

# Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text

by R. CRAIG KITCHEN\*

When, if ever, may the Executive amend statutory text? Suppose the President thinks that unintended consequences of a comprehensive statutory scheme fall disproportionately on certain groups. May the President waive the legal force or effect of the offending statutory provisions for those groups? Can the Executive unilaterally repeal part of a statute by cancelling the legal force or effect of its text? Over a decade ago, in *Clinton v. City of New York*, the Supreme Court suggested that the answer to all three questions is “no.” Congress may not give the Executive the unilateral power to change the text of duly enacted statutes because amendment and repeal of statutes, no less than enactment, must conform with bicameralism and presentment. In so holding, the Court purported to enforce the requirements of Article I, Section 7, thereby honoring the constitutional text and structure governing lawmaking. This Article reexamines the Court’s holding and shows that it has had limited, if any, impact on judicial review of lawmaking delegations.

Relying in part on the Court’s analysis, this Article then proposes an analytical framework for lawmaking delegations. The framework, based on the effect the delegated power has on statutory text, categorizes lawmaking delegations as either positive or negative. Positive lawmaking delegations involve the Executive’s delegated

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\* Law Clerk, Hon. Paul J. Watford, United States Court of Appeals for the Ninth Circuit. Harvard Law School, J.D., 2012; George Mason University, B.A., 2006. I am grateful to John F. Manning for his wise counsel and guidance in developing this Article. I thank Rich Chen, Katherine R. Gasztonyi, and Jonathon Roth for comments on earlier drafts. I also thank Ward Farnsworth for his encouragement, and Judge Brett Kavanaugh for helpful conversations during his separation of powers class at Harvard, which sparked the idea for this Article. This Article is dedicated to the memory of my sister Monica Leigh Kitchen, whose lively banter I sorely miss.

power to create rules or standards that are binding with the force of law. Negative lawmaking delegations involve the Executive's delegated power to negate the legal force or effect of statutory text. Within the statutory landscape of the modern administrative state, four distinct types of negative lawmaking delegations predominate: (1) contingent legislation, which predicates the negative power on the Executive's finding of a condition or fact; (2) amendment, which allows the Executive to modify the legal force or effect of statutory text; (3) waiver, which grants the Executive the power to negate the legal force or effect of statutory text for specific persons, projects, or categories of activities; and (4) cancellation, which allows the Executive to rescind the legal force or effect of statutory text entirely.

Formally, each type of negative lawmaking delegation allows the partial or total negation of statutory text and is thus constitutionally suspect under the Court's formulation of Article I, Section 7's requirements. Beyond formal negative effect, however, negative lawmaking delegations also share a significant functional pathology in light of the constitutional structure: they allow the Executive to undo the legislative compromises necessary to specify the details of statutory text. Understood in this way, many, if not most, negative lawmaking delegations are unconstitutional because they undermine a key structural purpose of Article I, Section 7—namely, protecting political minorities by empowering them to demand accommodation in determining the details of the laws that govern them. Moreover, reinvigorating Article I, Section 7 as a constraint on negative lawmaking delegations would protect the fruits of hard-fought legislative battles, thereby respecting compromise, rather than undermining it.

### **Introduction**

During his unsuccessful presidential bid in 2012, former Massachusetts governor Mitt Romney promised that, if elected, he would seek full legislative repeal of the Affordable Care Act ("ACA"), President Obama's signature legislative achievement. Governor Romney, perhaps recognizing that full Republican control of Congress was unlikely, also made an alternative promise—in essence, to functionally repeal much of the ACA, at least for the states, by unilaterally exempting them from many of the Act's

requirements.<sup>1</sup> Although Governor Romney lost the presidential election, his campaign promise nevertheless presents a fascinating and recurring separation of powers question: When, if ever, may the Executive unilaterally change, cancel, or otherwise negate the legal force or effect of statutory text? Under current separation of powers doctrine, the correct answer would seem to be “never.” The Supreme Court has made clear that “amendment and repeal of statutes, no less than enactment, must conform with” bicameralism and presentment,<sup>2</sup> a rule it reaffirmed when it held that it is unconstitutional to give the President “the unilateral power to change the text of duly enacted statutes.”<sup>3</sup>

As with many areas of separation of powers doctrine, however, what seems like a clear rule in theory is in application anything but. Consider Governor Romney’s campaign pledge. To accomplish his goal, he planned to use a waiver delegation in the ACA, a type of delegated executive lawmaking power that, in this case, authorizes the Secretary of Health and Human Services to waive for a given state many of the Act’s health insurance requirements. By ordering the Secretary to grant a waiver to every state, Governor Romney could override the details of the ACA’s health insurance requirements, thereby accomplishing via executive fiat what he was unlikely to be able to do via bicameralism and presentment.<sup>4</sup>

Despite the Supreme Court’s pronouncements to the contrary, many types of lawmaking delegations in the administrative state allow the Executive to change the text of duly enacted statutes, all without bicameralism and presentment. Indeed, Governor Romney’s campaign promise reflects only one such delegation in the ACA; the

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1. Mitt Romney, *If I Were President: Obamacare, One Year In*, NAT’L REV. ONLINE (Mar. 22, 2011, 8:20 PM), <http://www.nationalreview.com/corner/262800/if-i-were-president-obamacare-one-year-mitt-romney> (promising to issue “an executive order paving the way for Obamacare waivers to all 50 states” if elected President). The executive order would seek to “return the maximum possible authority to the states to innovate and design health-care solutions that work best for them.” *Id.* The waiver to which Governor Romney referred is known as a “Waiver for State Innovation.” Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1332(a)(1), 124 Stat. 119, 203 (2010). For more on its substantive and procedural requirements, see *infra* notes. 81–83 and accompanying text.

2. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

3. *Clinton v. City of New York*, 524 U.S. 417, 447 (1998).

4. See U.S. CONST. art. I, § 7 (detailing the requisite procedures for making “Law”: passage by both Houses and signature by the President after presentment, passage by a supermajority of both Houses if the President returns the bill unsigned, or the expiration of ten days (excluding Sundays) after presentment without signature or return by the President, unless Congress adjourns beforehand).

sections on Medicare contain others. Section 3022 creates a shared-savings program for affordable care organizations, sets out elaborate requirements the program must meet, and then allows the Secretary to waive those requirements, as well as any other requirements of the Medicare statute and certain provisions of the Social Security Act (“SSA”) “as may be necessary to carry out the provisions of this section.”<sup>5</sup> Section 3023, on payment bundling, likewise provides detailed requirements over several pages of the United States Statutes at Large; it then similarly allows the Secretary to waive any provision of the Medicare statute, as well as portions of the SSA governing peer review, fraud and abuse, and administrative simplification.<sup>6</sup> And section 3403, which establishes the Independent Payment Advisory Board (“IPAB”), requires that Health and Human Services (“HHS”) implement the Board’s proposed changes to Medicare provider payments to meet cost-control targets, unless Congress enacts a statute that meets the same targets.<sup>7</sup> Though Congress has long “micromanaged Medicare provider payments” and failed to enact legislation meaningfully reducing such payments, section 3403 allows the IPAB to do what Congress has thus far been unable or unwilling to do—that is, change the law governing Medicare provider payments to cut costs substantially.<sup>8</sup>

Moreover, the ACA is not unique in its delegation of a unilateral power to negate the legal force or effect of statutory text. In foreign affairs,<sup>9</sup> national security,<sup>10</sup> environmental law,<sup>11</sup> immigration,<sup>12</sup> trade,<sup>13</sup>

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5. Patient Protection and Affordable Care Act, (“ACA”) Pub. L. No. 111-148, § 3022, 124 Stat. 119, 395–99 (2010).

6. *Id.*, § 3023, 124 Stat. at 399–403.

7. *Id.* § 3403, 124 Stat. at 489–507.

8. Timothy Stolfus Jost, *The Real Constitutional Problem with the Affordable Care Act*, 36 J. HEALTH POL., POL’Y & L. 501, 503–06 (2011).

9. *See, e.g.*, Emergency Wartime Supplemental Appropriations Act for Fiscal Year 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003) (giving the President the authority to “suspend the application of any provision of the Iraq Sanctions Act of 1990” as well as to “make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism”); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d), 122 Stat. 3, 343–44 (2008) (authorizing the President to waive “any provision of this section with respect to Iraq” upon making certain findings and notifying Congress within 30 days).

10. *See, e.g.*, 42 U.S.C. § 9620(j)(1) (2006) (authorizing the President to issue orders exempting specific Department of Energy and Department of Defense sites or facilities from certain environmental law requirements in the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Superfund

other healthcare statutes,<sup>14</sup> and so forth, Congress often delegates to the Executive discretionary authority to waive, cancel, and sometimes even amend text that has been enacted as “Law.”<sup>15</sup> Accordingly, Governor Romney’s campaign promise, though audacious in scope, is not the only recent example of reliance on statutory waivers as a means to achieve policy ends outside the bicameral legislative process. The Obama Administration, for example, has used (on over a thousand occasions) a different kind of ACA waiver,<sup>16</sup> thereby exempting many entities from one of the Act’s requirements.<sup>17</sup> Doing

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Amendments when exemption is “necessary to protect the national security interests of the United States at that site or facility”).

11. *See, e.g.*, International Dolphin Conservation Program Act, Pub. L. No. 105-42, § 303(a)(2)(C), 111 Stat. 1122, 1132 (1997) (authorizing the Secretary of Commerce to “make such adjustments as may be appropriate” to certain statutory provisions in a statute enacted to protect dolphins from the dangers of industrial tuna fishing).

12. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c), 119 Stat. 231, 302 (2005) (“Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.”).

13. *See, e.g.*, Act of Oct. 1, 1890, 26 Stat. 567 (1890) (upon a finding of “reciprocally unequal and unreasonable” tariff duties being imposed by Great Britain, directing the President to “suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [certain listed goods] . . . for such time as he shall deem just”).

14. *See, e.g.*, 42 U.S.C. § 1315 (2006) (granting the Secretary of Health and Human Services the power to “waive compliance with any of the requirements of [various sections] of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out [any experimental, pilot, or demonstration project likely to assist in promoting the objectives of the statute]”).

15. U.S. CONST. art. I, § 7.

16. The Obama Administration’s issuance of waivers may not be authorized by any express delegation of waiver authority in the ACA itself. *See* Philip Hamburger, *Health-Care Waivers and the Courts*, NAT’L REV. ONLINE (Mar. 14, 2011, 5:00 AM), <http://www.nationalreview.com/articles/261982/health-care-waivers-and-courts-philip-hamburger>. Consequently, the Obama Administration has justified the waivers as follows: “the law *and regulations* issued on annual limits allow [HHS] to grant temporary waivers from this one provision of the law that phases out annual limits if compliance would result in a significant decrease in access to benefits or a significant increase in premiums.” *Annual Limits*, CENTER FOR CONSUMER INFO. & INS. OVERSIGHT, CENTERS FOR MEDICARE & MEDICAID SERVICES, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, <http://cciio.cms.gov/programs/marketreforms/annuallimit/index.html> (last visited Mar. 17, 2012) (emphasis added).

17. *See* Sam Baker, *HHS Grants 106 New Healthcare Waivers*, HEALTHWATCH, THE HILL (Aug. 19, 2011, 4:33 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/177581-hhs-grants-106-new-healthcare-waivers>. Some healthcare plans, many of which cover low-income workers, limit the amount they pay out in any given year; the ACA gradually bans this practice and requires greater coverage. Waivers have been granted to those companies that might stop offering healthcare coverage altogether rather than offer the greater coverage required under the Act. *See Annual Limits, supra* note 16.

so has allowed the Obama Administration to ameliorate what it deemed an unacceptable regulatory burden caused by the ACA, all without the need to seek statutory amendment from what likely would have been a recalcitrant Congress.

Are these types of lawmaking delegations to the Executive—ones allowing unilateral override of statutory text—different from the now ubiquitous delegations to the Executive of positive lawmaking power? Is there something inviolable about statutory text, something that makes its cancellation through delegated lawmaking processes problematic for the separation of powers? This Article comprehensively analyzes these questions in light of the constitutional text and structure governing lawmaking<sup>18</sup> and law execution.<sup>19</sup> In so doing, this Article proposes an analytical framework for lawmaking delegations based on the effect that delegated lawmaking power has on statutory text. Broadly speaking, lawmaking delegations are either positive or negative. Positive lawmaking delegations—for example, administrative rulemaking—allow the Executive to exercise discretion to create rules or standards that are binding with the force of law. Negative lawmaking delegations, in contrast, allow the Executive to exercise discretion to negate, in whole or in part, the legal force or effect of statutory text.

Surveying the statutory landscape of the modern administrative state shows that four distinct types of negative lawmaking delegations predominate: (1) contingent legislation, which predicates the negative power on the Executive's finding the existence of a condition or fact; (2) amendment, which delegates to the Executive the authority to modify the legal force or effect of statutory text; (3) waiver, which grants the Executive the discretion to negate the legal force or effect of statutory text for specific persons, projects, or categories of activities; and (4) cancellation, which allows the Executive to rescind the legal force or effect of statutory text entirely.

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Despite this justification for granting the waivers, some of the recipients include economic heavyweights such as Oxford Health Insurance, the Service Employees International Union, and PepsiCo. See Philip Hamburger, *Are Health-Care Waivers Unconstitutional?*, NAT'L REV. ONLINE (Feb. 8, 2011, 4:00 AM), <http://www.nationalreview.com/articles/259101/are-health-care-waivers-unconstitutional-philip-hamburger>.

18. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . ." U.S. CONST. art. I, § 7, cl. 2.

19. The President is to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

Beyond classifying negative lawmaking delegations, a task never comprehensively undertaken by commentators, this Article also sheds new light on the Supreme Court's now fifteen-year old holding in *Clinton v. City of New York*.<sup>20</sup> There, the Supreme Court invalidated the Line Item Veto Act ("LIVA") because it allowed the President to change statutory text without bicameralism and presentment. That over a decade has passed since the *Clinton* decision suggests the time to reexamine its import to separation of powers law has come. The decision, after all, has not proved to be a "hidden separation of powers blockbuster . . . , as important to separation of powers case law as *Lopez* is to the Court's federalism case law."<sup>21</sup> It instead seems to have had little practical effect: Congress still regularly delegates lawmaking authority to the Executive, and as the ACA waivers show, such delegations can allow the President (or some executive agent) to unilaterally change the text of duly enacted statutes by altering its legal force or effect, much like the LIVA did. Lower courts have yet to invoke Article I, Section 7 to strike down such lawmaking delegations; the Supreme Court has declined to intervene; and recent separation of powers scholarship has moved on, unflinchingly accepting *Clinton*'s holding (that line item vetoes are unconstitutional because they violate Article I, Section 7) and going no further. Nevertheless, by moving beyond *Clinton*'s focus on the formal effect delegated executive lawmaking power has on statutory text, this Article unites scholarship about legislative compromise with the Article I, Section 7 test the Court used to strike down the LIVA, finding broad implications for separation of powers analysis of lawmaking delegations.

Among scholars, these implications have been largely overlooked, even though commentators weighed in extensively after the *Clinton* decision, spawning a voluminous literature ranging from critical to laudatory. They contended, for example, that the Court reached the right result and that bicameralism and presentment was the correct rationale;<sup>22</sup> that the case was "in reality a non-delegation doctrine case masquerading as a bicameralism and presentment case;"<sup>23</sup> and that the decision was a travesty, a half-baked analysis wrought from whole cloth with "no basis in text, structure, or

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20. 524 U.S. 417 (1998).

21. Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 85 (2004).

22. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 740–53 (3d ed. 2000).

23. Calabresi, *supra* note 21, at 85.

precedent.”<sup>24</sup> They penned lengthy articles deconstructing the constitutional arguments on all sides, both before and after the Court decided the case.<sup>25</sup> And they attacked with renewed vigor the puzzle of reconciling nondelegation doctrine with the rise of the administrative state.<sup>26</sup>

Although more recent separation of powers scholarship seems to have disregarded *Clinton*, recognizing the decision’s promised revolution never came, a proper understanding of the decision suggests it may have been given short shrift. Rather than discard *Clinton* as a formalist anachronism,<sup>27</sup> separation of powers scholarship should view it as the Court’s attempt to protect the lawmaking process of Article I, Section 7, thereby safeguarding the compromises that process is designed to foster. Because encouraging such compromises—and the inherent friction of reaching compromises

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24. Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 269 (2001) (arguing that *Clinton*’s Article I, Section 7 analysis was a “feeble substitute . . . suggest[ing] that the Court is simply unwilling to hold laws unconstitutional under the nondelegation doctrine”).

25. See, e.g., Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1660–63 (1997) (arguing that the Act delegated too much discretion to the Executive to strike specific policy choices made by Congress, and predicting that the Court would therefore strike it down under nondelegation doctrine); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 872 (1999) (arguing that the LIVA was really about delegation, that the Court thus erred in applying the formalistic reasoning of *Chadha*, and that the proper analysis would have instead used nondelegation doctrine); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 397 (2000) (arguing that the decision was rightly decided, but that the rationale was flawed because of its “wooden reliance on the Presentment Clause and on the formalistic reasoning of *INS v. Chadha*”); H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171, 1172 (1998) (discussing how many thought the Act violated the requirements of bicameralism and presentment); Saikrishna B. Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 11–12 (1998); Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771, 773 (1997) (relying on the executive’s veto power and the nondelegation doctrine); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 104–18 (1997) (also discussing the scholarly consensus that the Act violated the requirements of bicameralism and presentment).

26. For a thorough discussion of the topic shortly after the *Clinton* decision, see Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999).

27. See Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 250 (2007) (arguing that “*Clinton* is thus a formalist opinion much in the style of *Chadha*” and that “the Court was wrong” and the two dissenting justices—Justices Scalia and Breyer—were right).



among two multi-member deliberative bodies (representing diverse constituencies) and a unitary Executive (representing a national constituency)—was a deliberate choice by the Framers (one with numerous salutary benefits), courts should strike down lawmaking delegations when they undermine that deliberate constitutional choice. By doing so, courts would respect the lawmaking process mandated by Article I, Section 7, which in turn safeguards the political minorities for whose protection the process was designed. Reinvigorating Article I, Section 7 as a constraint on lawmaking delegation, moreover, would honor the historical background of the Take Care Clause, which shows that the clause was designed to address the problems of suspension and dispensation, problems similar to those presented by delegating negative lawmaking power to the Executive.

This Article begins by discussing modern doctrine governing judicial review of lawmaking delegations. Part II introduces the Article's analytical framework and describes the positive and negative lawmaking delegation dichotomy in greater detail. Negative lawmaking delegations are then further broken down into four sub-categories. Part III surveys all federal court decisions deciding separation of powers challenges to lawmaking delegations using the bicameralism and presentment-based test of *Clinton*. The analysis shows that *Clinton* has had little, if any, impact on judicial review of lawmaking delegations, even where the challenged delegation involved negating statutory text. Nondelegation doctrine remains a largely theoretical constraint on the scope of discretion delegable by Congress to the Executive, while Article I, Section 7 remains essentially no constraint at all.

Part IV analyzes negative lawmaking delegations given the constitutional text, structure, and history animating separation of powers doctrine. The analysis demonstrates that negative lawmaking delegations are constitutionally suspect in light of the historical backdrop of the Take Care Clause and the purposes served by the Article I, Section 7 lawmaking process. Part V draws upon these insights and contends that, whatever the overall state of modern nondelegation doctrine, negative lawmaking delegations are more problematic than positive ones because they allow the override of specific legislative compromises, often undermining legislative success achieved by political minorities. This consequence allows negative lawmaking delegations to weaken a key protective feature of the constitutional structure, a result demonstrated by examining recent examples of the use of negative lawmaking delegations. Although

this examination demonstrates that each of the four types of negative lawmaking delegations formally allows the Executive to negate statutory text (thus raising concerns under the Court's holding that altering statutory text requires bicameralism and presentment), amendment, waiver, and cancellation are the most problematic. Contingent legislation is less so, because it has a firmer place in our historical tradition, and because it is less likely to undermine the minority-protective function of the constitutional structure.

### I. The Doctrine Governing Judicial Review of Lawmaking Delegations

There are currently two analytical frameworks for determining whether lawmaking delegations to the Executive are constitutional: nondelegation doctrine,<sup>28</sup> and a test based on bicameralism and presentment.<sup>29</sup> As convenient shorthand, this Article refers to the latter test as the Article I, Section 7 test. This Part briefly reviews the current state of nondelegation doctrine, before turning in greater detail to the Article I, Section 7 test.

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28. See Prakash, *supra* note 25, at 11–12. Early political philosophers, as members of the Court have noted, supported the idea of a nondelegation principle: “[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.” *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 n.1 (1980) (Rehnquist, J., concurring) (quoting JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT, IN THE TRADITION OF FREEDOM* 244 at ¶ 141 (M. Mayer ed. 1957)). This concern with separating powers was also noted by the Framers: “When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.” *THE FEDERALIST NO. 47*, at 318–19 (James Madison) (Belknap Press of Harvard Univ. ed., 2009) (quoting BARON DE MONTESQUIEU, *SPIRIT OF THE LAWS* 151–52 (Colonial Press ed. 1900)). For a thorough historical treatment tracing the development of the nondelegation doctrine from the early nineteenth century to the present, see Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than “A Dime’s Worth of Difference”*, 49 *CATH. U. L. REV.* 337, 341–59 (2000).

29. Before *Chadha* and *Clinton*, both of which struck down lawmaking delegations based on bicameralism and presentment, nondelegation doctrine was the sole judicial tool for determining whether a lawmaking delegation was constitutional. See *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); see also *Clinton v. City of New York*, 524 U.S. 417, 447–49 (1998). The Court has also used nondelegation doctrine to evaluate delegations of lawmaking authority to the Judiciary. See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (applying the “intelligible principle” test to a lawmaking delegation to the United States Sentencing Commission, an independent commission in the judicial branch).

