Michigan Law Review

Volume 114 | Issue 2

2015

Delegating Tax

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DELEGATING TAX

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Congress delegates extensive and growing lawmaking authority to federal administrative agencies in areas other than taxation, but tightly limits the scope of Internal Revenue Service (IRS) and Treasury regulatory discretion in the tax area, specifically not permitting these agencies to select or adjust tax rates. This Article questions why tax policy does and should differ from other policy areas in this respect, noting some of the potential policy benefits of delegation. Greater delegation of tax lawmaking authority would allow administrative agencies to apply their expertise to fiscal policy and afford timely adjustment to changing economic circumstances. Furthermore, delegation of the tax reform process to an independent commission or agency offers the prospect of Congress committing itself to rational reform and long-run budget sustainability in a way that is more apt to succeed than piecemeal legislative efforts. The Article concludes with an analysis of the constitutionality of tax delegation, noting the applicability of recent Supreme Court decisions confirming Congress's broad discretion to delegate rulemaking authority to federal agencies, and arguing that tax policy is of a kind with other federal policies.

"Congressional delegation of broad lawmaking power to administrative agencies has defined the modern regulatory state."

—David J. Barron & Todd D. Rakoff[1]

"Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes . . . ."

—Justice William O. Douglas[2]

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1. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 Colum. L. Rev. 265, 265 (2013).

2. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974).

Introduction

The broad delegation of lawmaking power to administrative agencies is a well-accepted feature of modern U.S. policymaking.[3] Administrative agencies with vast lawmaking powers now oversee virtually every sector of the U.S. economy. The National Highway and Traffic Safety Administration (NHTSA) regulates not only the automobiles that Americans drive, but also the roads on which those cars are driven.[4] Congress has given the Food and Drug Administration (FDA) broad lawmaking power with respect to the food Americans eat and the drugs Americans take, both legal and illegal.[5] Imbued with extraordinary powers, the federal Environmental Protection Agency regulates the air and water.[6] The legislative branch has even delegated important aspects of the healthcare system to a regulatory body. For example, under the Patient Protection and Affordable Care Act (ACA), Congress recently empowered the Secretary of Health and Human Services, with the assistance of a new Independent Payment Advisory Board (IPAB), to make recommendations for cutting Medicare expenditures that will automatically become law unless a congressional supermajority rejects the proposals.[7] One could continue at great length, listing examples to illustrate the point that Congress regularly delegates enormous amounts of lawmaking power,[8] from control over the money supply (power delegated to the Federal

3. Barron & Rakoff, *supra* note 1, at 266 (classifying the "delegation of broad lawmaking power to administrative agencies" as a "now-foundational governmental practice"); F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 Wm. & Mary L. Rev. 163, 170 (2013) ("Congress frequently delegates its power and regularly confers on administrative agencies the power to develop policy through rulemaking."); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 Am. U. L. Rev. 323, 329 (1987) (noting the "massive transfer" of policymaking to federal administrative agencies).

4. *See* 23 U.S.C. § 402 (2012); Highway Safety Act of 1970, Pub. L. No. 91-605, 84 Stat. 1739 (codified as amended at 23 U.S.C. §§ 401–412).

5. *See* 21 U.S.C. § 371 (2012); Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399f).

6. *See* 33 U.S.C. §§ 1251–1388 (2012); 42 U.S.C. §§ 7401–7515 (2012); Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

7. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3403(a), 124 Stat. 119, 499–500 (2010) (codified at 42 U.S.C. § 1395kkk(e)); Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 Geo. L.J. 519, 569–71 (2013).

8. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 497 (1989) (noting that the "funneling [of] enormous power into agencies" through regulatory statutes has "radically reconfigured . . . government authority"); Hessick & Hessick, *supra* note 3, at 170.

Reserve Board)[9] to the process for closing military bases after the end of the Cold War (which Congress entrusted to the Base Closure and Realignment Commission).[10]

But what about tax law? In the same way that Congress has delegated lawmaking power in these other areas, has it done so with tax? The answer is yes—and no. Congress has obviously delegated a great deal of tax lawmaking authority to the Treasury Department and the Internal Revenue Service (IRS). This is evidenced by, if nothing else, the thousands of pages of Treasury regulations, the numerous revenue rulings and other forms of written guidance issued by the IRS, and the countless discretionary enforcement decisions made by the IRS every year—settling some tax cases, litigating others.[11] Congress has also delegated some tax decisionmaking authority to the U.S. Tax Court, which interprets tax laws and regulations when taxpayers bring disputes over IRS determinations of tax deficiencies.[12]

These examples of agency-based tax lawmaking, however, differ from the sort of broad policymaking discretion that Congress regularly delegates to agencies in other areas of law. For example, Congress rarely enacts tax statutes that set out broad tax policy principles and authorize the Treasury Department or some other regulatory agency to fill in the details. There is no tax equivalent, for example, to the language in the Clean Air Act empowering (and requiring) the EPA administrator to set emissions standards for "any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[13] Moreover, there is at least some scholarly support for our claim that Congress generally delegates less broadly in the tax area than in other areas. In their study of all federal legislation between 1947 and 1992, Professors Epstein and O'Halloran find that tax legislation granted less policy and implementation discretion to executive agencies than did laws passed by Congress in any of fifty-three other substantive federal policy areas.[14]

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9. 12 U.S.C. § 248 (2012); *id.* §§ 411, 414.

10. 10 U.S.C. § 2687 (2012); Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808.

11. 1 Nat'l Taxpayer Advocate, 2012 Annual Report to Congress 6 (2012), http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Volume-1.pdf (estimating that the Internal Revenue Code contains four million words); 1 Nat'l Taxpayer Advocate, 2008 Annual Report to Congress 4 (2008), http://www.irs.gov/pub/tas/08_tas_arc_msp_1.pdf (noting that the number of words in the Code as of 2005 was estimated at 2.1 million, that tax regulations stand approximately a foot tall and that "[t]he CCH Standard Federal Tax Reporter . . . comprises 25 volumes . . . tak[ing] up nine feet of shelf space").

12. I.R.C. § 7441 (2012).

13. 42 U.S.C. § 7521(a)(1) (2012). The closest tax law analogs to a broad delegation of lawmaking authority would be IRC § 482, which addresses the allocation of income among related parties, and § 1502, which addresses consolidated tax returns by related parties. We discuss these examples further below.

14. David Epstein &SC Sharyn O'Halloran, Delegating Powers 196–203 tbl.8.2 (1999). This study measures delegation by identifying the fraction of legislative provisions with significant authority delegated to executive agencies, and also identifying the extent of legislated constraints on agency discretion. The difference between the two is the net delegation

This Article suggests that Congress should consider more extensively delegating authority in the tax area—or, at the very least, that Congress should think more expansively about what types of tax lawmaking power it is prepared to delegate. In this Article, as in most scholarship on congressional delegation, it is said that Congress "delegates" lawmaking authority when it enacts a statute that grants lawmaking power to an administrative agency or some other nonlegislative body. In other words, agencies exercise delegated authority *postenactment*. It is routine, of course, for Congress to rely heavily on its own staff, the Congressional Budget Office, the Council of Economic Advisers, and other important federal policy agencies (including Treasury and the IRS) for help conceiving and drafting legislation in the first instance. Those inputs are doubtless important to the lawmaking process; however, that sort of pre-enactment assistance is not what we, and not what others who write about regulatory agencies, mean by delegation. Thus, a move in the direction of greater delegation by Congress in a particular field of law implies that Congress has granted greater decisionmaking authority to parties whose actions will take place after the delegating legislation is enacted.

Another point worth emphasizing here is that greater tax delegation does not necessarily mean granting the Treasury Department greater authority. As discussed further below, what we have in mind is taking regulatory authority that Congress currently implements (in the minutiae) through the tax code and delegating more of that authority to *some* expert, and in some instances a politically independent, regulatory body.

Moreover, just because we seek to encourage consideration of greater delegation in the tax area does not mean that, in our view, Congress should replace the Internal Revenue Code (IRC) with a general standard, a single sentence that reads as follows: "The Department of Treasury shall promulgate all tax rules necessary to raise revenue sufficient to balance the federal budget and shall do so in a manner that is fair and efficient." Even if such an extreme delegation were desirable and constitutional (more on the latter question below), it is not a realistic possibility. Nevertheless, a number of considerably less extreme tax-delegation alternatives are within the realm of possibility but have never been used, or, so far as we are aware, seriously considered. This Article identifies three distinct types of tax delegation that have never before been used but are worthy of consideration, each for a

ratio. The authors use a number of different methods for identifying types or categories of legislation, including methods developed by other scholars. For example, they use the categories developed in David R. Mayhew, Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990 (1991) as well as the alternative categorization developed in Keith T. Poole & Howard Rosenthal, Workshop, *A Spatial Model for Legislative Roll Call Analysis*, 29 Am. J. Pol. Sci. 357 (1985). Under all of the various approaches to classifying federal statutes, tax law placed at or near the bottom in terms of the amount of discretion that has been delegated to agency decisionmaking. The difference was especially stark for laws setting tax rates, which entailed the smallest amount of discretion-granting of any type of federal legislation by far.

somewhat different constellation of reasons and each subject to a different set of objections and qualifications.

First, when Congress wants to enact a tax subsidy for a particular type of investment or activity, it should consider doing so in the form of a general tax standard rather than in the form of a set of ornately detailed tax rules. The standard would provide the Treasury Department with a relatively general statement of the policy goals to pursue, empowering Treasury to issue rules to meet those goals and to change those rules as necessary to continue to meet them. The rationale for such a shift would be the standard relative-expertise or comparative-advantage story often used to justify broad delegations of regulatory authority in nontax contexts. As explained below, Congress already does some of this, but it could do more.

Second, and more controversially, Congress should consider delegating some control over income tax rates, which would be unprecedented in U.S. history. Such authority could be granted to the Treasury Department, or, perhaps more realistically, to some other, arguably more independent, agency such as the Federal Reserve or a newly created independent authority. Giving the Federal Reserve some control over income tax rates would allow it to coordinate fiscal policy with existing monetary policy in the hope of dampening business cycles. Moreover, the Fed or some other independent agency might be able to precommit to an optimal policy plan over time, which Congress notoriously struggles to do.

Third, in designing the tax system efficiently and fairly to promote long-run fiscal sustainability—a goal that has eluded Congress for decades—the legislative body should consider delegating the tax reform component of a long-run deficit-closure effort to an independent commission similar to the Base Realignment and Closure model.[15] The rationale for this move has to do with collective action problems that inhibit the legislative branch from taking action, even in the face of strong evidence that such action is social welfare-maximizing.

In addition, it should be noted that Congress could delegate in any or all of these ways while still retaining a considerable degree of control over the one aspect of tax lawmaking that many regard as quintessentially legislative in character: namely, distributional consequences. Lawmakers and voters may consider it important for Congress to determine as much as possible the ultimate distribution of the federal tax burden across taxpayers. In that case, Congress could attach a requirement to any or all of these new forms of tax delegation that any policymaking output by the agency must be accompanied by a particular distribution of the tax burden designated in advance by, and remaining fully within the control of, Congress. We discuss this possibility further below.

Whether the sorts of broader tax delegations that this Article envisions are constitutional is obviously a separate but related question, and one that has been largely unexamined. On one hand, in areas other than tax, most

15. Indeed, a colleague suggested that such a law might be called the *Tax* Base Realignment and *Loophole* Closure Act.

scholars have concluded that few, if any, limits constrain Congress's power to delegate to administrative agencies. Indeed, much has been written in recent decades about the demise of the so-called nondelegation doctrine as a matter of constitutional law.[16] This is no surprise, given that the Supreme Court has not invalidated a federal law as an impermissible delegation of congressional authority since 1935.[17] In addition, in the intervening eighty years, the Supreme Court has repeatedly held that the congressional power to delegate lawmaking authority is extremely broad, so long as the statutory delegation includes an "intelligible principle" by which a court can evaluate the agency's exercise of its discretion.[18] Moreover, the Court has stated its view in prior tax nondelegation cases that when it comes to questions of delegation, there is no difference between tax law and other areas of law.[19]

On the other hand, the Court has also made statements in opinions issued over the years, including the second quote at the start of this Article, suggesting that it regards tax as special. And the current Court—or important members of it—has made clear that tax legislation is different from other types of legislation, and possibly holds similar views concerning tax delegation.[20] This Article argues that, when it comes to nondelegation and

16. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002) (asserting that although the Constitution bars the delegation of legislative power, that bar is not implicated with a statutory grant of authority to the executive branch or other agents because such agents are exercising executive, not legislative, powers); *cf.* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 Cornell L. Rev. 452 (2002) (arguing that courts should rely on the "hard look" doctrine of administrative law to address the delegation issue, rather than the nondelegation doctrine under constitutional law); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315–16 (2000) (arguing that the nondelegation doctrine has been "relocated" to certain interpretative canons of construction).

