THE FOOD & DRUG LETTER, Dec. 19, 2003. (“[D]espite a groundswell of grassroots support for drug reimportation, a provision that would have allowed the practice was stripped out of the final Medicare Rx conference committee bill. The original Senate version allowed for reimportation from Canada without safety certification by HHS Secretary Tommy Thompson. The final bill, however, kept the certification provision intact, as it was in past reimportation bills.”).

113. See Rowland, *supra* note 111, at A1 (“In the end, the conference committee gave a big boost to Medicare rates for insurance plans in 2004 and beyond, by an amount now estimated by the administration to be worth \$34 billion over 10 years. Republicans also added a \$12 billion fund for the administration to offer additional incentives to attract insurance companies to Medicare in regions where they otherwise would show no interest.”).

114. 140 CONG. REC. H11,877 (daily ed. Nov. 20, 2003); 140 CONG. REC. H12295 (daily ed. Nov. 21, 2003); see also HOUSE RULES COMMITTEE MINORITY OFFICE, *supra* note 48, at 42.

115. Milligan, *supra* note 40, at A1.

also arise in the Senate. While senators typically have the right to insist on unlimited debate for the consideration of conference reports (subject to cloture),¹¹⁶ they often voluntarily limit the amount of time devoted to debates over measures that they are voting on at the end of sessions of Congress.¹¹⁷ Because the large and complex omnibus appropriations measures often are not voted on until this later point in a session,¹¹⁸ senators often voluntarily restrict the amount of time they have to review such measures before they vote. As a result, like their colleagues in the House, senators frequently do not have the time to review all the provisions of massive conference reports before voting at the end of sessions.¹¹⁹

The potential for these self-imposed limitations to lead unaware senators to vote for highly objectionable provisions was highlighted during the Senate's consideration of the 2005 Omnibus Appropriations conference report. After the House passed the conference report,

116. See JUDY SCHNEIDER, *HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON*, CRS REP. NO. RL30945, at 8 (2005).

117. *Id.* (“[I]t would be impossible for the Senate to act on legislation in a timely fashion if Senators always exercised their right to extended debate. For this reason, the Senate often agrees to debate restrictions as set forth in complex unanimous consent agreements.”); see also *infra* note 119 (statement of Sen. McCain).

118. See *infra* note 119.

119. See, e.g., SINCLAIR, *supra* note 5, at 66 (“Since many conference committees finish their work late in a Congress when everyone works under severe time constraints, senators and representatives not on a conference committee often lack the time to study the conference report and thus to be able to challenge it.”); 150 CONG. REC. S11,718 (daily ed. Nov. 20, 2004) (statement of Sen. Durbin) (noting in discussion of omnibus appropriations report that “by waiting until the end of the session to put all of this in front of Members of Congress, it becomes literally impossible for us to meet our responsibility to say to the voters we represent that we know what is here . . .”). During a debate over the 2005 Omnibus Appropriations conference report, Senator McCain made comments which suggest why senators often do not devote more time to reviewing omnibus measures even though it is within their prerogative to do so:

Here we are, everybody trying to get home for the Thanksgiving recess, and we are going to debate and vote on this “as quickly as we can” and anybody who extends the debate is being terribly unfair to their colleagues. I have already had four colleagues who have airline reservations come up to me and say: Please don’t talk too long this time; you’re not going to hold up this bill, are you? . . . [The omnibus appropriations bill] always is considered at the last minute before we go out or the last hour or the last 2 hours. Why? Because the members of the Appropriations Committee know it will not bear scrutiny. . . . [I]f we were going to go out next Monday night, we would be debating this Omnibus bill next Monday night. If we were going out Christmas Eve, we would be debating Christmas Eve. It is in the appropriators’ benefit for us to do it at the last minute.

150 CONG. REC. S11,716, S11,725 (daily ed. Nov. 20, 2004) (statement of Sen. McCain).

a staffer for Senator Kent Conrad discovered that, soon before the House had voted, the conference committee had added a provision allowing the chairmen of the House and Senate Appropriations Committees, or anyone they designated, to access the tax returns of any individual or company and do whatever they wished with the returns without the risk of civil or criminal sanctions.¹²⁰ If not for an industrious Senate staffer, due to time constraints, the Senate, like their colleagues in the House, likely would have approved this highly objectionable provision.¹²¹ It was revealed that the provision had been inserted in the conference report by a staffer without the knowledge of the senior member of the conference committee from either the House or the Senate.¹²² Because the House had already voted for the conference report, it could not be recommitted to the conference to remove the provision.¹²³ The Senate ultimately voted to approve the omnibus measure, but only after senators received assurances from the leadership of both chambers that the offending provision would be removed in subsequent legislation.¹²⁴

120. See 150 CONG. REC. S11,715–16 (daily ed. Nov. 20, 2004) (statement of Sen. Conrad).

121. *Id.* 150 CONG. REC. S11,731 (daily ed. Nov. 20, 2004) (statement of Sen. Conrad) (“We don’t know what is in this bill. There are a handful of people who know what is in this bill. Most of us don’t know what is in this bill. If somebody, some sharp staff had not caught this, we would be making this the law of the land.”).

122. See 150 CONG. REC. S11,720–21 (daily ed. Nov. 20, 2004) (statement of Senator Ted Stevens, chairman of the Senate Appropriations Committee) (“I checked with Chairman Young, Bill Young of the House Appropriations Committee. Neither of us was aware this had been inserted in the bill. It was inserted at the request of one staff to another”); see also Scott Lilly, *When Congress Acts In the Dark of Night, Everyone Loses*, ROLL CALL, Dec. 6, 2004. (“The offending provision was introduced [in the conference report] in an all-night staff negotiation and was discussed between 3 and 5 a.m. on the day before the final 3,000-page document was assembled.”). The Chairman of the House Appropriations Committee learned of the provision shortly before the House voted on the conference report and, at that time, he engaged in an exchange with another congressman on the floor of the House that downplayed its significance. However, few paid attention to their exchange and as a result, when Senator Conrad revealed the existence of the provision to the full Senate, it provoked an outcry demanding that it be removed. See David E. Rosenbaum, *Panel Chief Denies Knowing About Item on Inspecting Tax Returns*, N.Y. TIMES, Nov. 23, 2004, at A22.

123. See Bach, *supra* note 8, at 8–9. Once one chamber approves a conference report, it is considered to have discharged its conferees. This means that the second chamber to vote on the report cannot vote to recommit it to the conference committee since the committee will have disbanded by the time it does so. *Id.*

124. Removing the provision required a somewhat complicated procedure. Because the omnibus measure had been reported out of a conference committee, it could not be amended—senators either had to approve it in its entirety or reject it. Additionally, because the House had already voted for the conference report, it could not be recommitted to the conference to remove the provision. As a result, the Senate’s majority

As various senators noted, the surprise was not that the Senate had almost voted for the conference report unaware of this provision's existence, but rather that the provision was discovered at all. Senator McCain, for example, asked:

[I]s [Senator Conrad] really surprised that something egregious should be in this long package that none of us have seen or read until a few hours ago? Does it really surprise the Senator when we find it packed full of goodies for special interest and policy changes and all kinds of things that are passed into law that otherwise would not bear scrutiny?¹²⁵

Senator Conrad agreed that he was “not surprised there are things in here almost nobody knows about. . . . [T]he system is broken. The system is completely broken when we have 3,000 pages dumped on our desk and we are told to vote in 3 hours.”¹²⁶ Although the controversial tax provision did not constitute a special interest measure *per se*, the process by which it was included in a conference report, passed with virtually no consideration by the House, almost enacted into law by the Senate, and ultimately removed only after overcoming numerous procedural hurdles highlights how the characteristics of modern lawmaking—particularly the unbridled discretion of conference committees—is easily exploited for the benefit of special interests.