### A. Nondelegation Doctrine and the Rise of the Administrative State

Nondelegation doctrine is “the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.”<sup>30</sup> The doctrine stems from the structural allocation of enumerated powers among three branches.<sup>31</sup> Because under our tripartite system only Congress may exercise “legislative power,”<sup>32</sup> Congress must delegate its legislative authority by statute before another branch may exercise legislative-type discretion. Such a delegation, however, may not delegate “legislative power” outside of Congress. Accordingly, lawmaking delegations must provide an “intelligible principle”<sup>33</sup> constraining another branch’s exercise of discretion, thereby preventing delegation of the broader “legislative power” that is constitutionally allocated to Congress alone.<sup>34</sup>

This simple but obviously circular principle has vexed courts and commentators for decades, and a precise demarcation of the boundary between legislative and executive power has proven elusive, largely because statutes and administrative rules look so alike. The exact same text may represent an exercise of either power,

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30. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

31. *Id.* at 334 (“The nondelegation principle is grounded in the more basic principle of enumerated powers. Executive officials generally cannot exercise legislative powers on their own initiative because they are not granted any such power by the Constitution.”). For an excellent and comprehensive originalist treatment of the nondelegation doctrine, see generally *id.*

32. See, e.g., *Touby v. United States*, 500 U.S. 160, 164–65 (1991) (“The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.’ From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government.”) (citation omitted) (quoting U.S. CONST. art. I, § 1); *Mistretta*, 488 U.S. at 371–72 (“The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,’ and we long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”) (citations omitted) (quoting U.S. CONST. art. I, § 1 and *Field v. Clark*, 143 U.S. 649, 692 (1892)).

33. The Court initially used this now ubiquitous language in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928): “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” Since then, the Court has repeatedly used the phrase “intelligible principle” as the test for determining whether the nondelegation doctrine has been violated. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton*, 276 U.S. at 409).

34. *Mistretta*, 488 U.S. at 372 (noting that “the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches” and discussing the intelligible principle requirement) (citing *J.W. Hampton*, 276 U.S. at 406, 409).

depending on whether it appears in the United States Statutes at Large after bicameralism and presentment, or the Federal Register as a final rule after notice and comment.<sup>35</sup>

Despite calls by some Justices to abandon nondelegation doctrine,<sup>36</sup> Supreme Court precedent, which presumes that each Branch is exercising its constitutionally allocated power, still focuses on the scope of discretion granted and the identity of the actor exercising discretion, rather than the nature or character of the discretion exercised.<sup>37</sup> As long as the degree of discretion conferred on the Executive falls “comfortably within the scope of discretion” permitted by Court precedent, legislative power has not been delegated, even when the nature of the power might otherwise seem legislative.<sup>38</sup>

Although the nondelegation doctrine purports to constrain how much discretion Congress may delegate, any such constraint is more theoretical than real. The Court, which has not explicitly invalidated any statute on nondelegation grounds<sup>39</sup> since 1935,<sup>40</sup> now regularly strains to find intelligibility in statutes that, on their face, appear standardless.<sup>41</sup> Accordingly, nondelegation doctrine is virtually dead

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35. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 78–79 (2006). Professor John F. Manning makes a similar point: “If Congress wants to adopt a per se rule of antitrust liability for horizontal price fixing, it can of course do so if it enacts a statute through the procedures of bicameralism and presentment. The Executive, however, could adopt a similar per se rule pursuant to broadly worded delegations of rulemaking power from Congress, as long as Congress has supplied an intelligible principle.” John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2019 (2011) (footnotes omitted).

36. *Whitman*, 531 U.S. at 488 (Stevens, J., concurring in part and concurring in judgment) (“The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it.”) (citations omitted).

37. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.”).

38. *Whitman*, 531 U.S. at 472, 476 (“[T]he constitutional question is whether the statute has delegated legislative power to the agency. . . . [The] text [of Art. I, § 1] permits no delegation of those powers.”) (citations omitted).

39. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 (2000) (explaining that “the Court has not used the doctrine to invalidate any statute since that time, notwithstanding many occasions when it might have found an absence of the requisite ‘intelligible principle.’”) (citations omitted).

40. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

41. “The Supreme Court has resoundingly rejected every nondelegation challenge that it has considered since 1935, including challenges to statutes that instruct agencies to regulate based on the ‘public interest, convenience, or necessity’ and to set ‘fair and equitable’ prices. After 1935, the Court has steadfastly maintained that Congress need

as a matter of precedent,<sup>42</sup> with modern decisions by the Court having swept the doctrine to the historical ash heap. To the extent the doctrine remains viable, it operates as a constitutional avoidance canon,<sup>43</sup> through which the Court narrowly construes statutory delegations that otherwise appear so broad that they tread close to the constitutional line.<sup>44</sup>

### **B. The Article I, Section 7 Test for Negative Lawmaking Delegations**

Nondelegation doctrine's relegation to lesser status as canon of construction, rather than structural constitutional rule with greater bite, at times troubled the Court, but such concerns never provided more than anecdotal fodder to criticize the doctrine.<sup>45</sup> Rather than recast nondelegation doctrine, the Court looked to the Article I lawmaking process to fashion a new limitation on lawmaking delegations.

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only provide an 'intelligible principle' to guide decisionmaking, and it has steadfastly found intelligible principles where less discerning readers find gibberish." Lawson, *supra* note 30, at 328–29 (citations and quotations omitted).

42. The delegation of positive lawmaking power is ubiquitous in the modern era, as Congress has recognized its inability to define with particularity rules and standards necessary to cover all the fields in which statutes now govern. Recognition of this difficulty in the modern administrative state drives the Court's lax application of the nondelegation doctrine to otherwise standardless legislation. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur 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."); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) ("[T]he Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.").

43. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 ("The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.").

44. *Mistretta*, 488 U.S. at 373 n.7.

45. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in judgment) (arguing the Court should abandon the nondelegation doctrine and acknowledge that Congress actually does delegate legislative power and that this practice is "fully consistent with the text of the Constitution"); *id.* at 487 (Thomas, J., concurring) ("Although this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles' . . . On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

### *I. Origins: The Legislative Veto*

The Court turned to the structural constitutional drawing board in 1983 when it found unconstitutional the one-house legislative veto in *INS v. Chadha*.<sup>46</sup> The Immigration and Nationality Act of 1952<sup>47</sup> delegated to the Attorney General the authority to suspend deportation of an alien who satisfied certain statutory criteria,<sup>48</sup> but it also allowed one house of Congress to “veto” the Attorney General’s exercise of delegated power.<sup>49</sup>

Analyzing a constitutional challenge to the House of Representative’s exercise of such a veto, the Court concluded that the House’s action was “essentially legislative in purpose and effect” because it “alter[ed] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch.”<sup>50</sup> The Court reasoned that Congress, absent the one-house veto, could only have overridden a deportation decision made by the Attorney General (whose power to make such a decision derived from a previously enacted statute) by enacting a new statute. Because enacting a new statute would require bicameralism and presentment, Congress could not override the Attorney General’s delegated policy choice outside that process.<sup>51</sup>

Recognizing the problems with its Article I, Section 7 analysis, the Court tried to distinguish the unconstitutional one-house exercise of legislative power by Congress from the Attorney General’s exercise of discretion. Its reasoning on this score, in short, was as follows. Congress has to comport with bicameralism and presentment, but the Attorney General’s exercise of discretion does not, even though it has the same effect on the legal rights, duties, and relations of persons as the one-house veto.<sup>52</sup> This is so because an agent exercising delegated authority cannot exceed the power delegated in the statute, and therefore the statute delegating authority also serves as a constraint on that authority. In addition,

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46. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

47. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537) (2006)).

48. 8 U.S.C. § 1254(a)(2) (1994) (repealed 1996).

49. *Chadha*, 462 U.S. at 925.

50. *Id.* at 952. Of course, this reasoning could easily apply to *any* positive or negative lawmaking delegation, as surely administrative rules “alter[] the legal rights, duties and relations of persons . . . outside the legislative branch,” making them “essentially legislative in purpose and effect.”

51. *Id.* at 952–55.

52. *Id.* at 953 n.16.

judicial review and the “power of Congress to modify or revoke the authority entirely” serve as further checks on executive action.<sup>53</sup>

Why such constraints on delegated lawmaking authority, if they had existed, would have been insufficient in the case of the one-house veto, the Court did not say. Nor did it say whether such constraints would generally be sufficient to allow actions taken without bicameralism and presentment to override the delegated policy choice of an executive agent acting under a statutory delegation. Nevertheless, what the Court did say laid the groundwork for the principle that, in some instances, it is unconstitutional to allow something less than bicameralism and presentment to negate a lawmaking action taken under a statutorily delegated power.

## 2. *Evolution: The Line Item Veto Act*

Fifteen years later, the Court drew on *Chadha*'s reasoning when it evaluated a constitutional challenge to the Line Item Veto Act (“LIVA”) in *Clinton v. City of New York*.<sup>54</sup> The LIVA allowed the President to “cancel in whole” certain spending and tax-benefit provisions enacted into law through bicameralism and presentment.<sup>55</sup> The Act thus allowed the President to cancel duly enacted statutory law, a delegated lawmaking power different in kind from the typical interstitial gap filling that administrative rulemaking is thought to entail. The President could not cancel anything before first making three determinations, each of which seemed like an intelligible principle. After reviewing the legislative history, purpose, and other relevant information about the items targeted for cancellation, the President had to determine that each cancellation would “(i) reduce

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53. *Id.* The Court has never expressly held that judicial review is required as a check on rulemaking by the Executive in order to ensure that it does not violate nondelegation doctrine. Whatever the merits of enlisting the Judiciary to help police the exercise of discretion by the Executive, some litigants have asserted that preclusion of judicial review should render broad lawmaking delegations unconstitutional as delegations of “legislative power” in violation of the nondelegation doctrine. *See, e.g., County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 at \*5-7 (W.D. Tex. Aug. 29, 2008) (rejecting plaintiffs’ claim that “judicial review is required in the context of the intelligible principle analysis”). These challenges have all failed, and the Supreme Court has denied certiorari. *See County of El Paso v. Napolitano*, 129 S. Ct. 2789 (Mem.) (2009); *Defenders of Wildlife v. Chertoff*, 554 U.S. 918 (2008).

54. 524 U.S. 417 (1998). *See Rappaport, supra* note 24 (arguing that the Court is unwilling to hold laws unconstitutional under nondelegation doctrine).

55. Line Item Veto Act (“LIVA”), Pub. L. No. 104-130, § 691(a), 110 Stat. 1200, 1200 (1996), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998). Bicameralism and presentment require every bill to pass both houses of Congress and then be presented to the President before it can become law. U.S. CONST. art. I, § 7, cl. 2.

the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.”<sup>56</sup> Line item cancellations under the Act rescinded discretionary budget items and prevented direct spending and tax-benefit provisions “from having legal force or effect.”<sup>57</sup>

Exercising his item veto authority, President Clinton cancelled one direct spending item and one limited tax benefit, and the affected groups sued, challenging the cancellations as unconstitutional. The first group, the City of New York, had benefited from the direct spending item, which resolved in the City’s favor a longstanding controversy over the amount (as much as \$2.6 billion) the federal government owed the City under the Social Security Act. The second group, comprised of owners of certain food refiners and processors, had received a limited tax benefit allowing deferral of gain realization when selling a food processing or refining company to a farmers’ cooperative. President Clinton determined that the direct spending item for New York gave it preferential treatment, setting a bad precedent, and he determined that the limited tax benefit lacked safeguards and failed to target its benefits to smaller cooperatives.<sup>58</sup>

In evaluating the President’s line item cancellations, the Court focused both formally and functionally on the effect upon statutory text.<sup>59</sup> After surveying the Constitution to see whether it gave the President the power to negate or alter the legal force or effect of statutory text, the Court found that, though the Constitution assigns lawmaking powers to the President, this power is not among those assigned.<sup>60</sup> In so doing, Justice Stevens’ opinion for the Court broke

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56. *Clinton*, 524 U.S. at 436 (quoting LIVA, § 691(a)(3)(A)).

57. *Id.* (citing LIVA, §§ 691e(4)(B)-(C)). The cancellation only took effect if the President “transmit[ted] a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision.” *Id.* (citing LIVA, § 691(a)(3)(B)).

58. *Clinton*, 524 U.S. 422–25.

59. *Id.* at 438 (“In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.”).

60. *Id.* (surveying the text of Article I and Article II for the assignment of lawmaking responsibilities to the President). Aside from presentment, during which the President may sign a bill, veto it, or decline to take action, art. I, § 7, cl. 2, he also “shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .” U.S. CONST. art. II, § 3. Because even George Washington recognized that the Presentment Clause meant he could either “approve all parts of a Bill, or reject it in toto,” partial rejection of a bill was inconsistent with the text of the clause. *Clinton*, 524 U.S. at 440 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)). The Court also relied on other historical authorities. *Id.* (citing W. TAFT, THE



with precedent and did not analyze the delegation of cancellation authority by looking for an intelligible principle. Instead, the Court concluded that the LIVA gave the President “the unilateral power to change the text of duly enacted statutes.”<sup>61</sup> The Court rejected the Government’s contention that the cancellations at issue did not amount to a “repeal” of the cancelled items because the items retained a “real, legal budgetary effect.”<sup>62</sup> Although no longer operative for the plaintiffs, the cancelled provisions still retained some “continuing financial effect on the Government.”<sup>63</sup> This partial retention of legal force or effect was insufficient to save the LIVA because “[t]he cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled.”<sup>64</sup>

In reaching this conclusion, the Court had to distinguish two lawmaking delegations that seemed to allow the alteration of statutory text without bicameralism and presentment. The first delegation was the supersession clause of the Rules Enabling Act, which provides that all laws conflicting with judicial rules subsequently promulgated by the Supreme Court shall no longer have legal force or effect.<sup>65</sup> The other delegation was in the Tariff Act of 1890, which granted the President broad discretion to suspend statutory trade duty exemptions.<sup>66</sup> The Court, distinguishing these delegations from the LIVA, stated:

Congress expressly provided that laws  
inconsistent with the procedural rules promulgated by

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PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS; 1 W. BLACKSTONE, COMMENTARIES \*154).

61. *Clinton*, 524 U.S. at 447.

62. *Id.*

63. *Id.*

64. *Id.*

65. The Rules Enabling Act delegates to the Supreme Court the power to “prescribe general rules of practice of procedure and rules of evidence” in federal district courts and courts of appeals. Rules Enabling Act, 28 U.S.C. § 2072, § 2072(a) (2006). The supersession clause provides: “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Id.* § 2072(b). For a thorough discussion of congressional and judicial authority to promulgate procedural rules governing the federal courts, see generally Bernadette Bolla Genetin, *Expressly Repealing Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677 (2002).

66. See *Field v. Clark*, 143 U.S. 649 (1892). Such a delegation is known as contingent legislation, discussed in further detail in Part II.B.1.

this Court would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts. As in the tariff statutes, Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court.<sup>67</sup>

Because the LIVA “authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, Section 7,” it was unconstitutional.<sup>68</sup>

### 3. *A Critique and a Principle*

The Court’s attempt to distinguish the Rules Enabling Act and the tariff statutes from the LIVA is unpersuasive. Surely, if the LIVA had instead provided that spending provisions have effect until the President promulgates his own conflicting spending provisions, it would have equally violated Article I, Section 7.<sup>69</sup> But under the Court’s distinction, such a hypothetical statute would have “expressly provided that laws inconsistent” with budgetary proposals promulgated by the President would be “automatically repealed” upon the President’s promulgation of the conflicting provisions. Moreover, the Court’s pronouncement that “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes”<sup>70</sup> belies the Court’s distinction. When statutory text is superseded by the promulgation of conflicting text by the Court, as it would be if the Court were to replace congressionally enacted rules with new rules promulgated by the Court itself, the statutory text is “amended” without bicameralism and presentment.

More broadly, the Court’s statement that the Constitution is silent on whether the President may enact, amend, or repeal statutes

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67. *Clinton*, 524 U.S. at 446 n.40 (1998). This Article focuses on delegations of lawmaking power to the Executive; delegations to the Judiciary raise additional concerns worthy of separate treatment. For more on the constitutionality of delegating cancellation authority to the Supreme Court, *see generally* Kelleher, *supra* note 25 (arguing that the supersession clause of the Rules Enabling Act does not unconstitutionally violate the separation of powers).

68. *Clinton*, 524 U.S. at 445.

69. The Court’s analysis distinguishing the Rules Enabling Act from the LIVA has been used by at least one court of appeals to uphold a statute that allows an administrative agency to modify statutory text. Further discussion can be found in Part III.B.

70. *Clinton*, 524 U.S. at 438.

is, of course, true, but the statement does little analytical work when Congress, despite the Constitution's silence on the subject, may delegate legislative-type authority and discretion to other branches.<sup>71</sup> Nevertheless, for the LIVA, the Court found "powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition."<sup>72</sup> The underlying premise is that, when the delegated power is one to *negate* law from having "legal force or effect," that delegation violates Article I, Section 7 and "the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."<sup>73</sup> But when the delegated power is one to *create* law—that is, future rules of general applicability—the Court looks only for an intelligible principle, which, if found, is sufficient to uphold the delegation no matter how vague it might be.<sup>74</sup>

This apparent contradiction led some commentators to argue that the Court's decision to strike down the LIVA implicitly rested on nondelegation reasoning, which could not be explicit because the intelligible principle requirement is such a weak constraint.<sup>75</sup> This argument has merit. If positive lawmaking delegations, such as rulemaking authority, survive nondelegation challenges with vacuous

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71. *Id.* ("Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes."). *But see* Lawson, *supra* note 30, at 333 (arguing that the Constitution "contain[s] a discernible, textually grounded nondelegation principle that is far removed from modern doctrine."). For an argument that the Executive Vesting Clause combined with the constitutional structure, purpose, and history tip the balance in favor of allowing only limited delegations, *see generally* Rappaport, *supra* note 24. Under Rappaport's framework, the LIVA was unconstitutional because it was an overly broad delegation. *See id.* An alternative view argues that the modern administrative state has not abandoned the nondelegation doctrine but instead has replaced it with more preferable—and more limited—nondelegation canons. *See generally* Sunstein, *supra* note 39.

72. *Clinton*, 524 U.S. at 439.

73. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Clinton*, 524 U.S. at 439–40 (citing *Chadha*, 462 U.S. at 951).

74. As Justice Scalia has observed: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216–17 (1943); *N.Y. Central Secs. Corp. v. United States*, 287 U.S. 12, 24–25 (1932)).

75. *See* Rappaport, *supra* note 24, at 269 (arguing that the Article I, Section 7 test was a "feeble substitute" for nondelegation doctrine). Some commentators have suggested that the nondelegation doctrine would have been sufficient to reach the same outcome in the case. *See, e.g., Huefner*, *supra* note 28, at 339–40.

standards such as “public interest, convenience, or necessity”<sup>76</sup> or mandates to set “fair and equitable”<sup>77</sup> prices, the three equally intelligible standards in the LIVA should have been sufficient under nondelegation doctrine. A decision to strike down the LIVA on nondelegation grounds would thus have been analytically inconsistent with the Court’s general willingness to affirm broad positive delegations.

Despite its flaws, *Clinton* stands for the principle that when a lawmaking delegation allows the Executive to *negate* statutory text without bicameralism and presentment, there is greater concern over that delegation’s constitutionality than when the delegation merely allows the positive discretionary creation of administrative rules. The next Part draws upon this principle to advance a new analytical framework for lawmaking delegations.

## II. A New Framework For Analyzing Lawmaking Delegations

The Article I, Section 7 test’s language suggests that bicameralism and presentment limit Congress’s ability to delegate its power to amend, repeal, or otherwise negate statutory text. Governor Romney’s promise to functionally repeal the ACA, if carried out, would have negated the legal force or effect of the waived statutory text, as the Obama Administration’s ACA waivers have already done. Evaluating the constitutionality of each raises the following question: Are waiver delegations more like the LIVA, or more like the generally constitutional delegation of rulemaking authority to administrative agencies? Both types of delegations share two key similarities.

The first key similarity is that the entity exercising discretion is an executive agent. Creating a new rule of general applicability that is binding with the force of law involves the exercise of legislative discretion, as does cancelling such a rule, or granting a waiver that exempts some from that otherwise generally applicable rule. However, it is the identity of the actor exercising discretion, not the nature of that discretion, that matters under modern separation of powers doctrine.<sup>78</sup>

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76. *Nat’l Broad. Co.*, 319 U.S. at 225–26.

77. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946).

78. Beermann, *supra* note 35, at 80 n.63 (“[T]here are many situations in which the characterization of a governmental power depends entirely on the identity of the entity exercising the power.”); *see also Chadha*, 462 U.S. at 951 (“When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.”). Generally,

The second key similarity between rulemaking delegations and the waiver power delegated in the ACA is the existence of statutory constraints. Whereas Congress operates solely within the confines of the Constitution, Executive Branch lawmakers must also operate within the bounds of the statute delegating lawmaking authority.<sup>79</sup> The existence of statutory standards enlists the aid of the Judiciary as policymaker.<sup>80</sup>

Consequently, all lawmaking delegations to the Executive involve the exercise of discretion within the constraints of a statutory grant of delegated lawmaking authority. Such constraints theoretically allow for judicial review. Indeed, Governor Romney's campaign promise to order the Secretary of Health and Human Services to issue a waiver of the ACA's legal requirements to all fifty states involves these features of lawmaking delegation. The waiver to which Governor Romney referred, known as a "Waiver for State Innovation," allows the Secretary to waive many of the ACA's legal requirements "with respect to health insurance coverage within that State."<sup>81</sup> It also requires thorough administrative procedures<sup>82</sup> and that states meet detailed substantive criteria before a waiver can be granted.<sup>83</sup>

Much like delegations of administrative rulemaking authority, the ACA waiver provision delegates lawmaking power to an agent in the Executive Branch—the Secretary of Health and Human

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when the Court analyzes delegations of positive lawmaking power to the Executive, it focuses on whether Congress has impermissibly delegated legislative power, which is vested exclusively in Congress under the Constitution. *See supra* Part I.A.

79. Beermann, *supra* note 35, at 80 n.63; *see also Chadha*, 462 U.S. at 953 n.16.

80. *See, e.g.,* Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected A Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 693 (2006) ("The expansion of the administrative state has brought about, albeit somewhat indirectly, a greater judicial role in the policymaking process that was originally intended to be the province of Congress.").

81. ACA, § 1332(a)(1), 124 Stat. at 203.

82. ACA, § 1332(a)(4) (requiring, among other things, public notice and comment, including public hearings; a detailed application; and development of a process for thorough reporting, monitoring, and evaluation). The ACA requires the Secretary of Health and Human Services and the Secretary of the Treasury to issue regulations regarding the procedures for obtaining Waivers for State Innovation under section 1332 of the ACA; those regulations were recently issued after public notice and comment, and they contain detailed requirements implementing the specific procedural criteria mandated by section 1332 of the Act. *See* Application, Review, and Reporting Process for Waivers for State Innovation, 77 Fed. Reg. 11,700 (Feb. 27, 2012) (to be codified at 31 C.F.R. pt. 33 and 45 C.F.R. pt. 155).

