

## ESSAY

### DELEGATION REALLY RUNNING RIOT

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*Conventional delegations—statutes delegating Article I, Section 8 authority—have generated a great deal of constitutional scholarship. We wish to shift the focus to delegation of other powers. Starting from the assumption that conventional delegations are constitutional, we ask whether Congress may delegate other congressional powers, such as those found in Articles II, III, and IV. For instance, we consider whether Congress may delegate its power to admit states and to propose amendments to the Constitution. We also consider whether Congress may delegate cameral authority, such as the House’s ability to impeach and the Senate’s ability to confirm nominations. Finally, we address whether Congress may delegate powers belonging to other entities, such as the President’s power to make treaties. Because conventional delegations often involve negating the President’s veto authority, unconventional delegations might similarly negate authority constitutionally granted to other entities. For instance, Congress might grant an agency the power to confirm the President’s Supreme Court and cabinet-level nominations, thereby circumventing the Senate’s role in confirmation. More radically, Congress might delegate complete appointment power to an agency, thereby circumventing the President’s important appointment role. We conclude that if one accepts the constitutionality of conventional delegations, one must likewise accept the constitutionality of all*

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*manner of unconventional delegations. In particular, if the Necessary and Proper Clause permits lawmaking outside of the Article I, Section 7 process, it likewise permits delegation of all sorts of powers previously assumed to be nondelegable. Unconventional delegations can be a means for “altering,” or at least evading, the structural Constitution’s most notable features.*

#### INTRODUCTION

JUSTICE Benjamin Cardozo famously condemned the National Industrial Recovery Act as an example of “delegation running riot.”<sup>1</sup> Since then, the delegation riot has morphed into a full-fledged revolution. Knowledgeable observers of the administrative state recognize that as the public has demanded more federal regulation, Congress has responded by creating “junior varsity” legislatures throughout the federal government. The result is a fifty-volume Code of Federal Regulations that dwarfs the statutory text found in the U.S. Code. The so-called nondelegation doctrine, a judicial doctrine which formally holds that Congress cannot delegate its legislative powers, is more aptly styled the “delegation non-doctrine.”

Adherents of the nondelegation school lament this state of affairs. Sometimes motivated by distaste for government regulation, they believe that the Constitution bars delegations of legislative power.<sup>2</sup> While everyone admits that Congress can delegate some discretionary power in implementing its laws,<sup>3</sup> antidelegation scholars regard sweeping delegations as unconstitutional because they believe the Constitution never authorizes the delegation of Congress’s Article I, Section 8 powers.<sup>4</sup> Under this view, Article I, Section 7 spells out the exclusive means of making law, and hence Congress, and no one else, may regulate commerce, declare war,

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<sup>1</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

<sup>2</sup> See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 195–97 (1993); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 351 (2002).

<sup>3</sup> See, e.g., Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 237 (2005) (arguing against “excessive discretion”).

<sup>4</sup> See Schoenbrod, *supra* note 2, at 195–97; Lawson, *supra* note 2, at 351.

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raise taxes, and so forth. Concerned about democratic legitimacy, many antidelegation scholars regard this implied structural constraint as entirely fitting, because Americans elect members of Congress to make laws, not unelected and largely unaccountable bureaucrats such as those found in the Securities and Exchange Commission (“SEC”) and the Internal Revenue Service (“IRS”).<sup>5</sup>

Other scholars regard the nondelegation doctrine as somewhat obtuse, if not silly. Adherents of this prodelegation school<sup>6</sup> think that Congress may delegate legislative power.<sup>7</sup> While Article I, Section 7 outlines one method of making law, it never decrees that it is the only means of making law. To the contrary, the Necessary and Proper Clause grants Congress authority to delegate legislative power.<sup>8</sup> A congressional statute granting an agency the power to regulate commerce is constitutional because such a statute is necessary and proper for carrying the commerce power into execution. From the perspective of most members of this school, delegations of legislative power make good sense. Members of Congress have neither the time nor the expertise to pass all the rules necessary for twenty-first-century America.

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<sup>5</sup> See generally Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 *Am. U. L. Rev.* 295, 296–97, 321–22 (1987).

<sup>6</sup> Admittedly, this nomenclature is a little misleading. Although many who believe that Congress can delegate legislative power no doubt favor delegation to administrative agencies, there are perhaps some who oppose such delegations on policy grounds even as they admit that such delegations are constitutional.

<sup>7</sup> See generally Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097 (2004). Professors Eric Posner and Adrian Vermeule maintain that Congress cannot delegate “legislative power” even as they argue that Congress can delegate the powers to regulate commerce, raise taxes, appropriate funds, and so on. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. Chi. L. Rev.* 1721 (2002). We have argued that whatever one’s views about the merits of the nondelegation doctrine, the phrase “legislative power” means the power to make rules for society. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 *U. Chi. L. Rev.* 1297, 1298, 1305–07 (2003). Hence, if one believes that the Constitution makes legislative power nondelegable (for whatever reason), then Congress cannot grant unconstrained rulemaking authority to others, for such grants would constitute delegations of the authority to make rules for society. *Id.* at 1329.

<sup>8</sup> See U.S. Const. art. I, § 8, cl. 18 (Congress shall have power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

The current delegation debate remains stuck on the question of whether Congress can delegate its legislative powers. Does the Constitution create one exclusive method of making laws, as the antidelegation scholars assert? Or does the Constitution permit Congress to deputize others to make laws? The ever expanding delegation literature belies the stagnant nature of this debate; both sides show signs of sclerosis.

In the meantime, nondelegation doctrine is on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it. No one familiar with this debate supports the Supreme Court's current "wink and nod" approach, which consists of a forgiving and sympathetic wink towards unbridled congressional delegations coupled with a hollow and insincere nod towards a long-standing nondelegation principle.<sup>9</sup> Some scholars want the nondelegation doctrine revitalized.<sup>10</sup> Others want the sick patient finished off, once and for all.<sup>11</sup>

Rather than offering yet another analysis of the constitutionality of familiar delegations, a different focus might help clarify what is at stake. Here we consider whether, under the arguments and assumptions of the prodelegation school, Congress may delegate other powers besides its legislative powers. For instance, Article V permits Congress to propose amendments to the Constitution. May Congress delegate its amendment-proposing authority to the President or to a Federal Amendment Agency? Alternatively, may Congress delegate an individual chamber's authority, such as the Senate's authority to consent to appointments? If it had such power, Congress might create the Federal Appointment Agency with authority to consent to the appointment of cabinet officers and Supreme Court Justices. The possibilities are mind-blowing. Members of Congress would be able to focus their limited resources on the legislative tasks and issues that they regard as truly vital, and the federal government's ability to "get things done" could be doubled if not trebled.

We conclude that if Congress may delegate its legislative powers, there is no sound reason why Congress cannot delegate other pow-

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<sup>9</sup> See Merrill, *supra* note 7, at 2102, 2125–27 (noting that the judiciary's current approach is inferior to the two prominent alternatives).

<sup>10</sup> See Schoenbrod, *supra* note 2, at 196.

<sup>11</sup> See Merrill, *supra* note 7, at 2181; Posner & Vermeule, *supra* note 7, at 1723.

ers. More precisely, if the Necessary and Proper Clause grants Congress the ability to delegate its legislative powers, as many scholars have insisted, we believe that the Clause also grants Congress the authority to delegate all sorts of other federal powers previously assumed to be nondelegable. The Necessary and Proper Clause supplies no reason for distinguishing delegations of legislative powers from delegations of other powers. After all, the Clause allows Congress to enact legislation to execute *all* the powers of the federal government, not just legislative powers. If broad delegations help Congress carry into execution its legislative powers, it follows that broad delegations can help Congress carry into execution all sorts of other constitutional powers.<sup>12</sup>

Part I will consider the structure of familiar, conventional delegations. Understanding the structure of conventional delegations is a crucial step in grasping why unconventional delegations of various sorts might likewise be constitutional. Part II will advance the claim that if we assume that conventional delegations are constitutional, all sorts of unconventional delegations must also be regarded as constitutional. In particular, we suggest that Congress may delegate more than just its legislative powers, including cameral authority—for example, the power to consent to appointments—and nonlegislative bicameral authority, such as the power to propose constitutional amendments. Part III will briefly consider some ramifications of unconventional delegations.

### I. THE STRUCTURE OF CONVENTIONAL DELEGATIONS

“Conventional delegations” consist of statutes that authorize someone other than Congress to issue binding directives, usually styled “rules” or “regulations.” These statutory delegations typically involve Article I, Section 8 powers, such as the authority to raise taxes and regulate commerce. Hence, the IRS may make all “needful” regulations relating to income taxes,<sup>13</sup> while the SEC may make all manner of exemptions relating to the sale of securities that otherwise must be registered.<sup>14</sup> At the same time, conventional delegations also may convey congressional powers found

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<sup>12</sup> Cf. U.S. Const. art. I, § 8, cl. 18.

<sup>13</sup> See 26 U.S.C. § 7805(a) (2000).

<sup>14</sup> See 15 U.S.C. § 77z-3 (granting the SEC general exemptive authority).

elsewhere in the Constitution, such as the Article IV power over the territories. Thus, the Guam legislature may exercise “legislative power” and write laws because Congress has delegated this power.<sup>15</sup>

Conventional delegations are best regarded as nonexclusive lawmaking licenses, because both Congress and its licensee may enact rules over particular areas. Hence, a congressional failure to take up a legislative proposal does not preclude a licensee—typically a government agency—from adopting the proposal, at least if the proposal lies within the scope of the licensee’s delegated authority. Moreover, even if Congress rejects a legislative proposal, the licensee might enact the very same rules embodied in the proposed law. Of course, notwithstanding its delegation, Congress retains the ability to enact statutes itself. Any statute subsequently enacted by Congress would trump any inconsistent rules made under the auspices of a delegation.