Even when members of Congress are aware that a conference committee inserted an interest group-supported provision they oppose or removed an interested group-opposed measure they support, they are nonetheless unlikely to vote against the conference report. The trend of legislating through omnibus measures and conference committees explains this dynamic. As discussed above, megabills often contain “must pass” or highly popular elements.¹²⁷ Because members of Congress must either vote for the entire conference report or reject

and minority leaders worked out a deal under which the Senate approved the omnibus measure and then voted for a separate bill to eliminate the provision. They further agreed that the omnibus measure would be “held at the Senate desk,” which prevents it from being sent to the President for his signature, until the House also approved the separate measure eliminating the provision. The House did so when it came back from the Thanksgiving recess for what had been intended to be a *pro forma* session. The fact that the chambers had to go through such extensive procedural hurdles to remove from the conference report a provision that had virtually no support demonstrates how securing a measure's inclusion in a conference report can be so effective. *See, e.g.*, Dan Morgan, *Aide Takes Blame for Tax Return Provision*, WASH. POST, Dec. 3, 2004, at A1; John Stanton & Susan Davis, *Pro Forma Session Should Suffice To Strike Tax Provision*, CONGRESSDAILY, Nov. 22, 2004.

125. 150 CONG. REC. S11,716 (daily ed. Nov. 20, 2004) (statement of Sen. McCain).

126. 150 CONG. REC. S11,716–17 (daily ed. Nov. 20, 2004) (statement of Sen. Conrad).

127. *See supra* notes 81–82 and accompanying text.

it outright, they are disinclined to vote against it and forsake the features they like (or feel are necessary) in order to reject the interest group-supported provisions they find objectionable.¹²⁸ Discussing the conference report for the 2004 Omnibus Appropriations measure, explored more fully in the case study presented in the next section, Senator Ben Nelson of Nebraska noted how this dynamic can lead a chamber to adopt legislation containing previously-rejected elements. He stated:

Too often, a conference report comes back to us with initiatives never discussed in this body, or worse, with provisions that were rejected outright months, weeks, or even days before. In a conference report, popular or necessary programs can be tied to unpopular or impractical ones, subverting the process by which we should consider legislation.¹²⁹

The interaction between the unamendable nature of conference reports and the increasing tendency to legislate through omnibus measures frequently results in members of Congress being forced to accept legislation that contains controversial provisions favored by special interests—or eliminates popular provisions that interest groups oppose—in order to secure the enactment of its other elements.

V.

CASE STUDY: THE FISCAL YEAR 2004 OMNIBUS APPROPRIATIONS CONFERENCE REPORT

The unprecedented power of conference committees in modern lawmaking and the tendency for that power to be employed on behalf of special interests can be observed in a case study of the 2004 Omnibus Appropriations conference report and, in particular, the fate of measures dealing with broadcast station ownership and with overtime pay rules.

The story of this legislation begins on June 2, 2003, when a divided Federal Communications Commission (FCC) voted to dramatically deregulate the broadcast industry. Among the various measures it adopted, the FCC raised the cap it imposed on the ownership of

128. See Christopher Smith, *Senate Panel May Vote on N-Weapons Research*, SALT LAKE TRIB., Nov. 14, 2004, at A4 (“It’s harder for rank-and-file lawmakers to vote against an omnibus, because it funds many critical and popular programs while shielding more contentious projects from a direct up-or-down vote.”); see also *supra* notes 12–14 and accompanying text.

129. 150 CONG. REC. S103 (daily ed. Jan. 21, 2004) (statement of Sen. Nelson of Nebraska).

broadcast stations.¹³⁰ This portion of the rulemaking was widely perceived to be a sop to media conglomerates Viacom and News Corporation, who had breached the existing caps and strongly lobbied for them to be raised.¹³¹ For this, and other reasons, the FCC's decision provoked a large and vociferous backlash from the public and a somewhat unlikely coalition of public interest groups. Conservative organizations, such as the National Rifle Association and the Christian Coalition, united with liberal groups including the National Organization for Women to oppose the decision.¹³² It also prompted members of Congress who rarely agree, such as Senators Trent Lott and Barbara Boxer, to join together in opposition to the rulemaking.¹³³ In the week following the FCC's announcement, members in both the House and Senate introduced bills that would overturn the FCC's revision of the ownership caps as well as bills that would reverse the entire rulemaking.¹³⁴

The House Appropriations Committee acted on one of these measures when it voted on July 16, 2003, to approve a rider to the Fiscal Year 2004 Commerce, Justice, and State (CJS) appropriations bill that would prevent the FCC from using any of its appropriated funds to enforce the rulemaking which raised the ownership cap for broadcast stations from thirty-five to forty-five percent, thereby leaving the former limit in place. The committee approved the rider by a vote of forty to twenty-five, with eleven Republican members defying their

130. See Jim Kirk, *FCC Eases Restrictions for Media*, CHI. TRIB., June 3, 2003, at 1. In approving the rulemaking, the FCC also voted to relax its rules on media cross-ownership in markets, thus giving companies greater leeway to own multiple types of media outlets, such as broadcast television stations and newspapers, in a single city. It also increased the number of television stations a company could own in a single city. *Id.*

131. See Demetri Sevastopulo, *Senate Begins Fight Over New T.V. Curbs*, FIN. TIMES (London), June 19, 2003, at 9 ("After the decision, Michael Powell, FCC chairman, came under heavy fire from lawmakers and consumer groups, who accused him of pandering to the media giants. Both Viacom, which owns the CBS network, and News Corporation, which owns Fox, were in breach of the 35 percent cap and lobbied strongly for it to be increased.").

132. See William Safire, *Big Media's Silence*, N.Y. TIMES, June 26, 2003, at A33; Jill Zuckman & Frank James, *Left, Right Team Up Against Media Giants*, CHI. TRIB., July 27, 2003, at 1.

133. See Jube Shiver, Jr. et al., *FCC Ruling Puts Rivals on the Same Wavelength*, L.A. TIMES, June 9, 2003, at A1.

134. See, e.g., H.R. 2462, 108th Cong. (2003); see also Edmund Sanders, *Senate Panel Votes to Reject New FCC Rules*, L.A. TIMES, June 20, 2003, at C-1; Shiver, *supra* note 133, at A1 ("At least three other bills have been introduced in the House and Senate that would constrain or reverse other FCC media ownership regulations.").

leadership to vote for the measure.¹³⁵ The next week, the full House of Representatives, by a vote of 400 to 21, approved the Fiscal Year 2004 CJS appropriations bill containing the rider.¹³⁶ The Senate was scheduled to take up the appropriations bill when it returned from its summer recess in September. The day before the Senate considered the measure, a panel of the Third Circuit Court of Appeals granted a stay against the enforcement of the new FCC rules, giving momentum to congressional opponents of the FCC's actions.¹³⁷ The next day, the Senate Appropriations Committee followed its House counterpart and unanimously approved an identical rider to the CJS appropriations measure.¹³⁸ At the time, Senator Ted Stevens, the chairman of the Senate Appropriations Committee, "said he deliberately copied the House language to make it impossible for the F.C.C.'s supporters to strip the provision when the measures are reconciled in a House-Senate conference committee" and asserted "[w]e've taken the issue out of conference."¹³⁹ A few days later, the whole Senate voted to overturn the FCC's entire rulemaking, including the provisions on the ownership caps.¹⁴⁰ The vote was fifty-five to forty, and included a bipartisan coalition of senators.¹⁴¹ Therefore, when the omnibus appropriations measures went to the conference committee in November 2003, both chambers had voted to overturn the FCC's ownership rules.