83. ACA, § 1332(b) (requiring, among other things, that the State plan provide coverage at least as comprehensive as that required under the ACA).

Services—and it constrains that agent’s discretion by requiring both burdensome administrative procedures and detailed substantive criteria before the agent may exercise the delegated power. Those substantive criteria, in turn, provide reviewing courts with specific standards by which they can determine whether the waivers were properly granted.

Despite the similarities between administrative rulemaking and the ACA waiver process, this Article argues that bicameralism and presentment require that the exercise of such a broad waiver power should receive greater judicial scrutiny than would the promulgation of regulations necessary to flesh out the Act. At first blush, this makes little sense, since a court reviewing a separation of powers challenge to the Executive’s waivers under the ACA would likely uphold them under nondelegation doctrine.<sup>84</sup> That doctrine is founded on a pragmatic, functionalist view of the separation of powers.<sup>85</sup> Such a functionalist view, however, rather than a formalist one, is less appropriate when Congress delegates the power to negate legislative bargains struck pursuant to our meticulous constitutional structure.<sup>86</sup>

The Court’s formalist view of lawmaking delegations has not had much effect in the lower courts.<sup>87</sup> Nor has the Court chosen to expand its bicameralism and presentment jurisprudence since it struck down the LIVA. But the principle undergirding *Clinton* should limit lawmaking delegations such as the waiver provision in the ACA. Waiver delegations have become more common as Congress seeks to allow flexibility to avoid the burdens of its increasingly complex

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84. See *supra* Part I.A.

85. See Manning, *supra* note 35, at 1950–58 (2011) (outlining functionalist principles and giving examples of functionalist reasoning in Supreme Court decisions); see also Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 582–85, 592–97 (discussing functionalism in the context of separation of powers theory).

86. *INS v. Chadha*, 462 U.S. 919, 919 (1983); *Clinton v. City of New York*, 524 U.S. 417 (1998); see also Manning, *supra* note 35, at 1943–44. But see Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 878–79 (2009) (arguing that separation of powers jurisprudence “vacillates between” and sometimes even blends elements of formalism and functionalism, all in the name of protecting liberty by preventing “tyranny and legislative aggrandizement”).

87. See *infra* Part III.

statutory schemes, leading to modest scholarly attention by a few recent commentators.<sup>88</sup>

Rather than examine waiver provisions in isolation, this Article views them more broadly within a novel framework that categorizes lawmaking delegations as either positive or negative. Negative lawmaking delegations raise greater separation of powers concerns than do positive ones because such delegations allow unilateral executive discretion to undo the legislative bargains embodied in congressional statutes.

### A. The Positive/Negative Dichotomy

There are two basic forms of lawmaking power delegable to the Executive by Congress. The first is a positive power. The positive power involves the Executive's delegated authority to create legal rules or standards, generally through administrative rulemaking.<sup>89</sup> Rules promulgated pursuant to such delegated authority have the same functional characteristics as statutes.<sup>90</sup> Indeed, the Administrative Procedure Act's ("APA") definition of a rule—a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"<sup>91</sup>—could easily describe most statutes as well.<sup>92</sup> Though the functional characteristics of administrative rules and statutes are the same, under modern doctrine, Congress has great latitude in determining the precision with which it legislates. A statute may contain broad goals and delegate the task of specifying the details to an

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88. E.g., Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257 (2010); Bryan Clark, Comment, *Refining the Nondelegation Doctrine in Light of REAL ID Act Section 102(c): Time to Stop Bulldozing Constitutional Barriers for A Border Fence*, 58 CATH. U. L. REV. 851 (2009); Andrew Dudley, Comment, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L.J. 273 (2009).

89. Prakash, *supra* note 25, at 4.

90. See *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386 (1932) (explaining that an agency exercising delegated lawmaking authority "speaks as the legislature, and its pronouncement has the force of a statute"); see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1477 (1992) (noting that "legislative rules have the force of statutes if validly adopted").

91. 5 U.S.C. § 551(4) (2006).

92. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 796 n.118 (2010) (noting that "agency lawmaking is quite indistinguishable from congressional lawmaking so far as the citizen is concerned").

administrative agency, or a statute may contain precise text with specific rules.<sup>93</sup>

This Article uses the term “lawmaking authority” or “lawmaking delegation” generally to describe delegations that grant legislative-type discretion to the Executive—namely, the power to amend or alter the legal rights and duties of individuals or the ways in which government operates. Delegations of legislative-type power to the Executive are then grouped into two categories: positive and negative. In the constitutional structure, amendment or repeal of existing law, no less than enactment of new law, requires an exercise of Congress’s lawmaking power under Article I.<sup>94</sup> The idea that lawmaking involves the creation, modification, or rescission of text that has legal force or effect is also evident in administrative law.<sup>95</sup> Thus, the term “positive” refers to the use of lawmaking power to add to a statutory scheme or otherwise fill in the interstices of broad statutory mandates. The power is positive in the sense that it adds to or elaborates upon existing statutory text, rather than modifies, cancels, or otherwise negates it.

The second form of delegable lawmaking power is a negative power. The negative power involves the Executive’s delegated authority to deny legal force or effect to statutory text that has been duly enacted through bicameralism and presentment.<sup>96</sup> There are a variety of examples of the negative power, including: the power to determine when given statutory text will take effect,<sup>97</sup> the power to amend or modify statutory text,<sup>98</sup> the power to waive the application

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93. Beermann, *supra* note 35, at 78. Professor Beermann explains: “For example, Congress may legislate precise limits on the emission of pollutants from automobiles, or it may set a goal of cleaner air and rely on an agency to establish the precise limits.” *Id.*

94. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

95. See 5 U.S.C. § 551(5) (defining “rule making” as the “agency process for formulating, amending, or repealing a rule”).

96. Both positive and negative lawmaking power can be and have been delegated to the Judiciary by Congress in the Rules Enabling Act. See *supra* note 65.

97. Professor Lawson calls this contingent legislation. Lawson, *supra* note 30, at 363. For more on contingent legislation and Lawson’s framework, see *infra* Part II.B.1. I characterize such legislation as conferring a negative power because the Executive can exercise discretion that prevents statutory text, duly enacted under the meticulous procedures of Article I, Section 7, from taking effect.

98. See, e.g., 42 U.S.C. § 300aa-14(c) (2006) (authorizing the Secretary of Health and Human Services to “promulgate regulations to modify” the Vaccine Injury Table contained in the National Childhood Vaccine Injury Act). Although I characterize modification authority as negative due to its effect on pre-existing statutory text, it is also positive in the sense that it creates new legal rules or standards that take the place of the pre-modification provision.



of statutes in specified instances,<sup>99</sup> and the power to permanently cancel the legal effect of statutory provisions.<sup>100</sup>

While implied but never fully explained by *Clinton*, the Executive's exercise of power to cancel or modify statutes is far more problematic than the Executive's now-ubiquitous promulgation of positive law, a practice that expands upon or fills in the gaps of existing statutes.<sup>101</sup> As a result, the Court less rigorously analyzes positive lawmaking delegations to the Executive than negative lawmaking delegations of equivalent scope. Commentators have similarly failed to provide an analytically sound explanation for the differing treatment of such delegations. The next subpart further elaborates on the distinction between positive and negative lawmaking delegations, breaking down negative lawmaking delegations into four distinct types. Each type of negative lawmaking delegation raises separation of powers concerns in light of the constitutional text and structure.

### **B. The Different Types of Negative Lawmaking Delegations**

The degree to which Congress may delegate negative lawmaking power is limited only by Congress's creativity (and willingness) to delegate its discretion to another Branch. Nevertheless, a more formal categorization of negative lawmaking delegations, a task never

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99. See, e.g., *Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58, 59–60 (2008) (approving the Secretary of Homeland Security's authority under 8 U.S.C. § 1103 to "waive all legal requirements . . . necessary to ensure expeditious construction of the barriers and roads under this section.").

100. See *Line Item Veto Act*, Pub. L. No. 104-130, § 691(a), 110 Stat. 1200, 1200 (1996), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998) (allowing the president to "cancel in whole" certain spending and tax-benefit provisions).

101. The President may have independent constitutional authority under Article II to provide the necessary details to complete an otherwise incomplete legislative scheme. Compare Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 *YALE L.J.* 2280, 2282 (2006) ("The completion power is the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme."), with Robert J. Reinstein, *The Limits of Executive Power*, 59 *AM. U. L. REV.* 259, 264 (2009) (rejecting the concept of a presidential completion power as "the modern equivalent of a royal prerogative that was asserted and discredited 400 years ago—that the King could, by proclamation and without legislative authorization, change domestic law by prescribing means that he deemed necessary to make a statutory scheme more effective"). The merits of a presidential completion power are intriguing, though it seems that at least some power to fill in the interstices of incomplete statutory mandates must be incidental to the execution of law even in the absence of express congressional authorization, particularly where Congress often legislates at a high level of abstraction, eschewing particularized instruction in favor of broad, goal-specifying legislation.

undertaken by the Court nor comprehensively attempted by commentators, helps better ground the analysis of such delegations within the constitutional text and structure governing separation of powers doctrine.

This Article proceeds by analyzing negative lawmaking delegations in a proposed classification of four broad types: contingent legislation, amendment, waiver, and cancellation.

### 1. *Contingent Legislation*

In *Clinton*, the Court referred to “Congress itself ma[king] the decision to repeal prior rules upon the occurrence of a particular” event. Justice Breyer’s dissent argued that the LIVA itself was a type of contingent legislation, no different than myriad other statutes delegating “to the President or to others . . . a contingent power to deny effect to certain statutory language.”<sup>102</sup>

Although *Clinton* did not fully address the issue of contingent legislation, nor has the Court ever done so, one prominent commentator defines such legislation as statutes in which Congress decides the statute shall be effective (or rendered ineffective) when the President or another actor determines that a certain contingency has occurred, rather than fixing the effective date of the statute to a calendar date.<sup>103</sup> Contingent legislation allows Congress not merely to set the initial effective date of a statute, but also to create the functional equivalent of a statutory on/off switch that can be flipped by executive or judicial agents. The flipping of the switch is generally not lawmaking because “Congress determine[s] the conditions under which the statute w[ill] be effective but le[aves] it to [an agent] to determine whether those conditions [are] satisfied.”<sup>104</sup> Such delegation is constitutional unless determining the conditions under which the statute is effective “passes beyond the implementational function of executive and judicial agents and instead becomes lawmaking.”<sup>105</sup>

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102. *Clinton*, 524 U.S. at 476 (Breyer, J., dissenting) (listing examples of contingent legislation).

103. Lawson, *supra* note 30, at 363–68.

104. *Id.* at 364.

105. *Id.* at 387. In Professor Lawson’s view: “If the President simply decides on an effective date, he is making a law. If he determines the existence *vel non* of an external fact, he is executing a law (provided that the determination does not require so much discretion that it crosses the line into lawmaking). If he makes some decision other than the effective date that consequentially establishes the effective date, the lines get very blurry. All of this merely proves once again that hard cases are hard.” *Id.* at 391.

The Supreme Court's first case on contingent legislation, decided in 1813, involved a statute that required forfeiture of cargo imported from Great Britain or France, unless the President declared by proclamation that either Great Britain or France had "cease[d] to violate the neutral commerce of the United States."<sup>106</sup> The statutory prohibition requiring cargo forfeiture was switched off when the President so proclaimed, but the President's switch was dependent on his determination of the existence of an external fact, which was sufficient to make the President's exercise of discretion constitutional.<sup>107</sup>

The second case involving contingent legislation, distinguished by *Clinton* when it invalidated the LIVA, was *Field v. Clark*, which evaluated the Tariff Act of 1890.<sup>108</sup> The Act exempted certain goods from import duties but directed the President to suspend those exemptions by proclamation whenever he determined that another country was imposing "reciprocally unequal and unreasonable" duties on those goods.<sup>109</sup> The Act then provided for import duties to be levied during the presidential suspension of the exemptions.<sup>110</sup>

Analyzing a constitutional challenge to the Act, the Court held that delegating discretion as to whether a statute should be executed was permissible, but delegating discretion as to the content of the law was not.<sup>111</sup> Relying heavily on the historical practice of delegating

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106. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 383 (1813).

107. Lawson, *supra* note 30, at 387 ("The President has, of course, some measure of discretion in determining whether the actions of Great Britain amount to violations of neutral commerce, but the extent of that discretion is no greater than in run-of-the-mill cases involving matters other than effective dates."). The implication of the statute in *Cargo of the Brig Aurora* is that, if the President mistakenly determined that Great Britain was no longer violating neutral commerce or began violating neutral commerce again after the President's proclamation, then the President could revive operation of the statutory prohibition on importation by revoking his proclamation. In other words, the effective date of the statute would turn on whether Great Britain was violating neutral commerce, as determined by the President, and thus the statute would switch on or off depending on the President's determination of an external fact. Since the external fact could change back and forth, so could the President's determination, and thus the operation of the statute.

108. *Field v. Clark*, 143 U.S. 649 (1892).

109. Act of Oct. 1, 1890, 26 Stat. 567 (1890).

110. *Id.*

111. *Field*, 143 U.S. at 693–94. Of course, Congress now regularly delegates to the Executive the discretion to determine the content of laws. Indeed, the very premise of *Chevron* deference is that textual ambiguity in a statute which an agency administers constitutes delegated interpretive authority to clarify that ambiguity with text that has the full force or effect of law. *See infra* note 252.

similar suspension authority to the President, the Court concluded that the delegation was constitutional.<sup>112</sup>

The government in *Clinton* argued that the LIVA was similar to the Tariff Act of 1890 and, thus, constitutional. The two statutes containing the cancelled spending provisions—the Balanced Budget Act and the Taxpayer Relief Act—were passed subsequent to the LIVA, but should be construed as including the LIVA’s item veto authority in their terms.<sup>113</sup> The President’s cancellation of the spending items was therefore an exercise of discretionary authority granted in the spending bills. This power, contended the government, was similar to the discretionary suspension authority granted in the Tariff Act of 1890, rather than the amendment of subsequently enacted statutes using a power delegated previously.

*Clinton* found several ways to distinguish the LIVA from the Tariff Act. First, the Tariff Act granted the President the suspension power contingent upon conditions not present when the Act was enacted.<sup>114</sup> Because the LIVA required the President to exercise the cancellation authority within five days after the spending provisions were enacted, the conditions under which Congress enacted the statute were the same. Second, the President had a “duty” to suspend the tariff exemptions when he determined that the specified contingency had occurred, while the three presidential determinations required under the LIVA “did not qualify his discretion to cancel or not to cancel.”<sup>115</sup> Third, under the Tariff Act the President “execut[ed] the policy that Congress had embodied in the statute,” while under the LIVA he “reject[ed] the policy judgment made by Congress and rel[ied] on his own policy judgment.”<sup>116</sup>

The Court’s attempt to distinguish the LIVA from the Tariff Act of 1890 is unpersuasive. First, under Article I, Section 7, it is irrelevant that *Field v. Clark* involved changed conditions after

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112. *Id.* at 683 (“If we find that [C]ongress has frequently, from the organization of the government to the present time, conferred upon the president powers, with reference to trade and commerce, like those conferred by [this Act], that fact is entitled to great weight in determining the question before us.”). The Court reasoned that “it is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.” *Id.*

113. *Clinton v. City of New York*, 524 U.S. 417, 442 (1998).

114. *Id.* at 443 (the imposition of “reciprocally unequal and unreasonable” import duties by other countries.).

115. *Id.* at 443–44.

116. *Id.* at 444.

enactment, while the LIVA involved the same conditions as during enactment. If it is the effect on statutory text that matters, then any cancellation allows partial repeal of statutes without bicameralism and presentment.

Second, the duty/discretion distinction does not change the fact that the delegated power negates statutory text; surely the LIVA would have been equally unconstitutional under the Court's analysis if the Act instead mandated cancellation upon presidential determination of the three requirements set forth in the Act.<sup>117</sup> Finally, the executing versus abrogating congressional policy judgment argument is a false distinction. It assumes that the spending provisions enacted subsequent to the LIVA did not embody the policy of the LIVA—namely, a policy of fiscal discretion and an understanding that the President was better equipped to make line-item determinations than a multimember deliberative body such as Congress.<sup>118</sup>

Congress's decision not to exempt the subsequent spending bills from the LIVA could easily be characterized as Congress deciding to embody the policy of the LIVA in those bills. Although the Court did not purport to analyze either the Tariff Act or the LIVA as "contingent legislation" in such explicit terms, many commentators, and some members of the Court,<sup>119</sup> rely on the contingent legislation framework.

Even assuming the contingent legislation framework is viable, this framework does not answer the larger question of whether negative lawmaking delegations are generally constitutional. A statute giving the President the power to cancel certain provisions "whenever he feels like it," even under the weak intelligible principle standard, would be unlikely to pass muster, although it is certainly "contingent" in the ordinary sense of the word. Whatever the specified contingency is, when the President prevents a statute from taking effect, or when he switches the statute off, as he did with the

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117. It is also unclear just how "mandatory" the suspension duty was in the tariff statutes. See *id.* at 493–94 (Breyer, J., dissenting) (explaining how some of the tariff statutes imposed no duty, while "[o]thers imposed a 'duty' in terms so vague as to leave substantial discretion in the President's hands").

118. See *id.* ("The majority also tries to distinguish [*Field v. Clark*] on the ground that the President there executed congressional policy while here he rejects that policy. The President here, however, in exercising his delegated authority does not *reject* congressional policy. Rather, he *executes* a law in which Congress has specified its desire that the President have the very authority he exercised.").

119. *Id.*

Tariff Act in *Field v. Clark*, he is unilaterally negating statutory text. Accordingly, contingent legislation implicates the Article I, Section 7 test, and therefore should be evaluated with greater scrutiny than positive lawmaking delegations of equivalent scope.

## 2. Amendment

*Chadha* held that “amendment and repeal of statutes, no less than enactment, must conform with Art. I,”<sup>120</sup> and *Clinton* reiterated that it is unconstitutional to give the President “the unilateral power to change the text of duly enacted statutes.”<sup>121</sup> In the negative lawmaking delegation framework, amendment power involves the Executive’s delegated authority to modify, in whole or in part, statutory text.

The Supreme Court has never directly confronted the question whether amendment delegations violate Article I, Section 7, but in one case the Court implied that such delegations may be constitutional. The delegation at issue allowed the Federal Communications Commission (“FCC”) to “modify any requirement” made by a particular section of the Communications Act of 1934.<sup>122</sup> Invoking its modification authority, the FCC eliminated, for over forty percent of the industry, a rate-filing requirement statutorily imposed on the entire industry.<sup>123</sup> The Supreme Court, largely based on a textualist analysis of the term “modify,” held that the FCC’s action was too great to be considered a “modification” and that the agency therefore exceeded its regulatory authority under the Act.<sup>124</sup> The clear implication is that less drastic changes would have been permissible.

Other amendment delegations have been challenged in court subsequent to *Clinton* and are addressed in further detail in Part III.B. Such delegations implicate the negative lawmaking framework because they allow an executive actor to override statutory text with new text never subjected to the lawmaking requirements of Article I, Section 7. When the executive actor—usually an administrative

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120. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

121. *Clinton*, 524 U.S. at 447.

122. *MCI Telecommc’ns. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994) (citing 47 U.S.C. § 203(b)(2) (1998 ed. & Supp. IV)).

123. *MCI*, 512 U.S. at 231–32.

124. *See MCI*, 512 U.S. at 228 (“It might be good English to say that the French Revolution ‘modified’ the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm.”).

agency—promulgates superseding text, the old text no longer has legal force or effect, at least not prospectively. The result is functionally equivalent to Congress exercising its lawmaking power under Article I, Section 7 to amend a statute.

### 3. Waiver

Waiver provisions, because they are unique to and highly shaped by the statutory scheme in which they appear, are difficult to describe as a class. To the extent that there has been academic commentary on the Executive's use of statutory waivers, the commentary has focused on their use in specific substantive areas of law, rather than on their general constitutional validity.<sup>125</sup>

In any event, “waiver” refers to a statutory provision exempting certain persons, projects, or categories of activities from some or all of the requirements of the statute in which the provision appears, or of other statutes.<sup>126</sup> When the waiver provision grants the Executive discretion as to whether and to whom to grant the waiver, the exercise of the delegated waiver authority involves executive negotiation of statutory text. Depending on the scope of such provisions, the Executive can determine if the waiver should be granted, to whom or for which activities, and to what extent other laws will not apply.

Waiver provisions can be internal or external. Internal waiver provisions allow the Executive to suspend all or part of the law of which they are a part.<sup>127</sup> External waiver provisions allow the Executive to suspend the requirements of other laws.<sup>128</sup> Both types of waiver provisions generally do four things. First, they identify which executive official may grant the waiver—for example, the Secretary of Defense or the President.<sup>129</sup> Second, waiver provisions prescribe the substantive criteria that must be met before the waiver can be granted.<sup>130</sup> These criteria run the gamut from detailed and specific to

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125. See *supra* note 88.

126. See Bowers, *supra* note 88, at 261–62 nn.15–19.

127. *Id.* at 264 n.34. The description of waiver provisions draws largely on Bowers, *supra* note 88, at 261, 264–71.

128. *E.g.*, Emergency Wartime Supplemental Appropriations Act for Fiscal Year 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (authorizing the President to “make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism”) (emphasis added).

129. Bowers, *supra* note 88, at 265.

130. *E.g.*, ACA, Pub. L. No. 111-148, § 1332(b), 124 Stat. 119, 203 (2010) (requiring, among other things, that the State plan provide coverage at least as comprehensive as that required under the ACA).

open-ended and vague.<sup>131</sup> Third, the waiver provisions lay out the procedural requirements for requesting and granting the waiver, to the extent there are any.<sup>132</sup> Finally, the provisions often specify the availability and scope of judicial review.<sup>133</sup>

Executive exercise of waiver authority to negate the legal force or effect of statutory text potentially undermines whatever legislative compromise was necessary to enact the negated text through bicameralism and presentment, and thus such waivers implicate the negative lawmaking delegation framework.

