Negative Lawmaking Delegations: Discretionary Executive Authority to Amend, Waive, and Cancel Statutory Text

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NEGATIVE LAWMAKING DELEGATIONS: DISCRETIONARY EXECUTIVE AUTHORITY TO AMEND, WAIVE, AND CANCEL STATUTORY TEXT

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Over a decade ago, the Supreme Court invalidated the Line Item Veto Act by invoking Article I, Section 7: 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. This Article shows that this holding has had limited, if any, impact on judicial review of lawmaking delegations.

In analyzing the limited impact of the Court’s holding, this Article proposes an analytical framework for lawmaking delegations based on the effect that the delegated power has on statutory text. The framework categorizes lawmaking delegations as either positive or negative. Positive lawmaking delegations involve the Executive’s delegated power to create rules or standards 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. Four distinct types of negative lawmaking delegations exist in the modern administrative state: (1) contingent legislation, which conditions the negative power on the Executive’s finding of a condition or fact; (2) amendment, which allows an executive agent to modify the legal force or effect of statutory text; (3) waiver, which negates 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 statutory text entirely.

Finding the limitations imposed upon lawmaking delegations by the nondelegation doctrine and Vesting Clauses wanting, this Article analyzes the background

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history and purposes which animating the Take Care Clause and the Bicameralism and Presentment Clauses and finds that, in light of this analysis, many negative lawmaking delegations in the modern administrative state are unconstitutional. Given this analysis, courts evaluating lawmaking delegations should examine whether the challenged delegation allows the negation, in whole or in part, of the legal force and effect of duly enacted text, thereby undoing the legislative compromises necessary to enact that text as law. When a delegation does so, it violates Article I, Section 7 by undermining its minority-protective function.
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INTRODUCTION

Now that the Supreme Court has upheld the Affordable Care Act ("ACA") in its entirety, what would presidential candidate Mitt Romney do if he is elected President but is unable to get Congress to repeal the Act? The answer, it turns out, is that Governor Romney may be able to unilaterally exempt the states from many of the Act’s requirements, using a lawmaking delegation, known as a state innovation waiver, contained within the text of the statute. In effect, Governor Romney has promised to use a waiver delegation in the ACA to obtain via executive fiat what he may not be able to do via bicameralism and presentment.

While unilateral executive repeal in this fashion may sound unusual, Governor Romney is not alone in looking to statutory waivers as means to achieve political ends outside the bicameral legislative process. The Obama Administration has issued over a thousand waivers under a different ACA provision, thereby exempting many entities from one of the Act’s requirements. Despite different intents in exercising their waivers, both

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2 Mitt Romney, If I Were President: Obamacare, One Year In, NATIONAL REVIEW ONLINE (Mar. 22, 2011, 8:20 PM), http://www.nationalreview.com/corner/262800/if-i-were-president-obamacare-one-year-mitt-romney (promising to, if elected President, issue “an executive order paving the way for Obamacare waivers to all 50 states.”). 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.
3 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).
4 It is not clear whether the Obama Administration waivers are being issued pursuant to any express delegation of waiver authority in the ACA itself. See Philip Hamburger, Health-Care Waivers and the Courts, NATIONAL REVIEW ONLINE (Mar. 14, 2011, 5:00 AM), http://www.nationalreview.com/articles/261982/health-care-waivers-and-courts-philip-hamburger. The only provision in the ACA that expressly permits HHS to grant waivers is section 1332, the state innovation waivers which Governor Romney has promised to issue if elected. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This may explain why the Obama Administration has justified the granting of its waivers as follows: “the law and regulations issued on annual limits allow the Department of Health and Human Services (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 INFORMATION & INSURANCE 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)
Governor Romney’s and President Obama’s ACA waivers raise compelling separation of powers concerns.

The ACA waiver provisions, moreover, are not unique in their delegation of discretionary authority to negate the legal force or effect of statutory text. From foreign affairs, national security, environmental law, Governor Romney’s intent is to undermine the Act. See Romney, supra note 2. The Obama Administration’s intent is to ameliorate an unintended negative consequence of the Act. See Annual Limits, supra note 4. Although the ACA itself has no provision granting waiver authority for the annual limits requirements of the Act, HHS has consistently interpreted the Act to give it authority to promulgate regulations that allow for waiver of the annual limit requirements. See, e.g., Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. 37,188, 37,191 (June 28, 2010) (codified at 26 C.F.R. pts. 54 & 602, 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 144, 146, & 147) (“So that individuals with certain coverage . . . would not be denied access to needed services or experience more than a minimal impact on premiums, these interim final regulations provide for the Secretary of Health and Human Services to establish a program under which the requirements relating to restricted annual limits may be waived if compliance with these interim final regulations would result in a significant decrease in access to benefits or a significant increase in premiums. Guidance from the Secretary of Health and Human Services regarding the scope and process for applying for a waiver is expected to be issued in the near future.”). The Secretary of Health and Human Services subsequently issued several guidance memoranda regarding the annual limit waivers, including information on the process and criteria for granting the waivers. See, e.g., DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CONSUMER INFORMATION AND INSURANCE OVERSIGHT, OCIIO SUB-REGULATORY GUIDANCE (OCIIO 2010-1): PROCESS FOR OBTAINING WAIVERS OF THE ANNUAL LIMITS REQUIREMENTS OF PHS ACT SECTION 2711 (Sept. 3, 2010), available at http://ccio.cms.gov/resources/files/OCIIO_2010-1_20100903_508.pdf; DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CONSUMER INFORMATION AND INSURANCE OVERSIGHT, OCIIO SUB-REGULATORY GUIDANCE (OCIIO 2010-1A): SUPPLEMENTAL GUIDANCE (Nov. 5, 2010), available at http://ccio.cms.gov/resources/files/annual_limits_waiver_guidance.pdf.

6 Governor Romney’s intent is to undermine the Act. See Romney, supra note 2. The Obama Administration’s intent is to ameliorate an unintended negative consequence of the Act. See Annual Limits, supra note 4. Although the ACA itself has no provision granting waiver authority for the annual limits requirements of the Act, HHS has consistently interpreted the Act to give it authority to promulgate regulations that allow for waiver of the annual limit requirements. See, e.g., Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. 37,188, 37,191 (June 28, 2010) (codified at 26 C.F.R. pts. 54 & 602, 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 144, 146, & 147) (“So that individuals with certain coverage . . . would not be denied access to needed services or experience more than a minimal impact on premiums, these interim final regulations provide for the Secretary of Health and Human Services to establish a program under which the requirements relating to restricted annual limits may be waived if compliance with these interim final regulations would result in a significant decrease in access to benefits or a significant increase in premiums. Guidance from the Secretary of Health and Human Services regarding the scope and process for applying for a waiver is expected to be issued in the near future.”). The Secretary of Health and Human Services subsequently issued several guidance memoranda regarding the annual limit waivers, including information on the process and criteria for granting the waivers. See, e.g., DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CONSUMER INFORMATION AND INSURANCE OVERSIGHT, OCIIO SUB-REGULATORY GUIDANCE (OCIIO 2010-1): PROCESS FOR OBTAINING WAIVERS OF THE ANNUAL LIMITS REQUIREMENTS OF PHS ACT SECTION 2711 (Sept. 3, 2010), available at http://ccio.cms.gov/resources/files/OCIIO_2010-1_20100903_508.pdf; DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CONSUMER INFORMATION AND INSURANCE OVERSIGHT, OCIIO SUB-REGULATORY GUIDANCE (OCIIO 2010-1A): SUPPLEMENTAL GUIDANCE (Nov. 5, 2010), available at http://ccio.cms.gov/resources/files/annual_limits_waiver_guidance.pdf.

7 See, e.g., Emergency Wartime Supplemental Appropriations Act for Fiscal Year 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (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”);
immigration\textsuperscript{10}, trade\textsuperscript{11}, other healthcare statutes\textsuperscript{12}, and so on, Congress often delegates to the Executive discretionary authority to waive, cancel, and sometimes even amend text that has been enacted as “Law.”\textsuperscript{13} Because such delegations allow the Executive—often with little to no judicial oversight, procedural constraints, or input from interested parties—to override the policy choices and political compromises embodied in the negated statutory text, such delegations implicate the constitutional text and structure governing separation of powers doctrine.

Using the specific textual provisions of the Constitution governing lawmaking\textsuperscript{14} and law execution,\textsuperscript{15} as well as the Supreme Court’s decision in Clinton \textit{v. City of New York},\textsuperscript{16} this Article argues that negating the legal force or effect of statutory text through the exercise of delegated lawmaking authority, as the Obama Administration has done and Governor Romney has promised to do, is unconstitutional. In reaching this conclusion, this

\textsuperscript{8} See, \textit{e.g.}, 42 U.S.C. § 9620(j)(1) (2006) (authorizing the President to issue orders exempting specific DOE and DOD sites or facilities from certain environmental law requirements in CERCLA and the Superfund Amendments where exemption is “necessary to protect the national security interests of the United States at that site or facility”).

\textsuperscript{9} See, \textit{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 certain methods of industrial tuna fishing).

\textsuperscript{10} See, \textit{e.g.}, REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c), 119 Stat. 231, 302 (“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.”).

\textsuperscript{11} See, \textit{e.g.}, Act of Oct. 1, 1890, 26 Stat. 567 (upon a finding of “reciprocally unequal and unreasonable” 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”).

\textsuperscript{12} See, \textit{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]”).