Current doctrine permits a broad array of interesting delegation possibilities. For example, nothing prevents Congress from granting two or more entities rulemaking power over the same area. A delegation of this sort would enable three or more entities to add to or change the corpus of law. Moreover, so long as Congress attaches an intelligible limiting principle to the original delegation, Congress might even delegate the right to make further delegations. One could imagine a “Delegation Agency,” tasked by Congress to do nothing more than make delegations to other agencies. Doctrine places few constraints on Congress’s ability to issue such lawmaking licenses.

Conventional delegations may be made to any governmental entity and, some would argue, to private entities as well.<sup>16</sup> In practice, Congress has delegated rulemaking authority to the President, executive branch agencies, independent agencies, the courts, territorial governments, and the states. Hence, no single entity has a mo-

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<sup>15</sup> See 48 U.S.C. § 1423 (granting the territorial legislature “legislative power” and providing that it can make laws).

<sup>16</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–12 (1936) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) can be read as establishing an iron-clad principle against delegations to private parties. It is not clear whether such readings remain viable given the modern judiciary’s permissive attitude towards delegations.

nopoly over the lawmaking that occurs in exercises of delegated rulemaking. Rather, under current doctrine, Congress decides who will enjoy the power to make law.

Broad delegations of power have existed since before 1787, the most famous pre-constitutional example being the Northwest Ordinance. The Continental Congress created a Governor, Legislative Council, and House “to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance.”<sup>17</sup> Some scholars claim that under the Constitution, early Congresses enacted all manner of broad conventional delegations.<sup>18</sup> One might argue that ever since then, Congress has repeatedly resorted to broad delegations of lawmaking authority as a means of effectuating congressional powers and purposes.

Surprisingly little attention has been paid to the structure of conventional delegations. The scholarly literature has ignored many fundamental questions, such as whose power is delegated in a conventional delegation and whose power is abridged. Our goal is to acquire a better grasp of the constitutional structure of conventional delegations, with an eye towards the next Part’s discussion of unconventional delegations.

There are at least four accounts of conventional delegations. We find three of them lacking in sophistication, at least in their consideration of the structure of conventional delegations. Nonetheless, we discuss them because they reflect certain mindsets about delegation and also inform some people’s thinking about why conventional delegations are permissible (or impermissible).

Under the Doctrinal Account, so called because the account comes from the Supreme Court’s doctrine, conventional delegations amount to an unconstitutional delegation of legislative power only if they are unconstrained by an intelligible principle. The Simple Account dispenses with the intelligible principle fig leaf and admits that conventional delegations often (perhaps always) consist of a delegation of legislative power. Professor Thomas Merrill has defended this conception.<sup>19</sup> The Formalist Account regards conventional delegations as delegations of rulemaking authority,

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<sup>17</sup> Northwest Ordinance, ch. 8, 1 Stat. 50, 52 n.a (1789).

<sup>18</sup> See Posner & Vermeule, *supra* note 7, at 1735–36.

<sup>19</sup> See Merrill, *supra* note 7, at 2135.

without any actual delegation of legislative power. To the contrary, those who wield delegated power are merely executing the law and thus cannot be exercising legislative power. Professors Eric Posner and Adrian Vermeule favor this approach.<sup>20</sup> Justice Stephen Breyer seems to favor it as well.<sup>21</sup> Under the Complex Account introduced and defended here, conventional delegations always consist of an implicit delegation of each chamber's lawmaking authority and often include an implicit bar on presidential vetoes of delegated lawmaking.

Each of these accounts offers a positive theory of conventional delegations. None of them, by itself, justifies or condemns conventional delegations. Indeed, scholars may agree that one account offers the best description of conventional delegations, but go on to reach very different conclusions about the constitutionality of conventional delegations. The focus below is on which account offers the most plausible description of conventional delegations. We will use these accounts in Part II to show how each of them can be understood to permit unconventional delegations—that is, delegations of powers hitherto assumed to be nondelegable.

#### *A. The Doctrinal Account*

Consistent with longstanding precedent, Supreme Court doctrine formally denies that Congress may delegate its legislative powers. “In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ *This text permits no delegation of those powers.*”<sup>22</sup> Delegation challenges before the courts turn on whether Congress has laid “down by legislative act an intelligible principle to which the person or body au-

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<sup>20</sup> See Posner & Vermeule, *supra* note 7, at 1726.

<sup>21</sup> In *Clinton v. City of New York*, Justice Breyer argued that cancellations under auspices of the Line Item Veto Act are merely instances of the President executing that Act. 524 U.S. 417, 469–70, 474 (1998) (Breyer, J., dissenting). This would seem to suggest that exercising discretion is always an exercise of executive power.

<sup>22</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *Loving v. United States*, 517 U.S. 748, 771 (1996) (emphasis added)).



thorized to [act] is directed to conform.”<sup>23</sup> Delegations cabined by an intelligible principle that channels discretion are permitted. Delegations lacking an intelligible principle, however, are unconstitutional delegations of legislative power and the courts will strike them down.

That is the stated doctrine. In practice, Congress can delegate virtually limitless discretion to agencies. To begin with, the intelligible principle test is not particularly demanding. Despite having held two statutes unconstitutional in the New Deal era, the Court has not struck down a statute on delegation grounds since. Instead, it has repeatedly upheld statutes that contained rather expansive delegations. As if to underscore the weakness of the intelligible principle standard, the Court and individual Justices make repeated reference to this long record of deference.<sup>24</sup> The Court has explained its position by saying that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>25</sup> This aversion to second-guessing Congress likely reflects the view that “[a] certain degree of discretion, and thus of law-making, inheres in most executive or judicial action.”<sup>26</sup> Knowing that the courts are unlikely to strike down legislation, Congress need not regard the nondelegation doctrine as a meaningful constraint.

Scholars seem united in their disdain for the Doctrinal Account. Those scholars who hope that the Court will reinvigorate the nondelegation doctrine regard current doctrine as hopelessly lax. Other scholars believe that the Supreme Court reaches the right results but for all the wrong reasons. The Constitution never bars delegations of legislative power, these prodelegation scholars claim. Hence, there is no need for any sort of intelligible principle in a delegation. Apparently, no one regards the Constitution as actually endorsing the Supreme Court’s approach to delegations. In

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<sup>23</sup> Id. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

<sup>24</sup> See, e.g., *Am. Trucking Ass’ns*, 531 U.S. at 474–75 (listing cases); *Clinton*, 524 U.S. at 471–72 (Breyer, J., dissenting) (same).

<sup>25</sup> *Am. Trucking Ass’ns*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

<sup>26</sup> Id. at 475 (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting) (emphasis omitted)).

other words, we know of no scholar who adopts the view that what distinguishes constitutional grants of discretion from unconstitutional delegations of legislative power is the presence or absence of an intelligible principle.

As a descriptive matter, the Doctrinal Account is implausible. The Doctrinal Account posits that when statutes that delegate rulemaking authority also contain an intelligible principle that barely (if at all) cabins rulemaking discretion, such statutes do not delegate legislative power. This account essentially defines legislative power as the ability to make laws in the absence of a supposedly constraining intelligible principle. This definition of legislative power leads to quite odd and untenable conclusions.

Consider the Constitution. Article I, Section 8 grants powers to Congress that are constrained by provisions and conditions far more robust than the intelligible principle standard. Nonetheless, no one regards these as nonlegislative powers merely because they are limited by various principles. For instance, while Congress can raise an army, it cannot fund that army with appropriations lasting longer than two years.<sup>27</sup> Does this make Congress's power to fund the army any less of a legislative power? Of course not. Likewise, the bankruptcy rules that Congress enacts must be "uniform."<sup>28</sup> The uniformity requirement in no way detracts from the common sense conclusion that bankruptcy laws passed by Congress result from exercises of legislative power.

More generally, each of the legislative powers listed in Article I, Section 8 is subject to the many constraints found in Article I, Section 9, the Bill of Rights, and the other constitutional amendments. Notwithstanding these significant limits—call them the Constitution's intelligible principles—no one concludes that Congress somehow lacks legislative powers. Put another way, the fact that the Constitution constrains Congress's ability to make laws in a number of well-known, beneficial, and significant ways does not mean that Congress lacks legislative power.

A hypothetical may help hammer the point. Suppose that a new constitutional amendment granted Congress the power to make

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<sup>27</sup> U.S. Const. art. I, § 8, cl. 12 (Congress may "raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.").

<sup>28</sup> Id. art. I, § 8, cl. 4 (Congress may "establish . . . uniform laws on the subject of bankruptcies throughout the United States.").

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“rules of family law in the public interest.” The Supreme Court has concluded that a statutory requirement that rulemaking be in the “public interest” means that Congress has not unconstitutionally delegated legislative power.<sup>29</sup> Were we to accept the Supreme Court’s logic, we would be forced to conclude that the above amendment likewise did not grant Congress a new legislative power merely because the amendment contained an identical “intelligible principle” limiting the grant of lawmaking authority. We doubt that anyone would come to this conclusion, which underscores the fatuousness of the Doctrinal Account’s obsession with intelligible principles.

Because of the Doctrinal Account’s superficiality, it inadequately explains the structure of, and rationale behind, conventional delegations. Indeed, the Supreme Court typically says little about the constitutionality of delegations, much less the structure of them, and is content to uphold whatever delegations come before it.

As a structural matter, the Doctrinal Account regards conventional delegations as consisting of a single entity—Congress—delegating its powers. To be sure, all conventional delegations must be enacted by both chambers (bicameralism) and must be given to the President for his review (presentment). But otherwise, the individual chambers and the President do not matter. The Court merely asks whether *Congress* has delegated its legislative power by granting unconstrained discretion. Whatever the statute’s features, the answer is always no. This single-minded and misplaced focus on Congress obscures the fact that conventional delegations actually consist of a delegation of the cameral authorities of both chambers and a negation of the President’s veto power. Once we realize these unacknowledged features of conventional delegations, all sorts of interesting delegation possibilities come to light.