#### 4. Cancellation

Cancellation authority involves the Executive's delegated authority to permanently rescind the legal force or effect of statutory provisions.<sup>134</sup> The LIVA is the paradigmatic example of such delegated authority. Given the Court's decision in *Clinton*, it is unlikely that Congress will attempt to fashion a similar cancellation provision in future statutes. To the extent that Congress may wish to delegate a functionally similar negative power, it will likely do so using a textual formulation that more closely mirrors waiver or contingent legislation, since both exist in other statutes and have a firmer place in our historical tradition. Alternatively, as Justice Scalia noted in his *Clinton* dissent, Congress could, at least in the budgetary context, simply appropriate a discretionary lump sum.<sup>135</sup> A presidential choice not to spend part of that sum would be functionally equivalent to the line item veto's effect. Even though

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131. Compare ACA, § 1332(b) (detailing comprehensive substantive criteria necessary before granting a waiver), with REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c), 119 Stat. 231, 302 (allowing the Secretary of Homeland Security to waive the effect of any law with respect to construction of a border fence when he determines it is "necessary to ensure expeditious construction").

132. E.g., ACA, § 1332(a)(4) (requiring, among other things, public notice and comment, including public hearings; a detailed application; and development of a process for thorough reporting, monitoring, and evaluation); REAL ID Act § 102(c) (requiring no procedure except for publication in the Federal Register within thirty days of the Secretary's exercise of the waiver authority).

133. E.g., REAL ID Act § 102(c)(2) (granting exclusive jurisdiction to federal district courts and only allowing constitutional claims, prescribing timeframe for filing claims, and limiting appellate review to the Supreme Court).

134. See Prakash, *supra* note 25 at 4 n.19.

135. *Clinton v. City of New York*, 524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part) ("Insofar as the degree of political, 'lawmaking' power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion.").



*Clinton* makes future cancellation delegations unlikely, their inclusion in the negative lawmaking delegation framework is necessary to help illuminate why the LIVA violated Article I, Section 7 given bicameralism and presentment's purposes, rather than solely because the President was "changing" statutory text.

### III. Post-*Clinton* Challenges to Negative Lawmaking Delegations

This Part surveys lower court decisions in which lawmaking delegations have been challenged using *Clinton*'s Article I, Section 7 test. It shows that the test has had limited impact on courts, even where the delegation at issue was similar to that in *Clinton*—that is, it allowed statutory text to be negated. Because *Clinton* drew tenuous distinctions, however, subsequent courts have elided bicameralism and presentment by distinguishing other negative lawmaking delegations from the one in the LIVA.

#### A. Waiver

##### 1. *The REAL ID Act: The Border Fence Puzzle*

That bicameralism and presentment is required to amend and repeal statutes, no less than to enact them, is an uncontroversial proposition.<sup>136</sup> But when the Executive has congressionally delegated authority to negate *any* statutes that conflict with a tangible objective, is it amending or partially repealing the conflicting statutes when it exercises discretion to negate them? This is the crux of the question presented by Secretary of Homeland Security Michael Chertoff's decision to waive the requirements of dozens of laws that he determined impeded the expeditious construction of a fence along the U.S.-Mexico border.<sup>137</sup>

In the REAL ID Act of 2005, Congress delegated waiver power to the Executive to facilitate construction of the border fence:

Notwithstanding any other provision of law, the  
Secretary of Homeland Security shall have the

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136. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

137. See *County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. Lexis 44244 (S.D. Cal. Dec. 12, 2005). The decision in *Defenders of Wildlife* sparked modest academic interest in the problem of negative lawmaking delegations. See, e.g., Clark, *supra* note 88; Dudley, *supra* note 88.

authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.<sup>138</sup>

After a district court preliminarily enjoined fence construction based on a likely violation of both the National Environmental Policy Act and the Arizona-Idaho Conservation Act of 1988, Secretary Chertoff exercised his authority to waive both Acts, along with over a dozen other laws, presumably as a preemptive strike to prevent further litigation.<sup>139</sup> The plaintiffs challenged the waiver authority, arguing that it: (1) violated *Clinton*'s Article I, Section 7 test; and (2) was an impermissibly standardless delegation of legislative power.<sup>140</sup>

The court rejected both arguments. First, the court distinguished waiver from the partial repeal or amendment in *Clinton*: the LIVA gave the President "the unilateral power to change the text of duly enacted statutes,"<sup>141</sup> whereas the REAL ID Act gave the Secretary "no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part."<sup>142</sup> According to *Defenders of Wildlife*, each cancelled provision in *Clinton* "no longer ha[d] any 'legal force or effect' under any circumstance,"<sup>143</sup> but "[e]ach of the twenty laws waived by the Secretary . . . retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President."

Second, the court, citing the intelligible principle line of cases, found the REAL ID Act clearly delineated its general policy and sufficiently cabined the Secretary's discretion by allowing him to "waive only those laws that he determines 'necessary to ensure

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138. REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c), 119 Stat. 231, 302.

139. The Secretary also waived eighteen other laws "in their entirety, with respect to the construction of roads and fixed and mobile barriers [in the disputed area]." 72 Fed. Reg. 60,870 (Oct. 26, 2007). Some of the other laws waived include the Endangered Species Act; the Clean Water Act; the Safe Drinking Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act; and the Administrative Procedure Act. *Id.*

140. *Defenders of Wildlife*, 527 F. Supp. 2d at 124–26.

141. *Id.* at 124 (quoting *Clinton v. City of New York*, 524 U.S. 417, 446–47 (1998)).

142. *Id.*

143. *Id.* (quoting *Clinton*, 524 U.S. at 437).

expeditious construction.”<sup>144</sup> Other district courts evaluating the REAL ID Act waivers adopted similar nondelegation reasoning.<sup>145</sup> And in the only other case in which the plaintiffs also alleged a violation of Article I, Section 7, the court adopted *Defenders of Wildlife*'s analysis to reject that argument.<sup>146</sup>

*Defenders of Wildlife* was wrong to suggest that the LIVA was distinguishable because the statutory text President Clinton cancelled no longer had legal force or effect “under any circumstance.” As *Clinton* made clear, the cancelled text retained some legal effect (there, a real budgetary effect on the federal government), but that effect was insufficient to save the LIVA from unconstitutionality. And though both the item veto power and the REAL ID Act waivers share the formal negative effect on statutory text, what is different, and thus interesting, about the REAL ID Act waivers is the nature of the delegated negative lawmaking power. It was narrow in physical scope, applying only for the purpose of ensuring “expeditious construction” of the border fence, construction of which was expressly limited to “areas of high illegal entry.”<sup>147</sup> But it was expansive in legal scope, allowing the DHS Secretary to, “notwithstanding any other provision of law,” waive *any* law that he determined in his “sole discretion” impeded the expeditious construction of the border fence. The statute effectively delegated unlimited cancellation authority, applicable to every provision of the United States Code, limited only by the constraints inherent in the goal of constructing the border fence. The power to cancel other law was also limited temporally, though somewhat indefinitely, by the projected completion time for the border fence project.

Though the plaintiffs cleverly framed the REAL ID Act waiver authority as functionally equivalent to the partial repeal authority invalidated in *Clinton*, the REAL ID Act specifically used the term

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144. *Id.* at 127 (quoting REAL ID Act of 2005, § 102(c), 119 Stat. 231, 302). Because the Supreme Court found a delegation to the Environmental Protection Agency to set air quality standards at a level “requisite to protect public health” contained a sufficiently intelligible principle, then the “necessary to ensure expeditious construction” standard of the REAL ID Act was also sufficiently intelligible; Congress did not need to define “necessary” in greater detail. *Id.* at 127 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001)).

145. See *County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. Lexis 44244 (S.D. Cal. Dec. 12, 2005).

146. *County of El Paso*, 2008 WL 4372693, at \*3–\*4 (citing *Defenders of Wildlife*, 527 F. Supp. 2d at 124).

147. *Defenders of Wildlife*, 527 F. Supp. 2d at 128 (citation omitted).

“waiver.”<sup>148</sup> The distinction between permissible waiver authority and impermissible partial repeal or cancellation authority is difficult to formulate with precision, but, at least in the realm of foreign affairs and other powers considered within the independent purview of the Executive,<sup>149</sup> the Court has consistently rejected separation of powers challenges to statutory provisions delegating waiver authority to the Executive.<sup>150</sup> Because the border fence is related to national security and immigration, the Executive’s independent powers in those realms may further mitigate concern over the REAL ID Act waivers.<sup>151</sup>

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148. The plaintiffs in *Defenders of Wildlife* argued that the waiver was functionally equivalent to a partial repeal because the laws waived were “repeal[ed] . . . to the extent that they otherwise would have applied to [the construction of the border fence].” 527 F. Supp. 2d at 124 (citation and internal quotation marks omitted) (alteration in original).

149. For example, the realm of national security is traditionally considered the Executive’s as part of the Commander-in-Chief power under Article II, Section 2, Clause 1. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (explaining that the national-security power of the Executive “flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant”). Similar reasoning is found in the Court’s decisions relaxing the intelligible principle standard in contexts in which the Executive traditionally has exercised independent authority. See, e.g., *Loving v. United States*, 517 U.S. 748, 750 (1996) (rejecting nondelegation challenge because the statute at issue involved military affairs, traditionally within the prerogative of the Executive and noting that “[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President,” *Loving*’s last argument that Congress failed to provide guiding principles to the President “might have more weight”).

150. See, e.g., *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009) (“The [statute] expressly allowed the President to render certain statutes inapplicable . . . . And it did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation.”) (emphasis in original). The Court explained: “To a layperson, the notion of the President’s suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs.” *Id.* at 856–57 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322–24 (1936)). The Court, noting that the statute granted the President the authority to waive an exception to foreign sovereign immunity, explained that “granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch.” *Id.* (citing *Ex parte Peru*, 318 U.S. 578, 586–90 (1943)).

151. See *Lawson*, *supra* note 30, at 387–95 (discussing how when “Congress is merely charging executive agents with the exercise of executive power, there is no constitutional problem”); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J. concurring) (discussing the role of the President’s independent powers vis-à-vis Congress’s lawmaking powers); *Curtiss-Wright*, 299 U.S. at 305, 315–20 (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which

More broadly, however, the REAL ID Act waiver authority is functionally equivalent to the cancellation authority resoundingly struck down by *Clinton*. Waivers allow the Executive to deny legal force or effect to statutory text, often with few limitations provided by Congress to constrain the Executive's discretion.<sup>152</sup> Consider again the 50-state waiver of the ACA's legal requirements promised by Governor Romney. The ACA waiver, unlike the REAL ID Act waiver, is an internal waiver—that is, it only waives other provisions

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does not require as a basis for its exercise an act of Congress . . .”). The Court has used the theory in *Curtiss-Wright* to justify exercises of presidential power in ways that otherwise might seem to evade the strictures of the Constitution. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Regan v. Wald*, 468 U.S. 222 (1984); see generally Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 412 (1996). It is a theory, moreover, that has been heavily criticized. See generally Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (discussing the broad range of scholarly criticism of *Curtiss-Wright* and contending that the Court was wrong to suggest that the Constitution was drafted against a “background of extraconstitutional powers in foreign affairs”).

Although I note the tendency of the Court to rely on independent executive authority in certain areas, such as foreign affairs and national security, I express no opinion on the relative merits and demerits of such a position, nor do I intend to enter the debate on the source of the President's powers in these realms. The debate has already spawned scores of works on the subject. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright*, 13 YALE J. INT'L L. 5 (1988); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999).

152. For example, Congress has granted broad waiver authority in Medicaid:

Section 1115 empowers the Secretary to waive the requirements of specific sections in the [Social Security Act]—including section 1902 of title XIX (the Medicaid title)—for any “experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title . . . XIX of this chapter . . . in a state or states.” The Secretary may waive the provision “to the extent and for the period he finds necessary to enable such State or States to carry out such project.” Section 1115 contains no procedural requirements that the Secretary must follow, nor does it provide any criteria on which the Secretary must base his decision, beyond the general language quoted above.

Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91, 98–99 (2003) (quoting 42 U.S.C. § 1315 (2000)). Though the text of the statute and legislative history provided little guidance on the types of experimental projects that were envisioned as appropriate for granting waiver requests, the waivers were broadly sought by and granted to states in ways that dramatically reformed state Medicaid programs. See *id.* at 99–101.

within the same statute. It also has greater administrative procedures and more detailed substantive criteria to limit executive discretion than the REAL ID Act waiver.

Despite these limitations, the ACA waiver power is far broader than the REAL ID Act waiver power, which applied only to a tangible national security project. State innovation waivers under the ACA undo much of the statutory scheme for health insurance requirements in every state granted a waiver. Governor Romney's hypothetical 50-state waiver amounts to effective repeal of much of the statute, thereby allowing him to change the text of the duly enacted ACA by rendering legally inoperative large swaths of its text, all without the process of bicameralism and presentment.

An external waiver, as in *Defenders of Wildlife*, effectively amends the waived external statutes to contain an exception for border fence construction. Secretary Chertoff exercised discretion as to when and where the United States Code was amended to contain exceptions for the border fence project. The REAL ID Act also did not limit the waiver authority to statutes enacted *prior* to the REAL ID Act; the Secretary presumably could have waived the requirements of subsequently enacted statutes.<sup>153</sup> Indeed, allowing the Secretary to waive *any* law granted the Secretary broad discretion to negate not only federal law, but state and local law as well.<sup>154</sup>

The broad deference ordinarily afforded to the Executive's waiver decisions means statutory challenges alleging the waiver exceeded the bounds of the statute's grant will usually fail.<sup>155</sup> And

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153. One might argue that the REAL ID Act effectively amends older statutes to contain a provision exempting the border fence project from their requirements upon a determination by the Secretary that such exemption is necessary to ensure expeditious construction of the border fence. That argument does not work, however, where a statute enacted after the REAL ID Act is waived by the Secretary using his REAL ID Act authority.

154. See Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, 73 Fed. Reg. 18,293 (Apr. 3, 2008) (waiving "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" 37 federal laws). Tenth Amendment-based federalism challenges to these waivers have failed in the district courts. See, e.g., *County of El Paso v. Chertoff*, 2008 WL 4372693, at \*9–10 (W.D. Tex. Aug. 29, 2008).

155. See, e.g., *Aguayo v. Richardson*, 473 F.2d 1090, 1105 (2d Cir. 1973) (upholding the exercise of section 1115 Medicaid waiver authority so long as the Secretary had a "rational basis for determining that the programs were 'likely to assist in promoting the objectives' of [the statute]"). The repeated use of the Executive's waiver authority under section 1115 under the deferential standard of review set forth in *Aguayo* has led to an increasing waiver of compliance with many provisions of the Medicaid title of the Social Security Act, "effectively giv[ing] the executive branch the power to change the text of duly enacted statutes." Bolton, *supra* note 152, at 98–101, 172.

unless Congress fails to provide any standard at all, the statute will have an intelligible principle sufficient to pass constitutional muster.<sup>156</sup>

The imprecision of the Article I, Section 7 test is also problematic. Where is the line between impermissible amendment or repeal of statutes without bicameralism and presentment and permissible waiver of statutes as an element of law execution? Why was the President “chang[ing] the text of duly enacted statutes” when he exercised his LIVA cancellation authority, but Secretary Chertoff was not when he exercised his waiver authority under the REAL ID Act? These questions are explored further in Part V.

## 2. *A Note on Executive Enforcement Discretion*

Further muddying the waters for waiver delegations is the distinct but related issue of executive discretion as to whether to enforce a law against those who violate it.<sup>157</sup> A full treatment of the complicated issues surrounding the Executive’s autonomy in law execution and interpretation, such as the authority to interpret the Constitution and the related issues of executive refusal to follow and refusal to enforce laws it believes unconstitutional, is beyond the scope of this Article.<sup>158</sup> At a minimum, however, the interplay of

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156. As the Court has repeatedly stated, it is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

157. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“Finally, we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art. II, § 3).

158. There is a thick literature in this vein. *See, e.g.,* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008) (arguing that the Take Care Clause not only allows but requires the President to refuse to enforce or to ignore laws he deems unconstitutional); Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137 (1993); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 43 (1993).

Although a treatment of these issues is beyond this Article’s scope, the Executive’s refusal to enforce a statutory scheme to achieve policy goals it cannot achieve through legislative change can be problematic. The refusal undermines the legislative bargain struck in the

waiver delegations with executive enforcement discretion and the prosecutorial power to grant immunity is important to understanding the role waiver delegations play in the context of negative lawmaking delegations.

The recently decided Ninth Circuit case of *In re National Security Agency Telecommunications Records Litigation* is illustrative.<sup>159</sup> After plaintiffs filed several lawsuits against private telecommunications companies who allegedly participated in a warrantless eavesdropping program run by the National Security Agency, Congress enacted legislation that provided retroactive immunity to the companies.<sup>160</sup> Amending the Foreign Intelligence Surveillance Act (“FISA”), the law grants immunity to private telecommunications companies from any civil action in federal or state court based on the companies’ “assistance to an element of the intelligence community.”<sup>161</sup> The Attorney General triggers immunity by certifying the existence of one or more of five conditions.<sup>162</sup> The plaintiffs challenged the constitutionality of the immunity provision on several grounds, including that it violated bicameralism and presentment because it

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non-enforced statute, which, one assumes, the Congress that passed it and the President who signed it, believed would be enforced. For example, the Obama Administration’s enforcement of the immigration laws has been viewed by some states as overly lax, bordering on a “federal polic[y] of nonenforcement.” See *Arizona v. United States*, 132 S. Ct. 2492, 2519 (Scalia, J., dissenting). Moreover, because the Development, Relief, and Education for Alien Minors (“DREAM”) Act has continued to stall in Congress, the Obama Administration unilaterally changed its immigration enforcement policy to mirror the DREAM Act’s effect. See Janet Napolitano, *Memorandum, Secretary of Homeland Security Janet Napolitano, Exercising Prosecutorial Discretion with respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>). In so doing, Secretary Napolitano made clear that only “Congress, acting through its legislative authority” can confer “substantive right[s], immigration status, or a pathway to citizenship,” but that the Executive could “set forth policy for the exercise of discretion within the framework of the existing law.” *Id.* This statement belies the fact, however, that Secretary Napolitano’s directive negates the legal force or effect of, and thus undermines the policies embodied in, the immigration laws previously enacted by Congress through its legislative authority. See *Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting). The policy change might be for the better, and it might indeed be the right thing to do, but the change stands in stark contrast to Congress’s failure to change existing law.

159. 671 F.3d 881 (9th Cir. 2011).

160. *Id.* at 890.

161. Foreign Intelligence Surveillance (FISA) Act of 1978 Amendments Act of 2008 § 802(a), Pub. L. No. 100-261, 122 Stat. 2435 (2008) (codified at 50 U.S.C. § 1885a).

162. They include Attorney General certification that the assistance was provided pursuant to a FISA Court order, a national security letter, an Attorney General directive, presidential authorization, or that no assistance was provided. *Id.*



allowed the Attorney General to “effectively amend[] or negate[] existing law.”<sup>163</sup> They unsuccessfully argued that the provision was similar to the LIVA because it gave the Executive discretionary authority to “partially repeal or preempt the law governing electronic surveillance.”<sup>164</sup>

The Ninth Circuit reasoned that under the immunity provision the “Executive does not *change or repeal* legislatively enacted law . . . . The law remains as it was when Congress approved it and the President signed it.”<sup>165</sup> Because “[u]nlike the line item veto, the Attorney General’s certification implements the law as written and does not frustrate or change the law as enacted by Congress,”<sup>166</sup> the Attorney General’s exercise of discretion was not an unconstitutional partial repeal or amendment of statutory text.

The Ninth Circuit correctly pointed out that the “Attorney General’s certification implements the law as written.” When the Attorney General certifies the existence of one or more statutory conditions, the immunity kicks in, and the FISA amendment is implemented as written.<sup>167</sup> What the court failed to note was that this was equally so when the President cancelled line items under the LIVA. When the President cancelled the two line items at issue in *Clinton*, he was implementing the LIVA. And by reading the LIVA cancellation authority into the subsequently enacted spending bills—a plausible reading given Congress’s failure to exempt the spending bills from the LIVA cancellation provision<sup>168</sup>—the President was also implementing the spending bills as written.

The Ninth Circuit’s more important analysis was that “a discretionary decision by the Attorney General that invokes a defense or immunity hardly represents an impermissible statutory

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163. *In Re Nat’l Sec. Agency Telecommc’ns Records Litig.*, 671 F.3d 881, 894 (9th Cir. 2011).

164. *Id.*

165. *Id.*, 671 F.3d at 894.

166. *Id.*

167. *Id.*

168. See Prakash, *supra* note 25 at 7 n.30 (“[T]he President could use the Act to ‘interpret’ a subsequently enacted statute as sanctioning cancellations of certain provisions, unless that statute provided otherwise. In this way, the Act was a rule of construction in that it colored how to construe future acts of Congress.”) Prakash’s argument is another way of saying that the LIVA creates a new default rule for spending bills, through which the President has five days to cancel provisions of a statute he has signed into law, unless the law expressly says that the default rule does not apply. See *infra* Part IV.A (criticizing this view as inconsistent with the constitutional text and structure governing lawmaking).

repeal.”<sup>169</sup> Relying on a law professors’ amicus brief,<sup>170</sup> the court noted that “[i]t is not uncommon for executive officials to have authority to trigger a defense or immunity for a third party.”<sup>171</sup> Because “[a]n executive grant of immunity or waiver of claim has never been recognized as a form of legislative repeal,” the statute did not violate Article I, Section 7.<sup>172</sup> The amicus brief identified numerous statutory examples of executive waiver conditioned upon identification of certain circumstances.<sup>173</sup> The Ninth Circuit, citing this portion of the amicus brief, considered this evidence that the “United States Code is dotted with statutes authorizing comparable executive authority.”<sup>174</sup>

The fact that other statutory examples of a similar type of power exist does not establish that they are constitutional.<sup>175</sup> And although a long tradition of granting similar authority to the Executive would not be dispositive, it would be relevant to establishing that the practice is at least historically acceptable, if not constitutional. The vast majority of the listed examples, moreover, dealt with areas in which the Executive has traditionally exercised independent constitutional authority, such as foreign affairs, immigration, and law enforcement. Because FISA—and the warrantless wiretapping program upon

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169. *In re Nat'l Sec. Agency*, 671 F.3d at 895.

