

Why Congress Matters: The Collective Congress in the Structural Constitution

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WHY CONGRESS MATTERS: THE COLLECTIVE CONGRESS IN THE STRUCTURAL CONSTITUTION

*Neomi Rao**

Abstract

Congress currently operates in the shadow of the administrative state. This Article provides a modern reconsideration of why Congress still matters by examining the “collective Congress” within the text, structure, and history of the Constitution. Like the unitary executive, the collective Congress is a structural feature of the Constitution’s separation of powers. With deep roots in political theory, the Framers created a representative and collective legislature that would provide a legitimate mechanism for bringing together the nation’s diverse interests to most effectively pursue the common good. To fully realize the benefits of collective lawmaking, the Constitution insists on the double exclusivity of the legislative power: only Congress can exercise legislative power, and Congress possesses only legislative power. The Constitution ties the ambitions of representatives and senators to Congress as an institution by prohibiting members of Congress from exercising the executive or judicial powers. This structure supports the members’ fiduciary responsibilities to the people, minimizes corruption, and reinforces the independence and integrity of the lawmaking power.

Understanding the principles of a collective Congress provides a framework for analyzing a range of separation of powers questions, particularly those arising from the delegation of legislative power to administrative agencies. Quite simply, presidential control of administration cannot replace congressional control of legislation. Congress remains relevant in our complex modern society because it provides a unique form of accountability for ascertaining and pursuing the public good, preserving the rule of law, and protecting individual liberty. The collective Congress provides a powerful conceptual framework for understanding the scope of the Constitution’s “legislative power” and how Congress may exercise it. The administrative state blurs the line between the executive and legislative powers. The collective Congress sharpens that line and helps explain why Congress still matters in our system of government.

* Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. This Article reflects my personal research and opinions and was written and accepted for publication while I was an Associate Professor at Antonin Scalia Law School, George Mason University, and Founder and Director of the Center for the Study of the Administrative State. An earlier version of this Article was presented at the American Political Science Association and the Federalist Society’s Article I Initiative Conference. I appreciate the thoughtful comments of Neal Devins, Michael Greve, Henry Monaghan, Saikrishna Prakash, and David Schoenbrod, and the excellent research assistance of Daniel Shapiro. This Article benefitted from sabbatical support from the Searle Freedom Trust.

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INTRODUCTION

The principle of political life lies in the sovereign authority. The legislative power is the heart of the State; the executive power is its brain A man can remain an imbecile and live. But as soon as the heart has ceased to function, the animal is dead.¹

The modern administrative state has marginalized Congress—or perhaps more accurately, by creating the modern administrative state, Congress has marginalized itself. The Constitution vests all legislative power in Congress,² but congressional lawmaking is now often the exception, rather than the rule. Commentators have deemed the constitutional framework a “relic.”³ Progressive era ideals of expertise and impatience with slow legislative processes have become firmly entrenched in the federal government, which acts primarily through administration. Congress is beset by polarization, gridlock, and weakness relative to the President. The executive branch has been declared the necessary victor in the separation of powers battles.

This Article aims to reveal—or perhaps more accurately, to revive—the reasons for vesting the legislative power in a Congress with specific institutional characteristics, namely collective decisionmaking and exclusion from the executive and judicial powers. The sidelining of Congress and dismissal of its importance in our complex society make it essential to reconsider the centrality of legislative power in the creation and maintenance of a republican form of government, the preservation of the rule of law, and the protection of individual liberty.

Revisiting the importance of Congress raises a challenge to the familiar themes that legislation and regulation are functionally interchangeable and that the efficiency and expertise of agencies outweigh the benefits of lawmaking by Congress.⁴ Regulation looks like

1. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 99 (Roger D. Masters ed., Judith R. Masters trans., 1978).

2. U.S. CONST. art. I, § 1.

3. See generally WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016) (arguing that Congress lacks effectiveness because the Constitution was flawed in its design).

4. See, e.g., ADRIAN VERMEULE, LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE 23 (2016) (“The very institutions of the original Constitution, functioning as they were originally created to function, decided for excellent reasons (from a lawyer’s point of view) to create the administrative state and to abnegate authority to it.”); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1611 (2016) (“[T]he informational advantages of the executive branch are an essential part of thinking about the contemporary system of checks and balances. These advantages were not clearly visible until relatively recently, and they bear directly on a wide range of questions involving the allocation of authority.”).

the law, walks like the law, and sounds like the law because it has the force of law. The dominance of regulation and administrative law has blurred the importance of lawmaking by Congress and the purpose of formulating and enacting society's rules in a representative legislature.

The gradual displacement of legislation with regulation originated in the early twentieth century with the progressives, who frankly advocated supplanting the original constitutional design.⁵ Yet contemporary scholarship has sought to accommodate the significant shift of lawmaking to agencies within the constitutional framework, to find proxies for traditional constitutional values, to justify and to harmonize administrative decisionmaking, and to promote accountability and restraint. We have in effect what some scholars have termed an *administrative constitution*, a parallel system of checks and balances for the fourth branch.⁶

Congress currently stands in the shadow of the administrative state. Yet administrative ascendance is not part of the inexorable march of

5. See, e.g., FRANK JOHNSON GOODNOW, *The American Conception of Liberty*, in THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT 7, 21 (1916) (arguing against the theories of individual liberalism from the eighteenth century that animated the Constitution). Goodnow notes that “while insistence on individual rights may have been of great advantage at a time when the social organization was not highly developed, it may become a menace when social rather than individual efficiency is the necessary prerequisite of progress.” *Id.*; WOODROW WILSON, *What Is Progress?*, in THE NEW FREEDOM 33, 48 (1913) (“All that progressives ask or desire is permission—in an era when ‘development’ ‘evolution,’ is the scientific word—to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine.”).

6. See generally WILLIAM N. ESKRIDGE, JR. & JOHN FERRELL, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (arguing that regulatory devices should be used to secure rights beyond those required by the Constitution); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1221 (2014) (“The statutes, judicial decisions, and executive directives that perform [constitutional] functions make up an unwritten constitution that governs the fourth branch of government not contemplated by the written Constitution. . . . [T]hey provide an essential legal and theoretical foundation for extending fundamental constitutional principles to administrative agencies.”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (discussing attempts to reconcile administration with the constitutional structure and arguing for an increased focus on arbitrariness in administrative decisionmaking); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1903 (2013) (describing the varieties of administrative constitutionalism); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 927 (2016) (noting with concern that agencies have moved away from the administrative constitution and considering how evolution of the administrative constitution can be legitimate). The legitimacy of these alternative checks and balances have provoked vigorous academic debate. Compare Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (critiquing political, judicial, and academic pushback against the administrative constitution), with Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1 (2017) (responding to Professor Metzger).

reason, and presidential control of administration⁷ should not replace congressional control of legislation. Other scholars, particularly Philip Hamburger, have provided a trenchant critique of the unlawfulness of administrative action that shifts legislative power to the executive.⁸ This Article shares some of the same conclusions, but it also offers a positive argument for the representative and collective Congress vested with the legislative power by our Constitution. Building on earlier scholarship, I identify the structure and values of the “collective Congress”⁹ as part of a project of rethinking Congress and its importance in our form of constitutional government.

This Article will identify and analyze the meaning of “legislative power” by examining the collective Congress in the text, structure, and history of the Constitution. Part I begins by identifying several important principles regarding legislative power found in the political philosophy familiar to the Framers. It considers the centrality of collective legislative power to the creation of government and the relationship between collective lawmaking and promoting the general good. The Framers wrestled with how to relate the parts to the whole—how representative government could act for all the people. They ultimately concluded that the deliberation, negotiation, and compromise necessary to produce legislation would best serve the interests of each individual. Collective lawmaking would also enforce a certain type of legislative impartiality and the rule of law. These principles run through the Framers’ understanding of the legislative power as essential for promoting the

7. Presidential accountability and control of agencies have been a favored tool for improving the accountability and effectiveness of administration. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 664 n.563 (1994) (arguing that presidential superintendence of the laws “promote[s] an energetic and accountable administration”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that the President’s directive authority advances accountability, effectiveness, transparency, and responsiveness).

8. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 81–82 (2014) (“Administrative law thereby restores the full range of extralegal powers concerning legislation—powers that constitutional law was designed to defeat. . . . The peril of administrative power, however, lies not in its potential for good, but in its potential for danger by unraveling government through law.”); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994) (“The actual structure and operation of the national government today has virtually nothing to do with the Constitution.”). Jeremy Waldron offers a more positive account of the “dignity of legislation” in comparison to other forms of executive or judicial lawmaking. *See, e.g.*, Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 354 (2009). Waldron explains the distinctive features of a legislature and advocates a “well-thought-through ideal which we can use to hold up [our legislative institutions] for comparison.” *Id.*

9. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1491 (2015) (introducing the concept of the collective Congress in the context of examining the problem of delegation).

general good and explain the Constitution's innovation to vest the legislative power exclusively with Congress.

Part II identifies and develops the principle of the collective Congress within the text of the Constitution. This textualist and "intratextualist"¹⁰ approach identifies relationships between the parts of Congress and the whole and reinforces the importance of generality in the law. The Constitution creates a double exclusivity of legislative power—only Congress can exercise legislative power and Congress possesses only legislative power. The Constitution's limits on Congress bolster legislation for the general good and frustrate factional interests. The collective Congress expresses an important separation of powers principle.

Part III analyzes the components of Congress and how the powers and limitations of the two branches and of individual members reinforce the importance of collective lawmaking. Both Congress as an institution and its members as individuals have only legislative powers. This parallel structure reinforces the collective Congress and the exclusivity of legislative power. The internal structure of Congress promotes the values of collective decisionmaking, such as the minimization of factional influence, the fiduciary duty of members to the people, and the enactment of laws that promote the general good.

The collective Congress within the constitutional structure will be taken up in Part IV. The Constitution deliberately vests the powers of the federal government in departments with specific characteristics in part "to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights."¹¹ The collective Congress delineates the scope and limits of the legislative power within a structure of separated powers by ensuring that members can realize their ambitions and interests only through Congress. A collective Congress exercising exclusively legislative powers aligns the ambitions of representatives and senators with Congress as an institution. While the pull of private and individual interests may drive members, the Constitution prohibits members from exercising executive (or judicial) powers, so they must focus their ambitions on the difficult business of enacting laws. This provides a solution, perhaps the only solution, for ensuring the institutional strength and independence of Congress within the federal government.

The Article concludes by considering some implications of the collective Congress for the power delegated to administrative agencies. It challenges the premise that administrative values of expertise,

10. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

11. THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

efficiency, and flexibility can substitute for the Constitution's collective legislative power, which promotes representation, deliberation, and the general good. The existence and operation of the collective Congress forms the foundation of the political society and reinforces that nondelegation is a deep feature of the constitutional structure and republican government. Regulation by executive agencies can never share the fundamental features of collective representative lawmaking. A full discussion of the implications of the collective Congress is part of a larger project and goes beyond the scope of this Article, but the collective Congress can provide a framework for analyzing various separation of powers questions.

As the unitary executive elucidates the proper exercise of "executive power," the collective Congress is a structural feature that provides a powerful conceptual framework for understanding the scope of the "legislative power" and how Congress may exercise it. The administrative state blurs the lines between the executive and legislative powers. The collective Congress sharpens that line and helps explain why Congress still matters in our system of government.

I. COLLECTIVE CONGRESS: LEGISLATIVE POWER AND REPUBLICAN GOVERNMENT

This Part recovers the meaning and importance of the "legislative power" vested in Congress. Understanding the legislative power has more than theoretical interest in a society predominated by administrative law. The affirmative value of a representative legislature undermines a common theme: that executive lawmaking can serve as an easy substitute for congressional lawmaking. Progressives who favored regulation over legislation understood that this was inimical to our constitutional form of government. They offered expertise, efficiency, and flexibility as a replacement to the old constitutional forms of separation of powers. Yet lawmaking by a representative legislature offers other values that are now often forgotten.

This Part examines key political theorists who influenced the Framers—including Locke, Montesquieu, and Rousseau—and their conception of the legislative power. It then considers how the Framers understood the legislative power and the particular form of legislative power vested in Congress. The theory and history provide a foundation for reconsidering the centrality of legislative power to the creation and maintenance of a republican form of government, to the values served by collective decisionmaking, and to the preservation of the rule of law within society.

As the Framers understood, special, private, and narrow interests will always exist—it is just a question of how they are expressed. While the Framers envisioned a certain legislative ideal focused on the general

good, they also understood that such an ideal would be pursued by real institutions run by real people.¹² The modern administrative state has certainly not eliminated special interests or perfected republican ideals of deliberation and accountability. This Part recalls the foundations for why a collective legislature was once considered the best mechanism for avoiding the intractable problems of self-interest in a society committed to the rule of law and the protection of individual liberty and property.

A. *Political Theory of Collective Legislative Power*

The Framers studied political theory and in particular the works of Locke and Montesquieu.¹³ Although there is less evidence of his influence on the Framers, Rousseau's political theory was well known at the time and helps elucidate the legislative power. Several important principles emerge from these thinkers. First, the creation of a representative, collective lawmaking power is central to the social compact and the creation of a political entity. Second, collective lawmaking best promotes the general good through the process of representation and the negotiation of competing interests. Third, preserving the integrity of legislative power requires its insulation from the executive and judicial powers. The exclusivity of legislative power provides an important separation of powers principle that protects the independence of all three branches. Legislation can be corrupted by a focus on execution and particular applications of the law. The executive cannot make the laws because it is concerned with the particular and is not a collective representative body empowered to reflect the general will. This reaffirms why the legitimate exercise of legislative power requires collective and exclusive lawmaking in the legislature.

12. Accordingly, the principle of a collective legislature aimed at the general good is not necessarily undermined by public choice theory. Public choice theory studies the incentives of various institutional actors to provide "a realistic, and often restorative, understanding of collective action and institutions." MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW*, at x (2009); see also MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS I* (1965) ("The view that groups act to serve their interests presumably is based upon the assumption that the individuals in groups act out of self-interest. If the individuals in a group altruistically disregarded their personal welfare, it would not be very likely that collectively they would seek some selfish common or group objective."); James M. Buchanan, *The Public Choice Perspective*, in 13 *THE COLLECTED WORKS OF JAMES M. BUCHANAN* 15 (2000).

13. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 151–52, 162 (1969).

1. Collective Lawmaking as the Foundation for Liberal Political Society

The Constitution reflects a political theory that places representative, collective lawmaking power at the foundation of political society. When trading the laws of nature for the laws of men, the establishment of a collective legislature provides the mechanism for bringing the diverse interests of the people into one society to enact laws for the benefit of all of the people. This social compact reflects a contractarian theory of government—the people provide consent to a particular form of government.¹⁴

The republican form of government provides one solution to the vexing problem of political association, the problem of how to form a legitimate lawmaking power that binds each individual even when the individual may not agree as to a particular law. Civil society requires all to follow the laws, because all have consented to be bound by the particular lawmaking power. Despite disagreement over the content of specific laws, citizens can consent to the legitimacy of a collective lawmaking power that represents their interests and enacts laws for the general good. The Constitution creates the contract between the people and the government. It is, however, the ongoing existence of the legislative power that allows for the continuation of the government by and for the people.

The legislature provides the common bond necessary for a government. As John Locke explained, “’tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is the *Soul that gives Form, Life, and Unity* to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion.”¹⁵ Rousseau similarly explained, “this act of association produces a moral and collective body, composed of as many members as there are voices in the assembly, which receives from this same act its unity, its common *self*, its life, and its will.”¹⁶

Locke refers to the legislature as the “soul”; Rousseau called it the “heart.”¹⁷ For both philosophers, a community unites and lives through

14. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 939 (1993) (“[Unlike in England,] Americans could observe in their various charters and, later, constitutions more tangible examples of the contract of government. Already in the 1770’s, the state-of-nature or modern natural rights analysis appears to have been the dominant theoretical justification for revolution and written constitutions.”).

15. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II, ch. XIX, § 212 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

16. ROUSSEAU, *supra* note 1, at 53.

17. See *id.* at 53, 99.

the legislature because it is through the collective lawmaking power that the people can influence each other, develop sympathy for others' perspectives, and establish effective government.

The consent of individuals creates a government and, importantly, a legislature that can act as "one body."¹⁸ Locke explains that ordinarily such a legislature will proceed through a majority of its members, and sometimes through a greater number.¹⁹ The majority represents the whole and can exercise the legislative power in a manner that binds everyone.²⁰ Individual liberty within society is "to be under no other Legislative Power, but that established, by consent, in the Commonwealth, nor under the Dominion of any Will, or Restraint of any Law, but what that Legislative shall enact, according to the Trust put in it."²¹

The legislature provides the possibility of uniting a disparate group of people into one society—one government—by providing a forum for negotiating and mediating diverse interests. A collective, representative legislature can secure an individual's life and property by promulgating laws that apply equally to each person. The existence of such a lawmaking power equally applied reduces the people's apprehension from tyranny and absolute, arbitrary power. As Locke explained, a person's life and property are only safe when the

Legislature was placed in *collective Bodies of Men*, call them Senate, Parliament, or what you please. By which means every single person became subject, equally with other the meanest men, to those Laws, which he himself, as part of the Legislative had established: nor could any one, by his own Authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to License his own, or the Miscarriages of any of his Dependants. *No Man in Civil Society can be exempted from the Laws of it*. For if any Man may do what he thinks fit, and there be no Appeal on Earth, for Redress or Security against any harm he shall do; I ask, Whether he be not perfectly Still

18. LOCKE, *supra* note 15, bk. II, ch. VIII, § 95.

19. *Id.* bk. II, ch. VII, § 96.