17. The most famous case was *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), in which the Court struck down the National Industrial Recovery Act on the ground, among others, that the Act's statutory standards were so open-ended as to impose no constraint whatsoever on agency action.

18. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution . . . permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.' " (alteration in original) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (citations omitted)).

19. *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.' " (alterations in original) (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

20. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) ("[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. . . . By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.").

related constitutional doctrines, the Court should not impose special, stricter limits on deliberate tax delegation undertaken by Congress. Tax laws, at least in terms of delegation authority, should be treated the same as other laws.

The Article proceeds as follows. Part I surveys the general arguments for and against general delegation of congressional authority to administrative agencies. Part II describes several forms of existing tax delegation, pointing out the relatively narrow role reserved for Treasury and the IRS compared with the regulatory role given to other federal agencies. This Part also considers some arguments for why tax lawmaking differs from other types of lawmaking. Part III then works through the three general types of expanded tax delegation mentioned above, which, again, go beyond what has previously been done in the tax area but which have precedents in other areas. Part IV addresses the constitutionality of these sorts of expanded tax delegation.

I. Arguments for (and Against) Broad Delegation

One of the most remarked-on developments in American law, ever, is the rise of the regulatory state.[21] For many commentators, the delegation of broad lawmaking authority and the increased role of regulatory agencies were both inevitable and desirable developments given the increasing complexity of modern economies.[22] One of the traditional rationales for broad delegation is relative expertise, meaning that regulatory agencies have greater knowledge and focus in particular areas and specific issues than Congress does—or realistically can.[23] An extreme example is the National Science Foundation, to which Congress delegates the task of selecting which researchers will receive federal grants to do basic research.[24] The NSF, staffed and assisted by preeminent experts in many fields of scientific inquiry,[25] has

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21. *See supra* notes 4, 11. For surveys of the earlier political science literature on federal delegation, see Epstein & O'Halloran, *supra* note 14; Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. Econ. Literature 401 (2003).

22. For representative justifications of broad congressional delegation of lawmaking power to agencies, and thus of the regulatory state in general, see, for example, Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law (1997) [hereinafter Mashaw, Greed]; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81 (1985) [hereinafter Mashaw, *Prodelegation*]; Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775 (1999); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511 (1992).

23. *See* Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air (1981); James M. Landis, The Administrative Process (1938); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969); Mashaw, *Prodelegation*, *supra* note 22.

24. *See About the National Science Foundation*, Nat'l Sci. Found., http://www.nsf.gov/about/ (last visited May 12, 2015).

25. *See NSF Organizational List*, Nat'l Sci. Found., http://www.nsf.gov/staff/orglist.jsp (last visited May 12, 2015).

greater knowledge about which scientific projects are likely to yield important results than any congressional committee or committee staff could realistically acquire. Furthermore, the highly effective peer-review process used by the NSF to judge grant applications would be difficult politically for Congress to use.[26] Thus Congress's role is limited primarily to setting funding levels and articulating the most general policy agenda,[27] leaving the discretion to determine which projects get funded to NSF experts.[28] The same delegate-to-the-experts principle applies on a grander scale to any major regulatory legislation, such as the Food and Drug Act[29] or the Clean Air Act.[30]

Although members of Congress and congressional staff can become relatively well versed in general policy goals, the details of implementation simply have to be delegated. Of course, individual legislators and their staffs are capable of developing important expertise on any number of policy questions. But it is unrealistic to expect legislators to maintain detailed knowledge of how to best implement policy in the whole range of areas affected by federal law. In theory, Congress could create a committee for every major policy issue, staffed with experts who would spend of all their waking hours working out detailed legislative solutions to every regulatory issue. In such a world, the committees would fill in details rather than the agencies. But that division of labor is generally considered inefficient in every policymaking area other than tax. However capable their staffs, members of Congress would be inappropriate and overtaxed supervisors if they needed to work through all of the issues apt to arise. To the contrary, the more efficient place to insert such detailed, specialized, and constantly updated expertise in the lawmaking process is with an agency postenactment.

The congressional staff that drafted the broad delegations in the Clean Air Act,[31] for example, probably knew at the time of enactment a great deal about the need to regulate air quality generally and the hazards of pollution to human well-being and the environment. But they would not have been expected to keep up to date on all of the subsequent scientific advances and accumulating knowledge concerning pollutants that threaten public health and what should be done about them. That is why the statute, for example,

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26. *See How We Work*, Nat'l Sci. Found., http://www.nsf.gov/about/how.jsp (last visited May 12, 2015).

27. The enacting statute provided the general directive to, among other things, "develop and encourage the pursuit of a national policy for the promotion of basic research and education in the sciences . . . initiate and support basic scientific research . . . and to appraise the impact of research upon industrial development and upon the general welfare." National Science Foundation Act of 1950, Pub. L. No. 81-507, § 3(a), 64 Stat. 149, 149.

28. *See id.* Congress has recently taken a more active role in overseeing the funding decisions of the NSF. *See, e.g.*, Paul Basken, *NSF-Backed Scientists Raise Alarm over Deepening Congressional Inquiry*, Chron. Higher Educ. (Oct. 16, 2014), http://chronicle.com/article/NSF-Backed-Scientists-Raise/149407.

29. 21 U.S.C. § 393 (2012).

30. 42 U.S.C. § 7601 (2012).

31. *Id.*

empowers the EPA to determine which pollutants might "reasonably be anticipated to endanger public health or welfare" in the motor vehicle context.[32] Of course, no one really disagrees that Congress needs to delegate the detail work. The harder question is whether Congress should delegate the more substantive policy choices, and this Article argues that perhaps it should—or that the case for delegating choices is as strong with tax as elsewhere.

Inherent differences between the process of issuing regulations and the process of passing statutes provides another common justification for broad congressional delegations of lawmaking power.[33] Even when the legislative process is working well, it may take longer for Congress to pass a law than it takes an agency to make a rule. As a result, agencies can react more quickly to new information than Congress can, including recent scientific findings and changed circumstances. In addition, the nature of the legislative process inhibits action.[34] This can be true, for example, when there is consensus that some action should be taken with respect to a particular problem, but there is deep division—say, between Republicans and Democrats, or within either party—on what precisely, if anything, should be done. In such a case, a broad and somewhat vague delegation of authority by Congress can permit legislators to take credit for successful policies, while reserving the ability to duck responsibility for the final outcome.[35]

One real-world example of this phenomenon, already mentioned, was the closing of military bases in the late 1980s and early 1990s.[36] Observers agreed at the time that the rapid decline of the Soviet military threat necessitated a radical reduction of the size of the U.S. military.[37] Moreover, there was a consensus specifically that the number of military bases was

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32. *Id.* § 7521(a)(1).

33. *See, e.g.*, Epstein & O'Halloran, *supra* note 14, at 14–33 (reviewing the extensive political science literature on congressional delegation).

34. *See* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1444–48 (2008).

35. For this method to advance lawmaker interests, voters must credit them for having addressed a problem, but not hold them fully responsible for the distress caused by an agency or commission in exercising its broad discretion. Mashaw, *Prodelegation*, *supra* note 22, at 89.

36. This section draws heavily from Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 Legis. Stud. Q. 393 (1995); *see also* Epstein & O'Halloran, *supra* note 14, at 1–4.

37. *See, e.g.*, Stephen M. Goldfein, Nat'l War Coll., The Base Realignment and Closure Commission: A Successful Strategy to Overcome Political Gridlock 1 (1994), http://www.dtic.mil/dtic/tr/fulltext/u2/a440641.pdf ("The collapse of communism and disintegration of the Soviet Union left a diminished threat and precipitated a reduction in the size of the US armed forces. The military base structure designed to accommodate a much larger Cold War force could no longer be maintained, especially in a much constrained budget environment. There seemed to be a general consensus across the nation that base consolidation and closure could cut fat, without affecting the muscle of the armed forces.").

untenable.[38] The difficulty, however, was that any member of Congress who voted for a measure that closed a base in his or her own jurisdiction risked political suicide. This presented a major collective action problem: a change that clearly enhanced welfare, and that needed to be made, could not be directly enacted given individual lawmakers' incentives. Congress could, however, vote to solve the problem indirectly, and it did. In 1988 Congress passed the Base Closure and Realignment Act, which created an independent commission with legal authority to determine which bases to close, subject to Congress's right to overturn the proposal through a joint resolution.[39] Under the Act, the head of each military service first submitted a list of recommended base closures to the Secretary of Defense, who could add to or subtract from that list.[40] The secretary then submitted the revised list to the commission, which in turn had the power to add or subtract bases.[41] At that point, the final list of recommended base closures went to the President, who could either approve the list (with no changes) or veto it, starting the whole process over.[42] If the President approved the list, the Secretary of Defense then had the authority to begin implementing the closures on the list, unless Congress halted the process within forty-five days of presidential approval by issuing a joint resolution.[43]

Congress has adopted similar mechanisms in other areas. The ACA, for example, delegates enormous Medicare cost-cutting authority to the Secretary of Health and Human Services and the newly created IPAB.[44] Under the ACA, the IPAB, consisting of fifteen experts named by the President and confirmed by the Senate, has the authority to recommend policy changes to Congress to cut Medicare costs. These recommendations can include "ideas on coordinating care, getting rid of waste in the system, incentivizing best practices, and prioritizing primary care."[45] What is interesting about these recommendations is the way in which they create legislative pressure to cut Medicare costs. First, Congress can accept IPAB's recommendations and enact them into law. Or, alternatively, "[i]f Congress rejects the recommendations, and Medicare spending exceeds specific targets, Congress must either

38. Mayer, *supra* note 36, at 396 ("[B]y 1988 it was clear to members that the military base structure bordered on the preposterous, and it was increasingly difficult to argue that every base was essential to national security.").

39. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 201–02, 102 Stat. 2623, 2627–28 (1988) (codified as amended at 10 U.S.C. § 2687 (2012)).

40. Mayer, *supra* note 36, at 393.

41. *Id.*

42. *Id.* at 394.

43. *Id.*

44. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3403, 124 Stat. 119, 489–507 (2011); *see also* Timothy Stoltzfus Jost, *The Independent Payment Advisory Board*, 363 New Eng. J. Med. 103, 103–04 (2010); Nancy-Ann DeParle, *The Facts About the Independent Payment Advisory Board*, White House Blog (Apr. 20, 2011, 5:46 PM), http://www.whitehouse.gov/blog/2011/04/20/facts-about-independent-payment-advisory-board.

45. DeParle, *supra* note 44.

enact policies that achieve equivalent savings or let the Secretary of Health and Human Services follow IPAB's recommendations."[46]

The parallels between this delegation and the base-closure delegation are obvious. At the most general level, Congress created the IPAB to address the need to cut healthcare costs, a need that virtually everyone agrees is essential to the long-term fiscal well-being of the country; likewise, Congress created the base closure commission to address the need to cut military expenditures, about which, again, there was general agreement.[47] Moreover, the collective action problem that inhibited Congress from making military spending cuts through the normal legislative process (no legislator wanting to vote for a law that kills a military base in his or her state) has analogs in the healthcare context. For example, although it was universally agreed that cutting Medicare costs would enhance overall public welfare, individual legislators resisted competitive bidding that could undermine their ability to secure contracts for medical device manufacturers or pharmaceutical companies in their own districts.[48]

The arguments *against* broad delegation of powers are also well known, concentrating largely on issues of legitimacy and accountability.[49] Granting agencies broad authority raises the possibility that they will enact regulations inconsistent with congressional intent. Furthermore, even if the regulations adopted by an agency reflect what Congress intended, the mere procedural fact that an agency rather than Congress is directly responsible for the final product may worsen the public perception of its legitimacy.[50] An elected Congress is endowed with the power and responsibility to make national laws, and answers to voters if it performs poorly in doing so.[51] Congress generally holds open hearings and votes, permitting voters to understand their representatives' contributions to legislative outcomes, and to a certain degree, why legislators voted the way they did. It may be more difficult for voters to hold Congress accountable for the actions of an agency, even if

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46. *Id.*

47. *See* sources cited *supra* notes 39–40, 44.