170. Brief of Amici Curiae Law Professors in Support of Appellees and Affirmance at 1, *In re Nat'l Sec. Agency*, 671 F.3d 881 (9th Cir. 2011) (Nos. 09–16676, 09–16677, 09–16679, 09–16682, 09–16683, 09–16684, 09–16685, 09–16686, 09–16687, 09–16688, 09–16690, 09–16691, 09–16692, 09–16693, 09–16694, 09–16696, 09–16697, 09–16698, 09–16700, 09–16701, 09–16702, 09–16704, 09–16706, 09–16707, 09–16708, 09–16709, 09–16710, 09–16712, 09–16713, 09–16717, 09–16719, 09–16720, 09–16723) (“Whether Congress should have granted this immunity, amici believe Congress possesses the constitutional power to do so.”). Counsel of record for the amici law professors was Howard Wasserman of Florida International University; the other law professors on the brief were Ed Brunet, Steven G. Calabresi, Donald L. Doernberg, Richard D. Freer, Lumen N. Mulligan, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Michael E. Solimine, and Steven D. Smith. *Id.*

171. *In re Nat'l Sec. Agency*, 671 F.3d at 895 (citing 18 U.S.C. § 6003 (2006), which allows executive officials to grant immunity from the fruits of compelled testimony in criminal prosecutions and 28 U.S.C. § 2679(d)(2) (2006), which allows the government to trigger immunity by certifying that a defendant is acting within the scope of federal employment).

172. *In re Nat'l Sec. Agency*, 671 F.3d at 895

173. Brief of Amici Curiae Law Professors in Support of Appellees and Affirmance, *supra* note 170, at Appendix A (listing over 50 statutory provisions).

174. *In re Nat'l Sec. Agency*, 671 F.3d at 895.

175. *Cf. Powell v. McCormack*, 395 U.S. 486, 546–47 (1969) (“That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”).

which the lawsuits were based—dealt with national security, the Executive’s traditional power in that area bolsters the argument that this type of delegation to the Executive is constitutional.<sup>176</sup>

Granting private parties an additional statutory defense based upon executive discretion is functionally similar to the executive discretion not to enforce a law or not to indict—the latter having long been considered within the sole unreviewable prerogative of the Executive under the Take Care Clause.<sup>177</sup> One might extrapolate from this functional similarity the notion that the Obama Administration’s waivers, whether authorized by the text of the ACA or not, are constitutional because exempting private parties from a requirement of the Act is functionally no different than declining to enforce that requirement against them.<sup>178</sup>

This broader issue was not discussed in the *In re National Security Agency* case. But the case demonstrates that delegations which grant the Executive discretionary authority to trigger a statutory defense or immunity mirror the negative effect upon statutory text held unconstitutional in *Clinton*. While the negation of other statutory text also involves the execution of statutory text granting the discretionary authority to the Executive, this is a difference in degree and not kind. Executing the LIVA permanently negated the two line items cancelled, whereas executing the FISA amendments only negates the text of the laws under which the now-immune companies would have been liable. As applied to those companies, the waived laws no longer have legal force or effect.

Although this Article contends that many waiver delegations unconstitutionally allow the Executive to undo legislative compromise outside the costly Article I, Section 7 bargaining process, there is stronger support for such delegations in laws governing the actions of individuals and private entities, rather than the functioning of the government. Where the waiver delegation only allows waiver of laws the enforcement of which would be within the unreviewable prerogative of the Executive, such delegations are less problematic despite their negative effect. Assuming the Ninth Circuit is correct

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176. See Travis H. Mallen, *Rediscovering the Nondelegation Doctrine Through A Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 431 (2005) (“The President’s conduct, then, is not defined solely by Congress’s power to delegate, but the combination of the President’s independent authority and Congress’s delegation power.”).

177. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

178. The history of the Take Care Clause undermines such a view, however, because self-delegation of waiver authority is similar to the long-rejected dispensation prerogative. See *infra* Part IV.B.

about the relevant history, then the immunity provision at issue in *In re National Security Agency* may be constitutional. Moreover, because Congress decided that specific laws should not apply to companies which met the specified criteria, it is less likely that allowing the Executive to determine the existence of those criteria would negate any underlying compromise in the negated text.

## B. Amendment

May Congress grant the Executive Branch discretionary authority to amend statutory text with new text never subjected to the constitutional requirements of bicameralism and presentment? Because of the Court's prior pronouncement that "amendment and repeal of statutes, no less than enactment, must conform with Art[icle] I," the answer should be no.<sup>179</sup> Two post-*Clinton* decisions in the Federal Circuit suggest otherwise.

### 1. *The Vaccine Injury Table Puzzle*

The first case<sup>180</sup> involved a challenge to a provision in the National Childhood Vaccine Injury Act of 1986.<sup>181</sup> The Act contained an "Initial Table" delineating allowable compensation to claimants for vaccine-related injuries or death.<sup>182</sup> Congress also delegated to the Secretary of Health and Human Services the authority to "modify" the Initial Table.<sup>183</sup>

The Secretary, using the modification authority, created a "Modified Table,"<sup>184</sup> deleting, among other things, various injuries related to the diphtheria-tetanus-pertussis ("DPT") vaccine. The Modified Table applied to all petitions for compensation filed on or after its effective date.<sup>185</sup> Plaintiffs, parents of a child who suffered injuries after receiving the DPT vaccine, filed a claim under the Act

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179. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

180. *Terran ex rel. Terran v. Sec'y of Health & Human Services*, 195 F.3d 1302 (Fed. Cir. 1999).

181. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to 34 (2006)).

182. *Id.* § 300aa-14(a).

183. *Id.* § 300aa-14(c)(1). "A modification of the Vaccine Injury Table . . . may add to, or delete from, the list of injuries, disabilities, illnesses, conditions, and deaths for which compensation may be provided or may change the time periods for the first symptom or manifestation of the onset or the significant aggravation of any such injury, disability, illness, condition, or death." *Id.* § 300aa-14(c)(3).

184. *Terran*, 195 F.3d at 1302.

185. National Childhood Vaccine Injury Act of 1986, § 300aa-14(c)(4).

after the effective date of the Modified Table. Because the child's injuries would have been compensable under the Initial Table, but were not under the Modified Table, plaintiffs challenged the modification, relying on *Clinton* and Article I, Section 7, as well as nondelegation doctrine.<sup>186</sup>

Although the Secretary's actions did not comport with bicameralism and presentment, the Federal Circuit reasoned that the modification did not "amend" or "repeal" any portion of the Act because the Secretary was merely "promulgat[ing] new regulations as contemplated in the Act."<sup>187</sup> The court explained:

Although we acknowledge that the statutory language in section 300aa-14(c) refers to the Secretary's ability "to modify" and "to amend" the Vaccine Injury Table, 42 U.S.C., § 300aa-14(c)(1), (2) (1994), a closer reading of that section makes clear that when the Secretary acts pursuant to section 300aa-14(c), she does not change in any way the original injury table found in section 300aa-14(a), but rather promulgates an entirely new vaccine injury table. This new table applies only prospectively. The Initial Table remains codified and unaltered, and continues to apply to all petitions filed before the revision. Therefore, the Initial Table is not amended.<sup>188</sup>

The court also relied on *Clinton*'s attempt to distinguish the Rules Enabling Act from the LIVA. The Vaccine Act's negative lawmaking delegation was like a "sunset provision" because Congress "clearly intended that the Initial Table would cease to apply to newly filed petitions when the Secretary promulgated a revised injury table."<sup>189</sup> Quoting *Clinton*, the court stated that: "the Supreme Court's power to 'repeal' laws by promulgating rules of procedure for the lower federal courts does not run afoul of the Presentment Clause because 'Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of

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186. *Terran*, 195 F.3d at 1312.

187. *Id.*

188. *Terran*, 195 F.3d at 1312.

189. *Id.*

procedural rules by this Court.”<sup>190</sup> Reasoning that the Rules Enabling Act was thus functionally similar to the Vaccine Act, the court held that the amendment of the Vaccine Injury Table did not violate Article I, Section 7, since “Congress itself decided to render the Initial Table ineffective upon the Secretary’s action.”<sup>191</sup>

Dissenting, Judge Plager reiterated the plaintiffs’ argument that the injured child “would be entitled to an award under the terms of the Congressionally-enacted table, but that under the table as amended by the Secretary she is not so entitled.”<sup>192</sup> He contended that it made little sense to say that the Act did not authorize an amendment because it merely authorized creation of a new table that superseded the old table.<sup>193</sup> Indeed, congressional changes to law “almost invariably” apply prospectively, so the majority’s reasoning would mean Congress “does not ‘amend’ a statute when it makes changes in existing legislation and leaves the earlier enactment unrepealed—only in the rare case of total repeal with retroactivity is the change an ‘amendment.’”<sup>194</sup>

Judge Plager’s argument is persuasive. Making the legal force or effect of statutory text contingent upon an agent’s discretionary modification of that text, moreover, is nothing like a sunset provision. Rather, sunset provisions automatically negate the legal force or effect of a statute upon the occurrence of an external condition (usually a specified date), and do not involve legislative-type discretion.<sup>195</sup> And the fact that Congress “clearly intended” that the text of spending bills would “cease to apply” if the President made the required LIVA determinations was insufficient to sustain the

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190. *Id.* at 1313.

191. *Id.* The court also swiftly disposed of the nondelegation challenge, finding a sufficiently intelligible principle to sustain the delegation. *See Terran*, 195 F.3d at 1314–15 (finding that, among other things, the initial table served as an intelligible principle and that the statute required the new table to be in the same format as the original, a further intelligible restraint on the exercise of discretion). The court did, however, note that “the Secretary could in theory delete all the entries in the table or, conversely, sweep in all possible illnesses or conditions,” but it found that because of the consultation requirements and notice-and-comment requirements such discretion was not unbounded. *Id.*

192. *Id.* at 1318. (Plager, J., dissenting).

193. *Id.* at 1319–20.

194. *Id.* at 1320.

195. *See, e.g.*, 28 U.S.C. § 599 (2006) (“This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994 . . .”).

statute; nor did *Clinton* indicate that the line-item veto was like a sunset provision.

The Federal Circuit also relied on the three factors *Clinton* used to distinguish the Tariff Act upheld in *Field v. Clark* from the LIVA. First, the negative power in the Vaccine Act was exercised under different conditions than when the legislation was enacted.<sup>196</sup> Second, while the LIVA did little to cabin the President's discretion, the Tariff Act's delegation was more circumscribed. Similarly, the Vaccine Act also constrained the Secretary's discretion, because it provided for various procedural requirements.<sup>197</sup> Third, the Secretary was fulfilling congressional policy in amending the Vaccine Table, just as the President was when he suspended import duty exemptions under the Tariff Act, whereas under the LIVA he was purportedly contravening congressional policy.<sup>198</sup>

These distinctions are unpersuasive. The Supreme Court has never explained why changed circumstances after enactment matter for purposes of Article I, Section 7. And, though the Secretary modified the Initial Table several years after the Vaccine Act went through bicameralism and presentment, there was nothing in the Act temporally limiting her power to do so.<sup>199</sup> Moreover, while *Clinton* did rely on the limited discretion the President had under the tariff statutes as compared to under the LIVA,<sup>200</sup> the Secretary's discretion was not nearly so limited under the Vaccine Act.<sup>201</sup> Finally, when the Secretary promulgated the Modified Table, she negated the policy embodied in the Initial Table while simultaneously executing the policy embodied in the provision granting the modification authority. Why was the general policy of the LIVA insufficient to allow override of whatever policies were embodied in the cancelled line items, while the general policy of compensating vaccine injuries was sufficient to

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196. *Terran*, 195 F.3d at 1313.

197. These included notice and comment, petition by any person, and consultation with experts. *Id.* at 1314.

198. *Id.*

199. See 42 U.S.C. § 300aa-14 (c) (2006).

200. *Clinton* thought it was relevant that, under the tariff statutes, the negative power was mandatory upon finding certain conditions. See *supra* note 118 and accompanying text.

201. See *Terran*, 195 F.3d at 1314–15 (noting that, despite some guideposts for the Secretary's exercise of discretion, “the Secretary could in theory delete all the entries in the table or, conversely, sweep in all possible illnesses or conditions”).

override whatever policies were embodied in the Initial Table?<sup>202</sup> This the Federal Circuit never explained.

As the Federal Circuit's analysis here shows, courts relying on the loose distinctions of *Clinton* can uphold amendment delegations, even though the amendment of statutory text ordinarily requires bicameralism and presentment. The delegation need only make the negative effect on existing statutory text automatic upon the promulgation of different text by the Executive.

## 2. *The Dolphin Safe Tuna Puzzle*

The second case involving amendment delegation<sup>203</sup> evaluated the International Dolphin Conservation Program Act ("IDCPA"). The IDCPA implemented an executive agreement seeking to reduce dolphin fatalities caused by the purse seine method of tuna fishing and brought supermarkets nationwide the now-defunct "Dolphin Safe Tuna" label.<sup>204</sup> The Act further delegated rulemaking authority to implement the Act to the Secretary of Commerce,<sup>205</sup> but specified that certain requirements be included in the implementing regulations; among these was a requirement that backdown (finishing) of the purse seine method of fishing be completed thirty minutes *before* sundown.<sup>206</sup> Nevertheless, the Secretary's interim-final rule required completion thirty minutes *after* sundown.<sup>207</sup>

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202. One might contend that both the Initial Table and Modified Table embodied the same policy: compensating victims of injuries linked to vaccines. What this argument fails to account for, however, is the nature of the Article I, Section 7 lawmaking process. That process inevitably involves myriad compromises on the way to producing an enacted text. *See infra* Part IV.C. In *Terran*, whatever the reason for the compromises involved in enacting the Initial Table, those compromises resulted in a determination that DPT-related injuries were compensable. When the Secretary chose to delete that text from the Modified Table, she overrode the policy compromise that put DPT in the Initial Table, thereby replacing a congressional policy decision with her own.

203. *Defenders of Wildlife v. Hogarth (Hogarth I)*, 330 F.3d 1358 (Fed. Cir. 2003).

204. International Dolphin Conservation Program Act, Pub. L. No. 105-42, 111 Stat. 1122 (1997).

205. 16 U.S.C. § 1413 (2006).

206. *Id.* § 1413(a)(2)(B)(v) (requiring that regulations ensure "that the backdown procedure . . . is completed . . . no later than 30 minutes *before* sundown") (emphasis added).

207. Taking of Marine Mammals Incidental to Commercial Fishing Operations: Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 50 C.F.R. § 216.24(c)(6)(iii) (2012), 65 Fed. Reg. 30, 51 (Jan. 3, 2000) ("the backdown procedure must be completed no later than one-half hour *after* sundown") (emphasis added).



The Defenders of Wildlife challenged the rule as plainly contrary to the IDCPA's text.<sup>208</sup> The Federal Circuit sustained the rule, notwithstanding its clear conflict with the statutory text, relying on an amendment delegation within the IDCPA that allowed "adjustments" to statutory requirements pertaining to "fishing practices."<sup>209</sup> The court upheld the change as a permissible alteration of a "fishing practice" under the IDCPA's delegation of modification authority.<sup>210</sup>

Dissenting from denial of rehearing en banc, Judge Gajarsa, joined by Judge Newman, argued that the panel opinion "permits the Secretary of Commerce to trump a duly enacted statute with a regulation."<sup>211</sup> Although "the supremacy of administrative over legislative authority is a concept foreign to our structure of government," the panel opinion, by sanctioning abrogation of statutory text without bicameralism and presentment, was allowing an agency to override Congress.<sup>212</sup> "A regulation eviscerating the legal force of the backdown procedures in [the Act] is no less an amendment to the IDCPA than the striking of clauses found unconstitutional in *Clinton*."<sup>213</sup> Thus, as with the LIVA, a provision of "Law" no longer had legal force or effect because of unilateral executive action.<sup>214</sup>

Judge Gajarsa's dissent properly notes the tension the panel opinion has with *Clinton*. Allowing the Secretary to abrogate express statutory requirements via administrative rulemaking is contrary to the language "amendment and repeal of statutes, no less than enactment, must conform with Art. I,"<sup>215</sup> as well as to the Court's statement that it is unconstitutional to give the Executive "the unilateral power to change the text of duly enacted statutes."<sup>216</sup> The

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208. *Hogarth I*, 330 F.3d at 1363.

209. 16 U.S.C. § 1413(a)(2)(C). It authorized the Secretary of Commerce to "make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." *Id.*

210. *Hogarth I*, 330 F.3d at 1367 n.5.

211. *Defenders of Wildlife v. Hogarth (Hogarth II)*, 344 F.3d 1333, 1334 (2003) (Gajarsa, J., with Newman, J., dissenting from denial of rehearing en banc).

212. *Id.* (citing *Clinton v. City of New York*, 524 U.S. 417 (1998)).

213. *Id.* at 1335.

214. *Id.* ("Much as Congress is forbidden to amend the Constitution with ordinary legislation, an executive agency may not amend legislation with regulation. This is the import of Article I, § 7 and *Clinton*.").

215. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

216. *Clinton*, 524 U.S. at 447.

regulation requiring backdown completion thirty minutes *after* sundown deprived the statutory text requiring completion thirty minutes *before* sundown of legal force or effect.

Allowing executive agents to supersede duly enacted statutory text with their own new text is functional amendment without bicameralism and presentment. In the vaccine case, this functional amendment meant that under congressional policy embodied in the Initial Table the child's injuries were compensable, but under executive policy embodied in the Modified Table her injuries were not. And in *Hogarth*, this functional amendment replaced a congressionally enacted rule protecting dolphins from purse seine tuna fishing with an executively promulgated rule that was less dolphin protective. Such executive override of congressional policy was at the heart of *Clinton's* rationale for proscribing unilateral executive amendment of statutory text.

#### IV. Constitutional Limitations on Negative Lawmaking Delegations

Some of the most prominent constitutional law scholars have commented favorably on the Court's decision to strike down the LIVA.<sup>217</sup> Even before the Court did so, many commentators were already predicting the Act's demise, relying on a variety of constitutional arguments, from nondelegation doctrine, the Take Care Clause, and, most prominently, Article I, Section 7, which of course ultimately became the rationale the Court adopted.

Even some detractors of the Court's Article I, Section 7 analysis recognized that the decision was correct to invalidate the item veto provision, and likely avoided other rationales (such as the nondelegation doctrine) out of necessity, rather than analytical rigor. A decision resurrecting nondelegation doctrine as a viable, judicially enforceable constraint on lawmaking delegations, for example, might have threatened the very foundations of the administrative state. And Justice Stevens, who authored *Clinton*, also penned *Chevron*, a decision that established the now-familiar administrative law regime of deference to administrative agency lawmaking, in which ambiguities or gaps in a statute are assumed to be implicit congressional delegations of lawmaking power to the agency charged with administering the statute. Invoking nondelegation doctrine to constrain the negative lawmaking delegation in the LIVA would have

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217. See, e.g., TRIBE, *supra* note 22.

been difficult to square with a framework that largely defers to both explicit and implicit congressional delegations of lawmaking authority to the Executive. Perhaps *Clinton* thus rested implicitly on a view that the LIVA delegated a unique type of lawmaking authority.

But as the previous Part demonstrates, if the unique nature of the effect the delegated power in the LIVA had on statutory text was the basis for the decision, then many other lawmaking delegations should be unconstitutional, because the LIVA was not unique in its delegation of negative lawmaking authority to the Executive. This Part, relying on constitutional text, structure, and history, draws upon this insight and analyzes negative lawmaking delegations more comprehensively.

First, the generality of the Vesting Clauses, and the resulting indeterminacy of the nondelegation doctrine, means that the Constitution's tripartite structural allocation of power does not bar the delegation of negative lawmaking power to the Executive.<sup>218</sup> Second, the Take Care Clause, understood in its historical context, contains a principle independent from the Vesting Clauses that constrains negative lawmaking delegations.

Third, contrary to the generality of the Vesting Clauses, Article I, Section 7 speaks at a level of fine-grained specificity. In so doing, it prescribes the sine qua non for making "Law" under the Constitution, and unilateral executive discretion should not suffice to override a prior bargain made by constitutionally delineated actors. The Article I, Section 7 test of *Clinton*, properly understood and further refined, provides the principal constraint on delegations of negative lawmaking power to the Executive. The structural purposes of bicameralism and presentment are best served by limiting such delegations.

#### **A. Nondelegation Doctrine: The Vesting Clauses and Generality Problems**

Given the weakness of the nondelegation doctrine as a constraint on congressional delegation of broad legislative-type discretion to non-legislative actors, most commentators have not looked to it as a limitation on negative lawmaking delegations. Indeed, some have

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218. See *supra* Part I.A (explaining nondelegation doctrine and its constitutional dimension); *cf.* Manning, *supra* note 35, at 2017–21 (contending that the generality of the Vesting Clauses makes deriving any specific constitutional rule from them problematic).

argued nondelegation doctrine should be rejected entirely.<sup>219</sup> Such commentators believe delegation is not only appropriate, but also entirely consistent with the constitutional text and structure, and that therefore even negative lawmaking delegations are constitutional.<sup>220</sup> Justice Breyer's dissent in *Clinton* reflects a similar understanding.<sup>221</sup> Those who share these views consider executive lawmaking, at least when done pursuant to statutory delegation, to be a key functional necessity in the administrative state, constitutional because the Executive, in making law, is merely executing the statute Congress enacted, not legislating.

Professor Prakash, taking a similar though somewhat distinct view, looks beyond the Vesting Clauses<sup>222</sup> and relies heavily on the Necessary and Proper Clause<sup>223</sup> to infer from the constitutional text and structure that lawmaking delegations of all types are constitutional.<sup>224</sup> And despite his view that delegated executive lawmaking is constitutional, he further argues that the LIVA "itself delegated nothing;" instead, the Act was merely a "rule of construction."<sup>225</sup> Because the President could not cancel spending provisions until Congress passed a subsequent statute subject to the LIVA, the Act allowed the President to construe later-enacted statutes as themselves containing the item veto power, thereby giving

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219. E.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165 (arguing "nondelegation doctrine . . . should be rejected"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002) ("In this essay, we argue that there is no such nondelegation doctrine: A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power.").

220. See, e.g., Prakash, *supra* note 25, at 4 (arguing negative lawmaking delegations such as the LIVA, "like generic lawmaking delegations, can be constitutional").