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<sup>29</sup> Nat’l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding a delegation to the Federal Communications Commission granting it authority to promulgate regulations in accordance with its view of the “public interest”); see also N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding delegation to Interstate Commerce Commission to regulate in the “public interest”).

*B. The Simple Account*

The Simple Account builds on the scholarly consensus against the Doctrinal Account. Under the Simple Account, the presence of an intelligible principle does not matter. Broad delegations are delegations of legislative power even when Congress adopts an intelligible principle constraining the delegation. If Congress permits a Commerce Commission to make commercial rules, Congress has delegated the power to regulate commerce, even if Congress should decree that such rules must be in the public interest. Likewise, if Congress creates an Armed Forces Regulatory Agency to create rules relating to the armed forces, Congress will have deputized this Agency to create laws. Because the Constitution grants Congress “the legislative powers herein granted,” it seems reasonable to say (as many have) that Congress delegates its legislative powers when it allows others to make laws.

Though lawmaking agencies nominally promulgate “rules” and Congress enacts “laws,” the Simple Account ignores the labels Congress uses in its delegating statutes. “Rules” are laws by another name. Indeed, while Congress typically authorizes the creation of “rules” or “regulations,” it has also authorized territorial governments to “make laws” and exercise some of Congress’s “legislative powers.”<sup>30</sup> Hence, Congress has, on occasion, understood itself to be delegating legislative powers, that is, the power to make laws rather than “rules” or “regulations.” This candor makes good sense, for the Constitution never distinguishes rules from laws, but treats them as interchangeable.<sup>31</sup> The only times rules created via delegated authority are not law is when those rules are invalid—that is, when the promulgating agency goes beyond the scope of its delegated lawmaking authority or the agency adopts an unconstitutional rule.

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<sup>30</sup> See District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 102, 87 Stat. 774, 777 (1973) (observing that the intent of Congress was to delegate “certain legislative powers” to the District of Columbia government).

<sup>31</sup> Although some text within Article I, § 8 speaks of Congress enacting laws, other portions of Article I speak of Congress making rules and regulations. See, e.g., U.S. Const. art. I, § 8, cls. 14, 18. Clearly, the Constitution does not differentiate “laws” from “rules” or “regulations.” See Alexander & Prakash, *supra* note 7, at 1306.

The Simple Account focuses on the nature of the power being exercised and not on who exercises it. Because rules promulgated pursuant to delegated rulemaking authority have the force of law, the rulemakers are engaged in lawmaking and exercise legislative powers. This is true even if the rulemakers—the President, executive agencies, the states, and so forth—are usually engaged in other governmental pursuits rather than in federal lawmaking.

The Simple Account of conventional delegations is fairly widespread. Whatever the Supreme Court might say about its doctrinal approach, many conclude that conventional delegations often involve delegations of legislative power and that federal agencies make law every day. The plausibility of this account is bolstered by the fact that the Supreme Court sometimes seems to admit that Congress has delegated legislative power. In *Lichter v. United States*, the Court declared that “[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.”<sup>32</sup> This came close to admitting that delegations of legislative power were permissible. Dissenting Justices in years past have been far less equivocal, declaring that Congress delegates legislative power all the time.<sup>33</sup> In the most recent delegation case of note, *Whitman v. American Trucking Associations*, Justices John Paul Stevens and David Souter endorsed the Simple Account, accusing their colleagues of “pretend[ing]” that Congress does not delegate legislative power when it grants rulemaking authority constrained by an intelligible principle.<sup>34</sup>

More recently, Thomas Merrill endorsed the Simple Account, asserting that Congress delegates legislative power in its statutes because Congress clearly delegates to others the power to make rules for society.<sup>35</sup> Like Justices Stevens and Souter, Merrill goes on

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<sup>32</sup> 334 U.S. 742, 778 (1948) (emphasis omitted).

<sup>33</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 752 (1986) (Stevens, J., concurring in judgment) (“Despite the statement in Article I of the Constitution that ‘All legislative Powers herein granted shall be vested in a Congress of the United States,’ it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers.”); *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (“[L]egislative power can be exercised by independent agencies and Executive departments . . .”).

<sup>34</sup> 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment).

<sup>35</sup> See Merrill, *supra* note 7, at 2120.

to defend the constitutionality of delegations of legislative power.<sup>36</sup> Such delegations are necessary and proper for carrying into execution Congress's legislative powers found in Article I, Section 8, he says. For Merrill, the only viable and defensible delegation doctrine is the much more modest, yet still significant "exclusive delegation doctrine."<sup>37</sup> *Only* Congress can delegate legislative power.

Of course, not all proponents of the Simple Account regard delegations of legislative power as constitutional. Even as they admit that Congress delegates legislative power all the time, Professors David Schoenbrod and Gary Lawson believe that such delegations are constitutionally improper.<sup>38</sup> What binds together adherents of the Simple Account is an unshakeable sense that Congress delegates legislative power even when it attaches an intelligible principle, along with a shared unwillingness to take the Supreme Court's Doctrinal Account seriously.

Like the Doctrinal Account, the Simple Account focuses on Congress as a single unit. Hence, the Simple Account likewise ignores the effect that conventional delegations have on the individual congressional chambers and the President.

### *C. The Formalist Account*

The Formalist Account also builds on the consensus against the Doctrinal Account. Once again, intelligible principles do not matter. The Formalist Account is premised on the belief that Congress may authorize agencies to make binding rules. Yet the Formalist Account rejects the claim that Congress actually delegates legislative power when it conveys rulemaking authority. When agencies adopt rules pursuant to statutorily delegated authority, these agencies do not make laws, they execute them. That is to say, these rulemaking agencies execute delegatory statutes.

This account is aptly labeled "formalist" because it turns on forms. If Congress creates a commercial rule, that rule is both a law and an exercise of legislative power. If an agency creates the exact same commercial rule pursuant to a delegation of rulemaking power, however, that binding rule does not result from the imme-

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<sup>36</sup> *Id.* at 2120–39.

<sup>37</sup> *Id.* at 2101.

<sup>38</sup> See Schoenbrod, *supra* note 2, at 155–64; Lawson, *supra* note 2, at 333–34.

diate exercise of legislative power. Instead, when this agency creates rules it merely executes the statute. In other words, the rule-making agency merely exercises executive power, in the same general sense that a prosecutor might. The careful observer will note that the Formalist Account utterly denies that delegations of legislative power are even possible, for under the Formalist Account any congressionally authorized rulemaking is always an execution of a statute and never an exercise of legislative power. In this way, the Constitution implicitly ensures that Congress cannot delegate legislative power. Because no one else can delegate legislative power, the Constitution effectively forbids the delegation of legislative power.

Recently, Eric Posner and Adrian Vermeule have advocated the Formalist Account, arguing that when Congress authorizes rulemaking outside the confines of bicameralism and presentment, the rulemaker never exercises legislative power but instead exercises the executive power to execute the law.<sup>39</sup> Part of Justice Breyer's dissent in *Clinton v. City of New York* can be read as advancing the same claim.<sup>40</sup>

Like the two previous accounts, this account focuses on Congress as a collective unit. Congress delegates rulemaking authority but not any legislative power. This account says nothing about the effect that delegations of rulemaking authority have on the individual chambers and the President.

#### *D. The Complex Account*

The previous accounts, though common enough, are surprisingly unsophisticated in their depiction of the structure of conventional delegations. These accounts are the legal equivalent of stick-figure drawings because they ignore crucial features of all delegations. In particular, these accounts ignore the real parties in interest whose prerogatives are actually affected by a delegatory statute. To better see these features, we need to more closely examine what happens in the ordinary process of Article I, Section 7 lawmaking.

First, we must remember that Congress is always a bicameral entity. Although we often speak of Congress as if it were a distinct

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<sup>39</sup> Posner & Vermeule, *supra* note 7, at 1726.

<sup>40</sup> 524 U.S. 417, 474 (1998) (Breyer, J., dissenting).

entity, “Congress” does not exist separate from its chambers. Article I, Section 1 tells us that Congress consists of a “Senate and House of Representatives.”<sup>41</sup> This does not mean that Congress can act as a unicameral body whenever enough Senators and Representatives gather in some great hall. (There is no unified chamber of Congress, only the separate chambers of the House and Senate.) Article I, Section 7 clearly assumes that Congress passes bills only when each chamber passes them.<sup>42</sup> Until each chamber has done that, “Congress” has done nothing with respect to the bill. Another way of putting the point is that Congress can act only when both chambers act separately but in unison—when each separately passes the same version of the bill or resolution.

This more precise understanding of the nature of Congress helps clarify what happens when an entity exercises delegated legislative power. When the SEC promulgates a rule that Congress could have enacted, it exercises the legislative powers of the individual chambers. To be sure, the SEC does not go through any bicameral process prior to its lawmaking. Nonetheless, when it promulgates securities rules, the SEC has exercised, via a much less cumbersome process, the collective lawmaking powers of the House and Senate. In other words, the SEC implicitly exercises the lawmaking authority of the individual chambers, subject to the restrictions contained in its delegatory statute.

This may not be intuitive, so some examples might prove useful. Suppose that the House and Senate enact a law that creates two new entities that can, when acting together, make commercial rules. We can call one entity the “Ersatz House for commercial rules” and the other the “Ersatz Senate for commercial rules.” Each would have the right to propose rules. But a proposed rule would have legal effect only if both chambers passed the exact same version of a rule. Nothing more would be required for rules to have the force of law. Here it should be obvious that the House

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<sup>41</sup> U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

<sup>42</sup> Id. art I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .”).



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and the Senate had delegated their respective lawmaking authorities to the two ersatz commerce entities.<sup>43</sup>

But if that point is clear in the above example, then it should be equally apparent that when the House and Senate pass a bill authorizing a single entity—the Commerce Commission—to write commercial rules, that entity effectively enjoys both the House’s and the Senate’s power over commerce. When the Commerce Commission promulgates rules having the binding force of law, it has simultaneously exercised both the House’s and the Senate’s lawmaking powers.