\textsuperscript{13} U.S. \textit{CONST.} art. I, § 7.

\textsuperscript{14} “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .” \textit{Id.} cl. 2–3.

\textsuperscript{15} The President is to “take Care that the Laws be faithfully executed.” \textit{Id.} art. II, § 3.

\textsuperscript{16} 524 U.S. 417 (1998) (invalidating the Line Item Veto Act because the authority delegated in the Act allowed the President to “cancel” statutory text without complying with bicameralism and presentment).
Negative Lawmaking Delegations

Article proposes an analytical framework based on the effect that delegated lawmaking power has on statutory text. The framework categorizes lawmaking delegations as either positive or negative. Positive lawmaking delegations involve the Executive’s delegated power to create rules or standards binding with the force of law, generally through administrative rulemaking. Negative lawmaking delegations involve the Executive’s delegated authority to negate the legal force or effect of statutory text.

The framework shows that four distinct types of negative lawmaking delegations exist in the modern administrative state: (1) contingent legislation, which conditions the negative power on the Executive’s finding the existence of a condition or fact; (2) amendment, which allows an executive agent to modify the legal force or effect of statutory text; (3) waiver, which negates 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 statutory text entirely.

These four types of negative lawmaking delegations, despite their distinct characteristics, are all constitutionally suspect under Clinton’s Article I, Section 7 test. Although lower courts have improperly narrowed that test, a broader interpretation is more faithful to the highly specific procedural bargain struck by constitutionmakers in 1787. This constitutional bargain should preclude the ability of the Executive to negate statutory bargains struck through bicameralism and presentment, even where the Executive is not literally “chang[ing] the text of duly enacted statutes,” as the Court believed President Clinton did when he cancelled spending items using his line item veto authority. This preclusion is also grounded in the historical background of the Take Care Clause, which was designed to address two specific problems—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 their four respective sub-categories. Part III surveys post-Clinton lower court decisions analyzing negative lawmaking delegations. This survey demonstrates that Clinton has had little to no effect on judicial review of lawmaking delegations to the Executive, even where the challenged delegation involved negating statutory text. Part IV analyzes negative lawmaking delegations given the constitutional text, structure, and history animating separation of powers doctrine. This

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17 **Clinton**, 524 U.S. at 446.
analysis shows that, whatever the overall state of modern nondelegation doctrine, negative lawmaking delegations are generally unconstitutional.

I. THE DOCTRINE GOVERNING JUDICIAL REVIEW OF LAWMAKING DELEGATIONS

There are currently two analytical frameworks for evaluating the constitutionality of lawmaking delegations to the Executive: nondelegation doctrine\(^{18}\) and a test based on bicameralism and presentment.\(^{19}\) As convenient shorthand, this Article refers to the latter test as the Article I, Section 7 test.

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.”\(^{20}\) The doctrine stems from the structural allocation of enumerated powers among three branches.\(^{21}\) Because under our tripartite system only Congress may exercise “legislative power,”\(^{22}\)

\(^{18}\) See Saikrishna B. Prakash, Deviant Executive Lawmaking, 67 GEO. WASH. L. REV. 1, 11–12 (1998). 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, ¶ 141, p. 244 (M. Mayer ed. 1957)). The nondelegation principle 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 (James Madison). 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, 341–359 (2000).

\(^{19}\) Prior to the Court’s decisions in Chadha and Clinton, both of which struck down lawmaking delegations based on bicameralism and presentment, nondelegation doctrine was the sole tool for judicial review of the constitutionality of lawmaking delegations. See INS v. Chadha, 462 U.S. 919 (1983); Clinton v. City of New York, 524 U.S. 417 (1998). The Court has also used nondelegation doctrine to evaluate delegations of lawmaking authority to the Judiciary. See Mirestrella v. United States, 488 U.S. 361, 371–72 (1989) (applying the “intelligible principle” test to a delegation of authority to create sentencing guidelines to the United States Sentencing Commission, an independent commission in the judicial branch).


\(^{21}\) 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.

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” constraining the exercise of discretion by another branch, thereby preventing such delegations from becoming the broader “legislative power” that is constitutionally allocated to Congress alone.

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

Despite calls by some Justices to abandon the nondelegation doctrine framework, Supreme Court precedent, which presumes that each 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; Field v. Clark, 143 U.S. 649, 692 (1892)).

23 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).

24 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).

25 Jack M. Beermann, Congressional Administration, 43 SAN DIEGO L. REV 61, 78–9 (2006). Professor 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).

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.\textsuperscript{27} So long as the degree of discretion conferred to the Executive falls “comfortably within the scope of discretion” permitted by Court precedent, there is no delegation of legislative power, even where the nature of the power might otherwise seem legislative.\textsuperscript{28}

Although the nondelegation doctrine purports to constrain the amount of discretion delegable by Congress, the Court has not explicitly invalidated any statute on nondelegation grounds\textsuperscript{29} since it invalidated two New Deal statutes in 1935.\textsuperscript{30} Instead, the Court now regularly strains to find intelligibility in statutes that appear to be standardless.\textsuperscript{31} Accordingly, modern decisions by the Court demonstrate that nondelegation doctrine is virtually dead as a matter of precedent.\textsuperscript{32} To the extent the doctrine remains

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).

\textsuperscript{27} 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.”).

\textsuperscript{28} Whitman, 531 U.S. at 472, 476 (“[T]he constitutional question is whether the statute has delegated legislative power to the agency. . . . [T]he text [of Art. I, § 1] permits no delegation of those powers.”) (citations omitted).

\textsuperscript{29} 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).


\textsuperscript{31} “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 only provide an ‘intelligible principle’ to guide decisionmaking, and it has steadfastly found intelligible principles where less discerning readers find gibberish.” Lawson, Delegation and Original Meaning, supra note 20, at 328–29 (citations and quotations omitted).

\textsuperscript{32} The delegation of positive lawmaking power is ubiquitous in the modern era, where 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, 488 U.S. at 372 (“[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.”).
viable, it operates as a constitutional avoidance canon, whereby the Court narrowly construes statutory delegations that otherwise appear so broad that they tread close to the constitutional line.

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 for dissatisfaction with the doctrine itself. Rather than refashion nondelegation doctrine, the Court instead looked to the Article I lawmaking process to fashion a new decisional rule limiting particular types of lawmaking delegations.

1. Origins

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

In analyzing a constitutional challenge to the House of Representative’s exercise of such a veto, the Court found that the House of Representatives took an action that 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.” The Court reasoned that

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33 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.”).

34 Mistretta, 488 U.S. at 373 n.7.

35 See Whitman v. Am. Trucking Assn’s, 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.”).


39 Chadha, 462 U.S. at 925.

40 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
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 enactment of a statute must comport with the procedures of Article I, Section 7, Congress could not override the delegated policy choice of the Attorney General without bicameralism and presentment.41

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, which had to comport with bicameralism and presentment, from the Attorney General’s exercise of discretion, which did not, even though it had the same effect on the legal rights, duties, and relations of persons as the one-house veto.42 Because an agent exercising delegated authority cannot exceed the power delegated in the statute, the statute delegating authority also serves as a constraint on that authority. Judicial review and the “power of Congress to modify or revoke the authority entirely” serve as additional checks.43

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. The Court merely laid the groundwork for the idea that 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 built upon the groundwork of Chadha when it evaluated the constitutionality of the Line Item Veto Act (“LIVA”)
in *Clinton v. City of New York*. The LIVA allowed the President to “cancel in whole” certain spending and tax-benefit provisions enacted into law pursuant to bicameralism and presentment. It thus allowed the President to cancel duly enacted statutory law, an exercise of delegated lawmaking discretion different in kind from the typical interstitial gap-filling that administrative rulemaking is thought to entail. The President could not exercise his cancellation authority without making three determinations, each of which seemed like an intelligible principle. He had to determine that each cancellation would “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.”

Line item cancellations under the Act rescinded items of discretionary budget authority and prevented direct spending and tax-benefit provisions “from having legal force or effect.”

In evaluating the President’s line item cancellations, the Court focused both formally and functionally on the effect upon statutory text. In so doing, Justice Stevens’ opinion for the Court broke with precedent and did not analyze the delegation of cancellation authority by looking for an intelligible principle. Instead, the Court found that the LIVA gave the President “the unilateral power to change the text of duly enacted statutes.”

The Court did distinguish the cancellation authority in the LIVA from the cancellation authority delegated to the Supreme Court in the supersession clause of the Rules Enabling Act, stating:

Congress expressly provided that laws inconsistent with the procedural

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45 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). There are, of course, two methods for a bill to become law pursuant to Article I, § 7: (1) pass both houses and be signed by the President after presentment; or (2) pass by a supermajority of both houses if the President returns the bill unsigned. U.S. CONST., art. I, § 7.


47 *Id.* (citing §§ 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 § 691(a)(3)(B)).

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

49 *Id.* at 447.

50 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 and courts of appeals. 28 U.S.C. § 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).
rules promulgated by 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. 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.

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 said that spending provisions have effect until the President
promulgates his own conflicting spending provisions, it would have equally
violated Article I, Section 7. But under the Court’s distinction, such a
hypothetical statute would have “expressly provided that laws inconsistent”
with budgetary proposals promulgated by the President 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” belies the Court’s distinction. When statutory text is superseded
by the promulgation of conflicting text by the Court, the statutory text is
“amended” without bicameralism and presentment.