48. Harold Pollack, *The Real Problem with the Independent Payment Advisory Board*, Am. Prospect (Apr. 23, 2011), http://prospect.org/article/real-problem-independent-payment-advisory-board. For an in-depth discussion of the mechanics of the board, see Bagley, *supra* note 7, at 569–71. The analogy is not perfect, of course.

49. *See, e.g.*, Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 93 (2d ed. 1979) (asserting that "the principle of broad and unguided delegation of power" is hostile to law itself); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 13–19 (1993) (arguing that delegation undermines democracy by allowing Congress and the President to avoid hard choices, jeopardizes liberty by bypassing the legislative process, and expands the federal government's regulatory jurisdiction too far); Mashaw, *Prodelegation*, *supra* note 22, at 82–85 (discussing the arguments put forth by critics of broad delegation, including that such delegation is undemocratic and reduces public welfare); Schuck, *supra* note 22, at 777–83, (criticizing standard arguments against broad delegation).

50. *See* Mayer, *supra* note 36, at 407.

51. *See* Schoenbrod, *supra* note 49, at 14.

Congress created the agency while fully anticipating its future behavior.[52] As a result, delegation arguably reduces the democratic nature of the system, undermining the legitimacy of its actions.

These are valid concerns, although they have often been overstated by the leading critics of broad delegation to agencies.[53] First, if an agency acts in a way that substantially diverges from the wishes of the legislature, Congress can pass another statute to restrict or remove the agency's authority. Numerous examples from the era of deregulation support this claim. To take one famous example, when Congress determined that the regulation of the airline industry was not working well, thereby producing excessively high fares, overcapacity, and inefficient nonprice competition (among other problems) it responded with a statute that "deregulated" the industry and abolished the Civil Aeronautics Board, the agency that was responsible for price and quantity regulation.[54] Similar stories can be told about deregulation of other industries, including telecommunications, energy, and finance. Whether these deregulatory efforts have, in retrospect, been net benefits to society is often debated. But that is beside the current point, which is this: when Congress decides that an agency has gone too far, Congress is capable of reining that agency in, one way or another.

This is not a complete response, of course, since one of the reasons for delegation is the inability of Congress to act, and the political coalition that passed the delegating statute in the first place may be difficult or impossible to put together to pass constraining or clarifying legislation. This is especially a concern in a world of congressional gridlock, marked by record-low enactment of laws.[55] Nevertheless, Congress's power to pass new laws does serve as a constraint on agency discretion, at least in cases involving obvious agency overreach.

Second, public opinion can be channeled to affect agency action. In the case of executive agencies, the President's policy preferences also constrain agency discretion, and the electorate in turn renders judgment over the President's management of the executive branch. Indeed, some argue that being accountable to the President, who is more attuned to the preferences of the majority of national voters than is any member of Congress, is more democratic than being accountable to Congress.[56] In addition, the notice and

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52. *See id.* at 14, 89–90.

53. *See generally* Schuck, *supra* note 22, at 784–93.

54. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. *See generally* Stephen Breyer, Regulation and Its Reform 197–221, 317–40 (1982) (describing economics and politics of airline regulation and deregulation).

55. Congress's lack of productivity in recent years is well documented. *See* Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, Pew Res. Center (Dec. 29, 2014), http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/.

56. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 59 (1995). One important example of presidential involvement in the regulatory process is through the Office of Information and Regulatory Affairs (OIRA). Under Executive Order 12866, the President directs agencies that are promulgating rules to consider various

comment process that agencies use in crafting regulations and that partly justifies their authority allows interested parties to draw public and congressional attention to instances of potential regulatory overreach. Media coverage also ensures accountability for high-profile issues. If an agency does something egregiously bad, voters find out, and Congress can be animated to act.

Third, judicial review constrains agency discretion. Courts are often called on to determine whether an agency has exceeded its legislative authority. Even if Congress were to convey broadly worded authority to an agency, the application of that authority in particular situations can be challenged in court by the affected parties.

Finally, there are agency norms that significantly influence the actions of professional staff and even political appointees. Regulatory agencies are staffed by professionals whose reputations and long-run effectiveness depend on high levels of competence, as well as a certain degree of political independence.

There is a related criticism that broad congressional delegation of lawmaking authority to agencies permits Congress to avoid accountability by shifting blame to agencies if some voters are unhappy.[57] Indeed, this Article notes that the ability to shift blame may make it possible for Congress to enact some beneficial reforms that political dynamics would otherwise prevent. Critics argue that the federal government should not be able to wield its power to interfere with economic activity, or with individual liberty, unless a certain number of legislators representing disparate parts of the country can publicly agree that doing so makes sense.[58] Exactly how Congress ought to express its policy preferences is potentially a separate question. There are some who argue that having Congress enact more general standards, with the specifics of implementation left to agencies, actually enhances Congress's accountability.[59] Professor Sunstein notes that, as a general matter, "[t]here is no evidence that agencies operating pursuant to open-ended authority do better, on any dimension, than agencies operating pursuant to statutes that sharply limit their discretion; nothing appears to link agency performance with statutory clarity."[60] More specifically, there is no evidence that agencies do better at maximizing social welfare when they are given a very specific statute than when they are given general guidance.[61]

alternatives to those rules and to perform a cost–benefit analysis of the proposed rules. Office of Mgmt. & Budget, *Office of Information and Regulatory Affairs (OIRA) Q&A's*, The White House (Nov. 2009), https://www.whitehouse.gov/omb/OIRA_QsandAs.

57. *See* Schoenbrod, *supra* note 49.

58. *See id.* at 15–16, 110.

59. *See* Mashaw, *Prodelegation*, *supra* note 22, at 95–99; Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 Mich. L. Rev. 2073, 2080–82 (2005); Schuck, *supra* note 22, at 781–83.

60. Sunstein, *supra* note 16, at 324; *see also* Mashaw, Greed, *supra* note 22, at 142–45.

61. Stewart, *supra* note 3, at 328 & n.28 (noting the "speculative and doubtful character of the gains to be achieved" in invalidating broad statutory delegations); *see also* Mashaw, *Prodelegation*, *supra* note 22, at 91–93.

While there is no shortage of normative arguments for and against broad delegation of authority by Congress to agencies, the point that should be emphasized is that Congress has—in virtually every policy domain other than tax—determined that the balance of the arguments weighs in favor of broad delegation. But not with tax. The modern practice of engaging in broad delegation takes an atypical form in tax legislation, where the IRS is limited it its ability to modify tax rules and not permitted to modify tax rates.[62] From a normative standpoint it is not at all clear why tax should be exceptional in this regard. The arguments in favor of delegation in other legal spheres, that Congress has apparently found to be compelling, would seem to apply with equal or greater force to tax law as to other laws.

But is tax different? Is there something special about the nature of tax law or the tax lawmaking process that favors a different approach, one that leaves many more of the details to congressional committees than is the case in most other areas of lawmaking? Before addressing this question it is helpful to review what tax functions Congress already delegates and how they differ from the sort of broad delegation it might adopt.

II. Current Tax Delegation

It is commonly understood that U.S. tax policy is, to a remarkable (and unusual) extent, determined by Congress not only in its broad outlines but also in its details. Congress enacts the statutes that together compose the IRC. The IRC defines the tax base and sets tax rates, which together determine each taxpayer's liability.[63] The IRC contains lengthy and detailed definitions of most of the key terms in the federal tax laws, usually leaving only a modest amount of substance to be decided by the Treasury Department and the IRS,[64] although there are exceptions, some noted below. Thus, although Congress often delegates authority to the Treasury Department, in the vast majority of cases the regulations and other guidance produced by Treasury serve the function of interpreting or filling in the gaps of an already very detailed IRC.[65] More specifically, most Treasury guidance is directed at defining the assets subject to taxation as well as handling issues of timing, attribution, and characterization, such as whether an item of income is capital or ordinary, and the extent to which expenses are deductible.[66] Congress rarely enacts very general tax provisions, with the expectation that Treasury, or some other regulatory agency, will fill in the details.

62. For instance, see Part II for the discussion of I.R.C. § 7805(a) and related issues.

63. I.R.C. §§ 1–59 (2012).

64. *See, e.g.*, *id.* § 2.

65. In a 2006 study, the Tax Section of the New York State Bar Association noted that, in addition to the general authority given to Treasury under IRC § 7805, discussed immediately below, "there are more than 550 individual provisions of the Code that provide grants of authority to promulgate regulations." N.Y. State Bar Ass'n Tax Section, Report on Legislative Grants of Regulatory Authority 2–3 (2006) [hereinafter NYSBA Report], http://old.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1121Report.pdf.

66. *See, e.g.*, Treas. Reg. §§ 1.1(h)-1, 1.162-5 (2014).

Congress has enacted a provision that provides some general regulatory authority to the Treasury Department. IRC § 7805(a) provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code]."[67] In addition, several sections of the IRC explicitly call on the secretary to provide regulations for interpretation and enforcement of those code sections. An example of this in § 25A, which provides education tax credits.[68] Congress also imposes limits on Treasury's rulemaking authority, including restrictions on any retroactive impact of new regulations[69] and limits on the duration of temporary regulations.[70] Courts grant Treasury regulations broad authority. For example, in 2011 the Supreme Court in *Mayo Foundation for Medical Education and Research v. United States* held that tax regulations are eligible for *Chevron* deference, making them enforceable unless determined to be arbitrary, capricious, or manifestly contrary to the statute to which they apply.[71]

In addition to its role in crafting regulations, together with the rest of the Treasury Department, the IRS in its role as tax enforcer issues guidance to taxpayers and to its own offices. The IRS issues revenue rulings and revenue procedures, which are public, and which offer its interpretation of tax situations.[72] Revenue rulings and revenue procedures have historically not been considered to have the force of law or even the authority of Treasury regulations, nor can taxpayers necessarily rely on them, although courts tend to be sympathetic to taxpayers whose tax payments are deemed deficient by the IRS, despite following the guidance of revenue rulings or revenue procedures.[73] And there are many less formal, though also public, ways in which the IRS transmits its interpretation of tax situations, including private rulings, determination letters, and technical advice memoranda.

Typical congressional tax delegation amounts to fleshing out the details—filling in the missing definitions—of provisions whose basic policy design was already put into place by statute. Treasury regulations under IRC

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67. I.R.C. § 7805(a).

68. *Id.* § 25A.

69. *Id.* § 7805(b).

70. *Id.* § 7805(e).

71. *See* 562 U.S. 44, 53–58 (2011).

72. The IRS publishes its revenue rulings, revenue procedures, and other statements of tax interpretation in the Internal Revenue Bulletin. *See Internal Revenue Bulletins*, IRS, http://apps.irs.gov/app/picklist/list/internalRevenueBulletins.html (last updated May 7, 2015).

73. The Tax Court has long considered revenue rulings, procedures, and notices to be mere statements of the IRS Commissioner's litigation position. *See, e.g.*, Lunsford v. Comm'r, 117 T.C. 159, 174 n.6 (2001); McLaulin v. Comm'r, 115 T.C. 255, 263 (2000), *cited in* Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 504 n.209 (2013). As Professor Hickman argues, however, there is increasingly good reason to regard revenue rulings, procedures, notices and other Internal Revenue Bulletin (IRB) guidance as having "the force of law" that would entitle such materials to eligibility for *Chevron* deference. *See* Hickman, *supra*, at 504–06 (noting the increasingly substantive and less procedural nature of IRB guidance and the assignment of greater legal significance to these documents by the IRS and Treasury).

§ 162 and § 263 offer examples. IRC § 162 permits taxpayers to claim deductions for "ordinary and necessary" business expenses, but IRS § 263(a) denies taxpayers immediate tax deductions for "any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."[74] The idea behind IRC § 263(a), which is quite consistent with the rest of the IRC, is that the costs of permanent improvements should be capitalized into the value of a property, much like the treatment of new investments. This means that taxpayers are not entitled to immediate deductions for improvement expenses, though the capitalization contributes to the asset's basis for the purpose of taking future depreciation deductions and in calculating gains or losses when assets are ultimately sold. These two code sections leave largely unanswered the knotty question of exactly how one distinguishes expenses for ordinary repairs, which are immediately deductible under IRC § 162, from expenses for permanent improvement, which are not. It is this sort of tax lawmaking authority—over fine-tuning the income tax base—that Congress is willing to delegate to Treasury.