20. *Id.* ("For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority*. . . . [I]t is necessary the Body should move that way whither the greater force carries it, which is the *consent of the majority*: or else it is impossible it should act or continue one Body, *one community* . . . and so every one is bound by that consent to be concluded by the *majority*. And therefore we see that in Assemblies impowered to act by positive Laws where no number is set by that positive Law which impowers them, the *act of the Majority* passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole."); *see also id.* bk. II, ch. VIII, § 99.

21. *Id.* bk. II, ch. IV, § 22.

in the State of Nature, and so can be no part or Member of that Civil Society.²²

Collective lawmaking ensures the greatest security for equal application of the laws because it provides a mechanism for negotiating people's different interests. Therefore, such lawmaking protects property because no man can be a law unto himself. This also means that no person has pretense to be exempt from the law. While each person is part of the legislative power, each person is also subject to the laws. Moving from the state of nature requires the creation of a collective legislative power that promulgates laws for everyone in society.

Also, throughout his discussion of legislative power Locke refers to "the legislative" as the collective body that exercises the legislative power.²³ Importantly, he does not use the term *legislators*, only *representatives*. This is consistent with his view that the legislative power should be collective. Members of the legislature are not *legislators*, or lawmakers, because they cannot make the law individually. Instead they are representatives in a body that is "the legislative."²⁴

Montesquieu similarly emphasizes the connection between law and safety for individuals: "The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another."²⁵ Liberty encompasses the tranquility of mind that follows from living under the rule of law. This statement precedes Montesquieu's frequently cited statements about the separation of powers. It explains that liberty requires the safety of living within the rule of law where separated powers frustrate tyranny, arbitrary control, and oppression.²⁶

Legislative power serves as the foundation of a civil society and if such power breaks, the society fails. Locke stresses: "when the *Legislative* is broken, or *dissolved*, Dissolution and Death follows. For the *Essence and Union of the Society* consisting in having one Will, the Legislative, when once established by the Majority, has the declaring,

22. *Id.* bk. II, ch. VII, § 94 (emphasis added); see also *id.* § 143 ("[I]n well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative Power* is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws . . ." (emphasis added)).

23. *Id.* bk. II, ch. XI, §§ 134–42.

24. Today we frequently speak of lawmakers or legislators, but that terminology was not commonly used at the Founding.

25. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., 1949) (1748).

26. See *id.* at 152.

and as it were keeping of that Will.”²⁷ The collective legislature represents and keeps the will of society—it provides the ongoing mechanism for bringing together, negotiating, and resolving the different interests in society. When the legislative power no longer functions or is dissolved, the union and civil society are in peril, for the people have no legitimate means of collecting their interests and expressing their will together.

A representative and collective legislature does not just gather up the different opinions in society, but subjects those opinions to reasoned deliberation. As Montesquieu highlights, the legislature promotes liberty by providing a manageable forum for considering the interests of the people and for “discussing public affairs.”²⁸ Deliberation constitutes an essential component of legislative power because it allows the people’s representatives to ascertain the general good and provides for the exercise of reason in determining the best course for society.

The legislative power may be corrupted in a variety of ways, each of which highlights the importance of collective lawmaking. First, the executive may dissolve or corrupt the legislature.²⁹ As Rousseau stated, the state might dissolve when the executive “no longer administers the state in accordance with the laws and usurps the sovereign power.”³⁰ In these circumstances, the executive eviscerates the legislative power. As Locke explained:

For if any one by force takes away the establish’d Legislative of any Society, and the Laws by them made pursuant to their trust, he thereby takes away the *Umpirage*, which every one had consented to, for a peaceable decision of all their Controversies, and a bar to the state of War amongst them. They, who remove, or change the Legislative, take away this decisive power, which no Body can have, but by the appointment and consent of the People [B]y removing the Legislative establish’d by the Society (in whose decisions the People acquiesced and united, as to that of their own will) they unty the Knot, and *expose the People a new to the state of War*.³¹

The collective legislative power can be corrupted by an executive who seizes power or fails to execute the laws faithfully. In either instance, the collective legislative will has unraveled, and the social

27. LOCKE, *supra* note 15, bk. II, ch. XIX, § 212.

28. MONTESQUIEU, *supra* note 25, at 154. Montesquieu notes that a representative body provides a “great advantage . . . i[n] their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.” *Id.*

29. LOCKE, *supra* note 15, bk. II, ch. XIX, § 222.

30. ROUSSEAU, *supra* note 1, at 97.

31. LOCKE, *supra* note 15, bk. II, ch. XIX, § 227 (emphasis added).

contract is undone. Without a representative legislature, there is no legitimate power to umpire and to provide peaceful resolution between the different opinions in society.

Second, and for Locke and Rousseau even more dangerous to the legislative power, the legislature may act against the collective trust placed in them. For Rousseau, “when the members of the government separately usurp the power they ought only to exercise as a body[. . .]his is no less an infraction of the laws, and produces even greater disorder.”³² The “greater disorder” occurs when members of the legislature act individually rather than collectively. Similarly, Locke observes that representatives may unravel the legislative power by seizing it for themselves or delegating it to others:

Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavour to grasp themselves, or put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power*, the people had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty, and, by the Establishment of a new Legislative . . . provide for their own Safety and Security, which is the end for which they are in Society.³³

Again, the establishment of a legitimate legislature is associated with “safety and security.” The legislature transgresses the power delegated from the people when it grasps for itself or puts into the hands of another person “*an Absolute Power* over the Lives, Liberties, and Estates of the People.”³⁴ The legislature must be collective and in the form originally created—it cannot be exercised by individual legislators or the executive. The existence of a collective legislature is a prerequisite for uniting the people; without such a collective power, the government dissolves. The collective and representative legislature connects the people and allows them to make laws for the benefit of all members of society.

The centrality of the collective legislature is further reinforced in the fact that the state, as a political association, persists through the maintenance of the collective legislative power, not through particular laws that have been enacted. As Rousseau states,

32. ROUSSEAU, *supra* note 1, at 98.

33. LOCKE, *supra* note 15, bk. II, ch. XIX, § 222 (emphasis added).

34. *Id.* This highlights the dangers of delegation of legislative power and the problem with conveying this power outside of the representative and collective legislature; it is, in short, the problem of the modern administrative state. See *infra* Part IV.

It is not through laws that the State subsists, it is through the legislative power. Yesterday's law does not obligate today, but tacit consent is presumed from silence, and the sovereign is assumed to confirm constantly the laws it does not repeal while having the power to do so.³⁵

Locke explains that if the legislature is prevented from meeting, “the *Legislative is altered*. For 'tis not a certain number of Men, no, nor their meeting, unless they have also Freedom of debating, and Leisure of perfecting, what is for the good of the Society For it is not *Names*, that Constitute Governments, but *the use and exercise of those Powers that were intended to accompany them*”³⁶ The government requires the preservation of the legislature in its proper collective form because the exercise of lawmaking power enables civil society and the resolution of disputes through a peaceful and binding process. The state depends on the ongoing existence and effectiveness of the legislature and rule by the lawmaking power.³⁷

Today we frequently speak of the rule of law with respect to the courts and the executive, which are bound to follow the enacted laws. Yet at a more foundational level, the rule of law means the availability of a lawmaking power that represents the general will. The executive and the judiciary must follow the law, but the rule of law applies also to the legislature. It means ruling through the making of laws rather than, for instance, through the issuance of edicts or the like.

2. Collective Lawmaking Promotes General Laws for the General Good

Collective and representative lawmaking relates to another fundamental principle of law: that legislation should focus on the general good rather than particular applications or personal preferences. As Rousseau said, legislation has legitimacy only when it applies equally to all and has “no other object than the general good.”³⁸ Generality has been a hallmark of law for centuries, originating in Greek and Roman political philosophy. Aristotle noted, “[L]aw can do no more than generalize.”³⁹ Friedrich Hayek identified generality as a foremost principle of constitutional law.⁴⁰ Through deliberation and the requirement of

35. ROUSSEAU, *supra* note 1, at 99.

36. LOCKE, *supra* note 15, bk. II, ch. XIX, § 215 (emphasis added).

37. HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 200 (1989) (“The rule of law for Locke clearly means the rule of the lawmaking power, not the ascendancy or inviolability of certain laws; it is the rule of the men who make the laws.”).

38. ROUSSEAU, *supra* note 1, at 63.

39. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23 (1967) (citing Aristotle's *Ethics* V.10).

40. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 149, 151, 155 (1960).

majority rule, a legislature would provide the best mechanism for representing the general will and aiming at the common good. Collective lawmaking provides the greatest likelihood of producing good legislation, understood as stable and general laws.

The difficulty, however, lies in ascertaining and promoting the general good when most individuals are primarily interested in pursuing private or particular goods. Contrasting the public good with the private or particular good, Locke and Rousseau focus on how to eliminate particular interests from the enacted law and how to align the individual interests of the representatives with the common good. As David Hume wrote, the best government aligns the separate interests of each official with the public interest; without such an alignment one can expect “disorder[] and tyranny.”⁴¹

Rousseau provides one of the subtler understandings of how the individual will relates to the general will. He was adamant that the law could have only general, not particular, objects. If the law pertained to particular individuals or particular facts, it could not properly reflect the general will.⁴² Rousseau feared the tendency of the personal, private impulse to take precedence over the general will. Although in a “perfect [act of] legislation, the private or individual will should be null . . . and consequently the general or sovereign will always [be] dominant,” in reality the general will is the weakest and “the private will is the first of all. So that each member of the government is first himself, and then magistrate, and then citizen—a gradation that is exactly opposite to the one required by the social order.”⁴³

Individual representatives are part of the collective legislature, and good legislation depends on their sharing the general good along with other citizens. Yet representatives, like all individuals, naturally privilege their private gain and misfortune over the public gain and misfortune. As Rousseau explains:

Each person, detaching his interest from the common interest, sees perfectly well that he cannot completely

41. DAVID HUME, *Of the Independency of Parliament*, in *PHILOSOPHICAL WORKS OF DAVID HUME* 39, 42 (1854) (“[W]e should always consider the separate interest of each court, and each order; and, if we find that, by the skillful division of power, this interest must necessarily, in its operation, concur with the public, we may pronounce that government to be wise and happy. If, on the contrary, separate interest be not checked, and be not directed to the public we ought to look for nothing but faction, disorder, and tyranny from such a government.”).

42. ROUSSEAU, *supra* note 1, at 66 (“[T]here is no general will concerning a particular object. . . . When I say that the object of the laws is always general, I mean that the law considers the subjects as a body and actions in the abstract, never a man as an individual or a particular action.”).

43. *Id.* at 82.

separate himself from it; but his share of the public misfortune seems like nothing to him compared to the exclusive good that he claims he is getting. With the exception of this private good, he wants the general good in his own interest just as vigorously as anyone else.⁴⁴

The exclusive, individual, private good will therefore frequently (maybe always) outweigh the public good. Rousseau states, perhaps ironically, that “apart from this private good,” the legislator wants the general good as vigorously as anyone.⁴⁵ The private good is always there, stronger than the collective, general good.

Nonetheless, representative legislatures are most likely to promulgate laws for the general rather than the particular good.⁴⁶ By requiring the agreement of some number of representatives, legislation can be produced only through deliberation, negotiation, and compromise—a process that encourages more general laws. As Rousseau says,

Because either the will is general, or it is not. It is the will of the people as a body, or of only a part. In the first case, this declared will is an act of sovereignty and constitutes law. In the second case, it is merely a private will, or an act of magistracy; it is at most a decree.⁴⁷

Similarly, Montesquieu criticizes lawmaking through decrees and exemptions because the “particular favor” may become a general rule, and those who apply for laws “are improper guides to the legislator; the facts are always wrongly stated.”⁴⁸

Locke explains that such laws should follow a specific process and should be “promulgated standing laws,” not “extemporary arbitrary decrees.”⁴⁹ Law would depend not on the private judgment of each individual, as it did in the state of nature, but rather “by settled Standing

44. *Id.* at 109; *see also id.* at 55 (“His private interest can speak to him quite differently from the common interest. His absolute and naturally independent existence can bring him to view what he owes the common cause as a free contribution, the loss of which will harm others less than its payment burdens him.”).

45. *Id.* at 109.

46. *Id.* at 108.

47. *Id.* at 59–60.

48. MONTESQUIEU, *supra* note 25, at 169.

49. LOCKE, *supra* note 15, bk. II, ch. XI, § 136; *see also id.* § 137 (“[T]he Ruling Power ought to govern by *declared and received Laws*, and not by extemporary Dictates and undetermined Resolutions. For then Mankind will be in a far worse condition, than in the State of Nature For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and promulgated Laws*; that both the People may know their Duty, and be safe and secure within the limits of the Law.”).

Rules, indifferent, and the same to all Parties.”⁵⁰ This relates to the classic rule of law values of notice, stability, and predictability in legal arrangements.

Moreover, general laws would have equal application to the people, securing their individual liberty and property rights. As Rousseau explains, the social contract requires each person to give his rights from the state of nature to the community, and “since each one gives his entire self, the condition is equal for everyone, and since the condition is equal for everyone, no one has an interest in making it burdensome for the others.”⁵¹ Fundamentally, the safety and liberty provided by government derives from collective decisionmaking because legislators will assemble to make laws, then return to private life, subject to the laws that they have made. Without the possibility of exemptions for themselves, their friends and supporters, the lawmakers will “take care” to make laws for the “publick good.”⁵²

Mutual interests between the people and the lawmakers encourage generally applicable laws. Such laws best serve individual liberty because the lawmakers and the people are united in their collective interests. Although a representative legislature could, of course, agree to enact laws to promote particular interests, it is the form most likely to promote generality and equal application of the law. Creating legitimate and good law is essentially intertwined with representative legislatures and with individual liberty.⁵³

3. Separation of Powers: Exclusivity of the Legislative Power

The previous Section explained why legislation must focus on the general or common good, not particular matters. This principle constitutes an essential feature of the separation of powers between the legislature and the executive and judiciary. The institution that makes the law should not be concerned with the law’s particular applications. Locke, Rousseau, and Montesquieu all agree that a good government requires an exclusive legislative power.

Exclusivity here refers to two principles: first, the legislature can exercise only legislative power, not the power to execute or implement the law in particular matters. Second, only the legislature may exercise legislative power. This means the executive, concerned as it is with particular matters, cannot also act as a lawmaker. Although an exclusive

50. *Id.* bk. II, ch. VII, § 87.

51. ROUSSEAU, *supra* note 1, at 53.

52. LOCKE, *supra* note 15, bk. II, ch. XII, § 143.

53. Modern administration in its very structure is so specialized and compartmentalized that agencies rarely reflect the range of interests of the general public across multiple issues. The White House and centralized review provides some remedy for this, but cannot replicate the type of generality of a representative legislature. *See infra* Conclusion.

legislative power did not exist in England or France (or anywhere else) in 1789, the U.S. Constitution comes very close to this ideal separation of the legislative power from the other powers of government.

Under the first principle of exclusivity, the legislature can exercise only legislative power. Rousseau insists that the lawmaker cannot execute precisely because the legislature represents the public will and therefore should be concerned with general matters. He explains:

It is not good for him who makes the laws to execute them, nor for the body of people to turn its attention away from general considerations to particular objects. Nothing is more dangerous than the influence of private interests on public affairs; and the abuse of laws by the government is a lesser evil than the corruption of the legislator, which is the inevitable consequence of private considerations.⁵⁴

Particular matters corrupt the lawmaker, who should focus on the general good. Since execution relates to particular applications, not the general rule, lawmakers should not execute the laws.

Those who command the law “should also not have authority over men. Otherwise, his laws, ministers of his passions, would often only perpetuate his injustices, and he could never avoid having private views alter the sanctity of his work.”⁵⁵ If the lawmaker also has control over execution, his laws will be unjust because his private opinions will corrupt his proper lawmaking role. The corruption of the lawmaker, by which Rousseau means the focus of the lawmaker on particular or private matters, threatens the essence of the legislature as the representation of the general will.

Montesquieu similarly stresses that the representative legislature can only enact laws, but not execute them:

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.⁵⁶

The legislative power cannot “stay the executive,” but “it has a right and ought to have the means of examining in what manner its laws have been executed.”⁵⁷ The legislature may examine the executive’s actions, what today we would call oversight, but cannot prevent the executive

54. ROUSSEAU, *supra* note 1, at 84–85.

55. *Id.* at 68.

56. MONTESQUIEU, *supra* note 25, at 155.

57. *Id.* at 157–58.

from executing laws. The legislature's role in "examining" presupposes a legislature without the power to execute the laws.

The first principle of exclusivity is that the legislature can exercise only lawmaking power. The second principle of exclusivity is that the lawmaking power can be exercised only by the collective legislature, and not by the executive. As Locke explained: "nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a *Law*, which has not its *Sanction from that Legislative*, which the publick has chosen and appointed."⁵⁸ Once the public consents to a collective legislature, this is the only body that can issue laws.

Locke and Rousseau reinforce the exclusivity of legislative power by insisting on a principle of nondelegation. Only the legislature can make laws and its grant of authority from the people to make laws does not include the authority to delegate or grant lawmaking power to the executive or another entity. Locke explained:

The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the People have said, We will submit to rules, and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making *Laws*, and place it in other hands.⁵⁹

Rousseau similarly suggests the sovereignty reflected in legislative power is inalienable since "sovereignty being only the exercise of the general will, can never be alienated, and that the sovereign, which is only a *collective* being, can only be represented by itself. Power can perfectly well be transferred, but not will."⁶⁰ The collective legislative will cannot be transferred.

Locke conceives of a separation between the legislature and the executive because they exercise different rights from the state of nature.

58. LOCKE, *supra* note 15, bk. II, ch. XI, § 134.

59. *Id.* bk. II, ch. XII, § 141.

60. ROUSSEAU, *supra* note 1, at 59 (emphasis added).

As Harvey Mansfield explains, in Locke's theory, "No single person, that is, can have both legislative and executive power in civil society, as every person does in the state of nature. No one can have both natural power and political power."⁶¹ Legislative power vests in bodies of men, whereas the executive power will usually vest in one person. Locke, however, does not press the necessity of the unitary executive to the same extent as the fundamental requirement of a collective legislature.