221. *Clinton*, 524 U.S. at 481–90 (Breyer, J., dissenting) (discussing how the LIVA was properly understood as allowing the President to "execute" the law and how it was not an impermissible delegation of "legislative power").

222. The Legislative Vesting Clause provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1. The Executive Vesting Clause provides: "The executive power shall be vested in a President of the United States of America." *Id.* art. II, § 1, cl. 1. The Judicial Vesting Clause provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, § 1.

223. Congress shall have the power to "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." *Id.* art. I, § 8, cl. 18.

224. See Prakash, *supra* note 25, at 11–16.

225. See *id.* at 7 n.30.

the President the authority to cancel their provisions. Each subsequent statute, unless exempted from the LIVA by Congress, thus contained the item veto power; when the President exercised that power, he was simply “executing” the subsequent acts, which was no different than implementing spending bills in other manners, such as by spending specified amounts on specific projects.<sup>226</sup>

From this conclusion, Professor Prakash argues that the key question should have been whether the LIVA impermissibly shifted “the balance of power toward the President,” which he contends it did not, since Congress could exempt future bills from the scope of the President’s item veto authority.<sup>227</sup> This Article contends otherwise. Although it is true that Congress may exempt any future bill from the scope of a prior bill’s delegated authority, those future bills could also be vetoed in their entirety by a President who enjoys the newfound power to cancel line items in federal spending bills, thus impermissibly shifting power to the President by forcing Congress to pass those future bills by supermajority, a requirement the Constitution ordinarily only provides for the extraordinary.<sup>228</sup> To restore the ordinary constitutional allocation of power, Congress would have to overcome the highest of constitutional hurdles. Given the already large shift in power to the Executive created by the regime of *Chevron* deference, additional shifts in the same direction should be viewed with increased concern.<sup>229</sup>

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226. Justice Breyer’s dissent in *Clinton* reflects a similar view, except that he viewed the cancellation as executing the LIVA, not the budget acts which contained the cancelled spending provisions. See *supra* note 118 and accompanying text.

227. See Prakash, *supra* note 25, at 47–48.

228. The original Constitution expressly specifies a supermajority voting requirement in only five situations: when either house expels a member, U.S. CONST. art. I, § 5, cl. 2; when the Senate convicts a President or other high officer on impeachment charges, *id.* § 3, cl. 6; when the Senate ratifies a treaty, *id.* art. II, § 2, cl. 2; when Congress proposes a constitutional amendment to the states, *id.* art. V; and when Congress overturns a presidential veto, *id.* art. I, § 7, cl. 2. See Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091, 1105–09 (2012) (discussing the negative inference that can be drawn from the Constitution’s express specification of supermajority voting requirements). Political scientists have also shown that bicameralism itself is roughly equivalent to a supermajority requirement. See John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1314 (2010) (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 233–48 (1962)). A supermajority requirement in both houses is thus a far more difficult hurdle than a one-house supermajority requirement.

229. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989).

In addition, if Congress delegates a broad and unprecedented power to the Executive, as it did in the LIVA, then the more likely the President would be to veto any attempt to undermine the newfound power. This state of affairs would give the President a significant bargaining chip in the legislative process, one not provided for in the constitutional text and inconsistent with its structure. It would allow the President to extract concessions from Congress otherwise beyond reach.

Nevertheless, despite this Article's contrary view of the LIVA's balance of power pathologies, if the Court is right to conclude that positive lawmaking delegations are constitutional so long as they provide an intelligible principle, then perhaps negative lawmaking delegations are too. If this is so, then one might counter that what distinguishes negative from positive lawmaking delegations, at least under the Vesting Clauses (which undergird nondelegation doctrine's intelligible principle requirement), is that negating the legal force or effect of statutory text seems more like an exercise of "legislative" power, while adding on to or filling in imprecise or broad statutory text is merely incidental to law execution.

At least two considerations undermine this argument. First, as a functional matter, the distinction between enacting a rule with the same legal force or effect as a statute, and negating a statutory provision's legal force or effect, is tenuous. Exercises of both positive lawmaking power and negative lawmaking power by the Executive are exercises of power pursuant to a statutory delegation enacted by Congress in the exercise of its enumerated powers under Article I, Section 8 and the Necessary and Proper Clause.<sup>230</sup> Both types of

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230. The debate over the role of the Necessary and Proper Clause with respect to lawmaking delegations is beyond the scope of this Article, but it is worth noting that historical materials "reveal precious little about how the clause structures Congress's horizontal relationship with the coordinate branches" and that "the bargain seems to have been to identify Congress as the responsible actor but to leave matters concerning the precise scope of the power to be worked out later." Manning, *supra* note 35, at 1989 (footnotes omitted).

Analysis of the scope of the power conferred on Congress by the Necessary and Proper Clause generally comes in the familiar context of vertical relationships between the federal government on one hand, and the states and the people on the other. That concern, for example, was front and center in the Court's decision on whether Congress had the constitutional power to enact the Affordable Care Act. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). But evaluating the Necessary and Proper Clause in this context does little to illuminate the role of the Clause for the horizontal separation of powers questions raised by negative lawmaking delegations. *See William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW &

delegated lawmaking power affect the legal rights and duties of individuals or the structure and functioning of the government. Both shape and affect the content and scope of text that has the force or effect of law.

Second, negative lawmaking delegations are often guided by open-ended standards in statutes that are at least as intelligible as those upheld in the positive lawmaking delegation context of agency rulemaking. Thus, just as the exercise of delegated positive lawmaking authority by the Executive may not exceed the limits set forth in the statute and is theoretically subject to judicial review,<sup>231</sup> so too is the exercise of statutorily delegated negative lawmaking authority.

For example, if President Clinton had not made the three determinations required by the LIVA, a court could have determined that he exceeded his delegated authority. Likewise, if Great Britain had not imposed reciprocally unequal and unreasonable tariff duties on the United States, thus making Great Britain's tariff policy the same as when the statute was enacted, then judicial review would have been available to challenge the President's suspension of trade duty exemptions under the Tariff Act analyzed in *Field v. Clark*.

Indeed, because nondelegation doctrine requires that Congress provide a standard for any lawmaking delegation, whether positive or negative, the Executive's exercise of discretion under any lawmaking delegation is theoretically subject to judicial review to ensure compliance with that standard. Considered in this light, both types of delegations are similar and operate under the same constraints; characterizing one as executive power and the other as legislative power provides no judicially administrable limitation on either type of delegation. Because of the generality of their language<sup>232</sup> and the

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CONTEMP. PROBS. 102, 116 (1976) (noting that the Necessary and Proper Clause's meaning for "the role of Congress and the amplification of executive power has been much neglected"). On the overall scope of the power conferred by the Necessary and Proper Clause, however, there is a rich academic debate. See generally, e.g., Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2004); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004).

231. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); see also Beermann, *supra* note 35, at 99–106 (discussing the role of judicial review and the way in which statutes constrain agency lawmaking).

232. See Manning, *supra* note 35, at 1986 (contending that the generality of the Vesting Clauses means they may do little to resolve separation of powers issues).

resultant difficulty in categorizing the nature of governmental power,<sup>233</sup> the Vesting Clauses provide little clarity on the constitutionality of negative lawmaking delegations.<sup>234</sup> And due to the Constitution's blending of many functions (which, like the separation of powers, was a deliberate choice by the Framers), categorizing powers under the Vesting Clauses may not only be fruitless, but also of little practical value.<sup>235</sup> In the administrative state, the Executive now makes law (as does the Judiciary<sup>236</sup>); it also then enforces the laws it writes and judges those who violate them.<sup>237</sup>

### B. The Take Care Clause

The Take Care Clause<sup>238</sup> generally has not been viewed as a constraint on delegated executive lawmaking, even though the initial

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233. Chief Justice Marshall made this point long ago when he stated:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825). Time has yet to reveal where Chief Justice Marshall's "precise boundary" might be found. See, e.g., Lawson, *supra* note 42, at 1238–39 & n.45 (noting that "the Constitution does not tell us how to distinguish the legislative, executive, and judicial powers from each other" and that the "problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law") (citations and quotations omitted); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

234. Cf. Manning, *supra* note 35, at 1959 ("Bereft of any express Separation of Powers clause, formalists derive their position not from any identifiable provision of the Constitution, but rather from the overall structure of the Vesting Clauses and other clauses suggesting a purpose to separate powers.").

235. See Magill, *supra* note 233, at 605 ("Talk of balancing three branches exercising three powers may be comfortable, but it is also tired, and more important, unhelpful and in some ways incoherent.").

236. See 28 U.S.C. § 2072(a) (2006) (delegating to the Supreme Court the power to "prescribe general rules of practice of procedure and rules of evidence" in federal district courts and courts of appeals); see also *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (evaluating a delegation of authority to create sentencing guidelines, which at the time were binding on district courts, to the United States Sentencing Commission, a part of the judicial branch).

237. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (noting how many administrative agencies perform all three functions).

238. Recall that the President is to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.



court challenge to the LIVA (brought by legislators who voted against the Act) succeeded in the district court by relying on the clause.<sup>239</sup> This is so because, as a textual matter, the President is “faithfully execut[ing]” the law delegating the negative power when he invokes it to negate other laws.<sup>240</sup> A brief exploration of the history of the royal prerogatives of suspension and dispensation shows, however, that the Take Care Clause was in part designed to ensure such prerogatives were not exercised by the President, thereby limiting his role as lawmaker. Understood against this historical backdrop, negative lawmaking delegations raise serious concerns because they are functionally similar to the royal prerogatives wrested from the Crown by Parliament (and denied the President by the Take Care Clause), and they share many of the same pathologies.

When so viewed, the Take Care Clause establishes a constitutional default of law effectiveness: the President may not suspend or dispense with laws independently. Some commentators, however, argue the Take Care Clause goes no further—that is, it applies only when Congress has not delegated a negative power.<sup>241</sup> When Congress has delegated such a power, then negative lawmaking delegations are no different than the positive lawmaking delegations so commonly upheld. Nevertheless, the problematic history of the Crown’s abuse of the royal prerogatives counsels against dismissing the clause completely, even where Congress has exercised its Article I powers to delegate negative lawmaking authority to the Executive.

### 1. *A Brief Sketch of the Historical Backdrop*

In England, despite Parliament’s theoretical legislative supremacy, the Crown had independent negative lawmaking power through the use of the royal prerogatives of suspension and dispensation. The suspension prerogative allowed the Crown to negate statutes, thereby abrogating the entire law or the portions with

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239. *Byrd v. Raines*, 956 F. Supp. 25, 37 (D.D.C. 1997) (“Canceling, *i.e.*, repealing, parts of a law cannot be considered its faithful execution.”), *vacated*, *Raines v. Byrd*, 521 U.S. 811 (1997); Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 321 (1998) (“The Act, in short, turns the President’s duty to ‘take Care that the Laws be faithfully executed’ on its head, allowing the President to emasculate a law (or extinguish a portion of a law) that he has just approved.”).

240. *Clinton v. City of New York*, 524 U.S. 417, 493–94 (1998) (Breyer, J., dissenting) (noting that the President, in exercising his item veto power under the LIVA, was “execut[ing] a law in which Congress has specified its desire that the President have the very authority he exercised”).

241. See, *e.g.*, Prakash, *supra* note 25, at 48–49.

which the Crown disagreed.<sup>242</sup> The dispensation prerogative allowed the Crown to excuse the individuals granted a dispensation from the duty of complying with the law, but it otherwise left the law intact.<sup>243</sup>

When constitutionmakers began the task of writing the blueprint for the United States government, they “were closely acquainted with English constitutional history” and therefore felt compelled to enshrine “the hard won principle that the Executive did not possess the authority to suspend a law.”<sup>244</sup> Accordingly, the Framers believed “that a statute may be suspended only by the lawmaking authority, and not by the Executive acting alone.”<sup>245</sup> The Framers’ familiarity with the English Crown evading the positive lawmaking supremacy of Parliament through suspension and dispensation frames Article II, Section 3’s command that the President “shall take care that the Laws be faithfully executed,” a command honoring the English struggle to transfer negative lawmaking power from the Crown to the Legislature.<sup>246</sup>

In this context, the requirement of faithful execution represents an affirmative constitutional command prohibiting unilateral exercise of negative lawmaking power by the Executive.<sup>247</sup> Cancellation

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242. Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 870 & n.12 (1994).

243. *Id.*

244. *Id.* at 872.

245. *Id.* at 873.

246. *Id.* (“[T]he clause acquires a richer and more specific meaning if we view it against the historical backdrop with which the Framers were familiar—the four hundred year struggle of the English people to limit the king’s prerogative and achieve a government under law rather than royal fiat.”). William Blackstone explained the outcome of the struggle between king and Parliament on the issue of negative lawmaking authority:

An act of parliament . . . is the exercise of the highest authority that this kingdom acknowledges upon earth. . . . And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament. . . . [I]t is declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.

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247. See, e.g., William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 491 n.82 (1989); Robert J. Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 320–21 n.50 (1975); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989) (“The President’s duty to take care that the laws be faithfully executed was an obligation, not a source of power. It incorporated into the Constitution the English prohibition on the executive suspension of statutes.”); Charles Tiefer, *The Constitutionality of Independent*

delegations, as in the LIVA, allow the President to abrogate statutory text without congressional vote in seeming contradiction of the President's duty to faithfully execute the law.

## 2. *Take Care Clause as Constitutional Default Rule*

Implicit in the Take Care Clause is a principle that limits the extent to which Congress may delegate negative lawmaking power to the Executive. Although Congress may delegate limited negative lawmaking power to the Executive, the Take Care Clause imposes a limitation on such delegations, even greater than the limitations imposed on positive lawmaking delegations by the Vesting Clauses and the intelligible principle requirement of the nondelegation doctrine. Congress may not give the President the power to prevent duly enacted statutes from being executed at all, thereby empowering him to violate the duty imposed by the Take Care Clause.

To see why this is so, note the functional similarity of negative lawmaking delegations to the Crown's suspension and dispensation prerogatives. Cancellation resembles suspension, while waiver functions similarly to dispensation. The only difference is that cancellation and waiver have Congress's imprimatur—an important difference to be sure, but not a determinative one.<sup>248</sup> Although Congress may delegate some form of negative lawmaking power to the Executive, it may not do so in ways that recreate functional equivalents to the royal prerogatives denied the President by the Take Care Clause.

This principle means that when Congress delegates cancellation authority, as it did in the LIVA, that delegation raises concerns because it allows the President to suspend the legal force or effect of the statutory text he cancels, a power resembling the forbidden

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*Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 90 & n.151 (1983). Other commentators have been more circumspect in evaluating the import of the Take Care Clause as a limitation on presidential power. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583–84 (1994) (“The Take Care Clause perhaps limits and defines the Executive Power Clause’s grant of executive power by making it clear that the President has no royal prerogative to suspend statutes.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 10 (1994) (“It may be true that the Take Care Clause is a duty at least as much as it is a power; but the duty is the President’s, and as with any duty, it implies certain powers.”).

248. Congressional authorization, while important, is not determinative because cancellation and waiver delegations, like all negative lawmaking delegations, circumvent bicameralism and presentment, thereby undermining the minority-protective function of Article I, Section 7. See *infra* Part IV.C (analyzing the functions of bicameralism and presentment).

suspension prerogative. Though this power was limited to spending bills and required three putative findings before it could be exercised, those limitations did little to ameliorate the broader problem: after the LIVA, all spending items were precatory until the President declined to exercise his cancellation authority during the time in which he was allowed to do so.<sup>249</sup> Congress's legislative supremacy vis-à-vis the President was thereby undermined, a result contrary to the lessons of English history that the Framers understood when drafting the U.S. Constitution and assigning "all legislative powers herein granted" to Congress while mandating that the President "take care that the laws be faithfully executed."

The Obama Administration's healthcare waivers likewise raise Take Care Clause concerns. Because the ACA contains no express delegation of authority to waive the minimum coverage provisions of the Act,<sup>250</sup> interpreting the Act to grant the Executive the power to do so is in effect executive self-delegation of a dispensation power.<sup>251</sup> It would make little sense to embody the rejection of the suspension and dispensation prerogatives in the Constitution only to allow Congress to recreate their functional equivalents, subject only to repeal through bicameralism and presentment, or, since the President would likely veto any repeal attempt as a matter of course, through passage by supermajority in both Houses. Nor would it make sense to allow the Executive to read suspension and dispensation delegations into statutes, even assuming textual ambiguity and a strong conception of *Chevron* deference to executive interpretations of statutes such as the ACA.<sup>252</sup>

Negative lawmaking by the Executive, particularly through selective waivers granted only to some, and even when authorized by congressional delegation in a statute, is also problematic because it allows for favoritism and unequal application of the law. Much as the Crown could reward allies by granting dispensations, thereby relieving them from the burden of complying with generally applicable laws, the Executive can reward the loyal, the favored, and

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249. See *supra* Part II.B.4.

250. See *supra* note 16 and accompanying text.

251. See Hamburger, *supra* note 16.

252. A reviewing court must defer to an agency's reasonable interpretation of ambiguous provisions in a statute that the agency administers; textual ambiguity is treated as implicit congressional delegation of lawmaking power to the agency. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984). The Court has limited *Chevron* deference to agency action taken pursuant to delegated lawmaking authority. See *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

the powerful by granting waivers, while leaving the opposition, the disenfranchised, and the undesired to flounder without such relief. The risk of political favoritism, and the influence of interest groups in the lawmaking process, is heightened when done solely in the discretion of the Executive, rather than with the check the bicameral legislative process provides.

Nevertheless, the Take Care Clause, even if viewed as an independent constraint on delegation of negative lawmaking power to the Executive, does not itself answer the question of how much negative power Congress may delegate. When does a limited delegation of waiver authority become a prohibited delegation of a dispensation power? Perhaps it has to do with the scope of the negative lawmaking power and the degree to which it is constrained by express criteria. But this is little different than nondelegation doctrine, and thus shares a similar problem of judicial manageability.<sup>253</sup>

Nor does the Take Care Clause solve the puzzle of negative lawmaking delegation generally. Indeed, because the Clause is directed at the President, it is arguable whether it can properly be viewed as a constraint on Congress's lawmaking power, and even if it can be so viewed, whether that limitation should extend to delegations to executive officers below the President.<sup>254</sup> Nevertheless, the Take Care Clause may help explain the Court's more stringent scrutiny of the LIVA. Because the Take Care Clause was designed in part as a limitation on suspension and dispensation, reading the Clause as embodying a background principle limiting negative lawmaking delegations is consistent with its historical backdrop. Vague, open-ended negative lawmaking delegations, as in the LIVA, functionally resemble the suspension prerogative and should

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253. Because it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority," there is little a reviewing court can do when considering a nondelegation doctrine challenge to a statutory delegation of lawmaking power. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); see *infra* Part I.A (discussing the theoretical limitation of nondelegation doctrine). Nothing in the Supreme Court's nondelegation jurisprudence, and nothing in the constitutional text and structure, can tell a reviewing court whether a "general policy" is sufficiently "clear" or whether the "boundaries" of "delegated authority" go too far. Accordingly, "[w]hile the acid test for impermissible delegation is thus an excessive legislative grant of discretion, the Court has never been able to articulate a judicially manageable standard for identifying how much is too much." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2442 (2003).

254. See Prakash, *supra* note 25, at 49 n.283.

accordingly be more limited than positive lawmaking delegations of equivalent scope. Likewise, waiver delegations (at least where not expressly authorized by statute or where the criteria for granting them cedes too much discretion to the Executive) should be limited because of their functional similarity to the dispensation prerogative.

### C. Article I, Section 7

Article I, Section 7 mandates bicameralism and presentment for the enactment, repeal, and amendment of statutory text. Far from mere empty formality, this carefully specified process has numerous benefits. Presentment, coupled with the presidential veto, magnifies these benefits. The upshot is that political minorities have significant power to demand compromise as the cost of their assent to the legislative goals of the majority. Statutory text embodies these compromises. That text should not have its legal force or effect undone through the exercise of unilateral executive discretion, thereby allowing presidential policy to override the difficult policy compromises reflected in statutory text. The mistake of *Clinton* was not its focus on statutory text and the Article I, Section 7 lawmaking process, but rather its overly wooden examination of textual form in the abstract, and the troubling distinctions it attempted to draw to differentiate the LIVA from other negative lawmaking delegations. Before returning to *Clinton*'s Article I, Section 7 test, this section examines the benefits of bicameralism and presentment in greater detail.

#### I. Purposes Served by Bicameralism and Presentment

The Article I, Section 7 lawmaking process serves a number of related and somewhat overlapping purposes,<sup>255</sup> all flowing from the fact that bicameralism and presentment require Congress to incur substantial costs in specifying statutory details.<sup>256</sup> Article I, Section 7 increases the decision costs of legislating by “carefully divid[ing] statuemaking power among three institutions—the House, the Senate, and the President—which are elected at different times and answer to different constituencies.”<sup>257</sup> Three benefits stem from this

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255. See, e.g., John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707–09 (1997).

256. *Id.* at 707 (noting how the bicameralism and presentment “process increases the decision costs of lawmaking”).

257. Manning, *supra* note 35, at 1982.

increase in decision costs. First, bicameralism and presentment protects against the influence of self-interested factions.<sup>258</sup>

Second, it promotes caution and deliberation because legislation must go through an “intricate process involving distinct constitutional actors, [thereby] reduc[ing] the incidence of hasty and ill-considered legislation.”<sup>259</sup> And “by relying on multiple, potentially antagonistic constitutional decisionmakers, the legislative process prescribed by Article I often produces conflict and friction, enhancing the prospects for a full and open discussion of matters of public import.”<sup>260</sup> As the Court has explained:

The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority. This does not mean that legislation must always be preceded by debate . . . . But the steps required by Art. I, §§ 1, 7 make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.<sup>261</sup>

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258. See Manning, *supra* note 255, at 708 (describing how bicameralism and presentment make it difficult for “factions to usurp legislative authority, ensuring a diffusion of governmental power and preserving the liberty and security of the governed.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 882, at 348 (Boston, Hilliard, Gray, and Co. 1833) (noting how the presidential veto power checks the power of Congress and helps “preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.”); THE FEDERALIST NO. 62, at 407 (James Madison) (Belknap Press of Harvard Univ. ed., 2009) (bicameralism “doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.”).