More broadly, the Court’s reference to the lack of constitutional text
authorizing the President to enact, amend, or repeal statutes is, of course,
true, but it does little analytical work in a world where Congress may
delagate legislative-type authority and discretion to other branches. The
constitutional text is silent on delegation. Yet, with respect to the LIVA,

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51 The reference to “tariff statutes” refers to Field v. Clark, 143 U.S. 649 (1892), which
dealt with a statute that granted the President broad discretion to suspend statutory
provisions in the Tariff Act of 1890. The decision is addressed in further detail in Part
II.B.1 below.

52 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 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 (2000) (arguing that the supersession clause of
the Rules Enabling Act does not unconstitutionally violate the separation of powers).

53 Clinton, 524 U.S. at 445.

54 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. See infra Part III.B.

55 Clinton, 524 U.S. at 438.

56 But see Lawson, Delegation and Original Meaning, supra note 20, at 333 (arguing
that the Constitution “contain[s] a discernible, textually grounded nondelegation principle

the Court found “powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.” 57 The Court’s underlying premise is that, where 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.” 58 But where the delegated power is one to create law—that is, future rules of general applicability—the Court applies a different analysis; an intelligible principle is sufficient to uphold the delegation, and this principle may be quite vague indeed. 59

This apparent contradiction led some commentators to argue that the Court’s decision to strike down the LIVA implicitly rested on nondelegation grounds, which could not have been explicit because the intelligible principle requirement is such a weak constraint. 60 There are merits to this argument. If positive lawmaking delegations, such as rulemaking authority, survive nondelegation challenges with vacuous standards like “public interest, convenience, or necessity” or mandates to set “fair and equitable” prices, the three standards in the LIVA, which were equally as intelligible, should have been sufficient under nondelegation doctrine. Accordingly, striking down the LIVA on nondelegation grounds would have been analytically inconsistent with the Court’s general willingness to affirm broad positive delegations.

Despite its flaws, the lesson of Clinton is that, when a lawmaking delegation allows discretionary negation of statutory text without 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, The Selective Nondelegation Doctrine, supra note 44. 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 29.

57 Clinton, 524 U.S. at 439.
59 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 National Broadcasting Co. v. United States, 319 U.S. 190, 216–217 (1943); New York Central Securities Corp. v. United States, 287 U.S. 12, 24–25 (1932)).
60 See Rappaport, supra note 44, 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 18, at 340.
bicameralism and presentment, there is greater concern over the constitutionality of that delegation than when it merely allows discretionary creation of administrative rules. The next Part draws upon this insight to advance a new analytical framework for lawmaking delegations.

II. A NEW FRAMEWORK FOR ANALYZING LAWMAKING DELEGATIONS

The phrasing of the Article I, Section 7 test used in *Clinton* 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 negates the legal force or effect of the waived statutory text; so too do the Obama Administration’s ACA waivers. Evaluating the constitutionality of each presents the following question: Are waiver delegations more like the LIVA, or more like the generally constitutional delegation of rulemaking authority to administrative agencies? Two similarities are of worthy of note.

First, and most important, is the identity of the body exercising discretion—an executive agent. Creating a new rule of general applicability that is binding with the force of law involves the exercise of legislative-type discretion, as does cancelling such a rule, or granting a waiver which exempts some from that otherwise generally applicable rule. It is, however, the identity of the actor exercising discretion, not the nature of that discretion, which matters under modern separation of powers doctrine.61

The second key similarity between rulemaking delegations and the waiver power delegated in the ACA is the existence of statutory constraints. While Congress operates solely within the confines of the Constitution, Executive Branch lawmakers must also operate within the bounds of the statute delegating lawmaking authority.62 The existence of statutory standards enlists the aid of the Judiciary as policymaker.63

Consequently, all lawmaking delegations to the Executive Branch involve the exercise of discretion within the constraints of a statutory grant of delegated lawmaking authority, constraints that theoretically allow for

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61 Beermann, *supra* note 25, 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, 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.

62 Beermann, *supra* note 25, at 80 n.63; *see also Chadha*, 462 U.S. at 953 n.16.

63 *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.”).
judicial review. Governor Romney’s promise to issue an executive order directing 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. Such a waiver, 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”;\(^\text{64}\) it also requires thorough administrative process\(^\text{65}\) and that states meet detailed substantive criteria before a waiver can be granted.\(^\text{66}\)

Just like delegations of administrative rulemaking authority, the ACA waiver process delegates lawmaking power to an agent in the Executive Branch—the Secretary of Health and Human Services—and it cabins that agent’s discretion by requiring both burdensome administrative procedure and detailed substantive criteria as predicates to exercise of 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 bicameralism and presentment require that exercise of such a broad waiver power receive greater scrutiny by the Court than would promulgation of regulations necessary to flesh out the Act. At first blush, this makes little sense, since the Court, if faced with a separation of powers challenge to an exercise of ACA waiver authority by the Executive, would likely uphold it under nondelegation doctrine.\(^\text{67}\) That doctrine has at its foundation a pragmatic, functionalist view of the separation of powers.\(^\text{68}\) Such a functionalist view, however, rather than a

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\(^\text{65}\) Id. (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).

\(^\text{66}\) Patient Protection and Affordable Care Act § 1332(b) (requiring, among other things, that the State plan provide coverage at least as comprehensive as that required under the ACA).

\(^\text{67}\) See supra Part I.A.

\(^\text{68}\) See Manning, Separation of Powers, supra note 25, at 1950–58 (2011) (outlining functionalist principles and giving examples of functionalist reasoning in Supreme Court decisions).
formalist one, is less appropriate when Congress delegates the power to negate legislative bargains struck pursuant to the meticulous constitutional structure.69

The Court’s formalist view of lawmaking delegations has not had much effect in the lower courts.70 Nor has the Court chosen to expand its bicameralism and presentment jurisprudence since it struck down the LIVA. But the rationale underlying Clinton should limit lawmaking delegations like 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 statutory schemes, and recently such waivers have received attention by a few commentators.71

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 implicate greater separation of powers concerns because they allow fewer actors than that required by bicameralism and presentment to, in their unilateral discretion, undo the legislative bargains embodied in congressional statutes.

A. The Positive/Negative Dichotomy

There are two basic categories of lawmaking power delegable to the Executive by Congress. The first is a positive power. It involves the Executive’s delegated authority to create legal rules or standards, generally through administrative rulemaking.72 Rules promulgated pursuant to such delegated authority have the same functional characteristics as statutes. 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”73—could easily describe most statutes as well. 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

70 See infra Part III.
72 Prakash, supra note 18, at 4.
specifying the details to an administrative agency, or it may contain precise
text with specific rules.\textsuperscript{74}

This Article uses the term “lawmaking authority” or “lawmaking
degression” generally to describe delegations that grant legislative-type
discretion to the Executive—to wit, the power to amend or alter the legal
rights and duties of individuals or the processes through which
governmental power is exercised. 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.\textsuperscript{75} The idea that lawmaking involves both the
imposition of text that has legal force or effect and the modification or
rescission of pre-existing text that has legal force or effect is also evident in
administrative law.\textsuperscript{76} 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
modifying, cancelling, or otherwise negating it.

The second 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.\textsuperscript{77} It can take many forms, including the
power to determine when given statutory text will take effect\textsuperscript{78}; the power
to amend or modify statutory text\textsuperscript{79}; the power to waive the application of
statutes in specified instances\textsuperscript{80}; and the power to permanently cancel the

\textsuperscript{74} Beermann, \textit{supra} note 25, at 78. 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.” \textit{Id}.

\textsuperscript{75} INS v. Chadha, 462 U.S. 919, 954 (1983).

\textsuperscript{76} See 5 U.S.C. § 551(5) (defining “rule making” as the “agency process for
formulating, amending, or repealing a rule”).

\textsuperscript{77} Both positive and negative lawmaking power can be and have been delegated to the

\textsuperscript{78} Professor Lawson calls this contingent legislation. Lawson, \textit{Delegation, supra} note
20, at 363. For more on contingent legislation and Lawson’s framework, see \textit{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.

\textsuperscript{79} 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.

effect of statutory provisions.\textsuperscript{81}

For some reason, implied but never fully explained by the Court’s decision in \textit{Clinton}, the prospect of the Executive exercising its power to cancel or modify statutes is far more problematic than the now ubiquitous promulgation of positive law that adds to or fills the interstices of existing statutes.\textsuperscript{82} 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 rigorous explanation for the differing treatment of such delegations. The next subpart further elaborates upon the distinction between positive and negative lawmaking delegations, and it breaks down the negative lawmaking category into four different types of lawmaking power that are analytically distinct but somewhat overlapping. Each type of negative lawmaking delegation implicates separation of powers concerns in light of the constitutional text and structure.

\textbf{B. The Different Types of Negative Lawmaking Delegations}

The array of negative lawmaking delegations possible 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 undertaken by the Courts 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


\textsuperscript{82} The President may have independent constitutional authority under Article II to provide the necessary details to complete an otherwise incomplete legislative scheme. \textit{Compare} Jack Goldsmith & John F. Manning, \textit{The President's Completion Power}, 115 \textit{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.”), \textit{with} Robert J. Reinstein, \textit{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 a high level of abstraction, eschewing particularized instruction in favor of broad, goal-specifying legislation.
through a proposed framework categorizing such delegations into four broad types: contingent legislation, amendment, waiver, and cancellation. Breaking down negative lawmaking delegations into four sub-categories will prove useful for a number of reasons.