A similar dynamic occurred with the Bush Administration's proposed revision of overtime pay rules. In March 2003, the administration announced a plan to change the regulations governing overtime

135. See Jacques Steinberg, *House Panel Adds Voice To Opponents Of Media Rule*, N.Y. TIMES, July 17, 2003, at C1.

136. 149 CONG. REC. H7369 (daily ed. July 23, 2003); see also Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1.

137. *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3d Cir. Sept. 3, 2003); see Frank Ahrens, *Court Blocks Media Rules*, WASH. POST, Sept. 4, 2003, at A1.

138. See Stephen Labaton, *Senate Panel Acts to Block TV Ownership Rule*, N.Y. TIMES, Sept. 5, 2003, at C1.

139. *Id.*

140. 149 CONG. REC. S11,519 (daily ed. Sept. 16, 2003); see also Frank James, *FCC Rule Changes Rejected in the Senate*, CHI. TRIB., Sept. 17, 2003, at 1.

141. 149 CONG. REC. S11,519 (daily ed. Sept. 16, 2003); see also Frank James, *FCC Rule Changes Rejected in the Senate*, CHI. TRIB., Sept. 17, 2003, at 1. In voting to overturn the FCC rules, the Senate used a "resolution of disapproval," a seldom-employed legislative device that permits Congress to overturn a federal agency's rulemaking. See Frank Ahrens, *Senate Votes to Block FCC Media Rules*, WASH. POST, Sept. 17, 2003, at A1.

under the Fair Labor Standards Act.¹⁴² The proposed rules changed the criteria for determining who constitutes an executive, administrative, or professional employee, all of whom are exempt from overtime regulations.¹⁴³ These revisions would have made it significantly more difficult for middle- and upper-income white collar workers to qualify for overtime. The proposed changes also increased the number of low-paid workers who would automatically qualify for overtime pay.¹⁴⁴ The rules were widely embraced by business groups, but opposed by labor unions.¹⁴⁵ After unsuccessfully lobbying the Bush Administration to rescind the proposed rules,¹⁴⁶ Democrats in the House offered an amendment to the Labor, Education, and Health and Human Services appropriations bill which would have retained the new rules' expansion of overtime pay for low-income workers but prevented enforcement of the rest of the policy.¹⁴⁷ The House narrowly defeated the amendment, 213 to 210.¹⁴⁸ The Senate, however, voted to adopt an analogous amendment by a fifty-four to forty-five margin, with six Republicans joining all but one Democrat to prevent the administration from implementing the new overtime rules.¹⁴⁹ The House then reversed course and followed the Senate's lead. On October 2, 2003, it voted 221 to 203 to oppose the overtime rules.¹⁵⁰ As a

142. Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 68 Fed. Reg. 15,560 (Mar. 31, 2003); see also Steven Greenhouse, *White House Proposes New Rules for Overtime*, N.Y. TIMES, Mar. 28, 2003, at A11.

143. *Id.*

144. *Id.*

145. See Steven Greenhouse, *Democrats Protest Changes to Overtime Rules*, N.Y. TIMES, July 1, 2003, at A19 ("Many business groups praised the proposals, calling them a needed effort to modernize what they said was a thicket of confusing, obsolete rules. . . . The Democratic lawmakers joined labor unions in opposing the rule changes, asserting that they would reduce take-home pay and free time for many workers.").

146. *Id.* (describing Democrats' unsuccessful lobbying efforts).

147. 149 CONG. REC. H6568 (daily ed. July 10, 2003).

148. 149 CONG. REC. H6579-80 (daily ed. July 10, 2003); see also Juliet Eilperin, *House Votes to Allow Overhaul of Overtime*, WASH. POST, July 11, 2003, at A2.

149. 149 CONG. REC. S11269 (daily ed. Sept. 10, 2003); see also Nick Anderson, *Senate Opposes White House Rewrite of Overtime Rules*, L.A. TIMES, Sept. 11, 2003, at A13.

150. 149 CONG. REC. H9155, H9166 (daily ed. Oct. 2, 2003) (voting to instruct House conferees to insist that Senate amendment regarding overtime compensation be included in conference report); see also Juliet Eilperin, *In a Switch, House Rejects Bush Overtime Proposal*, WASH. POST, Oct. 3, 2003, at A2 ("[The vote] essentially overturns earlier House approval and puts the chamber on record as supporting the Senate, which opposes the new regulations. House-Senate negotiators trying to resolve legislation to fund the Labor Department and other agencies will have difficulty allowing the proposed overtime changes to go forward, lawmakers said."); Klaus Marre, *House Overtime Vote Puts Pressure on the GOP*, THE HILL, Oct. 8, 2003, at 6

result, both chambers were on record as opposing the new overtime rules when the conferees met to reconcile the House and Senate appropriations measures.

Although the riders preventing the FCC from enforcing its revised ownership rules and the Department of Labor from enforcing its revised overtime rules were passed as parts of separate bills, those bills, along with other spending measures, were combined into the Fiscal Year 2004 Omnibus Appropriations Bill.¹⁵¹ A single conference committee, as a result, considered both measures during the reconciliation of various outstanding House and Senate appropriations measures. While it may have seemed that these two measures were assured a place in the conference report because majorities in both chambers had voted for them, the opposition of the Republican leadership in the House and the Senate made their fate uncertain. As is typically the case in the new era of conference committee ascendancy, the leaders of the conference committee—the chairmen of the House and Senate Appropriations Committees—reportedly did the bulk of the substantive work of negotiating the conference report, with assistance from other senior Republicans on the conference committee and the Republican leadership in the House and Senate.¹⁵²

This subset of officials who controlled the conference report ultimately chose to flout the wills of the parent chambers and included neither the broadcast ownership nor the overtime pay measures in the conference report. Instead of the thirty-five percent cap on broadcast

(quoting House Appropriations Committee staffer as saying “[s]omebody would have a lot of explaining to do” if amendment preventing Department of Labor from enforcing new overtime rules was not included in conference report because it is difficult to remove “a measure that makes it into both bills”).

151. The overtime measure was passed as part of the Education, Labor, Health and Human Services appropriations bill and the broadcast measure was passed as part of the CJS appropriations bill. These two appropriations bills were combined with the Agriculture, District of Columbia, and Veterans Affairs-Housing and Urban Development appropriations bills into the Fiscal Year 2004 Omnibus Appropriations Bill. See Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. (1st Sess. 2003); see also Klaus Marre, *Omnibus Conference Starting Slowly*, THE HILL, Nov. 19, 2003, at 4.

