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I. INTRODUCTION

In a previous article, I argued that, properly understood, textualism implements a special form of the nondelegation doctrine, one that prohibits legislative *self*-delegation.[1] If the judiciary accepts certain types of legislative history (committee reports and sponsors' statements) as "authoritative" evidence of legislative intent in cases of ambiguity, then the particular legislators who write that history (the committees and sponsors) effectively settle statutory meaning for Congress as a whole.[2] Against the background of

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1. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706-25 (1997).

2. Legislative history may be considered "authoritative" when courts use it to settle meaning while simultaneously attributing its authority to the identity of its source (for example, a committee report or sponsor's statement). *See id.* at 681-84. As I have explained elsewhere, self-delegation concerns arise when courts treat legislative history as "authoritative" in that sense. *See id.* at 731. I have also suggested, however, that this conclusion may leave some room for courts to consult "legislative history that does not just declare congressional intent, but that supplies an objective, unmanufactured history of a statute's context." *Id.* If such legislative history *persuasively* describes that objective context (rather than merely offering the committee's or sponsor's own idiosyncratic expression of intent), a court may consider that history for " 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facters which give it power to persuade, if lacking

such a judicially fashioned interpretive practice,[3] when Congress passes a vague or ambiguous statute, it thereby implicitly delegates its law-elaboration authority to legislative agents, who effectively fashion the details of meaning outside the enacted text.[4] As a result, rank-and-file members of the majority can vote for the statute without having to vote (and thereby assume responsibility) for the details authoritatively elaborated by their agents.[5] Much existing Supreme Court case law suggests precisely this result.[6] But I find it problematic.

In particular, I have argued that the Court's separation-of-powers case law powerfully undermines any approach to legislative history that generally treats it as authoritative.[7] Although the Court routinely sustains legislative delegations of law-elaboration authority to other branches,[8] it has strictly barred Congress from delegating such authority to its own agents, noting that self-delegation poses too great a threat to the constitutionally prescribed process of bicameralism and presentment.[9] The reason is

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power to control.' " *Id.* at 732, 733 n.252 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

3. With the rise of textualism near the end of the twentieth century, this practice seems to have become far less common. *See, e.g.*, Hans Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Statutory Interpretation*, 43 AM. J. COMP. L. 319, 324 (1995); Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57, 58.

4. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 23-24 (1994) (arguing that committee chairs and floor managers explain a bill's intent or purpose as "appointed agent[s] of the majority that passed the chamber's version of the statute"); 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, 306 (1990) ("[T]o the extent that Congress performs its responsibilities through committees and delegates to the staff the writing of its reports, it is Congress'[s] evident intontion that an explanation of what it has done be obtained from these extrinsic materials.").

5. *See infra* notes 35-40 and accompanying text.

6. *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 101 (1981) (holding that "[a]ny doubt as to the intent of Congress was removed by the House Report"); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trustees of tbe Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (noting that "the authoritative Committee Reports . . . squarely focus on the question" and "leave[ ] no room for doubt about Congress'[s] intent").

7. As noted below, Congress could, of course, actually *vote* to adopt some aspect of the legislative history as authoritative. *See infra* note 25 and accompanying text.

8. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928).

9. *See* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274-75 (1991) (holding that individual Members of Congress may not serve on a tribunal that exercises delegated power); Bowsher v. Synar, 478 U.S. 714, 726-27 (1986) (holding that Congress may not reserve power to remove an officer who exercises delegated lawmaking authority); INS v. Chadha, 462 U.S. 919, 944-59 (1983) (invalidating one-House legislative veto).

this: when Congress enacts a vague statute and leaves it to an agency or court to fill in the details, it consciously cedes potentially significant policymaking discretion to a different branch of government.[10] This fact provides a built-in structural incentive for Congress itself to specify important federal statutory policy.[11] If, however, Congress can delegate law-elaboration authority to *its own agents* (committees or bill sponsors), that structural incentive is lost, and the constitutional values embodied in the process of bicameralism and presentment are more readily compromised.[12] Hence, the Court has made clear that Congress as a whole must *either* formulate the statutory details itself (through the procedures prescribed by Article I, Section 7) *or* assign law-elaboration authority to a separate governmental branch.[13] Under these premises, judicial treatment of legislative history as authoritative is problematic precisely because it enables Congress to engage in constitutionally prohibited self-delegation.[14]

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10. *See* Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 865-66 (1984) (noting that it is "entirely appropriate" for the executive to resolve policy questions that "Congress itself either inadvertently did not resolve, or intentionally left to be resolved hy the agency charged with the administration of the statute").