First, each sub-category of negative lawmaking power involves its own unique set of separation of powers concerns. For example, considering whether it is acceptable for Congress to delegate to the President the discretion to determine whether a situation of reciprocally unequal and unreasonable duties upon imported goods exists with another country, and then conditioning the President’s ability to negate the effect of statutory text granting duty-free status to those goods, is far different than giving the President unfettered ability to cancel line items in federal appropriations bills. The former is more easily characterized as law execution and implicates foreign trade, an area traditionally associated with the Executive. To the extent that each power is distinct and falls within a separately identifiable class of negative lawmaking power, it is analytically useful to separate them into their respective groups.

Second, the analysis of each may shed insight on whether the Court’s Article I, Section 7 test applies equally to all types of negative lawmaking delegations. If each sub-category and the separation of powers concerns regarding each is so distinct, then perhaps no single test can be articulated which will govern all types of negative lawmaking delegations.

Third, depending on the outcome of each analysis, certain sub-categories of negative lawmaking delegations may be more likely to be constitutional than others; perhaps certain delegations are inherently less problematic. Moreover, because each sub-category of negative lawmaking delegation is somewhat distinct from the others, the further refinement of the categories may prove helpful in reviewing the relevant history. If contingent legislation has a long and non-controversial pedigree in the historical tradition, this fact carries weight in the constitutional analysis. Conversely, if cancellation authority does not, then this fact too is worthy of note.

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.”

Although the *Clinton* Court did not fully address the issue of

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contingent legislation, nor has the Court ever done so, one prominent commentator defines such legislation as statutes where, rather than fixing the effective date of the statute to a calendar date, Congress decides the statute shall be effective (or rendered ineffective) upon a determination by the President or another actor that a certain contingency has occurred.\textsuperscript{84} 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.”\textsuperscript{85} Such delegation is constitutional unless determination of the conditions under which the statute is effective “passes beyond the implementational function of executive and judicial agents and instead becomes lawmaking.”\textsuperscript{86} The first Supreme Court case regarding this practice was decided in 1813.\textsuperscript{87} It 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.”\textsuperscript{88} The statutory prohibition requiring cargo forfeiture was switched off upon proclamation by the President, but the President had to flip the switch by determining the existence of an external fact, which was sufficient to keep the President’s exercise of discretion constitutional.\textsuperscript{89}

\textsuperscript{84} Lawson, Delegation, supra note 20, at 363–368.  
\textsuperscript{85} Id. at 364.  
\textsuperscript{86} 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.  
\textsuperscript{87} Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).  
\textsuperscript{88} Id. at 383.  
\textsuperscript{89} Lawson, Delegation, supra note 20, 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.
The second case involving delegation of contingent negative lawmaking power, which the Clinton Court distinguished when it invalidated the LIVA, was Field v. Clark, where the Court evaluated the Tariff Act of 1890. 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. It then provided for import duties to be levied during the presidential suspension of the exemptions.

Analyzing a separation of powers challenge to the Act, the Court held that delegating discretion as to whether a statute should be executed was not an impermissible delegation of legislative power, while delegating discretion to determine the content of the law would be. Relying heavily on the extensive historical practice of delegating such suspension authority to the President, the Court found that the delegation did not cross the line into unconstitutional lawmaking by the President.

The government’s argument in Clinton was that the LIVA was similar to the Tariff Act of 1890 and, thus, constitutional. The two statutes which contained the cancelled spending provisions—the Balanced Budget Act and the Taxpayer Relief Act—were passed subsequent to the LIVA, but should be read to include the discretionary authority of the LIVA in their terms. The President “cancelling” the spending items was therefore an exercise of discretionary authority granted in the spending bills, which is very similar to the discretionary suspension authority granted in the Tariff Act of 1890, rather than the amendment of duly enacted statutes using power delegated in a prior-enacted statute.

The Clinton Court found several ways to distinguish the LIVA from

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90 143 U.S. 649 (1892).
92 Id.
93 143 U.S. 649, 693–94 (1892). Of course, Congress now regularly delegates to the Executive the discretion to determine the content of laws; 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 226.
94 Id. at 683 (“If we find that congress 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 found that it “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.
the Tariff Act. First, the Tariff Act granted the President the suspension power contingent upon conditions not present when the Act was enacted.\footnote{Id. at 443 (the imposition of “reciprocally unequal and unreasonable” import duties by other countries.).} Because the LIVA required exercise of the cancellation authority within five days after the passage of the spending provisions, the conditions under which Congress passed the statute were the same. Second, the President had a “duty” to suspend the tariff exemptions upon his determination that the specified contingency had occurred, whereas the three presidential determinations required under the LIVA “did not qualify his discretion to cancel or not to cancel.”\footnote{Id. at 443–44.} Third, under the Tariff Act the President “execut[ed] the policy that Congress had embodied in the statute,” whereas under the LIVA he “reject[ed] the policy judgment made by Congress and rely[ed] on his own policy judgment.”\footnote{Id. at 444.}

The Court’s attempt to distinguish the LIVA from the Tariff Act of 1890 is unpersuasive. First, as a constitutional matter under Article I, Section 7, it is irrelevant that \textit{Field v. Clark} involved changed conditions after enactment, while the LIVA involved the same set of conditions that existed 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 little analytical work; 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.\footnote{It is also unclear just how “mandatory” the suspension duty was in the tariff statutes. \textit{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”).} 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—to wit, a policy of fiscal discretion and an understanding that the President was better equipped to make line-item determinations than a multi-member deliberative body such as Congress.\footnote{\textit{See id.} (“The majority also tries to distinguish [\textit{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.”).}

Congress’s decision not to exempt the subsequent spending bills

\footnote{\textit{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”).}
from the LIVA could easily be construed as a decision 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, rely on the contingent legislation framework.

Even assuming the contingent legislation framework is viable, however, 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. Irrespective of the predicate contingency, when the President prevents a statute from taking effect, or when he switches the statute off, as he did in with the 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

The Court held in *Chadha* that “amendment and repeal of statutes, no less than enactment, must conform with Art. I,” and it reiterated in *Clinton* that it is unconstitutional to give the President “the unilateral power to change the text of duly enacted statutes.” 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 it implied that such delegations may be constitutional. The delegation at issue allowed the FCC to “modify any requirement” made by a particular section of the Communications Act of 1934. Invoking its modification authority, the FCC eliminated a rate-filing requirement prescribed by the statute for over 40% of the industry. 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. The clear implication is

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101 *Id.*
103 *Clinton*, 524 U.S. at 447.
105 *MCI*, 512 U.S. at 231–32.
106 See *id.* 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.”).
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 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 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 exercise of waiver authority by the Executive Branch, it has focused on waivers in specific substantive areas of law, rather than on their general validity as a constitutional matter. 107

In any event, the term “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 it appears, or of other statutes. 108 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 negation 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. 109 External waiver provisions allow the Executive to suspend the requirements of other laws. 110 Both types of waiver provisions generally do four things. First, they identify which executive branch official may grant the waiver, e.g., the Secretary of Defense or the President. 111 Second, waiver provisions prescribe the substantive criteria

107 See supra note 71.
109 Id. at 264 n.34. The description of waiver provisions draws largely on Bowers, supra note 71, at 261–271.
110 E.g., Emergency Wartime Supplemental Appropriations Act for Fiscal Year 2003, Pub. L. No. 108–11, § 1503, 117 Stat. 559, 579 (authorizing President to “make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism”) (emphasis added).
111 Bowers, supra note 71, at 265.
which must be met before the waiver can be granted. 112 These criteria run the gamut from detailed and specific to open-ended and vague. 113 Third, the waiver provisions detail the procedural requirements for requesting and granting the waiver, to the extent there are any. 114 Finally, the provisions often specify the availability and scope of judicial review. 115

Executive exercise of waiver authority to negate the legal force or effect of statutory text potentially undermines whatever legislative compromise was necessary to pass 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 rescind permanently statutory provisions. 116 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 the historical tradition. Alternatively, as Justices Scalia and Breyer noted in their Clinton dissents, Congress could, at least in the context of appropriations, simply appropriate a discretionary lump sum. A presidential choice not to spend part of that sum would thus be functionally equivalent to the line item veto’s effect. Even though 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

112 E.g., Patient Protection and Affordable Care Act, 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).

113 Compare Patient Protection and Affordable Care Act § 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 where he determines it “necessary to ensure expeditious construction”).

114 E.g., Patient Protection and Affordable Care Act § 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).

115 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).

116 See Prakash, supra note 18, at 4 n.19.
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 the Article I, Section 7 test of Clinton. The survey shows that the test has had limited impact on courts, even where the delegation at issue was similar to that in Clinton, i.e., it allowed the negation of statutory text. Because of distinctions drawn in the Clinton opinion, subsequent courts analyzing negative lawmaking delegations 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 “amendment and repeal of statutes, no less than enactment, must conform with Art. I” \(^\text{117}\) is an uncontroversial proposition. But when the Executive has congressionally delegated authority to negate any statute that conflicts with a tangible objective, is he amending or partially repealing the conflicting statutes when he exercises his 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. \(^\text{118}\)

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

> 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. Any such decision by the Secretary shall be effective upon being published in the Federal Register. \(^\text{119}\)

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. \(^\text{120}\) The

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\(^{120}\) The Secretary also waived eighteen other laws “in their entirety, with respect to the
plaintiffs challenged the waiver authority under two theories: (1) a violation of Article I, Section 7 under *Clinton*; and (2) an impermissibly standardless delegation of legislative power.\(^{121}\)

The court rejected both claims. 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,’”\(^{122}\) while 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.”\(^{123}\) According to the *Defenders of Wildlife* court, each of the cancelled provisions in *Clinton* “no longer ha[d] any ‘legal force or effect’ under any circumstance,”\(^{124}\) 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 nondelegation doctrine 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 expeditious construction.’”\(^{125}\) Other district courts evaluating the REAL ID Act waivers adopted similar nondelegation reasoning.\(^{126}\) And in the only other case where the plaintiffs also alleged a violation of Article I, Section 7, the court adopted the *Defenders of Wildlife* court’s analysis in rejecting that argument.\(^{127}\)

The negative power delegated in the REAL ID Act was narrow in physical scope, applying only for the purpose of ensuring “expeditious

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\(^{121}\) *Defenders of Wildlife*, 527 F. Supp. 2d at 124–126.