152. See Peter Cohn, *Appropriators Still Struggling Over Terms Of FY04 Omnibus*, CONGRESSDAILY, Nov. 20, 2003 (noting that “Senate Labor-HHS Appropriations Subcommittee Chairman Arlen Specter, R-Pa., met with [Senate Appropriations Committee Chair Ted] Stevens and Senate Majority Leader Frist today to discuss the matter [of the overtime pay rules] but failed to resolve it.”); *All Things Considered* (N.P.R. radio broadcast, Nov. 20, 2003) (“Right now, [the omnibus bill is] kind of in the backroom phase of legislation. The Conference Committee that normally handles something like this has done what it’s going to do. Now it’s down to the chairmen of the committee—there’s two chairmen, one from the House, one from the Senate—the leadership of the House and Senate.”).

station ownership approved by both the House and Senate, a provision was inserted in conference imposing a thirty-nine percent cap.¹⁵³ This provision allowed Viacom and News Corporation, which had exceeded the previous caps by buying stations reaching thirty-nine percent of the country, to retain all their television stations.¹⁵⁴ This decision seemed particularly egregious because Democratic conferees had been assured that the thirty-five percent cap would be included in the conference report.¹⁵⁵ The conference committee dropped altogether the limitation on the Labor Department's enforcement of portions of its new overtime regulations.¹⁵⁶

The decision of the leaders of the conference committee to drop the media ownership cap and overtime pay measures provoked outrage among the provisions' supporters. In the Senate, which held extended debate on the omnibus measure, numerous senators voiced their objections to both the end result of the conference report and the process which generated it. Senator Robert Byrd, for instance, who served as a conferee, described the process by which the conference report was negotiated—and strongly objected to it.¹⁵⁷ He discussed how after an initial open meeting with all the conferees at which some actual negotiating surprisingly occurred, the leaders of the conference committee and the majority party leadership in the House and Senate decided to conduct the rest of the conference negotiations among themselves, behind closed doors. Criticizing this process, Senator Byrd stated, “In the back rooms of the Capitol, the White House sat down with the Republican leadership and with fat-cat lobbyists representing big corporations and produced an unamendable 1,182-page, \$328 billion conference report. They produced a conference report that turned the legislative process on its head. . . . [P]rovisions that were approved by both the House and Senate have been dropped.”¹⁵⁸

During the debate on the omnibus spending measure, Senator Byron Dorgan also objected to the process by which the overtime pay

153. H.R. REP. NO. 108-401, at 98 (2003) (conf. rep.); see also, Nick Anderson, *Deal on Media Could Bring Passage of Spending Bill*, L.A. TIMES, NOV. 25, 2003, at A23.

154. *Id.*

155. See Frank Ahrens, *Democrats Decry 'Compromise' on FCC Rule*, WASH. POST, NOV. 26, 2003, at E1 (“Sen. Byron L. Dorgan (D-N.D.) . . . was a conferee on the House and Senate committee considering the spending bill. He was told that Stevens's 35 percent rider was intact in the spending bill and that that section of the bill had been closed to debate.”).

156. See, e.g., Eric Pianin, *Congress Drops Fight for Overtime*, WASH. POST, NOV. 22, 2003, at A2.

157. 150 CONG. REC. S77 (daily ed. Jan. 21, 2004) (statement of Sen. Byrd).

158. *Id.*

and media ownership cap provisions were removed.¹⁵⁹ He noted that the House and Senate, on a bipartisan basis, had voted to prevent the Department of Labor from enforcing the new overtime rules, but in a “closed room, [the majority] took that provision out. It was bipartisan, voted on in both the House and Senate, but big business didn’t like it, so it is gone.”¹⁶⁰ Senator Dorgan, who was a conferee, further described how the conference committee as a whole had agreed to include the thirty-five percent broadcast station ownership cap in the conference report, but the conference committee leaders subsequently chose to ignore that agreement when writing the final conference report. He stated, “Somewhere in a closed room, with just a few folks deciding, they abridged the decision by the House, the decision by the Senate, and explicit decision by the conference committee of which I was a member, with respect to broadcast ownership in television.”¹⁶¹

The criticism of the conference committee’s work came not just from members of the minority party. Senator McCain also strongly objected to the conference committee’s decision to disregard the thirty-five percent broadcast station ownership cap approved by both houses. He asserted that the thirty-nine percent cap instituted by the conference committee:

is objectionable because while purporting to address public concerns about excessive media consolidation, it really only addresses the concerns of special interests. It is no coincidence, my friends, that the 39 percent is the exact ownership percentage of Viacom and CBS. Why did they pick 39 percent? So that these two major conglomerates would be grandfathered in They pandered to a special interest, Viacom and CBS, and grandfathered them in.¹⁶²

Despite the fact that the conference committee blatantly ignored the wishes of the House and Senate, the two chambers nonetheless approved the omnibus measure.¹⁶³ As then-Senate Minority Leader Tom Daschle noted, because the consequences of not passing the conference report were so severe, members were not willing to defeat it

159. 150 CONG. REC. S67 (daily ed. Jan. 21, 2004) (statement of Sen. Dorgan).

160. *Id.*

161. *Id.* at S68.

162. 150 CONG. REC. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain).

163. 150 CONG. REC. S156 (daily ed. Jan. 22, 2004); 149 CONG. REC. H12,845 (daily ed. Dec. 8, 2003); *see also* Dan Morgan, *House Passes \$328 Billion Spending Bill*, WASH. POST, Dec. 9, 2003, at A1 (describing House passage of omnibus spending measure by vote of 242 to 176); Richard Simon, *Senate OKs \$328.5-Billion Spending Bill*, L.A. TIMES, Jan. 23, 2004, at A14 (describing Senate passage of omnibus spending measure by vote of sixty-five to twenty-eight and noting measure “allows the administration to move ahead with controversial rules that would limit overtime pay and let big media companies buy more TV stations . . .”).

even though the conference committee had disregarded the decisions of the House and Senate. Then-Senator Daschle stated, “[t]oo much is riding on all these appropriations. . . . We’re certainly not going to shut the government down.”¹⁶⁴ Congress’s approval demonstrates the extent of conference committees’ power when it comes to “must-pass” legislation. Because the conference report contained numerous elements critical to running the government, it was all but impossible for members to vote against it, no matter what liberties the leaders of the conference committee had taken in drafting the conference report.

The process by which the conference report for the Fiscal Year 2004 Omnibus Appropriations measure was crafted and approved highlights the unprecedented power now enjoyed by those who control conference committees, particularly the senior members of the committees and the majority party leadership in both houses. It also shows how that power can be, and often is, exploited to further the causes of special interests.

VI.

PROPOSED CANON

Congress has proven itself unwilling to address the fundamental changes in the nature of lawmaking described in this Article and the consequences of these developments for enacted legislation. In the absence of self-correcting action by Congress, courts must adopt a new approach to statutory interpretation that is cognizant of this transformation and interprets statutes in light of it. The canon proposed by this Article takes account of the significant changes in lawmaking that have accompanied the rise of conference committee dominance and seeks to address both the undue accrual of power by those who control conference committees and the tendency for this power to be employed on behalf of special interests. If applied by courts, the canon would facilitate the realignment of power dynamics among conference committees and the House and Senate so that instead of the former institution dominating the latter two, conference committees would again become meaningful agents of the parent chambers. The canon would also cabin the essentially unrestricted ability of conference committee leaders to enact rent-seeking provisions and reinvigorate the steps of the legislative process that the Constitution envisions as obstacles to the passage of such measures. This section lays out how this canon would be applied and explains why, considering both its

164. David Rogers, *Bush \$820 Billion Spending Bill Likely to Clear Congress Today*, WALL ST. J., Jan. 22, 2004, at B2.

advantages and disadvantages, it should be adopted by courts. Then, using an example of a case that turned on the interpretation of a statutory provision added by a conference committee, this section demonstrates the dramatic effect the canon would have on the resolution of judicial decisions involving such measures.