11. This premise bad a long pre-constitutional tradition in the political theory underlying the separation of powers. For example, influential theorists such as Montesquieu and Blackstene bad argued that the separation of lawmaking from law-elaboration would give the lawmaker an important incentive not to enact vague laws. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Administrative Interpretations of Rules*, 96 COLUM. L. REV. 612, 647-48 (1996).

This structural incentive is particularly important because, from tbe very beginning, the Court has consistently expressed doubt about its own capacity to enforce the nondelegation principle directly. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between tbe departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but tbe maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.") (Marshall, C.J.); Manning, *supra* note 1, at 727; Cass R. Sunstoin, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326-28 (2000).

12. As Justice Stevens once put it:

> 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 "tbe carefully crafted restraints spelled out in the Constitution." That danger— congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency.

Bowsher, 478 U.S. at 755 (Stevens, J., concurring) (footnote omitted) (quoting *Chadha*, 462 U.S. at 959); *see also* Peter L. Strauss & Andrew R. Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205, 207 (1992) (arguing that the legislative vete would "encourage less precise and less frequent legislation by depriving Congress of motivation to solve its substantial communications problems at the time of enactment").

13. *See Metropolitan Wash. Airports Auth.*, 501 U.S. at 272.

14. *See* Manning, *supra* note 1, at 710-25.

In a characteristically thoughtful article published in this volume, Professor Jonathan Siegel challenges the applicability of the general constitutional rule against legislative self-delegation to judicial reliance on legislative history to fix statutory meaning.[15] Although acknowledging the importance of that structural norm (as well as carefully elaborating some of its important implications),[16] Professor Siegel questions whether the judicial use of most legislative history implicates that norm at all. His argument rests upon three premises. First, Congress can validly incorporate pre-existing materials by reference.[17] Such action is not a form of "delegation" because Congress, in effect, votes for the existing materials when it votes for the statute.[18] Second, Congress can and does pass interpretation acts prescribing generic rules of construction to govern future enactments.[19] Third, and of most interest here, Congress could find "a fairly easy escape" from self-delegation concerns by passing what Siegel calls the "Interpretation of Statutes Act of 2000."[20] This hypothetical act would prescribe a generic rule of construction consisting of two parts: (1) it would provide that the legislative history of every future statute is automatically incorporated by reference (without express adoption); and (2) it would instruct courts to "give such weight to the [incorporated] legislative history . . . as was customarily given to legislative history by federal courts in the period from 1900 to 1980."[21] Siegel argues that this arrangement would eliminate self-delegation concerns because every vote for a future statute would, by operation of standing law, be a vote for its legislative history—or, more precisely, a vote directing courts to use that statute's legislative history in an authoritative manner. If such an Interpretation of Statutes Act could eliminate self-

15. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000).

16. *See id.* at 1462-70. For example, Professor Siegel notes that the norm against self-delegation applies with particular force to post-enactment legislative history. *See id.* at 1523.

17. *See id.* at 1480-89.

18. *See id.* at 1480.

19. *See id.* at 1490 n.181, 1502-03 (noting, however, that Congress only "rarely adopts legislation containing general instructions for the intorpretation of statutes"); *see also, e.g.*, 1 U.S.C. § 109 (1994) ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statuto, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."); *infra* note 24 and accompanying text.

20. Siegel, *supra* note 15, at 1498; *see also id.* at 1489-1509.

21. *Id.* at 1500.

delegation concerns about legislative history, Siegel argues, those concerns must not be constitutionally grounded.[22]

II. CODIFYING LEGISLATIVE SELF-DELEGATION

Given page constraints, this brief reply offers only preliminary observations about Professor Siegel's proposed solution to an old problem. If, as I have argued, judicial reliance on legislative history as an authoritative source of meaning permits an implicit—and impermissible—self-delegation of lawmaking power to legislative agents, then Siegel's proposed statute would simply formalize an unconstitutional arrangement. In fact, it would make matters worse. It would place Congress's express imprimatur on an arrangement that aggrandizes its own power to make law outside the explicit process mandated by Article I, Section 7. Further reflection indeed shows that Siegel's novel proposal does not mitigate the self-delegation problem.

