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The Use of Legislative History in a System of Separated Powers

*Jonathan R. Siegel**

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INTRODUCTION

In the long-running debate over methods of statutory interpretation, no issue receives more attention than legislative history. A question of particular importance in this debate is whether the judicial use of legislative history as a tool of statutory construction violates the Constitution. This Article suggests that the answer is no.

Legislative history is the ultimate bugaboo of the textualists—those judges and scholars who assert that in statutory interpretation, “[w]e do not inquire what the legislature meant; we ask only what the statute means.”¹ The textualists have unleashed argument after argument against legislative history. Textualists assert that judicial use of legislative history seeks a collective legislative intent that does not exist² and that would not be law if it did exist.³ They claim that congressional committees deliberately manipulate legislative history in order to influence statutory interpretation.⁴ They argue that legislative history is more ambiguous than

1. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

2. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 32 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 642 (1990) (restating the legal realist argument against the probability of identifying the collective intent of the legislature); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-72 (1930) (“A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”).

3. See Scalia, *supra* note 2, at 17; Easterbrook, *supra* note 2, at 68-69 (noting that the Constitution requires the two Houses of Congress and the President to agree on a *text*); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372-73 (1994).

4. See Eskridge, *supra* note 2, at 643-44 (commenting that, according to public choice theory, committee reports may represent strategic, and not sincere, explanations of a statute); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397-98 (1992) (arguing that judicial reliance on legislative

the statutes it supposedly clarifies,⁵ that it poses a special danger of judicial misinterpretation,⁶ and that judges cite it only as a makeweight argument added to decisions already reached on other grounds.⁷

Most of all, textualists claim that judicial reliance on legislative history is unconstitutional.⁸ They base their claims on separation of powers principles. Textualists observe that the Constitution vests the legislative power in Congress and that the power is non-delegable.⁹ If courts, in the process of statutory construction, consult legislative history created by mere committees or individual Members of Congress, they effectively approve an unconstitutional delegation of the legislative power.¹⁰ Moreover, textualists argue, the Constitution requires Congress to enact laws using a process of bicameral passage and presentment to the President.¹¹ Legislative history has not run this difficult gauntlet; it is therefore not law and courts should not consult it.¹²

Textualists have made these formalist, constitutional arguments over and over again. Recently, however, Professor John Manning of Columbia Law School has introduced an important new element into the debate about the constitutionality of legislative history.¹³ Manning calls attention to a substantial problem with the textualist reliance on the general nondelegation doctrine and on the requirements of bicameralism and presentment. Manning observes that Congress routinely delegates the power to elaborate statutory law—it delegates this power to administrative agencies and to

history gives members of Congress an incentive to manufacture it); Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 376-77 (noting the ease with which legislative history may be manipulated and referring to the "virtual cottage industry" in fashioning legislative history created by technocrats, lobbyists, and attorneys).

5. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (arguing that legislative history is "more likely to confuse than to clarify" as an interpretative guide).

6. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1860-77 (1998) (evaluating the judiciary's competence to consider legislative history).

7. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring).

8. See Scalia, *supra* note 2, at 35.

9. See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring).

10. See *id.* (asserting that Article I, § 1 of the Constitution prohibits Congress from delegating lawmaking power); *Conroy*, 507 U.S. at 521 n.2 (Scalia, J., concurring); Scalia, *supra* note 2, at 35.

11. See U.S. CONST. art. I, § 7.

12. See Eskridge, *supra* note 2, at 649-50; Slawson, *supra* note 4, at 405-06.

13. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997).

courts.¹⁴ Similarly, he notes that courts routinely consult cases and treatises in the course of construing statutes, even though these extrinsic materials are not passed through bicameralism and presentment.¹⁵

Therefore, Manning argues, textualists cannot base a constitutional rule against judicial use of legislative history on the general nondelegation doctrine or on the requirements of bicameralism and presentment.¹⁶ Rather, he claims, textualists should rely on a *specific* nondelegation doctrine: the special constitutional rule against congressional *self*-delegation.¹⁷ Manning argues that this non-aggrandizement principle, which prohibits Congress from drawing extra power to itself,¹⁸ explains the mystery of why courts may rely on treatises, but not on legislative history, in construing statutes, and why Congress may delegate law-elaboration power to executive agencies, but not to congressional committees.¹⁹ Manning concludes that the textualists are correct to condemn judicial reliance on legislative history, but for a different reason than they believed.²⁰

This Article demonstrates that although much of this "revised formalist" argument is sound, its conclusion is incorrect. It is true that the Constitution specially condemns congressional self-aggrandizement, but this new argument overlooks a simple yet critical point about legislative history: most of it is created *before* a statute's passage, not afterwards. This crucial detail takes most legislative history out of nondelegation doctrine, which is concerned with grants of power to act in the future, not the past. The vital importance of this distinction is reflected in the law concerning statutory incorporation by reference. Legislatures are free to enact statutory text that refers to and incorporates other, pre-existing text. Such incorporation by reference does not delegate legislative power; rather, the incorporating legislature ratifies and adopts the incorporated text as its own. Because most of a statute's legislative history is fixed prior to the statute's enactment, Congress could, without violating the Constitution, choose to incorporate it by reference

14. See *id.* at 695.

15. See *id.*; see also *infra* Part I.B.

16. See Manning, *supra* note 13, at 700-06.

17. See *id.* at 706-07.

18. See *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274-75 (1991); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986); *INS v. Chadha*, 462 U.S. 919, 956-58 (1983); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88, 99 (1994). See also *infra* Part I.A.

19. See Manning, *supra* note 13, at 706-19.

20. See *id.* at 739.

into the statutory text. Even without such express incorporation, the judiciary, without implicating nondelegation doctrine, may determine which pre-existing materials a statute implicitly ratifies. The revised formalist argument therefore fails.²¹

This Article exposes the error in the revised formalist argument. Moreover, having done so, the Article shows that the sound part of the argument clears up several vital points in the legislative history debate. First and foremost, it successfully refutes the prior textualist arguments against the constitutionality of using legislative history and shows why those arguments cannot be resuscitated. The upshot, as this Article will show, is a demonstration of the absence of a constitutional prohibition on the judicial use of legislative history in statutory construction.²² This Article shows that Congress could, by statute, instruct courts to give weight to legislative history, and it also suggests that the courts have acted constitutionally in doing so on their own initiative.

However, the Constitution does require some refinements in the way courts use legislative history. This Article explains that courts must confine themselves to relying on pre-enactment legislative history, and, moreover, that the proper definition of "pre-enactment" must be narrower than is commonly understood.²³ Finally, courts should not regard presidential signing statements as part of legislative history; although legislative history created by Congress may properly bind the President, the converse is not true.²⁴

Part I of this Article explains the revised formalist argument and traces how it shifts the constitutional ground of the legislative history debate from general nondelegation principles to the special rule against congressional self-aggrandizement. Part II exposes the flaw in the revised formalist argument and demonstrates that judicial use of pre-enactment legislative history does not countenance any delegation of power. Finally, Part III shows that a proper understanding of the revised formalist argument yields important and valuable conclusions for the debate concerning the constitutionality of using legislative history as a tool of statutory construction.

21. See *infra* Part II.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

24. See *infra* Part III.C.

1. THE REVISED FORMALIST ARGUMENT AGAINST LEGISLATIVE HISTORY

The revised formalist argument grows out of an insight that is powerful, yet so simple that it can be expressed in one sentence.²⁵ Because Congress routinely delegates the power to resolve ambiguities in statutes, and because judges (including textualist judges) routinely rely on extrinsic sources to help determine the meaning of statutory text, the constitutional problem with judicial use of legislative history cannot be that it violates the bicameralism and presentment clauses or the general principle that legislative power is nondelegable, but instead must be that giving weight to legislative history violates the special constitutional rule against congressional self-aggrandizement.²⁶

The revised formalist argument reproduces, within the legislative history debate, a progression of ideas that previously developed in the Supreme Court's separation of powers cases. In the early 1980s, the Supreme Court relied heavily on the Constitution's Bicameralism and Presentment Clauses in striking down the legislative veto.²⁷ This reasoning, the Court later came to understand, was inadequate. The true problem with the legislative veto was that it violated what came to be recognized as the constitutional rule against congressional self-aggrandizement.²⁸

The revised formalist argument applies this shift in reasoning to the problem of the constitutionality of consulting legislative history. The argument's insight can, in fact, be expressed as a simple equation in the analogical form so loved by the drafters of standardized tests:

Revised Formalist Argument : Legislative History Debate ::
Bowsher : *Chadha*

A short explanation of the two sides of this equation will bring out the analogy. Section I.A, below, examines the shift in the Supreme Court's separation of powers reasoning from 1983 to 1986, and notes the shift in focus from the Bicameralism and Presentment Clauses to the more general rule against congressional self-aggrandizement. Section I.B then relates how the revised formalist

25. I hope it is clear that, in saying this, I am praising, not criticizing, Manning's argument.

26. See Manning, *supra* note 13, at 675.

27. See generally *INS v. Chadha*, 462 U.S. 919 (1983). See also *infra* Part I.A.

28. See generally *Bowsher v. Synar*, 478 U.S. 714 (1986). See also *infra* Part I.A.

argument makes this same move in the debate over the use of legislative history.

A. Bowsher : Chadha

In *INS v. Chadha*, the Supreme Court held legislative vetoes to be unconstitutional.²⁹ The case concerned section 244 of the Immigration and Nationality Act, which authorized either house of Congress, acting alone, to cancel the Attorney General's decisions with regard to suspensions of deportation.³⁰ Under the statute, a deportable alien could apply to the Attorney General for suspension of deportation, which the Attorney General could grant if certain conditions were met.³¹ The statute provided, however, that either house of Congress could pass a resolution disapproving the suspension of an alien's deportation and that passage of such a resolution would oblige the Attorney General to deport the alien.³² Thus, under the statute, either house of Congress could "veto" the Attorney General's action.³³ The *Chadha* case arose when the House of Representatives exercised its power to cancel the Attorney General's suspension of the deportation of a particular alien, Jagdish Chadha.³⁴

The Supreme Court struck down the legislative veto. The Court's opinion employed simple, syllogistic reasoning. The Court first determined that the Constitution requires exercises of the legislative power to be accomplished through bicameral passage of a bill plus presentment of the bill to the President.³⁵ The Court next determined that an action that "alter[s] the legal rights, duties, and relations of persons . . . outside the Legislative Branch" is an exercise of legislative power.³⁶ Accordingly, the Court concluded, an action that alters the legal rights, duties, and relations of persons outside the Legislative Branch must satisfy the requirements of bicameralism and presentment.³⁷ The action of the House of Repre-

29. *Chadha*, 462 U.S. at 958-59.

30. *See id.* at 923.

31. *See id.* at 923-24. The statute required the alien to have been physically present in the United States for seven years and to be of good moral character, and it required that deporting the alien would result in extreme hardship to the alien or to the alien's citizen or permanent resident spouse, parent, or child. *See id.*

32. *See id.* at 925.

33. *See id.* at 925 n.2.

34. *See id.* at 923-28.

35. *See id.* at 944-51.

36. *Id.* at 952.

37. *See id.* at 956-57.

sentatives in canceling the suspension of Chadha's deportation met this definition; therefore, the Court held, the House could not, by itself, take this action.³⁸

The Court's opinion in *Chadha* was criticized on many grounds, one of which is of particular interest here. As Justice White observed in his dissenting opinion, the Court's reasoning seemed inconsistent with the well-established powers of federal administrative agencies.³⁹ Such agencies routinely take action that meets the Court's definition of "legislative" action, but they do so without satisfying the process of bicameralism and presentment. Agencies adopt rules that have the force and effect of law, but the rules so adopted are not passed by either house of Congress nor presented to the President.⁴⁰ Agencies also take actions in individual cases, such as the Attorney General's action in *Chadha* itself, which "alte[r] the legal rights, duties, and relations of persons . . . outside the Legislative Branch,"⁴¹ again without bicameralism and presentment.

Justice White said, "[i]f Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself."⁴² Put conversely, given the Court's holding that Congress may not authorize one of its houses to exercise legislative power without the consent of the other house and presentment of the matter to the President, it is difficult to understand how administrative agencies can take actions that, under the Court's definition, are also exercises of legislative power, without the consent of *either* house of Congress or presentment to the President. The Court attempted to address this point in a footnote, which stated that although administrative agency action "may resemble" lawmaking, such actions are not exercises of the legislative power because "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"⁴³—a less than complete explanation. The Court also noted that the Executive's administrative activity cannot reach beyond the limits of the statute that authorized it,⁴⁴ but, of course, the Court might have said the same about the House's exercise of the legislative veto in

38. See *id.* at 956-58.

39. See *id.* at 984-89 (White, J., dissenting).

40. See *id.* at 986-87 (White, J., dissenting).

41. *Id.* at 988-89 (White, J., dissenting) (quoting the majority opinion).

42. *Id.* at 986 (White, J., dissenting).

43. *Id.* at 953-54 n.16.

44. See *id.*

Chadha. Commentators found the Court's attempted refutation of Justice White's argument unsatisfactory and expressed their dismay with reasoning that, despite the Court's attempt to deny it, had the potential to invalidate the administrative state.⁴⁵

The germ of the answer to Justice White's argument was contained in Justice White's opinion itself. Justice White noted the oddity that, under the Court's opinion, Congress might vest "veto" power in an executive agency, but could not reserve such authority for itself. He remarked, "[p]erhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court's view of the Art. I presentment and bicameralism commands."⁴⁶ That was the crucial hint. The Bicameralism and Presentment Clauses cannot, by themselves, explain what is wrong with the legislative veto, but there is indeed a principle of separation of powers that prevents Congress from conferring upon itself certain powers that it may give to others.

This principle emerged a few years later in *Bowsher v. Synar*, where the Court faced a situation that it correctly determined was akin to *Chadha* even though *Chadha's* emphasis on the bicameralism and presentment requirements made it a somewhat awkward precedent to apply.⁴⁷ *Bowsher* concerned the Balanced Budget and Emergency Deficit Control Act of 1985.⁴⁸ The Act set a "maximum deficit amount" for the federal budget for each fiscal year from 1986 to 1991.⁴⁹ It empowered the Comptroller General to prepare an annual report estimating the deficit for each upcoming year.⁵⁰ If the report predicted that the deficit would exceed the permitted maximum amount, the Comptroller General would also calculate the spending reductions necessary to bring the deficit down to the per-

45. See, e.g., E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 145-47; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 634-638 (1984); Peter L. Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 796-801; see also Manning, *supra* note 13, at 715-16 (discussing Justice White's dissent and concluding that "[t]he *Chadha* Court's deceptively simple reasoning cannot be taken at face value. . . . [T]here must be more to [*Chadha*] than meets the eye").

46. *Chadha*, 462 U.S. at 987 (White, J., dissenting).

47. *Bowsher v. Synar*, 478 U.S. 714 (1986).

48. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1986).

49. See *Bowsher*, 478 U.S. at 717.

50. See *id.* at 718.

mitted level.⁵¹ The President would then be obliged to reduce spending in accordance with the Comptroller General's report.⁵²

The Supreme Court struck down the Act. It held that the Act unconstitutionally vested executive power in a congressional official.⁵³ The Comptroller General, the Court noted, is subject to removal by joint resolution of Congress.⁵⁴ The Constitution empowers Congress to remove executive officials only by impeachment; therefore, the Court determined, the Comptroller General is a congressional official.⁵⁵ Moreover, the Court held the Comptroller General's power under the Balanced Budget Act to be executive in nature; it concluded that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."⁵⁶ The Act was therefore unconstitutional.⁵⁷

In reaching this conclusion, the Court invoked its opinion in *Chadha*. The Court declared that "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible."⁵⁸

The Court correctly perceived that the *Chadha* principle applied in *Bowsher*. As Justice White pointed out in dissent, however, *Chadha's* reasoning, which stressed the constitutional requirements of bicameralism and presentment, did not quite fit the *Bowsher* situation, in which the Court was troubled by the power of Congress to remove the Comptroller General by joint resolution.⁵⁹ A joint resolution is passed by both houses of Congress and presented to the President—"joint resolution" is, indeed, just a fancier name for "statute."⁶⁰ Thus, as Justice White stated, "a removal of the Comptroller under the statute *satisfies the requirements of bicameralism and presentment laid down in Chadha*."⁶¹ The Court could not, therefore, decide *Bowsher* simply by applying the reasoning of *Chadha*.

51. *See id.*

52. *See id.* at 717-18.

53. *See id.* at 726.

54. *See id.* at 727-28.

55. *See id.* at 727-32.

56. *Id.* at 732-34.

57. *See id.* at 734.

58. *Id.* at 726.

59. *Id.* at 767-68 (White, J., dissenting).

60. *Id.* at 728 n.7; *id.* at 756 (Stevens, J., concurring).

61. *Id.* at 767 (White, J., dissenting) (emphasis in original).

The Court needed some alternative explanation of *Chadha*, some other principle supporting the case's result besides the failure of legislative vetoes to satisfy the bicameralism and presentment requirements. Justice Stevens provided the best explanation; as Justice White (perhaps unwittingly) hinted in his *Chadha* dissent, there is indeed a constitutional principle that prohibits Congress from drawing to itself certain powers that it may confer on the other branches.⁶² Justice Stevens observed that:

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution" . . . [T]bat danger—congressional action that evades constitutional constraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency.⁶³

That is, the bicameralism and presentment requirements are not, as *Chadha* somewhat clumsily stated, safeguards that apply to any act that meets the definition of "legislative power" set forth in that opinion.⁶⁴ Instead, they are special safeguards that apply to the actions of *Congress*.⁶⁵ Congress may not act without respecting these safeguards.

Seen in retrospect, through the lens of *Bowsher*, *Chadha* is significant not so much for its emphasis on the requirements of bicameralism and presentment as for its implicit recognition of a constitutional principle against congressional self-aggrandizement:⁶⁶ Congress may not, by statute, draw to itself, nor confer upon any part of itself, or upon any of its agents, powers that Congress does not already have by virtue of the Constitution. The bicameralism and presentment requirements are certainly important, but not quite in the way the Court stated in *Chadha*. The *Chadha* Court

62. See *INS v. Cbada*, 462 U.S. 919, 987 (1983) (White, J., dissenting).

63. *Bowsher*, 478 U.S. at 755 (Stevens, J., concurring).

64. See *Chadha*, 462 U.S. at 952.

65. Looking back upon *Chadha* with a charitable eye, one might read this interpretation into the Court's opinion. The phrase "legislative power" and the definition given to it, one might say, were never intended to have government-wide application; they were merely an effort to distinguish those actions of Congress that are really exercises of the legislative power from resolutions commending the Doorkeeper and other, similar matters that are not subject to bicameralism and presentment requirements. Still, even looking charitably upon *Chadha*, one would have to say that, if that is what the Court meant, it could have expressed itself more clearly.