A. *The Elements of the Canon*

The proposed canon would be applied to all bills reconciled using the conference committee process (as opposed to one of the two other methods of reconciliation).¹⁶⁵ It would initially require judges to determine if an enacted statute was passed using a conference committee. If so, the canon would then mandate that the court compare the text of the ultimately enacted statute, which was written by the conference committee (or, more likely, those few individuals that control the conference committee), with the text of the versions passed by the House and the Senate. Finally, the canon would call on courts to narrowly construe any provision found in the enacted text but not present in both the House and Senate versions.

This canon offers numerous advantages in terms of its capacity to address the problems engendered by conference committee dominance. First, it cabins the power of conference committees and their leaders by limiting the scope of legislative provisions included at the conference stage that were not previously passed by both the House and the Senate. Legislative provisions inserted at the conference stage (or at the conference stage after passage by only one house) would no longer be considered the equivalent of legislation passed by both chambers prior to the conference. The canon would privilege legislation enacted through the traditional lawmaking process over measures crafted at the conference committee stage. By doing so, the canon would reduce the ability of conference committees to function as essentially their own chamber, on par with the House and Senate, because measures that conference committees insert on their own, or with the support of just one house, would not have the same force and effect as measures passed by both chambers before the conference stage. Since canons are applied only to legislation that comes before courts and not to all statutes, the proposed canon would not completely eliminate the undue influence conference committees have acquired in recent years. Nonetheless, through its application to specific statutes by courts as well as through the broader pressure it would

165. See *supra* notes 9–11 and accompanying text (explaining how the conference committee process is most common method of reconciliation for major legislation).

create on all statutes because of the risk of judicial review, the canon would limit the power of conference committees and restore the proper balance between conference committees, the House, and the Senate.

Second, the canon would not only limit the discretion conference committees exercise at the expense of the parent chambers, but also would create incentives for outside groups to pressure Congress to use traditional lawmaking procedures. In order to guarantee the full effect of a measure, its supporters would need to ensure that it passed both the House and the Senate prior to the conference committee. Therefore, interest groups that want particular rent-seeking provisions enacted could no longer rely on sympathetic conferees adding them during the conference committee stage. Interest groups would be forced to apply their influence to getting their favored provisions passed through traditional procedures. Because interest groups inevitably will seek passage of measures that benefit them through the most efficacious means, the canon would leverage the hydraulic force of interest group pressure to encourage the increased use of traditional lawmaking procedures.

Third, the dynamics generated by the application of the canon would also make it more costly—both for interest groups and for legislators—to secure the enactment of narrow, rent-seeking legislation. Getting something passed by a full chamber, much less both chambers, is significantly more difficult than having it adopted by a conference committee, particularly when those committees are controlled by a small handful of members. In order for a measure to be adopted in either the House or the Senate, it needs to secure the support of a majority of the members of the chamber (or, in the case of the Senate, often a supermajority¹⁶⁶). On the other hand, because conference reports are almost always adopted by the House and the Senate even when they contain objectionable provisions for reasons discussed above,¹⁶⁷ a measure need only have the support of a majority of each chamber's conferees—which is significantly fewer people than a majority in either chamber—to be enacted into law. Moreover, since conference reports are often crafted not by the conference committee as a whole but by the small handful of members who control them,¹⁶⁸ a measure often needs the support of only a single member of Con-

166. In the Senate, a measure often needs the support of a supermajority, particularly if it is controversial, because of the ability of a single senator to filibuster legislation. Such filibusters can only be ended by a vote of sixty senators for cloture.

167. See *supra* notes 12–14, 77–83 and accompanying text.

168. See *supra* notes 41, 90, and 95 and accompanying text.

gress to be passed. While under today's prevailing system, interest groups can essentially guarantee the enactment of favored provisions by securing the support of a small number of members, or even a single one, the canon would force interest groups to seek support for their favored provisions from majorities in both houses of Congress to ensure the measures had their full effect. As a result, it would increase both the cost and the difficulty for interest groups of securing enactment of rent-seeking measures.

This dynamic would also increase the cost for legislators of supporting legislation which has the sole purpose of benefiting interest groups, as well as facilitate the public's ability to hold legislators accountable for backing such measures. Because the workings of conference committees are almost entirely secret,¹⁶⁹ objectionable provisions sought by interest groups can be added to legislation in conference committees without any legislator taking public responsibility (and often without members of Congress or the public even knowing that the provision is in the legislation at all). Consequently, a legislator can seek to have a measure added to the conference report with little fear that her support will ever be publicly revealed. She therefore does not have to consider whether the benefits of backing the measure outweigh the potential loss of voter support that would result if her constituents were aware of her sponsorship. However, since the canon requires that both the House and the Senate pass measures before the conference stage for them to have full effect and reach, legislators committed to interest group-promoting legislation would no longer be able to hide behind a conference committee. At least one supportive legislator in each house would be required to publicly propose and support the measure. As a result, it would be possible for the public to determine who promoted interest group-benefiting legislation and hold them accountable for their actions. The need for at least one member to publicly support legislation in order to ensure it has its full effect when interpreted by the courts—and the concomitant risk for legislators that they may be held accountable by voters for this support—would dramatically increase the cost for legislators of backing these measures. Their overall incentives to sponsor this type of legislation would therefore decrease, likely reducing the overall number of such measures enacted.

Fourth, unlike other proposed judicial approaches for limiting the occurrence and effect of rent-seeking legislation, this canon is easy for courts to administer. Judge Easterbrook, for instance, offers one

169. See *supra* notes 37–38 and accompanying text.

other approach. In order to determine whether a statute is private-interest legislation that should be narrowly construed, he advocates that courts delve deeply into the background of a statute, looking for indicators of rent-seeking as well as at elements of the process by which it was enacted including “[w]ho lobbied for the legislation? What deals were struck in the cloakrooms? Who demanded what and who gave up what?”¹⁷⁰ Judge Easterbrook suggests courts should then use this information to determine how broadly they will construe a statute.¹⁷¹ Such an approach would be very difficult for courts to implement. As one scholar noted, Judge Easterbrook’s approach essentially requires courts to be “investigative reporters”¹⁷²—a task for which they are not well suited. The proposed canon, on the other hand, imposes no such burden on courts. Instead, judges would need only to compare the readily available texts of the conference reports with the versions of the legislation originally passed by the House and the Senate.¹⁷³

Although the canon would require judges to look beyond the text of statutes when interpreting them, the use of legislative history that the canon entails avoids many of the common objections that textualists raise to the reliance on legislative history in the process of statutory construction. The arguments textualists typically make against the use of legislative history fall into two broad categories.¹⁷⁴ The first relates to whether legislative history is an authoritative reflection of congressional intent. In a critique of one of the most relied upon forms of legislative history, Justice Scalia argued, “[t]he only conceivable basis for considering committee reports authoritative, therefore, is that they are a genuine indication of the will of the entire house—which . . . they assuredly are not.”¹⁷⁵ This aspect of the textualist critique of legislative history does not apply to use of legislative history dictated by the canon. Unlike committee reports which are ratified by a subset of the House or Senate (or sponsor statements, which are approved by only a single member), the type of legislative history

170. Frank H. Easterbrook, Foreword, *The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984).

171. *Id.*

172. Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 239 (1986).