A. A "Rule of Construction?"

Professor Siegel principally contends that his proposed generic "rule of construction" eliminates the self-delegation problem for the following reason: because the proposed statute directs courts to treat the legislative history as if it had been expressly incorporated by reference (and to give it its customary weight), the statute would constructively subject the legislative history to the required legislative process. The serious structural concerns raised by treating legislative history as authoritative, however, can scarcely be cured by such a "rule of construction." While one can fully assume, and I certainly do, that Congress has the power both to prescribe generic rules of construction and to incorporate existing materials by reference, Siegel's proposed statute, in reality, is not directed to either purpose. It does no more and no less than instruct courts to give legal effect to materials produced by legislative subunits, while at the same time relieving rank-and-file members of any direct responsibility to vote for or against those extra-statutory materials.

To sharpen the point, consider how Siegel's proposal differs from traditional generic rules of construction. Such rules might tell the judiciary how to understand certain commonly used words or phrases when they appear in federal statutes (*e.g.*, "words import-

22. *See id.* at 1460-61.

ing the singular include and apply to several persons, parties, or things; words importing the plural include the singular").[23] Or they might inform the courts how to decipher frequently recurring situations in federal statute law (*e.g.*, "[w]henever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided.").[24] Or, while more unusual, generic rules might even refer, for convenience, to a fixed and pre-existing external source, universally incorporating it by reference into all relevant statutes (*e.g.*, "common law terms shall be understood in the sense recorded in the fifth edition of Black's Law Dictionary"). But Professor Siegel's proposed statute does not seek to adopt a fixed, external reference point for understanding oft-used words and phrases or recurring statutory scenarios; it simply is not about interpretation in that sense. Instead, it is explicitly and exclusively about reallocating lawmaking power from Congress to its legislative sub-units each and every time Congress passes a statute. Clothing a self-consciously structural objective in the garb of a rule of construction cannot alter that reality.

Indeed, to understand how Professor Siegel's generic incorporation-by-reference rule seeks to reallocate power, it is helpful to consider precisely what such a rule would accomplish. Under existing law, Congress already can incorporate by reference existing materials outside the statutory text, and it could include in any (or every) statute a provision stating that the legislative history, or some specified part of it (such as a Senate Report or a particular floor statement), "is hereby incorporated by reference for purposes of clarifying ambiguity." In fact, Congress has occasionally adopted the legislative history of a statute explicitly. Examples of this, however, are conspicuous *precisely because they are so rare* and because they tend to reflect a careful choice about *which* legislative history to include.[25] Perhaps that is because when Congress adopts or in-

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23. 1 U.S.C. § 1 (1994).

24. 1 U.S.C. § 108 (1994).

25. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 92 (1981) (Marshall, J., dissenting) (noting that Congress adopted certain legislative findings by enacting conference report); Roland Elec. Co. v. Walling, 326 U.S. 657, 668-69 n.5 (1946) (observing that Congress enacted conference reports accompanying Fair Labor Standards Act); ACLU v. FCC, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting in part) (indicating that, in the Cable Communications Policy Act of 1984, Congress chose "to speak to the precise issue at hand through a Committee Report that was expressly adopted by both Houses"). Perhaps the most famous example involves Section 105(b) of the Civil Rights Act of 1991, which provides:

> 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

corporates legislative history in a particular statute, its members must actually vote for or against the specific materials designated. Given the careful process that generates final statutory texts (including committee mark-up, floor amendment, and conference reconciliation), it would be somewhat odd if legislators decided simply to vote into law, without similar scrutiny, everything else generated by the legislative process as well.

If Professor Siegel correctly assumes that his generic incorporation-by-reference statute is functionally equivalent to explicit statute-by-statute incorporation,[26] then his proposal is, in fact, unnecessary.[27] Congress can already do that whenever and on whatever terms it desires. If, however, Siegel's proposed statute is attractive because it systematically dilutes rank-and-file legislators' responsibility for the legislative history thus "incorporated," then his proposal is susceptible to the same objection I previously lodged against judicial reliance on legislative history as authoritative. That is, it effectively permits those legislators to shift authoritative law-elaboration to the specific legislative agents who generate the legislative history.

B. The Separation-of-Powers Case Law

Professor Siegel further contends that because his proposed statute gives effect to *pre-enactment* legislative history, it does not even implicate the Court's case law condemning legislative self-

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or applying, any provision of this Act that relates to Wards Cove-Business necessity/cumulation/alternative business practice.

42 U.S.C.A. § 1981 (1994). The "official" legislative history, in turn, states as follows:

INTERPRETIVE MEMORANDUM

The final compromise on S.1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove-Business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

137 CONG. REC. S15276 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth).

26. *See* Siegel, *supra* note 15, at 1490-97.