Treasury uses its regulatory authority. For example, in 1960 Treasury issued regulation 1.162-4, which explained that "[t]he cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life but keep it in an ordinarily efficient operating condition may be deducted as an expense."[75] In addition, it issued regulation 1.263(a)-1(b), which adds that taxpayers may not deduct "amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use."[76] For many years, courts used these regulations to determine which expenses are immediately deductible repairs and which must be capitalized as improvements, to be deducted later through depreciation.[77] This case law, however, proved confusing and inconsistent. In 2001 the IRS issued Revenue Ruling 2001-4, which identified different scenarios of expenses in the particular context of airframe repair and overhaul, distinguishing types of expenditures that the IRS considered to be deductible repairs from those it considered to be nondeductible improvements.[78] And in 2014, following earlier temporary regulations, Treasury provided even more specific and comprehensive guidance in the form of additional regulations

74. I.R.C. §§ 162, 263(a).

75. Treas. Reg. § 1.162-4 (1960) (amended 2014).

76. Treas. Reg. § 1.263(a)-1(b) (1960) (current version at Treas. Reg. § 1.263(a)-3 (2014)).

77. *See, e.g.*, Moss v. Comm'r, 831 F.2d 833 (9th Cir. 1987); United States v. Wehrli, 400 F.2d 686, 687–89 (10th Cir. 1968); Ingram Indus., Inc. v. Comm'r, 80 T.C.M. (CCH) 532, 537–41 (2000); Plainfield-Union Water Co. v. Comm'r, 39 T.C. 333, 337–41 (1962).

78. Rev. Rul. 2001-4, 2001-1 C.B. 295.

whose purpose was to further clarify the meaning of the relevant code sections, and which had the effect of further restricting the ability of taxpayers to claim immediate deductions.[79]

These Treasury regulations and revenue rulings, which reflect both the issue's complexity and the Treasury's changing understanding of conditions affecting U.S. taxpayers, evolved without any accompanying legislative changes to the relevant portions of the underlying IRC § 162 and § 263. While Congress conceivably could have legislated the same regulations on the same time schedule, it is just as unrealistic to expect it to do so for tax law as it would be for Congress to legislate regulations in every other area of national policy that it currently delegates to federal agencies.

This tax lawmaking pattern is very common: Congress enacts a code section intended to help define the meaning of taxable income (much of the IRC is devoted to defining taxable income), followed by a series of judicial interpretations of that code section. Next, Treasury regulations and other published guidance interpret the same code section (sometimes adopting, sometimes refining, sometimes rejecting the interpretive glosses provided by the courts), occasionally followed by further statutory refinements, and the process repeats. The same history describes many sections in the Code. What is rare, however, is for Congress to enact a tax provision that sets forth the general tax policy goal to be achieved and that expressly authorizes the Treasury Department to fill in the details with regulations. Moreover, on the few occasions when Congress has done so, the tax policy goal it articulated involved definition of the base and minimization of tax avoidance behavior.

Two unusual examples of the latter phenomenon are § 482 and § 1502. Section 482 concerns the allocation of income between related parties, an issue primarily in international transactions when corporate taxpayers typically have incentives to arrange the nature and pricing of intercompany deals in order to claim that income is earned in low-tax rather than high-tax jurisdictions. Section 482, exactly two sentences long, empowers the Secretary of the Treasury to allocate income and deductions "in order to prevent evasion of taxes or clearly to reflect . . . income."[80] The Treasury Department, on behalf of the secretary, has issued voluminous regulations under § 482, thereby assuming the entire responsibility for its definition and enforcement.[81]

A second example of unusually broad tax delegation involves the rules governing consolidated income tax returns of related corporations. Under IRC § 1501, all members of an affiliated group of corporations may elect to file a consolidated return.[82] An "affiliated group" includes corporations that

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79. *See* Treas. Reg. § 1.263(a)-3 (2014).

80. I.R.C. § 482 (2012).

81. *See* International Income Taxation 102, 1236–420 (Robert J. Peroni et al. eds., 2013-2014 ed. 2013) (in which the (unabridged) text of IRC § 482 fills less than one-quarter of a page on page 102, whereas the § 482 Treasury regulations occupy 184 pages).

82. I.R.C. § 1501.

are related through a common parent corporation that owns at least 80 percent (in terms of voting power and value) of the subsidiary's stock.[83] One of the primary tax benefits of filing a consolidated return for a group of related corporations is the ability to share net operating losses within the group.[84] This benefits the taxpayer by permitting losses incurred by related corporations to be deducted from profits earned by other related corporations in calculating the taxable income of the group; in the absence of consolidation the losses would not be deductible so the group would have greater tax liabilities. Given the complexity of corporate structures and the intricacy of corporate tax laws in general, a comprehensive regime of consolidated return tax laws would require an extraordinary amount of detail. In a single sentence in § 1502, Congress delegated the job of fleshing out those rules almost entirely to the Treasury Department:

> The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.[85]

After the enactment of this section, Treasury did in fact respond with one of the longest and most intricate sets of regulations in the entire Code of Federal Regulations.[86]

In both of these examples, it can be argued that Congress in effect acknowledged the limits of rule-based tax lawmaking. That is, Congress understood that it would be inefficient to attempt to adopt a detailed set of related-party transactional rules and consolidated-return rules by statute. For example, the conditions under which a particular set of rules would be optimal could quickly change, especially given the strong motivation of sophisticated taxpayers to exploit loopholes in tax statutes. Indeed, the general grant of regulatory authority found in IRC § 7805 can be understood in the same light: because Congress cannot anticipate every way in which clever taxpayers will aggressively interpret even the most detailed tax provisions, Treasury must be given broad and general enforcement authority—the power to adopt regulations that themselves close statutory loopholes.[87] This

83. *Id.* § 1504.

84. Martin J. McMahon, Jr., *Understanding Consolidated Returns*, 12 Fla. Tax Rev. 125, 129–34 (2012).

85. I.R.C. § 1502 (2012).

86. *See* Treas. Reg. §§ 1.1502-0 to -100 (2014). In a 2006 report on different types of grants of regulatory authority by Congress to Treasury over tax matters, the NYSBA Tax Section listed § 1502 as the sole example of a tax delegation "to implement concepts that are expressed only in general terms." NYSBA Report, *supra* note 65, at 2.

87. The challenge in applying IRC § 7805 lies in distinguishing potential regulations that implement congressional intent as expressed in the Code from potential regulations that would effectively supplant congressionally enacted tax laws, and this can be a difficult line to walk. In several cases the courts have invalidated IRS regulations issued under the IRS's general

is precisely the argument that justifies the existence of a general anti-avoidance rule (which many countries, including the United States, have codified[88]) that the IRS and the courts can apply when interpreting the detailed tax rules.[89]

These types of broad delegation are consistent with the arguments this Article puts forth, and there are advantages of doing more of the same. For example, in other areas of tax law in which compliance issues are especially difficult to foresee at the statutory drafting stage, Congress might enact general grants of authority to Treasury to issue the rules and regulations necessary to ensure clear reflection of income and to prevent avoidance. What Congress has been reluctant to do, however, is to enact statutes that grant to Treasury, or to some other agency, broad authority to make tax policy beyond enforcement or base definition. In particular, the next Part suggests three different dimensions of tax policymaking that Congress might delegate, all of which go well beyond existing tax law delegation.

III. Expanding Tax Delegation

Some types of tax lawmaking power Congress just does not delegate. For example, Congress has never given the Treasury Department the power to set marginal tax rates or levels of tax credits. Instead, as mentioned, Treasury regulations concern appropriate definitions of taxable income, deductions, expenditures that are eligible for tax credits, and similar features of taxpayer situations.[90] In addition, Congress, so far as we are aware, has never delegated any sort of income tax lawmaking power to a body other than the Treasury Department—for example, to the Federal Reserve, or to an independent commission.[91] This Part sketches a picture of what expanded delegation might look like—expanded in terms of the types of tax lawmaking power delegated and the bodies to whom the power is given. These examples, though largely without direct precedent in the tax area, offer potential solutions to major problems and therefore deserve serious consideration. They also pose potential concerns, which again raise the question whether tax is different from other areas of law. We return to those questions below.

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regulatory authority, as in, for example, *Iglesias v. United States*, 848 F.2d 362 (2d Cir. 1988), a case that concerns an IRS regulation pertaining to I.R.C. § 861.

88. I.R.C. § 7701(o); Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. Rev. 83, 84 (2001).

89. This rule—known as the economic substance doctrine—long existed as a matter of tax common law in the United States, and has recently been codified. *See* I.R.C. § 7701(o); *see also* Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 Va. Tax Rev. 339, 365–68 (2005) (explaining the need for general anti-avoidance standard to prevent abuse of rule-based tax system); David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860, 861 (1999) (explaining how a purely rule-based approach to tax would lead to excessive complexity in the law).

90. Certain tax base definitions can influence effective marginal tax rates by conditioning the availability of tax credits, deductions, or income inclusions on receipt of marginal income.

91. *See infra* note 107 (noting that agencies other than the Treasury Department are, however, frequently authorized to adopt user fees).

A. *Delegating the Design of Tax Subsidy Programs*

Congress might expand its delegation of tax lawmaking authority by enacting more open-ended, general statutory provisions that provide guidance as to the tax policy goals that it wishes to achieve, but that leave the Treasury Department to work out the policy details. Consider, for example, the possibility of Congress delegating to Treasury the job of designing provisions intended to encourage particular types of investments. The research and experimentation (R&E) tax credit offers a specific example. The R&E credit is a tax subsidy program whose obvious purpose is to encourage investment in certain types of R&E expenditures. As currently designed, most of the important instrument-design choices with respect to the R&E tax credit—as with most of the important instrument-design choices regarding every tax subsidy program—are found in the tax code itself.[92] Our argument is that the R&E tax credit, and other provisions of that ilk, might be more effective if Congress delegated more open-ended authority, giving Treasury more of a hand in the design of the policy instrument.

IRC § 41(a)(1) currently offers a credit for 20 percent of "qualified research expenses" over the "base amount."[93] The Code in turn defines qualified research as research "undertaken for the purpose of discovering information . . . which is technological in nature" and "the application of which is intended to be useful in the development of a new or improved business component of the taxpayer," and whose primary purpose is learning more about "a new or improved function" or "performance" or "reliability or quality."[94] The base amount is defined, again in the Code, as the product of average annual gross receipts in the previous four years and the average ratio of qualified research spending relative to gross receipts by the same taxpayer during 1984–1988.[95] The Treasury Department has issued regulations, and other guidance, to adjust these definitions around the edges—for example, to elaborate on the meaning of qualified expenditures.[96] However, few of the important design choices with respect to the R&E tax credit have been delegated to Treasury.

The primary challenge in designing the R&E credit is to find a way to both encourage greater research spending and to avoid providing tax credits for research that would have been undertaken without the credit. As a general matter, it is impossible empirically to distinguish research that would have taken place in the absence of the credit from marginal research for which the credit is responsible.[97] The particular design of the R&E credit in

92. I.R.C. § 41.

93. *Id.* § 41(a)(1).

94. *Id.* § 41(d).

95. *Id.* § 41(c).

96. *E.g.*, Treas. Reg. § 1.41-4 (2014).

97. Note that this is not inconsistent with the many statistical findings that tax benefits encourage significantly greater research spending, reviewed in Nirupama Rao, *Do Tax Credits Stimulate R&D Spending? The Effect of the R&D Tax Credit in its First Decade* (The Wagner

the Code takes a stab at doing so, offering greater tax benefits to firms that significantly increase their research spending relative to historical averages, adjusted for changes in gross revenues. Because of the nature of statutory drafting, however, Congress possessed limited design choices—hence the use of the four-year average and the baseline percentage from the 1980s.[98]

One could imagine delegating more authority to the Treasury to pursue Congress's goal of encouraging research. Instead of enacting a statute that details how the credit will work, the statute could be more open ended, articulating the general goals that Congress wants the agency to pursue. Congress could give Treasury the general mandate of increasing investment in research and experimentation that maximizes the long-run benefit to the U.S. economy (in terms of minimizing unemployment or maximizing GDP growth or some other benchmark). Treasury could then be left to structure the tax benefit in the way that most efficiently achieves these goals. In pursuit of those stated goals, Treasury might indeed choose to offer a credit for research exceeding historical levels. Or it might not. And the credit percentage might vary over time, depending on what produces the best response and how demand for various types of research investments changes over time. Likewise, Treasury might fine-tune the definition of qualified expense, as experience and ongoing research reveal where the credit should be focused.

What is important is that Treasury could experiment with tailoring the tax credit in different ways in different years, or for different activities during the same years, to identify the most effective method of encouraging research. An executive agency charged by Congress with trying to stimulate research might be more willing than Congress itself to experiment with alternative approaches despite hostile reactions from some affected taxpayers, understanding that some approaches will be unsuccessful, but persisting with the experiments in the belief that they improve tax policy in the long run.