173. Today, this information is easily accessible on the Library of Congress’s Thomas website. See Library of Congress, Thomas, at <http://thomas.loc.gov>.

174. See *The Supreme Court, 2004 Term – Leading Cases*, 119 HARV. L. REV. 317, 324 & n.53 (2005).

175. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35 (1997); see also *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279–80 (1996) (Scalia, J., concurring).

that the canon requires courts to use—the text of a bill as passed by each chamber before it goes to conference—must be ratified by a majority of a chamber as a whole, and thus indisputably reflects “the will of the entire house.” Similarly, the type of legislative history that the canon depends on is not susceptible to the oft-levied criticism that “[i]n any major piece of legislation, the legislative history is extensive, and there is something for everybody. . . . [T]he trick is to look over the heads of the crowd and pick out your friends.”¹⁷⁶ Under the canon, only two pieces of legislative history are relevant when assessing statutes enacted through conference committee legislating: the text of a bill as passed by the House before conference and the text of a bill as passed by the Senate before conference. As such, the use of legislative history involved in applying the canon would be strictly circumscribed and impose meaningful constraints on courts’ interpretation of statutes.

The second broad category of the textualist critique argues that the use of any legislative materials beyond the final text of a law violates the Constitution because courts are only permitted to utilize those materials which have satisfied the bicameralism and presentment requirements of Article I, Section 7 when interpreting a statute.¹⁷⁷ As explained by Professor John Manning, the importance of courts relying exclusively on such materials when interpreting statutes is rooted in three principles:

First, by dividing the legislative power between two chambers, bicameralism and presentment make it more difficult for factions to usurp legislative authority, ensuring a diffusion of governmental power and preserving the liberty and security of the governed. Second, the requirements of Article I, Section 7 promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation. Third, by relying on multiple, potentially antagonistic constitutional decisionmakers, the legislative process prescribed by Article I often produces conflict and friction, enhancing the prospects for a full and open discussion of matters of public import.¹⁷⁸

Because it considers only legislative materials that have undergone the “cumbersome” Article I, Section 7 process to be relevant to

176. SCALIA, *supra* note 175, at 36.

177. See William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 654 (1990).

178. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–09 (1997).

statutory interpretation, textualism, according to Manning and other proponents, vindicates these principles, whereas allowing legislative history to inform statutory interpretation would undermine them. In the textualists' view, when courts treat materials such as committee reports and sponsor statements as authoritative indicators of a statute's meaning, they essentially allow legislators to make law without overcoming the "difficult" and "inefficien[t]" Article I, Section 7 process.¹⁷⁹ Thus, such courts remove the constitutionally imposed barriers which: (1) impede factions from securing legislation that advances their interests at the expense of the majority, (2) reduce the occurrence of "hasty and ill-considered legislation," and (3) ensure that multiple parties are involved in crafting and debating statutes.¹⁸⁰

However, when judges employ the pure textualist approach in interpreting statutes enacted through conference committee legislating, courts do not vindicate—but, in fact, undermine—these principles. Conference committee legislating, as the discussion in Parts IV–V makes clear, often produces statutes containing provisions which reward factions (i.e., special interests) at the expense of the general interest and are typically added at the last minute by a few members of Congress with little debate or deliberation. As a result, by treating only the final text of statutes enacted through conference committee legislating as authoritative and ignoring all legislative history, including the texts of the bill as passed by the House and by the Senate before conference, a court employing the pure textualist approach would protect the very type of statute (and process of legislating) that textualism is allegedly intended to guard against. On the other hand, by comparing the final text of such a statute with limited legislative history and construing narrowly any provision in the enacted statute which was not in the texts passed by both chambers prior to conference, as required by the canon, a court would further the principles that provide one of the primary justifications for the use of textualism.¹⁸¹ When it comes to statutes enacted through conference committee legislating, the canon's method, involving the limited use of

179. *Id.* at 707 ("When . . . the Court gives authoritative weight to a committee's subjective understanding of statutory meaning (announced outside the statutory text), it empowers Congress to specify statutory details—without the structurally-mandated cost of getting two Houses of Congress and the President to approve them.")

180. *Id.* at 706–39.

181. *Id.* at 708 (justifying textualism by invoking "importance of adopting interpretive rules designed to preserve the integrity of the constitutionally prescribed legislative process").

legislative history, does more to vindicate the principles that textualists claim underlie their approach than textualism itself does.¹⁸²

Although this canon offers numerous advantages, it is not without its downsides. Because the canon requires that any provision included in the conference committee version of a piece of legislation be narrowly construed unless it was passed by *both* chambers, there is a risk it may lead a court to unnecessarily apply the limiting construction meant for special interest provisions to a measure passed by only one chamber or even added at the conference committee stage that is in fact in the public interest. However, this is a risk worth taking. In the event that the conference committee adds a provision that promotes the public interest which was not included in the House or Senate versions of a piece of legislation, Congress can respond to a court's narrow interpretation by having both the House and Senate individually pass legislation including the public interest provision. If the provision is truly public interest-promoting, members of Congress will not mind the "publicity that surrounds any congressional overruling of a court decision."¹⁸³ If, as would more likely be the case, the provision is not public interest-promoting, then the additional burden of having each house pass the provision and the publicity that entails would provide an appropriate disincentive to Congress enacting such rent-seeking legislation, thereby outweighing the canon's potentially over-inclusive reach.

182. Two defenses of textualism stem from these principles: one, that it serves as a "nondelegation doctrine," and, two, that it increases the accountability of legislators. See, e.g., *id.* at 695 ("Textualism, in short, purports to operate as a nondelegation doctrine."); *id.* at 738 ("Textualism's simple ambition is to require legislators to accept responsibility for their legislative acts."). Similar to its relationship to the more general principles that justify the use of textualism in statutory interpretation, the canon also does more to advance nondelegation and legislator accountability than pure textualism when it comes to statutes enacted through conference committee legislating. As to nondelegation, by limiting the effect of provisions drafted by the subset of congressional officials who typically control conference committees, the canon curtails the ability of Congress to essentially delegate lawmaking authority to that subset. On the other hand, when courts interpret such statutes using a purely textualist approach—that is, when they consider only the text of the statute as enacted and ignore the texts of the bill as passed by each chamber before conference—they enable the delegation of lawmaking authority to a subset of Congress. As to accountability, a purely textualist approach would give full effect to the conference committee-drafted text of a statute, even though many of its provisions were drafted behind closed doors and are packaged in a way that makes it impossible for constituents to hold individual legislators responsible for their votes. On the other hand, the canon, by requiring at least one supportive legislator in the House and the Senate to publicly propose and support a measure in order for a court to give it full reach and effect, enhances the ability of the public to determine who promoted interest group-benefiting legislation and hold those legislators accountable for their actions.