27. It should be acknowledged that Professor Siegel states that his statute "is not offered as a proposal that Congress should adopt, nor as a prediction of anything Congress is likely to [illegible] legislative history." *Id.* at 1491 (footnote omitted). Nonetheless, examining the effect of [illegible] statute sheds important light on the constitutional implications of that [illegible] may.

delegation.[28] The relevant cases, he contends, reject legislative self-delegation of *post-enactment* authority to prescribe law outside the constitutionally prescribed procedures.[29] Siegel does accurately identify a distinction between his proposed statute and those at issue in the Court's cases.[30] Contrary to his argument, however, that distinction does not relate to the reasoning of those cases. That reasoning says nothing about the timing of the lawmaking at issue, but speaks directly to the problem of lawmaking without adherence to the proper procedures. Hence, in condemning self-delegation, the Court has emphasized that " 'when [Congress] exercises its legislative power, it must follow the 'single, finely wrought and exhaustively considered, procedures' specified in Article I."[31] If, however, a statute authorizes " 'a congressional agent to set policy that binds the Nation,' " that arrangement risks evasion of those constitutionally mandated procedures.[32] This concern, moreover, assumes added significance because congressional powers are " 'at once more extensive and less susceptible of precise limits,' " and because Congress can easily " 'mask under complicated and indirect measures' " any attempt to transgress constitutional limits.[33] Accordingly, the entire point of prohibiting self-delegation is to deny Congress the

28. *See id.* at 1492 ("[I]t is easy te see the hypothetical Interpretation of Statutes Act not only does not violate the nondelegation doctrine, but does not even implicate that doctrine at all.").

29. *See id.* ("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.").

30. The facts of the relevant cases are as follows: in *Chadha*, tbe Court invalidated a one-House veto of the Atterney General's exercise of delegated power to suspend a deportation. INS v. Cbadha, 462 U.S. 919, 944-59 (1983). In so holding, the Court made clear that Congress can delegate broad authority to administrative agencies to implement administrative scbemes, but it cannot reserve any of that power for its own components. *See id.* at 953 n.16. In *Bowsher*, moreover, the Court held tbat Congress could not authorize the Comptroller General, in effect, to reduce the budget deficit pursuant to a formula prescribed by the Gramm-Rudman Hollings Act. Bowsher v. Synar, 478 U.S. 714, 732-34 (1986). What was fatal, tbe Court emphasized, was that Congress possessed statutory power te remove the Comptroller for "actual or perceived transgressions of the legislative will." *Id.* at 729. Hence, Congress could not assign its own agent the power to implement a federal statutory scheme. Finally, in *Metropolitan Wash. Airports Auth.*, the Court invalidated a statute establishing a Board of Review for National and Dulles Airports, which included nine Members of Congress acting in their "individual capacities, as representatives of users" of tlie metropolitan Washington airports. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 267, 271-74 (1991) (construing 49 U.S.C. App. § 2456(f)(1) (1986)). The Court explained that no federal legislator can participate in the administration of an act of Congress, even if it involves a de minimis exercise of federal power. *See id.* at 271-77.

31. *Metropolitan Wash. Airports Auth.*, 501 U.S. at 274 (quoting *Chadha*, 462 U.S. at 951).

32. *Id.* at 274 n.19 (quoting *Bowsher*, 478 U.S. at 758-59 (Stevens, J., concurring)).

33. *Id.* at 274 (quoting THE FEDERALIST NO. 48 (James Madison)).

power "to evade the 'carefully crafted' constraints of the Constitution."[34]

Professor Siegel's proposal directly implicates these constitutional concerns. And the fact that the legislative history exists before the statute's enactment does not alleviate them. Rather, that fact exacerbates such concerns by highlighting that *such materials could have been, but were not, enacted along with the statute.* Although the legislative history comes into being prior to the enactment, a vote for the statute (despite Siegel's proposal) does not amount to vote for the legislative history. In fact, by codifying customary interpretive practice, his proposal would ensure that rank-and-file legislators need never take responsibility for that history.[35] The Court traditionally has relied on the legislative history when a statute is ambiguous.[36] But no algorithm exists for such a determination,[37] and many factors (text, structure, etc.) may bear on whether a statute is clear without regard to the legislative history. Individual legislators may understand the text differently from the representations in the legislative history and, more importantly, they may *express* a plausible public disagreement with a committee's or a sponsor's views on the bill. Indeed, because traditional practice treats committee reports and sponsors' statements as more "authoritative" than rank-and-file floor statements, individual legislators can even take to the floor to disavow the committee's or sponsor's interpretation, without precluding judicial reliance on the views of those more "authoritative" actors.[38] Hence, even if committee reports and sponsors' statements have dispositive force, rank-and-file members avoid meaningful responsibility for those materi-

34. *Id.* at 269 (quoting *Chadha*, 462 U.S. at 959).