Although Locke and Rousseau acknowledge some flexibility in execution of the law, they firmly maintain that such discretion is not a legislative power. For instance, Locke recognizes a prerogative power that allows the executive to act without sanction of law, or sometimes against the law, for the common good.⁶² This power may arise because of exigent circumstances and the flexibility required for the application of law. Locke nowhere suggests, however, that this prerogative power includes a lawmaking power. Rather, he emphasizes that the lawmaking power can be exercised only by the legislative power authorized by the people, and that those who seek to remove the legislature are usurpers who "untie the Knot" of society and exercise only "Force without Authority."⁶³

Recognizing the necessity for flexibility in the executive, Rousseau explains when there is peril "the general will is not in doubt, and it is evident that the first intention of the people is that the state should not perish. In this manner, the suspension of legislative authority does not abolish it."⁶⁴ Yet Rousseau also explicitly states that the executive cannot make the law: "The magistrate who silences it cannot make it speak; he dominates it without being able to represent it. He can do anything but make laws."⁶⁵ While Locke and Rousseau recognize that the executive possesses a limited prerogative to modify or to suspend legislation when circumstances warrant, they also insist that the executive cannot make the law. Only the people's representatives can collectively make law.

Moreover, the combination of legislative and executive powers, in particular, can lead to tyranny. For Locke, if the legislative and executive powers are joined,

61. MANSFIELD, JR., *supra* note 37, at 199.

62. LOCKE, *supra* note 15, bk. II, ch. XIV, §§ 159–60.

63. *See, e.g.*, LOCKE, *supra* note 15, bk. II, ch. XIX, § 227 ("They, who remove, or change the Legislative, take away this decisive power, which no Body can have, but by the appointment and consent of the People And thus by removing the Legislative establish'd by the Society (in whose decisions the People acquiesced and united, as to that of their own will) they untie the Knot, and expose the People a new to the state of War.").

64. ROUSSEAU, *supra* note 1, at 121.

65. *Id.* at 121–22.

humane frailty apt to grasp at Power . . . they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government.⁶⁶

Allowing for the combination of the general law with the particular application, allows government officials to seize power for personal gain, contrary to the general good that is the purpose of government.

Montesquieu similarly argues against the combination of the executive and legislative powers, noting that if the executive power “should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.”⁶⁷ If legislators could serve as executive officials, it would allow for the combination of lawmaking with execution, effectively ending liberty.

The political theorists closest to the Framers developed the centrality of the collective and representative legislative power as the bond between individuals in society. The legislature provided a mechanism for umpiring inevitable disputes and resolving them through the enactment of law. Such a legislature provides the greatest security for an individual’s life, liberty, and property. These principles provide a further understanding of the deep structure against the delegation of legislative power outside the collective legislature. Executive lawmaking unravels the social compact and the basic principles of republican government. To maintain the integrity of the legislative power and its focus on the general good, the legislative power should be exercised by a representative legislature and that legislature should not have a part in exercising the other powers of government.

B. *The Framers and the Collective Congress*

The Framers adopted many of the insights of this political theory and applied it to their experience with English parliamentary government and the shortcomings of the Articles of Confederation. Representative collective lawmaking is often taken for granted in our system, in part because no one questions that the Constitution’s legislative power must be exercised by Congress, a collective lawmaking institution. The Framers disagreed about many aspects of the national legislature—its

66. LOCKE, *supra* note 15, bk. II, ch. XII, § 143.

67. MONTESQUIEU, *supra* note 25, at 156.

precise form, the number of representatives, how representation would be divided, and the rules for voting. On the fundamental question of a multimember Congress, however, there was no disagreement. This is unsurprising, since collective representative lawmaking was at the heart of the Framers' practical experience with, and theoretical understanding of, republican government. Even today, in the face of an expansive administrative state, the principle that "legislative power" must be exercised by the collective Congress remains an article of faith.⁶⁸ Yet in the modern era, this commitment to representative lawmaking often stands as a mere formality in the face of substantial functional lawmaking outside of Congress.

This Section examines *why* the Framers believed collective lawmaking provided the essential foundation for the national government. First, the people of the nation could be united only through a representative lawmaking power. Collective legislative power would unite the people of the various states by creating an institution that could address their shared problems and promote the general good. This was an important aspect of the fiduciary relationship of "public trust" between the people and the federal government reflected in the Constitution.⁶⁹ Second, the Framers considered factions inevitable and yet dangerous to the public good. The collective Congress provided their unique solution to the difficult question of how to maintain a representative government while minimizing the influence of personal, particular, and factional interests in lawmaking.

1. Collective Legislative Power as the Mechanism for Bringing People Together

Although the Framers feared an overly powerful Congress, "drawing all power into its impetuous vortex,"⁷⁰ they also recognized that political association and the creation of a federal government required the existence of an effective lawmaking power. As Alexander Hamilton wrote, "Government implies the power of making laws."⁷¹ Corruption and failure of legislative power is a serious problem—without a functioning legislative power, the core of political society collapses and

68. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (upholding agency's authority while recognizing that "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers"); *Field v. Clark*, 143 U.S. 649, 692 (1892) (stating that nondelegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution").

69. See generally Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077 (2004) (developing the ideal of fiduciary government and the public trust doctrine within the Constitution).

70. THE FEDERALIST NO. 48, *supra* note 11, at 257 (James Madison).

71. THE FEDERALIST NO. 15, *supra* note 11, at 72 (Alexander Hamilton).

the people lack a legitimate mechanism to enact laws that bind all members of the society. The Framers chose a structure for Congress that would promote the government's responsibility to maintain the public trust. The Constitution vests the legislative power in a collective Congress that first unites the diverse interests of the society and, second, promotes generality and the equal application of the laws.

For the Framers, a representative legislature established the mechanism for collecting and uniting the interests of the people. After all, government is a collective enterprise—a way to protect liberty and property rights, and to provide common solutions to shared problems. As John Adams explained,

[A representative assembly] is the only instrument by which the body of the people can act; the only way in which their opinions can be *known and collected*; the only means by which their wills can be *united*, and their strength exerted, according to any principle or continued system.⁷²

A representative legislature provides the most legitimate institution for identifying the opinions of the people, collecting them together, and negotiating their interests.

Through the Constitution, the people consent to be bound by the laws made by Congress. This consent legitimizes the laws Congress enacts. In *The Essex Result*, Theophilus Parsons stressed that the legislative power requires the consent of the majority, which derives from the fundamental conditions of the social compact:

This supreme power is composed of the powers of each individual collected together, and voluntarily parted with by him. . . . Each individual also surrenders the power of controuling his natural alienable rights, only when the good of the whole requires it. The supreme power therefore can do nothing but what is for the good of the whole; and when it goes beyond this line, it is a power usurped.⁷³

Parsons's reading reflects a common understanding that legislative power extended only so far as the people's consent. Logically, the

72. JOHN ADAMS, DEFENCE OF THE CONSTITUTION OF THE GOVERNMENT OF THE UNITED STATES (1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 119, 120 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

73. THEOPHILUS PARSONS, THE ESSEX RESULT (1780), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 112, 115 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also id.* at 116 ("No man consented that his natural alienable rights should be wantonly controuled: they were controulable, only when that controul should be subservient to the good of the whole; and that subserviency, from the very nature of the government, can be determined but by one absolute judge.").

people's consent extended only to laws enacted for the "good of the whole."⁷⁴ As in Locke and Rousseau, if the legislature should fail to represent the general good, it usurps the power of the people and violates its fiduciary duties.

In practice, collective lawmaking should work towards the good of the whole. For instance, a collective Congress would promote deliberation, because agreement between diverse interests would require discussion and negotiation to produce legislation that could receive a majority vote in the House and Senate. The Framers occasionally expressed optimism that a legislative assembly, at its best, could reflect the reason of the public in government.⁷⁵ In part, there would be negotiation and debate, but also a refinement of the views of the public. As Madison noted, "[A] majority of the whole society could seldom take place upon any other principles, than those of justice and the general good."⁷⁶ Diverse views would be filtered through the process of enacting legislation thereby improving the final law.

Similarly, the collective legislative process would help secure liberty by making it difficult to combine for purposes of corruption. As Madison observed,

It could not be presumed that all or even a majority of the members of an Assembly would lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body.⁷⁷

The form of collective decisionmaking would discourage the corruption of Congress as an institution and encourage the fulfillment of the public trust.

In addition, collective lawmaking would encourage, if not guarantee, equal application of the laws, a value essential to the rule of law in a republican government. As with Locke and Rousseau, John Adams explained, a republic is "only a government, in which all men, rich and poor, magistrates and subjects, officers and people, masters and servants,

74. *Id.* at 114.

75. *E.g.*, THE FEDERALIST NO. 49 (James Madison).

76. THE FEDERALIST NO. 51, *supra* note 11, at 271 (James Madison).

77. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 332–33 (1966) (referring to the statement of James Madison).

the first citizen and the last, are equally subject to the laws.”⁷⁸ Everyone, including the lawmakers, would be subject to the laws.

Adams also highlighted the importance of “safety” under the laws for the liberty and property of every individual in society.⁷⁹ The safety would be guaranteed by the vital connection between the representatives and the people. As Madison explained:

[T]hey can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest, and sympathy of sentiments, . . . without which every government degenerates into tyranny.⁸⁰

The representatives in Congress are bound to the people not only through election, but also through their shared interests as members of the community. Laws will affect the mass of people along with the lawmakers and their families and friends. Equal application of the laws would provide security to the people that their lawmakers would enact only those laws under which they would also want to live. Regular elections would ensure the fidelity of the representative to his electors and their common interests.⁸¹

78. ADAMS, *supra* note 72, at 119.

79. *Id.* (“It implies, moreover, that the property and liberty of all men, not merely of a majority, should be safe; for the people, or public, comprehends more than a majority, it comprehends all and every individual . . .”).

80. THE FEDERALIST NO. 57, *supra* note 11, at 297 (James Madison); *see also id.* (“If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it.”).

81. *See* THOMAS PAINE, COMMON SENSE (1776), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 103, 104 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[T]hat the *elected* might never form to themselves an interest separate from the *electors*, prudence will point out the propriety of having elections often: because as the elected might by that means return and mix again with the general body of the *electors* . . . their fidelity to the public will be secured by the prudent reflection of not making a rod for themselves. And as this frequent interchange will establish a common interest with every part of the community, they will mutually and naturally support each other, and on this . . . depends the *strength of government, and the happiness of the governed.*”); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 164 (1969) (“[T]he multitude collectively always are true in intention to the interest of the public, because it is their own. They are the public.” (citing 3 JOHN WITHERSPOON, WORKS OF WITHERSPOON 434)).

In a modern era of widespread exemptions for Congress from federal laws as well as exemptions for well-placed groups,⁸² the vitality of this principle has been lost. As John Jay wrote, the national government would be weak “if it should forget, that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole.”⁸³

Mindful of the limitations of government, the Framers created a collective Congress that promotes the generality of lawmaking and its equal application to all citizens through a variety of mechanisms designed to align the interests of the lawmaker with the public.⁸⁴ The collective Congress within the structure of the Constitution was designed to ensure the lawmaker maintains the public trust and the purposes for which the government was created, namely the public good.

2. Mediating Factions, Avoiding Cabals

Taking a collective, representative legislature as the foundation for government, the Framers carefully considered the question of how such an entity could collect different interests to pursue the general good. As Madison said, “The regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.”⁸⁵

A collective Congress provides representation of the people and a mechanism for regulating particular and conflicting interests. Although the Framers recognized that there was no precise formula for the size of legislative assemblies,⁸⁶ they understood the size chosen would affect the

82. See, e.g., Theodor Meyer, *Do as We Say, Congress Says, Then Does What It Wants*, PROPUBLICA (Jan. 31, 2013, 2:02 PM), <https://www.propublica.org/article/do-as-we-say-congress-says-then-does-what-it-wants> (listing a number of laws from which Congress has exempted itself, including whistleblower protections, health and safety requirements, and the Freedom of Information Act).

83. THE FEDERALIST NO. 64, *supra* note 11, at 336 (John Jay); see also RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION* 36 (2016) (explaining that government cannot have strength and vigor by pursuing the interests of some—it must focus on the whole, each of the parts and members).

84. See *infra* Part IV (discussing collective Congress within the structure of the Constitution).

85. THE FEDERALIST NO. 10, *supra* note 11, at 44 (James Madison).

86. See THE FEDERALIST NO. 55, *supra* note 11, at 287 (James Madison) (explaining that with respect to the number of representatives “no political problem is less susceptible of a precise solution”); see also THE FEDERALIST NO. 58, *supra* note 11, at 304 (James Madison). The number of representatives should not increase beyond a certain point because “[t]he countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed.” *Id.*

Congress's operation, leadership, and accountability to the people. The Framers' debates concerned varying judgments about the best way to represent a wide range of interests and to promote laws aimed at the general good.

A truly republican government required that all individuals, districts, and regions be represented in legislative deliberations.⁸⁷ Elections created the necessary direct relationship between the federal government and the people—"not only as the corner Stone, but as the foundation of the fabric."⁸⁸ A related principle was equality of representation. As Wilson explained,

[A]s all authority was derived from the people, equal numbers of people ought to have an equal [number] of representatives Representatives of different districts ought clearly to hold the same proportion to each other, as their respective Constituents hold to each other. . . . [E]ach man is naturally a sovereign over himself, and all men are therefore naturally equal.⁸⁹

The equality of each person before the law was one of the foundations of republican government and such equality required equal representation.

Madison repeatedly pressed the importance of a republican government having a broad base of popular representation:

It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people⁹⁰

Although the scope of suffrage was very limited by modern standards, the Framers argued for the principle of wide representation, which would connect the members of Congress with the people, ensuring that various interests of individuals and regions would be part of the deliberations within Congress.

The crucial question remained, however, how members of Congress, attached to "local objects," might work to benefit the "national prosperity

87. MADISON, *supra* note 77, at 375 ("[T]he interests & rights of every class should be duly represented & understood in the public Councils. . . . [T]he Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathise, with the rights of the people in every part of the Community.").

88. *Id.* at 167 (referring to Wilson's statement).

89. *Id.* at 97–98 (referring to Wilson's statement).

90. THE FEDERALIST NO. 39, *supra* note 11, at 194 (James Madison).

and happiness.”⁹¹ How can self-interested representatives move beyond narrow interests to serve the general good? Madison grappled with the difficulty that representatives must resolve public disputes despite their individual interests in such disputes.

In a republican form of government, the legislators inevitably serve as both judge and party over the rights of citizens in the lawmaking process. As Madison writes in Federalist 10:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? and what are the different classes of legislators, but advocates and parties to the causes which they determine? Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail.⁹²

In this important passage, Madison invokes the necessity of an impartial judge between adverse parties—the maxim *nemo iudex in sua causa*, no man should be judge in his own cause—in the context of lawmaking.

The creation of law invariably reflects what Madison calls “so many judicial determinations” about the “rights of large bodies of citizens.” Legislation is like a judicial decision insofar as it sets the rights and obligations of citizens. Unlike a judicial decision by an impartial judge, however, self-interested representatives enact laws to which they are also subject. As Madison observes, in a republican form of government “the parties are, *and must be*, themselves the judges.”⁹³ Lawmaking cannot be separated from the people who will be affected by the law.

The collective Congress provides a mechanism for mitigating this difficulty. While representatives have self-interest and local concerns, they cannot make the law individually but must work together. If the “parties are, and must be, themselves the judges” in a representative

91. THE FEDERALIST NO. 46, *supra* note 11, at 245 (James Madison) (“[T]he members of the federal legislature will be likely to attach themselves too much to local objects. The states will be to the latter, what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual states.”).

92. THE FEDERALIST NO. 10, *supra* note 11, at 44 (James Madison).

93. *Id.* (emphasis added).

government, law must be made by sufficiently large groups of representatives. A collective legislature allows for a lawmaking process that can aggregate and negotiate diverse interests in the enactment of laws. No one party or narrow interest should prevail. This was another reason for fixing the majority quorum and voting rules.⁹⁴ If a minority could block legislation, “an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.”⁹⁵ A majority rule for lawmaking would promote the negotiation and equitable sacrifices necessary for the general good.

The parallel between adjudication and legislation highlights that legislation must meet certain political standards of impartiality and be directed at the national, not particular, good. The collective process for lawmaking ensures that no lawmaker can be a judge in his own cause, but rather must work with other lawmakers to determine the public good. Legislative or political impartiality requires that decisions benefit the people and that determinations turn not on self-interest, but on the interest of the whole.

Collective lawmaking also connects to due process—the legitimate exercise of the legislative power requires collective decisionmaking, particularly regarding laws that affect the life, liberty, and property of individuals.⁹⁶ Just as judges must be impartial between parties in the exercise of judicial power, legislators must work collectively in order to exercise the type of impartiality that counts in legislation. This impartiality means that all the various interests of society are put through a process where representatives must reach agreement. Due process includes the specifics of Article I, Section 7, but more generally requires collective legislation because this is most likely to promote the general good.

Madison and others assumed that the size of the nation would promote legislation that balanced various interests, rather than furthering factions adverse to the public good.⁹⁷ The Framers frequently distinguished a truly representative legislature from a “junto”⁹⁸ that would rule through the influence of small groups.⁹⁹ Similarly, the

94. See *infra* notes 279–81 and accompanying text.

95. THE FEDERALIST NO. 58, *supra* note 11, at 305 (James Madison).

96. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1788 (2012).

