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# Timing and Delegation: A Reply

*Jonathan R. Siegel\**

For two authors who come to such different conclusions, Professor Manning and I agree on a good deal. We agree that courts, in considering whether to consult legislative history in the course of statutory construction, must take heed of the special constitutional rule against congressional self-aggrandizement.<sup>1</sup> Thus, we agree that the Constitution forbids courts to give authoritative weight to post-enactment legislative history,<sup>2</sup> because the effect of such a judicial practice is to permit Congress to delegate a very important power, the power to elaborate the meaning of statutes, to its committees or Members.<sup>3</sup> We also agree, however, that Congress may, by express statement in a statute, validate legislative materials through incorporation by reference, thereby investing such materials with authority.<sup>4</sup> Indeed, inasmuch as we agree that Congress might use such incorporation by reference in *every* statute it passes,<sup>5</sup> I take it we agree that my hypothetical Interpretation of Statutes Act<sup>6</sup> could function constitutionally if only Congress, in

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\* Associate Professor of Law, George Washington University Law School. I would like to thank Professor Manning for engaging in this colloquy. Thanks also to Chip Lupu for his comments on this reply.

1. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1522-23 (2000).

2. In saying that courts should not treat such legislative history as "authoritative," both Professor Manning and I mean that courts must not give such legislative history any weight by virtue of its source. We agree, however, that courts are not forbidden to read legislative history, even post-enactment legislative history; they are free to consider any persuasive argument about the meaning of a statute. Such an argument, if made in post-enactment legislative materials, does not have any *less* value than it would if made elsewhere (say, in a litigant's brief); it simply should not receive any *more* weight either. See John F. Manning, *Putting Legislative History to a Vote*, 53 VAND. L. REV. 1529 n.2 (2000); Siegel, *supra* note 1, at 1476-77.

3. See Siegel, *supra* note 1, at 1522-24.

4. See Manning, *supra* note 2, at 1530 n.7, 1533; Siegel, *supra* note 1, at 1489-97.

5. See Manning, *supra* note 2, at 1534-35, 1541; Siegel, *supra* note 1, at 1495.

6. For the provisions of this hypothetical Act, see Siegel, *supra* note 1, at 1491, 1522.

The sticking point, therefore, is only this: if Congress wants to create a regime in which courts may attribute authority to legislative history, must it do so by including an express statement to that effect in every statute, or may it pass *one* statute that makes this the general rule? Professor Manning inclines to the former view; I, to the latter. In this very brief reply, I have just a couple of comments on this difference between us.

The root cause of our disagreement lies in our different understandings of the importance of timing in delegation doctrine. Professor Manning acknowledges that the Supreme Court's cases concerning congressional self-delegation all deal with delegation of authority to take action *after* enactment of the authority-granting statute, but he regards this point as a mere detail "that does not relate to the reasoning of those cases."<sup>7</sup> I, on the other hand, believe that there is a fundamental difference between a delegation of power to act in the future and a delegation of power to act in the past.<sup>8</sup> Indeed, in my view, not only the established doctrine, but logic and common sense, compel such a difference. The very concept of a delegation is inherently forward-looking. It is hard to see how a legislature could delegate power to act in the past, even if it wanted to. If a legislature, knowing that another body has already taken a certain action, tries to "delegate," to the other body, power to take that very action (not to take a similar action again in the future, but to take the action already taken), the grant of power operates as an adoption or ratification of the action, not as a delegation. That is the lesson of the incorporation by reference cases, which make this point by holding, over and over again, that *static* incorporation by reference is always valid, not because it is a permitted delegation, but because it is not a delegation at all.<sup>9</sup>

The incorporation by reference cases establish that timing is of fundamental importance to delegation doctrine. In light of these cases it should be no surprise that the law should distinguish between permitting a statute's interpretation to be influenced by extrastatutory texts that existed before the statute's passage and granting such influence to texts not written until afterwards. If Congress, by statute, authorized a congressional committee to prepare materials *later* that would authoritatively elaborate the statute's meaning, it would indeed violate the rule against self-

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7. Manning, *supra* note 2, at 1536.