35. The following discussion builds on Manning, *supra* note 1, at 720-21.

36. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutery text that is clear."); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989) (emphasizing that courts must respect a statute's "plain meaning").

37. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988).

38. *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 229-30 (1997) (disregarding individual Senator's floor statement in favor of contrary expression in Senate Roport); United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942) (disregarding floor debates in favor of exposition in committee report); Lapina v. Williams, 232 U.S. 78, 90 (1914) (same); *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982) (discounting interpretive value of floor statements by rank-and-file legislaters); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (same); International Bhd. of Elec. Workers, Local 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring) (noting that legislators use floor statements "to reach beyond Capitol Hill to audiences ranging from lobbyists who may help a beleaguered legislator achieve his goals, to home state journalists on whose reports the next election may well depend").

als.[39] This separates responsibility from result, defeating the special accountability that comes from requiring both Houses to pass authoritative texts and then to submit them to the President for approval or veto.[40] That concern does not vanish simply because Congress enacts a statute that tells the courts to keep doing what they (by Siegel's account) customarily did with legislative history. Quite to the contrary; by converting an implicit delegation, built on an unfocussed and unanalyzed judicial practice, into the explicit product of a legislative command, Siegel simply intensifies the problems I have described.

C. Preserving the Aims of Bicameralism and Presentment

Finally, Professor Siegel dismisses my general concern about legislative responsibility as a "practical" argument, apparently implying that, as such, it lacks constitutional relevance.[41] Here too, I believe he is in error. At bottom, his criticism fails to acknowledge that bicameralism and presentment serve important constitutional interests, which the Court's non-self-delegation jurisprudence seeks to protect.[42] While this brief reply is not the occasion for detailed

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39. Indeed, Professor Vermeule has argued that modern legislative history is voluminous and heterogeneous in its interpretive authority; hence, such history may be costly and difficult to disentangle with accuracy, particularly in relation to the statutory text. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1867-77 (1998). This complexity may make it harder to hold legislators accountable for policy details found in the legislative history rather than the text. That same problem remains under Professor Siegel's proposed statute, which incorporates the legislative history wholesale into every statuto under the customary rules of intorpretation. Of course, if Congress *specifically* incorporates the entire legislative history by reference on a statute-by-statute basis (something I have treated as valid), the problem of volume would persist. As previously discussed, however, it is unlikely that an act of specific, statuto-by-statute incorporation would often result in the incorporation of the entire legislative history; the enhanced accountability that comes with specific incorporation should induce the legislature to pick and choose which legislative history to embrace. *See supra* note 25 and accompanying text.

40. *See* INS v. Chadha, 462 U.S. 919, 948-49 (1983) ("By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not bo enacted unless it has been carefully and fully considered by the Nation's elected officials.").

41. *See* Siegel, *supra* note 15, at 1509.

42. For example, in condemning a one-House legislative veto of the executive's exercise of delegated authority, tbe Court placod considerable emphasis on the purposes served by an insistence upon legislative action through bicameralism and presentment. *See Chadha*, 462 U.S. at 946-51. The Court thus explained:

> [T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures tbat the legisla-

consideration of the purposes of bicameralism and presentment,[43] it suffices to examine one respect in which "practical" concerns about legislator responsibility implicate the relevant constitutional interests. The constitutional objective of controlling "factions" (or, as we would put it, "interest groups") is manifest in the design of the legislative power.[44] Bicameralism and presentment divide the legislative power among three relatively independent institutions, in significant part, to make it harder for any faction to capture the legislative process and use it to the detriment of the public interest. That, at least, was the original understanding.[45]

> tive power would be exercised only after opportunity for full study and debate in separate settings . . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Id. at 951.

43. For further discussion of those purposes, see Manning, *supra* note 11, at 649-50.

44. *See, e.g., Chadha*, 462 U.S. at 950 (noting that bicameralism addressed the "fear that special interests could be favored at the expense of public needs"); Mark Movesessian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1183 (1998) ("[B]y acting to disperse legislative power among diverse acters with conflicting interests, they help prevent any one 'faction' from capturing government and threatening 'the liberty and security of the governed'. "); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1249 (1989) ("The Framers created two antidotes to factionalism in Congress: bicameralism and presentment. Bicameralism forces a potential faction te capture both Houses of Congress simultaneously. Presentment gives the president—the politically accountable entity least susceptible to capture by factions—a voice in the legislative process.").