66. *Bowsher*, *Chadha*, and the relationship between them can also be understood in other ways. See, e.g., RICHARD PIERCE ET AL., *ADMINISTRATIVE LAW AND PROEOESS* 87 (3d ed. 1999) (stating that the problem with the statute at issue in *Bowsher* was that it violated Article II of the Constitution). But the non-aggrandizement principle, which subsequent cases have noted, see, e.g., *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986) ("Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."), is the point that is most relevant to this Article.

saw them as a restraint on any exercise of "legislative power," defined so broadly as to encompass actions routinely taken by the executive branch. In fact, however, the bicameralism and presentment requirements limit only the *Congress*, which may not give itself power to evade those restraints. Moreover, the principle against congressional self-aggrandizement applies even when the bicameralism and presentment requirements are not implicated. The Constitution vests Congress with power to remove executive officials, but only by impeachment; Congress may not grant itself the additional power of using some other method of removal, even one that satisfies bicameralism and presentment. Understanding *Chadha* as embodying a rule against congressional self-aggrandizement explains the mystery of why Congress may delegate to others powers that it may not confer upon its own houses; it also explains why the rule applies even to an attempt by Congress to grant itself extra power that it may exercise only through bicameralism and presentment.

Subsequent opinions have applied the principle against congressional self-aggrandizement strictly. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, the Supreme Court considered a statute that subjected actions of the Metropolitan Washington Airports Authority to veto by a "Board of Review" that consisted of nine members of Congress serving "in their individual capacities as representatives of users of the airports."⁶⁷ Although acknowledging that the Board of Review might be "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government[.]'"⁶⁸ the Court struck down the statute, noting that "Congress may not delegate the power to legislate to its own agents or to its own Members."⁶⁹ Similarly, in *FEC v. NRA Political Victory Fund*, the D.C. Circuit held that Congress could not constitutionally authorize the Secretary of the Senate and the Clerk of the House of Representatives to sit on the Federal Election Commission, even in an advisory, non-voting capacity, because "Congress must limit the

67. *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 258-60 (1991).

68. *Id.* at 276.

69. *Id.* at 275; see also *Hechinger v. Metropolitan Wash. Airports Auth.*, 36 F.3d 97, 105 (D.C. Cir. 1994) (rejecting modified statute, passed in response to Supreme Court's decision, that eliminated the Board of Review's power to veto the Airport Authority's decisions, but allowed it to delay their effective date).

exercise of its influence, whether in the form of advice or not, to its legislative role.”⁷⁰

Commentators have noted that the rule against congressional self-aggrandizement is an anomaly within separation of powers doctrine because it is a bright-line rule in a field dominated by mushy balancing tests.⁷¹ Some have criticized the Supreme Court for using formalist reasoning with regard to congressional self-aggrandizement even though it takes a functionalist approach to other separation of powers issues.⁷² The point deserves the extended treatment it has received; here, where it is relevant only as background, we may simply note that the Supreme Court’s treatment of congressional self-aggrandizement finds support in the original constitutional vision. The Framers tried to avoid concentrating too much power in any part of the government, including the legislative branch. The Framers regarded the legislative power as likely, in a representative republic, to extend the sphere of its activities, draw excessive power to itself, and present a danger of tyranny.⁷³ They regarded the legislature as the department of government against which the people “ought to indulge all their jeal-

70. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).

71. The general nondelegation doctrine is, of course, very much looser than the rule against congressional self-delegation. The courts approve delegations of power to executive branch agencies so long as Congress lays down an “intelligible principle” for the exercise of the power, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), and even this alleged constraint is applied so loosely as to be hardly a constraint at all, *see, e.g., Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988) (noting that courts have invalidated “[o]nly the most extravagant delegations of authority”). *But see American Trucking Ass’ns., Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (striking down EPA regulations on nondelegation grounds), *cert. granted*, 120 S. Ct. 2003 (2000). Similarly mushy tests govern most other separation of powers issues. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 691 (1988) (holding that, in determining whether Congress may limit the power of the President to remove an executive branch official, the test is “whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (holding that, in determining whether Congress may confer adjudicatory authority on administrative agencies, a court must consider “the extent to which the essential attributes of judicial power are reserved to Article III courts, . . . the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III”) (internal quotation omitted).

72. *See, e.g., Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 519-20 (1987); *see also Erwin Chemerinsky, A Paradox Without Principle: A Comment on the Burger Court’s Jurisprudence in Separation of Powers Cases*, 60 *S. CAL. L. REV.* 1083, 1087-96 (1987) (characterizing the different methodologies as “strict originalist” and “non-originalist”).

73. *See THE FEDERALIST* No. 48, at 309-10 (James Madison) (Clinton Rossiter ed., 1961).

ousy and exhaust all their precautions."⁷⁴ One might wonder today whether the Framers were insufficiently prescient in predicting which branch of government was most likely to pose a danger to liberty,⁷⁵ or whether the executive branch seems more dangerous now precisely because the Framers took more care in protecting against legislative tyranny. Regardless, however, of how one might view the matter today, the Constitution that we have received from the Framers contains carefully crafted procedural constraints on the actions of the legislative branch that have no counterpart with regard to actions of the executive. The Supreme Court is right to regard attempts by Congress to draw additional power to itself as violating a constitutional principle that the Court must enforce strictly.

B. Revised Formalist Argument : Legislative History Debate

Professor Manning's article takes the insights of the line of cases just discussed and applies the same progression of ideas to the question of whether it is permissible to use legislative history as a tool of statutory construction. Three elements appear again: first, the assertion that certain actions are invalid because they violate supposed separation of powers principles, including principles supposedly based on the Bicameralism and Presentment Clauses; second, the observation that those principles, if taken seriously, would invalidate routine, widely accepted practices; and third, the conclusion that the original assertion is correct for the alternative reason that the actions in question violate the special principle against congressional self-aggrandizement. Let us trace this isomorphism between Manning's arguments and the development from *Chadha* to *Bowsher*.

The starting point is the textualist argument for the unconstitutionality of using legislative history as a tool of statutory construction, as articulated in cases and articles prior to Manning's. As noted earlier, the textualists make numerous arguments against the use of legislative history.⁷⁶ They make practical arguments, alleging, for example, that legislative history is ambiguous and unre-

74. *Id.*; see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996) (noting that Madison "had no doubt" that the legislature was the most dangerous branch of government).

75. See Flaherty, *supra* note 74, at 1727 (arguing that today the executive branch dominates its two counterparts).

76. See *supra* notes 1-12 and accompanying text.

liable.⁷⁷ They also make formalist arguments, based on the Constitution.⁷⁸ Here, we are interested in the textualists' formalist, constitutional arguments.

The textualists assert that the Federal Constitution provides an exclusive mechanism for making law: bicameral passage of a bill and presentment of the bill to the President. Textualists therefore deny the authority of legislative history as an indicator of statutory meaning. Legislative history has not survived the gauntlet of the enactment process and is therefore not law.⁷⁹ It cannot even be used to resolve statutory ambiguities, because the power to resolve such ambiguities, which Manning calls the "law-elaboration" power,⁸⁰ is effectively the power to make law.⁸¹

Textualists also observe that the legislative power is non-delegable. The Constitution vests the legislative power in Congress, and at the time of the framing, *delegata potestas non potest delegari*

77. See *supra* notes 4-7 and accompanying text.

78. See *supra* notes 8-12 and accompanying text.

79. See, e.g., Slawson, *supra* note 4, at 405-06; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64 (1988) ("[Running the gauntlet] means committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on.").

80. Manning, *supra* note 13, at 711.

81. See Slawson, *supra* note 4, at 417 ("[T]he manufacturing of legislative history at least arguably violates the Bicameralism Principle if the legislative history is later used to give meaning to the statute."). Some authors attempt to refute this constitutional argument by distinguishing the power to elaborate law from the power to make law and asserting that judicial use of legislative history serves only the former function. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 211 (1994) ("[L]egislative history is not itself law, but law's meaning depends on context, and legislative history is the most authoritative context for determining the probable meaning of statutory language.") (citing Frederick J. de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. 538 (1934)); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992) ("No one claims that legislative history is a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'"). These arguments, however, cannot completely answer the constitutional objection. When the two tasks are both performed within the legislative branch, it is difficult to draw a meaningful distinction between elaborating law and making law. To allow legislative history to resolve statutory ambiguities is to allow Congress to determine the content of the law—effectively, to make law—by determining the content of legislative history.

Moreover, even assuming that the two tasks can be meaningfully distinguished, there can be no doubt that the power to elaborate law by resolving statutory ambiguities is a very significant power. The Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is "one of the most important constitutional law decisions in history," Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997), precisely because it reallocated this power from courts to administrative agencies. Even if, therefore, one can avoid the objection based on the bicameralism and presentment requirements by arguing that using legislative history to resolve statutory ambiguities does not constitute treating it as "law," such use still enables congressional committees to exercise a vital power, thereby implicating the point raised by Professor Manning, which is discussed in the next few pages of the text above.

("a delegated power cannot be delegated") was an accepted maxim.⁸² In his *Second Treatise of Government*, John Locke explained that the power to make laws is not a power to make legislators.⁸³ Judicial use of legislative history as an indicator of statutory meaning effectively permits Congress to delegate the law-elaboration power; this is forbidden.⁸⁴

These textualist arguments, like the opinion of the Supreme Court in *Chadha*, make broad assertions about the exercise of a particular power. Just as *Chadha* said that exercises of the "legislative power" must satisfy the Bicameralism and Presentment Clauses, the textualists say that the law-elaboration power must satisfy those same clauses. Similarly, they argue that Congress may not delegate the law-elaboration power.

At this point, Manning's article enters the debate. Like the dissenting opinions of Justice White in *Chadha* and *Bowsher*, Manning calls attention to a serious problem with making such broad arguments about the law-elaboration power.⁸⁵ Manning points out that these arguments, if taken seriously, would invalidate routine practices of the courts and the executive branch.⁸⁶

Manning observes that Congress regularly delegates the law-elaboration power.⁸⁷ No statute is completely clear, and someone must resolve statutory ambiguities and fill in details left open by a statute.⁸⁸ Courts and executive branch agencies routinely undertake this function.⁸⁹ The *Chevron* doctrine in administrative law recognizes the role of executive branch agencies in elaborating law. Under *Chevron*, an ambiguous administrative statute is deemed to be an implicit delegation of law-elaboration power to the agency entrusted with the statute's administration.⁹⁰ In cases to which *Chevron* does not apply, the task of resolving statutory ambiguities falls to the courts.⁹¹

82. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405 (1928) (stating that this maxim is well understood).

83. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 87 (R. Cox ed., H. Davidson 1982).

84. See Scalia, *supra* note 2, at 35.

85. See Manning, *supra* note 13, at 699-705.

86. See *id.*

87. See *id.* at 699.

88. See *id.* at 695, 699.

89. See *id.* at 699-702.

90. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

91. See Manning, *supra* note 13, at 701.

These commonplace practices are widely accepted by courts and scholars, including textualists.⁹² The general consensus that these practices are lawful, Manning observes, poses a problem for the textualist argument against legislative history.⁹³ The textualists assert that judicial use of legislative history is unconstitutional because it effects a delegation of an allegedly nondelegable power, but, as Manning observes, the power in question is delegated all the time.⁹⁴ The textualists must provide some additional explanation.⁹⁵

Manning similarly observes that there is a problem with the textualists' reliance on the Bicameralism and Presentment Clauses.⁹⁶ It is surely not the rule that courts, in construing statutes, must look only at statutory text that has been duly enacted via bicameralism and presentment. Courts routinely consult other texts to aid them in ascertaining the meaning of statutory text, and these other texts were never passed by either house of Congress nor presented to the President. Manning observes that courts often consider the meaning of a statutory term to be determined by the meaning that the term has in the common law or in some other specialized body of law from which the term is taken.⁹⁷ In determining the meaning of the statutory term, therefore, courts consult texts such as their own prior decisions or legal treatises.⁹⁸ Court decisions and treatises are not, of course, approved via the bicameralism and presentment procedure, and Manning therefore asks why textualist judges, such as Justice Scalia, feel free to consult them when they have cited the failure to comply with bicameralism and presentment as the reason for not relying on congressional committee reports.⁹⁹

Manning might, indeed, have cited far more examples of the routine use by textualists of texts other than those passed through the bicameralism and presentment process. Although textualism rejects legislative history, the rise of textualism has been marked by in-

92. *See id.* at 701.

93. *See id.* at 706.

94. *See id.* at 699.

95. *See id.* at 701-02.

96. *See id.* at 702-05.

97. *See id.* at 702.

98. *See id.* at 702-06. Manning notes, by way of example, Justice Scalia's reliance on an 1896 Supreme Court decision and on Blackstone's *Commentaries* in determining the meaning of the word "take," as used in the Endangered Species Act of 1973. *See id.* at 702-05; *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

99. *See Manning, supra* note 13, at 705; *see also Eskridge, supra* note 2, at 671-72 (making a similar point and arguing that "[c]onsulting [committee reports] does not violate bicameralism or presentment any more than would consulting a dictionary").

creased judicial consultation of other extrinsic aids, such as dictionaries.¹⁰⁰ In fact, when Justice Scalia is in need of interpretive assistance, he sometimes seems to go out of his way to consult any and all extrastatutory texts, provided they are not legislative history.

An outstanding example of this practice is Justice Scalia's opinion in *Hartford Fire Insurance Co. v. California*.¹⁰¹ The case required the Court to determine the meaning of the word "boycott" as used in section 3 of the McCarran-Ferguson Act,¹⁰² which exempts the business of insurance from the antitrust proscriptions of the Sherman Act, but then excepts from the exemption "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."¹⁰³ In elaborating the meaning of the word "boycott" for purposes of this Act, Justice Scalia, as usual, refrained from citing any committee reports or statements made by legislators in the course of enacting the statute. He did, however, rely on definitions of the word provided by the Oxford English Dictionary and by Webster's New International Dictionary; he consulted treatises and articles on antitrust law; he examined the usage of the term in prior cases; and, quoting the historical works of Justin McCarthy and Harry Wellington Laidler, he recounted the story of Captain Charles Boycott, an agent who managed Irish estates for absentee English landlords in the nineteenth century, whose refusal to lower rents led tenants to refuse to have anything to do with him, including refusing to sell him any food, and whose name entered the English language and ultimately found its way into the McCarran-Ferguson Act.¹⁰⁴

Needless to say, the works of Messrs. McCarthy and Laidler were not passed by both houses of Congress, nor were they presented to the President. Justice Scalia nonetheless seems to have had no compunction about using them and a host of other equally un-passed, un-presented materials as tools of statutory interpretation. Manning rightly asks why textualists permit courts to consult such extrastatutory materials, which have failed to go through the lawmaking process, if they regard the lack of bicameral passage

100. See Merrill, *supra* note 3, at 355.

101. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

102. 15 U.S.C. § 1013 (1994).

103. *Id.* § 1013(b).

104. See *Hartford Fire Ins. Co.*, 509 U.S. at 800-11.

and presentment to the President as an insuperable obstacle to the use of legislative materials as a guide to statutory interpretation.¹⁰⁵

Thus, Manning's article, like the criticism of the Supreme Court's *Chadha* opinion, demonstrates that the prior formalist arguments cannot, by themselves, explain the prohibition that they allegedly supported. Just as Justice White pointed out that satisfaction of the bicameralism and presentment requirements cannot be the only mechanism for the exercise of "legislative power" (as defined by the majority opinion in *Chadha*), because executive branch agencies routinely exercise such power without satisfying them, Manning rightly points out that courts cannot be flatly forbidden from consulting extrastatutory texts not passed through bicameralism and presentment, because courts do so all the time.¹⁰⁶ Nor is the law-elaboration power truly nondelegable; in fact, it is routinely delegated.¹⁰⁷ If judicial consultation of legislative history is forbidden, Manning reasons, it must be because of some special principle applying to legislative materials that is not fully explained by their failure to satisfy the bicameralism and presentment requirements or by the general nondelegation doctrine.¹⁰⁸

Manning now completes his argument by determining that there is indeed such a principle: the principle against congressional self-aggrandizement. The problem with legislative materials is not simply that they are not enacted through bicameralism and presentment, but more precisely that they are *legislative* materials not enacted through bicameralism and presentment.¹⁰⁹ The special constitutional prohibition on congressional self-aggrandizement means, as noted earlier, that there are powers that Congress may vest in others but may not draw to itself.¹¹⁰ Congress cannot give itself, or

105. See Manning, *supra* note 13, at 705. For another good example of the point discussed here, see Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998). Strauss points out that in a unanimous decision issued in 1997, the Supreme Court relied on provisions of the Model Penal Code and even on statements by the drafters of that Code (none of which, of course, had passed either house of Congress or been presented to the President) to inform the Court's interpretation of a federal statute, while, on the same day, in a case decided by an otherwise unanimous opinion, three Justices refused to join a paragraph of the opinion that buttressed the Court's interpretation of a federal statute by quoting statements of the statute's sponsor. See *id.* at 245-46. Again, if lack of bicameralism and presentment prevents reliance on sponsor's statements (which represent the views of at least one Member of Congress), one might think that it should equally prevent reliance on materials generated by the American Law Institute (which may not reflect the views of any Member of Congress).

106. See Manning, *supra* note 13, at 702, 706.

107. See *id.* at 699.

108. See *id.* at 706.

109. See *id.*

110. See *supra* Part I.A.

its components, Members, or agents, powers beyond those provided in the Constitution.¹¹¹

Judicial reliance on legislative history, Manning argues, violates this special rule. It effectively permits Congress to assign power to its committees or Members. Congress can make law only through bicameralism and presentment; it cannot, Manning rightly observes, fix the meaning of a previously enacted statute by means short of adopting a new one,¹¹² and no more can it grant the law-elaboration power to its committees or Members. Manning hypothesizes, for example, a statute in which Congress attempts to clarify the meaning of fee-shifting legislation by providing that "[t]he House and Senate Judiciary Committees shall, by joint action, issue authoritative interpretations of the phrase 'reasonable attorney's fees.'" ¹¹³ Such a statute would plainly violate the rule against congressional self-aggrandizement, because it would give a congressional committee the power to make law. A judicial practice of giving authoritative weight to committee reports or floor statements must be equally forbidden.¹¹⁴ Even though it is a judicial rather than a legislative practice, its effect is to permit sub-units of Congress to exercise law-elaboration power without the necessity for Congress itself to comply with the constitutionally required procedures.¹¹⁵ It therefore violates separation of powers principles by effectively permitting Congress to usurp a power belonging to the judicial or executive branches.¹¹⁶

111. See *supra* Part I.A.

112. Cf. *INS v. Chadha*, 462 U.S. 919, 954 n.18 (1983) ("There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.").

113. Manning, *supra* note 13, at 714.

114. See *id.* at 721-22.

115. See *id.*

116. One might try to argue that there is no violation of the rule against congressional self-aggrandizement so long as the judiciary, not Congress, makes the decision to use legislative history as a tool of statutory construction. However, the *Chadha* line of cases should be understood as creating a rule prohibiting *aggrandizement* of the powers of Congress regardless of whether the aggrandizement results from congressional or judicial action; the validity of a practice must rest on its overall effects and not just its origin. Suppose, for example, that committees of Congress were in the habit of publishing their views regarding the proper application of previously-enacted statutes to pending civil cases. If the Supreme Court created a *Chevron*-like rule that courts were bound to apply such views so long as they were not clearly inconsistent with the applicable statutes, the power of Congress would be greatly enlarged, and the Framers' concerns about legislative tyranny, see *supra* notes 73-75 and accompanying text, would surely be implicated, notwithstanding the judicial origin of the rule. The practice of giving weight to legislative history is similar. Although the practice is of judicial origin, the textualists may properly argue that it apparently empowers sub-units of Congress to legislate without complying with the Article I procedures. See Manning, *supra* note 13, at 722.