8. See Siegel, *supra* note 1, at 1492.

9. See Siegel, *supra* note 1, at 1480-89.

delegation. By providing that passage of any statute would operate as a ratification or incorporation of *already-existing* materials, however, my hypothetical Interpretation of Statutes Act would draw the sting of Professor Manning's charge that the statute unconstitutionally "authorizes 'a congressional agent to set policy that binds the nation.'"<sup>10</sup> The agent would not be setting policy; Congress would be voting to ratify the agent-prepared texts when passing each statute.<sup>11</sup> The Interpretation of Statutes Act would not "reallocate] lawmaking power from Congress to its legislative subunits,"<sup>12</sup> because legislative adoption of extrinsic materials yields no power from the legislature to the preparer of the materials—provided the materials are fixed *before* the legislative vote adopting them.<sup>13</sup> I rest my case on this crucial point.

Professor Manning attempts to defeat my arguments by relying on the purposes underlying the special rule against congressional self-aggrandizement. He suggests several times that a critical problem with the Interpretation of Statutes Act is that it would "separate[ ] responsibility from result."<sup>14</sup> It would, he says, allow courts to give weight to legislative materials even though rank-and-file legislators would not really be responsible for them.<sup>15</sup> In my respectful view, this argument contains two errors. It understates the degree of responsibility that rank-and-file legislators would bear for legislative history under my hypothetical Act, and it overstates the degree of responsibility that the Constitution requires. In fact, legislators could not fully distance themselves from legislative history, and such distancing as they could achieve would be constitutional.

As I suggested in my Article, if the Interpretation of Statutes Act were in effect, a vote for any bill *would* be a vote for the bill's legislative history, because the history would be deemed incorporated into the bill.<sup>16</sup> A legislator who disclaimed responsibility for the legislative history under such a regime would simply be lying (or, more charitably, would be mistaken). This point addresses the scenario that appears most troubling to Professor Manning, in which a rank-and-file legislator votes for a bill while proclaiming

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10. Manning, *supra* note 2, at 1536 (quoting *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quoting *Bowsher v. Synar*, 478 U.S. 714, 758-59 (1986) (Stevens, J., concurring in judgment) (internal quotation marks omitted))).

11. See Siegel, *supra* note 1, at 1496-97.

12. Manning, *supra* note 2, at 1534.

13. See Siegel, *supra* note 1, at 1482, 1491-92.

14. Manning, *supra* note 2, at 1538; see also *id.* at 1530, 1534, 1535, 1540.

15. See *id.*

16. See Siegel, *supra* note 1, at 1506-07.

disagreement with the bill's legislative history, and secretly relies on the knowledge that courts will later treat the legislative reports and sponsor's statements as more authoritative than a mere disclaimer from an ordinary legislator.<sup>17</sup> In Manning's view, this scenario is unconstitutional because it allows Congress's vote to imbue legislative history with authoritative force while permitting ordinary legislators to disclaim responsibility for the history. In my view, each legislator necessarily votes for incorporated legislative history, and the scenario is therefore no more troubling than one in which a legislator votes for a bill while making an implausible statement about the bill's meaning, and secretly relies on the knowledge that a court interpreting the statute will give the statutory text priority over the legislator's remarks.<sup>18</sup> A legislator cannot avoid responsibility for a vote simply by disclaiming it any more than he can avoid responsibility by crossing his fingers while voting. The Interpretation of Statutes Act would ensure that each legislator would bear the constitutionally required degree of responsibility for legislative history.<sup>19</sup>

At the same time, it is certainly true that a legislator could achieve some distance from legislative history by honestly relying on the lesser status that legislative history has (and would have even under my hypothetical Act) compared to statutory text.<sup>20</sup> Even if the Interpretation of Statutes Act were in effect, a legislator who agreed with a statute's text but believed that a legislative report explained the text incorrectly could truthfully say, "I am necessarily voting for the whole package, but everyone should bear in mind that the legislative history is just legislative history; under established judicial practices that the Interpretation of Statutes Act confirms, it will be consulted only if the statutory text is ambiguous and even then it will receive less weight than the statutory text."

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17. See Manning, *supra* note 2, at 1537.