\(^{122}\) Id. at 124 (quoting *Clinton v. City of New York*, 524 U.S. 417, 446–47 (1998)).

\(^{123}\) Id.

\(^{124}\) Id. (quoting *Clinton*, 524 U.S. at 437).

\(^{125}\) Id. at 127 (quoting REAL ID Act of 2005, Pub. L. No. 109-13, § 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)).


construction” of the border fence, construction of which was expressly limited to “areas of high illegal entry,”\footnote{Defenders of Wildlife, 527 F. Supp. 2d at 128 (citation omitted).} 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 cabined 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 \textit{Clinton}, the REAL ID Act specifically used the term “waiver.”\footnote{The plaintiffs in \textit{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).} 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,\footnote{For instance, the realm of national security is traditionally considered the Executive’s as part of his Commander-in-Chief power under Article II, Section 2, Clause 1. \textit{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 where the Executive traditionally has exercised independent authority. \textit{See}, e.g., \textit{Loving v. United States}, 517 U.S. 748, 772 (1996) (rejecting nondelegation challenge because 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.”).} the Court has consistently rejected separation of powers challenges to statutory provisions delegating waiver authority to the Executive.\footnote{\textit{See}, e.g., \textit{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.” 556 U.S. at 856–57 (citing \textit{United States v. Curtiss-Wright Exp. Corp.}, 299 U.S. 304, 322–324 (1936)). The Court, noting that the statute granted the President the authority to waive an exception}
further mitigate concern over the REAL ID Act waivers the border fence is related to national security and immigration.  

More broadly, however, waiver authority is functionally equivalent to the cancellation authority resoundingly struck down by the Clinton Court. Waiver authority allows the Executive to deny legal force or effect to statutory text, often with few limitations provided by Congress to cabin his discretion.  

Consider again the 50-state waiver of the ACA’s legal 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)).  

Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636–39 (1952) (Jackson, J. concurring) (discussing the role of the President’s independent powers vis-à-vis Congress’s lawmakership powers); Curtiss-Wright, 299 U.S. at 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 does not require as a basis for its exercise an act of Congress . . . .”). The Court has used Curtiss-Wright’s theory 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). Although I note the tendency of the Court to rely on independent executive authority with respect to certain powers, such as foreign affairs and national security, I express no opinion on the relative merits and demerits of such a position. There is an extensive debate over these issues in the literature. See, e.g., HAROLD HONGU 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).  

For instance, 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
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 within the same statute. It also has greater administrative process and more detailed criteria to limit executive discretion than the REAL ID waiver.

Despite these limitations, the ACA waiver power is far broader than the REAL ID waiver power, which applied only to a tangible national security project. State innovation waivers under the ACA undo much of the statutory scheme with respect to health insurance requirements for every state granted such a waiver. 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 ineffective large swaths of its text, all without the costly process of bicameralism and presentment.

An external waiver like in Defenders of Wildlife effectively amends the waived external statutes to contain an exception for the 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. 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.

The broad discretion afforded to the Executive in making the waiver decision means statutory challenges alleging an exercise of power

\[\text{Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program, 37 Colum. J.L. & Soc. Probs. 91, 98–99 (2003) (quoting 42 U.S.C. § 1315 (2000)). Though the text of the statute and legislative history provided little guidance on the types of experimental projects that were envisioned as appropriate for granting waiver requests, the waivers were broadly sought by and granted to states in ways that dramatically reformed state Medicaid programs. See id. at 99–101.}\]

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

\[\text{See Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, 73 Fed. Reg. 18,293 (Apr. 3, 2008) (waiving “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of” 37 federal laws). Tenth Amendment-based federalism challenges to these waivers have failed in the district courts. See, e.g., County of El Paso v. Chertoff, 2008 WL4372693 (W.D. Tex. 2008), at *9–10.}\]
exceeding the bounds of the statute’s grant usually fail. And unless Congress fails to provide any standard at all, the statute will have an intelligible principle sufficient to pass constitutional muster.

The imprecision of the Article I, Section 7 test of Clinton 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 changing the text of the negated laws when he exercised his waiver authority under the REAL ID Act?

2. A Note on Executive Enforcement Discretion

Further muddying the separation of powers 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. A full treatment of the complicated issues surrounding the Executive’s autonomy in execution and law interpretation, such as his authority to interpret the Constitution and the related issues of Executive refusal to follow and refusal to enforce laws he believes unconstitutional, is beyond the scope of this Article. At a

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136 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 133, at 98–101, 172.

137 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, 104 (1946)).

138 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).

minimum, however, the interplay of waiver delegations with Executive enforcement discretion and the 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. 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. The law grants immunity from any civil action in federal or state court to private telecommunications companies who provide “assistance to an element of the intelligence community.” The Attorney General triggers immunity by certifying the existence of one or more of five conditions. The plaintiffs challenged the constitutionality of the immunity provision on several grounds, including that it violated bicameralism and presentment because it allowed the Attorney General to unilaterally “effectively amend[] or negate[] existing law”. 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.”

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.” 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,” the exercise of discretion by the Attorney General did not constitute unconstitutional partial repeal or amendment of statutory text.

The Ninth Circuit is correct to point out that the “Attorney General’s certification implements the law as written”; when the Attorney General

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140 671 F.3d 881 (9th Cir. 2011).
141 Id. at 890.
143 They included 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.
144 Id. at 894.
145 Id.
146 Id.
147 Id.
certifies the existence of one or more of the statutory conditions, the immunity kicks in, and the FISA amendment is implemented as it was written. What the court fails to note is that this was equally so when the President cancelled line items under the LIVA. When the President cancelled the two spending items in the two statutes at issue in \textit{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—\textsuperscript{148} the President was also implementing the spending bills as written.

The more important analysis the Ninth Circuit undertook focused on the fact that “a discretionary decision by the Attorney General that invokes a defense or immunity hardly represents an impermissible statutory repeal.” \textsuperscript{149} Relying upon a law professors’ amicus brief,\textsuperscript{150} 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.” \textsuperscript{151} 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. The amicus brief identified numerous statutory examples of executive waiver “conditioned upon identification of certain circumstances.” \textsuperscript{152}

\textsuperscript{148} See Prakash, \textit{supra} note 18, 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, whereby 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. \textit{See infra} Part IV.A (criticizing this view as inconsistent with the constitutional text and structure governing lawmaking).


\textsuperscript{150} Brief of Amici Curiae Law Professors in Support of Appellees and Affirmance at 1, \textit{In re National Security Agency}, 2011 WL 6823154 (“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. \textit{Id}.

\textsuperscript{151} \textit{In re National Security 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) (2006), which allows the government to trigger immunity by certifying that a defendant is acting within the scope of federal employment).

Circuit, citing this portion of the amicus brief, considered this evidence that the “United States Code is dotted with statutes authorizing comparable executive authority.”

The fact that other statutory examples of a similar type of power exist does not establish that they are constitutional. 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 which the lawsuits were based—dealt with national security, his traditional power in that area bolsters the argument that delegation of this type of discretion to the Executive is constitutional.

Granting private parties an additional statutory defense based upon the exercise of discretion by the Executive is functionally similar to the executive exercise of 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. 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 from declining to enforce that requirement against them.

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 company would have been liable. As applied to those companies,

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153 In re National Security Agency, 671 F.3d at 895.
154 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.”).
156 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.
the waived laws no longer have legal force or effect.

Although this Article contends that 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 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. I,” the answer should be no. Two post-Clinton Federal Circuit decisions suggest otherwise.

1. The Vaccine Injury Table Puzzle

The first case involved a challenge to a provision within the National Childhood Vaccine Injury Act of 1986. The Act contained an “Initial Table” delineating allowable compensation to claimants for vaccine-related injuries or death. Congress also delegated to the Secretary of Health and Human Services the authority to “modify” the Initial table.