Manning stresses the difficulty with treating legislative history as "authoritative."¹¹⁷ What about the possibility of permitting legislative history to serve as one interpretive factor in statutory construction, receiving more or less weight depending on all the circumstances of the case? Manning is somewhat reticent on this point,¹¹⁸ but his answer (and really the only answer consistent with his argument) may be inferred from a portion of his article in which he argues that some judicial uses of legislative history are permissible.¹¹⁹ Manning notes that statutory text must be considered in context and that legislative history may helpfully call a court's attention to context, by, for example, recording the historical events that led to a statute's passage, or reciting a list of sources that establish the meaning of a term of art used in the statute.¹²⁰ A court may consult legislative history for this purpose, Manning asserts, but he stresses that in doing so the court must consider the legislative history in the same manner that it might consider a litigant's brief, or a book, newspaper, or law review article.¹²¹ The court must assess the value of legislative materials without regard to their institutional source.¹²²

In other words, to recognize that legislative materials may be a helpful reference aid because they record true facts is one thing, but to give weight to legislative materials because they *are* legislative materials is forbidden. Whether a court treats legislative history as dispositively resolving a question of statutory interpretation, or whether it merely permits itself to be influenced by the fact that legislative history suggests a particular understanding of statutory text, should make no difference. For courts to give legislative history any weight by virtue of its source creates the conditions under which sub-parts of Congress may exercise legislative power.¹²³ Thus, in considering Manning's argument that the rule against congressional self-aggrandizement forbids courts from giving authoritative weight to legislative history, we may understand

117. See Manning, *supra* note 13, at 677-84, 715.

118. Manning states that "asking whether one should classify legislative history as mere 'evidence' of intent is somewhat beside the point. More important is the fact that the Court at times treats such evidence as 'authoritative,' capable of resolving ambiguity through a committee's or sponsor's mere declaration of intent." *Id.* at 683-84; see also Strauss, *supra* note 105, at 250 (noting that Manning at times "hints" that he means only that courts should not regard themselves as *bound* by legislative history).

119. See Manning, *supra* note 13, at 731-37.

120. See *id.* at 731-34.

121. See *id.* at 732-33.

122. See *id.* at 732.

123. See *supra* note 81.

“authoritative” weight to mean not merely “definitive” weight, but any weight “proceeding from authority.”¹²⁴

By relying on the principle against self-aggrandizement, rather than solely on the Bicameralism and Presentment Clauses, Manning solves the mystery of why textualists can believe that courts may freely consult all manner of extrastatutory materials to inform the meaning of statutory texts, so long as the materials consulted are not legislative history. Similarly, the special rule against congressional self-delegation explains, as the general nondelegation doctrine does not, why Congress can delegate the law-elaboration power to courts and executive agencies, but not to its own committees. Such a state of affairs is possible because of the special concerns about congressional self-delegation, which are not present when Congress delegates power to others.¹²⁵

Manning further explains the structural principles underlying his constitutional conclusions and relates them to the more general nondelegation doctrine.¹²⁶ He observes that when Congress chooses to leave a matter unresolved in a statute, thereby necessarily granting law-elaboration authority to courts or administrative agencies, the delegation of power comes at a cost to Congress, which loses its control over the matter’s resolution.¹²⁷ Compelling Congress to pay this cost, Manning argues, provides a “structurally-enforced” nondelegation doctrine.¹²⁸ The natural inclination to cling to power will tend to ensure that Congress does not excessively delegate law-elaboration power, so long as the delegation comes at this cost.¹²⁹

Self-delegation, however, would provide Congress with the advantages of delegation without forcing it to face the cost. If Congress could leave a statute’s text vague (thereby making it easier to get the statute passed), while granting control over the statute’s interpretation to a congressional committee, it could evade the carefully crafted restraints on the exercise of its power.¹³⁰ While Congress’s control over the statements made by its committees may be imperfect, it is presumably a greater degree of control than Con-

124. Dictionaries give both definitions. See, e.g., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 146 (1993).

125. See Manning, *supra* note 13, at 710-19.

126. See *id.* at 710-19.

127. See *id.* at 711.

128. *Id.* at 711-12.

129. See *id.* at 712-13.

130. See *id.* at 714.

gress has over either courts or administrative agencies.¹³¹ Permitting Congress to vest its committees with the power to determine the meaning of legislation would, therefore, tend to promote too much delegation of the law-elaboration power, because such delegation would not be structurally checked by the mandatory loss of congressional control over the exercise of the power.¹³²

Thus, Manning concludes, the textualists are right to condemn reliance on legislative history as constitutionally illegitimate, though not quite for the reason they believed. Manning's conclusion parallels the development of *Bowsher* and subsequent non-aggrandizement cases. Just as those cases reconceptualized *Chadha's* reliance on the Bicameralism and Presentment Clauses, so Manning reconceptualizes the textualist reliance on those clauses in the legislative history debate. The Bicameralism and Presentment Clauses are certainly relevant, but it cannot be true that they limit all exercises of the law-elaboration power. Rather, they limit the exercise of that power by *Congress*. Similarly, the nondelegation doctrine does not forbid all congressional delegation of the law-elaboration power, but only congressional delegation of that power to *congressional committees or Members*. Therefore, Manning concludes, the use of legislative history, unlike the use of other extrastatutory materials that have not been enacted into law, is uniquely illegitimate in the process of statutory interpretation.

II. THE FLAW IN THE REVISED FORMALIST ARGUMENT

Manning's argument is simple and elegant. Even though it went unnoticed until he drew attention to it, the relationship between the legislative history debate and the development from *Chadha* to *Bowsher* seems quite obvious once explained.¹³³ Nonetheless, Manning's ultimate conclusion is incorrect. The reason is as simple as Manning's argument itself: most legislative history exists in a fixed form prior to the adoption of a statute. For a statute's interpretation to be influenced by texts that existed prior to the statute's adoption cannot violate the rule against self-delegation, because it does not involve a delegation at all. The concept of delegation of power is inherently forward-looking; it involves the granting of power to act in the future. A legislature that adopts an action taken or a text produced by some other body in the past is not dele-

131. *See id.*

132. *See id.* at 710-19.

133. Again, I hope it is clear that this is strong praise, not criticism.

gating power, but is, rather, ratifying or incorporating the other body's action or text. This point is proved by the law concerning statutory incorporation by reference. As this section shows, there is a fundamental difference between incorporating by reference a text that exists prior to a statute's adoption and giving some person or body the power to elaborate a statute after it is adopted. The latter is a delegation of power that may be valid or invalid depending on the applicable rules concerning delegation; the former is not a delegation at all. The issue Manning raises does not implicate the rule against congressional self-aggrandizement; rather, Manning effectively proposes a rule against statutory incorporation by reference, and there is no such rule.

A. The General Problem of Statutory Incorporation by Reference

The revised formalist argument ingeniously relates the long-running debate over the use of legislative history in statutory interpretation to the line of cases establishing the principle against congressional self-aggrandizement. It fails, however, to relate the issue to another, highly relevant source of authority, namely, the law concerning a legislature's power to enact statutory text that incorporates other text by reference. Manning complains that the enactment of a statute should not be deemed to give the statute's legislative history authoritative force. The idea, however, that a statute's text might imbue some other text with authoritative force is not new; courts have tested and approved it and have, specifically, rejected challenges to it based on nondelegation doctrine. The critical point made in the cases and the literature is that if the extrastatutory text that a statute incorporates exists prior to the statute's adoption, then the incorporation does not effect an invalid delegation of power to whatever body produced the incorporated text; indeed, such an incorporation is not a delegation at all.

Consider the matter first through reason alone. Incorporation by reference of pre-existing text cannot violate the nondelegation doctrine, because it does not give away any power. When Congress passes federal statutory text that incorporates some other text by reference, it is not giving the body that produced the incorporated text the power to decide what federal law shall be. Rather, Congress is itself making the decision. Because the incorporated text is fixed prior to the enactment of the statute that Congress adopts, Congress is voting on the incorporated text just as much as if the text were written out verbatim in the bill it is passing. It is Congress's vote, not the action of any other body, that gives the incor-

porated text its authoritative force. Incorporation by reference of some text not yet in existence, which some other person or body would later produce, would, of course, be a different matter. The production of the pre-incorporated text would then change federal law, and the person or body producing it would be exercising an important power. But where the text exists prior to Congress's vote, it seems intuitively clear that Congress is making the policy decision, and that the nondelegation doctrine is simply not implicated.

We need not, however, rely solely on reason to reach this conclusion. Numerous cases consider nondelegation doctrine challenges to statutory incorporation by reference. The results of the cases confirm the reasoning given above.

Statutory incorporation by reference takes many forms. In federal law, the most frequent form is for a federal statute to incorporate another federal statute by reference. Countless examples of such incorporation might be cited.¹³⁴ Such incorporation by reference is not, however, relevant to the point under discussion here. Even if such incorporation by reference were somehow regarded as a "delegation" of power, it would not pose any problem, because the delegated power is exercised only by the full Congress acting through the constitutionally prescribed procedures for enacting another statute. The rule against congressional self-aggrandizement prevents Congress from drawing to itself power that it does not already have under the Constitution, but it does not prevent Congress from granting itself the power it already has, namely the power to change the law by passing a statute through the constitutional lawmaking process.¹³⁵

Incorporation by reference, however, does not end there. Federal statutes incorporate text not produced by the Congress, thereby requiring courts to determine whether such incorporation is permissible. For example, some federal statutes incorporate state law by reference. A well-known example is the Assimilative Crimes Act, which gives force, within federal "enclaves" such as military forts or national parks, to the criminal law of the states in which

134. For just a couple of examples, see 29 U.S.C. § 152(2) (1994) (defining "employer," for purposes of the National Labor Relations Act, to exclude persons "subject to the Railway Labor Act, as amended from time to time"); 29 U.S.C. § 794a(a)(1) (1994) (providing that plaintiffs in lawsuits under the Rehabilitation Act shall be entitled to "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964").

135. Congress frequently passes statutes in which it grants itself the power to pass other statutes. See, e.g., 5 U.S.C. § 801(b) (Supp. IV 1998) (providing that Congress may, by statute, nullify a rule promulgated by an administrative agency). These statutes are somewhat puzzling, since Congress already has the power they grant. Presumably, such statutes serve a symbolic or informational function.

the enclaves are situated.¹³⁶ It might be argued—indeed, it has been argued—that, by giving force to state law, the act unconstitutionally delegates Congress's legislative power to the legislatures of the states.¹³⁷ The Supreme Court has, however, rejected such attacks on the act.¹³⁸ Significantly for our purposes, the Court has reasoned differently in considering early versions of the act, which incorporated only the state criminal law that existed at the time of their passage, and the current version, which incorporates both existing and future state law.

In *Franklin v. United States*, the Supreme Court considered an early version of the Assimilative Crimes Act, which, like the current version, extended state criminal law to federal enclaves within the states.¹³⁹ A person convicted under the statute asserted that the act unconstitutionally delegated Congress's power of legislation to state legislatures.¹⁴⁰ The Court, however, noted that the federal statute's incorporation of state law was a *static* incorporation; that is, it was "limited to the laws of the several states in force at the time of its enactment."¹⁴¹ Such an incorporation, the Court held, cannot constitute a forbidden delegation of legislative authority because it gives state legislatures no power to change what Congress has done.¹⁴² It is really not a delegation of authority at all. The Court said, "[t]here is, plainly, *no delegation* to the states of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction."¹⁴³ The Court thought the point extremely clear; not only did it rule against the

136. 18 U.S.C. § 13(a) (Supp. IV 1998). The incorporation of state criminal law is not complete. The Act provides that:

Whoever within or upon any . . . [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id. Thus, the Act gives force only to state law that criminalizes conduct not already criminalized by federal law. Defining the precise circumstances under which the Act assimilates state law can be rather complicated. See generally *Lewis v. United States*, 523 U.S. 155 (1998). For our purposes, however, we may treat the statute as though it simply assimilated all state criminal law in federal enclaves.

137. See *Franklin v. United States*, 216 U.S. 559, 567 (1910).

138. See *id.* at 569.

139. *Id.* at 568.

140. See *id.* at 567.

141. *Id.* at 568 (quoting *United States v. Paul*, 31 U.S. (6 Pet.) 141, 142 (1832)).

142. See *id.* at 569.

143. *Id.* at 569 (emphasis added).

defendant unanimously, but it held that the defendant's argument was "so unfounded in substance as to utterly fail."¹⁴⁴

By contrast, consider *United States v. Sharpnack*, a case concerning a similar challenge to the modern Assimilative Crimes Act, which, as amended in 1948, provides for a *dynamic* incorporation of state law.¹⁴⁵ The Act now incorporates not just the state criminal laws that existed in 1948, but the state criminal laws as they may be amended in each state from time to time.¹⁴⁶ This time, the Supreme Court could not dismiss the argument of unconstitutional delegation quite so quickly. Although it upheld the Act, some explanation was required. The Court noted that because the incorporation of state law in the first Assimilative Crime Act, passed in 1825, was static, the Act "gradually lost much of its effectiveness in maintaining current conformity with state criminal laws."¹⁴⁷ To maintain the principle that federal enclaves should be governed by state criminal law, Congress had to reenact the statute continually—it did so in 1866, 1874, 1898, 1909, 1933, 1935, and 1940, each time incorporating the state criminal law that was then in force.¹⁴⁸ Finally, in 1948, Congress switched to a dynamic incorporation of state law.¹⁴⁹

The Supreme Court approved the modern statute. It reasoned that:

The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws . . . Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves.

Having the power to assimilate the state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress is within its constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such . . . offenses and punishment as shall have been

144. *Id.* at 570. The defendant had appealed to the Supreme Court directly from his judgment of conviction, under the statute which, at that time, permitted such appeals if "the constitutionality of a law of the United States was drawn in question." *Id.* at 567. The Supreme Court considered defendant's delegation argument so weak that it could not even support jurisdiction under this provision. *See id.* at 570.

145. *United States v. Sharpnack*, 355 U.S. 286, 288 (1958).

146. *See id.* at 288.

147. *Id.* at 291.

148. *See id.* at 291-92.

149. The modern Assimilative Crimes Act provides that it shall be a crime to commit, in a federal enclave, an act made criminal by the state law in force "at the time of such act," rather than the state law in force at the time the federal statute was adopted. 18 U.S.C. § 13 (Supp. IV 1998); *see also Sharpnack*, 355 U.S. at 291-92.

already put in effect by the respective States for their own government. Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State.¹⁵⁰

Notice that the required reasoning is more complex and controversial in this case of dynamic incorporation than it was in the case of static incorporation. Indeed, Justice Douglas, joined by Justice Black, dissented.¹⁵¹ Justice Douglas observed that the Constitution vests the legislative power in the Congress and argued that this power could not be delegated to the states.¹⁵² Significantly, he agreed that there could be no problem with a federal statute that effected a *static* incorporation of state law: "Of course," he said, "Congress can adopt as federal laws the laws of a State; and it has often done so. Even when it does so without any enumeration of the laws, it 'has acted as definitely as if it had repeated the words' used by the State."¹⁵³ He believed, however, that dynamic incorporation must be considered under the principles of the nondelegation doctrine.¹⁵⁴ That did not mean that dynamic incorporation was automatically invalid.¹⁵⁵ By analogy to the nondelegation doctrine in administrative law, Justice Douglas explained that Congress might, for example, prohibit "speeding" in federal enclaves and leave to the states to fill in, from time to time, the detail of exactly what the speed limit is.¹⁵⁶ Congress's wholesale delegation to states of the power to define crimes was, however, in his view unconstitutional; under such broad dynamic incorporation "it is a State, not the Congress, that is exercising the legislative power under Art. I, § 1 of the Constitution."¹⁵⁷

These cases concerning the Assimilative Crimes Act establish two points that are critical to the present discussion: first, it is no violation of the nondelegation doctrine for a federal statute to incorporate by reference a pre-existing text produced by a body other than the Congress, and, second, there is a crucial distinction between static incorporation and dynamic incorporation. Dynamic in-

150. *Sharpnack*, 355 U.S. at 293-94.

151. *See id.* at 297 (Douglas, J., dissenting).

152. *See id.* at 297-98 (Douglas, J., dissenting).

153. *Id.* at 298 (Douglas, J., dissenting) (quoting *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 167 (1920) (Holmes, J., dissenting)).

154. *See id.* at 297-98 (Douglas, J., dissenting).

155. *See id.* at 298-99 (Douglas, J., dissenting).

156. *See id.* (Douglas, J., dissenting).

157. *Id.* at 299 (Douglas, J., dissenting).

corporation at least poses an issue under the nondelegation doctrine. Some reasoning must be given to approve it, and Justices may disagree as to whether such incorporation is permissible. Static incorporation, however, is simply and uncontroversially "no delegation" of power at all.¹⁵⁸ Congress adopts the incorporated law as if it had repeated the words of that law.¹⁵⁹ Dynamic incorporation *may* be constitutional under the applicable principles of nondelegation doctrine,¹⁶⁰ but static incorporation will *always* be constitutional, at least insofar as nondelegation doctrine is concerned, because it does not implicate that doctrine at all.¹⁶¹

Similar results obtain with regard to the converse problem of state incorporation of federal law. These results are relevant because most state governments are, like the federal government, bound by a nondelegation doctrine that prohibits the legislature from delegating its legislative power.¹⁶² The state cases confirm the

158. *Franklin v. United States*, 216 U.S. 559, 569 (1910).

159. See *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 625 (1838) (asserting that when Congress adopts British statutes by reference "they become our own as entirely as if they had been enacted by the legislature"); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 167-68 (1920) (Holmes, J., dissenting) (stating that Congress acted as if it had repeated the words used by the several states); see also *Engel v. Davenport*, 271 U.S. 33, 38 (1926) ("The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length.").

160. See, e.g., *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (upholding the Lacey Act, 16 U.S.C. § 3372, which makes it illegal to import fish or wildlife taken in violation of the law of foreign nations); *United States v. Palmer*, 465 F.2d 697, 699 (6th Cir. 1972) (upholding 18 U.S.C. § 1955, which makes it a federal crime to conduct an illegal gambling business, and which defines "illegal gambling business" by reference to state law). These cases seem appropriate in light of *Sharpnack*. The Supreme Court's statement in *Sharpnack* that dynamic incorporation of state law was permissible because Congress was adopting laws that "shall have been already put in effect by the respective States for their own government," *Sharpnack*, 355 U.S. at 294, suggests a distinction between the dynamic incorporation of law adopted by another sovereign for its own purposes and the empowerment of another sovereign to make federal law. The Court's analysis suggests that while Congress may incorporate future state law by reference if the incorporated law will be adopted by the states "for their own government," it would be unconstitutional for Congress to pass a law providing that "each state may prescribe criminal laws to be effective within federal enclaves in that state." Such a law, rather than incorporating laws adopted by states for independent reasons, would empower states to adopt special criminal laws just to govern federal enclaves. The state would then really be making federal law, rather than making its own law for its own independent reasons.