45. *See, e.g.*, THE FEDERALIST NO. 62 (James Madison) ("[A] senate, as a second branch of the legislative assembly, distinct from and dividing the power with a first, . . . doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient."); THE FEDERALIST NO. 73 (Alexander Hamilton) (deeming it "far less probable, that culpable views of any kind should infect all the parts of the goverament at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them"). For a somewhat later view, see 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 555 ("It is far less easy to deceive, or corrupt, or persuade two bodies into a course, subversive of the general good, than it is one; especially if the elements, of which they are composed, are essentially different.").

Presentment advances a similar purpose. The veto, Hamilten thus explained, "establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly te the public good, which may happen to influence a majority of that body." THE FEDERALIST NO. 73 (Alexander Hamilten); *see also* STORY, *supra*, § 882 ("[T]he [veto] power is important, as an additional security against the enactment of rash, immature, and improper laws. It establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.") (citation omitted). The vete may serve as a particularly effective check on factions, in part, bocause the President is elected by a national constituency. *See Chadha*, 462 U.S. at 951 ("The President's participation in the legislative process was . . . te protect the whole people from improvident laws."); *cf.* Myers v. United States, 272 U.S. 52, 123 (1927) (noting that "the President elected by

If interpretive practice (whether judicially fashioned or legislative codified) enables legislators to vote for a statute without taking direct responsibility for potentially authoritative legislative history, the result detracts from the constitutional interest in controlling factions. If a given policy is controversial, or if the costs of agreement are high,[46] the enacting coalition in each House may be content to shift policy details to a subset of that body's most intensely interested members.[47] For instance, if most legislators want credit for enacting environmental legislation, but do not want responsibility for its potentially costly specifics, they can leave the details of that legislation to committees whose constituencies are most interested in the policy outcomes. Given the skewed composition of most committees,[48] effectively channeling law-elaboration authority to them can institutionalize permanent factional logrolling; the Agriculture Committee will have a disproportionate say in elaborating the details of farm policy, but will yield like authority over financial markets to members of the Banking Committee.[49] Although this circumstance surely counts as a "practical" consequence of separating the legislator's responsibility from the legislative result, it is a practical consequence that the process of bicameralism and presentment was designed to address and to restrain so far as practicable.

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all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide").

46. Increasing the precision and transparency of statutory norms brings value conflicts to the foreground, and increases the costs of reaching agreement. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

47. This shift would lower the costs of agreement by reducing the number and diversity of legislators who would have to assent. *See* Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 54-55 (1994):

> While the generation of supplementary legislative materials is costly, it is not nearly so costly as writing more specific statutes. In addition to the time and manpower necessary to produce the statutory language, it must bo agreed upon by the Congress, a process that becomes more precarious as legislation becomes more specific.

48. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) ("Committee membership rarely represents a cross-section of the legislature. Instoad, legislators tend to self-select into those committees in which their supporters have the greatost stakes."); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 n.22 (1986) (noting that committee reports are "prepared by the unrepresentative members and their staffs").

49. *See, e.g.*, William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 383-84 (1990).

III. CONCLUSION

In the end, Professor Siegel's Interpretation of Statutes Act cannot change a crucial reality. Like a statute itself, legislative history is a text. As a text, it either adds to or subtracts from the meaning of the enacted text; otherwise, courts would not bother to consult it. By Professor Siegel's own account, the legislative history is available when Congress votes for the statute itself; thus, it can be adopted expressly or incorporated by reference each time Congress passes a specific statute. If Members of Congress do not explicitly choose to do so, that fact is significant—constitutionally significant, I would insist. Such specific incorporation would make legislators directly responsible for the contents of the legislative history, and it would compel them to decide which parts of the legislative history they wish to incorporate—and which parts they wish to exclude. A statute instructing courts to give such history decisive effect, without insisting upon direct and specific legislative assent, allows legislators to avoid the difficulties associated with that choice. In so doing, it effectively permits Congress to generate binding statutory details through a process other than bicameralism and presentment. That outcome, whether sanctioned by judicial practice or legislative direction, amounts to a self-delegation of legislative power, the very practice generally condemned by the Court's modern cases.