The Secretary, using the modification authority, created a “Modified Table”, deleting, among other things, various injuries related to the DPT vaccine. The Modified Table applied to all petitions for compensation filed

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158 Terran ex rel. Terran v. Sec’y of Health & Human Services, 195 F.3d 1302 (Fed. Cir. 1999).
160 Id. § 300aa-14(a).
161 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).
162 Terran, 195 F.3d at 1302.
on or after the effective date of the new table.\footnote{163} Plaintiffs, parents of a child who suffered injuries after receiving the DPT vaccine, filed for a claim under the Act 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 \textit{Clinton} and Article I, Section 7, as well as nondelegation doctrine.\footnote{164}

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.”\footnote{165} 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.\footnote{166}

The court also relied on the \textit{Clinton} Court’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.”\footnote{167} Quoting \textit{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 procedural rules by this Court.’”\footnote{168} Reasoning that the REA 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.”\footnote{169}

\footnote{163} § 300aa-14(c)(4). \footnote{164} \textit{Terran}, 195 F.3d at 1312. \footnote{165} \textit{Id.} \footnote{166} \textit{Id.} \footnote{167} \textit{Id.} \footnote{168} \textit{Id.} at 1313. \footnote{169} \textit{Id.} The court also swiftly disposed of the nondelegation challenge, finding a sufficiently intelligible principle to sustain the delegation. \textit{See Terran}, 195 F.3d at 1314–15 (finding that, among other things, the initial table served as an intelligible principle and
Dissenting, Judge Plager noted 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.” He argued 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. 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 then leaves the earlier enactment unrepealed; only in the rare case of total repeal with retroactivity is the change an ‘amendment.’”

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, which merely negates the legal force or effect of a statute upon the occurrence of an external condition (usually a specified date). 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 statute; nor did the Court think the line-item veto was like a sunset provision.

The Federal Circuit relied on the three factors the Clinton Court used to distinguish the Tariff Act upheld in Field v. Clark from the LIVA. First, the contingent negative power in the Vaccine Act was exercised under different conditions than when the legislation was enacted. 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. 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 intent 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. at 1318.

**Footnotes:**
170 Id. at 1318.  
171 Id. at 1319–20 (Plager, J., dissenting).  
172 Id.  
174 Terran, 195 F.3d at 1313.  
175 These included notice and comment, petition by any person, and consultation with experts. Id. at 1314.
policy.\textsuperscript{176} 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 his power to do so.\textsuperscript{177} Moreover, while the \textit{Clinton} Court did rely on the limited discretion the President had under the tariff statutes as compared to under the LIVA,\textsuperscript{178} the Secretary’s discretion was not nearly so cabined under the Vaccine Act.\textsuperscript{179} Finally, when the Secretary promulgated the Modified Table, he 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 override whatever policies were embodied in the Initial Table?\textsuperscript{180} This the Federal Circuit never explained.

As the Federal Circuit’s analysis here shows, courts, relying on the loose distinctions of \textit{Clinton}, can uphold amendment delegations, even though 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 agent. Reduced to its essence, this language from \textit{Clinton} allows negation of Article I, Section 7 bargains in a manner less rigorous than Article I, Section 7 requires.

\textsuperscript{176} \textit{Id.}
\textsuperscript{177} See 42 U.S.C. § 300aa-14 (c) (2006).
\textsuperscript{178} The \textit{Clinton} Court thought it was relevant that, under the tariff statutes, the negative power was mandatory upon finding certain conditions. \textit{See supra} note 132 and accompanying text.
\textsuperscript{179} \textit{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”).
\textsuperscript{180} 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. \textit{See infra} Part IV.C. In \textit{Terran}, whatever compromises were 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, he overrode the policy compromise that put DPT in the Initial Table, thereby replacing a congressional policy decision with his own.
2. The Dolphin Safe Tuna Puzzle

The second case involving amendment delegation evaluated the International Dolphin Conservation Program Act ("IDCPA"), which 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. The IDCPA delegated rulemaking authority to implement the Act to the Secretary of Commerce, but specified that certain requirements be included in the implementing regulations, including a requirement that backdown (finishing) of the purse seine method of fishing be completed thirty minutes before sundown. Nevertheless, the Secretary’s interim-final rule required completion thirty minutes after sundown.

The Defenders of Wildlife challenged the regulation as plainly contrary to the text of the IDCPA. The Federal Circuit sustained the regulation, 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.” The court upheld the change as a permissible alteration of a “fishing practice” under the IDCPA’s delegation of modification authority.

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.” Because “the supremacy of administrative over legislative authority is a concept foreign to our structure of government,” the panel opinion was allowing abrogation of statutory text without bicameralism and presentment. “A

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184 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).
186 Hogarth, 330 F.3d at 1363.
187 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.
188 Hogarth, 330 F.3d at 1367 n.5.
190 Id. (citing Clinton v. City of New York, 524 U.S. 417 (1998)).
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*.191 Thus, as with the LIVA, a provision of “Law” no longer had legal force or effect because of unilateral executive action.192

Judge Gajarsa’s dissent properly notes the tension that the panel majority’s 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,”193 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.”194 The regulation requiring backdown completion 30 minutes *after* sundown deprived the statutory text requiring completion 30 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 they were not. And in the dolphin case, this functional amendment replaced a congressionally enacted rule protecting dolphins from the purse seine method of tuna fishing with an executively promulgated rule that was less dolphin protective. Such policy override was at the heart of *Clinton*’s rationale for proscribing unilateral executive amendment of statutory text.

IV. CONSTITUTIONAL LIMITS ON NEGATIVE LAWMAKING DELEGATIONS

This Part, relying on constitutional text, structure, and history, analyzes negative lawmaking delegations and concludes that most such delegations are unconstitutional. 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.195

Second, the Take Care Clause, understood in its historical context, is an explicit textual source beyond the Vesting Clauses that constrains

191 *Id.* at 1335.
192 *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 of *Clinton*.”).
194 *Clinton*, 524 U.S. at 447.
195 See infra Part I.A (explaining nondelegation doctrine and its constitutional dimension); *Cf.* Manning, *Separation of Powers*, supra note 25, at 2017–21 (contending that the generality of the Vesting Clauses makes deriving any express constitutional rule from them problematic).
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 the exercise of discretion by something less than both houses of Congress and the President should not suffice to override a prior bargain made by the required 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—even where the modern administrative state assumes broad positive lawmaking delegations are constitutional.

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 argued nondelegation doctrine should be rejected entirely. Such commentators believe that delegation is not only appropriate, but also entirely consistent with the constitutional text and structure, and that therefore even negative lawmaking delegations are constitutional. Justice Breyer’s dissent in Clinton reflects a similar understanding. This Article rejects such a conclusion, but analyzes its underlying claims more fully in this subpart.

One prominent commentator, looking beyond the Vesting Clauses and relying heavily on the Necessary and Proper Clause, infers from the

\[\text{footnotes}\]

196 E.g., Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 COLUM. L. REV. 2097, 2165 (arguing that “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.”).

197 See, e.g., Prakash, supra note 18, at 4 (arguing that negative lawmaking delegations such as the LIVA, “like generic lawmaking delegations, can be constitutional”).

198 Clinton 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”).

199 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. 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.

200 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
constititional text and structure that lawmaking delegations of all types are constitutional.\footnote{See Prakash, supra note 18, at 11–16.} He also argues that the LIVA “itself delegated nothing.”\footnote{See id. at 7 n.30.} Under this view, the cancellation provision was only a “rule of construction” because the President could not use his cancellation authority until Congress passed a subsequent act; once Congress passed a statute subject to the LIVA, only then could the President use the LIVA to interpret the subsequently enacted statute as allowing cancellation of provisions.\footnote{Id.}\footnote{Id. at 47–48.} Functionally, then, the LIVA cancellation authority becomes part of subsequent spending bills unless Congress expressly exempts those bills from the cancellation authority. Exercising the cancellation authority in subsequent acts, when viewed in this manner, is merely “executing” the law—no different than implementing spending bills in other manners, such as by spending specified amounts on specific projects.\footnote{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 100 and accompanying text.}

It is correct to point out that Congress could exempt future bills from the ambit of the President’s LIVA cancellation authority,\footnote{Id. at 47–48.} but it is incorrect to conclude that the LIVA did not impermissibly shift “the balance of power toward the President.”\footnote{Id. at 48.} The President could easily veto bills that were exempt from the LIVA. Then Congress would be forced to pass the bill via a supermajority, a requirement ordinarily only provided for the extraordinary.\footnote{Cf. U.S. CONST., art. I, § 3, cl. 6 (vesting the “sole Power to try all Impeachments” in the Senate and mandating that “no Person shall be convicted without the Concurrence of two thirds of Members present”). 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.}

Beyond this objection, however, is a more fundamental one. The Take Care Clause establishes a constitutional default of law effectiveness; the President may not suspend or dispense with laws independently.\footnote{See infra Part IV.B.} Professor Prakash argues that the Take Care Clause serves no role, or at least that the role it serves is limited to situations in which Congress has not spoken about the issue, i.e., has not delegated a negative lawmaking
power. Where Congress has delegated such a power, then negative lawmaking delegations are no different than the positive lawmaking delegations so commonly upheld. The Take Care Clause is addressed more fully in Part IV.B below, but for now it is worth noting that there are strong reasons, primarily rooted in the history of the Take Care Clause and the problems it was meant to address, that counsel against dismissing it completely, even where Congress has exercised its Article I powers to delegate negative lawmaking authority to the Executive.

Another way to distinguish negative from positive lawmaking delegations under the Vesting Clauses is to identify one as “legislative” power and the other as “executive” power. Negative lawmaking involves an override of statutory text, which sounds remarkably like “legislative” power, while rulemaking power involves the adding on to or the filling in of imprecise or broad statutory text, which is somewhat more easily characterized as incidental to law execution. This distinction fails for at least two reasons.

First, as a functional matter, the distinction between enacting a rule that has the same legal force and effect as a statute and negating a statutory provision’s legal force and effect is tenuous. Exercises of both positive lawmaking power and negative lawmaking power by the Executive Branch 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. Both types of delegated

209Prakash, supra note 18, at 48–49.