161. Even a static incorporation might, of course, be unconstitutional for some other reason, if the matter incorporated violated the Constitution in some other way. For example, in *Knickerbocker Ice*, the Supreme Court invalidated Congress's attempt to permit maritime workers to recover for job-related injuries under state worker's compensation laws. *Knickerbocker Ice*, 253 U.S. at 164. Although it very briefly mentioned the nondelegation doctrine, the Court struck down the statute for the different reason that under the Constitution, federal maritime law must be uniform throughout the United States; the incorporation of state laws created an unconstitutional disuniformity. See *id.* at 164, 166.

162. See, e.g., *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982) ("An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency

two vital points made in the federal cases. First, static incorporation by reference is not a delegation at all. State courts have approved, for example, the incorporation into state law of the federal income tax statute and its accompanying regulations,¹⁶³ the federal food stamp law,¹⁶⁴ and the federal prohibition law.¹⁶⁵ These courts, like the United States Supreme Court, held that static incorporation of the law of a different sovereign does not violate the nondelegation doctrine; the incorporated law becomes the state's own law as effectively as if it had been set out verbatim by the enacting state legislature.¹⁶⁶ Second, state cases also confirm the crucial importance of the distinction between static and dynamic incorporation. Some state cases note that incorporation of *future* federal law would present a different question;¹⁶⁷ others, where necessary, carefully construe state law so that it effects only a static incorporation;¹⁶⁸ some state cases actually hold dynamic incorporation of federal law to be unconstitutional.¹⁶⁹

The cases also make a further important point, which concerns the permissible origins of incorporated text. So far, the exam-

unrestricted authority to make fundamental policy decisions."); *Commission on Med. Discipline v. Stillman*, 435 A.2d 747, 759 (Md. 1981) ("In the enactment of laws, the legislature acts in the exercise of a power conferred upon it by the people; it cannot validly redelegate its lawmaking authority to others."); *Dearborn Ind., Inc. v. City of Dearborn*, 49 N.W.2d 370, 376 (Mich. 1951) ("The state legislatures cannot delegate their sovereign powers to the federal government.") (quoting 16 C.J.S. *Constitutional Law* § 133); *Santee Mills v. Query*, 115 S.E. 202, 205 (S.C. 1922) ("There can be no doubt that 'the enactment of laws is one of the high prerogatives of a sovereign power,' and that 'it would be destructive of fundamental conceptions of government through republic[an] institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.'") (quoting *In re Opinion of the Justices*, 133 N.E. 453, 454 (Mass. 1921)); *Independent Community Bankers Ass'n v. State*, 346 N.W.2d 737, 743 (S.D. 1984) ("The legislative power is vested in the [L]egislature, . . . and the . . . Legislature may not abdicate nor delegate its essential power.").

163. See *Santee Mills*, 115 S.E. at 205.

164. See *State v. Gill*, 584 N.E.2d 1200, 1202 (Ohio 1992).

165. See *In re Kinney*, 200 P. 966, 967 (Cal. Ct. App. 1921).

166. See *Santee Mills*, 115 S.E. at 205; see also *Kinney*, 200 P. at 967 ("[T]he effect of the reference to [the] provisions of the [federal] act is to make them a part of the ordinance.").

167. See, e.g., *Kinney*, 200 P. at 967.

168. See, e.g., *Gill*, 584 N.E.2d at 1201 (construing a reference to "the 'Food Stamp Act of 1977,' 91 Stat. 958, 7 U.S.C. 2011, as amended" to include only amendments made before enactment of the state act); *Santee Mills*, 115 S.E. at 205-06 (construing a reference to the "rules and regulations promulgated by the Department of Internal Revenue" to mean only such rules and regulations as were in force at the time of the approval of the state act).

169. See *Advocates for Effective Regulation v. City of Eugene*, 981 P.2d 368, 380 (Or. Ct. App. 1999) (holding that local regulation unconstitutionally incorporated future federal regulatory definitions of hazardous substances); see also *Radecki v. Director of Bureau of Workers' Disability Compensation*, 526 N.W.2d 611, 613 (Mich. Ct. App. 1994) ("Statutes that incorporate existing federal statutes by reference are valid and constitutional However, it is an unlawful delegation of legislative power to adopt by reference future legislation enacted by another sovereign entity.").

ples given have all concerned the incorporation into a statute of text that is itself another statute (though passed by a different sovereign) or at least a formal regulation. But that is not a limiting principle. Texts may be incorporated even though they do not by themselves have legal force. Indeed, courts have approved the incorporation by reference of texts that are not promulgated by government bodies at all. In one recent case, *McCabe v. North Dakota Workers Compensation Bureau*, the court considered a state worker's compensation statute that required officials to resolve certain issues in accordance with "the most current edition of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment.'" ¹⁷⁰ Applying the same reasoning we have already seen, the court approved the statutory incorporation by reference. The court held that the statute "does not delegate authority to an association to create a standard but involves a valid adoption of a standard already in existence." ¹⁷¹ The court was careful to determine that the statutory reference to "the most current edition" of the AMA Guide was a reference to the edition that was most current at the time of the statute's adoption, not at any later time at which a particular injured worker applied for benefits—the contrary interpretation, the court held, would unconstitutionally delegate legislative power to the AMA. ¹⁷² Courts have, similarly, approved the static incorporation by reference (while condemning dynamic incorporation by reference) of privately promulgated building codes, ¹⁷³ provisions of an insurance industry manual, ¹⁷⁴ and technical safety standards for machinery. ¹⁷⁵

170. *McCabe v. North Dakota Worker Compensation Bureau*, 567 N.W.2d 201, 203 (N.D. 1997) (capitalization altered) (quoting NDCC 65-01-02).

171. *Id.* at 205 (quoting *Michigan Mfrs. Ass'n v. Director of Workers' Disability Compensation Bureau*, 352 N.W.2d 712, 715 (Mich. Ct. App. 1984)).

172. *See id.*

173. *See International Ass'n of Plumbing & Mech. Officials v. California Bldg. Stds. Comm'n*, 64 Cal. Rptr. 2d 129, 134 (Cal. Ct. App. 1997).

174. *See Michigan Mfrs. Ass'n*, 352 N.W.2d at 714-15 (approving a statute that defined "employment in the logging industry" to mean "employment in the logging industry as described in the section in the workmen's compensation and employers liability insurance manual, entitled, 'logging or lumbering and drivers code no. 2702', which is filed with and approved by the commissioner of insurance").

175. *See North American Safety Valve Indus., Inc. v. Wolgast*, 672 F. Supp. 488, 495 (D. Kan. 1987). The case was slightly complicated by the fact that the incorporation by reference occurred at the administrative rather than the legislative level. *See id.* at 491-95. The plaintiff's complaint, however, was the familiar one that the incorporation effected an unconstitutional delegation of power. *See id.* at 491. The statute pursuant to which the delegation was made was careful to provide that the state administrator could "incorporate by reference *specific editions*, or portions thereof," of the boiler and pressure vessel code, thereby making clear that the incorporation was to be a static one. *See* KAN. STAT. ANN. § 44-916 (1999 Supp.) (emphasis added).

It is clear, therefore, that so long as statutorily incorporated text is fixed before the incorporation takes place, nothing turns on the character of the text. There is no requirement that the text be promulgated by some legislative body or that it have legal character on its own. Indeed, how could there be such a requirement? The argument against incorporation by reference is that it delegates power to the body that produces the incorporated text; the refutation of the argument is that in the case of static incorporation, the incorporating legislature adopts the text as its own and no delegation takes place. To require that the incorporated text be the product of some other legislative body would be to focus on precisely that which renders the text vulnerable to attack rather than on that which saves it. The saving grace is that the text is deemed to have been adopted verbatim by the legislature that incorporated it by reference,¹⁷⁶ and that can be done with any text whatever. If Congress amended the postal statutes to provide that "the Postal Service shall act in conformity with the inscription on the General Post Office building at 8th Avenue and 33rd Street in New York City,"¹⁷⁷ no one could claim that Congress was unconstitutionally delegating power to the inscription's author—the Greek historian Herodotus.¹⁷⁸ Herodotus died two thousand years too soon to enjoy any such power; Congress would simply be adopting his statement as its own command.

The cases thus reveal widespread agreement with the intuitively obvious principle that static incorporation by reference does not even implicate, much less violate, any nondelegation doctrine. There are, to be sure, reasons why statutory incorporation by reference may be considered undesirable. As a 1941 article pointed out, incorporation by reference may complicate the task of ascertaining the meaning of legislation; it may permit the passage of statutes that could not have garnered majority support if the effects of the incorporated texts were fully understood; and it may promote the passage of statutes without full and intelligent consideration.¹⁷⁹ With regard to the constitutional question of delegation, however,

176. See, e.g., *Santee Mills v. Query*, 115 S.E. 202, 205 (S.C. 1922).

177. That inscription, of course, is, "[n]either snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds." See David W. Dunlap, *Lost Colossus Draws Closer to Resurrection: Plan Gains for Post Office to be New Penn Station*, N.Y. TIMES, Feb. 9, 1998, at B1. Cf. Bill McAllister, *Postal Service, Despite Its Pledge, Blames Weather for Delays*, WASH. POST, Mar. 27, 1994, at A15.

178. See HERODOTUS, HISTORIES, Book 8, Chapter 98.

179. See Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 277 (1941).

the article concluded that there could be no doubt about the permissibility of static incorporation by reference, or the importance of the distinction between static and dynamic incorporation:

When . . . a legislature adopts a precept merely in the existing form in which another law-making body has already passed it there is clearly no delegation at all On the other hand, if future laws, rules, or regulations are included in the adopted there is with equal clarity a delegation.¹⁸⁰

Once again, a dynamic incorporation constitutes a delegation, which must be evaluated under the applicable delegation doctrine, but a static incorporation is *not a delegation at all* and cannot, therefore, be invalid under any delegation doctrine.

B. Incorporation by Reference and Legislative History

We must now apply the general reasoning regarding statutory incorporation by reference to the particular problem of legislative history. As the reader might expect, this section will argue that statutes may be deemed to incorporate their legislative history. However, rather than dealing with the whole problem at once, the argument proceeds in stages. First, section (1), below, imagines that Congress expressly instructs courts to use legislative history and considers the constitutionality of this instruction. Section (2) considers the weight that legislative history would receive under such a regime. Sections (3) and (4) consider some objections that might be made, and finally, section (5) considers the constitutionality of using legislative history in the absence of congressional instruction.

1. An Express Incorporating Statute

Let us first consider what would happen if Congress expressly instructed courts to consult a statute's legislative history when interpreting the statute. Imagine that Congress adopts the "Interpretation of Statutes Act of 2000." The Act provides:

Each statute passed by the Congress shall, unless it states otherwise, be deemed to incorporate the statute's legislative history.

This hypothetical statute, it should be noted, is not offered as a proposal that Congress should adopt, nor as a prediction of any-

180. *Id.* at 283 (citations omitted).

thing Congress is likely to adopt.¹⁸¹ It is a thought experiment that will help us to determine the constitutionality of the judicial use of legislative history. Would the Act be constitutional?

Manning's article does not expressly consider what would follow if Congress adopted such a statute, but it would seem to be a necessary implication of his argument that the statute would be unconstitutional. Congress cannot use a statute to evade the constitutional rule against congressional self-aggrandizement;¹⁸² the very purpose of the rule is to protect against statutes in which Congress attempts to draw additional power to itself (or to its sub-units or agents).¹⁸³ Manning believes that judicial reliance on legislative history violates the rule against congressional self-aggrandizement by effectively permitting Congress to grant additional power to its committees and Members; thus, it must follow that he would condemn a statute in which Congress instructs courts to engage in this practice.¹⁸⁴ A demonstration that this statute would not violate the nondelegation doctrine would therefore be a substantial blow to the revised formalist argument against legislative history.

In fact, given the investigation carried out by the previous section, it is easy to see the hypothetical Interpretation of Statutes Act not only does not violate the nondelegation doctrine, but does not even implicate that doctrine at all. As explained above,¹⁸⁵ the main step in the revised formalist argument is its shift in focus from the general nondelegation doctrine to the special rule against congressional self-delegation. The critical point here, however, is that we do not need to figure out *which part* of nondelegation doctrine applies to the incorporation by reference of pre-existing texts. As the previous section demonstrated, incorporations by reference

181. Congress rarely adopts legislation containing general instructions for the interpretation of statutes. It is, however, not inconceivable that Congress might consider a statute similar to the hypothetical statute discussed here if the Supreme Court ever adopted Justice Scalia's position with regard to the use of legislative history.

182. See *INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983) ("The explicit prescription for legislative action contained in Art. I cannot be amended by legislation.").

183. See *id.* at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

184. Professor Peter Strauss, commenting on Manning's article, draws this same conclusion from it. Strauss hypothesizes a statute similar to the one suggested here and says that such a statute "would dramatically illustrate Professor Manning's point . . . Manning is convincing that the *Stinson* approach has no place in the world of statutes." Strauss, *supra* note 105, at 249-50. Professor Strauss refers to the Supreme Court's decision in *Stinson v. United States*, in which the Court, in interpreting the United States Sentencing Guidelines, held that the Sentence Commission's commentary on a guideline "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

185. See *supra* Part I.B.

of pre-existing texts are simply not delegations at all. As long as the incorporated text is fixed prior to the adoption of the statute incorporating it, there is no rule restricting where that text may come from.¹⁸⁶ By voting for the statute that incorporates the extrastatutory text, a legislature adopts the incorporated text as though it were set out verbatim.¹⁸⁷ The concerns of any delegation doctrine, including the rule against self-delegation, are thereby satisfied.

The Interpretation of Statutes Act would therefore be constitutional because it would simply provide that statutes shall incorporate by reference certain texts that exist at the moment of their passage.¹⁸⁸ It is no accident that *Chadha*, *Bowsher*, and the other cases developing and applying the rule against congressional self-delegation are all cases about delegation of power to take *future* acts that have legal force.¹⁸⁹ There is not, and could not be, a rule forbidding Congress to grant power to its committees to take actions *prior* to a statute's passage that have legal effect upon the adoption of the statute. Such a rule would render unconstitutional what congressional committees do every day. Committees craft the bills that Congress passes. In doing so, the committees exercise a great deal of power; as a practical matter, Congress has only a limited ability to alter bills once they come out of committee.¹⁹⁰

Surely there can be no more important influence on legislation than the power to prepare the text of the law, but no one would imagine that Congress's delegation of this vital power to its com-

186. See *supra* Part II.A.

187. See *supra* Part II.A.

188. But see *infra* Part III.B for a necessary caveat to this statement.

189. *Chadha* concerned legislative vetoes to be effected after passage of the statutes authorizing them, *INS v. Chada*, 462 U.S. 919, 923-25 (1983); the statute at issue in *Bowsher* vested the Comptroller General with power to take later steps that would affect federal spending, *Bowsher v. Synar*, 478 U.S. 714, 717-18 (1986); in *Metropolitan Airports*, the Court struck down a statute making Members of Congress members of an executive body that would act after the statute was passed, *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 258-60 (1991); and in *NRA Political Victory Fund* the flaw in the statute was its authorization for congressional officials to sit in on future meetings of the Federal Election Commission, *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993).

190. See WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 170-73, 223-26 (9th ed. 1997) (describing the central role committees play in the process of legislation crafting, but also noting the rising importance of floor politics). Indeed, Woodrow Wilson, describing the House of Representatives, wrote:

The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It legislates in its committee-rooms; not by the deliberation of majorities . . .

It would seem, therefore, that practically Congress, or at any rate the House of Representatives, delegates not only its legislative but also its deliberative functions to its Standing Committees.

WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 69, 71 (1956) (1st ed. 1885).

mittees is a "delegation" of the legislative power in the constitutional (i.e., forbidden) sense. Congress always retains, in theory, the power to make any decision it wants about any bill that a committee sends to it, and the passage of the bill irrebuttably demonstrates, for legal purposes, that the bill is the choice of the whole Congress, no matter how true it may be in fact that committees determined the bill's content.¹⁹¹ So long as the committees act *before* the final bill is passed (which they do, insofar as the bill's text is concerned), no one would dream of claiming that Congress's delegation to the committees of the power to craft bills even implicates, much less violates, the nondelegation doctrine, including the special rule against congressional self-delegation.

A similar result must obtain with regard to text that is not expressly included in a statute, but is incorporated by reference. The distinction between the incorporation by reference of pre-existing texts and the delegation of power to take future actions that have legal effect is not merely some picayune quibble. As the previous section showed, the distinction is fundamental to the nondelegation doctrine. The lesson of the incorporation-by-reference cases is that the very concept of a delegation is inherently forward-looking. That is why the cases sharply distinguish between static and dynamic incorporation of extrastatutory texts. Dynamic incorporation delegates power to the body that will produce the subsequently incorporated text; this delegation may be valid or invalid under the applicable nondelegation doctrine. Static incorporation, however, is *not a delegation at all* and is always valid insofar as nondelegation doctrine is concerned, because it confers no power on anyone to change what the legislature has done.¹⁹²

Manning's argument suggests that Congress is specially disabled from incorporating by reference extrastatutory text that is produced by a congressional committee. Since Congress may vest certain powers in executive branch agencies that it could not give to its own committees, Manning would perhaps argue that it can incorporate into its statutes texts that are produced by other bodies, but not by its committees or Members. This view, however, would be erroneous, because, by adopting a statute, Congress gives the constitutionally required assent to all matter that the statute in-

191. *Cf.* *Field v. Clark*, 143 U.S. 649, 672-73 (1892) (holding that a court will irrebuttably presume that an enrolled bill, attested by the signatures of the presiding officers of the two houses of Congress and the President and deposited with the Secretary of State, was in fact passed by the Congress); Scalia, *supra* note 2, at 34-35 (arguing that a bill passed by Congress is law whether or not Members of Congress were aware of its contents).

192. *See* *Franklin v. United States*, 216 U.S. 559, 569 (1910); *see also supra* Part II.A.

corporates by reference.¹⁹³ So long as the extrastatutory text is fixed before the statute is adopted, Congress is following the procedures that satisfy even the especially stringent rule against congressional self-delegation.