The point is that in every conventional delegation of legislative power, each chamber grants a nonexclusive right to exercise its crucial role in enacting laws. When a statute grants one entity some legislative power, however, the delegations from the individual chambers are obscured and overlooked because the entity can enact rules without having to go through a two-step process. That understandable obscurity does not change what really is delegated to those who exercise delegated legislative power. As shorthand, we could say that Congress has delegated its legislative power. But more precisely, we could say that the House and Senate have delegated their respective roles in making laws.

Second, we must keep in mind the President’s role in lawmaking, a role ignored in the above discussion. As everyone knows, the chambers cannot make law by themselves. No law can be made unless it is first presented to the President. If he vetoes the proposed statute, that legislation only becomes law if supermajorities in both chambers reenact the bill.<sup>44</sup> What do these well-known features of Article I lawmaking—presentment and the possibility of a veto—mean for our understanding of conventional delegations?

The existence of these features explodes the idea that conventional delegations never involve anything more than decisions to delegate congressional authority. Conventional delegations permit the making of law without any presentment to the President. Obviously the delegatory bill is presented to the President, but once such a bill becomes law, by whatever means, the President cannot veto the laws promulgated under the auspices of the delegatory

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<sup>43</sup> For now, we ignore the President’s role in lawmaking, which we discuss later.

<sup>44</sup> See U.S. Const. art. I, § 7, cl. 2.

statute. The President never has an opportunity to veto the SEC's or the Federal Communications Commission's regulatory lawmaking. Such delegations circumvent his role in the legislative process.

For those skeptical of this claim, an analogy may help. As is well-known, the President, with the Senate's concurrence, can make treaties. Suppose a proposed treaty permitted the President to make treaties without the Senate's concurrence. And suppose the President ratifies this treaty after receiving Senate approval. Immediately upon ratification, the President begins entering into all manner of treaties. Notwithstanding the Senate's acquiescence to the new treaty procedures, those new procedures authorize the President to bypass the Senate's role in the treaty-making process.

In the same way, laws made pursuant to conventional delegations bypass the presentment requirement and negate the President's ability to veto proposed laws. Hence, conventional delegations not only involve a delegation of the two chambers' legislative authorities, they also implicitly negate presidential authority in the sense that the President cannot veto rules promulgated by legislative power licensees.

That many exercises of delegated lawmaking evade the presentment requirement and hence diminish the President's lawmaking role is an unappreciated structural feature of conventional delegations. As noted earlier, the other accounts focus solely on Congress and the delegation of *its* authority and creation of intelligible principles. Those who believe delegations are constitutional argue that Congress can delegate its authority without pausing to consider the effect on presidential powers.<sup>45</sup> Those who deny the constitutionality of delegations typically do not say anything about the failure to satisfy the presentment requirement, content to rest their arguments on other grounds.<sup>46</sup>

Perhaps this element of conventional delegations—the evasion or avoidance of the presentment requirement—is obscured by the President's well-known influence over the promulgation of federal regulations. For the past three decades or so, executive orders have

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<sup>45</sup> See, e.g., Merrill, *supra* note 7, at 2145–47 (discussing presentment only in the context of a normative discussion of the benefits of the traditional nondelegation doctrine).

<sup>46</sup> See, e.g., Lawson, *supra* note 2 (failing to discuss the evasion of the presentment requirement).

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required that executive branch regulations be sent to the Office of Management and Budget (“OMB”) for review.<sup>47</sup> This OMB regulatory review permits the President to exercise tremendous influence over executive branch rulemaking. Indeed, as compared to conventional lawmaking, the President arguably has greater ability to influence substantive law when Congress delegates rulemaking authority to executive agencies.

Yet the executive branch hardly has a monopoly on delegated rulemaking. Nonexecutive entities, most prominently the independent agencies, promulgate rules that are never subject to OMB review.<sup>48</sup> The same can be said of federal rulemaking done by the states and the territories. Hence, with respect to rules created by nonexecutive entities, delegations clearly have the effect of diminishing the President’s lawmaking role. Indeed, some of the most important regulations involving securities, banking, communications, and elections are made entirely free of presidential review and control.

It might be tempting to say that the overall system of delegation makes the President better off and, hence, he has no legitimate grievance. This seems a little like saying that a subsidy recipient has no cause for complaint if Congress also limits his freedom of speech, because he benefits from the overall system of legislation. More aptly, it is like saying that congressional encroachments on executive power are balanced by congressional abdications to the President.

Whether one is outraged or indifferent to the President’s plight does not affect our simple descriptive point. Whatever the President’s role in delegated lawmaking, it is undeniably true that laws are made every day under delegatory statutes without any presentment to the President. Hence, delegations of rulemaking authority always negate an important presidential power, even if some of these delegations are made against the backdrop of a system in which the President has a good deal of influence over certain rulemakings.

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<sup>47</sup> See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1993), *reprinted in* 5 U.S.C. § 601 (2000) (requiring cost-benefit analysis of executive agency rules).

<sup>48</sup> See *id.*, 3 C.F.R. at 641 (defining agency to exclude so-called independent agencies).

For all these reasons, standard delegation discourse, focusing as it does on Congress as an entity, obscures quite interesting features of conventional delegations. When Congress delegates—that is, permits others to issue rules that have the force of law—Congress effectively grants to those others the legislative rights of the House and the Senate. Just as significantly, Congress bars presidential vetoes. These features are present regardless of whether the delegation recipients are a set of entities or, as is more typically the case, a single entity. To say that conventional delegations involve nothing more than a delegation by Congress of its legislative powers is to be guilty of a gross oversimplification.

## II. THE POSSIBILITY OF UNCONVENTIONAL DELEGATIONS

As noted at the outset, the objective here is not to contest or defend the constitutionality of conventional delegations. To the contrary, we assume for purposes of this essay that conventional delegations of Congress's Article I, Section 8 legislative powers are entirely constitutional. Our focus is whether other types of delegations are possible given these assumptions. No matter which of the preceding accounts of conventional delegations is the most accurate, we believe that each account permits rather intriguing delegation possibilities, at least if one subscribes to the idea that conventional delegations are constitutional. If so, the conventional delegations all too familiar to any scholar of constitutional or administrative law are not the only possible delegations. Congress could pass statutes delegating a number of powers previously assumed to be nondelegable; these might be called "unconventional delegations."

For instance, Congress might convey its authority to admit states.<sup>49</sup> Perhaps Congress could delegate cameral authority, such as the Senate's power to confirm nominations.<sup>50</sup> Congress might be

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<sup>49</sup> See U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . .").

<sup>50</sup> See *id.* art. II, § 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

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able to delegate the authority to propose amendments.<sup>51</sup> Finally, Congress might even be able to delegate the rights and powers of other branches or its individual chambers, such as the President's power to nominate and the Senate's power to consent to nominations.<sup>52</sup>

To see the powerful case for these seemingly outlandish possibilities, we need to focus on the constitutional authority Congress draws upon under any of the accounts of conventional delegations. When Congress delegates, it does not rely upon its substantive Article I, Section 8 powers. For instance, Congress does not exercise its taxing power when it authorizes the IRS to promulgate tax rules. More precisely, Congress neither "lays" nor "collects" taxes when it delegates authority to the IRS.<sup>53</sup> Rather, Congress permits the IRS to craft tax rules. Similarly, Congress does not regulate commerce when it empowers the Federal Reserve. Instead it authorizes the Federal Reserve to creating banking rules and thereby regulate commerce, albeit in a limited sphere.

As everybody who has defended the constitutionality of conventional delegations agrees, Congress relies upon the Necessary and Proper Clause when it authorizes some entity to promulgate rules, tax or otherwise.<sup>54</sup> When Congress delegates, it concludes that granting someone else authority to promulgate rules would be useful and appropriate to carry into execution congressional authority over taxes, commerce, bankruptcy, and so on.

Why would it be useful and appropriate to delegate? A number of sound reasons come to mind. Members of Congress realize that if Congress delegates, they can use their most precious resource—time—on other matters. If Congress has confidence in its delegate, it makes good sense to entrust authority freely, recognizing that if the delegate acts against a strong congressional preference, there is the opportunity to overrule the delegate. If the delegate does

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<sup>51</sup> See *id.* art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .").

<sup>52</sup> See *id.* art. II, § 2, cl. 2.

<sup>53</sup> *Id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

<sup>54</sup> See, e.g., Merrill, *supra* note 7, at 2101.

something members of Congress intensely dislike, Congress might codify its preferences or, if need be, wholly retract the delegation.

Moreover, conventional delegations enable Congress to enlist others to ensure that congressional powers are exercised most wisely. Often lacking expertise or experience, Congress can rely upon the assistance of personnel who have specialized knowledge. Some might say that, as compared to congressional lawmaking, delegated lawmaking is far more effective at furthering congressional goals, for the rules created by agencies are the product of individuals with much more time, sophistication, and information.

The Supreme Court has said that its delegation “jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>55</sup> If Congress “simply cannot do its job” of passing legislation without broad delegations, there can be no more fitting use of the Necessary and Proper Clause than statutes that make it possible for Congress to remain a meaningful, functional legislature.<sup>56</sup>

Below we consider the possibility of unconventional delegations under the various structural accounts of conventional delegations. We begin with the Complex Account because we believe it offers

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<sup>55</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>56</sup> We have built our argument around the notions that substantive grants of legislative power do not themselves sanction the delegation of lawmaking authority and that the Necessary and Proper Clause is the only possible source of the authority to delegate lawmaking power. To the extent that scholars believe that reliance on the Necessary and Proper Clause is unnecessary to authorize conventional delegations, such views hardly affect our overall claim about the possibility of unconventional delegations. If substantive grants of lawmaking authority permit Congress to delegate legislative power and circumvent presidential powers, then other congressional and cameral powers should likewise be understood to authorize the same. For instance, if the power to raise taxes permits Congress to grant to others the power to raise taxes and thereby circumvent the presentment requirement and the veto power, then we do not see why the power to admit states should not also be read to permit Congress to grant others the right to admit states. Likewise, if Congress regulates commerce when it permits others to regulate commerce, the Senate approves treaties when the Senate, via a ratified treaty, permits others to approve treaties. The case for unconventional delegations becomes relatively easy if one concludes that substantive grants of legislative power (rather than the Necessary and Proper Clause) authorize the delegation of legislative power and the derogation of executive rights and powers, for the same conclusions must be drawn with respect to other grants of power.