259. Manning, *supra* note 255, at 708–09.

260. *Id.* at 709.

261. *INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983). “Because Article II vests ‘the executive Power’ in a constitutionally independent President who answers to a distinct constituency, Congress must compete with a powerful and constitutionally independent rival for control over the direction of administrative policy.” Manning, *supra* note 255, at 712–13. Accordingly, “[u]nless public policy reflects substantial interaction among the branches, it is unlikely to reflect the quality of deliberation that the framers intended their new representative government to exhibit.” Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693, 693 (1999).

Bicameralism and presentment thus capture “the central republican understanding that disagreement can be a creative force,”<sup>262</sup> and thereby deliberately sacrifice lawmaking efficiency in order to protect liberty.<sup>263</sup>

Third, bicameralism and presentment are immensely minority protective, giving minorities tremendous ability to block legislative change and promoting compromise in a lawmaking process that would otherwise allow determined majorities to run roughshod over minority dissenters.<sup>264</sup>

The high cost of legislating means that, when the Executive exercises its delegated authority to negate statutory text—whether by waiving it for certain parties or governmental processes, by amending it, or by cancelling it completely—the choices it makes “remain the law unless and until Congress can overcome the substantial inertia of the legislative process and pass a statute” to reverse the executive negation.<sup>265</sup> If the negated text represents a legislative compromise obtained by political minorities, those minorities must seek through the Article I, Section 7 lawmaking process what they lost in the less protective delegated lawmaking process. And, if the President chooses to back the executive agent’s exercise of delegated power rather than acquiesce to Congress’s attempt to override that choice through legislation, Congress will presumably have to overcome a presidential veto to reestablish the legal force or effect of the negated statutory text.

Ensuring that negation of statutory text occurs through bicameralism and presentment, rather than less cumbersome delegated procedures, respects the specific procedural framework outlined by the Constitution for amendment and repeal of statutes.<sup>266</sup>

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262. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1562 (1988).

263. Manning, *supra* note 255, at 709; *see also* Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 *ADMIN. L. REV.* 1, 6 (2007) (“Checks and balances are central to a deliberative democracy in which the peoples’ different viewpoints are shared and debated to arrive at outcomes with broad appeal. No single preference is paramount, and no particular actor should be dominant. The representation of diversity is a key attribute of a well-functioning system of checks and balances.”).

264. *See infra* notes 288–291 and accompanying text.

265. Manning, *supra* note 255, at 713–14.

266. *See* Manning, *supra* note 35, at 1952 (arguing that “when an enacted text establishes a new power and specifies a detailed procedural framework for that power’s implementation, conventional principles of textual exegesis suggest that the resultant specification should be treated as exclusive of any other alternative. (Why would



That respect is warranted because “in the absence of any widely shared baseline, every detail of the American separation of powers had to be bargained for.”<sup>267</sup> Moreover, the choice of constitutionmakers to involve two branches of the tripartite federal government in the process of turning text, duly considered by both Houses but devoid of legal force or effect, into law represents a specific constitutional bargain.<sup>268</sup> Indeed, “[t]he original U.S. Constitution is . . . a ‘bundle of compromises.’”<sup>269</sup> Respecting those compromises requires a proper understanding of *Clinton’s* Article I, Section 7 test given the purposes served by bicameralism and presentment.

## 2. *Recasting the Article I, Section 7 Test*

The Court’s Article I, Section 7 test is too mechanical, formalistically examining statutory text in the abstract, rather than whether the exercise of delegated lawmaking authority by the Executive is negating, in whole or in part, a legislative bargain struck pursuant to the meticulous constitutional structure. This myopic focus is problematic because nothing close to literal alteration of the “statutory text” occurs when the Executive exercises negative lawmaking power.<sup>270</sup> Because nobody can *literally* change the text of duly enacted statutes (as if the President could somehow mark up the master copy of the United States Statutes at Large), the more relevant inquiry is whether the Executive is depriving statutory text of legal force or effect without bicameralism and presentment.

One commentator points out that *Clinton’s* wooden Article I, Section 7 test, which seems to focus mechanically on textual form over legal force or effect, would allow the same functional result as

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constitutionmakers go to the trouble to spell out in exquisite detail the procedures for enacting legislation . . . if they viewed alternative procedures as equally acceptable?”).

267. *Id.* at 1978.

268. *See id.* at 1978–80.

269. *Id.* at 1978 & n.203 (quoting MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 201 (1913)).

270. *See Prakash, supra* note 25, at 39 (noting that the “official statutory text for most statutes is found only in the United States Statutes at Large and not the U.S. Code” and that the Statutes at Large “never changes, regardless of what happens after a bill becomes law. In other words, its statutes appear just as Congress and the President enacted them into law by Congress and the President. . . . [[L]egislative repeal or modification (which will be printed in Statutes at Large) or the executive repeal or modification (which will not) simply supersedes the prior statutory language found in United States Statutes at Large.”).

the LIVA without the “supposed Presentment Clause infirmity.”<sup>271</sup> Congress could allow executive negation of statutory text by delegating regulatory authority to suspend the legal force or effect of statutory text while leaving that text formally intact.<sup>272</sup> Although such a delegation might be an improper attempt to circumvent bicameralism and presentment, such a critique applies to any delegation, whether positive or negative.<sup>273</sup>

While it is true that *any* lawmaking delegation could be viewed as circumventing bicameralism and presentment, only negative lawmaking delegations allow specific compromises in the negated statutory text to be undermined—compromises likely integral to the statute clearing the hurdles of bicameralism and presentment in the first place. The real question, then, is the extent to which the deprivation of legal force or effect from statutory text represents infidelity to the legislative compromise embodied in that text. This is so because the deprivation of legal force or effect may be complete or nearly complete, as it was in *Clinton*, or it may be incomplete. Amendment and cancellation delegations are complete deprivations—one provides new text to take the cancelled text’s place, the other leaves nothing. Waiver and contingent legislation, by contrast, are incomplete. Waiver is incomplete because it only exempts certain entities, areas, or activities from the legal force or effect of otherwise generally applicable statutory text, leaving the text legally operative for those entities, areas, or activities not granted a waiver.

This incomplete negative effect was demonstrated in *Defenders of Wildlife*, where the text of the laws waived by the Secretary of Homeland Security continued to have legal force or effect for everything but the geographic area near and activities undertaken to construct the border fence. Waivers may further be incomplete where the negative effect has a temporal limitation, as do the state innovation waivers Governor Romney promised to issue under the ACA.

Contingent legislation’s negative effect is also incomplete because it acts as a statutory on/off switch,<sup>274</sup> allowing statutory text to take effect or be deprived of effect upon the Executive’s determination that specified contingencies have occurred. To the

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271. *Id.* at 38.

272. *Id.*

273. *Id.* at 38 n.229.

274. *See supra* Part II.B.1.

extent statutory text may once again have legal force or effect when the Executive changes its determination, that text remains intact in the United States Statutes at Large. This activation and deactivation of statutory text took place under the Tariff Act analyzed in *Field v. Clark*.<sup>275</sup>

Even if the President could cross out lines from a master copy of the Statutes at Large, formal alteration of text alone is of no moment. By focusing on merely the formal requirement of bicameralism and presentment, *Clinton* overlooked the purposes that process serves, thus leading the Court down a path that rigidly examines statutory text and forcing the Court to draw unpersuasive distinctions from lawmaking delegations with similar negative effect. But while statutory text is important (because it represents the most precise and best evidence of the legislative compromise struck),<sup>276</sup> the idea that text is somehow special in the abstract makes nonsense of the lawmaking process. The fact that the legal force or effect of an enacted text is altered outside the Article I, Section 7 lawmaking process is the true concern.

The constitutional text, for example, would be of no legal significance had it not cleared the difficult procedural hurdles of ratification. Accordingly, when legally operative text (whether constitutional or statutory) is deprived of legal force or effect without the same procedural hurdles that made the text legally operative, the compromises embodied in that text are not implemented, and the legislators involved are denied the fruits of their bargain. Reconfiguring the Article I, Section 7 test in light of this insight means reinvigorating bicameralism and presentment as a constraint on negative lawmaking delegations. Doing so would help ensure that legislators are not losing the benefit of their bargains in oblique or indirect ways, or in ways in which they have no meaningful ability to block or to force change.

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275. See *supra* note 111 and accompanying text.

276. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (“The best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (“Invocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) (contending that, as faithful subordinates of their legislative superiors, judges must obey the text of statutes where it is clear).

The Article I, Section 7 test of *Clinton*, properly understood, represents fidelity to a highly specific constitutional bargain regarding the procedure for lawmaking. Statutory text is important to determining what the law *is*. Literal alteration or deletion of that text would make the content of the law indeterminate. More important, though, is that simply examining the statutory text does little to illuminate the legislative compromises necessary to enact legally meaningless text into law under Article I, Section 7. Negating or altering the legal force or effect of that text outside of bicameralism and presentment risks undermining whatever bargain was made for that specific text, and it does so without the input of the parties who made the bargain and without providing them any opportunity to demand compromise in other areas in exchange for their agreement to the change.

At the very least, then, Article I, Section 7 should preclude negative lawmaking delegations that are not deeply rooted in history and tradition. If Justice Scalia is correct about the relevant history and tradition, then perhaps the title of the LIVA really did “fake out” the Supreme Court.<sup>277</sup> Likewise, negative delegations related to embargoes, economic sanctions, or tariffs fall comfortably within the tradition of allowing more play in the structural constitutional joints for foreign affairs-related powers.<sup>278</sup> Contingent legislation also has a firmer place in the historical tradition.<sup>279</sup> More generally, however, negative lawmaking delegations are unconstitutional because they allow precise legislative bargains struck through a painstaking legislative process to be negated by the exercise of executive discretion. That exercise of discretion avoids political accountability and the procedural protections that govern lawmaking.

## V. The Case for Limiting Negative Lawmaking Delegations

This Part contends that negative lawmaking delegations should be limited in light of the purposes of the Article I, Section 7

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277. Justice Scalia viewed the power delegated in the LIVA as functionally no different than the power to impound funds or the power to spend funds under a lump-sum appropriation, powers long exercised by the President and accordingly not powers “that our history and traditions show must reside exclusively in the Legislative Branch.” *Clinton v. City of New York*, 524 U.S. 417, 465–69 (1998) (Scalia, J., concurring in part and dissenting in part). Accordingly, for Justice Scalia, the discretion granted by the LIVA was “no broader than the discretion traditionally granted to the President in his execution of spending laws.” *Id.* at 466.

278. See *supra* notes 150–151 and accompanying text.

279. See Lawson, *supra* note 30, at 363–68.

lawmaking process. Lawmaking through this process is inherently about compromise, and because the minority-protective features of Article I, Section 7 engender compromise likely unobtainable through less burdensome procedures, allowing executive negation of statutory text undermines this protective function. With this understanding, applying the Article I, Section 7 framework to some examples of negative lawmaking delegations illustrates this pathology of such delegations.

Although this Article argues that many negative lawmaking delegations are unconstitutional, this Part offers some suggestions for how Congress should fashion such delegations in the future, recognizing that if such delegations are to be upheld as constitutional, they should at least be more limited, both substantively and procedurally, to approximate the benefits of bicameralism and presentment.

#### **A. Lawmaking as Compromise**

Lawmaking inevitably reflects compromises. It is a process of bargained-for exchange, the result of which represents the sum total of those compromises, not necessarily a coherent blueprint for achieving a particular statutory goal.<sup>280</sup> As such, statutes inevitably prescribe means for achieving a given end in a manner that a reasonable person seeking to achieve that same end might not choose alone.<sup>281</sup> When the statute speaks in precise, rule-like terms, it represents a policy choice made by a multimember deliberative body that nevertheless speaks with a high degree of specificity. Such specific choices should be honored. Indeed, statutory text that is clear but seems inconsistent or imprecisely drafted might simply reflect a compromise that was acceptable but not wholly satisfying to the interest groups and political representatives involved in the legislative battle, a compromise necessary to enact the statute.<sup>282</sup> And

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280. See, e.g., Manning, *supra* note 35, at 1978–79 (describing the lawmaking process and noting that “[e]ven when lawmakers share a broad consensus about their basic goals, they must still decide how broad a problem to tackle, whether to use rules or standards to effectuate their aims, what remedial mechanisms to employ, and countless other questions”).

281. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”).

282. As the Supreme Court has explained:

Dissatisfaction, however, is often the cost of legislative compromise.  
And negotiations surrounding enactment of this bill tell a typical story

because increasing a legal rule's specificity also increases the cost of enacting it (both in terms of getting the necessary information about the rule's impact and the necessary votes to adopt it<sup>283</sup>), the more specific statutory text is, the less permissible it should be to negate that text through a streamlined process such as unilateral executive discretion.

Even less precise statutory text represents a compromise of sorts. A statute seeking to further a given purpose might speak in the abstract or at a high level of generality because the legislators involved could only agree on the ends but not the means. High-level policy ends (clean air or water, greater transparency and accountability in the financial sector, a fair process for securing disability benefits, and so on) are easier to agree on than the means for achieving them.<sup>284</sup> Such imprecision, in the context of administrative law, is treated as a delegation of interpretive authority to an agency charged with administering the statute, thereby allowing the agency to expound the details of a general statute that has legislated a given policy goal.<sup>285</sup> In some cases, the compromise reflects the understanding that Congress is not best situated to make

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of legislative battle among interest groups, Congress, and the President. Indeed, this legislation failed to ease tensions among many of the interested parties. Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole. . . . The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.

*Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (citations omitted).

283. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983) ("Rulemaking involves two sorts of social costs: the cost of obtaining and analyzing information about the rule's probable impact, and the cost of securing agreement among the participants in the rulemaking process. These costs usually rise with increases in a rule's transparency since objective regulatory line-drawing increases the risk of misspecification and sharpens the focus of value conflicts.").

284. See AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE* 17 (2012) (discussing how legislative compromise implicates principles as well as material interests, and how comprehensive statutes like the Tax Reform Act of 1986 and the ACA came about "because the principled positions that reformers espoused—a simple and transparent tax code or universal healthcare coverage, for example—did *not* survive intact in the tangled process that produced the final legislation").

285. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (describing reasons for textual ambiguity or generality and the implication for deference to agency interpretations of the statutes they are charged with administering).

the specific means choices—because of lack of time, will, expertise, or the like.<sup>286</sup>

Some commentators have argued that nondelegation doctrine and bicameralism and presentment, when distilled, serve the same purpose: ensuring that sufficiently important decisions are made, not by less procedurally costly delegated lawmaking, but by the expensive Article I, Section 7 lawmaking process.<sup>287</sup> This argument lines up at some level with the textualist justification for respecting the level of generality at which statutory text speaks, which, at bottom, is about accountability for a law's details (rather than its purpose alone) and ensuring that political minorities have the power to impede the legislative goals of the majority.<sup>288</sup> But what the argument fails to account for fully is that compromise is inherent in the lawmaking process, and respecting statutory text respects the compromises that

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286. See Manning, *supra* note 35, at 1985–86 (“It is a common drafting strategy to elide disagreement or deal with hard-to-predict futures by writing some provisions in general terms—that is, to strike a bargain that, implicitly or explicitly, leaves much to be decided by those charged with implementing the provisions in question.”).

287. See, e.g., Calabresi, *supra* note 21, at 85–86 (“When the old pre-Roosevelt Court struck down two delegations of power by Congress to the [E]xecutive, what the Court was saying was that the actions those statutes delegated gave power to the [E]xecutive so important that such action had to be done with bicameralism and presentment. *Schechter Poultry* and *Carter Coal* were thus not only nondelegation doctrine cases, they were also, in the words of *Clinton v. City of New York*, bicameralism and presentment cases.”).

288. Manning, *supra* note 228, at 1314 (describing the political science foundation of modern textualism, which “depends on the relatively modest empirical assumption that when the text of a statute is clear but fits awkwardly with its purpose, its unusual shape may reflect compromise rather than inadvertence”). The more important a policy goal embodied in a given statute, the more important it is for political minorities to have a meaningful voice in the lawmaking process. The Article I, Section 7 lawmaking process empowers political minorities by giving them the power to block legislative change; this power, in turn, allows them to extract greater compromise from the majority than might otherwise be possible. As Professor Manning explains:

Political scientists have shown, for example, that the bicameralism and presentment requirements of Article I, Section 7 approximate a supermajority requirement, thereby giving political minorities extraordinary power to block legislative change. The legislative procedures adopted by each House—most notably, committee gatekeeping, the Senate filibuster, and the Senate’s unanimous consent requirement—accentuate that constitutional design feature. Accordingly, by assuming that a clear text reflects the product of compromise, second-generation textualism preserves the right of minorities and outliers to insist that the majority take half a loaf, even if the end result is not neatly logical, internally consistent, or tightly connected to the background purposes that seemingly inspired the majority to act.

*Id.* (footnotes omitted).

produced that text, even if that text may seem awkward, inefficient, or fit imperfectly with the statute's stated purpose.<sup>289</sup> Consequently, preventing executive negation of statutory text respects the compromises in the text that would have been negated.

### **B. Examples of Negative Lawmaking Delegations Allowing the Unilateral Executive Override of Legislative Compromise**

Executive negation of statutory text denies to legislatures the specific bargains that were the products of hard-fought compromises,<sup>290</sup> just as interpreting statutes atextually “denies to legislatures the choice of creating or withholding gap-filling authority.”<sup>291</sup> The broader and more unbounded the negative lawmaking delegation, the greater the Executive's power to upset the compromises embodied in specific statutory provisions. Because the Executive represents a national, rather than a local or minority constituency, such negation of compromises undermines the minority-protective, compromise-inducing function of the cumbersome Article I, Section 7 lawmaking process. The degree to which it does so, and accordingly the constitutional concern, varies with the type of negative lawmaking delegation at issue.

An internal waiver upsets legislative compromise only in those provisions within the statute delegating the negative power. External waivers, amendment delegations, and cancellation delegations allow executive override of prior, current, and possibly even future compromises. Contingent legislation, however, is of more limited concern, because the power delegated merely allows the Executive to determine when the negation will occur, usually conditioned on the existence of objectively determinable criteria.

An important caveat regarding the interplay of the negative lawmaking delegation framework with the independent lawmaking powers of the Executive is in order. Although a full treatment of the issues involved is outside this Article's scope, I do assume, consistent

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289. See Manning, *supra* note 35, at 1978–79 (explaining that “compromise is inevitable whenever lawmaking reflects ‘the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds’”) (citing JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999)).

290. See *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (“Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.”).

291. Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 547 (1983).



with existing case law, that the Executive has some independent lawmaking power. That power manifests itself in a variety of contexts, a few examples of which are noted here. The political question doctrine, for example, at times simply means a court has decided the Constitution allows exclusive executive branch lawmaking on the subject.<sup>292</sup> In the realm of foreign affairs, presidential lawmaking has long been judicially sanctioned, though the scope of the President's power in this realm has never been defined precisely.<sup>293</sup> And in administrative law, *Chevron* deference carries "special force"<sup>294</sup> when a lawmaking delegation to the Executive overlaps with the Executive's independent lawmaking powers on the same subject,<sup>295</sup> while the intelligible principle requirement of nondelegation doctrine is relaxed in such circumstances for analogous reasons.<sup>296</sup> Accordingly, when an executive agent overrides statutory compromises in pursuit of a concrete goal, particularly when that goal is in a realm traditionally considered within the independent constitutional authority of the Executive, such negation of congressional compromises may be acceptable. This is especially so when there is a long tradition of allowing such delegations, or a long tradition of deference to the Executive's views in a particular realm.<sup>297</sup>

Such tradition might be sufficient to defend the negative lawmaking delegation in the REAL ID Act, as well as in the Tariff

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292. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 610–12 (1976) (discussing how the Court's deeming a case to be a "political question" and thus nonjusticiable could be considered a holding "that the President's decision was within his authority and therefore law for the courts").

293. Henry Paul Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 47–56 (1993).

294. *Abourezk v. Reagan*, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting) (discussing the need for greater *Chevron* deference where "the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs").

295. See, e.g., *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *CIA v. Sims*, 471 U.S. 159, 169–73 (1985); *Regan v. Wald*, 468 U.S. 222, 232 (1984). For a thorough discussion of the independent lawmaking powers of the Executive and the interplay with judicial review of executive decisions, see generally Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 683 (2000).

296. See *Loving v. United States*, 517 U.S. 748, 772 (1996).

297. See Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 1009 (2012) (noting that "there is nothing unusual or particularly problematic about judicial flexibility in a field of special executive authority" and that "in no field is executive authority more pervasive than in foreign affairs").

Act of 1890.<sup>298</sup> Moreover, because the justification for independent executive lawmaking power in part rests on relative institutional competence (the President, as opposed to the multi-member bicameral legislature, for example, is better positioned to direct foreign affairs or the military), it makes pragmatic sense for Congress to delegate flexibility to the constitutional actor in the best position to make certain policy decisions.<sup>299</sup> And contingent legislation, which merely allows the Executive to determine a future condition or fact, recognizes that Congress is not in a position to make such on-the-ground determinations, at least not with the expediency that might be necessary to ensure effective governance.

Consider, however, what such a position means when understood in light of the minority-protective function of Article I, Section 7. For example, for the REAL ID Act, when the Secretary waives other laws to further the goal of constructing the border fence, each negated portion of other statutory text is a statutory bargain being overridden through a process less rigorous—and thus far easier—than bicameralism and presentment. The groups represented in the negated bargains have no meaningful way to participate in the negative lawmaking process when it is done at the Secretary’s “sole discretion” merely through publication in the Federal Register, and even if they had the ability to participate in the decisionmaking process, they would lack the power to block lawmaking change and thereby obtain compromise from the majority.

By delegating complete negative lawmaking discretion to the Secretary, Congress avoided political accountability for waiving important environmental statutes, among others. Because the Secretary is insulated from the local constituents most affected by the waivers, he is not as sensitive to the constituent-level needs that might have greater salience to particular Members in the regions affected by the waivers. Prior statutory bargains are thus negated without the contentious deliberative process that might otherwise have caused greater consideration of the appropriate policy balance to be struck between expeditious construction of the border fence on one hand,

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298. See *Field v. Clark*, 143 U.S. 649, 683 (1892).