Manning hypothesizes the wrong statute. As noted earlier, he imagines that Congress, perhaps fed up with court decisions construing the numerous statutes that provide for “reasonable attorney’s fees,” passes an Act stating, “The House and Senate Judiciary Committees shall, by joint action, issue authoritative interpretations of the phrase ‘reasonable attorney’s fees.’”¹⁹⁴ Manning is plainly right that this statute would be unconstitutional, but only because the statute would violate the non-aggrandizement principle by empowering congressional committees to take *future* action that would have legal effect. An entirely different case would be presented if Congress, in 2001, passed a statute stating that, “courts shall give authoritative effect to the interpretation of the phrase ‘reasonable attorney’s fees’ that was contained in the Memorandum of Understanding adopted by joint action of the House and Senate Judiciary Committees on December 1, 2000.” This statute would not vest any power whatever in congressional committees. It would simply mention them in the course of identifying the particular, pre-existing text that Congress, by the required constitutional procedures, was adopting through incorporation by reference. Provided the text is fixed before Congress adopts the statute incorporating it, it makes no difference whether the text is a law adopted by a state legislature, an inscription on a public building, or the product of a congressional committee. The action is the action of Congress, not the body that produced the incorporated text.¹⁹⁵

This point may perhaps best be driven home by considering a couple of actual examples of statutory incorporation by reference of legislative materials. Consider first a recently enacted budget bill, the Consolidated Appropriations Act for 2000.¹⁹⁶ Division B of this act took a rather unusual form. It provided:

The provisions of the following bills are hereby enacted into law:

- 1) H.R. 3421 of the 106th Congress, as introduced on November 17, 1999;
- 2) H.R. 3422 of the 106th Congress, as introduced on November 17, 1999;
- 3) H.R. 3423 of the 106th Congress, as introduced on November 17, 1999;

193. See, e.g., *Franklin*, 216 U.S. at 569-70.

194. Manning, *supra* note 13, at 714.

195. See *supra* notes 170-178 and accompanying text.

196. Consolidated Appropriations Act for 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1535-36 (1999).

- 4) H.R. 3424 of the 106th Congress, as introduced on November 17, 1999;
- 5) H.R. 3425 of the 106th Congress, as introduced on November 17, 1999;
- 6) H.R. 3426 of the 106th Congress, as introduced on November 17, 1999;
- 7) H.R. 3427 of the 106th Congress, as introduced on November 17, 1999, except that subsection (c) of section 912 of H.R. 3427 shall be deemed to read as follows:
...
8) H.R. 3428 of the 106th Congress, as introduced on November 17, 1999; and
9) S. 1948 of the 106th Congress, as introduced on November 17, 1999.¹⁹⁷

This act expressly gives legal force to legislative materials that do not meet the requirements of bicameralism and presentment. The act "enacts into law" various previously-existing bills, each of which had been introduced in one house of Congress, but had not been passed even by that house, much less by both houses with presentment to the President. Yet the act obviously does not violate the rule against congressional self-aggrandizement. Through incorporation by reference, both houses of Congress approved the incorporated bills as fully as if they had been written out verbatim in the act finally passed. There was no delegation of power to the individual houses of Congress; rather, the full Congress adopted as its own certain work previously done in its individual houses.

The second example, even more pertinent to our purposes, concerns express statutory incorporation by reference of legislative history. Such incorporation is very rare, but not entirely unknown; Congress used it in passing the Civil Rights Act of 1991. When that statute was before the Congress, there was a substantial difference of opinion among legislators as to the meaning of a provision that was designed to overturn the holding of the Supreme Court in *Wards Cove Packing Company v. Atonio*.¹⁹⁸ The provision concerned the ability of employers to engage in practices that have a disparate impact on a protected group when such practices are "job related for the position in question and consistent with business necessity."¹⁹⁹ The precise meaning of "business necessity" was sharply disputed,

197. *Id.* § 1000(a). Subsection (b) added:

In publishing the Act in slip form and in the United States Statutes at Large pursuant to section 112, of title 1, United States Code, the Archivist of the United States shall include after the date of approval at the end appendixes setting forth the texts of the bills referred to in subsection (a) of this section.

Id. § 1000(b).

198. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

199. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

and rival legislators were attempting to work their understandings of the provision into the legislative history. To counter these attempts, the final bill contained this interesting provision:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.²⁰⁰

This provision is not, in fact, a perfect example of incorporation of legislative history by reference. It does not say that courts *shall* give any particular weight to the interpretive memorandum that it references; it only prohibits them from considering anything *else* as legislative history. But consider it suitably modified: imagine that it referenced the interpretive memorandum and stated that, in construing the statute, the courts should give the memorandum the customary force of legislative history. Could such a provision possibly violate any nondelegation doctrine? The memorandum was published prior to the adoption of the statute, and the statutory text shows that the full Congress ratified the memorandum, thus imbuing it with legal force, using the constitutionally prescribed mechanism of bicameral passage and presentment to the President. The legislators approved the interpretive memorandum as surely as if the text of the bill they adopted reproduced the memorandum in full.²⁰¹ No power was delegated to the committee that produced the memorandum, because that committee could not alter the memorandum after Congress acted.

Congress's incorporation by reference of specific, pre-existing texts is thus perfectly constitutional, even when the pre-existing texts happen to be legislative history. That which Congress may do once, it may do every time; it could include, in every statute it passes, a provision incorporating the statute's legislative history. And because Congress could do this every time, it could pass one

200. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b) (1991) (set out as a note following 42 U.S.C. § 1981 (1994)).

201. The one appellate court to consider this statutory provision had no problem with it. That court stated, "[b]ecause the Act proscribes resort to legislative history with the exception of one short interpretive memorandum endorsing selective caselaw, our starting point in interpreting the Act's business necessity language must be that interpretive memorandum." *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 488 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 970 (2000). The court believed itself bound to follow Congress's instruction not to consider any other legislative history of the business necessity provision. *See id.* at 488 n.13. The dissenting opinion, although ultimately disagreeing with the court's evaluation of the statute, appeared to have no dispute with the permissibility of consulting the incorporated interpretive memorandum or with following Congress's admonition not to consult any other legislative history. *See id.* at 497 (Weis, J., dissenting).

statute making it the general rule that statutes are deemed to incorporate their legislative history by reference. That is precisely what the hypothetical Interpretation of Statutes Act would do.

But perhaps this last step was too hasty; let us consider it in more detail. Accepting (as seems unassailable) that Congress may validly incorporate particular legislative history by reference in a particular statute, as it did in the Civil Rights Act of 1991, and even further accepting that this means that Congress could, in every statute it passes, include a boilerplate provision incorporating the statute's legislative history by reference, does it really follow that Congress may pass one statute making such incorporation the general rule? Might such a statute not constitute a dynamic delegation since it would grant power to future congressional committees to write authoritative legislative history? Perhaps Congress can incorporate legislative history by reference only by doing so in every statute it passes.

In fact, such repetition is not required. The hypothetical Interpretation of Statutes Act would not grant power to future congressional committees. It would not effect a dynamic incorporation by reference. Rather, it would only set forth a general rule pursuant to which each subsequent statute (unless it stated otherwise) would, at the moment of its passage, effect a static incorporation by reference of materials that existed at that moment.

The creation of such a general rule is valid. The import of every statute is determined in part by prior statutes, and Congress may pass a statute creating general rules governing the effect of future statutes. A good example is the general savings statute, 1 U.S.C. § 109.²⁰² Congress passed this statute in response to judicial decisions concerning the construction of statutes that repealed other statutes.²⁰³ The common law rule was that when a statute repealed an earlier statute, the courts would construe the repealing statute to remit any penalties or liabilities created by the repealed statute, unless the repealing statute contained a provision that expressly saved them.²⁰⁴ Section 109 reverses this rule and provides that courts should construe the repealing statute to save the penalties or liabilities created by the repealed statute, unless the repealing statute contains a provision that expressly remits them.²⁰⁵ In applying § 109, the Supreme Court has noted that it is "a general

202. 1 U.S.C. § 109 (1994).

203. *See* *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974).

204. *See* *United States v. Breier*, 813 F.2d 212, 213-16 (9th Cir. 1987).

205. *See* 1 U.S.C. § 109.

saving clause, to be read and construed as a part of all subsequent repealing statutes.”²⁰⁶

The hypothetical Interpretation of Statutes Act would, similarly, be a general provision that would “be read and construed as a part of” all subsequent statutes.²⁰⁷ Hence, each subsequently passed statute would (unless it provided otherwise) be deemed to contain a provision incorporating its legislative history by reference. The Interpretation of Statutes Act of 2000 would not, by itself, give force to the legislative history of some statute passed by Congress in 2010. Rather, the statute passed in 2010 would be deemed to include the Interpretation of Statutes Act of 2000 (unless it contained a provision saying otherwise), and for this reason the 2010 statute would incorporate legislative history materials existing at the time of its passage. Therefore, each incorporation of legislative history effected pursuant to the Interpretation of Statutes Act would be a static incorporation, not a dynamic incorporation.

Thus, the Interpretation of Statutes Act would be constitutional. The critical point, once again, is that incorporation by reference of pre-existing texts simply does not implicate nondelegation doctrine. The Interpretation of Statutes Act would create a regime whereby each subsequently passed statute would be deemed to incorporate its pre-existing legislative history.

2. *The Effect of Incorporated Legislative History*

We have seen that Congress may validate legislative history by incorporating it into statutes by reference. The concept of incorporation by reference does, however, raise an important subsidiary question: precisely what effect would such incorporation have? As discussed above, the normal rule is that text incorporated into a statute by reference is as much a part of the statute as though it were set out verbatim.²⁰⁸ Applying this rule to legislative history would require a very substantial change from current judicial practices, since even those courts that rely on legislative materials do not usually give them the same weight as statutory text. Courts

206. *Hertz v. Woodman*, 218 U.S. 205, 217 (1910); see also *Marrero*, 417 U.S. at 659 & n.10 (holding that earlier general savings clause was not superceded by later specific one where there was no conflict between them); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465-69 (1908) (holding that the general savings clause must be considered in construing a repealing act); *United States v. Reisinger*, 128 U.S. 398, 401-03 (1888).

207. *Cf. Hertz*, 218 U.S. at 217.

208. See *supra* Part II.A.

usually regard legislative history as, at most, a source that influences the interpretation of statutory text. The degree of influence varies from court to court and from judge to judge, but, in these days of heightened appreciation for textualism, it is generally agreed that legislative history should not receive the same weight as operative statutory text.²⁰⁹

Indeed, it would often be virtually impossible to give legislative materials such weight. As is notorious, legislative history often contradicts itself and provides support for multiple different interpretations of statutory text.²¹⁰ In such cases, a court would face the greatest difficulties in interpreting the statute if it were obliged to treat the statutory text and all statements in the legislative history as equally binding.

One might claim, therefore, that even if the arguments in the previous section are accepted, they merely expose a dilemma. On the one hand, if Congress instructed courts to deem statutes to incorporate their legislative history by reference, the courts would be in a hopeless situation because they would be obliged to give statutory weight to the multifarious and contradictory texts that legislative history often contains.²¹¹ On the other hand, if legislative history is not considered incorporated into statutes by reference, then its use is illegitimate for the reasons stated by Professor Manning.

Fortunately, there is a fairly easy escape from this dilemma—in fact, two possible escapes. The first is judicial. All that is needed is for courts to conclude that the Interpretation of Statutes Act instructs them to deem legislative history to be incorporated by reference, but not to have the same weight as operative statutory text.

209. See, e.g., *Shannon v. United States*, 512 U.S. 573, 583 (1994) (“We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.”); Breyer, *supra* note 81, at 863 (“No one claims that legislative history is a statute, or even that, in any strong sense, it is ‘law.’ Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the ‘law.’”); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1521 (1998) (“[M]ost of this century’s major theories of statutory interpretation have approached legislative history as evidence, not as authority.”).

210. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 n.15 (1994) (discussing the conflicting statements made by Members of Congress regarding the retroactivity of the Civil Rights Act of 1991); *Conroy v. Aniskoff*, 507 U.S. 511, 519-27 (1993) (Scalia, J., concurring) (discussing conflicting elements in the legislative history of the Soldiers’ and Sailors’ Civil Relief Act).

211. The matter would be even more troubling if legislators took advantage, as they surely would, of the strategic incentives provided by the Interpretation of Statutes Act. See Manning, *supra* note 13, at 720-21 (discussing strategic creation of legislative history by legislators). If the usual rule that incorporated text is to be treated on a par with other statutory text applied, any legislator could simply make a statement on the floor during debate on a bill, which, upon the bill’s passage, would then be entitled to the same weight as any other statutory text. Such a regime would obviously be intolerable.

Rather, it should have the weight that courts usually give to legislative history (when they are not troubled by the issue of legislative history's legitimacy, since the Interpretation of Statutes Act would resolve that issue). The incorporated legislative history should have some influence but should not be treated on a par with operative statutory text.

Courts could properly give legislative history this lesser weight even if it were incorporated by reference into statutory text. Incorporation by reference would effectively turn legislative history into statutory text, but courts recognize that, even within statutory text, not all words have the same weight. Statutes often consist of different types of texts that courts should and do treat differently. The operative part of most statutes consists of a series of commands, but many statutes also contain sections of a different character, such as a title, a short name, a preamble, a section of findings, or a statement of purposes.²¹² Such sections, courts recognize, are part of the statute and have legal force that may influence the interpretation of the statute's commands,²¹³ but courts often determine that these sections do not have the same weight as the operative portions of the statute.²¹⁴ The same should be true of a portion of a statute that sets forth the statute's legislative history, whether that portion is included verbatim in a statute or incorporated by reference. Like a preamble or a statement of purpose, legislative history should be treated as a special kind of statutory text that

212. See NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* §§ 18.01, 20.03, 20.10, 20.12 (Sands 4th ed. 1985).

213. For example, the "findings" section of the Americans with Disabilities Act states that "[t]he Congress finds that . . . some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a) (1994). In *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 2147 (1999), the Supreme Court stated that this finding was "critical[]" to its conclusion that the determination of whether a person is disabled within the meaning of the ADA should be made with reference to measures that mitigate the person's impairment. If the determination were made without reference to such mitigating measures, the Court noted, there would be well over 100 million disabled Americans. See *id.* at 2148-49. The Court stated that, "[b]ecause it is included in the ADA's text, the finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term 'disability.'" *Id.* at 2149. See also *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) ("While the title of an act will not limit the plain meaning of the text . . . it may be of aid in resolving an ambiguity.").

214. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19-20 (1981) (holding that the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 was "simply a general statement of 'findings'" that only "encourage[d], rather than mandate[d], the provision of better services"); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (stating "the name given to an act . . . cannot change the plain import of its words"); *Association of Am. R.R.s. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers."); SINGER, *supra* note 212, §§ 20.03, 20.12.

should receive less weight than the words of the operative parts of a statute.²¹⁵

Courts would probably reach this conclusion on their own. The other solution, however, would be for Congress to provide express legislative direction on this point. Congress could add a second section to the Interpretation of Statutes Act as given above, so that the act would provide:

§ 1. Each statute passed by the Congress shall, unless it states otherwise, be deemed to incorporate the statute's legislative history.

§ 2. In interpreting statutes passed by the Congress, courts shall give such weight to the legislative history incorporated pursuant to § 1 of this Act as was customarily given to legislative history by federal courts in the period from 1900 to 1980.

This version of the act would ensure that legislative history would be validly incorporated into statutes, while providing for it to have appropriate weight.²¹⁶

Curiously enough, the notion that courts could give appropriate weight to incorporated legislative history when instructed to do so by Congress might be more controversial than the view that courts could take the same action on their own. Although some authors think it clear that Congress may enact statutes regulating statutory interpretation,²¹⁷ others perceive potential constitutional

215. For the same reason, the Interpretation of Statutes Act would not require courts to alter the established hierarchy of weights given to different kinds of legislative history, under which committee reports receive the most weight, sponsors' statements some weight, and floor statements by ordinary Members of Congress still less weight. See Manning, *supra* note 13, at 721; Eskridge, *supra* note 2, at 636-39.

216. By specifying a particular time period in § 2, this hypothetical act would of course raise the question of exactly what weight courts customarily gave to legislative history during the specified period. The dates given here are intended to reference the period before the current campaign against the use of legislative history began, but, if this were a real statutory drafting exercise, it would perhaps be better to choose some different language for this section. Since the statute is offered here only as a thought experiment, we need not fuss too much over this detail; the point is that this section would direct that legislative history be given some weight, but not as much as operative statutory text. Although leaving it up to the courts to determine just how much weight legislative history customarily received, the hypothetical statute would still promote more uniform treatment of legislative history, since it would defuse the arguments of those who decline to consider legislative history at all.

217. See Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2107 (1990) ("Interpretive instructions include, least controversially, explicit legislative guidance about statutory interpretation."); Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 448 (1950) ("Any serious sug-

problems with such statutes.²¹⁸ While the potential constitutional problems are unrelated to the nondelegation doctrine, and are therefore somewhat tangential to the main point of this Article, it is worth briefly noting why Congress might properly choose to regulate, by statute, the weight that courts should give to legislative history that would be incorporated by reference under the Interpretation of Statutes Act.

The main potential argument against interpretive instructions in statutes is that they unconstitutionally invade the judicial function.²¹⁹ This argument is based on the principle that “[t]he legislature has the power to make the laws, while the judiciary declares what those laws mean.”²²⁰ This argument, however, draws an implausibly sharp dichotomy between the task of making law and the task of giving it meaning. Perhaps the argument is based on an analogy from some established (or supposed) limits of the legislative power. The legislature may not review a case decided by the courts,²²¹ nor instruct the courts to reopen a finally-decided case,²²² nor, it is said, direct the courts as to how to apply previously-enacted law in a particular case.²²³ But even accepting these principles, what they establish is a rule against congressional interference with the judicial function of applying the laws to particular cases.²²⁴ They do not prove that Congress may not give courts direc-

gestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously.”)

218. See, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 270-76 (1975); Alan R. Romero, *Interpretive Directions In Statutes*, 31 HARV. J. ON LEGIS. 211, 223-25 (1994) (“It also might be constitutionally impermissible for legislatures to go beyond specifying the appropriate guiding principles or interpretative attitude . . . to insisting that courts consult or not consult certain sources.”).

219. See Romero, *supra* note 218, at 221.

220. *Id.*

221. See *District of Columbia v. Eslin*, 183 U.S. 62, 64-66 (1901) (holding that an Article III court may not give judgment in a case where the judgment would have no effect unless approved by Congress).

222. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995).

223. This is sometimes said to be the meaning of the Supreme Court’s enigmatic decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See, e.g., *Seattle Audobon Soc. v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990), *rev’d*, 503 U.S. 429 (1992).

224. Even with regard to decision of individual cases, the line between properly making law and improperly telling the courts how to do their job of applying law is, at best, an exceedingly fine one. In *Robertson v. Seattle Audobon Soc.*, 503 U.S. 429, 434-35 (1992), the Supreme Court unanimously approved a statute in which Congress “determine[d] and direct[ed]” that certain actions of the Bureau of Land Management satisfied the statutory requirements that were at issue in two particular cases identified in the statute by name and docket number. The Court held that the statute permissibly made law for those cases. See *id.* at 438-41. Similarly, in *Stockdale v. Atlantic Ins. Co.*, 87 U.S. (20 Wall.) 323, 331 (1873), the Court approved a statute which provided that an earlier statute “shall be construed” in a certain way. The Court acknowl-

tion with regard to the ascertainment of statutory meaning.²²⁵ Congress makes the laws that the courts must apply,²²⁶ and it is appropriate for Congress, as for any giver of binding instructions, to give instructions about how those who must carry out the instructions should understand them.