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the most complete understanding of the structure of a conventional delegation. We discuss possible delegations and numerous objections most extensively here. We then consider whether unconventional delegations are also possible under the other accounts.

*A. Unconventional Delegations Under the Complex Account*

Recall that the Complex Account supposes that every conventional delegation has two features. First, a conventional delegation does not merely delegate “congressional powers.” More precisely, a conventional delegation grants another entity the right to exercise the powers of each of the chambers to enact legislation. Hence, a delegation of bankruptcy authority to an agency would mean that both chambers have granted the agency the ability to exercise their respective powers over the enactment of bankruptcy legislation. Second, conventional delegations also implicitly negate the President’s right to veto proposed laws. As we noted earlier, federal laws are made every day by independent agencies, states, and others without any presentment to the President, and thus without the opportunity for a presidential veto.

*1. The Case for Unconventional Delegations*

If we accept this description of conventional delegations and we assume the constitutionality of such delegations, then all manner of unconventional delegations are possible, from the prosaic to the seemingly radical. We consider these unconventional delegations in order of difficulty, from the simpler to the more complicated.

*a. Delegations of Congressional Power*

Almost everyone who believes that Congress may delegate its legislative powers likely supposes that Congress may delegate each of its Article I, Section 8 powers.<sup>57</sup> Nothing seems to differentiate among these powers in any way. If the Necessary and Proper Clause authorizes delegations of some of these powers, it would seem to authorize delegation of all of them. Indeed, one reputable scholar has suggested that Congress can delegate its power to de-

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<sup>57</sup> See, e.g., Merrill, *supra* note 7, at 2101 (saying that Congress can delegate § 8 powers).

clare war to the President,<sup>58</sup> even though many regard the Constitution as embodying a decision to deny that power to the President.

If Congress may delegate Article I, Section 8 legislative powers, it should likewise be able to delegate legislative powers found outside of Article I, Section 8. For example, Article III permits Congress to set the punishment for treason.<sup>59</sup> It also notoriously authorizes Congress to make exceptions to the Supreme Court's jurisdiction.<sup>60</sup> Among other things, Article IV permits Congress to prescribe the manner in which "[a]cts, [r]ecords and [p]roceedings" of states will be proved and to make rules relating to property and the territories.<sup>61</sup> There is no reason to think that the Necessary and Proper Clause permits delegations of commercial and tax rulemaking, but forbids delegations of these other legislative powers. Indeed, as noted earlier, Congress has delegated its power to make rules for the territories to territorial legislatures, a power granted by Article IV.<sup>62</sup>

Of course, Congress has other powers, not all of which are readily classifiable as legislative powers. For instance, Congress can permit officers to accept gifts from foreign states, can vest the ability to unilaterally appoint inferior officers, and can admit states into the union. If Congress may delegate its Article I, Section 8 powers and some Article III and Article IV powers, it should likewise be able to delegate its powers found in Article I, Section 9, Article II, and the remainder of its Article IV powers, such as its power to admit states. The Necessary and Proper Clause, the source of delegatory authority, does not distinguish lawmaking authority from other governmental powers. The Clause grants Con-

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<sup>58</sup> See Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. Davis L. Rev. 321, 364–69 (2003) (suggesting that Congress can delegate its power to declare war).

<sup>59</sup> U.S. Const. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

<sup>60</sup> Id. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

<sup>61</sup> Id. art. IV, § 1 ("Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); id. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

<sup>62</sup> See *supra* note 17.



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gress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government . . . or in any Department or Officer thereof.”<sup>63</sup> A more succinct, and no less accurate, way of summing up the Clause is to say that it permits Congress to enact necessary and proper laws to carry into execution *all* federal powers. If Congress carries its legislative powers into execution by permitting others to exercise its legislative powers, it likewise carries its nonlegislative powers into execution by permitting others to exercise them.

What is true for Articles I through IV should be equally true for Article V. Congress should be able to delegate its authority to propose constitutional amendments. Likewise, it also should be able to delegate the decision as to whether state legislatures or state conventions must approve amendments. Congress could create a Federal Amendment Agency, with authority to make these crucial decisions. Paralleling arguments made earlier, Congress could conclude that delegating such authority to this Agency would be necessary and proper for carrying into execution Congress’s amendment powers.

At this point, we might generalize the principle: once we accept that Congress may delegate some of its powers, there is no good reason to suppose that it would be unnecessary or improper to delegate other congressional powers. Hence, Congress may delegate whatever authority the Constitution permits Congress to exercise.

In view of what Congress currently delegates, the conclusion that Congress can delegate all congressional powers may seem startling and radical. But considering the textual underpinnings of conventional delegations, there is nothing radical about the idea at all. If the Necessary and Proper Clause authorizes the delegation of war-declaring power, spending power, and taxation power, three of the most consequential federal powers, it is hardly a leap to conclude that the Clause permits delegations of the power to admit states and the authority to propose amendments.

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<sup>63</sup> U.S. Const. art. I, § 8, cl. 18.

*b. Delegations of Cameral Authority*

What of powers belonging to individual chambers? Could Congress delegate the Senate's power to consent to appointments and treaties? Could it delegate the House's power to impeach federal officials? If the Necessary and Proper Clause permits the delegation of legislative powers—powers that can ordinarily be exercised only when the House and Senate jointly act—the Clause would likewise seem to authorize delegations of cameral authority. Once again, the Clause authorizes Congress to carry into execution all federal powers, including the unique powers of individual chambers. Under this reasoning, Congress—that is, the House and Senate—could conclude that the House's time is better spent examining defense procurement or tax collection and that it ought to delegate the power to impeach minor officials.<sup>64</sup> By statute, Congress might create an Impeachment Agency that would focus on impeachments, developing expertise and acquiring knowledge that the House could never hope to replicate. The House would retain its impeachment functions and could choose to impeach a minor official the Agency previously declined to impeach. By the same token, the Agency might impeach someone whom the House decided not to impeach. Once an official was impeached by the Agency, the Agency might then refer the impeachment to the Senate.

Likewise, Congress could decide that the Senate's authority over the appointment of noninferior officers<sup>65</sup> would be better carried into execution by creating an Appointment Agency with authority to approve nominees. By statute, Congress would grant the Appointment Agency the right to approve nominees, reserving, of

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<sup>64</sup> See *id.* art. I, § 2, cl. 5 (granting the House the sole power to impeach). Some might read the "sole" language of this provision as meaning that only the House can impeach. But like the grant of legislative powers, it too can be read as a grant of exclusive constitutional authority. In other words, no one else has a constitutional claim to impeach. This reading would not preclude delegation of such authority, for even if delegations were enacted, it still would be the case that, as a matter of the Constitution itself, the House would have the sole power to impeach.

<sup>65</sup> *Id.* art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

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course, the Senate's right to approve nominees as well. The President might then send nominations of noninferior officers to the Senate and the Agency. The commission (or head) at the apex of the agency would judge whether a nominee ought to be approved. If the Agency approved the nominee, the President could proceed with the appointment without having to wait for senatorial consent. If the Agency disapproved, the Senate could still approve the nomination.

Finally, Congress could decide that the Senate's time would be better spent not reviewing some of our nation's proposed treaties, many of which might be rather inconsequential.<sup>66</sup> Instead, Congress could create a Treaty Consent Agency to consent to some or all treaties. Once again, the President might send proposed treaties to both the Senate and the Agency and be content to receive consent from either.

Of course, if one accepts the Complex Account of conventional delegations, conventional delegations already consist of two cameral delegations. When Congress delegates power over commerce or taxes, Congress implicitly delegates the rights of both chambers to vote on such legislation. As noted earlier, "Congress" does not exist as an entity separate from its chambers. Congress can act only when both chambers act. Hence, whenever we speak of a delegation of congressional power, we necessarily are also referring to a delegation of the powers of the House and Senate.

Once we understand the true nature of conventional delegations—that they consist of delegations from the individual chambers—delegation of cameral authority should not be problematic at all. If the House and the Senate each can grant a nonexclusive license to exercise their authority over the taxing power whenever Congress delegates authority to raise taxes, then there should be no difficulty when Congress enacts a statute that delegates an individual chamber's other powers. After all, only one chamber's power is being conveyed, as compared to the bicameral authority conveyed in conventional delegations. Just as the House delegates its ability to pass patent statutes when it authorizes others to make patent rules, the House also should be able to delegate its ability to

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<sup>66</sup> See *id.* ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

impeach officers. Likewise, just as the Senate may delegate its ability to pass tax statutes, it also should be able to delegate, by statute, its ability to confirm the appointment of noninferior officers.

Such delegatory statutes likely would not (indeed likely could not) deny the House and Senate their powers over impeachment, appointment, and treaties. Rather the House and Senate would retain their powers, because the delegatory statutes would merely permit others to act as well. Inaction by the House and Senate would not preclude impeachments, appointments, and treaty approvals. This arrangement would just parallel the structure of conventional delegations. Recall that conventional delegations do not grant a legislative monopoly; Congress retains the right to pass laws. By the same token, conventional delegations do not require the delegate to mimic or even approximate congressional preferences. Even if Congress fails to pass legislation embodying a set of rules, say by an overwhelming vote, the Agency may subsequently enact the rules that were defeated in Congress if those rules are within the scope of the delegated authority previously granted by Congress. In the same way, the delegate who receives the right to exercise cameral authority would be free to ignore the preferences of the relevant chamber.