97. THE FEDERALIST NO. 10, *supra* note 11, at 48 (James Madison). The size of national government “consist[s] in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority[.]” *Id.*

98. *Junto* was understood to be a small political group or faction, often operating in secret. E.g., SAMUEL JOHNSON, *Junto*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

99. See MADISON, *supra* note 77, at 451–52 (referring to Mercer and Gerry’s statements).

Framers cautioned against rule by “cabal,”¹⁰⁰ or lawmaking in a “conclave” that would seek power and operate through intrigue and secrecy.¹⁰¹ A cabal or junto would serve its own interests, rather than the interests of the whole. These small groups could more easily pursue narrow interests and thereby corrupt the legislative power.¹⁰² Lawmaking by a small number leads to corruption of the lawmaking power and fundamentally fails to live up to the social contract to enact laws for the good of the whole.

In contrast to a junto or cabal, Congress would be a large, representative body, taking its actions in the open and visible to the public. The Constitution created a federal government designed to minimize the likelihood of cabals and small groups wielding the lawmaking power. This was one of the arguments for having a larger number of representatives—a point pressed throughout the Convention. Even at the very end of deliberations, Hamilton successfully proposed an increase in number of representatives because it was “on so narrow a scale as to be really dangerous, and to warrant a jealousy in the people for their liberties.”¹⁰³ Madison similarly considered that a larger Congress would allow for greater representation of diverse interests and would enable a closer connection and knowledge of the people.¹⁰⁴ In addition, a smaller group was more capable of corruption.¹⁰⁵

The size of the nation was thought a protection because coalitions in the government “could seldom take place upon any other principles, than those of justice and the general good.”¹⁰⁶ “The genius of republican liberty” required deriving power from the people and entrusting that power “not in a few, but in a number of hands.”¹⁰⁷ Madison argued at the Convention that enlarging the sphere of the republic was the “only

100. *Id.* at 577–78 (noting the main danger is “cabal”).

101. For example, Wilson stressed the importance of publishing journals of the legislative proceedings, since “[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.” *Id.* at 434. (referring to Wilson’s statement); *see also id.* (“[I]t would give a just alarm to the people, to make a conclave of their Legislature.”).

102. For example, George Mason and others argued the House of Representatives should be comprised of a sufficiently large number of representatives to reflect the diversity of interests throughout the nation. Keeping with this idea, the Constitution fixes the number for a quorum, because “[i]f the Legislature should be able to reduce the number [of a quorum] at all, it might reduce it as low as it pleased & the U. States might be governed by a Juncto [sic].” MADISON, *supra* note 77, at 429 (referring to Mason’s statement).

103. *Id.* at 608 (referring to Hamilton’s statement).

104. *Id.* at 263 (referring to Madison’s statement).

105. *Id.* (noting Gerry’s statement of “[t]he larger the number, the less the danger of their being corrupted”).

106. THE FEDERALIST NO. 51, *supra* note 11, at 271 (James Madison).

107. THE FEDERALIST NO. 37, *supra* note 11, at 181 (James Madison).

defence against the inconveniences of democracy consistent with the democratic form of Govt.”¹⁰⁸ Having a larger sphere would ensure that it would be difficult for a majority to unite in pursuit of an interest at odds with the whole.¹⁰⁹ Yet Madison also cautioned against allowing the assembly to grow too large, because though it might be more democratic, a larger assembly would be more likely to be controlled by a few individuals.¹¹⁰

Collective lawmaking would be the primary (though not exclusive) safeguard against factional interests.¹¹¹ For the Framers, lawmaking must address the diversity of interests and competition among factions within society to create laws for the benefit of all individuals. To serve as true fiduciaries of the people and to exercise the public trust, members of Congress must work together to enact laws and cannot delegate their legislative power to the executive. Collective lawmaking by a sufficiently large number of representatives would promote making general rules for the whole of society. By requiring the mediation and negotiation of different interests, legislation that emerges from the process of bicameralism and presentment would best serve the good of each individual—not just particular groups or persons.

Founding Era political theory and the Framers connected the collective and representative legislature with certain fundamental features of a legitimate government. Lawmaking by the executive shares none of the features of a collective and representative legislature. The legislative power is vested in a collective Congress in order to create a government that brings together all the disparate interests of society and creates laws that further the general good, avoid corruption, and protect the rights of individuals.

II. THE COLLECTIVE CONGRESS IN THE CONSTITUTION

Reflecting the principles discussed above, the Constitution vests the legislative power in a collective Congress, a concept I introduced and explored in an earlier article.¹¹² Collective lawmaking is a fundamental feature of the U.S. Constitution and collectivity serves the values of

108. MADISON, *supra* note 77, at 76 (referring to Madison’s statement).

109. *Id.* at 77 (referring to Madison’s statement).

110. THE FEDERALIST NO. 58, *supra* note 11, at 304 (James Madison). If the assembly grew too large “the soul that animates it, will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed.” *Id.*

111. For example, the possibility of a divergence of interests between the people and Congress was one justification for a separately elected President. *See* MADISON, *supra* note 77, at 360 (referring to Morris’s statement).

112. *See* Rao, *supra* note 9, at 1491–95, 1506.

republican government by promoting the general good, mediating factional interests, and separating power. These values protect individual liberty by encouraging (though not guaranteeing) laws that benefit every individual and by frustrating the pursuit of particular or narrow interests.

This Part closely analyzes the collective Congress in the text of the Constitution. Collective lawmaking was necessary to republican government, but not sufficient. The Framers carefully specified the proper relationship between the people and the federal government. Importantly, they created a double exclusivity of legislative power, vesting legislative power exclusively with Congress and allowing Congress to exercise only legislative powers. The Constitution's references to "Congress" reinforce that, as an institution, Congress exercises only legislative powers. Moreover, Congress's powers and limitations closely connect to the general good and the prevention of narrow factional interests.

A. *Creation of a Collective Congress*

The Constitution creates a particular type of collective legislature that maintains the integrity and exclusivity of the lawmaking power by insulating Congress from law execution and adjudication. The Constitution's Preamble invokes the political theory discussed in the previous Part and expresses the creation of a government for all of the people.¹¹³ The people "do ordain and establish this Constitution for the United States of America."¹¹⁴ The people together create the political entity for their collective benefit: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the *common* defence, promote the *general* Welfare, and secure the Blessings of Liberty to *ourselves and our Posterity*."¹¹⁵ The Preamble invokes the common enterprise of creating a government—a union of the people who together provide for their common defense and general welfare.

Article I establishes how the people form this union. First, the Constitution creates limited federal lawmaking power. The Vesting Clause of Article I provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a

113. See, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 444 (J. Brown & C.C. Little eds., 2d ed. 1851) (noting that the Preamble reflects the intention of the Framers); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 28 (2008) ("The Preamble states the purposes of the instrument, or rather of the decision to make the instrument law, in terms most of which seem oriented toward human good broadly conceived rather than toward institutional goals narrowly defined.")

114. U.S. CONST. pmbl.

115. *Id.* (emphasis added).

Senate and House of Representatives.”¹¹⁶ Following the political theory of the Framers, it is no accident that the legislative power comes first. The lawmaking power within Congress forms the social contract by creating and maintaining an institution that can collect the will of the people and enact laws for the public good. The vesting of the legislative power in a representative Congress fundamentally reaffirms the commitment to republican government. As Locke, Montesquieu, and Rousseau all emphasized, the lawmaking power must be given to collective bodies of men who will make laws for the political society that bring together the different interests of the nation.¹¹⁷

The term *congress* means a coming together to represent distinct interests.¹¹⁸ It derives from the Latin word *congrēdi* or *congressus*, meaning to meet with.¹¹⁹ The Continental Congress initially reflected the strong federal nature of the government under the Articles of Confederation, wherein the States came together to represent their particular interests and settle their affairs, similar to a meeting of separate sovereigns.¹²⁰ At the Convention, the Framers did not debate the use of the term *Congress*, but continued with its use.¹²¹

The Framers quite consciously, however, did not call the federal legislature “parliament.” In England, Parliament was sovereign,¹²² whereas the Constitution recognized that sovereignty resided in the people, who delegated certain limited powers to the federal government.¹²³ Moreover, Parliament included all the powers of the

116. *Id.* art. I, § 1.

117. *See supra* Section I.A.

118. Samuel Johnson defines Congress as “[a] meeting; a shock; a conflict; 2. An appointed meeting for settlement of affairs between different nations.” *Congress*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Noah Webster’s 1828 dictionary defines Congress as “1. A meeting of individuals; an assembly of envoys, commissioners, deputies, &c., particularly a meeting of the representatives of several courts, to concert measures for their common good, or to adjust their mutual concerns.” *Congress*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The modern definition remains mostly unchanged. *Congress*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/39158?rskey=Cgpb13&result=1&isAdvanced=false#eid> (last visited Oct. 13, 2017) (defining “Congress” as “[a] formal meeting or assembly of delegates or representatives for the discussion or settlement of some question”).

119. *Congress*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/39158?rskey=Cgpb13&result=1&isAdvanced=false#eid> (last visited Aug. 28, 2017).

120. *See* AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 25 (2005).

121. *See id.* at 57.

122. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 156 (1765) (“The power and jurisdiction of parliament, says sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.”).

123. *See* AMAR, *supra* note 120, at 179 (“In America, the bedrock principle was not legislative supremacy but popular sovereignty.”); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 280 (1985) (arguing that the Constitution “implied that the source of sovereignty was the people of the states”); Henry Paul

government—the executive, the judicial, and the legislative.¹²⁴ By contrast, the American Congress was vested with only enumerated legislative powers and was specifically excluded from exercising executive or judicial powers.

Under the Vesting Clause of Article I, Congress possesses all the legislative power of the federal government and no legislative power is vested in any other department. The Constitution makes Congress the exclusive recipient of “[a]ll legislative powers herein granted.”¹²⁵ This exclusivity means that the federal legislative powers may be exercised only by Congress and not by any other government actor.¹²⁶ This exclusivity runs in two directions. First, under the Vesting Clause, only Congress possesses legislative power. Second, the other references to Congress within the Constitution reinforce that Congress can exercise only legislative power. Although the two houses of Congress have some separate non-legislative powers,¹²⁷ Congress as an institution exercises only legislative power.

One point to clarify, however, is that Congress possesses some foreign affairs powers that were traditionally considered executive, or in Locke’s term, “federative,” such as the power to declare war and to grant letters of marque and reprisal.¹²⁸ These powers, however, are not powers to execute or to enforce the laws. Rather, they pertain to foreign affairs and the exercise of sovereignty. Although some scholars have argued that foreign affairs powers were associated with the “executive power” during the eighteenth century,¹²⁹ there was no essential connection between foreign affairs and executive power.¹³⁰ Moreover, the foreign

Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 138 (1996).

124. See 1 BLACKSTONE, *supra* note 122, at 149, 156 (Parliament possessed “absolute despotic power” and consisted of “the king’s majesty . . . the three estates of the realm; the lords spiritual, the lords temporal (who sit, together with the king, in one house), and the commons, who sit by themselves in another”).

125. U.S. CONST. art. I, § 1.

126. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002). *But cf.* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (explaining the difference between the nondelegation doctrine, that Congress cannot delegate legislative power, and the exclusive delegation principle, that only Congress can delegate legislative power, and advocating for the exclusive delegation interpretation).

127. See *infra* notes 207–40 and accompanying text.

128. U.S. CONST. art. I, § 8, cl. 11.

129. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 272 (2001) (“[The Framers] understood . . . that the phrase ‘executive power’ would include foreign affairs powers unless otherwise qualified by particular language.”).

130. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 560–71 (2004). Theorists such as Locke and Montesquieu

affairs power was also recognized as distinct from domestic execution of the laws.¹³¹ The external execution of the foreign affairs power or federative power was usually linked to the executive. Conferring some of this foreign affairs power to Congress does not suggest, however, that Congress has any share of the domestic law execution or enforcement power that would be associated with the “executive power.” Congress does not execute the law, even with respect to its foreign affairs powers. For instance, it can declare, but not wage, war.¹³² Its powers are limited to regulating aspects of foreign affairs and delineating the rules for the exercise of the foreign affairs power.¹³³ These powers do not undermine the exclusivity of the legislative power.

The text of the Constitution consistently refers to “Congress” or “the Congress”¹³⁴ as the collective lawmaking institution of the federal government acting as a singular entity. In addition to the Article I, Section 8, powers discussed in the next Section, the other powers of Congress are also exclusively legislative, allowing Congress to set out rules, regulations, and prohibitions in various contexts. Consider the following:

- “the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight;”¹³⁵
- the Emoluments Clause provides that government officials cannot accept any “present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State” “without the Consent of the Congress;”¹³⁶
- “The Congress may determine the Time of chusing the Electors;”¹³⁷

“provide no more than weak support for the idea that foreign relations powers are inherently executive in nature.” *Id.*

131. *See id.* at 560–64.

132. *See* U.S. CONST. art. I, § 8, cl. 11.

133. *Id.* art. I, §§ 1, 8, 10.

134. The Vesting Clause of Article I is the only place where the Constitution uses the indefinite article to refer to “a Congress” and “a Senate and House of Representatives.” *Id.* art. I, § 1.

135. *Id.* art. I, § 9, cl. 1.

136. *Id.* art. I, § 9, cl. 8.

137. *Id.* art. II, § 1, cl. 4.

- “the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President;”¹³⁸
- “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments;”¹³⁹
- “in such inferior Courts as the Congress may from time to time ordain and establish;”¹⁴⁰
- “with such Exceptions, and under such Regulations as the Congress shall make;”¹⁴¹
- “but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed;”¹⁴²
- “The Congress shall have Power to declare the Punishment of Treason;”¹⁴³
- “And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof;”¹⁴⁴
- “New States may be admitted by the Congress into this Union . . .”; and no state may be formed or erected “without the Consent of the Legislatures of the States concerned as well as of the Congress;”¹⁴⁵
- “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;”¹⁴⁶
- “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . or the other Mode of Ratification may be proposed by the Congress;”¹⁴⁷

138. *Id.* art. II, § 1, cl. 6.

139. *Id.* art. II, § 2, cl. 2.

140. *Id.* art. III, § 1.

141. *Id.* art. III, § 2, cl. 2.

142. *Id.* art. III, § 2, cl. 3.

143. *Id.* art. III, § 3, cl. 2.

144. *Id.* art. IV, § 1.

145. *Id.* art. IV, § 3, cl. 1.

146. *Id.* art. IV, § 3, cl. 2.

147. *Id.* art. V.

- “The Congress and the several States shall have concurrent power to enforce this article;”¹⁴⁸
- “The Congress shall assemble at least once in every year . . . ” and “the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified;”¹⁴⁹
- “The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them;”¹⁵⁰
- The Congress has power to “enforce” by “appropriate legislation” a number of amendments.¹⁵¹

In these varied contexts, Congress’s powers pertain to lawmaking authority. The Constitution reinforces this by consistently using the language of lawmaking, that Congress shall “by law” or “by appropriate legislation” “enforce” or “declare” or “consent.” The above list is also notable for what it excludes. Congress has no power to execute or to adjudicate the law. Each of these powers relates to setting general, prospective rules. Congress has power to act within a variety of contexts, but it always acts as the lawmaking and regulating body of the federal government.

Moreover, the Constitution uses the definite article “the Congress” in almost every reference, which reinforces the singular national Congress acting in a legislative capacity.¹⁵² Congress is an “it” not a “they” when exercising the legislative power of the federal government.¹⁵³ There are only a few clauses in which no article precedes the reference to Congress.¹⁵⁴ This difference, however, appears stylistic because similar

148. *Id.* amend. XVIII, § 2 (repealed 1933).

149. *Id.* amend. XX, §§ 2–3.

150. *Id.* amend. XX, § 4.

151. *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XVIII, § 2 (repealed 1933); *id.* amend. XIX; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

152. *See supra* note 134 and accompanying text.

153. *Compare* Rao, *supra* note 9, at 1465–67, with Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 244–49 (1992) (asserting that congressional outcomes often differ from what any individual legislator desires).

154. U.S. CONST. art. I, § 8, cl. 17 (creating as the seat of the federal government a district “as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States”); *id.* amend. I (“Congress shall make no law”); *id.* amend. XIII, § 2 (“Congress shall have power to enforce”); *id.* amend. XIX (“Congress shall have power to enforce this article”).

clauses will use “the Congress” or simply “Congress” with no apparent distinction in meaning. For example, Article I, Section 10 places limitations on states to act without the consent of Congress.¹⁵⁵ Clause 2 states, “No State shall, without the Consent of *the Congress*, lay any Imposts or Duties on Imports or Exports”¹⁵⁶ Yet in the same Section in a parallel formulation, Clause 3 states, “No State shall, without the Consent of *Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace”¹⁵⁷ These adjoining clauses, which are similar in structure and purpose, use *the Congress* and *Congress* interchangeably. *Congress* and *the Congress* mean the same thing in a Constitution with one federal lawmaking body.¹⁵⁸

The Constitution’s reference to state legislatures,¹⁵⁹ however, also speaks to the meaning of “legislative power.” These legislatures take different forms and exercise various powers under their respective state constitutions; nonetheless state legislature refers “solely and exclusively to a state’s general lawmaking body comprised of elected representatives.”¹⁶⁰ The Supreme Court has reaffirmed that at the time of

155. *Id.* art. I, § 10.

156. *Id.* art. I, § 10, cl. 2 (emphasis added).

157. *Id.* art. I, § 10, cl. 3 (emphasis added).

158. In other constitutional provisions, the Supreme Court has interpreted the definite article to have significance. For example, in *NLRB v. Noel Canning*, in a concurring opinion Justice Antonin Scalia argued that “the Recess” referred only to intersession recesses, and not the shorter breaks within a legislative session also called recesses. 134 S. Ct. 2550, 2595 (2014) (Scalia, J., concurring). *But cf. id.* at 2564 (majority opinion) (holding that “the Recess” could refer to inter- or intra-session recesses in part because of a longstanding historical practice between the President and the Senate).