210The 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, Separation of Powers, supra note 25, at 1989 (footnotes omitted).

Concern over the scope of the power conferred upon 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. This context does little to illuminate the role of the Clause with respect to 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, LAW & CONTEMP. PROBS., Spring 1976, at 116 (noting that the Necessary and Proper Clause’s meaning with regard “to the role of Congress and the amplification of executive power has been much neglected”). Nonetheless, there is a rich academic debate on the overall scope of the power conferred by the Necessary and Proper Clause. 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.
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,211 so too with the exercise of statutorily delegated negative lawmaking authority.

For example, if President Clinton had not made the three predicate determinations required by the LIVA, a court could have found he exceeded his delegated authority. Likewise, if Great Britain was not imposing reciprocally unequal and unreasonable tariff duties on the United States, perhaps because Great Britain’s tariff policy was the same as when the statute was enacted, then there is a plausible argument that judicial review would have been available to challenge the President’s exercise of his suspension authority under the Tariff Act analyzed in Field v. Clark.

Exercises of both positive and negative lawmaking power happen under some kind of congressionally mandated standard; that standard would provide the analytical anchor through which to challenge the exercise of the delegated power in court. Considered in this light, both types of delegations are functionally 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.212 Because of the generality of their language213 and the resulting difficulty in categorizing the nature of governmental power, the Vesting Clauses provide little clarity on the constitutionality of negative lawmaking delegations.214


211 INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); see also Beermann, supra note 25, at 99–106 (discussing the role of judicial review and the way in which statutes constrain agency lawmaking).

212 Cf. Lawson, Rise of the Administrative State, supra note 32, 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).

213 See Manning, Separation of Powers, supra note 25, at 1986 (contending that the generality of the Vesting Clauses means they may do little to resolve separation of powers issues).

214 Cf. Manning, Separation of Powers, supra note 25, at 1959 (“Bereft of any express
B. The Take Care Clause

This subpart briefly explores the history of the royal prerogatives of suspension and dispensation and how the Take Care Clause was, in part, designed to ensure such prerogatives were not exercised by the President. It then argues why negative lawmaking delegations should be suspect in light of this history.

1. History

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 which the crown disagreed.215 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.216

When constitutionmakers set to 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.”217 Accordingly, the Founders believed “that a statute may be suspended only by the lawmaking authority, and not by the Executive acting alone.”218 The Founders’ familiarity with the history of 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.219

The requirement of faithful execution, therefore, represents an

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216 Id.
217 Id. at 872.
218 Id. at 873.
219 Id. 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.

1 WILLIAM BLACKSTONE, COMMENTARIES, Ch. 2, at 185 (1765).
affirmative constitutional command prohibiting unilateral exercise of negative lawmaking power by the Executive. Cancellation delegations, like the one in the LIVA, allow the President to abrogate statutory text without congressional vote in seeming contradiction of the President’s duty of faithful law execution, as some contended when evaluating the LIVA’s constitutionality.

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. Even if Congress may at times delegate limited negative lawmaking power to the Executive, the Take Care Clause imposes a limitation on such delegations greater than the limitations imposed on positive lawmaking delegations by the text of the Vesting Clauses and the intelligible principle requirement of 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

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220 See, e.g., 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 Officers as Checks on Abuses of Executive Power, 63 B.U. L. REV. 59, 90 & n.151 (1983); 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); William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 GEO. WASH. L. REV. 474, 491 n.82 (1989); John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 CARDOZO L. REV. 375, 402 (1993). 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.”).

221 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, 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.”).
similarly to dispensation. The only difference is Congress’s grant of authority to do so—an important difference to be sure, but not a determinative one.\footnote{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).}

When Congress delegates cancellation authority, as it did in the LIVA, that delegation raises concerns under the Take Care Clause because it allows the President to suspend the legal force or effect of the statutory text he cancels. 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 are precatory until the President declines to exercise his cancellation authority during the time in which he is allowed to do so.\footnote{See supra pp. 73–75.} Congress’s legislative supremacy vis-à-vis the President is 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,\footnote{See supra note 4 and accompanying text.} interpreting the Act to grant the Executive the power to do so is in effect executive self-delegation of a dispensation power.\footnote{See Hamburger, supra note 4.} It would make little sense to embody the rejection of the suspension and dispensation prerogatives in the Constitution only to allow Congress to recreate them at will, subject only to repeal through bicameralism and presentment, or, since a presidential veto would likely issue as a matter of course, through passage by supermajority of 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 \textit{Chevron} deference to executive interpretations of statutes like the ACA.\footnote{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 \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 843–45 (1984).}

The Take Care Clause, which serves 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.227

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 viewed that way, whether that limitation should extend to Executive Branch officers below the President.228 Nevertheless, the Take Care Clause may help explain the Court’s different treatment of negative lawmaking delegations. Because of the functional equivalence that cancellation and waiver power have to suspension and dispensation, respectively, and 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 text and history.

C. Article I, Section 7

The benefits of bicameralism and presentment flow from the fact that it increases the costs of lawmaking. The result is greater deliberative process and greater protection from self-interested faction, and the fostering of the creative forces of friction and disagreement. Consequently, minorities have significant power to demand compromise as the cost of their assent to the legislative goals of the majority. Statutory text reflects these compromises. The Article I, Section 7 test articulated in Clinton, while honoring such compromises, focuses on textual form in the abstract. Rather than do so, it should focus on how executive discretion impacts the legal force or effect of statutory text, and thus the compromises necessary to enact that text as law.

1. Purposes

The lawmaking process mandated by the text of Article I, Section 7 serves a number of related and somewhat overlapping goals,229 all flowing from the fact that bicameralism and presentment require Congress to incur substantial costs in specifying statutory details.230 Article I, Section 7

227 Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)) (stating that 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.”).

228 See Prakash, supra note 18, at 49 & n.283.


230 Id. at 707 (noting how bicameralism and presentment “process increases the
increases the decision costs of legislating by “carefully divid[ing] statutemaking power among three institutions—the House, the Senate, and the President— which are elected at different times and answer to different constituencies.”231 Three benefits stem from this increase in decision costs. First, bicameralism and presentment protects against the influence of self-interested factions.232 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.”233 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.”234 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.235 Bicameralism and presentment thus captures “the central republican understanding that disagreement can be a creative force,”236 and thereby deliberately sacrifices lawmaking efficiency in order to protect liberty.237

Third, by giving minorities tremendous ability to block legislative decision costs of lawmaking”

232 See Manning, Textualism, supra note 229, 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 (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 (James Madison) (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 be otherwise be sufficient”).
233 Manning, Textualism, supra note 229, at 708–09.
234 Id. at 709.
237 Manning, Textualism, supra note 229, at 709.
change, bicameralism and presentment is immensely minority protective, promoting compromise in a lawmaking process that would otherwise allow determined majorities to run roughshod over minority dissenters. 238

When an executive agency exercises its delegated authority to negate statutory text—whether by waiving it with respect to certain parties or governmental processes, by amending it, or by cancelling it completely—“[t]he agency’s choices will 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 of statutory law. 239 Congress must go through the costly procedures of bicameralism and presentment to undo an effective amendment or repeal to the statutes it previously enacted—even though that effective amendment or repeal never had to undergo the Article I, Section 7 procedures for lawmaking. And, if the President chooses to back the delegated agent’s exercise of discretion rather than acquiesce to Congress’s attempt to override the delegated choice through legislation, Congress will presumably have to overcome a presidential veto in order 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 or repeal of statutes. 240 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,” and 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. 241 Indeed, “[t]he Original U.S. Constitution is . . . a ‘bundle of compromises.’” 242 Respecting those compromises requires a proper understanding of Clinton’s Article I, Section 7 test given the purposes of bicameralism and presentment.

238 See infra notes 255–258 and accompanying text.
239 Manning, Textualism, supra note 229, at 713–14.
240 See Manning, Separation of Powers, supra note 25, 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 constitutionmakers go to the trouble to spell out in exquisite detail the procedures for enacting legislation . . . if they viewed alternative procedures as equally acceptable?)”).
242 Id. & n.203 (quoting MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (1913)).
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 any actual alteration of the “statutory text” occurs when the Executive exercises negative lawmaking power. 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 and effect without bicameralism and presentment.

One commentator points out that an Article I, Section 7 test which focuses mechanically on textual form over legal force or effect would allow the same result as the LIVA without the “supposed Presentment Clause infirmity.” 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. 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.

While it is true that any lawmaking delegation could be viewed as eliding bicameralism and presentment, only negative lawmaking delegations allow the override of specific compromises in the negated statutory text, 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 that may be embodied in that text. This is so because the deprivation of legal force or effect may be complete, as it was in Clinton, or it may be incomplete. Amendment and cancellation delegations are complete deprivations, with one providing new text to take the cancelled text’s place and the other leaving nothing, while waiver and contingent legislation are incomplete.

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243 See Prakash, supra note 18, 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.”).

244 Id. at 38.

245 Id.

246 Id. n.229.
Waiver is incomplete because it only exempts certain entities, areas, or activities from the legal force or effect of otherwise generally applicable statutory text.

For example, the text of the laws waived by the Secretary of Homeland Security in *Defenders of Wildlife* continued to have legal force or effect with respect to 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 has promised to issue under the ACA.