The simple point is that if the Constitution permits the delegation of legislative power and, therefore, the delegation of an individual chamber's powers, the Constitution should likewise be understood as permitting Congress to enact statutes that delegate any power granted to an individual chamber.

### *c. Derogations of Power*

Here we veer into more radical possibilities. As we demonstrated earlier, conventional delegations are in derogation of the President's veto power. Laws made outside the Article I, Section 7 process are made without presentment to the President. If we accept that Congress can pass laws delegating the power to make laws that bypass presentment, it would seem that Congress could impinge upon other powers, so long as it is carrying its own powers into execution.

We have already seen why Congress could seemingly delegate the Senate's authority to approve treaties. But Congress might be able to delegate even more broadly. If Congress can pass a statute

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that permits the making of laws outside of Article I, Section 7, why could it not also pass a statute that permits the making of treaties outside the Article II, Section 2 treaty-making process? Congress might pass a statute delegating to the independent Department of Treaties the authority to make all manner of international agreements. To be sure, congressional lawmaking differs from treaty making in that in lawmaking the President is a second mover, rather than the first mover.<sup>67</sup> Yet it is hard to see why this should matter. Why would a statute permitting others to make treaties without presidential input be more problematic than a statute permitting others to make laws without presidential input? One can make parallel arguments with respect to the appointment and impeachment process. If laws can be made without satisfying Article I, Section 7, appointments and impeachments might occur without satisfying Article II, Section 3 or Article I, Section 4. All statutes delegating such authority could be regarded as necessary and proper for carrying these powers into execution.

One can press the point further: Congress might bar the exercise of powers granted to other entities. If Congress can pass a statute that circumvents presentation and hence precludes vetoes of certain lawmaking, we might well conclude that Congress could bar the exercise of other powers. For instance, Congress might conclude that deterrence is best served when punishment is swift and certain. Punishment will not be determinate if the President can commute and pardon, and thereby change the cost-benefit calculus that potential lawbreakers consider. Thus, Congress might provide that certain offenses are not pardonable. The Necessary and Proper Clause supplies no reason for distinguishing laws that circumvent presidential powers (as conventional delegations do) and laws that bar the exercise of presidential power. Indeed, one can just as well characterize a conventional delegation as a bar on presentment and veto of rules promulgated by others.

At the extreme, Congress might be able to delegate power granted to another entity, even where Congress has no role in the exercise of such power. Consider again the pardon power. Suppose

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<sup>67</sup> This oversimplifies. Because the President can propose legislation, the legislative process often parallels the treaty process. See *id.* art. II, § 3 (providing that the President may “recommend to their Consideration such Measures as he shall judge necessary and expedient”).

Congress was of the view that it would prescribe tougher punishments if the President were more willing to pardon the convicted or commute their sentences. The idea would be that Congress might prefer tougher sentences coupled with a healthy measure of discretionary justice that would hopefully prevent injustices in particular circumstances. But if the President evinces little interest in pardoning people, Congress cannot satisfy its preferences. To better carry its power to punish into execution, Congress might delegate authority to pardon to the "Pardon Agency" and require that it consider and issue a goodly number of pardons. This delegatory statute could be regarded as necessary and proper in the same way that conventional delegations that bar presidential vetoes of delegated rulemaking are regarded as necessary and proper.

## *2. Objections to Unconventional Delegations*

Until now, the discussion has been one sided. We have paid no attention to the many arguments one might raise against unconventional delegations. Here we consider such objections, though our discussion runs the risk of being less than complete. Since no one has advanced the idea of unconventional delegations before, we cannot be sure that we have addressed all plausible objections to the idea. Despite this unavoidable limitation, we conclude that the objections considered are almost entirely insubstantial.

Perhaps the principal objection might be that conventional delegations are quite different from unconventional delegations. Federal lawmaking, whether done by Congress, the SEC, or a state legislature, certainly seems unlike the choice to admit a state into the union, the decision to confirm an appointment, or the ability to propose amendments to the Constitution. Because unconventional and conventional delegations are rather dissimilar, there is good reason to treat these delegations differently, or so the argument might go.

We admit that there are differences between some categories of unconventional delegations and the more familiar conventional delegations. Yet as we argue below, we do not see why these differences are relevant as a constitutional matter. The Necessary and Proper Clause, the source of any delegatory authority, supplies no reason for thinking such differences matter. As noted earlier, the Necessary and Proper Clause does not distinguish lawmaking au-

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thority from other governmental authority. It permits Congress to enact necessary and proper laws to carry into execution *all* federal powers. On what theory would laws delegating authority related to statehood and treaty making be any less necessary and proper than laws that delegate lawmaking authority over commerce and taxes? We consider some possibilities below.

Some might maintain that the Necessary and Proper Clause cannot justify delegation of certain crucial federal powers because such delegations are necessarily improper. At first blush, this might seem to resonate. We can imagine that creators of a constitution might decide to permit the delegation of relatively inconsequential powers but forbid delegation of fundamental powers. If we thought that our Constitution had this structure, we would likely conclude that Congress cannot delegate the power to propose constitutional amendments or the power to make treaties, because those powers are too important for others to exercise. Yet once we accept the constitutionality of conventional delegations, it becomes obvious that the Constitution does not bar the delegation of vital and fundamental powers. Congress delegates supremely vital powers all the time, such as the power to tax and regulate commerce. Taxation has always been a vital power and a source of controversy. Americans sought independence from England in part because of complaints about taxation without representation. Indeed, tax revolts of various sorts continue to this day. Commerce is no less significant. The lack of an ability to regulate commerce was one of the principle defects of the Articles of Confederation (another being the absence of ability to tax) and led to the creation of the Constitution. And the commerce power is the authority that many cite as the constitutional basis for the vast expansion of federal authority over the past 200 years. Hence, insofar as the federal Constitution is concerned, the importance of the power to be delegated cannot be a reason for distinguishing unconventional from conventional delegations.<sup>68</sup>

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<sup>68</sup> Even if it were true that conventional delegations consist entirely of rather trivial delegations, that fact would be of little moment. The Necessary and Proper Clause does not suggest that the more important a congressional power, the less likely it is that Congress can delegate that power. Congress has authority to carry into execution all powers, the important and the inconsequential.

Another objection might be that at least some unconventional delegations are improper because they circumvent the Constitution's supermajoritarian requirements. Presumably, the argument would go something like this: If the Constitution provides that certain goals can be achieved after the satisfaction of demanding procedures, it would be improper to delegate authority to be exercised without compliance with those procedures because it might render the procedures somewhat irrelevant. Delegation of treaty-making authority obviously avoids the two-thirds senatorial approval requirement. Similarly, delegation of amendment-proposal authority circumvents a two-thirds requirement in the House and Senate. Another way of putting the objection is that constitutional provisions that require supermajorities ought to be read as the exclusive means of satisfying the relevant goals of those provisions. Hence, treaties can only be made through the supermajoritarian process described in Article II.

If one believes that delegations may not circumvent supermajoritarian requirements because such evasion would be improper, one has to conclude that all conventional delegations are unconstitutional. After all, conventional delegations circumvent a robust supermajoritarian process.<sup>69</sup> In the absence of delegations of lawmaking authority, each exercise of that authority must occur through the legislative process. In that process, each chamber can be fairly said to represent a different majority. House action in favor of a bill represents a nationwide majority of roughly proportional districts. Senate action represents a majority of Senators, each of whom represents the people of an entire state. And the President, who has the chance to veto the bill and thus has a chance to influence the legislation that is ultimately presented to him, is the only official who can be said to represent a majority composed of the entire country.<sup>70</sup> While Article I's supermajoritarian hurdles are not identical to the other supermajoritarian obstacles found in the Constitution, there is no sound reason to suppose that the Necessary and Proper Clause somehow sanctions the evasion of one fa-

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<sup>69</sup> See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 770–80 (2002) (describing the lawmaking process as supermajoritarian).

<sup>70</sup> *Id.* at 773–74.



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mous supermajoritarian hurdle and simultaneously forbids the circumvention of others.

At this point, some might be tempted to deny that the Article I, Section 7 process is a supermajoritarian process at all. We believe that any such denial blinks at reality. But even if we accepted the claim, it suggests a rather peculiar understanding of our Constitution. Imagine a constitution identical to the federal Constitution in every respect, except that a fifty-one percent majority vote was required for the House to assent to legislation. If we accepted the argument that delegations cannot circumvent supermajoritarian requirements, then it would seem that this hypothetical constitution would bar conventional delegations. We do not think the constitutionality of conventional delegations turns on the supposed absence of a supermajority requirement for the passage of legislation.

Another sophisticated objection might rely on the fact that, with respect to conventional delegations, each chamber typically delegates its power by a majority vote. Congress uses a simple majoritarian process to grant others the ability to make laws and thereby authorizes the circumvention of the Article I, Section 7 majoritarian process. In other words, one majoritarian process permits the circumvention of another majoritarian process. But in the case of some of the delegations discussed above, the powers delegated are ordinarily only exercisable by a supermajority of a particular chamber. Hence, in the case of delegated treaty approval power, the Senate and the House will be delegating by majority vote a power the Senate may exercise by itself only by a two-thirds vote. Likewise, to delegate the power to propose constitutional amendments by a majority vote would be to delegate by majority vote a power that the House and Senate may exercise by supermajority votes in both chambers. Such differences in the majority needed to pass a delegation and the majority needed to exercise the underlying power negates the supposed symmetry between ordinary and some novel, unconventional delegations.