In *Freytag v. Commissioner of Internal Revenue*, Justice Scalia opined that the “the Courts of law” in the Appointments Clause referred only to the federal courts created by the Constitution and vested with the judicial power. 501 U.S. 868, 902 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“The Clause does not refer generally to ‘Bodies exercising judicial Functions,’ or even to ‘Courts’ generally It refers to ‘the Courts of Law.’ Certainly this does not mean *any* ‘Court[] of Law’ (the Supreme Court of Rhode Island would not do). The definite article ‘the’ obviously narrows the class of eligible ‘Courts of Law’ to those courts of law envisioned by the Constitution. Those are Article III courts, and the Tax Court is not one of them.”). The Court held that the definite article designated the federal courts, as opposed to state courts, executive branch courts, or other courts. *Id.* Unlike in these contexts, “Congress” has only one meaning within the Constitution—it is the bicameral lawmaking body of the federal government.

159. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”); *see also* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2692 (2015) (Roberts, C.J., dissenting) (referring to the appendix compiling all references to “legislature” in the Constitution).

160. Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. L. REV. 847, 863 (2015). The Supreme Court recently addressed the meaning of “legislature” in the Elections Clause in a case challenging the constitutionality of the Arizona

the Founding, “[a] Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning.”¹⁶¹ The Constitution created Congress as a particular type of legislature, but state legislatures were similarly understood to be representative, collective, lawmaking institutions.¹⁶²

The Constitution confines the legislative power within Congress through several other mechanisms. The Constitution does not vest any legislative powers in either the executive or the judiciary. Even in areas in which the executive enjoys significant power, such as foreign relations, it lacks any power to make laws.¹⁶³ The Constitution does not vest Congress with any power to delegate its legislative power.¹⁶⁴

Finally, the Constitution not only creates a legislative power, but it also requires that “[t]he Congress shall assemble at least once in every Year.”¹⁶⁵ This follows the reasoning of Locke and others that the ongoing existence and availability of the collective legislative power provides the foundation for the rule of law. The President cannot dissolve or suspend Congress, only adjourn the two houses to a specific date in the case of their disagreement.¹⁶⁶ Even this limited presidential power was subject

Independent Redistricting Commission. *Ariz. State Legislature*, 135 S. Ct. at 2668. Although the majority allowed the people of Arizona to create a redistricting commission by referendum, Chief Justice Roberts’s dissenting opinion argues that an independent commission cannot exercise the constitutional powers of the state legislature. *Id.* at 2678 (Roberts, C.J., dissenting). The dissent is more consistent with the text and structure of the Constitution and the importance of collective decisionmaking by representative legislatures. The Chief Justice notes that every reference in the Constitution to a state legislature “is consistent with the understanding of a legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature” *Id.* at 2680 (Roberts, C.J., dissenting).

161. See *Hawke v. Smith*, 253 U.S. 221, 227–28 (1920). “Legislatures” in Article V “was not a term of uncertain meaning when incorporated into the Constitution A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states.” *Id.*

162. See, e.g., *Ariz. State Legislature*, 135 S. Ct. at 2680 (Roberts, C.J., dissenting).

163. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

164. See generally Lawson, *supra* note 126 (discussing the history of the nondelegation doctrine).

165. U.S. CONST. art. I, § 4, cl. 2.

166. *Id.* art. II, § 3 (“[The President may] on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper.”).

to serious debate and apparently has not been exercised in American history.¹⁶⁷

The Constitution creates a particular type of collective legislature, ensuring that all of the legislative powers of the national government vest in Congress. The text also reinforces the double exclusivity of the legislative power: only Congress can exercise lawmaking power and Congress can exercise only lawmaking power.

B. *Promoting the General Good Through Congressional Powers and Limits*

The Constitution vests the collective Congress with enumerated powers and also specifies important limitations on the legislative power. These powers and limitations reinforce values served by collective lawmaking, including promotion of the general good and frustration of narrow or factional interests. This Section closely examines the powers and limitations of Congress and identifies how the Constitution connects lawmaking and the general good and prohibits a variety of legislative actions that would allow Congress to favor particular individuals, groups, or states.¹⁶⁸

The Constitution vests Congress with specific, enumerated powers to exercise collectively. Linked by an emphasis on subjects of general concern, the enumerated powers implicitly and, in some clauses explicitly, require generality and uniformity. This goes to the nature of the legislative power, which the Framers understood to require equal application to citizens without exemption or favor. The powers in Section 8 taken together emphasize the general good and provide further evidence about generality as a hallmark of the legitimate exercise of legislative power.¹⁶⁹

The first conferred power echoes the Preamble and allows Congress to “lay and collect Taxes, Duties, Imposts and Excises” to “provide for the *common* Defence and *general* welfare of the United States” and “all Duties, Imposts and Excises shall be *uniform* through the United

167. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 413 (2015).

168. Accordingly, this Section draws on the originalist and clause-based scholarship of others, as an independent inquiry into each of these clauses is beyond the scope of this project.

169. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“The enumeration presupposes something not enumerated . . .”); see, e.g., Amar, *supra* note 10, at 751 (discussing Section 8 as a whole); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 150 (2010) (“[T]he theory of collective action federalism reads Section 8 as a unified whole, like a well-written paragraph. Clause 1 is the topic sentence that expresses the unifying principle of a federal government empowered to promote the general welfare.”).

States.”¹⁷⁰ The first of the enumerated powers includes taxing, but only for the general welfare. The early Congresses seriously debated whether spending on items like internal improvements were for the “general welfare.”¹⁷¹ The requirement of generality functioned as an important limitation on the exercise of federal power and spending. As Robert Natelson explained, the Clause implemented a “fiduciary-style impartiality,” requiring revenues to be spent only on projects of general benefit.¹⁷²

The Commerce Clause uses the term “to regulate Commerce with foreign Nations, and among the several States.”¹⁷³ As Randy Barnett has demonstrated, the original meaning of *regulate* was *to make regular*.¹⁷⁴ Throughout the debates on the Constitution, the Framers used *regulate* to mean *to subject to a rule* or *to regularize*.¹⁷⁵ The term *regulate* refers to a kind of uniformity—specifying how certain activity should take place. Although of course there has been substantial debate about the scope of “commerce,”¹⁷⁶ the Constitution confers a power to regularize commerce, meaning to create general rules for commerce between the states or with foreign governments.¹⁷⁷

Congress has power to “establish an uniform Rule of Naturalization” and “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁷⁸ The Supreme Court has interpreted the uniformity requirement in the Bankruptcy Clause as prohibiting private bills on

170. U.S. CONST. art. I, § 8, cl. 1.

171. See John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 72 (2001) (explaining the original meaning of “general” was for the national welfare, not regional or local welfare, and as a limitation on the federal spending power).

172. See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 53 (2003).

173. U.S. CONST. art. I, § 8, cl. 3.

174. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001).

175. *Id.* at 142.

176. See *NFIB v. Sebelius*, 567 U.S. 519, 601 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (defending the constitutionality of the individual mandate in the Affordable Care Act with an expansive view of “commerce” based on practical considerations and experience); *id.* at 659–60 (Scalia, J., dissenting) (arguing for an original and narrower interpretation of “commerce” noting that “Article I contains no whatever-it-takes-to-solve-a-national-problem power”). Compare Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999) (describing a broad commerce definition), with Barnett, *supra* note 174 (arguing for a narrower commerce definition), and Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (arguing for a narrower commerce definition).

177. U.S. CONST. art. I, § 8, cl. 3.

178. *Id.* art. I, § 8, cl. 4.

bankruptcy.¹⁷⁹ In a detailed study of the Constitution's uniformity requirements, Judith Koffler concluded that the Supreme Court has applied different standards of uniformity across clauses.¹⁸⁰ The uniformity requirement has sometimes been interpreted to mean without preference across the states; but has not been interpreted to mean that taxes must be uniform across individuals.¹⁸¹

Other clauses similarly include a generality or uniformity requirement. For example, Congress has power "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures."¹⁸² Regulating the value of coined money promotes a uniform standard throughout the nation and also allows Congress to set the value of foreign money across the nation. Fixing the standard of weights and measures similarly provides for a settled uniform rule declared in law and applicable across the nation.

The foreign affairs powers in Clauses 10 through 16 give Congress power to regulate the armed forces and other aspects of national sovereignty.¹⁸³ Defining and punishing "Offences against the Law of Nations" allows Congress to codify and provide a uniform national definition for international law crimes.¹⁸⁴

In the Full Faith and Credit Clause, Congress may prescribe the manner of proving state records and proceedings by "general Laws."¹⁸⁵ Several clauses of Article I require uniform Laws, but this is the only place where the Constitution uses the term *general Laws*. There is very little historical evidence about what *general Laws* means or how it affects Congress's power to legislate under Article IV.¹⁸⁶

Congress's enumerated powers reinforce the shared characteristics of good laws, namely their general applicability and impartiality. On the flip side, the specific restrictions on Congress in Article I, Section 9, reinforce that Congress cannot legislate for narrow or particular

179. *Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 473 (1982) (holding that a statute that provided relief to only one bankrupt railroad violated the uniformity provision of the Bankruptcy Clause); *id.* at 472 ("[T]he Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws.")

180. Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 77 (1983).

181. *Id.* at 77–78.

182. U.S. CONST. art. I, § 8, cl. 5.

183. *Id.* art. I, § 8, cl. 10–16.

184. See generally Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1675 (2012) (developing the original meaning of the Offenses Clause).

185. U.S. CONST. art. IV, § 1.

186. See Julie L. B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1614 (1997) (noting the lack of research).

matters.¹⁸⁷ Even in a government of limited and enumerated powers, the Framers considered these limits important enough to specify. These prohibitions share a common characteristic: they all pertain to the exercise of legislative power over particular, rather than general, matters.

For example, Congress could not prohibit the migration or importation of people that the States wanted to admit until 1808, but they could be taxed up to ten dollars per person.¹⁸⁸ This limited Congress from taking specific actions against southern states and their slaveholding citizens. The prohibition on bills of attainder prevents Congress from making a judicial determination by legislation.¹⁸⁹ This reinforces separation between the legislative and judicial powers and prevents Congress from using the legislative process to render judgment against a particular person in a particular case.¹⁹⁰ The Supreme Court's decision in *Bank Markazi v. Peterson*,¹⁹¹ however, substantially narrowed the limitation on bills of attainder.¹⁹²

Similarly, the prohibition on *ex post facto* laws prevents Congress from enacting laws that have retroactive effect.¹⁹³ Unlike prospective legislation with general applicability, backward looking laws can target a specific group, allowing lawmakers to know who will be affected.¹⁹⁴ At the Convention, Ellsworth noted: "there was no lawyer, no civilian who would not say that *ex post facto* laws were void of themselves. It can not then be necessary to prohibit them."¹⁹⁵ Nonetheless, the Constitution includes the traditional prohibition on *ex post facto* laws

187. See U.S. CONST. art. I, § 9.

188. *Id.* art. I, § 9, cl. 1.

189. *Id.* art. I, § 9, cl. 3.

190. See Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 366 (1962) ("[T]he clause was intended as a broad implementation of the separation of powers . . . designed to limit the legislature in much the same way as the case and controversy requirement of article III limits the judiciary.").

191. 136 S. Ct. 1310 (2016) (upholding a statute that directed a particular set of assets to be made available for post-judgment execution to satisfy past judgments against a separation of powers challenge because the statute did not formally direct the courts to decide a case in favor of a certain party). *But cf. id.* at 1329 (Roberts, C.J., dissenting) (arguing that the statute violates separation of powers and intrudes on the power of the judiciary because "Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory").

192. *Id.*

193. U.S. CONST. art. I, § 9, cl. 3.

194. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

195. MADISON, *supra* note 77, at 510.

precisely because such laws—by definition—change the rights of particular persons or entities and are contrary to the nature of the legislative power.

The other restrictions in Article I, Section 9, similarly prohibit a variety of discriminatory laws. For instance, capitation and other direct taxes must be in “proportion to the Census or Enumeration.”¹⁹⁶ Such taxes must be proportional and therefore uniform based on the number of individuals under the census. Congress cannot impose a tax or duty on articles exported from any state,¹⁹⁷ which protects state trade and also prevents taxes or duties that would discriminate between states. The Port Preference Clause requires Congress treat the regulation of commerce equally across all ports and that vessels from one state to another need not pay duties,¹⁹⁸ which prevents the imposition of trade laws that favor one state or industry over others. The United States cannot grant titles of nobility,¹⁹⁹ a restriction on all departments of the federal government, and against drawing distinctions between citizens, who are equal before the law.

Congress’s powers promote generality and its restrictions prohibit a variety of laws that would target or benefit specific individuals or groups. While the Constitution does not, and by its nature cannot, specify what makes a law serve the general good, its legislative powers and restrictions together reinforce the importance of legislating impartially and for the general good. Political choices will at times result in laws that confer special benefits. Such laws are not for that reason unconstitutional. Nonetheless, generality provides an important value and guiding principle for the legitimate exercise of legislative power.

III. COMPONENTS OF THE COLLECTIVE CONGRESS: HOUSE, SENATE, AND MEMBERS

The Constitution creates a collective Congress, but it also carefully specifies the structure, powers, and limits for the two branches of Congress and for individual senators and representatives. This Part analyzes how the components of Congress support the collective legislative power and reinforce its exclusivity within Congress. Moreover, the internal structure of Congress reflects values promoted by collective decisionmaking, such as the minimization of factional influence, the fiduciary duty of members to the people, and the enactment of laws that promote the general good.

196. U.S. CONST. art. I, § 9, cl. 4.

197. *Id.* art. I, § 9, cl. 5.

198. *Id.* art. I, § 9, cl. 6.

199. *Id.* art. I, § 9, cl. 8.

A. *Two Houses of Congress*

The Constitution creates a bicameral Congress and provides the House and Senate with separate institutional dignity, but with no separate legislative powers.²⁰⁰ This Section focuses on how the one-house powers of the House and Senate, which are not legislative, reinforce the exclusivity of legislative power in Congress as a whole.

The bicameral structure of Congress serves a number of familiar values and purposes. Fundamentally, this structure creates different levels of representation. The House of Representatives provides a direct and immediate connection to the people through popular election every two years.²⁰¹ Originally selected by state legislatures, the Senate provides for equal representation of each state.²⁰² The Senate also serves as an upper chamber with more statesmanlike views as reflected in longer, staggered, six-year terms. The debates and concerns leading to the Great Compromise are well documented, but there was also widespread agreement about bicameralism as a mechanism for expanding the range of representation and ensuring that different perspectives would be reflected in legislation.²⁰³

With a bicameral legislature, lawmaking requires separate deliberation in the House and Senate and agreement between the two branches before presentment to the President. Article I, Section 7, reinforces that all bills and “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)”²⁰⁴ must be presented to the President for his approval.

Bicameralism provides an internal check within Congress that ensures each branch restrains the other. As James Wilson argued, “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches.”²⁰⁵ The two branches represent different constituencies and therefore have somewhat different interests, further reinforcing the checking mechanism.²⁰⁶ Bicameralism raises the

200. *Id.* art. I, § 1; *INS v. Chadha*, 462 U.S. 919, 945 (1983).

201. U.S. CONST. art. I, § 2, cl. 1.

202. *Id.* amend. XVII (providing for the direct election of senators).

203. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 158–59 (1937) (noting little disagreement at the Convention with regard to a bicameral Congress).

204. U.S. CONST. art. I, § 7, cl. 2, 3.

205. MADISON, *supra* note 77, at 126–27; see also *THE FEDERALIST* NO. 22, *supra* note 11 (Alexander Hamilton) (arguing against the adoption of a unicameral legislature).

206. MADISON, *supra* note 77, at 233–34 (discussing the need for the Senate to have independence and life tenure because the Senate must check the democratic branch). “[T]he

cost of legislating and checks factionalism, promoting legislation aimed at the general good and with due regard for the multitude of interests in society.²⁰⁷

The two branches of Congress play an equal role in the enactment of legislation; however, the Constitution also provides each house with several distinct institutional powers that are not legislative. The powers given to each house highlight what is distinctive about the legislative power, which must be exercised through bicameral passage and presentment. As the Supreme Court explained in *INS v. Chadha*,²⁰⁸

These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified²⁰⁹

The exceptions to bicameralism are all “separately justified” and distinct from the legislative power.²¹⁰ For instance, the one-house powers have no binding legal effect without an action by the other house or the President. Consider the impeachment and removal powers. The House has “the sole Power of Impeachment”²¹¹ and the Senate has “the sole Power to try all Impeachments.”²¹² The Framers recognized that the impeachment power and the power to judge impeachments could have been vested in other institutions, including the courts or a specialized committee selected for that purpose.²¹³ They debated the correct placement, but eventually chose to vest this power in Congress. The House would represent the people in bringing impeachments and the Senate would have the fortitude and sufficient size (compared to the courts) to remove high-ranking officials.²¹⁴

checking branch must have a personal interest in checking the other branch, one interest must be opposed to another interest.” *Id.* at 233.

207. See STORY, *supra* note 113, at 202. Bicameralism “operates indirectly as a preventive to attempts to carry private, personal, or party objects, not connected with the common good.” *Id.*

208. 462 U.S. 919 (1983).

209. *Id.* at 956.

210. *Id.*

211. U.S. CONST. art. I, § 2, cl. 5.

212. *Id.* art. I, § 3, cl. 6.

213. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION 500 (Max Farrand ed., 1911).

214. See THE FEDERALIST NO. 65, *supra* note 11, at 339 (Alexander Hamilton). Hamilton argues that the Senate is the proper body to try impeachments because “[w]hat other body would be likely to feel *confidence enough in its own situation*, to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*” *Id.*; see also *Nixon v. United States*, 506 U.S. 224, 233–35 (1993) (explaining the

The text and structure of the impeachment and removal powers suggest that the House and the Senate are playing something other than their usual legislative role. The impeachment and removal powers are located in clauses that pertain to the selection of the leadership of each house, not enumerated with the lawmaking powers of Article I, Section 8. Both the selection of leadership and impeachment turn on the political discretion and judgment of each house,²¹⁵ unencumbered by either the other house of Congress or the President. These are discretionary political judgments not reviewable by either the President or the courts.²¹⁶ The impeachment and removal powers do not establish general rules for the public, but rather perform a distinct function of holding high-ranking officials and judges accountable for their actions.