Many statutes and cases confirm this principle. Statutes frequently contain not only commands, but also instructions regarding the interpretation of those commands. Innumerable statutes, of course, provide definitions for the terms that they use.²²⁷ Statutes may also provide more general principles regarding how they should be construed, such as a rule that the statute should be construed liberally so as to effectuate its purposes.²²⁸ Statutes may also give directions for the interpretations of other statutes, as by providing definitions of terms as used in statutes generally.²²⁹

In addition, statutes may provide general principles of statutory interpretation. Many state legislatures, for example, have adopted statutes that abrogate the common law rule that statutes

edged that "in our system of government, the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts," but it held that Congress, in telling the courts how to construe the old law, was really doing no more than making new law. *Id.* at 332. The Court held that it should not regard the statute as an "invasion of the judicial function where the effect of the statute and the purpose of the statute are clearly within the legislative function." *Id.*

225. See SINGER, *supra* note 212, § 27.03, at 463 ("Many courts have failed to distinguish carefully between general interpretive statutes which apply to all subsequent legislation and special interpretive statutes which frequently are enacted for the purpose of retroactively altering the interpretation of the law. Where general interpretive statutes exist they should be relied on extensively in determining the meaning of particular words.").

226. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

227. See SINGER, *supra* note 212, §§ 27.01-02.

228. See, e.g., Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a) (set out as a note following 18 U.S.C. § 1961 (1994)) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-498 (1985) (applying this provision). The Federal Rules of Evidence, which Congress enacted as statutes, provide a rule of construction that sets forth several purposes that courts should construe the rules so as to achieve. See FED. R. EVID. 102; see also *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 n.1 (3d Cir. 1996) (applying this provision).

229. The federal Dictionary Act contains a series of instructions to courts regarding how to construe particular terms in other statutes. See 1 U.S.C. §§ 1-6 (1994). Many states have similar statutes. See, e.g., *Alphonse Custodis Chimney Constr. Co. v. Molina*, 32 S.E.2d 726, 727 (Va. 1945) (applying a definition of "United States" provided in a general construction statute and noting that "it is a familiar rule of statutory construction that subsequent legislation is enacted in light and with knowledge of such interpretive statutes, and hence the latter control unless there be a clear legislative intent to substitute a different interpretation"). Similar statutes also have a long history in England. See, e.g., Interpretation Act, 52 & 53 Vict., ch. 63 (1889) (defining numerous terms); An Act for shortening the Language used in Acts of Parliament, 13 & 14 Vict., ch. 21 (1850) (same).

in derogation of the common law shall be strictly construed²³⁰ or that provide some other general principles of construction.²³¹ Similar general principles have long existed in English statutes.²³² In our federal system, a good example of a general interpretive direction is the general savings statute, 1 U.S.C. § 109, mentioned earlier.²³³ As noted, the common law rule of statutory construction was that a statute that repealed another statute remitted the penalties of the repealed statute unless it contained a provision expressly saving them; section 109 reverses this rule. The Supreme Court has never shown any indignation at Congress's interpretive instructions or suggested that they invaded the judicial function. Rather, it has applied § 109, declaring that the statute "has been upheld by this court as a *rule of construction* applicable, when not otherwise provided, as a general saving clause, *to be read and construed as a part of all subsequent repealing statutes*, in order to give effect to the will and intent of Congress."²³⁴

230. See, e.g., *People ex rel. Dep't of Transp. v. Muller*, 681 P.2d 1340, 1343-45 (Cal. 1984) (applying statutory provision abolishing strict construction rule); *Commonwealth v. Trent*, 77 S.W. 390, 393 (Ky. 1903) (same; stating, with regard to statute abolishing strict construction rule, that "[i]t was within the competency of the Legislature to enact the statute, and it is incumbent on the judiciary to enforce it").

231. See, e.g., *Shapiro v. Shapiro*, 697 A.2d 1342, 1346-49 (Md. 1997) (applying statutory provision making it the general rule that in statutory language, the plural includes the singular); *Boyes v. Eddie*, 970 P.2d 91, 95 (Mont. 1998) (applying statutory provision making it the general rule that in statutory language, the singular includes the plural); *Wolkoff v. Chassin*, 675 N.E.2d 447, 448-50 (N.Y. 1996) (applying a provision of New York's General Construction Law that altered the common law rule for determining the required quorum for action by a multi-member administrative body created by statute); *In re Hezzie R.*, 580 N.W.2d 660, 665, 674-75 (Wis. 1998) (applying statutory provision making it the general rule that provisions of statutes are severable).

232. See Interpretation Act, 52 & 53 Vict., ch. 63, §§ 1, 11 (1889) (providing, inter alia, that, unless a contrary intention appears, the masculine gender shall include the feminine, words in the singular shall include the plural and vice versa, and that the repeal of a statute that itself repealed another statute shall not revive the earlier statute); An Act for shortening the Language used in Acts of Parliament, 13 & 14 Vict., ch. 21, §§ 4, 5 (1850) (same); An Act for improving the Administration of Justice in Criminal Cases in *Ireland*, 9 Geo. IV, ch. 54, § 35 (1828) (providing that, in any act relating to any offense, words describing the offense that are in the singular number or masculine gender shall include several matters of the same kind as well as one matter, several persons as well as one person, females as well as males, and bodies corporate as well as individuals).

233. 1 U.S.C. § 9 (1994); see also *supra* notes 202-206 and accompanying text.

234. *Hertz v. Woodman*, 218 U.S. 205, 217 (1910) (emphasis added); see also *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 & n.10 (1974); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 468-69 (1908); *United States v. Reisinger*, 128 U.S. 398, 401-03 (1888); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 3003 (Horack 3d ed. 1943) ("Practically all of the states enacted at an early date a general statute defining terms commonly used in legislative enactments. It must be presumed that all subsequent legislation is enacted in light of and with knowledge of these general interpretive statutes and thus the statutes control except where a clear legislative intent to substitute a different interpretation appears.").

These examples show that statutes may prescribe rules of statutory construction. Congress would not invade the judicial function by instructing courts that they should give legislative history, when incorporated into statutes by reference, only the weight that they would probably have given it anyway, namely, the weight that courts have traditionally given to legislative history.²³⁵ The Inter-

235. This issue, of course, could be treated at greater length, but, as noted in the text, it is somewhat tangential to the main theme of this Article. A few more thoughts: Romero suggests that there might be a distinction between statutes that set forth interpretive principles to guide courts and statutes that regulate the sources that courts may consult when interpreting statutes. See Romero, *supra* note 218, at 223. It is unnecessary to resolve this point because, as Romero recognizes, if extra-legislative sources were incorporated into a statute, they would be part of the law. See *id.* at 225. Instructions regarding their use would, therefore, not be instructions regarding sources, but instructions regarding the interpretive principles to be applied to statutory language.

Another potential constitutional objection is that statutes that attempt to control the interpretation of future statutes unconstitutionally detract from a legislature's own power, by preventing the legislature from relying in the future on accepted usages and normal principles of communication. See DICKERSON, *supra* note 218, at 272-74. Several points, however, answer this argument. First, the legislature, in passing any statute, may always exclude it from the operation of any previously passed interpretive statute. So, interpretive statutes do not really detract from the legislature's power. To be sure, the interpretive statute alters the burden of inertia; if the legislature wishes to avoid the effect of a previously enacted interpretive rule, it must act affirmatively to do so. But legislatures are already under innumerable similar affirmative burdens, of judicial origin, since courts have created innumerable clear statement rules and other rules of construction that apply where the legislature has not provided otherwise. Some of these rules may fairly be characterized as being no more than explicit articulations of the rules that an ordinary interpreter of language would apply in determining the meaning of a statute, but others have the effect of requiring courts to give statutes some meaning other than the natural meaning of their words. For example, the Supreme Court has determined that when Congress passes a statute providing that with regard to certain statutory violations the United States shall be liable "the same as a private person," the words "except for interest" are to be read into the statute. See *Library of Congress v. Shaw*, 478 U.S. 310, 319-23 (1986). Similarly, when Congress charters a federal entity and provides that the entity may "sue and be sued" in the federal courts, these words are to be understood as creating federal *jurisdiction* over any case to which the entity is a party. See *American Nat'l Rod Cross v. S.G.*, 505 U.S. 247, 257 (1992). Congress must take affirmative steps to overcome these counterintuitive rules of construction. It would be rather ironic if the courts could burden Congress with such rules, but Congress were forbidden to create such rules for itself.

Moreover, the legislature surely does not detract from its own power when it provides, in a statute, special definitions or rules of construction for that very statute. See DICKERSON, *supra* note 218, at 272. A general interpretation statute is, however, deemed to be a part of every future statute to which it applies. See *Hertz*, 218 U.S. at 217.

Finally, it is not necessary to claim here that a general interpretive statute, such as the hypothetical Interpretation of Statutes Act, absolutely controls all future statutes unless they clearly exclude its operation. It is sufficient if interpretive statutes simply set forth the rule to be applied unless a future statute excludes its operation either expressly or by implication. The general savings statute again provides a good example of the appropriate judicial attitude toward general interpretive statutes. See 1 U.S.C. § 109. In applying it, the Court has said:

[Because section 109] has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment. But, while this is true, the provisions of § [109] are to be treated as if incorporated in and as a part of sub-

pretation of Statutes Act could, therefore, fulfill its intended function. By incorporating legislative history into statutes by reference, it would legitimate that legislative history and save it from the nondelegation doctrine argument. Then, either by judicial decision or in accordance with express statutory provision, the legislative history could receive an appropriate weight in the process of statutory construction.

3. An Attempted Rebuttal

In his article, Professor Manning does not expressly consider the law concerning statutory incorporation by reference, but he does to some degree anticipate and attempt to rebut the argument made here. He notes that one could regard the use of legislative history in statutory construction as effecting only a "one time, pre-enactment delegation" of power to congressional committees.²³⁶ He further observes:

If it is widely understood that a legislator's vote for an ambiguous statute is effectively a vote for certain forms of legislative history, one might contend that there is no substantial difference between the text and the legislative history; members of Congress would be publicly accountable for committee reports and sponsor's statements, just as they are for a statutory text.²³⁷

Manning then asserts, however, that this argument "understates the possibility of strategic behavior by legislators."²³⁸ He argues that because "[v]oting for the statute is not the same as voting for the legislative history," individual legislators who understand the statutory text differently from the meaning expressed in legislative history are "free to assert a contrary conception of the legislation—expressing a plausible disagreement with the committee's or sponsor's interpretation of the bill."²³⁹ Moreover, Manning argues, because the Supreme Court gives more weight to committee reports

sequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § [109].

Great Northern Ry. Co., 208 U.S. at 465. That is, while one should not go as far as to say that a general construction statute is absolutely binding on future statutes, it would surely be wrong to hold it a nullity; the general statute should be deemed to be a part of subsequent statutes and the subsequent statutes should then be construed fairly.

236. Manning, *supra* note 13, at 720.

237. *Id.*

238. *Id.*

239. *Id.*

and floor statements by a bill's sponsor than to statements of other legislators, individual legislators who agree with a bill's legislative history but find it politically uncomfortable can make floor statements disavowing the legislative history and asserting a contrary understanding of the bill, secure in the knowledge that courts will later discount their floor statements and rely on the legislative history anyway.²⁴⁰ Manning concludes, therefore, that even though legislative history may exist prior to a statute's enactment, giving it authoritative force enables Congress to "separate responsibility from result, defeating the principle of accountability that lies at the heart of our representative government."²⁴¹

Like Manning's main argument, this argument would be defeated by passage of the Interpretation of Statutes Act. Manning argues that "[v]oting for the statute is not the same as voting for the legislative history," but if every statute were legally deemed to incorporate its legislative history by reference, then voting for the statute *would* be the same as voting for the legislative history, just as each legislator's vote on the Civil Rights Act of 1991 was also a vote on "the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991)."²⁴² Any legislator might, of course, still attempt to vote for the bill while disclaiming responsibility for a part of the legislative history with which he disagrees, but the legislator's claim that he was not voting for the legislative history would simply be wrong as a matter of law. Such an attempt would be no different from a legislator's attempt to vote for one section of a bill while disclaiming responsibility for another section. Such attempts do not unconstitutionally "separate responsibility from result."²⁴³ Nothing can stop a legislator voting on welfare reform from solemnly declaring that "this bill will never permit the truly needy to be cut off from public assistance," or a legislator voting on the Gun-Free School Zones Act from saying that "this bill does not unnecessarily federalize local criminal law." A legislator may even make quite contradictory statements about what a bill does.²⁴⁴ The legislator remains constitutionally respon-

240. See *id.* at 720-21.

241. *Id.* at 721.

242. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b) (1991) (set out as a note following 42 U.S.C. § 1981 (1994)).

243. Manning, *supra* note 13, at 721.

244. See, e.g., Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-81 (recounting how Representative Morris Udall, in attempting to get a mining bill passed, first assured one legislator that the bill preserved each state's power over strip mining within its territory, and then assured another legislator that the bill set a uniform federal standard for strip mining).

sible for the bill's contents,²⁴⁵ and this rule must apply equally to text that a bill incorporates by reference, since that text is adopted as though written out verbatim.²⁴⁶

Manning may well be right that using legislative history to resolve statutory details makes it easier, as a practical matter, for legislators to distance themselves from details that might harm them politically. This point, however, does not detract from the validity of incorporating legislative history by reference. First, it is noteworthy that this is essentially a practical argument. As noted earlier, the rule against congressional self-aggrandizement is distinctive in separation of powers doctrine in that it is a formalistic rule. It is a sign of trouble in Manning's argument that he must resort to a functionalist argument to explain the illegitimacy of legislative history even though its pre-enactment existence satisfies the formal requirement for texts that may be incorporated by reference.

Moreover, Manning's argument does not succeed even on a practical level. True, incorporation by reference of legislative history may make it easier for legislators to avoid political responsibility for their actions and facilitate the passage of statutes that might not be enacted if their full details were explained in statutory text. These problems, however, have long been understood to pertain to all uses of incorporation by reference,²⁴⁷ and yet static incorporation by reference is uncontroversially allowed. It is no worse than the myriad different uses of obscurity, periphrasis, and deception in which Congress indulges in statutory text itself for the purpose of avoiding political responsibility and making it easier to get statutes passed.²⁴⁸ Congress is constitutionally permitted to use incorporation by reference, despite its potential for subterfuge, and it does not significantly add to Congress's deceptive powers to permit the matter incorporated to be legislative history.

245. See Scalia, *supra* note 2, at 34-35.

246. See *supra* Part II.A.

247. See Read, *supra* note 179, at 277.

248. To give just one noteworthy example, what is the top individual income tax rate? The Internal Revenue Code appears to have a top tax rate of 39.6%; this rate is prominently mentioned in the Code's very first section. See 26 U.S.C. § 1(a) (1994). Buried in 26 U.S.C. § 68, however, is the rule that individual taxpayers must reduce their itemized deductions by 3% of the excess of their adjusted gross income over a specified amount. See *id.* § 68(a). A simple calculation shows that, for some taxpayers, this rule is equivalent to increasing the top tax rate by a little over 1%, to about 40.8%. (An affected taxpayer is taxed at a rate of 39.6%, but on an income that is 103% of the taxpayer's actual income in excess of the specified amount.) It seems likely that the top tax rate of 39.6%, like a price tag of \$39.99, was chosen to avoid going above a psychologically significant level. The subterfuge of section 68 enabled Members of Congress to say, duplicitously, "I voted to keep tax rates below 40%," but it is not invalid for that reason.

If the Interpretation of Statutes Act were in effect, each statute's incorporation by reference of legislative history would not be a "one time" delegation of power to congressional committees, as Manning suggests,²⁴⁹ but a "zero time" delegation of power. Manning is surely right that a true delegation of law-elaboration power to a congressional committee could not be excused on the ground that it gave the committee only one opportunity to exercise the power, but incorporation by reference of pre-existing text, even text that happens to have been produced by a congressional committee, is not a delegation of power at all.

4. The Argument from the Lack of Necessity

Manning also makes another argument against using legislative history that is not precisely directed at the point made in this Article but is worth noting. Having argued that the use of legislative history effects an unlawful delegation of law-elaboration power to congressional committees, he inquires whether textualists should go even further and assert that delegation of law-elaboration power to courts and executive agencies should be regarded as a violation of the general nondelegation doctrine.²⁵⁰ He explains that the two situations are distinguishable. All statutes, he notes, contain ambiguities, and someone must resolve them when they come up in the course of each statute's application.²⁵¹ Some law-elaboration by courts and executive agencies is therefore inevitable.²⁵²

This argument does not, however, justify giving congressional committees authority to elaborate statutes in legislative history. If a statutory ambiguity is noted and clarified in legislative history, Manning observes, then, necessarily, someone spotted the point before the bill was passed and Congress could have included the clarifying statement in the legislation itself.²⁵³ There is no necessity, Manning therefore concludes, for allowing legislative materials to elaborate the law; such elaboration should occur in the laws themselves. "The sole impediment," he states, "is the burden of enacting the already-identified legal principle into law through bicameralism

249. Manning, *supra* note 13, at 720.

250. *See id.* at 725-26.

251. *See id.*

252. *See id.* at 727-28.

253. *See id.* at 728.

and presentment—a burden that the Constitution expressly contemplates and requires.”²⁵⁴

Manning is correct to observe that Congress could move legislative history into actual statutory text, but that does not defeat Congress’s power to choose to give force to legislative history by incorporating it into statutes by reference. Static incorporation by reference is never necessary. The text to be incorporated exists in a fixed form prior to the adoption of the incorporating statute, and the legislature could always set it out verbatim in the statute itself. Incorporating it by reference instead is only a convenience. This point, however, has never been thought to defeat legislative power to use incorporation by reference.²⁵⁵ Legislatures have freedom to draft statutes in the form that pleases them.

Moreover, at a more practical level, Manning overstates the case when he says that the burden of bicameralism and presentment is the sole impediment to moving clarifying statements from legislative history to statutory text. There are sound, practical reasons why a reasonable legislator might prefer to put certain statements in a bill’s legislative history rather than in its actual text. Including too much statutory text can be self-defeating. If there is an ambiguity in operative statutory text, an attempt to explain it by including more operative text may create more problems than it resolves because the explanatory text would be of equal legal status with the text being explained and might itself require further explanation.²⁵⁶ At some point, it may be desirable to cease adding to the operative text and to adopt an “Official Comment” or similar supplementary text, to which courts will give some weight, but not as much as they give to the operative text. This is a well-accepted strategy, used, for example, by the drafters of the Uniform Com-

254. *Id.* Manning also observes that, because some law elaboration by courts and executive agencies is inevitable, some must be permitted. It would be extremely difficult for courts to distinguish such inevitable law elaboration from elaboration that effects a forbidden delegation of the legislative power; therefore, courts do not attempt to do so. That is why the general non-delegation doctrine is so weak. Because, however, any point of elaboration noted in a bill’s legislative history could have been put into the bill itself, law elaboration in legislative history is not inevitable. Therefore, courts are free to impose a flat ban on such elaboration. *See id.*

255. *See supra* Part II.A; Read, *supra* note 179, at 283.