On a number of levels, the asymmetry argument fails wholly to condemn unconventional delegations. First, the Necessary and Proper Clause gives us no reason for treating this particular asymmetry as constitutionally meaningful. That Clause clearly allows Congress to carry into execution all federal powers and to do so through the passage of legislation by a simple majority vote. Once

again, if one carries the commerce power into execution by allowing others to exercise the power to regulate commerce without having to go through the normal lawmaking process each time commercial rules are made, one likewise carries into execution the treaty-approval power by allowing others to approve treaties without having to go through the ordinary treaty-approval process each time treaties are approved. Put another way, the Necessary and Proper Clause gives us no reason to suppose that the precise mechanics of the constitutional process being bypassed matter. If a delegatory statute properly permits the circumvention of the Article I, Section 7 process, it would be no less proper for a delegatory statute to circumvent the Article II treaty-approval process.

Second, even if the asymmetry objection held water, it would permit many forms of unconventional delegations. Approval of nominations, impeachment, admission of states—none of these require anything more than the supermajority currently required for all statutes. To the contrary, many of these powers—for example, nomination approval and impeachment—actually require action by only one chamber. A statute delegating the power to approve nominations that passed both chambers would be delegating authority through a lawmaking process that is much more majoritarian than the process for exercising the underlying power.

Third, the asymmetry objection could be overcome. If Congress by a two-thirds majority vote in the Senate and a simple majority in the House passed a statute delegating treaty approval authority to a Treaty Approval Agency, the statute delegating treaty approval authority would have been passed by the same supermajority of the Senate that is necessary for approving treaties ordinarily. The same could be done with respect to a statute delegating the authority to propose amendments. It too could be passed by a two-thirds supermajority in both chambers and thereby satisfy the underlying standard for actually proposing amendments.

Adopting a different tack, some might hope to cabin unconventional delegations by raising concerns about particular types of conventional delegations. For instance, someone who favors the idea that the Constitution enshrines a unitary executive and who regards conventional delegations as generally constitutional might argue that conventional delegations made to nonexecutive branch entities are unconstitutional. The idea might be that the President

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must control all execution of federal statutes, including exercises of delegated lawmaking. If that is true, then conventional delegations are permissible so long as they are made to entities under presidential control. A consequence of this argument is that conventional delegations are unconstitutional if made to those independent of presidential control. Because many present delegations are to independent agencies, this argument would invalidate a sizeable number of conventional delegations.

Even if one thought that delegations made to nonexecutive entities were unconstitutional because of the Constitution's creation of a unitary executive, the types of permissible unconventional delegations would be unchanged. Congress could still delegate powers such as the power to make exceptions to the Supreme Court's jurisdiction. It could likewise delegate the power to admit states and the ability to propose amendments. All that Congress would have to do is ensure that all of its unconventional delegations were made to an executive entity under the President's superintendence. In other words, this indirect attack on unconventional delegations does little more than limit the recipients of unconventional delegations. The various categories of unconventional delegations discussed earlier would not be altered in the least.

Yet another possible objection might reject certain unconventional delegations, implicitly admitting the constitutionality of the rest. For instance, one might deny that it is possible for Congress to delegate powers that do not belong to Congress in the first instance. This argument does not quarrel with the idea that Congress may delegate its own powers, either bicameral or unicameral. It just denies that the Necessary and Proper Clause authorizes the delegation of powers committed to other branches, such as the power to make treaties or the power to appoint to a noninferior office. Both of those powers, though checked in significant ways by the Senate, can only be exercised by the President.

This seems like an eminently sensible principle. But if accepted, it sweeps too broadly, for it also condemns conventional delegations. As we have seen, conventional delegations have the following structure: a delegation of congressional power coupled with an implicit negation of presidential power, that is, the power to veto. If it is acceptable to negate the veto in the context of conventional delegations, then it should likewise be possible to negate presiden-

tial powers over appointments and treaties and delegate full appointment and treaty-making powers to others. In other words, if conventional delegations properly permit Congress to delegate powers it does not have—namely, the power to make law without fear of presidential veto—it should likewise be able to delegate other powers it does not have, such as the power to make appointments and the power to ratify treaties. Put simply, conventional delegations consist of delegated powers that Congress does not possess, for Congress clearly lacks the power to make laws without presentment and without fear of presidential veto.

Another objection against treating conventional and unconventional delegations as if they were no different in kind might rest on the supposed different nature of powers found in Article I, Section 8 and powers found elsewhere. Congress can wholly exercise non-Article I, Section 8 powers by simply proposing amendments, admitting states, and so forth. Yet, some might argue, the same cannot be said of the Article I, Section 8 powers such as the power to tax or appropriate funds. Congress, no matter how detailed its laws, can never fully exercise those powers. It necessarily relies on someone else—the executive branch or the courts—to flesh out the details of its laws.

We think this objection imagines a categorical distinction where none can be found. Many of the Article I, Section 8 powers can be wholly exercised by Congress. For instance, Congress could grant letters of marque and patents to individuals and would not need the assistance of any regulatory machinery. On the other hand, the power to propose amendments is no different in kind from the power to write legislation. If Congress can wholly accomplish the task of writing amendments, then it can wholly accomplish the task of writing legislation. If it cannot do the latter, on the grounds that no words passed by Congress can fully operationalize the law, the same point holds true for amendments. Indeed, much of constitutional law is dedicated to the proposition that the constitutional text does not constitute the exclusive means of discerning the Constitution's meaning. In other words, much of constitutional law is dedicated to the view that no matter how specific constitutional text is, others will have to "give life" to it as it is applied to particular circumstances. In any event, this categorical distinction objection supposes that there are rather large differences in the types of

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powers found in Article I, Section 8 and elsewhere—a supposition without merit.

Finally, some might say that the argument for unconventional delegations fails to take into account the idiosyncratic features and the historical background of individual constitutional powers. By saying that Congress may delegate all of its powers, bicameral or cameral, we have ignored the peculiar features and constitutional histories that might suggest that particular powers are not delegable.

Admittedly, we have swept with a broad brush. We have not examined in minute detail the purpose or intent behind each of the unconventional delegations we have discussed here. We are open to the possibility that there may be something about particular powers that makes those powers nondelegable. But we are dubious about this prospect. One might say that the treaty approval process was meant to give the states a large role in deciding whether to commit the United States on the international stage and that, therefore, the Senate cannot delegate treaty approval to someone else. But then again, one might say the same about the lawmaking process—it was meant to give the states a large role in deciding which proposed rules would become law. One might say that the drafting and ratification history of the appointment provision reflects a need to have the wisdom of multiple legislators opine on the fitness of nominees for noninferior offices. But one might say the same thing about the lawmaking process—it too was meant to ensure that many legislators would have a say about whether some proposed law actually became law. In short, many of the factors that might be cited as reasons for denying the constitutionality of particular unconventional delegations actually have been cited as reasons for denying the constitutionality of conventional delegations. If they failed to move people in the latter context, we do not see why these reasons should have special purchase when it comes to the possibility of unconventional delegations.

The only objection with any substance rests on the novelty of unconventional delegations. As noted earlier, conventional delegations have existed from the beginning of the nation. Unconventional delegations apparently lack this historical pedigree. The absence of an established practice of delegations perhaps serves as a reason for treating these delegations differently.

There is some merit to this claim. If the whole argument for conventional delegation rested on a centuries-old practice, then perhaps it would justify denying the constitutionality of unconventional delegations. Yet this reasoning might also cast doubt on many conventional delegations that many might have thought entirely proper. After extensive research, we might discover that Congress has never delegated the right to create inferior tribunals<sup>71</sup> or the authority to raise armies.<sup>72</sup> Not having enacted such delegations in the past, Congress could not do so in the future, at least if prior practice is the only reason why conventional delegations are permissible.

Moreover, scholars do not rely merely upon practice to vindicate and defend conventional delegations. To the contrary, scholars claim that the Constitution's text affirmatively permits conventional delegations. In particular, those who defend conventional delegations cite the Necessary and Proper Clause as legitimating conventional delegations. Practice is cited as a supporting argument for the textual claim that there is no implicit bar to delegations. If the argument for conventional delegations rests on the Necessary and Proper Clause, as scholars have argued, then the apparent absence of unconventional delegations cannot preclude Congress from making such delegations in the future. A generous reading of the Necessary and Proper Clause that permits delegations of certain powers cannot be arbitrarily curtailed in certain circumstances merely because Congress has yet to delegate particular powers. Unless one is willing to rest the constitutionality of conventional delegations on nothing more than long historical practice, the novelty of unconventional delegations is of no moment.

There is no shortage of reasons why one might treat conventional delegations differently from unconventional delegations. Yet we very much doubt that the Constitution embodies any of these various rationales. If the Constitution authorizes delegation of legislative power (and hence cameral authority), then there is no reason to suppose that the Constitution forbids delegation of other types of power. Likewise, if the Constitution authorizes the nega-

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<sup>71</sup> See U.S. Const. art. I, § 8, cl. 9.

<sup>72</sup> See *id.* art. I, § 8, cl. 12.

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tion of the President's veto power when entities outside of Congress make law, we see no reason to conclude that the Constitution forbids negation of other powers when Congress delegates authority. The many distinctions between conventional and unconventional delegations that one might draw are interesting but lack any grounding in the Constitution sufficient to make these differences constitutionally meaningful. These differences are no more significant than a theory of delegation that distinguishes for delegation purposes even-numbered provisions in Article I, Section 8 from odd-numbered provisions in that same section.

*B. The Case for Unconventional Delegations under the Other Accounts*

We believe that the other accounts of conventional delegations more straightforwardly permit unconventional delegations.<sup>73</sup> Consider the Doctrinal Account. Recall that this account asserts that there is no delegation of legislative power whenever an intelligible principle constrains the relevant delegation. If this claim holds true for legislative power, it should be equally true for delegations of other powers. In other words, Congress may delegate other powers so long as it restricts these delegations through the use of a limiting intelligible principle. Given that the Necessary and Proper Clause is the source of any delegatory authority, there is no reason to suppose that different standards apply to different grants of authority.