183. See Macey, *supra* note 172, at 255.

Moreover, even in light of the difficulties involved in passing legislation that enjoys widespread support,¹⁸⁴ this possible downside of the canon does not offset its potential to mitigate some of the more egregious abuses of legislative procedure that have occurred in the new era of conference committee ascendancy. For instance, this canon would discourage the practice recently adopted by members of the majority party of supporting any form of legislation on a particular topic during initial committee consideration or on the floor, even when they are deeply opposed to its provisions, in order to get it to a conference committee where it can be completely rewritten to reflect their views, as was done with the energy bill explored in an earlier section.¹⁸⁵

Furthermore, the canon would undercut the utility of using amendments in the nature of a substitute as a means for enacting measures that would never pass both houses on their own. As discussed above, under the formal rules of the House and the Senate, conference committees technically have the greatest discretion when one of the bills sent to the conference is an amendment in the nature of a substitute.¹⁸⁶ Thus, in situations where, for example, the leadership of the Senate wants to see some of the aspects of a bill first passed by the House enacted into law but also wants to use the conference report as a means to secure the enactment of extraneous provisions that would never pass as stand-alone measures, there is a temptation for the Senate to pass a bill that is an amendment in the nature of a substitute. Under the current regime, using this technique allows the conference committee to include the portions of the House bill that the leadership in both chambers support, while also including the extraneous provisions sought by the leadership in the Senate. If the canon was implemented by courts, however, this legislative maneuvering would no longer be as attractive; conference committees' power in situations involving the reconciliation of an amendment in the nature of a substitute would be particularly limited because whatever legislation resulted would be narrowly construed in its entirety (due to the fact that there would be no provision that the House and the Senate had technically both enacted). This means that the extraneous provisions the Senate leadership inserted in the conference report would be construed

184. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66–67 (3d ed. 2001) (describing “vetogates”—“choke points” in the legislative process).

185. See *supra* note 97 and accompanying text.

186. See *supra* notes 30–34 and 60 and accompanying text.

narrowly, and that the provisions passed by the House that the Senate leadership also wanted enacted would be narrowly construed as well. In other words, by using this technique under a regime governed by this Article's canon, the leadership in the Senate would forsake the opportunity to have the provisions on which both chambers agree robustly enforced by the courts without much of an upside for the extraneous provisions they wanted to see enacted.

Thus, on balance, this canon would go a long way toward restricting the unprecedented power now exercised by conference committees and addressing the tendency of this power to be exploited on behalf of special interests. In addition, it would create incentives for Congress to once again rely on traditional lawmaking procedures and thus facilitate the restoration of the proper balance of power among conference committees, the House, and the Senate.

*B. The Canon's Effect on Judicial Decisions:
An Example Application*

This canon, if adopted, would have a dramatic impact on the outcomes of cases involving statutes enacted using the conference committee process. As demonstrated by the example of *In re Sinclair*¹⁸⁷—a case which turned on a statutory provision added at the request of a special interest by a member of the conference committee—the canon would limit the effect of such provisions and thus the ability of senators and representatives to exploit the conference committee process for the benefit of special interests.

Sinclair involved courts' interpretation of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.¹⁸⁸ This statute went through a fairly typical enactment process. After the bill was reported out of committee, the House approved it and sent it to the Senate.¹⁸⁹ The Senate took up the bill on the floor, at which point a senator proposed an amendment in the nature of a substitute.¹⁹⁰ This amendment replaced the text of the bill approved by the House with the text of related legislation that the Senate had passed earlier that year.¹⁹¹ The Senate adopted the amendment and

187. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

188. Pub. L. No. 99-554, 100 Stat. 3088 (1986).

189. 132 CONG. REC. 20,993 (1986) (statement of presiding officer) (noting H.R. 5316 was passed by the House).

190. *Id.* at 21,897 (statement of Sen. Dole).

191. *Id.* at 21,897 (statement of Sen. Thurmond) (proposing Senate adopt S. Amdt. 2772, which would replace text of pending House bill with text of S. 1923/H.R. 2211); *id.* at 21,982-93 (text of amendment).

the revised bill.¹⁹² It then insisted on its amendment and asked for a conference with the House.¹⁹³ The House disagreed with the Senate amendment and agreed to the request for conference.¹⁹⁴ At the conference, a provision was added to the conference report that was not included in the version of the legislation passed by either the House or the Senate.¹⁹⁵ The provision, section 302(c)(1),¹⁹⁶ addressed the conversion of bankruptcy filings pending at the time of the statute's enactment from a pre-existing part of the bankruptcy code, Chapter 11, to a new part of the code created by the statute, Chapter 12, which was more advantageous for farmers. Section 302(c)(1) limited the overall applicability of the Act, stating that the allowances the statute made for conversions "shall not apply with respect to cases commenced under Title 11 of the United States Code before the effective date of this Act."¹⁹⁷ In other words, it seemed to preclude conversion for pending bankruptcy matters filed under Chapter 11. According to rumors, a Senate staff member added the provision to the conference report at the request of a special interest group—the lending industry¹⁹⁸—presumably because it would limit the reach of a bill that was otherwise unfavorable to lenders in various ways. Indeed, the provision seemed aimed at another part of the statute beneficial to farmers, section 256, which permitted conversion from Chapter 11 to Chapter 12 in situations when it was requested by a debtor and was equitable.¹⁹⁹ The special interest-promoting provision on conversion, buried deep in the statute and unmentioned in the conference report, re-

192. *Id.* at 21,897.

193. *Id.* (statement of Sen. Dole).

194. *Id.* at 22,346 (1986) (statement of presiding officer).

195. Compare Pub. L. No. 99-554, 100 Stat. 3088 (1986) with 132 CONG. REC. 20,981-88 (1986) (text of legislation as passed by House) and 132 CONG. REC. 21,982-93 (1986) (text of legislation as passed by Senate).

196. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(c)(1), 100 Stat. 3088, 3119.

197. *Id.*

198. See ESKRIDGE, FRICKEY, & GARRETT, *supra* note 184, at 962-63.

199. Section 256 of the statute amended the portion of the U.S. Code that deals with conversions of Chapter 11 filings. As amended, that portion of the U.S. Code stated:

- (d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
- (1) the debtor requests such conversion;
 - (2) the debtor has not been discharged under section 1141(d) of this title; and
 - (3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

11 U.S.C. § 1112(d) (2000), amended by Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 256, 100 Stat. 3088, 3114.

mained unnoticed by the statute's supporters at the time they voted for it.²⁰⁰

This provision became the focus of litigation in *Sinclair*, as well as in numerous other cases.²⁰¹ *Sinclair* involved owners of a family farm who had filed a bankruptcy petition under Chapter 11 in April 1985.²⁰² After the enactment of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986,²⁰³ the Sinclairs requested that the bankruptcy court convert their filing from Chapter 11 to Chapter 12.²⁰⁴ The bankruptcy court, in a decision affirmed by the district court, declined to do so, citing section 302(c)(1)—the provision of the Act added during the conference committee.²⁰⁵ The Seventh Circuit upheld the lower court, also giving broad effect to section 302(c)(1) at the expense of another part of the statute, section 256(1), which strongly indicated that conversion was appropriate in the Sinclair's case.²⁰⁶ Thus, under the existing regime of statutory interpretation, the Seventh Circuit expansively interpreted a special interest-promoting provision of the statute despite other parts of the legislation that indicated a more narrow construction of that provision (i.e., one that favored the farmers, not the lenders) was appropriate. As a result, the staff member who added the provision at the request of the lending industry successfully exploited the conference committee process to protect that special interest. Due to the expansive construction the courts gave to section 302(c)(1), the courts forced the Sinclairs to pursue bankruptcy under the portion of the bankruptcy code most advantageous to lenders.²⁰⁷

200. 133 CONG. REC. 3769 (1987) (statement of Sen. Grassley) (stating that “members did not notice” section 302(c)(1)); 133 CONG. REC. E544 (daily ed. Feb. 19, 1987) (statement of Rep. Coelho); see also ESKRIDGE, FRICKEY, & GARRETT, *supra* note 184, at 962–63.