256. *See SINGER, supra* note 212, § 20.09 (“[D]efinitions in statutes should be limited to the fewest number of words or phrases possible and it should be remembered that a definition may confuse, as well as clarify and simplify the legislative meaning.”). *Cf.* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 72 (1994) (noting that a difficulty with using dictionaries in statutory interpretation is that “[l]exicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular”).

mercial Code and by the United States Sentencing Commission in its promulgation of the Sentencing Guidelines.²⁵⁷

One might even feel that the weight accruing to "Official Comments" is more than one would like to see given to particular extrastatutory texts. One might, in fact, want the extrastatutory text to receive exactly the weight that legislative history materials customarily receive, whatever one believes that is. That is the point of § 2 of the hypothetical Interpretation of Statutes Act. It instructs courts to deem that statutes incorporate their legislative history by reference but to give these incorporated materials only such weight as courts have customarily given to legislative history.

Manning observes, rightly enough, that Congress could accomplish this end within the confines of statutory text.²⁵⁸ Congress could adopt legislative history under the heading "findings," "purpose," "official comment," or whatever name would seem most likely to imbue the text with the weight Congress desired it to receive.²⁵⁹ Congress could even set out legislative history verbatim in a portion of statutory text called "legislative history" and instruct courts to give that portion only the customary weight given to legislative history in the process of statutory construction.²⁶⁰ Still, just because Congress could do all this does not mean that it is obliged to do so. Congress is not constitutionally obliged to use the best statutory drafting practices. In particular, it may use static incorporation by reference even though such reference is never necessary.²⁶¹

5. Legislative History in the Real World

The arguments so far have relied on passage of a hypothetical Interpretation of Statutes Act, which, of course, Congress has never passed. These arguments nonetheless go a long way toward refuting the revised formalist position. They show that Congress could, by statute, legitimate the current judicial practice of giving weight to legislative history. As noted earlier, it would be surprising if a statute could have that effect if, as Professor Manning asserts, the constitutional rule against congressional self-aggrandizement prohibits

257. Manning agrees that Congress could validly adopt official commentary that would authoritatively explain statutory text. See Manning, *supra* note 13, at 730.

258. See *id.* at 729-30.

259. See *id.*; *supra* Part II.B.2.

260. See *supra* Part II.B.2. As there noted, even without express instruction, courts would probably conclude on their own that such a statutory section should receive lesser weight than operative statutory text.

261. See, e.g., *Franklin v. United States*, 216 U.S. 559, 569-70 (1910).

the use of legislative history as a tool of statutory construction.²⁶² The validity of the hypothetical statute therefore suggests that judicial use of legislative history does not violate the constitutional rule.

Moreover, the arguments given so far considerably reduce the scope of the problem to be resolved. The problem is not whether our Constitution can tolerate a regime in which courts give weight to legislative history in the process of statutory construction. The preceding sections show that it can. This Article demonstrates, at the very least, that the Constitution does not itself definitively resolve the question of whether courts may use legislative history, but permits Congress to resolve the question by statute. This is a very significant distinction, comparable to the distinction between saying, as the Supreme Court once said, that the Constitution forbids private individuals from suing states for money damages except as expressly allowed by Congress,²⁶³ and saying, as the Supreme Court now says, that the Constitution forbids private individuals from suing states for money damages, period.²⁶⁴ With regard to the legislative history issue, we now know that we are on the former side of this line.

Still, the remaining, albeit reduced, issue is whether congressional passage of the Interpretation of Statutes Act is an essential precondition to the constitutionally valid use of legislative history. One might argue that it is. Only such a statute, the argument would run, could defuse the self-aggrandizement problem by showing that the whole Congress ratified legislative history produced by congressional committees or Members. The judiciary, on this view, could not, on its own, decide that statutes should be deemed to ratify their legislative history. Even accepting Congress's ability to incorporate legislative history into a statute by express reference,

262. See *supra* notes 182-184 and accompanying text.

263. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (plurality opinion) (holding that CERCLA renders states liable for monetary damages in federal court and Congress may render them so liable pursuant to the Commerce Clause).

264. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (holding that the Eleventh Amendment limits Congress's power to subject a state to suit in federal court). Of course, in the complex area of state sovereign immunity, no rule really ends with "period." A more complete statement would mention that Congress may authorize private suits against states when acting pursuant to its powers under section 5 of the Constitution's Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976), but not when acting pursuant to its Article I powers, see *Seminole Tribe*, 517 U.S. at 76. There are many other details. See Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 542-43 (1995). The point here, however, is simply to emphasize the significance of the distinction between a determination that the Constitution itself resolves an issue and a determination that the Constitution commits the issue to Congress.

the rule would be that such incorporation must be express and cannot happen by mere judicial implication.

While the ability of the judiciary to decide the legislative history question is not as clear as that of Congress, the arguments given so far point the way to understanding the validity of the judicial use of legislative history in the real world, in which the Interpretation of Statutes Act does not exist, and in which legislative history is not actually incorporated by reference into statutory text. The value of the previous discussion is that it brings out the crucial importance of legislative history's pre-enactment status. The previous sections demonstrate that it is no mere nicety to distinguish between permitting congressional committees or Members to clarify a statute *after* it is passed and giving some effect to comments they make *before* it is passed. Rather, this distinction goes to the very heart of nondelegation doctrine.²⁶⁵

The revised formalist argument against legislative history rests on the constitutional distinction between delegations of power outside the legislative branch and legislative self-delegations. As we have seen, however, the pre-enactment/post-enactment distinction trumps the distinction between self-delegations and delegations to others, insofar as nondelegation doctrine is concerned. With regard to delegations of power to take actions in the *future*, there is a sharp distinction between congressional self-delegations and congressional delegations of power to others. In allowing a statute to give force to extrastatutory texts that existed *before* the statute's passage, however, nondelegation doctrine makes no distinction based on the origin of the extrastatutory text.²⁶⁶ Pre-enactment text created by a congressional committee is the same as any other pre-enactment text, so far as nondelegation doctrine is concerned.

The priority of the pre-enactment/post-enactment distinction over the distinction between self-delegations and delegations to others suggests that the courts, in deciding whether statutory incorporation of pre-existing legislative history must be express or whether it can also occur by implication, may treat the question as they would any question about whether a statute may be deemed to incorporate any pre-existing text. Such questions are familiar to the courts. The courts frequently decide, on their own, that statutes have the effect of incorporating or adopting certain matters that pre-dated their passage. The courts, for example, have determined that "[w]here Congress uses terms that have accumulated settled

265. See *supra* Part II.A.

266. See *supra* Part II.A.

meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."²⁶⁷ Similarly, courts have developed the principle that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."²⁶⁸ Indeed, judicial reliance on all manner of extrinsic sources, such as treatises and historical events,²⁶⁹ necessarily assumes that it is appropriate for the judiciary to determine which extrinsic sources a statute implicitly references.

Of course, in the absence of an express incorporation by reference, such as would be provided by the Interpretation of Statutes Act, judicial determinations as to whether Congress's passage of a statute ratifies the statute's legislative history will always be subject to uncertainty. The same is true, however, of all judicial judgments regarding implied adoption of pre-existing materials. Scholars have criticized, for example, the principle that statutory reenactments implicitly ratify pre-existing judicial and administrative interpretations.²⁷⁰ The point, however, is that the question of which pre-existing texts a statute should be understood to incorporate implicitly is not regarded as a *constitutional* matter, but as a matter for sound judicial judgment. Whether the courts have exercised the best judgment with regard to legislative history is a separate question.

The force of the special constitutional rule against congressional self-delegation applies only to self-delegations of power to take *future* actions that have legal force. As to texts that exist prior to a statute's passage, nondelegation doctrine makes no distinction based on the origin of the text. Therefore, the question of which pre-existing texts are ratified by a statute's passage is, as usual, a proper judicial question, even with regard to texts that are legislative materials. Thus, essentially the same arguments that demonstrated the validity of the hypothetical Interpretation of Statutes Act also suggest that it does not violate the constitutional rule against congressional self-aggrandizement for the courts to conclude, even without express congressional direction on the matter, that passage of a statute ratifies the statute's pre-existing legisla-

267. *Neder v. United States*, 527 U.S. 1, 21 (1999) (internal quotations omitted; ellipsis in original).

268. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

269. See *supra* notes 96-105 and accompanying text.

270. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1365-69 (Eskridge & Frickey eds., 1994).

tive history and gives it the force that legislative history customarily receives.

Similar observations apply to the arguments given by Manning in response to the point that the use of legislative history makes possible only a pre-enactment delegation of power. As noted earlier, Manning argues that judicial reliance on legislative history permits legislators to engage in strategic behavior such as voting for a bill while disavowing its legislative history.²⁷¹ But, as also noted, such strategic distancing from the legislative history is not possible in a regime in which a vote for the bill is effectively a vote for the legislative history. In such a regime, the legislator's claim that she is voting for the bill but not for the legislative history is simply wrong as a matter of law.²⁷²

As we have just seen, such a regime can arise by judicial implication as well as by legislative action. Judicial rules of statutory construction can render a legislator's strategic behavior legally ineffective just as much as statutory rules of statutory construction. An individual legislator might claim to be voting for a bill while disavowing its legislative history, just as an individual legislator might say, "I am voting for this bill, but I do not understand the terms in it to have the settled meanings that they have in common law," or "I am voting for this bill, which amends and re-enacts a previously-existing statutory scheme, but I do not thereby approve certain long-standing judicial interpretations of the previously-existing scheme." The fact is, however, that a statute will be interpreted in accordance with certain judicially created rules of statutory construction whether the legislator likes it or not. The legislator is presumed to know these rules,²⁷³ and may properly be held responsible for the bill as it will be construed in accordance with them.²⁷⁴

271. See *supra* Part II.B.3.

272. See *supra* Part II.B.3.

273. See *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (stating that Congress is "on . . . notice" of rules of construction regarding "sue and be sued" clauses in federal charters); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

274. Of course, a legislator might complain that she had no opportunity to alter a bill's legislative history. But that argument would be no more valid than an argument that the legislator had no opportunity to alter the common law understandings of a bill's terms or the prior judicial decisions that a bill would be understood to adopt. In any of these cases, if the legislator does not like the implications that would be read into the bill by virtue of the rules of statutory construction, she is free to attempt to get Congress to include in the bill a provision officially disavowing the potential interpretation that she finds objectionable (just as Congress, in the Civil Rights Act

What really matters, therefore, is simply whether there is a systemic understanding that a legislator's vote on a statute has the effect of ratifying the statute's legislative history. Passage of the Interpretation of Statutes Act would be a way to ensure that there is such an understanding, but the same understanding could arise from judicial practice and congressional acquiescence. In a regime in which a legislator's vote on a bill is understood to confirm the bill's legislative history and authorize courts to give it its customary weight, a legislator cannot lawfully distance himself from legislative history.

Indeed, one may argue that this is just the system we have. Justice Stevens has justified the use of legislative history by asserting that the practices of Congress have given rise to an implicit understanding that most Members voting for a bill do so in reliance upon the judgment of their trusted colleagues who were principally responsible for it.²⁷⁵ Because the press of business prevents them from appreciating every detail of bills on which they do not personally work, "most Members are content to endorse the views of the responsible committees."²⁷⁶ Accordingly, Justice Stevens contends, "the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress."²⁷⁷ Justice Stevens echoes an argument made long ago by Judge Learned Hand, who observed that "while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way."²⁷⁸

The systemic understanding that Congress implicitly delegates authority to committees and sponsors and ratifies their work when it passes a bill should suffice to defuse the concerns of the constitutional rule against congressional self-delegation. The lack of an Interpretation of Statutes Act in the real world does not leave legislative history without any claim to authority; rather, it leaves legislative history in the same position as other text that exists

of 1991, expressly disavowed all of the legislative history of one of the Act's provisions except for a specified memorandum). If that attempt fails, the legislator is simply stuck with the choice of voting up or down on the bill as it stands and as it will be construed in accordance with all of the rules of statutory construction, including the rules regarding the use of legislative history.

275. See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

276. *Id.*

277. *Id.* at 276-77.

278. *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935).

prior to a statute's passage. That is, it is subject to the principle that the judiciary may determine which texts are implicitly ratified or incorporated when Congress adopts a statute. So long as the texts exist before the statute is passed, giving weight to them does not implicate nondelegation doctrine. Thus, while this Article's arguments are certainly strongest with regard to the proposition that Congress may by statute expressly instruct courts to give weight to legislative history, the argument from incorporation by reference also suggests that the Constitution does not bar the courts from concluding that Congress has done so implicitly.

III. WHAT THE REVISED FORMALIST ARGUMENT DOES PROVE

In 1879, a certain A.B. Kempe, B.A., published what he thought was the solution to a problem that had vexed mathematicians for nearly three decades: the "four-color problem."²⁷⁹ Francis Guthrie, in 1852, had considered the task of coloring a map in accordance with the cartographic convention of giving different colors to any two bordering countries. He conjectured that a mapmaker, by strategically selecting the colors for each country, could always color an entire map with no more than four different colors.²⁸⁰ It is easy enough to verify the sufficiency of four colors for any particular map that one selects, but proving that four colors will always suffice for any map, no matter how many countries it contains and how complex their connections, is a different matter.

Kempe published what he thought was a proof of the four-color theorem in 1879. His argument stood for eleven years. In 1890, however, P.J. Heawood pointed out a fatal error in Kempe's argument.²⁸¹ Almost another century was required before the four-color theorem could be established.²⁸²

Flawed though it was, however, Kempe's proof was by no means valueless. Heawood demonstrated that, although the error in Kempe's argument prevented it from proving that one can always

279. See A.B. Kempe, *On the Geographical Problem of the Four Colours*, 2 AM. J. MATHEMATICS 193, 194 (1879).

280. See THOMAS L. SAATY & PAUL C. KAINEN, *THE FOUR-COLOR PROBLEM: ASSAULTS AND CONQUEST* 6 (1977); see also Kenneth O. May, *The Origin of the Four-Color Conjecture*, 56 ISIS 346 (1965).

281. See generally P.J. Heawood, *Map-Colour Theorem*, 24 Q.J. MATHEMATICS 332 (1890).

282. See SAATY & KAINEN, *supra* note 280, at 8 (noting that the four-color theorem was proved in 1976). Even today, the four-color theorem is still a subject of controversy. The 1976 "proof" of the theorem was unique in the history of mathematics in that it was so lengthy, no human being could read and verify all of it. Its authors claim that its validity has been verified by a computer. See *id.* at 94-98. Whether a proof that cannot be verified by a human being is really a "proof" is a question still debated by mathematicians.

color any map with four colors, the argument, with the error duly corrected, successfully showed that any map can be colored with five colors.²⁸³ Heawood thus showed that Kempe's line of thinking made a significant contribution to the study of the four-color problem, just not quite the one Kempe thought he had made.²⁸⁴

A similar conclusion obtains with regard to Professor Manning's revised formalist argument. It makes a significant contribution to the debate about the use of legislative history as a tool of statutory construction, although not quite the one Manning intended. Indeed, the principal conclusion to draw from Professor Manning's article is essentially the opposite of the one that he does draw. Secondarily, Manning's argument calls attention to a constitutional need to revise, slightly, the established practice regarding the use of legislative history. Finally, the argument leads to an interesting conclusion about the significance of presidential signing statements.

A. Shaking Off the Constitutional Argument Against Legislative History

As Manning observes, the standard formalist arguments against the use of legislative history as a tool of statutory construction are, first, that it violates the constitutional requirement that laws be made (and, consequently, elaborated) through bicameralism and presentment, and, second, that it violates the Lockean principle that legislative power (and, consequently, the power to elaborate existing statutory law) cannot be delegated.²⁸⁵ Before Manning revised them, these arguments formed the primary support for the claim that judicial reliance on legislative history is unconstitutional.²⁸⁶

Manning's achievement is that he successfully knocks these props out from under the textualists' formalist claims. He correctly

283. See SAATY & KAINEN, *supra* note 280, at 31-32.

284. Kempe's achievement (with Heawood's assistance) is significant, even though it did not solve the whole problem, because, if we let the "*n*-color theorem" be the statement that "any map can be colored, using *n* colors, so that no two bordering countries have the same color," then there is no value of *n* for which the *n*-color theorem is immediately obvious. Although every map can, of course, be colored with some finite number of colors (by simply giving each country a different color), it is not clear, *a priori*, that there is one finite number of colors that works for all maps. There might be some map that requires 5 colors, another that requires 6, another that requires 100, and so on. For any value of *n*, there might be a map requiring *n*+1 colors. So an argument is essential to prove the *n*-color theorem no matter how high a value is chosen for *n*.

285. See Manning, *supra* note 13, at 696-98; John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 687-88 (1999).

286. See Eskridge, *supra* note 2, at 649-50.

points out that the formalist arguments against the use of legislative history are analogous to the Supreme Court's unsuccessful attempt to explain its decision in *Chadha*. The courts cannot accept the formalist arguments against the use of legislative history, because those arguments, if taken seriously, would undermine the legitimacy of routine, universally accepted practices: the elaboration of statutes by courts and administrative agencies and the use of other extrastatutory materials, besides legislative history, as guides to statutory interpretation (just as the principles articulated in *Chadha*, if taken seriously, would have undermined the legitimacy of all administrative agencies).

Manning attempts to shore up the textualist rejection of legislative history in the way *Bowsher* shored up *Chadha*, by replacing the reliance on the general nondelegation doctrine with reliance on the more specific rule against congressional self-delegation. But here his analogy fails. Judicial reliance on legislative history does not permit Congress to effect a self-delegation because it does not permit any delegation at all. Properly viewed, it is analogous only to the static incorporation by reference of text that is in existence at the time Congress passes a statute, which is a valid legislative technique.

Thus, Manning's argument, combined with the idea of incorporation by reference, defeats the formalist attack on the constitutionality of using legislative history and further shows that the formalist attack cannot be resuscitated. The principal conclusion to be drawn from Manning's argument is the opposite of the one he does draw. His argument actually shows that the Constitution does not bar the use of legislative history as a tool of statutory construction.