Hence, even if Congress cannot delegate the authority to propose amendments unconstrained by an "intelligible principle," it might grant some entity the authority to propose amendments "in the public interest" because this delegation does not convey the unconstrained power to propose amendments. Similarly, if a statutory grant of authority to make international agreements is coupled with an intelligible principle, the satisfaction of the intelligible principle standard suggests that Congress has not delegated the power to make treaties. What is good for the legislative power goose is good for the treaty approval power, the amendment proposal power, and impeachment power ganders.

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<sup>73</sup> Above we discussed various objections to unconventional delegations in the context of the Complex Account of conventional delegations. We see no need to repeat those arguments here, so we do not discuss those objections again.

The Simple Account also permits unconventional delegations. The Simple Account is more candid, at least according to its advocates. Congress does delegate legislative power when it delegates rulemaking authority, but such delegations are permissible because they are entirely necessary and proper. Congress can do far more things if it can delegate legislative power, and the resulting rules may be far superior if it can delegate to those with more expertise.

As argued earlier, if conventional delegations are permissible on these grounds, there is no reason to suppose that Congress may not delegate all manner of other powers, both congressional and cameral. As the Court said in *Lichter v. United States*, “[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.”<sup>74</sup> This argument is clearly not limited to the delegation of legislative powers. Other powers—the powers to approve nominations, to approve treaties, to propose and make amendments—also must have implied delegatory authority sufficient to implement those powers. Hence, if delegation of the power to approve nominations would better serve Congress, then Congress can delegate that power. The same can be said of the other unconventional delegations, such as delegation of the power to propose amendments or the delegation of the power to impeach officials.

Finally, the Formalist Account poses no obstacles to unconventional delegations. Recall that Justice Breyer as well as Posner and Vermeule have supposed that those who write rules pursuant to delegated authority are not exercising legislative powers at all but are instead exercising executive powers; that is, they are executing delegatory statutes. If writing laws in pursuance of a statute that delegates rulemaking authority amounts to nothing more than an execution of that statute, then making treaties under a statute that delegates that right is likewise nothing more than an execution of that statute. The same must be said of statutes granting the authority to admit states or the power to appoint officers. When a delegate carries these statutes into execution, it does nothing more than exercise a power to execute the law. Indeed, as remarked earlier, under the Formalist Account it is *impossible* for Congress to delegate any power, be it treaty power, amendment power, or ap-

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<sup>74</sup> 334 U.S. 742, 778 (1948) (emphasis omitted).



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pointment power, because the Formalist Account treats the implementation of any statute, no matter what it authorizes, as never anything more than an exercise of law-executing authority. Hence, the Formalist Account likewise permits unconventional delegations.

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If one regards conventional delegations as constitutional, there is no reason to wholly shun the unconventional delegations we have outlined. The Necessary and Proper Clause, broadly construed, authorizes both types of delegations. Nonetheless, some may have a sense that unconventional delegations are fundamentally different than conventional delegations. As we have argued, there is little behind this intuition. The two categories seem quite different precisely because one is conventional and familiar while the other is seemingly exotic and presumptively suspicious. But if Congress ever chose to make unconventional delegations using the same arguments that have won the acceptance of conventional delegations, the alien might quickly become familiar and accepted by many.

### III. THE UNDOUBTED BENEFITS OF UNCONVENTIONAL DELEGATIONS

This Part considers some of the benefits of unconventional delegations. Just as conventional delegations confer a host of benefits on Congress, unconventional delegations have the potential to do the same. If Congress enacts unconventional delegations, Congress will have more time to focus on other matters, various important decisions can be made by experts, and it will be far easier to accomplish certain ends.

One area in which an unconventional delegation could restore vigor to a moribund process is impeachment. Currently, impeachment serves as a remote threat, almost a phantom menace.<sup>75</sup> It is rather hard to impeach and convict someone, and the long, drawn-out process greatly detracts from other useful congressional pur-

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<sup>75</sup> See Saikrishna B. Prakash, *America's Aristocracy*, 109 *Yale L.J.* 541, 571 n.141 (1999) (review of Mark Tushnet, *Taking the Constitution Away from the Courts* (1999)).

suits. But if Congress could delegate the House's impeachment power and the Senate's conviction power, then imagine how much more useful impeachment could be as a disciplining instrument. Officers would have to be concerned, not just with prosecution by U.S. attorneys, but also about whether they might be removed from office by the impeachment agency.

To be sure, there would be costs to impeachment delegations. Besides the trivial funding costs, there would be a more significant cost in the independent judgment wielded by the delegate who exercised such power. There is no way for Congress to guarantee that the delegate would exercise power in a manner consistent with congressional preferences or interests. Yet the weighing of the costs and benefits would be for Congress to make. Many members of earlier Congresses clearly supported the independent counsel concept and they might similarly favor the independent impeachment agency concept.

Next, consider the approval of appointments. At the outset of a new administration, there is always a long and slow process involved in the confirmation of proposed nominees. Some of the delay is caused by a senatorial desire for more information. But some of the delay is no doubt attributable to the rush of appointment business and the lack of time to attend to it. Via statute, the Senate might choose to grant an agency the ability to confirm certain appointments. Although Congress already has the ability to delegate appointment power over inferior officers, the number of offices requiring senatorial confirmation is now so large that it might prove useful to have another agency consider confirmation of certain officers.<sup>76</sup> Once again, there would be agency costs associated with the creation of a "Confirmation Agency." Senators would run the risk that the Confirmation Agency would not mirror the preferences of the Senate. But that would be a chance that Senators

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<sup>76</sup> As of 2001, there were some 500 positions requiring Senate confirmation. See A Bipartisan Plan to Improve the Presidential Appointments Process: Testimony Before the S. Comm. on Government Affairs, 107th Cong. 13 (2001) (statement of Franklin D. Raines, Chairman and CEO of Fannie Mae), available at [http://www.senate.gov/~govt-aff/040501\\_Raines.pdf](http://www.senate.gov/~govt-aff/040501_Raines.pdf).

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might be willing to take and one that might be mitigated by legislation to cabin the Agency's discretion.

Likewise, treaties, commercial and tax treaties especially, often involve highly technical matters where expertise would be quite useful. Moreover, treaties are quite difficult to approve because the Constitution requires a two-thirds majority for approval in the Senate. The advantages of delegating treaty approval to an agency would be obvious. That agency could focus on treaty approval and would enjoy expertise on treaty matters that Senators could not hope to match. Furthermore, it would be far easier to approve treaties because the agency would not have to satisfy a supermajority requirement. The ability of the United States to make more significant international agreements might be greatly bolstered in a world where the Senate agrees to delegate its authority to consent to treaties.

Finally, passing a constitutional amendment is notoriously difficult. That is true partially because proposing one is so difficult. Part of that difficulty arises from the supermajority necessary to pass a proposal, but part also stems from the diversion from other important legislative business. By delegating the power to propose amendments, we would no doubt see more amendments proposed, thus making the Constitution more amenable to change.

Of course, we admit that not everyone will favor more viable proposals for constitutional amendments, more treaties, more impeachments, or an easier appointment process. But of course, the same could be said of the increase in the number of rules produced through the generous delegations that Congress now routinely passes. We know that there are many who positively dislike many of those rules. The point is that Congress, using its broad powers under the Necessary and Proper Clause, would decide whether it wishes to enact unconventional delegations, just as it now decides whether to pass conventional delegations.

We cannot say whether Congress will ever enact unconventional delegations. It could very well be that Congress might want to retain the monopoly it currently enjoys over certain subject matters. Or it could be that members of Congress feel that certain matters should only be handled by Congress. Nonetheless, unconventional delegations would make it possible for wiser and more informed

decisionmaking to flourish while also freeing up time for other congressional pursuits.

#### CONCLUSION

Delegation discourse tends to focus exclusively on conventional delegations, such as delegations of commerce, taxing, and other familiar powers. This should hardly be surprising. Congress has enacted conventional delegations, and courts have opined about them. Hence, scholars continue to quarrel about the familiar delegations of legislative power.

We have sought to break away from the typical arguments and push the envelope by examining whether unconventional delegations are possible. In making the case for unconventional delegations, we have assumed the constitutionality of conventional delegations and argued that there is no sound reason for distinguishing the two categories. If the familiar is constitutional, so are the unfamiliar delegations we considered. And if the unfamiliar delegations are possible, Congress might make all manner of interesting and useful delegations.

Our argument may strike some as utterly fantastic. Indeed, some may suspect that we have made something of a *reductio ad ridiculum* claim—that conventional delegations must be unconstitutional because if they are constitutional, other rather fantastic delegations are possible. There is, to be sure, some merit to that suspicion.

Nonetheless, our claim is not some variant of the slippery slope argument. The slippery slope argument typically has the following form: If “A” is permitted, “B” must be permitted as well, even though it is further down the slippery slope to oblivion. In fact, many of the unconventional delegations we discuss are no worse than the generally accepted class of conventional delegations. If delegations of legislative power are permitted, then delegations of other congressional powers—such as the power to admit states or the power to propose amendments—must be permitted as well because the latter delegations reside on the exact same spot along the slippery slope. Moreover, certain unconventional delegations are actually *less* problematic and hence lie higher on the slope than do conventional delegations. A delegation of the power to approve treaties would be far less problematic because it would delegate only cameral authority, rather than bicameral authority, and would

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involve no derogation of presidential power. All in all, many unconventional delegations should be less difficult to justify than the largely accepted category of conventional delegations.

While some will harbor suspicions about the whole idea of unconventional delegations, we suspect that others will welcome the prospect. Rather than regarding this Essay as an indirect challenge to conventional delegations, some may regard it as a blueprint and justification for all manner of novel and beneficial delegations. If that happens, and if the arguments made here are valid, then Congress essentially would have carte blanche to refashion many of the structural Constitution's most famous features. Then, delegation might really run riot.