Greater delegation does not mean the absence of congressional control. It is unlikely, of course, that Congress would delegate the design of a spending mandate without a budget. Congress would likely instead appropriate a predetermined amount of funding for Treasury Department promotion of R&E to accompany its greater discretion. Congress could budget a particular amount of money that Treasury could, or even must, spend to encourage research and experimentation. U.S. corporations claimed $8.5 billion of research credits in 2010;[99] and according to Treasury, the R&E tax credit was

Sch., N.Y. Univ., Research Paper No. 2272174, 2013), http://wagner.nyu.edu/files/faculty/publications/do-tax-credits-stimulate-r-d-spending.pdf.

98. *See* I.R.C. §§ 41(c)(1), 41(c)(3).

99. *SOI Tax Stats – Corporation Research Credit*, IRS, http://www.irs.gov/uac/SOI-Tax-Stats-Corporation-Research-Credit (last updated Mar. 12, 2015).

responsible for at least one dollar of additional private sector research investment for every dollar of tax credit provided.[100] The Obama administration has proposed making the credit percentage permanent and increasing it, in hope of spending $100 billion on R&E tax credits over ten years.[101]

This spending plan could be delegated, with the spending limit perhaps monitored by the General Accounting Office (GAO). The same sort of delegation could occur with other types of tax incentive provisions. For example, Congress could delegate the design of other, more narrowly tailored credits (such as the electric vehicle credit) and deductions meant to encourage equipment investment (such as bonus depreciation).[102] Congress could also accompany any particular tax subsidy delegation with not only a spending budget, but also a range of required distributional outcomes, as discussed further in the next Section.

Another alternative would be for Congress to remove such subsidies from the tax code entirely and place them on the spending side of the budget. Under this approach, the subsidies would be supervised by agencies other than Treasury with expertise in the substantive policy areas in question. For example, the R&E credit might indeed be placed on the spending side, under the auspices of an agency staffed with experts in research and development policy instead of experts in tax enforcement. Such a spending-side alternative would be consistent with a particular critique of the use of tax expenditures generally. On this view, tax expenditures—provisions in the IRC that deviate from "normal" taxation in ways that subsidize particular activities[103]—are bad policy because they require both the IRS and Treasury, as well as the tax writing committees, to engage in a type of analysis for which they lack expertise. While the IRS is designed to police compliance with the tax code and to issue regulations to fill in gaps where the Code is ambiguous or unclear, it is not so well suited to make policy in the areas of research and experimentation, education, or health care. If the Treasury Department is not the agency best situated—in terms of expertise and institutional capacity—to design and maintain a particular subsidy provision, some other agency should be chosen. The general point is that broad discretionary delegation, even if nominally implicating "tax" issues, should be

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100. U.S. Dep't of the Treasury, Investing in U.S. Competitiveness: The Benefits of Enhancing the Research and Experimentation (R&E) Tax Credit 4 (2011), http://www.treasury.gov/resource-center/tax-policy/Documents/Investing-in-US-Competitiveness-Benefits-of-RandE-Tax-Credit-3-2011.pdf.

101. The White House, Expanded, Simplified and Permanent Research and Experimentation Tax Credit (2010), https://www.whitehouse.gov/sites/default/files/fact_sheet_re-credit_9-8-10.pdf.

102. If Congress were to delegate additional lawmaking authority of this sort to the Treasury Department, the agency's tendency to promulgate interpretive rulings that have binding (or nearly binding) authority without going through the formal notice-and-comment rulemaking process would need to be reconsidered. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1153 (2008).

103. James R. White, U.S. Gov't Accountability Off., Tax Expenditures: Background and Evaluation Criteria and Questions 1, 8 (2012).

made to the agency best equipped to make the important policy choices on the ground.

B. *Delegating Tax Rates*

Although Congress frequently delegates authority over definition of the income tax base (comprising much of the work of the Treasury Department), delegation of the power to set income tax rates is unprecedented. Traditionally, the statutes specify income tax rates in excruciating detail in IRC § 1 for individuals and § 11 for corporations, with different marginal tax rates applying to different "brackets" of income.[104] These legislated marginal tax rates change from time to time, either as the result of a change in the political party controlling the federal government (since the major parties often disagree about the appropriate degree of progressivity in the rate structure) or as the result of an unexpected need for additional revenue or fiscal stimulus.[105] Other than delegating the job of indexing brackets for inflation to Treasury,[106] however, Congress maintains sole responsibility for determining the rate structure. That is, although Congress frequently delegates to agencies the power to set "user fees," it has never delegated the power to set income tax rates to the Treasury Department or to any other regulatory body.[107] Why not?

Congress may retain control over income tax rates because they play an especially important role in the distribution of tax burdens. Indeed, some would argue that this is one of the primary ways, if not *the* primary way, in which tax law differs from other areas of law. That is, when we ask "how is tax different?" or "why not tax?" when it comes to broad delegations of authority, it is the concern over control of distributional consequences—and the role of tax rates in determining distributional consequences—that is the most common answer we receive. Some view the distribution of tax burdens to be a quintessentially political decision entailing tradeoffs among different groups of taxpayers whose interests are best represented and given voice in

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104. I.R.C. §§ 1, 11 (2012).

105. In addition, there are nominal changes in marginal tax rate brackets due to automatic inflation indexing. *Id.* § 1(f).

106. *See id.*

107. Congress frequently delegates to an agency the power to set "rates" or "fees" for specified activities. The authority for such fees comes either from particular statutes or from the Independent Offices Appropriation Act of 1952, ch. 376, 65 Stat. 268 (1951). *See generally* Susan J. Irving, U.S. Gov't Accountability Office, Federal User Fees: A Design Guide (2008), http://www.gao.gov/assets/210/203357.pdf. User fees are distinguished from taxes in that the former have a "user pay" element; that is, they are supposed to be related either to the benefit received by the regulated party or to the cost imposed by that party on the agency in question. "Taxes," by contrast, are generally assessed according to some measurement of ability to pay and are not necessarily tied to costs imposed or benefits received. *Id.* at 3–5. In the history of the income tax, however, Congress has not delegated the power to set income tax rates, individual or corporate.

the rough-and-tumble of the tax legislative process. And such decisions, the argument goes, must rest with Congress alone.[108]

The difficulty with attributing congressional reluctance to delegate rate-setting to this consideration, however, is that Congress frequently delegates decisions that have distributional consequences similar to those of tax policy choices to other agencies. For example, Congress permits the Occupational Safety and Health Administration to craft rules that impose significant responsibility for workplace safety, with accompanying distributional consequences for workers and firms.[109] Rules enacted by the Environmental Protection Agency similarly affect the distribution of benefits and burdens of protecting the environment. Prior to the wave of federal deregulation in the 1970s and afterward, federal regulation of energy, telecommunications, and other utilities often focused explicitly on pricing structures designed to achieve distributional objectives.[110] The efficiency and distributional goals that motivated, and that motivate, this and other federal regulation bear uncanny resemblance to those that underlie tax policy.

Moreover, many delegations of regulatory authority, whether intended to by Congress or not, have been wielded in ways that can have massive distributional consequences. Take, for example, the decision by the EPA to designate carbon dioxide (and several other heat-trapping gases) as pollutants under the Clean Air Act.[111] That decision, coupled with the agency's proposed rules to cut emissions from existing coal plants by as much as 30 percent by 2030, could obviously have significant distributional consequences.[112] EPA regulation of greenhouse gases influences the prices of cars, trucks, and energy, thereby changing the profitability of affected industries and real wages in the economy.[113]

108. This is an argument we have heard from commenters who have read prior drafts of this Article. Indeed, this point has been made at every workshop at which we have presented this paper. However, we have found no written version of the argument, perhaps because no one has seriously considered the possibility of delegating the power to set income tax rates before.

109. 29 U.S.C. § 651(b)(3) (2012) ("Congress . . . authoriz[es] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . . .").

110. For example, the Federal Communications Commission routinely permitted AT&T to charge above-cost rates on interstate telephone service to cross-subsidize universal local phone service at rates that were affordable to less affluent consumers. *See* Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 Yale J. on Reg. 55, 59–60 (2007).

111. John M. Broder, *E.P.A. Clears Path to Regulate Heat-Trapping Gases for First Time in the U.S.*, N.Y. Times, Apr. 18, 2009, at A15, http://www.nytimes.com/2009/04/18/science/earth/18endanger.html. The Supreme Court subsequently upheld these rules. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

112. *See* Amy Harder, *EPA Sets Draft Rule to Cut Carbon Emissions by 30% by 2030*, Wall St. J. (June 2, 2014, 4:35 PM), http://online.wsj.com/articles/epa-rule-to-cost-up-to-8-8-billion-annually-sources-say-1401710600.

113. For a survey of the ways in which environmental regulation can have distributional consequences, see generally Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787 (1993).

All of which leaves unanswered, again, the central question: Why should the regulatory approach to tax policy differ from regulatory approaches to other areas of federal policy? One possible explanation is a combination of historical accident and path dependence. The modern U.S. income tax was introduced in 1913 following adoption of the Sixteenth Amendment earlier that year, which gave Congress the authority to levy a federal income tax.[114] After passing the initial tax legislation, Congress enacted several additional tax statutes in succession, largely to provide funding during the First World War (beginning in 1916 and continuing for several years thereafter); and it was during this period that Congress developed the pattern of having legislative committees draft detailed revisions to various code sections.[115] Also during this time, motivated by particular lawmakers who were pushing the income tax as a source of federal war revenue, Congress began to cultivate expertise in income tax statutory drafting in the "legislative drafting service," created in 1918, which would later become the House and Senate Legislative Counsel offices (both still in existence today).[116] At any point during this period, of course, Congress might have decided to delegate additional lawmaking authority to Treasury. However, Treasury, as well as Congress, lacked prior experience with income tax laws generally, and the substantial expansion in authority of federal regulatory agencies had yet to occur. Thus, no large, well-staffed, and expert agency existed to which Congress could have delegated the tax lawmaking task.[117]

Of course, historical accident and path dependency do not alone provide persuasive reasons why additional tax lawmaking authority—including rate-setting authority—ought not be delegated to an agency today. Another possible argument is that locating the power to set tax rates exclusively with Congress and its committees is essential to the bargaining that characterizes a successful legislative process. On this view, if Congress delegated control over income tax rates to an agency, such a delegation would remove an issue from the legislative process with respect to which legislators can bargain. The absence of this bargaining chip would make it more difficult for Congress to reach tax and other legislative deals.[118] For example, suppose that conservative members of Congress would agree to raise tax rates only in exchange for significant spending cuts, and liberals would concede on government spending reductions only in return for higher tax rates. In this example, the only way to find common ground would be to bundle tax

114. *E.g.*, George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 Tax L. Rev. 787, 790 (2013).

115. *Id.* at 793, 808–13.

116. George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 Notre Dame L. Rev. 2287, 2295 (2013).

117. *See id.*

118. *See, e.g.*, Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 Am. Econ. Rev. 1162 (1992).

increases with spending cuts.[119] If, however, Congress gave the Fed or Treasury authority over tax rates, liberal legislators might face less political pressure to agree to spending cuts.

The effect of delegation on congressional bargaining reflects the more general impact of delegation on the distribution of power within Congress. The member of Congress who has the ability to dispense favors (and disfavors) to taxpayers also has the ability to help other legislators by assisting their constituents or by sharing campaign funds raised from those who seek favors.[120] A member of a congressional tax writing committee who votes to reduce the committee's authority by empowering the IRS or another agency thereby votes to reduce the value of his or her hard-won committee seat, making it perhaps unsurprising that this does not happen as a matter of course.[121]

The potential effect of delegation on logrolling, however, is hardly unique to tax policies. Yet in other areas Congress has nevertheless agreed to delegate enormous lawmaking power to agencies, including power over decisions with large distributional consequences. For example, delegating to the EPA the power to determine what constitutes a pollutant removes that chip from the congressional bargaining table.[122] So it is difficult to see why tax policy is exceptional in this regard. Furthermore, even if this consideration is important, it follows only that Congress should not irreversibly delegate all of its power to change tax rates, which it is unable constitutionally to do in any case. Just as Congress can always enact a law to rein in the EPA if it goes too far in defining a pollutant, Congress could pass a law undoing any rate change Treasury enacted that went too far. These political arguments do not imply that Congress is unable to usefully delegate at least some of its discretion over tax rate setting. Rather, they suggest that Congress might want to delegate only *some* of its control over rates.[123]

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119. For example, the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, addressed growing federal budget deficits by increasing individual income tax rates and federal excise tax rates, and the Budget Enforcement Act of 1990 established the "pay-as-you-go" rules that limited subsequent discretionary spending to measures paid for with new taxes or other spending cuts. Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388-573 (codified as amended in scattered sections of 2 and 15 U.S.C.).