This conclusion does not prove that courts *should* use legislative history. The formalist critique of legislative history is only one of the textualist arguments against its use in statutory construction. This Article has not addressed whether, under our current lawmaking regime, legislative history is a reliable guide to the meaning of statutes,²⁸⁷ whether it in fact reflects the views of most legislators or only those of committee members (or their staffs), whether it contains misleading, strategically planted disinformation,²⁸⁸ and whether courts do a good job of using it.²⁸⁹ This Article

287. See *id.* at 642-43.

288. See *id.* at 643-44.

289. See Vermeule, *supra* note 6, at 1860-77. Vermeule claims that courts are especially likely to misinterpret legislative history, because it is "distinctively voluminous and heterogene-

also does not resolve the question of whether, on the whole, the legal system would be best served by a judicial policy of rejecting legislative history and relying solely on statutory text.²⁹⁰ Moreover, I have previously explained why I believe that judicial departures from statutory text are frequently, and legitimately, caused by a factor unrelated to legislative history, namely, the influence of background principles of law.²⁹¹

Still, given the attention that the legislative history issue receives in the literature and the stress that so many textualists, including, of course, Justice Scalia, place on the formalist critique of legislative history,²⁹² it is certainly significant to be able to determine that the Constitution does not, in fact, pose a barrier to the use of legislative history in statutory construction. That argument should be taken off the table. If we determine that judicial use of legislative history leads to the best system of statutory interpretation, the Constitution will not bar that system from being put into place. Exactly who can make the necessary determination—whether the courts can do it on their own, or whether Congress must also act—is not perfectly clear, but the legal system is empowered to act on this matter. The Constitution does not debar Congress and the courts from implementing a system in which courts rely on legislative history.

ous in comparison to other interpretive sources." *Id.* at 1867. Without commenting on this argument at length, it is worth noting that Manning's demonstration of what is wrong with the formalist attack on the use of legislative history also provides a powerful rebuttal to Vermeule. Manning observed that the routine judicial use of extrinsic materials in statutory construction proves that the problem with legislative history cannot be simply that legislative materials are not passed through bicameralism and presentment. Similarly, given that courts routinely allow themselves to consult history itself (e.g., the story of Captain Boycott), which is surely as voluminous and heterogeneous as anything could be, it is hard to believe that they are facing some special risk of error when they consult legislative history.

A similar comment applies to Vermeule's more recent argument, *see generally* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000), that courts should abstain from reliance on legislative history because, on the one hand, we can never empirically demonstrate that using such materials is beneficial, whereas, on the other hand, we know that we can reduce litigation costs by abjuring their use. Even assuming that the first part of this claim is correct, the second seems doubtful. No one is suggesting that courts refrain from trying to understand what mischief caused a legislature to pass a statute. This inquiry requires research into historical materials, and legislative history may well be the *cheapest* available source to provide that information.

290. *See* Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 656-57 (1999).

291. *See generally* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998).

292. *See* Scalia, *supra* note 2, at 35; *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring); *Conroy v. Aniskoff*, 507 U.S. 511, 521 n.2 (1993) (Scalia, J., concurring).

B. The Cutoff Date for Legislative History

There is, moreover, a further conclusion to be drawn. The arguments in the previous Part principally show that the Constitution does not forbid courts from consulting legislative history—at least, they show that it would be permissible for Congress to instruct courts to do so.²⁹³ The analysis, however, also reveals a subtle but important problem with the prevailing understanding of what materials may constitute legislative history.

Judges who approve the use of legislative history as a tool of statutory construction will typically consider committee reports produced by committees in either house of Congress, statements made on the floor during a statute's passage, and statements made in committee hearings.²⁹⁴ Use of these materials does not violate the nondelegation doctrine, because the passage of the final statute may be deemed to ratify or incorporate them.²⁹⁵ As we saw earlier, however, for this conclusion to be valid, the incorporated materials must have been fixed in their final form prior to the statute's passage. The nondelegation doctrine always permits incorporation by reference of text that was fixed prior to a statute's passage, but incorporation by reference of materials to be produced in the future is a delegation that must be analyzed under the applicable delegation doctrine; in some circumstances, the latter may be forbidden.²⁹⁶

Most legislative history materials are, of course, produced prior to a statute's passage. It must be remembered, however, that "passage" of a federal statute consists of more than one event. The Constitution requires that each house of Congress pass a bill before it can become law. The incorporation by reference concept should call our attention to legislative materials produced after one house of Congress has finally passed a statute, but before the other has taken this step.

This problem does not occur with regard to most legislative history. In the typical journey of a bill through Congress, the house in which the bill originates refers the bill to a committee, which produces a report. The originating house then passes the bill and sends it to the other house. The second house also refers the bill to

293. In the remainder of the Article, I shall assume the reader agrees with all of the arguments made so far, but a reader who disagrees with Part II.B.5 should treat what remains as subject to the assumption that Congress has passed the Interpretation of Statutes Act.

294. See, e.g., Eskridge, *supra* note 2, at 636-40 (cataloguing the various types of legislative history).

295. See *supra* Part II.B.

296. See *supra* Part II.A.

a committee that produces a report, following which the second house passes the bill, usually with amendments. A conference committee consisting of Members of both houses then reconciles differences in the versions of the bill as passed by the two houses; this conference committee produces yet another report. Only then does each house of Congress vote on passage of the final bill.²⁹⁷ In this typical scenario, the most important elements of the legislative history—the reports of each house's committee and the conference committee report—are produced prior to each house's vote on the final bill. Because a statute may incorporate by reference any pre-existing text,²⁹⁸ each house's vote may be considered to incorporate all the legislative history that was fixed before the vote, including the text of a report produced by a committee of the other house or by a conference committee. Thus, the final votes of the two houses of Congress may be deemed to have ratified all the legislative history that was produced prior to either vote.

Some legislative history, however, may not follow the typical pattern. Imagine that the House of Representatives passes a bill and sends it to the Senate. The Senate refers the bill to a committee, which issues a report that explains the bill and recommends its adoption without any changes. The Senate then passes the bill, avoiding the necessity for a conference committee or for reconsideration of the bill by the House. The Senate's passage of the bill may be deemed to incorporate the Senate Report because the report existed in a fixed form prior to the Senate's vote. As to the vote of the House, however, the Senate Report constitutes a future text, not a pre-existing text. Giving the Senate Report authoritative effect would, insofar as the House is concerned, not be a proper incorporation, but a delegation of power. Essentially, the House would have delegated, to the Senate committee, the power to elaborate details of the bill's content.

Bicameralism requires *both* houses of Congress to agree to everything in the final bill.²⁹⁹ The principle against congressional self-aggrandizement forbids either house of Congress from delegating power to the other and permitting just one house to take action where the Constitution requires action by both.³⁰⁰ We have seen that the nondelegation doctrine does not, in general, forbid

297. See KEEFE & OGUL, *supra* note 190, at 34.

298. See *supra* Part II.A.

299. See U.S. CONST. art. I, § 7.

300. See *INS v. Chadha*, 462 U.S. 919, 957-59 (1983) (holding one-house congressional vetoes unconstitutional).

consideration of legislative history, because statutes may be deemed to incorporate their legislative history. That conclusion, however, can apply only to legislative history that can properly be deemed incorporated by the votes of both houses of Congress. Legislative history produced after one house has finally voted on a bill does not meet this test. Accordingly, we need to amend our hypothetical Interpretation of Statutes Act once more by adding a third section:

§ 3. For purposes of this Act, a statute's "legislative history" shall consist of congressional committee reports, floor statements by Members of Congress, and records of committee hearings, that existed in a fixed form prior to the date of final passage of the statute in the Senate or the date of final passage of the statute in the House of Representatives, whichever is earlier.

This provision guarantees that consideration of legislative history will not violate the rule against congressional self-aggrandizement by permitting one house of Congress to authorize the other, acting alone, to elaborate the meaning of a statute.

The conclusion that the Constitution compels this partial restriction on the use of legislative history may seem curious at first. Most people either approve or disapprove of using legislative history in statutory interpretation. Permitting judges to consult most legislative history, but not such materials as were produced in one house of Congress after final passage of a statute by the other, will, perhaps, satisfy no one.

In fact, however, this conclusion is not so odd as it may seem. Even those who embrace the use of legislative history as a tool of statutory construction typically recognize a distinction between pre-enactment and post-enactment legislative history. Judge Wald, for example, supports the use of legislative history,³⁰¹ but she recognizes that post-enactment statements by Members of Congress "deserve little weight in [the] task of statutory interpretation."³⁰²

If one thinks about it, the rule against considering post-enactment legislative history (or at least, requiring that such mate-

301. See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281, 301 (1990).

302. *Natural Resources Defense Council, Inc. v. EPA*, 907 F.2d 1146, 1172 (D.C. Cir. 1990) (Wald, J., dissenting in part); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 204-05 (1983) (arguing for "cautious and limited reliance" on post-enactment legislative history).

rials receive little weight) is somewhat at odds with the intentionalist philosophy of statutory interpretation. Intentionalists generally believe that the goal of statutory interpretation is to discern and apply the intent of Congress, and that judges may consult any materials that assist them in that task.³⁰³ Why should post-enactment legislative history fulfill this function any less than pre-enactment legislative history? A statement made five minutes, or even five years, after a bill's passage may reveal Congress's intentions just as much as a statement made five minutes before.

The argument made here—that the use of legislative materials is permissible because statutes may be deemed to incorporate them by reference—resolves this paradox and perhaps reveals the basis that underlies our intuition that post-enactment legislative history is different. While it is possible to believe that Members of Congress, in voting for a bill, relied upon and ratified understandings of the bill contained in pre-enactment legislative history, they can hardly have done so with regard to understandings that did not exist at the time of the vote. Post-enactment legislative history is a *future* text, and we have seen that the law treats pre-existing and future texts very differently.³⁰⁴

In any event, the general agreement that post-enactment legislative materials must be treated specially shows that there is nothing odd about distinguishing between pre- and post-enactment legislative history. The argument made here simply refines this existing distinction by suggesting that we must slightly constrict the set of materials that we regard as “pre-enactment” legislative history; we should limit such history to materials produced before the earlier of the two final votes adopting a bill. Although perhaps

303. See Eskridge, *supra* note 2, at 626; Wald, *supra* note 301, at 281, 301.

304. See *supra* Part II.A. This analysis also explains why courts often consider legislative history but will not receive live testimony from a legislator about the meaning of a previously-enacted bill. Professor Vermeule claims that this restriction is “inexplicable” under the premises of intentionalism or contextualism, see Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1353 (1999), but in fact it is perfectly appropriate. A legislature may have relied on pre-enactment legislative history, but can hardly have relied on testimony given in a case tried after a law was passed.

Of course, there may also be other explanations for the principle that post-enactment legislative history should be treated differently. Post-enactment legislative history seems especially likely to be strategic rather than truly descriptive of congressional intent. Once a bill is passed, partisans on either side are entirely free to make strategic statements designed to influence interpretation of the bill; someone wishing to characterize the bill prior to its passage must worry at least a little that excessively partisan characterizations might lead to the bill's defeat. For a notable example, see C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, THE WASH. POST, Nov. 14, 1991, at A23 (containing the White House Counsel's partisan explanation of the Civil Rights Act of 1991, which had been passed a few days earlier).

surprising, this result is not, therefore, a particularly radical suggestion.³⁰⁵

C. *The Special Case of Presidential Signing Statements*

Finally, we may draw out one more point. As noted above, the new, constitutionally compelled definition of "pre-enactment" legislative history will not greatly change the set of materials that courts may consult in most cases. The legislative reports will typically be produced before either house of Congress votes on final passage of a bill. The materials most commonly excluded under the rule given here would be floor statements made in one house of Congress after the other has finally passed a bill. Debate on final passage in whichever house goes second would be excluded from consideration (although debate on the bill's initial passage in that house, before the bill goes to conference, could be considered).³⁰⁶

The other, perhaps more practically important, point resulting from this analysis is that presidential signing statements should not be considered part of a statute's legislative history. The President's signature always comes last in the process of statutory enactment (except when the President's veto is overridden, in which case there is no presidential signature), and his signing statement is typically produced only at the time of signing. Thus, the signing

305. Slawson notes the problem caused by the creation of legislative history after one house of Congress has finally acted on a bill, but he seems to regard the point as a *reductio ad absurdum* of the legitimacy of relying on legislative history at all. See Slawson, *supra* note 4, at 404. Considering the possibility that a bill might be voted on in both houses of Congress after preliminary passage (with creation of legislative history) in each, he argues, "[i]f, and only if, the bill were finally passed without the slightest discussion by both houses—because any discussion would create more legislative history—could it and its legislative history be deemed to have full Congressional approval." *Id.* Slawson overlooks the possibility of distinguishing between legislative history created before the earlier of Congress's two final votes and that created later and relying only on the former.

306. The proposed rule would affect one commonly prepared source of post-enactment legislative history: the explanations of major tax legislation produced, usually some months after enactment, by the staff of Congress's Joint Committee on Taxation. See Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 98-99 (1994). While these "Blue Books," as they are known, consist mostly of a handy compilation of pre-enactment legislative history materials, they may also contain new matter prepared by committee staff after passage of legislation. See *id.* at 98-100. Courts express some hesitation about consulting these explanations because of their post-enactment status, see *id.* at 104, but sometimes choose to give them "substantial weight," see, e.g., *Bank of Clearwater v. United States*, 7 Cl. Ct. 289, 294 (Cl. Ct. 1985). The proposed rule would forbid treating such post-enactment materials as having weight by virtue of their origin, although, as discussed earlier, the rule would not forbid a court from consulting them in the same fashion as a court might consult "a thesis of a text writer on a given point." *Id.*

statement necessarily comes after the votes of Congress that adopted the statute; those votes therefore cannot be deemed to incorporate the President's signing statement.

It is true that, because the President is not part of Congress, a congressional instruction that courts should consider presidential signing statements when construing statutes would not violate the rule against congressional self-aggrandizement. Such an instruction would, to be sure, delegate power to the President to elaborate ambiguous points in statutes, but that power is routinely delegated to the executive branch.³⁰⁷ Congress could, therefore, include presidential signing statements in the definition of "legislative history" in the hypothetical "Interpretation of Statutes Act."³⁰⁸ That statute, however, is only hypothetical. Congress has not instructed courts to consider presidential signing statements. In the absence of congressional instruction, courts should not do so, because signing statements come too late in the enactment process.

This conclusion may appear to create an unfair, double standard: the President is effectively bound by Congress's extrastatutory explanation of statutory text, but not vice-versa. The asymmetry, however, necessarily follows from the temporal sequence of the events that cause a bill to become law under our Constitution. A bill arrives on the President's desk only after Congress has acted.³⁰⁹ To the extent that the bill is deemed to incorporate its legislative history, the President's assent to the bill may fairly be deemed to be assent to the bill's legislative history. Congress, however, acts before the President. Congress's assent to the bill cannot be deemed an assent to a presidential signing statement that did not exist at the time Congress acted.³¹⁰

307. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (directing courts to defer to agencies' permissible constructions of statutes).

308. Actually, such an instruction might be in some tension with the Supreme Court's decision in *Clinton v. City of New York*, 524 U.S. 417, 421 (1998), in which the Court held the Line Item Veto Act unconstitutional. The Court in that case distinguished between executive actions taken in the course of executing a statute and presidential actions taken within five days of a statute's enactment (as the Line Item Veto Act required), on the ground that the latter were "necessarily . . . based on the same conditions that Congress evaluated when it passed those statutes." *Id.* at 443. This distinction suggests that it might be unconstitutional for Congress to instruct courts to give weight to presidential signing statements even though courts routinely give weight to executive interpretations of statutes. On the other hand, perhaps this paradox should better be taken as a sign that *Clinton* was incorrectly decided.

309. See U.S. CONST. art. I, § 7.

310. This is not to deny that the President plays an important role in the legislative process under the Constitution; his desires will often affect the way Congress crafts bills. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992) (observing that the President's preferences influence legislation because of his veto power). Nonetheless, the vote of a house of Congress could not be deemed to incorporate a state-

To put it another way, the argument made above shows that legislative history is "pre-enactment" legislative history only if it exists before the earlier final action by either house of Congress on a bill. If we expand the argument to include consideration of the President's role in the lawmaking process, the conclusion is unchanged. Legislative history that existed before either house acted will necessarily have existed at the time of the earliest final action by any one of the three actors in the lawmaking process (the Senate, the House of Representatives, and the President). A statement issued when the President signs a bill, however, will never satisfy this requirement. Accordingly, presidential signing statements, if legislative history at all, are really *post-enactment* legislative history and should receive, at most, the lesser weight due to materials that have that status.³¹¹

One might reach this same result by an analysis of the roles of the President and Congress in the lawmaking process. Congress has the power to craft legislation; the President's power, one could argue, is only that of accepting or rejecting the legislation as Congress has crafted it.³¹² Indeed, strictly speaking, one might say that the President's power is limited to *rejecting* legislation, inasmuch as the President's signature is not actually necessary for a bill to become law. Provided the President does not veto a bill (and provided Congress does not adjourn during the ten days following the bill's passage), the bill becomes law whether the President signs it or not.³¹³ Moreover, as the Supreme Court recently reminded us, the President has no power to change a bill that Congress has enacted; he cannot sign part of it while vetoing other parts.³¹⁴ One might say, therefore, that we care about a statute's legislative history because it reflects the views of those who had the power to change and craft the statute; the views of the President, who had only the power to accept or reject the statute as crafted, should not count.³¹⁵

ment made by the President after the vote any more than it could be deemed to incorporate a report issued by the other house after the vote. See *supra* Part III.B.

311. Cf. Slawson, *supra* note 4, at 404. Again, Slawson notes the fact that presidential signing statements come after both houses of Congress have acted, but seems to regard the point as demonstrating the invalidity of all reliance on legislative history. See *supra* note 305.

312. See William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 699 (1991).

313. See U.S. CONST. art. I, § 7; Popkin, *supra* note 312, at 709-10.

314. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (rejecting the constitutionality of the line item veto act); Popkin, *supra* note 312, at 710 n.55.

315. See Popkin, *supra* note 312, at 709 ("The authority of traditional legislative history depends on its origin within the legislative branch . . . The President, however, is not a legislator and therefore cannot create authoritative legislative history.").

A functional approach, therefore, could yield the same result as the argument made here. Once again, however, the argument made here has the virtue of exposing what is perhaps the basis of the functional view. The reason we view Congress as the crafter of legislation, and the President as having only the power to accept or reject legislation as crafted is not only that the Constitution vests the "legislative power" in the Congress.³¹⁶ It also rests on the simple fact that, in the sequence of events by which legislation is made, the Congress acts first and the President last.³¹⁷

CONCLUSION

In creating our system of separated powers, the Framers built in special protections against the dangers of legislative tyranny. The Supreme Court has rightly implemented these protections through a strict rule against congressional self-aggrandizement. That rule, however, is not so strict as to prohibit legislative techniques that do not increase Congress's power at all. Congress's power is to enact fixed texts into law. Reason and long-established precedent agree that, provided a text is fixed at the time of enactment, the power to enact it applies whether the text is written out verbatim in the bill passed by Congress or incorporated into that bill by reference. Pre-enactment legislative history is such a fixed text, and its use is therefore legitimate within our system of separated powers.

316. U.S. CONST. art. I, § 1.

317. Vermeule points out that courts give substantial weight to presidential signing statements when interpreting treaties. *See* Vermeule, *supra* note 289, at 122. This point is not, however, an anomaly; it fits perfectly with the theory propounded here. The process for making treaties differs from the process for making statutes. With regard to statutes, the Constitution provides that Congress acts first and that the President's role is to sign or not sign the bill Congress has crafted. *See* U.S. CONST. art. I, § 7. With regard to treaties, however, the Constitution provides that the President may *make* treaties, by and with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2. In practice, this means that, with regard to treaties, the President creates the text of treaty (in negotiations with some foreign country or countries, of course) and *then* submits it to the Senate for ratification. Because the President acts first and the Senate last, the Senate's action may be deemed to ratify not only the treaty, but also extrinsic interpretive materials produced by the executive branch prior to ratification.