18. See Siegel, *supra* note 1, at 1507-07.

19. Professor Manning lodges his criticisms against those parts of my Article that argue for the constitutionality of my hypothetical Interpretation of Statutes Act; he does not specifically address my discussion of the constitutionality of judicial use of legislative history in the real world, in which the hypothetical Act has never been passed. Presumably, this is because, if Professor Manning is right that my hypothetical Act is unconstitutional, it would follow *a fortiori* that judicial use of legislative history in the real world is invalid. In this reply, I therefore devote my attention primarily to the constitutionality of the hypothetical statute, but I do not mean to withdraw from my suggestion that, even without passage of such a statute, an appropriate degree of legislative responsibility for legislative history can arise from a systemic understanding that a vote for any statute ratifies the statute's legislative history and authorizes courts to give it the force that legislative history customarily receives. See Siegel, *supra* note 2, at 1511-16.

20. See Siegel, *supra* note 1, at 1497-1505.

The Interpretation of Statutes Act would permit this degree of distance to exist between legislators and legislative history.

Professor Manning claims that this degree of distance would unconstitutionally relieve legislators of responsibility for legislative history,<sup>21</sup> but in fact it would be no more than an honest recognition of legislative history's status. This degree of distance already exists between legislators and some kinds of statutory text. As I observed in my Article, statutory text often contains different parts, some of which (for example, a preamble or a statement of purposes) are less definitive than others.<sup>22</sup> A legislator who agrees with a statute's operative text while disagreeing with some of the implications that might flow from its preamble may vote for the whole package while pointing out that courts will not give the preamble the same weight as the operative text. It might be said that such a legislator distances herself from, or does not take full responsibility for, the preamble; this distancing, however, is no more than an honest recognition of the status of this kind of statutory text. The Constitution does not require that Congress enact only text for which legislators are willing to take "full responsibility," if by "full responsibility" we mean that they are willing to have courts give the text the full weight given to operative statutory text. Passage of text with lesser status, from which legislators may be said to be somewhat distanced, is allowed.<sup>23</sup> Only this same kind of distancing could be achieved with regard to legislative history, and it should be no more troubling there than it is with regard to distancing from a preamble.<sup>24</sup>

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21. See Manning, *supra* note 2, at 1537.

22. See Siegel, *supra* note 1, at 1499-1500.

23. See *id.*; see also Manning, *supra* note 1, at 729-30.

24. A couple of minor points: in support of his assertion that the Interpretation of Statutes Act is an unconstitutional structural command masquerading as a rule of statutory construction, Professor Manning claims that the Act seems uncomfortably different from typical rules of statutory construction. Certainly it is somewhat different from the rules that he offers for comparison, such as those defining particular statutory terms. See Manning, *supra* note 2, at 1534. However, I would suggest that the Act bears an appropriate resemblance to other rules of statutory construction, such as the rule that Congress is presumed to be aware of and to ratify existing administrative or judicial interpretations of statutory language that it re-enacts without change. Like that rule, the Interpretation of Statutes Act provides that Congress is deemed to be aware of and to ratify certain extrinsic materials when it enacts a statute. See Siegel, *supra* note 1, at 1513-16.

Manning also asserts that, in practice, Congress would probably want to incorporate legislative history only selectively. See Manning, *supra* note 2, at 1534-35. I am not sure that this assertion is accurate. Manning notes that Congress only rarely incorporates legislative history expressly; he mentions the Civil Rights Act of 1991 as such a rare example. See *id.* What really happened in that Act, however, was that Congress took the rare step of expressly *disavowing* legislative history. See Siegel, *supra* note 1, at 1495. One might equally well infer from the

## CONCLUSION

By creating a regime in which each statute is deemed to incorporate its legislative history, the Interpretation of Statutes Act would take legislative history out of delegation doctrine altogether, and it would ensure that Congress as a whole bears the constitutionally required degree of responsibility for legislative history. Judged either by the formal requisites of the separation of powers or by the underlying purposes of that doctrine, the Act would be constitutional.

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rarity of congressional action in this area that Congress is content with current judicial practices, under which most judges consider themselves free to consult all legislative history and to give each part of it such weight as is, in their judgment, appropriate. Also, Congress might be willing to incorporate all legislative history despite the less careful process by which it is generated, *see Manning, supra* note 2, at 1535, because of the lesser weight it receives.

In any event, whether or not Manning is correct on this point, congressional passage of the Interpretation of Statutes Act would evince a desire to incorporate all legislative history (as defined in § 3 of the Act) into every statute. The Act would not relieve legislators of the responsibility for choosing which legislative history to incorporate, *see Manning, supra* note 2, at 1541; it would instruct them that, if they make no contrary statement, their vote for a statute will be a vote to incorporate all of the statute's legislative history.