120. See, for example, the discussion of congressional favors surrounding passage of the Tax Reform Act of 1986 in Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform (1987).

121. For examples of tax legislation detail that Congress designed to promote the importance of tax writing committee members, see Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. Rev. 1159 (2006).

122. *See* 42 U.S.C. § 7602(g) (2012).

123. Courts can help police the boundary between the rate-setting power Congress delegates to Treasury and the rate-setting power it retains for itself. Treasury would be required by principles of administrative law not to act beyond the congressional grant of rate-setting authority. Taxpayers affected by whatever rate increases Treasury adopts would have standing to sue, challenging those increases for exceeding the scope of Congress's delegation. Courts would, however, presumably accord *Chevron* deference to Treasury rate-setting decisions, just as they apply such deference to other agency decisions. For general discussion of the use of

There are several reasons why it might be normatively attractive for Congress to delegate control over tax rates. The first echoes the arguments for congressional delegation of broad authority to agencies in general and to Treasury in particular. Congress already delegates considerable authority to the Treasury Department to interpret code sections and to enforce tax laws.[124] These delegations presumably reflect a congressional determination that Treasury and the IRS have comparative advantages, in terms of expertise and time, with respect to these aspects of tax law. The question this Section poses is why the same point does not apply to tax rates. Assuming that Congress delegates regulatory authority to the Treasury with the expectation that Treasury will deploy its expertise to craft sensible regulations that are consistent with congressional intent, Congress might want to permit the Treasury to also modify tax rates with similar results. Second, tax bases and tax rates together determine tax obligations; therefore, regulatory changes to tax base definitions, which the Treasury routinely undertakes, automatically carry implications for the distribution of tax burdens. Socially optimal tax policymaking might call for Congress to grant Treasury the power both to adjust tax bases and to alter tax rates together. Indeed, if Treasury seeks to adjust the tax base, having the ability to also make rate adjustments to achieve distributional neutrality might be extraordinarily useful.

A third reason why Congress might want to delegate tax rate authority to the Treasury or another agency is to afford greater tax policy flexibility in response to changing economic and financial conditions. An agency that concentrates on economic policy is better positioned than Congress to react quickly and adroitly to economic developments. Since Congress has responsibility for all federal policies, it has less of a specialist focus. Furthermore, Congress is political, a characteristic which need not be problematic in economic policymaking but can be; and worse, market anticipation of political moves by Congress can undermine the effectiveness of economic policies.

An argument can be made that the Treasury Department, being answerable to the President, would be more responsive than Congress to changes in circumstances that affect the majority of Americans, because the President answers to a majority of the electorate in a way that no single legislator or even group of legislators does.[125] If this is true, it would mean that Treasury might be better than Congress itself at responding to such changes in circumstances. Such responsiveness is, however, a liability in settings in which effective policy requires committing to a consistent plan over time.[126] In that case, and for that reason, the Federal Reserve would likely be a better locus

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administrative law to constrain agency discretion, see, for example, Bressman, *supra* note 16; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999).

124. I.R.C. § 7805(a) (2012).

125. Calabresi, *supra* note 56, at 59. Of course there is considerable disagreement over the costs and benefits of a powerful unitary executive.

126. Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. Pol. Econ. 473 (1977).

for delegated tax rate-setting authority than Treasury. The customary rationale for central bank independence is indeed to reduce political influence over monetary policy and thereby reassure financial markets of the credibility of long-run monetary policy: specifically, to commit governments not to run large budget deficits that they then monetize, causing inflation and implicitly taxing holders of government bonds.[127] An independent monetary authority such as the Federal Reserve is instead charged with maintaining steady long-run monetary stability while using policy mechanisms to reduce the amplitude of economic cycles. Likewise, it would be natural to delegate some countercyclical tax policy tools to the Federal Reserve, permitting it, say, to adjust tax rates within a band (set statutorily by Congress) in response to short- and medium-run economic fluctuations. Indeed, there is some research suggesting that, if countercyclical fiscal policy is to be used, the optimal approach is to coordinate monetary and fiscal stimulus, which may be easier to do if one body has both powers.[128]

Another objection to delegating control over tax rate-setting to the Treasury Department in particular is that such a delegation gives too much control over fiscal policy to one branch of government. The Treasury Department ultimately answers to the President, who appoints the Secretary of the Treasury as well as many other high-ranking Treasury officials.[129] Presidential appointees might be tempted to make tax rate changes that benefit the President's political future and that of his or her political party. For example, they might want to cut tax rates to boost the economy in the period leading up to an election, or to exercise the power to set tax rates in a way that maximizes the advantage to the President's election base or swing voters in the next election.[130] But the same criticism could be leveled in other

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127. For a survey of the literature and evidence of the effectiveness of central bank independence, see Christopher Crowe & Ellen E. Meade, *The Evolution of Central Bank Governance Around the World*, 21 J. Econ. Persp. 69 (2007).

128. For evidence of the effectiveness of countercyclical fiscal policy, see Alan J. Auerbach et al., *Activist Fiscal Policy*, 24 J. Econ. Persp. 141 (2010). For analysis of the benefits of coordinating monetary and fiscal policy, see Klaus Adam & Roberto M. Billi, *Distortionary Fiscal Policy and Monetary Policy Goals*, 122 Econ. Letters 1 (2014); Klaus Adam & Roberto M. Billi, *Monetary Conservatism and Fiscal Policy*, 55 J. Monetary Econ. 1376 (2008); Jess Benhabib & Stefano Eusepi, *The Design of Monetary and Fiscal Policy: A Global Perspective*, 123 J. Econ. Theory 40 (2005); William A. Branch et al., *Monetary-Fiscal Policy Interactions Under Implementable Monetary Policy Rules*, 40 J. Money Credit & Banking 1095 (2008); Jagjit S. Chadha & Charles Nolan, *Optimal Simple Rules for the Conduct of Monetary and Fiscal Policy*, 29 J. Macroeconomics 665 (2007); Avinash Dixit & Luisa Lambertini, *Interactions of Commitment and Discretion in Monetary and Fiscal Policies*, 93 Am. Econ. Rev. 1522 (2003); Mats Persson et al., *Time Consistency of Fiscal and Monetary Policy: A Solution*, 74 Econometrica 193 (2006); Diana N. Weymark, *Inflation, Government Transfers, and Optimal Central Bank Independence*, 51 Eur. Econ. Rev. 297 (2007); Stefano Eusepi & Bruce Preston, *Stabilizing Expectations Under Monetary and Fiscal Policy Coordination* (Nat'l Bureau of Econ. Research, Working Paper No. 14391, 2008).

129. 31 U.S.C. § 301 (2012).

130. These political considerations are distinct from the precommitment and time-inconsistency problems already mentioned. Here the argument is not that the executive branch—seeking only to maximize social welfare—will find it difficult to maintain a time consistent

areas of regulatory policy. For example, one could imagine political manipulation of environmental regulations—to favor certain consumers, or certain industries—around the timing of sensitive elections. Yet either this happens very little or else its occurrence has not prompted alarm sufficient for Congress to withdraw environmental regulatory authority. Moreover, concern over excessive presidential influence over rate setting could in theory be dealt with by delegating only a limited amount of rate setting power, requiring that the Treasury coordinate its actions with the Congressional Budget Office, or else the use of an independent agency or commission styled on the Federal Reserve—or possibly just giving this authority to the Federal Reserve, which could exercise it along with its power over the money supply.

A fourth, and related, reason to delegate tax rate authority is to avoid congressional determination of tax policy features that Congress is unwilling or unable to undertake. Congress might, for example, pass a law requiring the Treasury or the Fed to select tax rates and bases that raise a given amount of tax revenue in a manner consistent with broad income tax progressivity and that distribute the burden fairly. Alternatively, Congress could exercise greater control over the delegation by prescribing a distributional table (perhaps the status quo distribution that exists at the time of enactment), leaving Treasury or the Fed to determine the rates that best achieve that result, subject perhaps to congressional override by joint resolution majority vote of both houses. Insofar as fiscal stimulus concerns drive tax rate changes, Congress could delegate the power to temporarily lower marginal rates, within set boundaries. For example, current individual income tax rates are 10, 15, 25, 28, 33, 36, and 39.6 percent.[131] Congress could enact a law permitting Treasury or the Federal Reserve, upon determining that a tax rate reduction is necessary for the economy, to reduce all rate brackets by up to 10 percent of their prior levels for six to eighteen months, which would have immediate effect unless Congress passes a joint resolution reversing the rate change. Furthermore, the President answers to a larger fraction of the voting population than does any member of Congress and is arguably more responsive to the needs of the majority of the population.[132]

Another alternative to delegating tax rate-setting power to the Federal Reserve, and the fiscal stimulus that it provides, would be to "delegate" that power to a formula.[133] That is, Congress could enact a statute providing that, in the event that unemployment rises above a given threshold (say, 7.5 percent or some other point at which fiscal stimulus is generally deemed appropriate), individual income tax rates, corporate tax rates, or employment tax rates, or perhaps all three, would be reduced by some set percentage that Congress deems sufficient to put the economy back on track. And there

policy plan, but rather that the executive on occasion may have an incentive to use the office of the Treasury for purely partisan political purposes.

131. 26 U.S.C.A. § 1 (West, Westlaw through P.L. 113-296).

132. *See* Calabresi, *supra* note 56, at 59.

133. Delegation to a formula that is written by Congress and by congressional committees is of course a form of nondelegation.

could be a symmetrical automatic rate increase when unemployment falls below the same or another threshold. One advantage of such an approach would be an even greater degree of separation between the power to set rates and the political process; indeed, there would be complete separation, except that Congress would obviously retain the power to alter the rate-change formula by enacting a new statute. The obvious, and quite serious, difficulty with such automatic rate changes is the difficulty Congress would face in deciding on the optimal rate-change formula and triggering thresholds. Indeed, it seems likely that the optimal formula and threshold would vary depending on circumstances in the economy, suggesting that the better approach would be to delegate at least some discretion to the Fed. Indeed, that is precisely what has been done with the money supply, as the Fed has considerable power to alter the discount rate, and to purchase assets, as circumstances require.

C. *Delegating Tax Reform*

Many have described the need for tax reform as a problem analogous to the base-closing problem: everyone in theory wants it to happen, but no one wants to vote for anything that imposes burdens on their constituents or on the individuals and groups that contribute to their reelection.[134] With the base-closing situation, virtually everyone agreed not only that spending on national defense should be dramatically reduced, but also that this reduction, (1) should include the closure of a substantial number of domestically located military bases, and (2) that the choice as to which bases should be closed ought to turn on the merits, as determined by military experts, and not by politics or logrolling among members of Congress.[135] The Base Closure and Realignment Commission offered an appealing solution to the problem. Even though each legislator could potentially lose from the decision of the base-closure process, as a group they agreed to the process—in part because it was the right thing to do, and in part because they could deflect responsibility if the commission selected their hometown base for closure.[136] Of course, they could be blamed for voting in favor of the process, but most legislators apparently did not find the risk of being saddled with that sort of responsibility sufficient to prevent them from doing what made sense as a policy matter.

A similar story might be told for tax reform. Many lawmakers feel that the IRC is broken: that it is too long, too complex, and littered with provisions that make little sense now, if they ever did.[137] Moreover, many believe that the country would be better off if Congress simplified or eliminated

134. *See, e.g.*, Mayer, *supra* note 36, at 394, 396.

135. *See id.* at 398–402.

136. *Id.* at 396–97, 405.

137. For one of many examples, see Congressman Tim Huelskamp, *Tax Reform*, U.S. House of Representatives, http://huelskamp.house.gov/issues/tax-reform (last visited May 12, 2015) ("Already more than 1,000,000 words long, the U.S. tax code is too long, complicated and burden[s] real job growth.").

some of these. In addition, one need not oppose tax credits, deductions, and exemptions as a general matter to support tax reform; even tax expenditure enthusiasts would likely agree that some overall pruning makes sense. As a result, Congress could vote for a process authorizing a group of experts, perhaps in the executive branch, perhaps in an independent body, to produce a tax reform plan that would, subject to approval by the President, become law unless stopped by a joint resolution of a majority of both houses of Congress. To the extent that general agreement exists concerning the need for reductions in tax expenditures, the advantages of such an approach are similar to the advantages of the base-closure legislation. First, if any particular tax provision is popular with a politically powerful constituency, this approach enables legislators to vote for a process that can lead to beneficial tax reform, even though that reform may result in the elimination of that provision. Second, the proposal helps circumvent the Senate filibuster as an obstacle to reform. By requiring a simple joint majority vote to stop the reform proposal submitted by the independent commission and approved by the President, a minority of senators could not block reform by threatening a filibuster.[138] It could happen.