201. 133 CONG. REC. 3769 (1987) (statement of Sen. Grassley) (mentioning cases).

202. *In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989).

203. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(c)(1), 100 Stat. 3088, 3119.

204. *Sinclair*, 870 F.2d at 1341.

205. *Id.*

206. *Id.* at 1345. In fact, in the course of its expansive interpretation of section 302(c)(1), the Seventh Circuit did not even mention section 256(1).

207. Interestingly, in doing so, the court suggested it was aware of how the conference committee process can be exploited to enact provisions that are not broadly supported. The court styled the issue before it as one involving tension between the enacted text and seemingly contrary legislative history. As a result, it devotes the bulk of the opinion to discussing the issue of how a court should reconcile statutory text with conflicting legislative history. It was in this context that the court discussed the possible perversions of conference committee legislating. It stated, “[i]t is easy to imagine opposing forces arriving at the conference armed with their own texts and legislative histories, and in the scramble at the end of session one version slipping into

In a system of statutory interpretation that applied the canon proposed in this Article, this decision would have come out quite differently. Under the alternative interpretive regime, a court, when presented with the Sinclairs' case, would have first determined whether the statute at issue had been reconciled using the conference committee process. Finding that it was, the court would have next ascertained whether the disputed provision—section 302(c)(1)—was included in the texts of the legislation passed by both the House and the Senate or whether it was added during the conference committee. Comparing the final text of the enacted measure with that of the legislation passed by the House and the Senate, the court would have found that section 302(c)(1) was added during conference committee.²⁰⁸ Based on this comparison, the court would have narrowly construed that provision per the rules of the canon. In doing so, the court would have rejected the broad interpretation of section 302(c)(1) that prevented conversion of the Sinclairs' bankruptcy filing—an interpretation which benefited lending interests—and instead narrowly interpreted the provision in light of the other parts of the statute which indicated conversion was appropriate when it was requested by the debtor and was equitable, as it clearly was in this case. Such an interpretation would have limited the effect of section 302(c)(1) and thus undermined the efforts to use the conference committee process to further the concerns of special interests.

VII.

CONCLUSION

The type of lawmaking that has come to dominate Capitol Hill in recent years would be quite unfamiliar to a devotee of *Schoolhouse Rock*²⁰⁹—but it would be a surprise to relatively sophisticated observers of Congress as well. As one senator who had been a professor before joining Congress said in 1998:

I used to teach political science classes. . . . [And] I feel guilty. I need to refund tuition to students for those two weeks I taught classes on the Congress. I was so off in terms of a lot of the decision

the bill and the other into the report.” *Sinclair*, 870 F.2d at 1345. It is worth noting that under the proposed canon, it would be unnecessary for courts to deal with any legislative history beyond the texts of the statutes enacted by each chamber.

208. See *supra* note 195.

209. *Schoolhouse Rock*, the series of educational cartoons that ran on network television in the 1970s and 1980s, famously taught a generation of children “how a bill becomes a law.” See Jennifer Weiner, *Tunes that Teach*, PHILA. INQ., Oct. 14, 1996, at C1.

making. I should have focused on the conference committees as the third House of the Congress²¹⁰

This senator, before his revelation about how the legislative process has fundamentally changed in recent years, was in good company. Political scientists, legal academics, and certainly courts have largely not noticed, or at least not acknowledged, that important legislation is now generated through an essentially tricameral process. The few members that control conference committees exercise almost unfettered, and largely unmonitorable, discretion to craft legislation to their liking, no matter the preferences expressed by majorities in the House and Senate.

This dramatically different process for making laws raises a number of concerns. First, as a result of the widespread failure to recognize that we are in an era of conference committee ascendancy, statutes are too often evaluated based on the assumption that the measures they contain were enacted because they enjoyed the support of the majority of elected representatives. As this Article has demonstrated, that is rarely the case with significant portions of major legislation. Rather, through the subversion of chamber rules and the increasing reliance on unorthodox legislative procedures, the lawmaking process has been fundamentally reshaped in a way that makes it possible to regularly secure the passage of rent-seeking measures benefiting special interests that would stand no chance of being enacted via traditional lawmaking avenues. By failing to recognize these characteristics of many modern statutes, people and institutions, particularly courts, enable these abuses of the legislative process.

Second, the changes in the lawmaking process have occurred through the aggrandizement of the powers of conference committees at the expense of the House and Senate. Due to this development, the balance of power in Congress has shifted in ways that are deeply troubling. Conference committees, an institution that was intended to serve as the agent of the House and Senate, have now become, for all intents and purposes, the superior of those chambers. This already problematic dynamic is exacerbated by the fact that the power of conference committees is exercised almost exclusively by an extremely small group of people—the leaders of those committees and the majority party leadership in the two chambers.

Finally, these changes have not only upset relationships among institutions and members within Congress, they also have disrupted

210. 144 CONG. REC. S7649–50 (daily ed. July 8, 1998) (statement of Sen. Wellstone).

the relationships between members of Congress and their constituents. Legislating by conference committee undermines the ability of voters to hold their representatives in Congress accountable—a cornerstone of republican government. By obscuring who spearheaded the addition of certain provisions to legislation (or, alternatively, the deletion of measures from bills), conference committee legislating renders it nearly impossible for voters to identify who is primarily responsible for these actions and hold them accountable if they so choose. Moreover, because this form of legislating often relies on highly complex bills that combine unpopular provisions or those supported by interest groups with more popular or necessary provisions, it has become increasingly difficult for voters to hold their representatives responsible for voting for the unpopular measures, which would be possible if members voted on measures individually. Under the prevailing system, representatives can always use the popular provisions to justify their vote for the more unpopular elements of a piece of legislation.

By raising awareness that traditional accounts of lawmaking no longer encapsulate the actual legislative process, this Article aims to draw attention to the existence and negative consequences of the triumph of conference committee legislating. Furthermore, by proposing the new canon, the Article offers one way, through courts' ordinary process of statutory interpretation, to stem and potentially reverse the changes engendered by these now dominant lawmaking procedures. The canon, by limiting the effects of legislation enacted through this troubling process and creating incentives for Congress to re-embrace traditional approaches to drafting laws, would go a long way toward addressing the dysfunctions of tricameral legislating.

Conference committees have been described as the “third house” in Congress—and that description has never been more apt than it is today. But if the changes in lawmaking procedures in Congress continue to go largely unnoticed and unaddressed, it may soon be more accurate to refer to conference committees not as the “third house,” but as the “only house”—or at least the only house that matters.