When sitting for the purpose of trying impeachments, senators “shall be on Oath or Affirmation.”²¹⁷ All senators, however, already take an Oath or Affirmation under Article VI to uphold the Constitution.²¹⁸ The additional oath suggests a separation between their ordinary legislative powers and the power to try impeachments, the latter more akin to a judicial determination. The Senate’s trial of impeachments also includes a supermajority vote of two-thirds of the “Members present.”²¹⁹ The impeachment and removal powers work in tandem—an official is removed only upon the action of both houses.

Similarly, the Senate has the power to provide advice and consent for the officers, judges, and other officials nominated by the President.²²⁰ The President, however, has the sole power of appointment, and even after confirmation by the Senate, the President has the sole power to commission officers.²²¹ Thus, although it serves as an important

historical background of vesting the power to try impeachments in the Senate); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 5 (1973).

215. See *THE FEDERALIST* NO. 65, *supra* note 11, at 338 (Alexander Hamilton). The jurisdiction and acts of impeachment “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.” *Id.*

216. See *Nixon*, 506 U.S. at 230 (explaining that the word “try” in the Impeachment Trial Clause “lacks sufficient precision to afford any judicially manageable standard of review”); CHARLES BLACK, *IMPEACHMENT: A HANDBOOK* 57 (1974) (arguing that judicial review of impeachment would be inconsistent with the structure of the Constitution).

217. U.S. CONST. art. I, § 3, cl. 6.

218. *Id.* art. VI, cl. 3.

219. *Id.* art. I, § 3, cl. 6.

220. *Id.* art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

221. *Id.* art. II, § 3, cl. 6 (The President “shall Commission all the Officers of the United States.”).

safeguard, the Senate's advice and consent power is not a legislative act. It has legal effect only when the President initiates a nomination.²²²

The Senate's role in the ratification of treaties depends on the President's power to "make Treaties, provided two thirds of the Senators present concur."²²³ The treaty power also was not considered an aspect of legislative power; rather, treaties are acts of sovereignty shared by the President and the Senate.²²⁴ As Hamilton explains, "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."²²⁵ As for the treaty power, "[i]ts objects are, CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."²²⁶ The Senate's role in treaty ratification pertains not to the collective legislative power, but instead to the distinct power over the regulation of foreign relations shared with the President.²²⁷

There are only two actions that each house may exercise and complete independently without the involvement of the other house or the President. First, each house of Congress has the power to determine "the Rules of its Proceedings,"²²⁸ which allows the House and Senate to manage their internal organization and rules for the orderly passage of legislation. This power was understood as essential to the legislative power.²²⁹ The Supreme Court has consistently upheld the authority of

222. *Id.* art. II, § 2, cl. 2; *see also* THE FEDERALIST NO. 66 (Alexander Hamilton) (discussing the advice and consent power and noting "[t]here will of course be no exertion of *choice*, on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose* . . . they can only ratify or reject the choice he may have made").

223. U.S. CONST. art. II, § 2, cl. 2.

224. *See* THE FEDERALIST NO. 64, *supra* note 11, at 335 (John Jay) ("All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty, by which the citizens are to be bound and affected.").

225. THE FEDERALIST NO. 75, *supra* note 11, at 388 (Alexander Hamilton).

226. *Id.* at 389; *see also* 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 514 (1891) (James Madison) ("The object of treaties is the regulation of intercourse with foreign nations, and is external.").

227. *See* *Bond v. United States*, 134 S. Ct. 2077, 2103–08 (2014) (Thomas, J., concurring in the judgment) (discussing the original meaning of the Treaty Clause and concluding that the Treaty Power "can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs").

228. U.S. CONST. art. I, § 5, cl. 2.

229. STORY, *supra* note 113, at 579 ("No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist,

each branch of Congress to determine its schedule and rules of proceeding, so long as there is “a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained” and the rule does not “ignore constitutional restraints or violate fundamental rights.”²³⁰ The Court recently explained that “[w]e generally take at face value the Senate’s own report of its actions,” including when it is in session or as to the existence of a quorum reflected in the Journal.²³¹

Second, Article I, Section 5, provides: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”²³² Each house also has the authority to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” Exclusion and expulsion are actions that each house can complete independently. Senators and representatives are “judged” only by their fellow senators and representatives respectively, and therefore not by the courts or the executive, as to whether they meet the qualifications established in the Constitution or should be expelled for “disorderly Behaviour.”²³³ These provisions establish accountability for each member to his house of Congress.

The rules of proceeding, punishment of members, and expulsion of members are the only powers that allow each chamber to *complete* a unilateral action. These require no action by the President, as with appointments and treaty making, and no concurrence of the other chamber, as for the impeachment and removal of high-ranking officials.²³⁴ These are the only subjects on which one chamber can “serve in both a ‘legislative’ and an ‘executive’ capacity, creating and enforcing rules to govern their internal chamber affairs.”²³⁵

it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order.”)

230. *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also* *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring) (“Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value.”).

231. *NLRB v. Noel Canning*, 134 S. Ct. 2250, 2574–75 (2014).

232. U.S. CONST. art. I, § 5, cl. 1.

233. *Id.* art. I, § 5, cl. 2.

234. U.S. CONST. art. I, § 5, cl. 2; Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 607 (2014).

235. Grove & Devins, *supra* note 234, at 583. These powers are also “the textual source of each chamber’s investigative authority—a power that has enabled each house to conduct inquiries into executive wrongdoing. The House and the Senate act separately and independently when conducting such investigations—each pursuing matters of interest to its chamber.” *Id.* at 608 (footnotes omitted). Each house has an independent power and authority to investigate the executive. *Id.*; *see also* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV.

As the Court carefully explained in *Chadha*, the unicameral powers and functions of the House and Senate are not legislative and have distinct justifications from the legislative power.²³⁶ In addition, none of these unicameral actions allow one house of Congress to execute or to adjudicate the laws.²³⁷ The unicameral powers reconfirm the centrality of the collective Congress for exercising the legislative power and the role of the House and Senate as institutional components of that collective power.

B. *Members of the Collective Congress*

This Section develops how the Constitution creates the collective Congress with “senators” and “representatives” who have specific requirements for representation, limited privileges in connection with exercising the legislative power, and complete restrictions from exercising anything other than the legislative power. The Constitution’s references to “senators,” “representatives,” and “members” reinforce their importance as parts of the collective Congress. Members of Congress have only a partial power, which is to enact laws together with a majority of their colleagues. The Constitution grants members of Congress no individual powers as legislators. As the Supreme Court noted,

The two houses of congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole²³⁸

The power and dignity of members flows from their offices, which are parts of the collective Congress.

The powers and limitations of members reinforce both the collective Congress and legislative exclusivity: members have only one part of the collective lawmaking power and members can exercise exclusively legislative powers, not executive or judicial powers. In addition, the powers and limitations of members also reinforce the fiduciary duty of members to the people, the independence of members from the other departments, and the integrity of the legislative power as a process for the general, not particular, good.

1083, 1143 (2009) (discussing “Congress’s ability to hold executive branch officers in contempt”).

236. *INS v. Chadha*, 462 U.S. 919, 956 (1983).

237. *Id.* at 955.

238. *United States v. Ballin*, 144 U.S. 1, 7 (1892).

1. Election, Representation, Organization

Representatives and senators are the components of Congress and the connection between the people and the legislative power. The Constitution carefully establishes this fiduciary relationship in a manner that preserves the integrity and independence of members, while restricting them to only a partial legislative power. The Framers debated at great length the size and form of representation that would best encourage Congress to collectively pursue the general good.²³⁹ The Constitution's job descriptions for members reinforces the essential features of the collective Congress.

The Constitution delineates distinct age, citizenship, and residency qualifications for representatives and senators.²⁴⁰ The specification of qualifications in the Constitution provides a safeguard against self-dealing. Madison explained that since representatives could have "a personal interest distinct from that of their Constituents" the qualifications of electors and elected "were fundamental articles in a Republican Gov't and ought to be fixed by the Constitution," not left to a self-interested Legislature to regulate.²⁴¹ The Supreme Court has held that the qualifications are exclusive and neither a single house, nor Congress as a whole, can impose additional qualifications on its members, because those qualifications are fixed in the Constitution.²⁴²

239. 1 FARRAND, *supra* note 213, at 413.

240. U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

241. MADISON, *supra* note 77, at 427 ("In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. . . . It was as improper as to allow them to fix their own wages, or their own privileges."); *see also* THE FEDERALIST NO. 60, *supra* note 11, at 349 (Alexander Hamilton) ("The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature."); *Powell v. McCormack*, 395 U.S. 486, 521–22 (1969) (providing a detailed history of the original and post-ratification meaning of the Qualifications Clause).

242. *Powell*, 395 U.S. at 548 ("[B]oth the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."). The Supreme Court has also held that states may not impose additional qualifications for representatives or senators in addition to those listed in the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) ("In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist."). *But see id.* at 845 (Thomas, J., dissenting) ("Nothing in the

The Twenty-Seventh Amendment, proposed in 1789 and ratified in 1992, placed a similar type of anti-self-dealing restriction on members of Congress, requiring that legislated changes in compensation should not take effect until after an election of representatives.²⁴³

Senators and representatives receive “a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.”²⁴⁴ Congress may set the compensation for its members by enacting legislation, which like other laws would be subject to the President’s veto. Yet the Treasury must pay such compensation, placing it outside the discretion of the President or any executive officer.²⁴⁵ The President cannot check the service of individual members of Congress by withholding their pay. This guarantees members’ independence from the President for the payment for their public service. Moreover, the President lacks any powers of removal or discipline over members of Congress—these are left exclusively to each house to judge its own members.²⁴⁶ The President’s veto provides a check on the collective legislative power of Congress, but he has no checks on the individual members of Congress.

The Constitution also requires “Senators and Representatives,” along with other state and federal officials, to be “bound by Oath or Affirmation, to support this Constitution.”²⁴⁷ The oath applies to members of Congress individually in the discharge of their offices. These protections and requirements ensure the integrity of the offices held by individual members.

The Constitution provides a simple framework for the organization and leadership of the House and Senate, leaving most of the details to be determined by each chamber. Each chamber has the exclusive power to choose its leader—the Speaker of the House and the President pro tempore of the Senate respectively—as well as other congressional officers.²⁴⁸ But, unlike the unitary executive and even the judiciary,

Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. . . . [W]here the Constitution is silent, it raises no bar to action by the States or the people.”)

243. U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

244. *Id.* art. I, § 6, cl. 1.

245. *Id.*

246. *See supra* notes 232–35 and accompanying text.

247. U.S. CONST. art. VI, cl. 3.

248. *Id.* art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

which is headed by the Chief Justice of the Supreme Court,²⁴⁹ there is no singular head of Congress. Since the Constitution does not create congressional offices beyond the Speaker and President pro tempore, or specify their powers, each chamber may create the offices and functions it considers necessary and proper, providing the House and the Senate with control over their internal organization and leadership. The Constitution recognizes the need in a collective Congress for leadership and organizing offices to direct legislative work, but leaves such organization to be ascertained by the members of Congress.

Although the Speaker of the House and the President pro tempore of the Senate may be first among equals, these congressional leaders have no distinct constitutional powers or prerogatives, including no prerogative to their offices that stems from the people. Nor do they have a relationship to any other department of the government separate from the relationship of the House and the Senate as institutions and parts of Congress.²⁵⁰ The Speaker and President pro tempore lead, administer, and organize the business of their respective chambers, which can result in significant practical power and visibility, but they do not exercise any separate lawmaking powers. The Supreme Court, however, has recognized one potentially significant power for the Speaker of the House and the President of the Senate in the “enrolled bill doctrine,” which requires courts to accept the signatures of these officers as

249. The Constitution refers to the “Chief Justice,” not in Article III, but only in Article I, Section 3, Clause 6, “When the President of the United States is tried, the Chief Justice shall preside . . .” *Id.* art. I, § 3, cl. 6. The judiciary, of course, is not unitary like the executive, and the Chief Justice has no directive authority or control over how lower court judges exercise the judicial power.

250. The Twenty-Fifth Amendment is the only other place where these congressional officers are mentioned, and here they have the role of receiving the President’s resignation or statement of inability to serve. *Id.* amend. XXV, § 3 (“Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.”); *id.* amend. XXV, § 4 (“Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.”). The legislative history of the Amendment suggests that the specific officers were named so that a transmission could be made even if Congress was not in session. 111 CONG. REC. 3270 (1965) (statement of Sen. Bayh). The role is also administrative, providing for the officers to receive the transmission of presidential disability, but not providing for the exercise of any other power in connection with the transmission.

“complete and unimpeachable” evidence that a bill has been constitutionally enacted.²⁵¹

The Constitution establishes representatives and senators as components of Congress who remain responsible to their constituents through regular elections. Yet members have no independent power, only the power and dignity of being one part of the whole. Even the leadership of the House and Senate possesses no separate constitutional powers or relationship with the other departments of the government. This reinforces the collective Congress within the constitutional structure by ensuring that members can exercise power only when acting together.

2. The Privilege of Speech and Debate

The Constitution provides a specific privilege for members of Congress that preserves the independence and integrity of each member, but within their duties as part of the collective Congress. Senators and representatives

shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.²⁵²

This language was drawn from the English Bill of Rights of 1689.²⁵³ The purpose of the Clause relates to the preservation of the independence of the legislature.

These privileges attach to individual senators and representatives. The Speech and Debate Clause first specifies that except for the most serious crimes, members cannot be arrested. This is another mechanism for protecting the ability of Congress to convene and exercise the legislative power. The executive cannot stop the legislature from meeting through trivial arrests.

251. *Field v. Clark*, 143 U.S. 649, 672 (1892); *see also* *Pub. Citizen v. U.S. District Court*, 486 F.3d 1342, 1343 (D.C. Cir. 2007) (affirming the rule of *Field*). There are reasons to question whether the enrolled-bill rule is consistent with the collective Congress. *See Ittai Bar-Siman-Tov, Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 GEO. L.J. 323, 327 (2009). Bar-Siman-Tov argues that the doctrine is incompatible with the Constitution because, *inter alia*, it “amounts to an impermissible delegation of both judicial and lawmaking powers to the legislative officers of Congress” and “permits the exercise of lawmaking authority by just two individuals—the Speaker of the House and the President of the Senate—rather than by Congress as a whole, as mandated by the Constitution.” *Id.*

252. U.S. CONST. art. I, § 6, cl. 1.

253. BILL OF RIGHTS 1689, 1 W. & M. cl. 2 (Eng.) (“The freedom of speech and debates or proceedings in Parliament shall not be impeached.”).

In addition, the Clause provides a privilege against answering for legislative speech or debate “in either House.” The Clause has not received significant scholarly attention, but Professor Josh Chafetz’s extended treatment suggests a broad reading of the Clause’s purposes.²⁵⁴ Others, however, have argued that the original meaning of the Clause relates to a relatively narrow privilege connected with official duties.²⁵⁵ The Supreme Court has interpreted the Clause to apply only within the “legislative sphere.”²⁵⁶ Moreover, the covered legislative acts “must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”²⁵⁷

Whatever its precise scope, the natural reading of the Clause emphasizes these privileges in the context of the collective legislative power. The privilege from arrest pertains to the attendance at a legislative session or going to and from those sessions.²⁵⁸ The privileged speech and debate are within “either House.” As Hamilton explained:

[I]t is essential to the freedom, and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a *collective* capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.²⁵⁹

The privilege pertains to members’ *collective* actions—it helps to maintain the integrity and independence of Congress as an institution and the deliberations within the House and Senate. It further aligns the

254. JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 110 (2007); see also Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 *YALE L. & POL’Y REV.* 351, 357–63 (2014).

255. Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 *VA. L. REV.* 385, 393 (2012) (arguing that the original meaning of the Clause confers only legislative immunity, but not an evidentiary privilege).

256. *Gravel v. United States*, 408 U.S. 606, 624 (1972).

257. *Id.* at 625.

258. U.S. CONST. art. I, § 6, cl. 1.

259. THE FEDERALIST NO. 66, *supra* note 11, at 385 (Alexander Hamilton) (emphasis added); see also 2 JAMES WILSON, *WORKS OF JAMES WILSON* 38 (“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.”).

individual members with the interests of Congress as a whole and protects their deliberation for the common good.

This principle provides grounds for resolving a circuit split as to whether the Speech and Debate Clause provides an individual privilege from nondisclosure.²⁶⁰ While a full analysis is beyond the scope of this Article, an understanding of the collective Congress seems to support a view that the privilege must be closely connected to the official duties of representatives and senators. “[The privilege] is restrained to things done in the House in a Parliamentary course For [the member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty.”²⁶¹

Within the collective Congress, members have no individual power, only the power of an office that exercises part of the collective legislative power. The Supreme Court explained, “The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”²⁶² The privilege should follow the power—the power is only a partial one within the collective, and accordingly the privilege perhaps should relate only to the exercise of their partial legislative power. By contrast, the Supreme Court has held that the President’s executive privilege extends to the “outer perimeter” of his duties, in part because of the nature of executive power.²⁶³

The Constitution carefully circumscribes the boundaries of legislative power and the individual power of each member. The text and structure support a narrow reading of the Speech and Debate Clause, limiting it to a member’s official duties as part of the collective. The values cited to support a more expansive reading, including that the disclosure of legislative material would intrude into the legislative process,²⁶⁴ do not fit with the role of members as simply one part of the collective Congress.