Of course, it has not happened. There have been many U.S. tax reform efforts, even tax reform commissions, with extensive reports and nothing legislatively to show for the effort. This may be due in part to the absence of a shared national consensus on the desirability of tax reform, but also due to the reluctance of legislators to enact new tax laws that heavily burden certain groups. Three recent examples are illustrative of these efforts.

President Bush empaneled the President's Advisory Panel on Federal Tax Reform in January 2005, which issued its report in November 2005.[139] Charged with recommending tax options to make the U.S. tax system simpler, fairer, and more conducive to economic growth, this bipartisan commission included political and academic tax experts and an outstanding staff.[140] The commission developed two promising blueprints for major federal tax reform for the Treasury Department to evaluate, possibly amend, and selectively recommend to Congress.[141] Unfortunately, the political winds

138. Senate filibusters are permitted by Senate Rule XIX, and cloture is invoked by Senate Rule XXII. *See* Richard S. Beth & Valerie Heitshusen, Cong. Research Serv., Filibusters and Cloture in the Senate (2014). Of course, the sixty-vote cloture rule would have to be satisfied to pass the bill delegating such tax reform authority to an independent commission in the first place. But the hope, as in the base-closure case, is that it would be easier to get sixty votes for such delegation, as it would have the benefit of deflecting responsibility for the ultimate legislative reform.

139. Connie Mack, III et al., President's Advisory Panel on Fed. Tax Reform, Simple, Fair and Pro-Growth: Proposals to Fix America's Tax System (2005). The full-time and part-time staff who participated in the work of the panel, as well as the panel itself, includes some of the most well-respected public finance economists and tax law experts in the country.

140. *Id.*

141. *Id.* at 59.

shifted and the Treasury Department never forwarded any version of either recommendation.

In 2010, Congress considered legislation to create a Bipartisan Task Force for Responsible Fiscal Action that would recommend policies to improve the fiscal situation in the medium term and achieve fiscal stability over the long run, with the commission's recommendations subject without amendment to up-or-down congressional votes.[142] The Senate defeated this proposal,[143] after which President Obama nonetheless created the commission (known informally as the Bowles-Simpson Commission, after its co-chairs), and gave it the membership and charge it would have had under the failed legislation, but without any special status for its recommendations.[144] The commission passed a December 2010 report over considerable internal dissent, and Congress never brought its recommendations to a vote.[145]

Finally, as part of a political deal to raise the federal debt ceiling and thereby avoid defaulting on the debt, the Budget Control Act of 2011 created the Joint Select Committee on Deficit Reduction (informally known as the Supercommittee[146]), a bipartisan joint committee of Congress charged with developing a plan to reduce federal deficits by $1.5 trillion over ten years.[147] The committee's recommendations were to be subject without amendment to up-or-down congressional votes; in the absence of committee recommendations and successful passage by Congress by December 23, 2010, the bill authorized an automatic $1.2 trillion in spending cuts over ten years.[148] In the end, the committee failed to reach agreement, no recommendations were forthcoming, and the automatic spending cuts took effect.[149]

One could imagine Congress more forcefully passing legislation empowering a commission to propose tax legislation that would automatically become law in the absence of specified congressional intervention, a design similar to that of the base-closing commission. Congress could instruct the commission to raise a specified amount of revenue, or revenue equal to a

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142. 156 Cong. Rec. 585–88 (2010).

143. *Id.* at 639.

144. Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 18, 2010).

145. Nat'l Comm'n on Fiscal Responsibility and Reform, The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform (2010), http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf; Jackie Calmes, *Fiscal Plan is Expected to Fall Short of Votes*, N.Y. Times, Dec. 3, 2010, at A22, http://www.nytimes.com/2010/12/03/us/politics/03fiscal.html?_r=0; *In a 11-7 Tally, the Fiscal Commission Falls Short on Votes*, N.Y. Times (Dec. 3, 2010), http://www.nytimes.com/interactive/2010/12/03/us/politics/deficit-commission-vote.html?_r=0.

146. *See, e.g.*, Editorial, *The Supercommittee Collapses*, N.Y. Times, Nov. 22, 2011, at A28, http://www.nytimes.com/2011/11/22/opinion/the-deficit-supercommittee-collapses.html?_r=0.

147. Budget Control Act of 2011, Pub. L. No. 112-25, § 401(b), 125 Stat. 240, 259–62.

148. *Id.* at §§ 301(a)(2), 402, 125 Stat. 240, 252, 263–65.

149. Binyamin Appelbaum & Annie Lowrey, *For Deficit Panel, Failure Cuts Two Ways*, N.Y. Times, Nov. 22, 2011, at A1, http://www.nytimes.com/2011/11/22/us/politics/behind-deficit-panels-failure-a-surprise.html.

specified fraction of national income, with its tax plan. Congress could then identify the tax burden distribution (as a function of income, age, geography, or other variables) that it wishes the tax plan to impose. This would be a very strong form of delegation that might permit Congress to achieve goals that it has so far found elusive.

One of the benefits—and at times, the cost—of delegation is the commitment that it affords. In removing itself from the final stages of the tax rate and tax base determination process, Congress would partially insulate itself from the pleadings of lobbyists interested in maintaining favorable treatment for special interests. Voting in favor of delegation might incense lobbyists as a group, but a member of Congress could offer a principled reason for such an affirmative vote, even while expressing sympathy to individual lobbyists for the cause he or she champions. There is no doubt that the locus of lobbying efforts in such a scenario would then turn more toward the Treasury, independent commission, or Federal Reserve—whatever entity Congress empowers with greater tax lawmaking authority—and there would be attendant complications as these organizations inevitably become somewhat more political in response. While the less political nature of the delegated authority might well reduce the problems associated with lobbying, these problems will not disappear, and it is naïve to think that an agency with newly granted authority over policies of great interest to lobbyists could maintain its prior level of independence entirely unchanged. On the other hand, one of the related benefits of greater tax delegation to the Treasury and Federal Reserve is that the greater authority vested in these organizations would very likely make it easier for them to attract and retain highly qualified and professional staff.

The commitment associated with delegation has the most potential value in circumstances in which the absence of commitment is most problematic. Long-run fiscal imbalance is arguably the primary tax and spending problem subject to commitment problems, dwarfing (and at time coinciding with) the problems associated with lobbying and special interests.[150] Long-run challenges, such as structural fiscal deficits and long-run environmental degradation, are paradigmatic cases of collective action problems, because many of the affected parties are unborn and therefore unable to bargain.[151] Congress and other legislatures are notoriously willing to forego policy sustainability for short-term advantages. One possibility would be for Congress to empanel a commission with the authority—subject to some form of congressional override—to enact tax and spending policies that bring the country's accounts into long-run fiscal balance. In a nod to reality, such a

150. For a reasoned survey of the data on the long-run fiscal imbalance, see *The Coming Crisis: America's Dangerous Debt: Hearing Before the S. Budget Comm.*, 114th Cong. (2015), http://www.budget.senate.gov/republican/public/index.cfm/2015/2/the-coming-crisis-america-s-dangerous-debt (statement of Laurence J. Kotlikoff, Professor of Economics, Boston University).

151. Mancur Olson, The Logic of Collective Action (2d ed. 1971).

commission's actions might have binding force starting several election cycles from the enactment date. In the absence of truly binding constraints, it is admittedly uncertain just what impact the commission's output would have—though the general unwillingness of Congress to tamper excessively with existing regulations offers a glimmer of hope that policy commitments, even if not fully binding, can have important and beneficial effects on policy outcomes.

IV. The Constitutionality of Expanded Tax Delegation

Expanded tax delegation must be constitutional in order to be feasible, and while it has not been directly tested before the Supreme Court, there are strong reasons to expect that the Court would uphold its constitutionality. The main argument is that the so-called nondelegation doctrine, the most likely constitutional ground on which expanded tax delegations might be challenged, is dead; or at least the nondelegation doctrine is so weak that it no longer matters.[152] According to this argument, the Constitution actually places very few limits on the types of authority Congress can delegate to an agency or commission, and the limits that remain are easily satisfied.[153] The interesting question is whether the same statement applies to delegations of tax law, given that the Constitution expressly mentions taxation as one of the powers granted to Congress. And the Court has occasionally suggested that tax is different, as evidenced by Justice Douglas's line in the *National Cable Television Association* case quoted at the start of this Article.[154] Nevertheless, the conventional wisdom seems to be that Congress has just as much freedom to delegate tax lawmaking power as it has to delegate any sort of lawmaking power.

The nondelegation doctrine is said to arise from Article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[155] The doctrine holds that, for a statutory delegation of lawmaking power to be constitutional, Congress must supply an "intelligible principle" to guide the lawmaking decisions of the agency or commission or other actor to whom such power has been delegated.[156] An intelligible principle constrains agency discretion and provides a standard by which courts can review agency decisionmaking. The Supreme Court, however, has only applied the nondelegation doctrine to strike down statutory delegations of lawmaking power by Congress twice, and both times were in

152. *See infra* note 158 and accompanying text.

153. *See infra* note 158 and accompanying text.

154. Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1973) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes . . . .").

155. U.S. Const. art. I, § 1.

156. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2000) (citing J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); Sunstein, *supra* note 123, at 330–35 (discussing the development of the doctrine over time).

the 1930s.[157] As a result, constitutional scholars and Supreme Court Justices alike seem to agree that the doctrine no longer has any bite.[158]

Scholars offer several rationales to justify the disappearance of the nondelegation doctrine as a constraint on Congress's power to delegate. Some of these rationales track the justifications for delegation reviewed in Part II: agencies' relative expertise, flexibility, and distance from the political process as compared with Congress.[159] Another commonly cited reason why the Court has been reluctant to use the Constitution to strike down congressional delegations of authority is that the Court does not want the job of policing the line between what is delegable and what is not delegable.[160] Rather, this is the sort of political question that the Court prefers to leave to elected members of government.[161] In addition, to the extent a vigorous nondelegation doctrine would be motivated by a desire to make sure that Congress is held accountable for the laws promulgated under its authority, such accountability remains. Even without a nondelegation doctrine to impose constitutional limits, federal agencies cannot make law without first receiving some congressional authorization that could always be legislatively revoked.[162] Moreover, scholars have pointed out that, even though the Constitution does little to limit congressional delegation (other than imposing

157. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

158. Many have pronounced the doctrine either "moribund" or "dead." *See, e.g.*, Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in the result) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . . ."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 132–33 (1980); Posner & Vermeule, *supra* note 16, at 1722 ("In our view there just is no constitutional nondelegation rule, nor has there ever been."); *cf.* Sunstein, *supra* note 16 (arguing that the nondelegation doctrine is not dead, but is instead relocated to other doctrines). But some scholars argue that the doctrine should be brought back to life. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002).

159. Mashaw, *Prodelegation*, *supra* note 22; Schuck, *supra* note 22.

160. *See, e.g.*, Schuck, *supra* note 22, at 793.

161. The Supreme Court has long declined to hear certain types of disputes that it believes present "political questions" that the Constitution leaves to the other branches of government. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208–10 (1962).

162. An interesting argument is that under certain conditions the President has the power to alter tax laws, including raising tax rates, even in the absence of authorizing congressional legislation. The argument, advanced by Neil Buchanan and Michael Dorf, applies when the President is put in a situation in which there is no constitutional alternative; that is, because of the nature of the circumstances, all of the President's options are arguably contrary to the Constitution. Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 Colum. L. Rev. 1175 (2012). In such a situation, they argue, the "most constitutional" thing for the President to do is to choose the "least unconstitutional course." *Id.* at 1175. The specific example they discuss involves the following "trilemma" that faced President Obama in 2011 and may well face him or his successors again (and again). When the amount of federal borrowing necessary to pay the country's outstanding spending obligations, which are the product of a duly enacted federal statute, approaches the limit imposed by the so-called debt ceiling, also

the "intelligible principle" requirement), other interpretive tools are available to the courts to limit agency discretion. Some scholars, for example, argue that the function once played by the doctrine has been relocated elsewhere, especially to various interpretive doctrines.[163] Given all of these reasons, the demise of nondelegation as a freestanding limit on Congress's power to delegate seems wholly unexceptional.