299. See THE FEDERALIST NO. 70 (Alexander Hamilton) (discussing the importance of energy and vigor in the executive); *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (noting the President has a better opportunity to observe the “conditions which prevail in foreign countries”); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 347 (2006) (“The unity of the national executive represents an important institutional advantage in analyzing and responding to the delicate issues that often attend international diplomacy.”).

and the important environmental and other interests protected by the waived statutes on the other hand.<sup>300</sup>

Beyond ensuring political minorities the ability to block legislation and thereby obtain compromises from the majority that they would otherwise be unable to obtain,<sup>301</sup> the Article I, Section 7 lawmaking process, by horizontally blending the lawmaking function, also protects small-state residents because each state has equal representation in the Senate.<sup>302</sup> When Secretary Chertoff exercised his waiver authority under the REAL ID Act, he not only overrode the compromises embodied in each of the federal laws he cancelled, he also preempted all state and local laws that interfered with the expeditious construction of the border fence.<sup>303</sup>

Had the waiver authority not been granted, the Article I, Section 7 lawmaking process would have ensured that the residents most affected by the waivers not only had a voice in whether federal laws

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300. Fence construction angered many residents along the border, who saw the project as both destructive to the commercial interests and natural resources of their local communities, and likely to be ineffective in stemming the flow of illegal immigration. See Dudley, *supra* note 88, at 851 n.6; Editorial, *Haste Lays Waste: Ill-Planned Security Fencing Along the Border Would Ravage the Communities It's Meant to Protect*, HOUSTON CHRON., Oct. 4, 2007, at B8. Indeed, Congressman Raul Grijalva, who represents Arizona's 7th District, which is along the U.S.-Mexico border, introduced legislation attempting to repeal the REAL ID Act waiver provision, but the bill died in committee. See Borderlands Conservation and Security Act of 2007, H.R. 2593, 110th Cong. § 5(b) (2007). Had the waiver itself been required to undergo the bicameral process, Congressman Grijalva, who represents some of the people most directly affected by the waivers and the project for which they were used, may have been able to block the waiver, or at least to obtain compromise in other areas in exchange for his vote.

301. See, e.g., Manning, *supra* note 228, at 1314 (describing how bicameralism and presentment, along with the legislative procedures of each House, "give political minorities extraordinary power to block legislative change and insist on compromise as the price of assent"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 114–17 (2010) (discussing and agreeing with Professor Manning's argument that allowing judges to alter statutory text risks undoing compromises that political minorities may have extracted from the majority); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 881 (2011) (discussing how the structural safeguards of the Article I lawmaking process give "even political minorities" the power to block legislation); Glen Taszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 39 (2006) (stating that the traditional legislative process provides the safeguards of bicameralism and presentment to protect political minorities).

302. See U.S. CONST. art. I, § 3, cl. 1; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1371–72 (2001).

303. See *supra* note 154 and accompanying text. The federalism concerns of delegated negative lawmaking authority are worthy of separate treatment; I note them here only to demonstrate that bypassing the Article I, Section 7 lawmaking process to negate other laws circumvents important structural protections that ensure political minorities not only have a voice in the process, but also the power to influence the outcome of the process.

that protect them should yield to the goal of securing the border, but also in whether their own local laws should yield. While the laws may still have been waived, those political minorities most affected by the waivers could have obtained compromise from the majority as the price for their assent, perhaps in the form of concessions in other legislation.

In *Clinton*, the compromises necessary to obtain minority votes to pass the spending bills were overridden by the President's exercise of the item veto power. Allowing this override to happen vitiates a key purpose of Article I, Section 7 because the cancellation is done outside the Article I, Section 7 bargaining process. In light of this process, the President may veto the bundle of compromises represented in the entire spending bill, but cannot pick and choose which ones to negate; the President gets the whole loaf or nothing at all.

Instead of vetoing entire bills, however, President Clinton cancelled line items in two spending bills, and the City of New York (which had won a longstanding battle over billions of federal dollars) and the other affected group had to resort to the courts to protect their interests, even though they already achieved legislative success in Congress.<sup>304</sup> Obtaining benefits in the spending bills may have been the product of compromises in the spending bills themselves, or the price of obtaining those groups' support for other legislation. Allowing those compromises to be circumvented through unilateral executive discretion undermines the minority-protective features of the Article I, Section 7 lawmaking process, and it dishonors the legislative bargain struck.

For the Vaccine Injury Table, the Federal Circuit thought it important that the legislative history indicated Congress may have chosen to codify the table in the statutory text rather than allow agency promulgation of the Initial Table because of concerns over agency delay.<sup>305</sup> In so doing, however, Congress exposed the Table to the compromise-promoting functions of the Article I, Section 7 lawmaking process. Each entry on the Table is therefore a legislative bargain, one not necessarily made based on the technocratic

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304. See *supra* text accompanying note 58.

305. See *Terran ex rel. Terran v. Sec'y of Health & Human Services*, 195 F.3d 1302, 1308 (Fed. Cir. 1999) (citing *Vaccine Injury Compensation: Hearings on H.R. 5810 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 98th Cong. 210-11 (1984) (letter from Martin H. Smith, Vice President, American Academy of Pediatrics to Representative Henry A. Waxman)).

judgment of Congress that the best available medical science had identified a given injury as linked to a given vaccine, but made instead as the price for some legislator's vote. For the injured child, the congressionally enacted table would have compensated her, but the agency table did not. And for the dolphins in *Hogarth*, the agency rule meant one additional hour of exposure to a dangerous method of tuna fishing, while under the congressionally enacted statute they were better protected.

The unraveling of the near-entirety of a comprehensive statute by waiver is also problematic. Governor Romney's promise to issue state innovation waivers under the ACA was, in effect, a promise to partially repeal the ACA. Doing so would undermine the many specific compromises necessary to specify each detail of the comprehensive health insurance coverage scheme the Act prescribes, compromises born when legislators sacrificed principled positions in order to reach agreement.<sup>306</sup> So too would allowing Health and Human Services to rewrite the statutory framework governing Medicare, as several sections of the ACA appear to allow it to do.<sup>307</sup>

Given the cost of reaching the specific compromises required to enact text of such painstaking detail, effective repeal of that text should not be delegable.<sup>308</sup> Nor should the power to negate specific statutory compromises be granted with open-ended, vacuous criteria, as it was in the LIVA. Even where Congress expressly delegates negative lawmaking power to the Executive and delineates procedural and substantive criteria to constrain the exercise of discretion by the Executive, such a delegation abdicates the legislature's constitutional role. Preventing such abdication preserves the constitutional structure and ensures that when a legislative bargain is to be undone, whether temporarily or permanently, it will more often require another legislative bargain, instead of unilateral discretion by an agent such as the President.<sup>309</sup>

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306. See GUTMANN & THOMPSON, *supra* note 281.

307. See *supra* notes 5–8 and accompanying text.

308. See *supra* note 283 and accompanying text.

309. See *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“Abdication of responsibility is not part of the constitutional design.”); Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 480 (2011) (“Once the President signs a bill, each and every provision it contains becomes law, and there is nothing the President can do unilaterally to alter its legal effect. All the practical arguments about the necessity for an effective method of deficit reduction and the degree of discretion Presidents traditionally have over the actual spending of appropriated funds were not relevant to the basic structural reality.”).

It is true that the inclusion of a negative lawmaking delegation in a comprehensive statute, such as the waiver delegation within the text of the ACA, might itself be the result of legislative compromise; perhaps some legislators were more willing to sign on to the ACA knowing their states might later be exempted from the specifics of the Act's health insurance requirements. That does not change the fact that an ACA waiver allows executive negation of the text specifying the details of health insurance requirements for each state; this formal negative effect on statutory text alone raises concerns under *Clinton's* formulation of Article I, Section 7.

Formal negative effect is not the only pathology of the ACA waiver delegation, however. For if the specific health insurance requirements embodied in the ACA's text may be overridden by general executive discretion, then so too may Congress allow executive discretion to override the specifics of other comprehensive statutory schemes. Congress thus not only gets to make specific policy choices, but also gets to avoid the consequences of those policy choices by delegating the power to change them to an executive actor. Such a result abdicates congressional responsibility for the policy consequences of its legislative bargains. Once the legislature has gone through the trouble of framing legal rules with specificity, a costly process given that it requires agreement among a diverse set of representative actors,<sup>310</sup> it should also shoulder responsibility for making sure the rules it specified are the rules it wishes to keep. And because waivers generally occur in the discretion of an executive agent below the President—for example, the Secretary of Homeland Security or the Secretary of Health and Human Services—the executive agent with discretion to negate is less representative than the legislators whose statutory details are being negated.

### **C. The Impact on the Administrative State and Some Practical Considerations**

Requiring bicameralism and presentment before negation of statutory text would make law more permanent, and less malleable in response to changing circumstances. The separation of powers, after all, was designed to “impose burdens on governmental processes that

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310. See Diver, *supra* note 280.

often seem clumsy, inefficient, even unworkable.”<sup>311</sup> This inefficiency was a deliberate choice meant to protect liberty by diffusing power.<sup>312</sup>

Because making law through bicameralism and presentment is hard, Article I, Section 7, at its core, embodies an ideal, a republican commitment to the preservation of liberty. If there are to be laws that govern us, those laws should not be easily passed; if we are to be burdened by such laws, their content should be determined by our representatives; and if we are to allow our representatives to make such determinations, those determinations should be carefully made.<sup>313</sup> Accordingly, some might argue that delegating negative lawmaking power may serve, rather than hinder, this ideal, for if the Executive is not creating laws but negating them, there will be fewer laws restricting our freedom. This may be so in some cases—Governor Romney’s promised healthcare waivers, for example, would have relieved a burden on the states and thus their citizens—but in other cases negative lawmaking delegations allow the Executive to negate laws designed to protect us. When Secretary Chertoff unilaterally waived dozens of laws to expedite construction of the border fence, he negated those laws not to remove a burden on individual liberty, but to remove a burden on the exercise of governmental power, laws such as the Clean Water Act, the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Administrative Procedure Act.<sup>314</sup> From this perspective, negative lawmaking delegations only sometimes allow the Executive to limit the extent to which laws restrict individual liberty.

Some commentators also argue that stricter enforcement of bicameralism and presentment, though it might limit the extent to which Congress delegates negative lawmaking power, would also encourage Congress to forgo specificity in its statutes and to instead

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311. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

312. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (“The declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

313. See Lessig & Sunstein, *supra* note 247, at 101–06 (discussing how the Constitution’s diffusion of power, and its system of checks and balances, were designed to protect liberty, in large part by increasing political accountability and by limiting the power of factions).

314. See *supra* note 139 and accompanying text.

rely on broader, more open-ended positive delegations.<sup>315</sup> Under the weak nondelegation doctrine, broader positive delegations would allow agencies to make rules with legal force or effect and also to cancel those rules with less than bicameralism and presentment. This, in turn, would achieve the same effect that legislating with specificity but delegating negative lawmaking power currently achieves.

While this argument has merit, it represents a general critique of the state of nondelegation doctrine and the rise of the administrative state, not an attack on the Article I, Section 7 lawmaking process or the purposes that it serves. Administrative lawmaking generally requires significant process under the APA and is subject to judicial review, allowing a greater policymaking role for both the Executive and the Judiciary vis-à-vis Congress, perhaps more than is constitutionally appropriate.<sup>316</sup> Reinvigorating bicameralism and presentment, while no panacea for the problem of broad lawmaking delegations generally, nevertheless would encourage Congress to be more accountable for the legislation it enacts, and the policy choices it is required to make.<sup>317</sup> If a statute is bad policy, politically unpopular, or unworkable in practice, Congress should repeal or fix it, consistent with Article I, Section 7.<sup>318</sup> Congress should not rely on the Executive

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315. See, e.g., Prakash, *supra* note 25, at 18–25 (arguing that having greater statutory specificity and then allowing negative lawmaking delegations is both functionally equivalent to and better as a policy matter than broad, open-ended positive lawmaking delegations).

316. See Garry, *supra* note 80, at 693 (arguing that the rise of the administrative state has not only granted the Judiciary a greater policymaking role than the Framers originally intended, but also has increased the power of the Judiciary relative to the representative Branches).

317. The ability to avoid accountability for difficult, and potentially unpopular, policy choices tempts Congress to achieve its goals through less transparent, and thus less accountable, means. For example, Congress chose to delegate to the President the power to change the debt ceiling specified by statute in 31 U.S.C. § 3101(b), doing so in large part to “force the President to bear accountability for the unpopular task historically within the province of congressional responsibility.” *Constitutional Law—Separation of Powers—Congress Delegates Power to Raise the Debt Ceiling—Budget Control Act of 2011*, *Pub. L. No. 112-25, 125 Stat. 240 (to Be Codified in Scattered Sections of the U.S. Code)*, 125 HARV. L. REV. 867, 869 (2012).

318. Forcing Congress to make, rather than avoid, the difficult policy choices involved in lawmaking has led one commentator to argue that Article I, Section 7 also requires both houses of Congress to agree on identical text and allows judicial review of the congressional lawmaking process to ensure that Congress so agreed. Congress cannot delegate the choice between two textually different bills to actors outside bicameralism and presentment. Courts, however, remain generally unwilling to examine alleged flaws in the legislative process for enacting a statute. See Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 GEO. L.J. 323, 363–64 (2009).



to do the fixing, thereby avoiding its constitutional obligation and forgoing political accountability.<sup>319</sup> Nor should the Executive be able to override compromise forged in the crucible of the bicameral process.

This result was a deliberate choice by the Framers, who carefully divided lawmaking power between two branches while also crafting a highly specific lawmaking process, suggesting a desire not only to separate while simultaneously blending powers,<sup>320</sup> but also to protect the political minorities who might otherwise be overlooked in a less costly process.<sup>321</sup> The specificity with which this choice was enshrined in the constitutional text suggests that this procedure should not lightly be departed from. As the Court has noted:

By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those

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319. Though the Executive is representative, and thus politically accountable to a certain extent, it is "situated in the constitutional scheme quite differently" than Congress. Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 808 (1999). Understanding the different representative roles that the two branches serve undercuts any argument that it is sufficient that an executive agent, supervised by the elected President, is sufficiently representative to make his decisions accountable to the people.

320. See THE FEDERALIST NO. 47, at 318 (James Madison) (Belknap Press of Harvard Univ. ed., 2009) (discussing how the separation of powers did not mean that the branches "ought to have no partial agency in, or no control over the acts of each other"); THE FEDERALIST NO. 48, at 324, 325 (James Madison) (Belknap Press of Harvard Univ. ed., 2009) (explaining why the branches needed to be "connected and blended as to give to each a constitutional control over the others" to check the "encroaching nature" of power through more than mere "parchment barriers"); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–82 (2000) (discussing the competing traditions of separation and balance of powers underlying the Constitution).

321. See *supra* notes 288–291 and accompanying text.

delicate and necessary decisions essential to governance . . . [T]he delegation doctrine . . . prevent[s] Congress from forsaking its duties.<sup>322</sup>

If all this is so, then many lawmaking delegations in the administrative state, whether positive or negative, may well be unconstitutional. That conclusion might represent the most faithful adherence to not only the text and structure of the Constitution, but its historical backdrop, and the purposes served by its structural protections.<sup>323</sup> Nevertheless, because such a result is not only inconsistent with current doctrine but also unworkable, given the practical difficulties in upsetting an administrative state so reliant on lawmaking delegations generally, this section offers some thoughts on how the benefits of bicameralism and presentment might be approximated through delegated lawmaking procedures, focusing especially on negative lawmaking delegations.

First, negative lawmaking delegations should provide express, specific criteria as requirements for the executive negation of the legal force or effect of statutory text. Doing so would make negative lawmaking delegations mirror the contingent legislation category, one better situated in history and tradition. Because drafting in generalities is a common tool to resolve legislative disagreement, requiring specificity would ensure that negative lawmaking delegations were more often the products of legislative compromise themselves, rather than open-ended tools, phrased in general terms, that grant the Executive the discretion to undermine legislative compromise elsewhere. By specifically identifying both the criteria for executive negation of statutory text and which statutory text is subject to the negative power, Congress can help ensure that legislators, rather than executive agents, have chosen which legislative bargains should yield to the policy goal underlying the negative lawmaking delegation.<sup>324</sup> The LIVA did not have such protections:

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322. *Loving v. United States*, 517 U.S. 748, 757–58 (1996).

323. For an extended argument that excessive delegation is both inconsistent with the Constitution properly interpreted and bad public policy, *see generally* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

324. Ensuring that legislators make these policy choices, difficult though the choices may be, is an important constitutional principle. As Justice Scalia has pointed out: “It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing

although it putatively constrained Executive discretion with three requirements before cancellation, it in reality granted the President great room to maneuver, essentially delegating the difficult policy choice of which specific spending provisions (likely the products of legislative compromises themselves) should yield to the more general policy goal of a balanced budget.

Second, predicating executive exercise of delegated negative lawmaking power upon express, specific criteria suggests that judicial review of the exercise of delegated lawmaking authority is critical.<sup>325</sup> Allowing executive negation of any statutory text in the Secretary of Homeland Security's "sole discretion," while also limiting review of that exercise of discretion to claims of constitutional violation, makes the Executive's interpretation of its delegating statute unreviewable. It renders the requirements for waiving other laws toothless.

Third, coupled with judicial review to give their views the power to block change, political minorities should be given a voice in any delegated negative lawmaking procedure. Because the Executive represents a national, rather than a local, constituency, majoritarian impulses might override the local interests that would otherwise have been protected had the same result been sought through bicameralism and presentment.<sup>326</sup> Ensuring that each affected group plays a role in the lawmaking process decreases the risk that any one group will gain undue control of a lawmaking process deliberately designed to be cumbersome and at times fractious and incoherent. Judicial review to ensure the executive agent took the minority views into account would grant a rough approximation of the power to demand compromise in the bicameral legislative process. While not equivalent by any means, it would ensure that political minorities not only had a voice in the decision to negate laws affecting them, but that their voice was heard in a meaningful way.<sup>327</sup>

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society are to be made by the Legislature." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); see also David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239, 251–53 (2003).

325. See Daniel B. Rodriguez, *The Presumption of Reviewability: A Study of Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 752–65 (1992) (discussing how the Court and commentators have both thought judicial review of agency decisions critical to the legitimacy of administrative lawmaking).

326. See *supra* note 261 and accompanying text.

327. There are a variety of ways in which the courts have imposed procedural requirements on agency lawmaking that attempt to "replicat[e] the process of interest group representation and bargaining thought responsible for legislation." See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264–72 (2001) (discussing

The three suggestions here are familiar, for they reflect well-established requirements of administrative rulemaking.<sup>328</sup> In short, negative lawmaking delegations, if Congress is to continue to make them, should mirror the procedures required for positive lawmaking delegations. Such procedures, however, should be stricter for negative lawmaking delegations, because of the unique structural concerns such delegations raise. And because the procedures associated with administrative rulemaking reflect constitutional values associated with the Constitution's structural protections,<sup>329</sup> to require that negative lawmaking delegations have those procedures ensures that such delegations better honor the Constitution's republican design.<sup>330</sup> These procedures make negative lawmaking delegations more accountable, and thus more legitimate; they help ensure that decisions regarding whether laws are to yield to some other policy goal will not be made arbitrarily;<sup>331</sup> they allow Congress and the people it represents to better superintend agency action (or

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interest group representation in administrative rulemaking and how judicial review attempts to facilitate political control over that process). The relative merits and demerits of such procedures in the broader context of administrative lawmaking is beyond this Article's scope. At a minimum, however, some form of interest group representation, and a way to ensure that such interest groups have a role in the negative lawmaking process, seems critical given the risk that negative lawmaking delegations allow unilateral executive override of legislative compromise that political minorities have obtained in Congress. *See supra* Part V.A–B.

328. *See* Kagan, *supra* note 327, at 2253–72 (discussing the history and theory of “mechanisms of administrative control”).

329. Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) (noting the accountability concerns reflected in the Administrative Procedure Act); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing similarities between the constitutional structure and administrative procedure).

330. *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 124 (2011) (“[W]here Congress delegates lawmaking authority to the other branches, it must channel that authority through liberty-promoting procedures that are functionally comparable to the checks and balances of Articles I and II. Congress may satisfy this standard by prescribing an intelligible principle to guide agency discretion, coupled with APA-style deliberative administrative procedures that are backed by political accountability and judicial review.”).

331. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 516–27 (2003) (discussing the importance of procedure in preventing arbitrary lawmaking and contending that it is a concern for preventing arbitrariness, rather than for preserving accountability, that is most reflected in the Court's administrative law jurisprudence, including *Chadha* and *Clinton*).

inaction); and they allow the people to better understand agency decisionmaking.<sup>332</sup>

### Conclusion

The rise of the modern administrative state, facilitated by delegation to the Executive of Congress's lawmaking function, stands in stark contrast to nondelegation doctrine's status as a bedrock principle of American constitutional law since the founding of the Republic. That nondelegation doctrine has proven unworkable as a limitation on executive lawmaking, however, does not mean that all executive lawmaking is constitutional. By focusing on the effect delegated lawmaking power has on statutory text, this Article has shown that two distinct types of lawmaking delegations, positive and negative, exist in the modern administrative state.

Within this dichotomy, negative lawmaking delegations, which allow the discretionary executive negation of statutory text, are more problematic in light of the constitutional text and structure. This Article has shown that, in today's administrative state, four distinct types of negative lawmaking delegations predominate: contingent legislation, amendment, waiver, and cancellation. Although each type of negative lawmaking delegation formally allows the negation of statutory text—thus raising concerns under the Court's holding that alteration of statutory text requires bicameralism and presentment—amendment, waiver, and cancellation delegations are more problematic because they undermine the minority-protective, compromise-inducing functions of Article I, Section 7. Cancellation also resembles suspension, while waiver resembles dispensation; this functional similarity to long-rejected royal prerogatives, denied to the President by the Take Care Clause, also raises separation of powers concerns.

Nevertheless, this Article has also shown that lower courts have yet to invoke *Clinton v. City of New York* to strike down a negative lawmaking delegation. Rather than continue to mechanically apply the verbal formulation of *Clinton's* Article I, Section 7 test, courts should focus on following its core principle, thereby limiting the use of delegated negative lawmaking power. Ensuring that statutory text, once enacted, is negated through the same process that created it would further key structural purposes served by the Article I, Section

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332. See Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1752, 1776–804 (2007) (explaining how administrative law, including its procedural rules, helps further representative political values).

7 lawmaking process, and in so doing would protect the compromises inherent in, and the minorities represented by, the details of statutory text.