260. Compare *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 656 (D.C. Cir. 2007) (holding that the Speech and Debate Clause contains a privilege of nondisclosure), with *United States v. Renzi*, 651 F.3d 1012, 1039 (9th Cir. 2011) (declining to adopt the rationale of the D.C. Circuit). “[The Speech and Debate Clause] does not incorporate a non-disclosure privilege as to any branch.” *Id.*

261. *Hutchinson v. Proxmire*, 443 U.S. 111, 125 (1979) (alteration in original) (emphasis added) (quoting THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 20 (1854), reprinted in THE COMPLETE JEFFERSON 704 (Saul K. Padover ed., 1943)).

262. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

263. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (“In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”).

264. *Rayburn House Office Bldg.*, 497 F.3d at 660.

3. Prohibition on Execution and Self-Dealing in Office

As discussed above, Congress as an institution has no power to execute the laws or to exercise the judicial power. The individual members of Congress similarly lack these powers. The Constitution carefully excludes members from the execution of the laws and from realizing certain types of benefits from their legislative service.²⁶⁵ These restrictions on senators and representatives serve a number of purposes, such as reinforcing their circumscribed role as parts of the collective Congress, securing their independence of the other departments of government, and maintaining the integrity of the legislative power exercised on behalf of the people.

Perhaps the most significant restriction, the Incompatibility Clause, prohibits members of Congress from simultaneously serving as an Officer of the United States: “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”²⁶⁶ Professor Steven Calabresi and now-Judge Joan Larsen have provided a comprehensive originalist examination of the Clause and explained how it serves a number of fundamental separation of powers principles.²⁶⁷ Foremost, it prevents members from participating in the execution of the laws. It also prohibits the type of parliamentary government found in England where members of Parliament simultaneously serve as executive ministers.²⁶⁸

The Incompatibility Clause also reinforces the exclusivity of the legislative power. Senators and representatives cannot simultaneously enact legislation and serve as executive officers who administer and execute legislation. The Constitution creates a Congress with members who exercise part of a collective legislative role, a role incompatible with execution.²⁶⁹ It addresses the concern expressed by Locke and Rousseau that lawmakers must be restricted to making laws, because laws concern the general good, not the particular application.²⁷⁰ Once the lawmaker partakes of execution, it perverts and corrupts the lawmaking power. Both Congress as an institution and the members as individuals have only

265. U.S. CONST. art. I, § 6, cl. 2.

266. *Id.*

267. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1094 (1994).

268. *Id.*

269. *See, e.g.*, *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.”).

270. *See supra* Section I.A.

legislative powers. This parallel structure bolsters the collective Congress and the exclusivity of legislative power.

Similarly, the Constitution prohibits members from legislating offices for their own benefit. The Ineligibility Clause provides: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.”²⁷¹ Members cannot create offices or increase the salary of offices in anticipation of being appointed to those offices.²⁷²

The Ineligibility Clause recognizes that collective action might not prevent laws that would benefit individual members of Congress. Collective lawmaking aims at the general good and frustrates the satisfaction of particular interests, but the Constitution specifically prohibits members from being appointed to new or enhanced offices. This provides an additional check against members’ self-dealing, even if this check has largely been evaded by appointment of members to existing offices.²⁷³ The Ineligibility Clause is an explicit limitation on using legislative power for individual benefit, and further promotes the fiduciary obligations of members to their constituents and to the general, not personal, good.²⁷⁴

These limitations on the powers of individual members serve important separation of powers principles, creating a barrier between the lawmaker and the law interpreter. During the Convention, the Framers quickly agreed on a principle of incompatibility of offices, but debated at some length the issue of ineligibility. In particular, there was concern that Congress not be the lackey of the President, with members ingratiating for favors and offices.²⁷⁵ On the flip side, the Incompatibility

271. U.S. CONST. art. I, § 6, cl. 2; see also Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994).

272. See U.S. CONST. art. I, § 6, cl. 2.

273. See Note, *The Ineligibility Clauses’ Lost History: Presidential Patronage and Congress, 1787-1850*, 123 HARV. L. REV. 1727 (2010).

274. This also relates to Madison’s concern that in the legislative process representatives serve as both parties and judges, which is why they can act only collectively, and not as individuals. By restricting mechanisms for individual benefit, the Constitution encourages members to work together to exercise the legislative power. See *supra* notes 92–95 and accompanying text.

275. THE FEDERALIST NO. 76, *supra* note 11, at 395 (Alexander Hamilton) (noting that the Ineligibility and Incompatibility Clauses are “important guards against the danger of executive influence upon the legislative body”).

Clause reinforces the independence of the executive branch, ensuring that executive officers answer only to the President, not to Congress.²⁷⁶

Other provisions similarly ensure the separation between individual members of Congress and the executive power. The Vice President is designated as the President of the Senate, yet when the Vice President exercises the Office of the President, the Constitution specifies that the President pro tempore of the Senate will serve.²⁷⁷ The Constitution provides for this eventuality, carefully specifying that the same person cannot exercise both executive and legislative power.

Members of Congress possess exclusively legislative powers, and are prohibited from serving in the executive branch. Moreover, they cannot appoint or remove executive officers (except through impeachment).²⁷⁸ This confirms members' partial role within the collective Congress and denies them any individual power.

4. Quorums, Supermajorities, and Other Numbers

The relationship between individual senators and representatives and their respective chambers is further developed in the numbers needed for particular legislative actions. The Constitution tailors the required level of legislative support to the nature and importance of the legislative action. The number of lawmakers reinforces just *how collective* an action must be.

For instance, the Constitution provides for several different quorum rules. The Framers debated whether to specify the requirements for a quorum and ultimately agreed that “a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day.”²⁷⁹ This explicit requirement within the Constitution placed a floor on the number of representatives for the passage of law. It ensured a certain degree of representation and avoided the passage of laws by too small a minority of members. Yet the ordinary quorum requirement allows laws to be enacted by a minority of lawmakers—a majority of a bare majority would allow enactment with just over one-quarter of representatives and senators.

Importantly, the Constitution does not leave the size of the quorum to be determined by Congress. It is not part of the internal matters left for

276. See Calabresi & Larsen, *supra* note 267, at 1088–89 (explaining why the Incompatibility Clause “has almost certainly *increased* presidential power by securing presidential independence from Congress” because without the Clause, members of Congress would demand appointment to prestigious offices in order to pass the President’s legislative agenda).

277. U.S. CONST. art. I, § 6, cl. 2.

278. See *infra* notes 318–20 and accompanying text.

279. U.S. CONST. art. I, § 5, cl. 1.

each house to determine, such as the rules of proceedings and punishments for members. The size of the quorum relates to the nature and breadth of representation and therefore is fixed in the Constitution. The quorum reflects a judgment about the minimum collective for representative government. The Supreme Court has reserved the authority to review whether a quorum existed for the passage of a bill, but only by applying the standards for certifying a quorum under the rules of the chamber of Congress.²⁸⁰

Both Madison and Hamilton defended the majority-quorum rule as well as the majority-voting rule for ordinary legislation in order to prevent a minority from blocking legislation for the public good.²⁸¹ A majority of the people's representatives must make the laws that bind society. This relates to the importance of having a large enough group of representatives, so that the government is a truly republican one and not a "junto" or "cabal."²⁸² This promotes lawmaking for the general good rather than allowing the pursuit of narrow interests.

The Constitution also contains several supermajority requirements, including two-thirds of the Senate for removal after impeachment,²⁸³ two-thirds to expel a member from the House or Senate,²⁸⁴ two-thirds in each house to override the President's veto,²⁸⁵ two-thirds of the Senate

280. *United States v. Ballin*, 144 U.S. 1, 7 (1892); *see also supra* note 254 and accompanying text (discussing the enrolled bill doctrine).

281. THE FEDERALIST NO. 58, *supra* note 11, at 305 (James Madison) ("It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice, or the general good, might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority."); THE FEDERALIST NO. 22, *supra* note 11, at 140–41 (Alexander Hamilton) ("To give a minority a negative upon the majority, which is always the case where more than a majority is requisite to a decision, is, in its tendency, to subject the sense of the greater number to that of the lesser. . . . But its real operation is, to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority. . . . If a pertinacious minority can controul the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.").

282. *See supra* notes 98–102 and accompanying text.

283. U.S. CONST. art. I, § 3, cl. 6.

284. *Id.* art. I, § 5, cl. 2.

285. *Id.* art. I, § 7, cl. 2.

to ratify a treaty,²⁸⁶ and two-thirds of both the House and Senate to amend the Constitution along with ratification by three-fourths of the States.²⁸⁷ The actions that require a supermajority, however, are not exercises of the “legislative power.”²⁸⁸

One feature the supermajority requirements share is they pertain to discrete issues requiring a high level of consensus. For example, the supermajority required for overriding the President’s veto gives the House and Senate a binary choice—they are no longer formulating or amending the law, but deciding whether a law that already passed both houses has the support for being enacted without the President’s support. Similarly, constitutional amendments usually address important, but discrete, subjects. The impeachment and removal of a high-ranking official requires judgment rendered about an individual’s actions. Expulsion of a member of a Congress by two-thirds vote similarly focuses on the misconduct of a particular person. This is not to suggest that such choices are easy or cannot raise difficult considerations, but they are limited in their scope, unlike most legislation. Moreover, decisions that require a supermajority arguably pose a more pressing need for consensus because of their gravity.²⁸⁹

The Framers debated the merits of majority and supermajority rules—aware of the trade-offs between allowing the majority to prevail in their judgment or providing a minority group the ability to block or frustrate the majority.²⁹⁰ A modern debate continues about the desirability and lawfulness of additional supermajoritarian requirements, such as the filibuster, or supermajority requirements for the enactment of certain types of legislation.²⁹¹ For example, Professors John O. McGinnis and

286. *Id.* art. II, § 2, cl. 2.

287. *Id.* art. V.

288. See, e.g., Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 406 (1998) (arguing that the supermajority requirements all “either relate to important actions taken unicamerally by state representation or provide for the Congressional reversal of a decision previously taken by another ‘majority rule’ entity. Given the unique architecture of the Constitution, I would argue that both of these principles serve to reinforce notions of popular sovereignty”).

289. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 805 (2002) (explaining that supermajoritarianism is a process of “establishing social consensus through eliciting broad social support for legal innovations”).

290. THE FEDERALIST NO. 22, *supra* note 11, at 140 (Alexander Hamilton) (“To give a minority a negative upon the majority, which is always the case where more than a majority is requisite to a decision, is, in its tendency to subject the sense of the greater number to that of the lesser.”).

291. McGinnis & Rappaport, *supra* note 289, at 805 (“The United States Constitution is pervasively and enduringly supermajoritarian.”); King, *supra* note 288, at 406. King argues that the supermajority requirements all “either relate to important actions taken unicamerally by state

Michael B. Rappaport have argued that supermajority requirements for ordinary legislation would be constitutional.²⁹² Others have argued such rules would be unconstitutional and that the Senate's filibuster is similarly unconstitutional.²⁹³ Both sides have raised a number of important textual, structural, and historical arguments supporting their views. The principles underlying the collective Congress could provide further grounds for evaluating the constitutionality of supermajority requirements and how they might be structured.

In addition to these often debated supermajoritarian requirements, the Constitution also includes provisions that confer power on minority groups of lawmakers. Used to check other lawmakers, these provisions create a supervisory relationship between members who serve together in the House or Senate. For example, only one-fifth of members present can require the yeas and nays be entered on any question.²⁹⁴ By compelling the lawmaking majority to reveal their preferences on a particular vote, this mechanism empowers the minority to ensure accountability (or at least transparency) for legislation that has majority support.

Another mechanism for minority groups of lawmakers allows them "to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."²⁹⁵ The Constitution

representation or provide for the Congressional reversal of a decision previously taken by another 'majority rule' entity. Given the unique architecture of the Constitution, [King] would argue that both of these principles serve to reinforce notions of popular sovereignty." *Id.*; see also Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 761 (1994). Amar suggests that constitutional discourse focuses too much on the Bill of Rights "and so we have missed the many ways in which [the Constitution] was also structured to enhance majority rule and promote popular sovereignty." *Id.*

292. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 485 ("[J]ust as the text of the Rules of Proceedings Clause authorizes the House to issue a rule providing that bills pass by majority vote, it also authorizes the issuance of a rule providing for a supermajority. A supermajority rule would be illegal only if it conflicted with some other clause of the Constitution or some implicit constitutional principle.").

293. See Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1015 (2011) (providing a structural argument against the filibuster); see also Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 90 (1996) ("Article I, Section 7, grants the Congress power to make law for the nation *by majority vote*, with only the President standing in the way. The three-fifths rule is in reality the assertion of a power to contract this core power: it is an attempt by majority vote of the House to take away the power of Congress to make law by majority vote. As a result, the three-fifths rule facilitates the accumulation of excessive authority by other players in the constitutional system.").

294. U.S. CONST. art. I, § 5, cl. 3 ("[T]he Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

295. *Id.* art. I, § 5, cl. 1.

empowers a small number of members to force other members to participate in the lawmaking process at least by attending a session of Congress. This provides a kind of accountability and security against the withholding of the legislative power by members who would deny the necessary quorum.²⁹⁶

Requiring a record of votes or compelling the attendance of members provides an internal checking mechanism between members and for minority groups of lawmakers. These powers promote the accountability and integrity of the collective legislative process and can be used as mechanisms for aligning the interests of individual members with the successful operation of their house of Congress.²⁹⁷ Even in this context where individual members have some additional power, it serves primarily to bolster the collective legislative power.

The Constitution carefully creates a collective Congress at the center of the republican form of government. The components of Congress—the two chambers and the individual senators and representatives—reinforce the structure of collective lawmaking for the general good. Acting alone, each chamber can exercise only non-legislative powers. Members of Congress have no individual lawmaking power, nor can they exercise the executive or judicial powers. The insulation of members from particular matters, execution, and implementation of the law, prevents the fragmentation of the collective and reinforces the independence of Congress and the integrity and exclusivity of the lawmaking power.

IV. THE COLLECTIVE CONGRESS IN THE STRUCTURAL CONSTITUTION

Using structural interpretation, this Part analyzes the implications of vesting the legislative power in a collective Congress. Primarily it explains why the legislative power must be exercised only by Congress and not the executive. These structural arguments consider the relationship between the departments of the federal government and how their powers interact.²⁹⁸ This approach focuses on the Constitution's

296. Unlike the provision for allowing one-fifth of members present to require the recording of the yeas and nays, the Constitution does not provide the number of members necessary to compel attendance, stating only that a "smaller Number" than a quorum "may be authorized" to compel attendance. *Id.* Moreover, the power to compel other members is not given directly in the Constitution, but requires each house to authorize the action "in such Manner, and under such Penalties as each House may provide." *Id.*

297. *See infra* Section IV.B.

298. *See* CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 31 (1969). Black explains the method of drawing inferences from the structure of the Constitution

vesting of specific powers in institutions with carefully delineated structures and looks holistically at how power operates across the three coordinate departments of the federal government.²⁹⁹

This analysis further elucidates the values and purposes of collective lawmaking. First, the collective Congress serves values of deliberation, compromise, generality, and promotion of the general good. Second, the collective Congress fits into the separation of powers by aligning the ambitions of members of Congress with Congress as an institution. Collective decisionmaking reinforces the exclusivity of the lawmaking power and imposes a practical barrier to exercising executive or judicial powers. Third, the Supreme Court has recognized in a variety of contexts that Congress cannot circumvent the collectivity requirement; that is, the collective Congress provides an underlying rationale for some of the judicial limits on congressional action.

A. *Collectivity Values: Deliberation, Compromise, and Generality*

Just as the unitary structure of the executive branch promotes energy, dispatch, and responsibility, similarly the collective Congress promotes deliberation, compromise, generality, and the common good. Congress is the institution for protecting these civic republican values.³⁰⁰ As explained above, the collective Congress relates to the creation of a republican form of government. It allows the people to choose representatives to exercise the legislative power, mediating the different interests of society for the general good. Although the Constitution does not specify the particular content of laws, Congress is structured to promote legislation that serves the good of the people, not narrow interests.

To be clear, the collective legislative power is no guarantee that laws will promote the general good. Rather collective legislative power is our Constitution's mechanism for identifying and pursuing the general good.

and notes “[t]here is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and the inference drawn from the must surely be controlled by the text.” *Id.*; cf. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 624–25 (2001) (expressing skepticism about structural and formal methods that try “to assign specific exercises of government authority based on the general normative reason for the power allocation”).

299. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1216 (1992) (explaining why “only a holistic approach to constitutional analysis gives coherent meaning to all the provisions of Article III”).

300. A significant literature exists on “civic republicanism” and its scope and applications. See Cass R. Sunstein, *Beyond the Republican Revival*, 91 YALE L.J. 1539, 1540–41 (1988) (gathering sources and describing key principles of republican theory).

Representatives working together must first identify the public good and then must compromise on how to achieve those goals. Invariably in a large and diverse nation, ongoing disputes will occur both about the public good and the means for achieving it. The collective Congress and democratic representation serve these values of working for the general good, even if they do not always achieve them. As economist and philosopher Friedrich Hayek explained:

Liberalism is a doctrine about what the law ought to be, democracy a doctrine about the manner of determining what will be the law. Liberalism regards it as desirable that only what the majority accepts should in fact be law, but it does not believe that this is therefore necessarily good law.³⁰¹

In a similar manner, the unitary executive is designed to promote energetic execution—unitariness is the Constitution’s mechanism for good administration of the laws. The fact that a unitary executive cannot always achieve this ideal does not undermine the importance of a unitary executive.