Contingent legislation’s negative effect is also incomplete because it acts as a statutory on/off switch, allowing statutory text to take effect or be deprived of effect upon the determination by the Executive that certain specified contingencies have occurred. To the extent statutory text may once again have legal force or effect when the Executive changes his determination regarding the specified contingency, 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*. Although the statutory text remains formally intact, each negation potentially undermines a compromise made when that text was enacted as “Law,” even where the text is not cancelled in its entirety.

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. While statutory text is important because it represents the most precise and best evidence of the legislative compromise struck, the idea that text is somehow special in the abstract makes nonsense of the lawmaking process. Text is text; it only becomes “Law” through the process of Article I, Section 7.

The constitutional text would be of no legal significance had it not cleared the difficult procedural hurdles of ratification. When statutory text

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247 See supra Part II.B.1.
248 See supra note 89 and accompanying text.
is deprived of legal force or effect, the compromises embodied in that text are not implemented, and the legislators involved are denied the fruits of their bargain. That is the true concern of Article I, Section 7, and the reinvigoration of it as a constraint on negative lawmaking generally ensures 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 force change.

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 bargaining process that resulted in the necessary votes 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, Article I, Section 7 should preclude negative lawmaking delegations that are not deeply rooted in history and tradition. Assuming Justice Scalia is correct about the history and tradition behind presidential impoundment, then the title of the LIVA really did “fake out” the Supreme Court. Likewise, negative delegations related to embargoes, economic sanctions, or tariffs fall comfortably within the tradition of allowing more play in the structural constitutional joints with respect to foreign affairs-related powers. 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.

D. The Case for Limiting Negative Lawmaking Delegations

This subpart makes the case for limiting negative lawmaking delegations in light of the purposes of the Article I, Section 7 lawmaking process. It first argues that lawmaking through this process is inherently about compromise. 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. Applying the Article I, Section 7 framework in light of this understanding to some examples of negative
lawmaking delegations shows why they are unconstitutional and how they undermine the protective, compromise-inducing function of bicameralism and presentment.

1. 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.\(^{250}\) 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 on her own.\(^{251}\) When the statute speaks in precise, rule-like terms, it represents a policy choice made by a multi-member deliberative body that nevertheless speaks with a high degree of specificity. Such specific choices should be honored.

When a statute seeking to further a given purpose speaks in the abstract or at a high level of generality, that imprecision itself represents a compromise. Such imprecision, in the context of organic statutes, is treated as a delegation of interpretive authority to an agency to expound the details of a statute that has legislated a given policy goal.\(^{252}\) The compromise might have been born from any number of disagreements. 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. In some cases, the compromise reflects the understanding that Congress is not best situated to make the specific means choices—whether because of lack of time, will, expertise, and the like.\(^{253}\)

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,  

\(^{250}\) See, e.g., Manning, Separation of Powers, supra note 25, 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.”).

\(^{251}\) 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.”).

\(^{252}\) See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (describing reasons for textual ambiguity or generality and the implication for deference to agency interpretations of the statutes they are charged with administering).

\(^{253}\) See Manning, Separation of Powers, supra note 25, 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.”).
Section 7 lawmaking process. This argument lines up at some level with the textualist justification for respecting the level of generality at which statutory text speaks. But what it fails to account for is that compromise is inherent in the lawmaking process, and respecting statutory text respects the compromises that produced that text, even if that text may seem awkward, inefficient, or fit imperfectly with the statute’s stated purpose. Likewise, preventing executive negation of statutory text respects the compromises in the text that would have been negated.

2. Negative Lawmaking Delegations to the Executive Allow Unilateral Override of Legislative Compromise

Executive negation of statutory text denies to legislatures the specific bargains that were the products of hard-fought compromises.

254 See, e.g., 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, 85–86 (2004) (“When the old pre-Roosevelt Court struck down two delegations of power by Congress to the Executive, what the Court was saying was that the actions those statutes delegated gave power to the Executive 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.”)

255 Manning, Second-Generation Textualism, supra note 207, 1314 (describing the political science foundations 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).

256 See Manning, Separation of Powers, supra note 25 at 1978–79 (explaining that compromise is “inevitable” when it is “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)).

just as interpreting statutes atextually “denies to legislatures the choice of creating or withholding gap-filling authority.”\textsuperscript{258} 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.

An internal waiver upsets legislative compromise only in those provisions within the statute delegating the negative power. External waivers or cancellation delegations allow executive override of prior, current, and possibly even future compromises. Such delegations may be of limited concern when the power delegated is merely regarding when the negation will occur, such as with contingent legislation. But, when the power is with respect to when and where text in the United States Statutes at Large is deprived of legal force or effect, it gives the Executive a freestanding negative lawmaking power that resembles the long-rejected suspension and dispensation prerogatives. When an executive agent overrides statutory compromises in pursuit of a concrete goal, particularly where 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 where there is a long tradition of allowing such delegations. Such tradition might be sufficient to defend the negative lawmaking delegation in the REAL ID Act, as well as in the Tariff Act of 1890.\textsuperscript{259}

Consider what such a position means when expanded more broadly to encompass all negative lawmaking delegations. 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 those 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


\textsuperscript{259} See Field v. Clark, 143 U.S. 649, 683 (1892).
Secretary, Congress avoided political accountability for waiving important environmental and other statutes. 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, and the important environmental and other interests protected by the waived statutes on the other hand.260

The Article I, Section 7 lawmaking process ensures that political minorities have the ability to block legislation and thereby obtain compromise from the majority they otherwise would not be able to obtain.261 The minority-protective features built into the Article I, Section 7 lawmaking process—that is, by the horizontal blending of the lawmaking function—also protect small-state residents because each state has equal representation in the Senate.262 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.263

260 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 71, 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). 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.

261 See, e.g., Manning, Separation of Powers, supra note 25, at 2013 n.373 (“To assign a political minority the power to block change is also to give it the power to extract compromise from the majority.”); Manning, Second-Generation Textualism, supra note 207, 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”).


263 See supra note 135 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
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 had not only a voice in whether federal laws that protect them should yield to the goal of securing the border, but also whether their own local laws should yield as well. 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 LIVA cancellation authority. Allowing the President to cancel statutory text in this manner vitiates a key purpose of Article I, Section 7 because the cancellation is done outside the Article I, Section 7 bargaining process. The President may veto the bundle of compromises represented in the entire spending bill, but he cannot pick and choose which ones to negate; he gets the whole loaf or nothing at all.

Instead of vetoing entire bills, however, President Clinton cancelled discretionary spending line items in those bills, and the affected groups had to resort to the courts to protect their interests, even though they had already achieved legislative success in Congress by having funds appropriated for them. Obtaining those appropriations may have been the product of compromise 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 elides 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 apparent intent—to the extent one finds legislative history useful for divining intent—was to codify the table in the statutory text rather than allow agency promulgation of the Initial Table because of concerns over agency delay. 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 because it was the

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264 The affected groups were the City of New York, two hospital associations, one hospital, two unions representing healthcare employees, and certain owners of food refiners and processors. *Clinton v. City of New York*, 524 U.S. 417, 422–425 (1998).

technocratic judgment of Congress that best available medical science had identified a given injury as linked to a given vaccine, but potentially the price of 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 is, in effect, a promise to partially repeal the ACA. Effective repeal should not be delegable. Nor should the power to negate specific statutory compromises be granted with open-ended, vacuous criteria, such as 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 helps preserve the constitutional structure and ensure 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.

3. Potential Critique

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, however, was designed to “impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable.” This inefficiency was a deliberate choice meant to protect liberty by diffusing power.

Nevertheless, some commentators argue that a stricter enforcement of bicameralism and presentment, though it might limit the extent to which Congress delegates negative lawmaking power, would also encourage Congress to simply bypass this limitation by forgoing specificity in its statutes and instead relying on broader, more open-ended positive delegations. Under the weak nondelegation doctrine, broader positive delegations would allow agencies to make rules that have legal force or

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267 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)).

268 See, e.g., Prakash, *supra* note 18, 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).
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 modern administrative state, not an attack on Article I, Section 7 or the purposes that underlie it. 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 Judicial branches vis-à-vis Congress, perhaps more than is constitutionally appropriate. A reinvigoration of bicameralism and presentment, while no panacea to the problem of broad lawmaking delegations generally, nonetheless would encourage Congress to have greater accountability for the legislation it enacts. If a statute is bad policy, politically unpopular, or has proven unworkable in practice, Congress should repeal it or fix it, consistent with Article I, Section 7. Congress should not rely on the Executive to do the fixing, thus ducking its constitutional obligation and forgoing political accountability. Nor should the Executive be able to override compromise forged in the crucible of the bicameral process.

CONCLUSION

The rise of the modern administrative state has been facilitated by delegation to the Executive of Congress’s lawmaking function, even though nondelegation doctrine has been a bedrock principle of American 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 that 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 inherently more dangerous. This Article has shown that negative lawmaking delegations can be further broken down into contingent legislation, amendment, waiver, and cancellation. Regardless of their specific characteristics, all such delegations are unconstitutional when they undermine the minority-protective, compromise-inducing functions of Article I, Section 7. They are also unconstitutional when they functionally resemble the long-rejected royal prerogatives of suspension and dispensation, prerogatives denied the President by the Take Care Clause. Nonetheless, 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 mechanically
apply the verbal formulation of the Clinton Article I, Section 7 test, thereby eliding bicameralism and presentment and improperly narrowing the holding of Clinton, courts should instead focus on limiting the use of delegated negative lawmaking power. Doing so would help further the purposes underlying the Article I, Section 7 lawmaking process. Statutory text, once enacted, should only be negatable through the same process that created it.

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