But what about nondelegation as applied to tax law? A serious argument can be made that, even if the Constitution generally places few limits on the power of Congress to delegate, there are several reasons why tax law should be treated differently.[164] First, in the political and social history of the country's founding period, leading up to and including the drafting of the Constitution, taxes played a uniquely pivotal role. Resentment of British taxes encouraged the American Revolution; subsequently, the difficulty of securing sufficient financing of both the revolutionary efforts and the early U.S. government strengthened the case for a strong federal government with significant taxing authority.[165] Second, the Constitution itself expressly assigned the taxing power to Congress. Specifically, Article I, Section 8, provides that "Congress shall have Power To lay and collect Taxes."[166] Indeed, the Supreme Court has long held, and recently reaffirmed, that Congress's power to tax is broader than its power to regulate.[167]

Third, not only does the Constitution specifically assign the taxing power to Congress, it goes so far as to specify how tax laws must be enacted. Article I, Section 7 expressly states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[168] It could be argued that locating the power to initiate tax legislation in the House forecloses the option for

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the product of a duly enacted federal statute, the President must either "ignore the debt ceiling and unilaterally issue new bonds, thus usurping Congress's borrowing power; unilaterally raise taxes, thus usurping Congress's taxing power; or unilaterally cut spending, thus usurping Congress's spending power." *Id.* Buchanan and Dorf favor first unilaterally raising the debt ceiling, but, if that proves insufficient to calm the credit markets, then raising tax rates, with spending cuts as the least preferred option. *Id.*

163. *See* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1408–15 (2000); Sunstein, *supra* note 16, at 322, 328–30.

164. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 243–47 (2005) (arguing that nondelegation doctrine should have special force in the tax context).

165. *See* Davis Rich Dewey, Financial History of the United States (Augustus M. Kelley 1968) (12th ed. 1934); Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution (2005); 1 William Graham Sumner, The Financier and the Finances of the American Revolution (Augustus M. Kelley 1968) (1891).

166. U.S. Const. art. I, § 8.

167. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (holding that, although the Commerce Clause does not provide Congress with the authority to require individuals to purchase health insurance, the taxing clause does provide Congress with the power to tax people for not buying health insurance); *id.* at 2600 ("[T]he breadth of Congress's power to tax is greater than its power to regulate . . . .").

168. U.S. Const. art I, § 7.

agencies to be the source of tax policy. Finally, as mentioned earlier, many consider tax and spending legislation the primary tool by which society implements its distributional, or redistributive, goals. Indeed, there are those who argue that, if society wants to redistribute from the rich to the poor, the most efficient means of doing so is the tax and spending system, rather than, for example, redistributive legal rules.[169] On the basis of these reasons, one might argue that Congress's ability to delegate tax lawmaking power should be more limited than its power to delegate other types of regulatory authority.

The argument, however, faces the difficulty that its conclusions do not follow from its premises. Even if taxes did play an important, even a central, role in the founding of the country and in the drafting of the Constitution, that fact does not necessarily imply anything about Congress's power to delegate the taxing power. More specifically, that tax law was uniquely important during the country's founding does not imply that delegation of authority by Congress should be more (or less) difficult in the tax area than in other areas. Likewise, that the Constitution expressly locates the federal taxing power within Congress, and specifically requires that revenue bills originate in the House of Representatives, imposes no obvious limit on Congress's power to delegate its tax lawmaking authority, so long as the delegation is explicit and takes the form of a statute that originates in the House. If Congress retains the power to alter or claw back whatever version of the taxing power it delegates (which would always be the case with any plausible form of tax delegation—and certainly with the version of tax delegation that we have proposed), then Congress has effectively retained the power to tax.[170] Moreover, as we have discussed above, even if there is a consensus that distributional objectives should be set by congressional statute, Congress can legislatively require that any delegated tax lawmaking be crafted to achieve particular distributional outcomes. In addition, and perhaps most importantly, no Supreme Court case has ever struck down a congressional delegation of tax lawmaking authority on nondelegation grounds, and no case has held that the limits on tax delegation are any different than the limits on other types of delegation—which, by general agreement, are trivial.[171] Thus, so long as Congress articulates an intelligible principle in authorizing legislation (that originates in the House), all of the expanded forms of tax delegation discussed in this Article should pass constitutional muster.[172]

169. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

170. This argument parallels arguments made generally against a strong nondelegation doctrine.

171. There have been only a handful of cases in which any sort of law was struck down on nondelegation grounds. *See* Sunstein, *supra* note 16. None of those cases involved delegation of tax lawmaking authority.

172. The Court's recent decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), is not to the contrary. In that case the Court held, among other things, that Congress did not intend to delegate to the IRS the power to decide whether federal tax credits for purchasing health insurance would be available on federal health insurance exchanges as well as state exchanges

This conclusion is, however, subject to a few caveats. First, it is notoriously difficult to predict how the Supreme Court will decide a particular case. Second, to the extent that Congress was to make radical departures from prior delegations in the tax area, it is conceivable that the Court could be provoked to announce a new distinction between tax delegations and other regulatory delegations, imposing greater limits on the former. This possibility seems more likely for the types of expanded tax delegation that are most unlike prior tax delegations. In other words, delegating more of a role in designing tax subsidy provisions to Treasury seems unlikely to be enough of a departure from what Congress has done in the past, when it has delegated the job of defining the tax base, to concern the Court, even one that wanted to reinvigorate the nondelegation doctrine. Delegating control over individual or corporate rates to Treasury or to the Federal Reserve, however, or delegating tax reform to a commission, would be a departure from anything that has been done in the tax area before—although, again, the base closure case would provide one helpful and relevant precedent (albeit not in the tax area).

In the extreme, if Congress passed a law repealing the entire IRC and replacing it with a single sentence giving Treasury power to create a new income tax system that is "fair and efficient and that collects revenue sufficient to balance the budget," one wonders if the Court might not take that as the occasion to revisit the limits of the "intelligible principle" idea. In addition, if Congress does decide to delegate tax law in a more expansive way, the Court has made clear that some ways of doing so are not acceptable, although not necessarily on classic nondelegation grounds. For example, after the Court's decision in *Clinton v. City of New York*, congressional delegation of authority by granting the President the power to cancel or invalidate particular types of laws (including tax laws) is off the table, because, according to the Court, doing so violates the Presentment Clause.[173] None of the expanded tax delegations discussed above, however, have this structure.[174]

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or whether, instead, they would be available only on the latter. In the Court's words, "[i]t is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* at 2489. This statement does not suggest that Congress lacks the authority, under the taxing power, to delegate such decisions to the IRS if it chooses to, only that it must do so expressly and not by silent implication. *See id.*

173. 524 U.S. 417 (1998) (holding, among other things, that the Line-Item Veto statute, which empowered the President to strike certain types duly enacted of laws from a statute without approval of Congress, violated Article 1, Section 7 of the U.S. Constitution); *see also* INS v. Chadha, 462 U.S. 919 (1983).

174. Although the majority's opinion in *Clinton* is put in terms of concerns about compliance with the Presentment Clause, a number of commentators have pointed out that the real, albeit largely unstated, concern is with excessive delegation or with delegation of a particular sort. And the particular type of delegation that the Court seems to find problematic is delegation of the power to "unmake" law rather delegation of the power to make law. *See, e.g.*, Barron & Rakoff, *supra* note 1, at 314. None of the delegations analyzed in this Article are of the power to unmake existing law.

Conclusion

Congress delegates broad regulatory authority to federal agencies or independent commissions in many important areas of federal policy. Environmental law is one obvious example, in which the EPA has been delegated enormous authority to promulgate substantive rules that can have enormous effects on incentives and distribution. Federal tax law is done differently. More so than in other areas of law, all of the big decisions—rate setting and definitions of the tax base—are made by Congress itself, or, more specifically, are delegated pre-enactment to the tax-writing committees. There are certain exceptions such as with § 482 and § 1502, but as a general matter Congress delegates *relatively* little tax lawmaking power. Since all of the arguments that support broad delegation in other areas apply to the tax context as well, Congress should at least consider doing more broad tax delegation.

Broad delegation of taxing power is not without precedent. Other governments sometimes grant relatively broad policymaking discretion to their tax enforcement agencies. In Ireland, for example, the legislature enacted a general anti-avoidance provision (known as "section 811") that delegates the power to determine when tax avoidance has occurred to the Irish Revenue Commissioners, permitting them in so doing to disregard legislatively enacted tax statutes.[175] This statutory provision goes well beyond anything enacted in the United States; it offers the benefit of enhancing revenue collections at the cost of possibly introducing uncertainty and arbitrariness in the enforcement process. However, even that example of tax delegation focuses primarily on issues of enforcement and anti-avoidance. Perhaps a better example of the sort of delegation considered in this Article is the law passed by the California legislature in 2006 (known as "Assembly Bill 32") requiring the California Environmental Protection Agency Air Resources Board to design and implement a market-based system to reduce California's greenhouse gas emissions. This grant of tax policymaking authority took effect in 2011 when the California environmental regulator adopted regulations that took the form of a cap-and-trade system roughly equivalent to carbon taxes.[176]

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175. *See* Paul Brady, *General Anti-Avoidance: Time for a Re-Think?*, Irish Tax Rev., July 2008, at 64, 65, http://www.taxandlegal.ie/ITRJuly2008.pdf ("[Section 811] delegates the power to determine when tax avoidance has occurred to the Revenue Commissioners and permits them to disregard tax provisions enacted by the [Irish legislature].").

176. New Zealand formally delegates a significant part of the responsibility for proposing and designing new tax legislation to civil servants in its Inland Revenue Department. *See* Struan Little et al., Development of Tax Policy in New Zealand: The Generic Tax Policy Process 13 (2013), http://www.ctf.ca/CTFWEB/EN/Publications/Tax_Policy/Tax_Policy_Roundtable_2013.aspx. And for many years Sweden has had a similar, albeit less formal, system of tax policy development that relies on delegation of authority to tax professionals in government. *See* Sven Steinmo, *The Evolution of the Swedish Model*, *in* Internalizing Globalization: The Rise of Neoliberalism and the Decline of National Varieties of Capitalism 149, 149–64 (Susanne Soederberg et al. eds., 2005).

This Article entertains three particular versions of expanded tax delegation. First, Congress should consider general statutory grants to delegate greater authority to the Treasury Department to design particular tax subsidy provisions, such as the R&E credit. Second, Congress should consider delegating some control over income tax rates, either to Treasury, the Federal Reserve or perhaps a newly created independent authority, thereby facilitating the coordination of fiscal policy with monetary policy to minimize the effects of business cycles, while also avoiding problems of time inconsistency. Finally, Congress should consider delegating the job of tax reform to an independent commission with authority to enact tax law reforms that would take effect unless a majority of both houses of Congress vote to stop it. All of these expansions of tax lawmaking authority have analogs in other areas of law and policy, where broad delegations of authority are common.

This Article considers the practice of broad delegation in nontax areas as possible precedent for broader delegation in the tax area. The reverse argument could also be made: that instead of expanding tax delegation to mimic other areas of federal policy, Congress should perhaps conform delegation in other policy areas to mimic the way in which tax policy is currently made. In other words, the inverse lesson would be that Congress could consider wresting delegated authority from the nontax agencies and returning that authority to Congress, and to congressional committees. Congress would then be responsible for providing all of the important details of those nontax regulatory regimes, with the executive agencies primarily filling in the gaps around the edges and, importantly, focusing on enforcement. Indeed, there are those in Congress who would take precisely that approach.[177] This is not the path that Congress has taken in areas other than tax law; and while it is not necessary that the policy process work similarly in all areas of law, it is difficult to identify principles that support approaching tax law so differently. Perhaps there nonetheless exist real and important differences between tax law and every other area of law that make tax delegation different from every other type of delegation; and if so, it would be very useful to understand their implications and their limits.

177. Republican Members of Congress have recently proposed legislative steps to reverse the trend toward expanded delegation of federal lawmaking authority to agencies, a trend that they claim has accelerated under President Obama. Some of the proposals entail reduced funding or increased reporting requirements for executive agencies. *See, e.g.*, Benjamin Goad, *GOP Bills Target 'Overreaching' EPA*, The Hill (Feb. 14, 2013, 8:25 PM), http://thehill.com/regulation/energy-environment/283257-gop-bills-target-epa-power-seek-transparency- (describing legislative proposals to limit EPA "overreaching" put forward by Sen. Mike Johanns, Republican of Nebraska).