Collective decisionmaking helps to identify and promote the general good in several ways. A multimember lawmaking body requires cooperation, negotiation, and deliberation. As James Madison stated, the effect of lawmaking by representatives should be “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”³⁰² The legislative process refines and enlarges disparate public views. Through the exercise of reasoned debate, different interests may be brought together and negotiated in order to yield an enlarged view of the public good. “[I]t is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controled and regulated by the government.”³⁰³ Alexis de Tocqueville similarly argued that only in a democratic form of government would the public have a reason to educate themselves and to form the proper opinions for their governance.³⁰⁴

As discussed above, the Framers frequently referred to regulating, umpiring, and aggregating interests—all suggesting that the legislative

301. HAYEK, *supra* note 40, at 103; *see also id.* at 108 (“But if the prospects of individual liberty are better in a democracy than under other forms of government, this does not mean that they are certain.”).

302. THE FEDERALIST NO. 10, *supra* note 11, at 46 (James Madison).

303. THE FEDERALIST NO. 49, *supra* note 11, at 264 (James Madison).

304. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55–56 (1835).

process would require deliberation to achieve some collective benefit. Importantly, neither the executive nor the courts could properly achieve these ends. As Hamilton noted, “The differences of opinion, and the jarring of parties in [the legislature], though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority.”³⁰⁵ Collective representation in the legislature serves the beneficial purpose of providing a “constitutional averaging process” that weighs and balances various interests in order to produce legislation.³⁰⁶ This process was designed to legislate for the general good by mediating the interests of factions, thwarting oppressive majorities, and controlling powerful minorities.

B. *Collective Ambition and Separation of Powers*

In a system of separated powers, the structure of collective lawmaking aligns the incentives of members with the institution of Congress. Members’ interests are aligned because they can exercise only a part of the collective legislative power and therefore must work together for the successful operation of Congress. Moreover, the Constitution carefully excludes members from non-legislative powers, particularly preventing them from execution, or otherwise controlling the executive power through appointment and removal. The nondelegation principle similarly maintains this alignment of interests by preventing members from relocating the legislative power to executive agencies. Finally, the requirements of bicameralism and presentment place a practical barrier to Congress exercising or controlling the executive and judicial powers through legislation. Thus carefully circumscribed to the legislative power, members have every incentive to support Congress because they can exercise public power only through Congress as an institution.

As Madison wrote in Federalist 51, the Constitution arranged the three departments to serve as a check on each other, “giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . The interest of the man, must be connected with the constitutional rights of the place.”³⁰⁷ Madison recognized, however, that “it is not possible to give

305. THE FEDERALIST NO. 70, *supra* note 11, at 365 (Alexander Hamilton).

306. H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1036 (1975) (“The structure in which . . . local representatives meet, however, provides a corrective for their parochial biases. Because each piece of legislation needs at least the majority support of each legislating body, local interests tend to cancel each other out. Thus, legislation passes through what is effectively a constitutional averaging process based on a specific, preestablished weighting system, designed to cut across potential factional interests.”).

307. *See* THE FEDERALIST NO. 51, *supra* note 11, at 268–69 (James Madison).

to each department an equal power of self-defence,”³⁰⁸ and that in republican government “the legislative authority necessarily predominates.”³⁰⁹

Yet in the Madisonian government of ambition counteracting ambition, what is the incentive for members of Congress to defend the institution of Congress? The question of incentives is more readily answered for the single President who unites personal ambition with the strength and success of the executive branch.³¹⁰ The difficulty of congressional incentives has come into focus in the modern era. As a descriptive matter, there is widespread agreement that Congress fails to defend its prerogatives and that a number of structural realities hamper Congress’s ability to function effectively.³¹¹ As a consequence, some political scientists, such as William Howell and Terry Moe, have argued that Congress and its constitutional form of lawmaking are a “relic” that fails to function properly and thus more power should vest in the executive.³¹² Legal professors Eric Posner and Adrian Vermeule have also argued about the necessity and desirability of more executive lawmaking.³¹³

Implicit in these critiques is an assumption about the availability of executive lawmaking—that law may be formulated either by Congress or by expert agencies and that the choice should turn on which institution provides functional benefits of efficiency, expertise, and flexibility. It should be obvious that such arguments are possible only after the complete demise of the nondelegation principle, because the Constitution does not pose a binary choice between lawmaking in Congress or the executive; instead it vests “All legislative Powers herein granted” in

308. *Id.*

309. *Id.*

310. *See* Rao, *supra* note 9, at 1487.

311. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006); *see generally* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1995) (explaining how Congress uses delegation to make laws through federal agencies); PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009) (explaining how a partisan and complaisant Congress has contributed to an abuse of executive power).

312. HOWELL & MOE, *supra* note 3, at 88 (“Under the Constitution, Congress is granted the authority to make the laws, and the fact that it makes them badly—and indeed, is *wired* to make them badly—fatally undermines the ability of American government to meet the challenges of modern society.”).

313. *See* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 31 (2010); VERMEULE, *supra* note 4, at 209 (“Judges and lawyers have collectively realized that the very principles and doctrines that law created to check the administrative state, rightly understood and with their logic worked all the way through, themselves indicate that administrative discretion should be extremely broad.”).

Congress.³¹⁴ Our Constitution requires an effective Congress to bring together the interests of the people, to identify the common good, and to use the power of government when necessary to solve common problems. Allowing for a parallel lawmaking track in the executive unravels these important protections.

Rather than simply accept more expedient administrative lawmaking, the values of a collective and representative legislature make it imperative to reinvigorate constitutional safeguards for the effectiveness of Congress. Although the Constitution vests Congress with enough powers to be the most dangerous branch,³¹⁵ the institutional strength and defense of Congress are rooted in the mechanisms identified in this Article: collective decisionmaking and the exclusivity and insulation of the legislative power within Congress. These structural features align the incentives of the members with the institution; they provide a solution, perhaps the only solution, for ensuring the institutional strength and integrity of Congress in the system of separation of powers.

First, collectivity requires that members work toward the success of Congress. Individual members can implement their interests and ambitions only through enacting legislation. Given but one vote in the collective lawmaking power, the individual lawmaker must work for the effective operation of Congress. Even the most senior and powerful senator or representative must convince a majority to agree to his legislative proposals. In order to serve even a part of his interests, a member must negotiate, compromise, and deliberate with others to produce legislation. Thus, the requirement for collective lawmaking aligns the ambitions of members with successful lawmaking in Congress.

As Rousseau noted, the private good almost always has a stronger pull than the public good.³¹⁶ The collective Congress requires legislative power to be exercised by a majority of both houses, and to receive the requisite number of votes, legislation must serve some collective good. This frustrates lawmakers from implementing laws that service their individual and private good. In the legislature, the part has no power to control the whole—a single member cannot independently exercise the legislative power. Since the legislative power can be exercised only together, the interests of members should align with protecting the prerogatives of Congress.

Second, the exclusivity of the legislative power reinforces this mechanism by explicitly prohibiting members from exercising the executive and judicial powers. Members cannot avoid the difficulties inherent in the collective legislative power by instead exercising one of the other powers of government. The Constitution, through specific

314. U.S. CONST. art. I, § 1.

315. See THE FEDERALIST NO. 48, *supra* note 11 (James Madison).

316. See *supra* note 43 and accompanying text.

textual limits, as well as through its structure, separates the legislative power from the implementation and application of the laws. As discussed above, members have no independent legislative power and they are barred from exercising executive or judicial power. The Incompatibility Clause prevents members from serving as executive officers³¹⁷ and the Constitution carefully keeps Congress from the appointment and removal of executive officers. The Appointments Clause gives the President the power of appointment over principal officers, subject to the advice and consent of the Senate. Congress “may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Departments.”³¹⁸ The Supreme Court has repeatedly invalidated the attempts of Congress to control the appointment or removal of executive officers.³¹⁹ Thus, members have no power to execute the law directly and they are prohibited from controlling the execution of the laws through other means.

In addition, the Senate’s power to provide advice and consent to appointments of executive officers does not give the Senate control over execution; rather, this power serves as an important check in the appointment process.³²⁰ Officers remain in the chain of command to the President. The collective Congress can hold executive branch officers accountable through ordinary legislative processes, oversight hearings, and *in extremis*, impeachment and removal. Congress, however, holds no other powers for controlling administration. Members of Congress also cannot serve as electors and thereby cannot partake in the selection of the President.³²¹

Thus, while the pull of private and individual interests may drive representatives and senators, they have no opportunity to run the bureaucracy or otherwise exercise executive powers. These limitations should encourage members to focus their attention on the difficult business of enacting laws.

317. See U.S. CONST. art. I, § 6, cl. 2.

318. *Id.* art. II, § 2, cl. 2.

319. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (“[B]ecause Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers.”); see generally *Buckley v. Valeo*, 424 U.S. 1 (1975) (holding commissioners appointed by Congress cannot exercise executive powers, which can only be exercised by “Officers of the United States” appointed in accordance with Article II, Section 2, Clause 2); see also Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (explaining that Congress’s powers are limited to prevent encroachment on the executive power).

320. See U.S. CONST. art. II, § 2, cl. 2.

321. *Id.* art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

The nondelegation principle also reinforces the collective Congress and exclusivity of the legislative power. Article I, Section 1, vests all legislative power in Congress. This includes a principle of nondelegation.³²² Maintaining legislative power within the elected and collective legislature serves a number important values of democratic accountability, requiring that binding laws be made by the people's representatives. In addition, if Congress can delegate lawmaking power to executive agencies, this fractures the interests of Congress, as I have explained elsewhere.³²³ Delegation creates regulatory discretion for executive officials, which members of Congress can then work to influence and control. Delegation unravels the collective Congress by allowing members to meddle in administration and by creating a strong incentive for members to influence the regulatory process, rather than make laws. Thus, it destroys the primary mechanism for bolstering the independence and integrity of Congress as an institution.

Collectivity also serves as a practical restraint on Congress, enforcing the separation of powers by making it difficult for members of Congress to use the legislative power for exercising the executive or judicial powers. The Framers feared the combination of power, and in particular combinations with the legislative power, which could draw everything into its vortex. Creating a requirement for large numbers of members to act in concert practically and functionally prevents Congress from executing or adjudicating the law. Just as the unitary executive is designed for energetic execution, the collective Congress is disabled structurally from execution.

Similarly, the checks Congress has over the other branches must all be exercised collectively. Congress's tools of impeachment and removal, which exert control over the Judiciary and President, are extremely blunt and must be exercised collectively. Impeachment by the House requires a majority, and removal requires two-thirds of the Senate. Congress cannot reduce the salary of a sitting judge³²⁴ and cannot increase or diminish the salary of the President during his term.³²⁵ So Congress cannot use the power of the purse to target judges or the President as individual officeholders.

322. See Lawson, *supra* note 126, at 328.

323. See generally Rao, *supra* note 9.

324. U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.”).

325. *Id.* art. II, § 1, cl. 7 (“The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected.”).

While this Section has focused on how the collective Congress limits legislative control over the other departments, members and congressional committees undoubtedly have a variety of legislative tools—oversight, appropriations, investigations, informal contacts—to cajole, pressure, and control the executive branch. Indeed, such control may at times be quite effective.³²⁶ Such influence, however, depends on the political balance of power between the President and the Congress. Congress can take no *binding* action against the other branches except through legislation or through impeachment and removal. By contrast, the President can frustrate or decline enforcement of the laws on constitutional grounds,³²⁷ and a single district court judge can declare a law unconstitutional.

Collective decisionmaking is thus a deep feature of congressional power, bolstered by the text and structure of the Constitution. Delegation that places lawmaking outside of Congress allows members to exercise independent power threaten Congress as an institution by undermining collective lawmaking and circumventing the exclusivity of the legislative power. The limits on Congress work together to preserve the independence and integrity of lawmaking—they separate lawmaking from the other powers of the government in order to promote lawmaking most conducive to promoting the general good.

C. *Collectivity as Restraint on Legislative Power*

Collectivity serves as a restraint on legislative power and on the power of individual lawmakers. Yet Congress and its individual members have tried a variety of mechanisms to alter the requirements of collectivity or exclusivity. The Supreme Court has consistently invalidated congressional efforts to circumvent the collectivity or the exclusivity of the legislative power (with the notable exception of cases raising nondelegation challenges, discussed below). These decisions demonstrate how principles of the collective Congress connect a range of separation of powers cases.

The Constitution vests Congress and the President with specific characteristics that provide both power and restraint. The President has the strength and energy of being a unitary actor, which includes authority to act independently and to direct and to control the execution of the laws. His singular position at the head of the executive department, however, also imposes responsibility and accountability. Congress is vested with the awesome collective legislative power to determine how the government will exercise its authority over the life, liberty, and property

326. See Jack Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 144 (2006).

327. See Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1682–83 (2008).

of the people. Yet collectivity also imposes Congress's primary restraint. Representatives and senators must reach majority agreement, and receive the President's approval, to enact legislation.

Although collectivity remains the hallmark of the exercise of legislative power, Congress has frequently sought to disaggregate legislative power through mechanisms that empower one branch of Congress, bolster power for individual members, or otherwise work to change the careful process of Article I, Section 7. The Supreme Court has consistently resisted attempts to modify the collective legislative process. Most notably, in *INS v. Chadha*,³²⁸ the Supreme Court held unconstitutional the one-house legislative veto, explaining that it violated the requirements of bicameralism and presentment for legislative actions. Thus, when the "House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, executive branch officials and Chadha, all outside the legislative branch," such action was deemed a legislative action for which the Constitution requires bicameralism and presentment.³²⁹ The Court prevented one house of Congress from taking legislative action.³³⁰ The one-house veto violated the fundamental principle that only Congress as a whole can exercise legislative power.

Similarly, in *Clinton v. City of New York*,³³¹ the Supreme Court invalidated the Line Item Veto Act (LIVA), drawing on the reasoning from *Chadha* that Congress cannot modify the collective legislative process that requires bicameralism and presentment.³³² The LIVA allowed the President to cancel certain types of spending.³³³ The Court explained that such action allowed the President to repeal or amend the statute, and the President had no such authority under the Constitution.³³⁴ "If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature."³³⁵ This reaffirms the importance of exclusivity of the legislative power and the

328. 462 U.S. 919, 959 (1983).

329. *Id.* at 952.

330. *Id.* at 958–59.

331. 524 U.S. 417 (1998).

332. *Id.* at 438.

333. *Id.* at 421.

334. *Id.* ("In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. '[R]epeal of statutes, no less than enactment, must conform with Art. I.' There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." (alteration in original) (citation omitted) (quoting *Chadha*, 462 U.S. at 954)).

335. *Id.* at 448.

problem of delegating legislative authority to the President.³³⁶ The President cannot unilaterally modify, amend, or repeal a statute—those actions must all be taken according to the process of Article I, Section 7, calling for collective action by Congress.

The Supreme Court has also restricted the ability of members of Congress to use the judicial process to achieve their political goals. Members generally lack standing to challenge executive branch actions, except in some very limited contexts. These cases reinforce the partial power of members within Congress and confirm the importance of the collective Congress as an institution in disputes against the executive. The D.C. Circuit for a number of years allowed quite lax congressional standing.³³⁷ In *Raines v. Byrd*,³³⁸ however, the Supreme Court disallowed standing for a member of Congress to challenge the LIVA.³³⁹

The reasoning in *Raines* strongly reinforced Congress's institutional power and held that individual members have no personal right to exercise political power, because that power runs with their particular seats. In *Raines*, Senator Byrd claimed that the LIVA causes an institutional injury by diminishing the legislative power, which injures all members of Congress equally. In response, the Court explained that members had no personal right to the political power of their seats.³⁴⁰ As the Court explained:

If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.³⁴¹

This case goes to the relationship between the individual members and Congress as an institution. The Court makes clear that the individual member occupies an office that exercises a portion of legislative power.³⁴² The member, however, has no personal right to exercise that

336. *Id.* at 465 (Scalia, J., concurring in part and dissenting in part) (framing the problem of the Line Item Veto Act in terms of delegation).

337. *See, e.g.,* *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir. 1979) (en banc) (holding that senators had standing to challenge President Carter's unilateral termination of a mutual defense treaty with the Republic of China); *Kennedy v. Sampson*, 511 F.2d 430, 433 (D.C. Cir. 1974) (holding that Senator Kennedy had standing to challenge whether a bill had become a law through the "pocket veto" when the President failed to sign or to veto it).

338. 521 U.S. 811 (1997).

339. *Id.* at 813.

340. *Id.* at 829.

341. *Id.* at 821.

342. *Id.*

power and therefore no personal injury from the operation of the statute.³⁴³ The Court also “attach[es] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.”³⁴⁴ If a collective “collegial body” declines to litigate an issue, its members generally will lack standing.³⁴⁵

Congress has increasingly sought to vindicate its constitutional and political interests as an institution in the courts. Most recently, the House of Representatives brought suit against the Secretary of Health and Human Services for using unappropriated funds to implement the Affordable Care Act.³⁴⁶ The district court allowed standing for the House.³⁴⁷ The court reasoned, “Where the dispute is over true implementation, Congress retains its traditional checks and balances—most prominently its purse strings. But when the appropriations process is itself circumvented, Congress finds itself deprived of its constitutional role and injured in a more particular and concrete way.”³⁴⁸ The House was an injured party because of its institutional interest in the appropriations process.³⁴⁹ The case is pending on appeal and scholars have continued to debate the appropriateness of standing in this context.³⁵⁰

Recognition of the importance of the collective Congress could help elucidate whether a single house of Congress has standing or if Congress as a whole is necessary to maintain suit. One question is whether a single house can be an “institutional plaintiff asserting an institutional

343. *Id.*

344. *Id.* at 829.

345. *Id.*

346. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015).

347. *Burwell*, 130 F. Supp. 3d at 81; *see also Burwell*, 185 F. Supp. 3d at 189 (enjoining the use of unappropriated monies to fund reimbursements under Section 1402 of the Affordable Care Act).

348. *Burwell*, 130 F. Supp. 3d at 75.

349. *Id.* at 71.

350. *See* Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 373 (2015) (taking an expansive view of congressional functions and defining standing to include situations in which the bargaining power of Congress is diluted); Bethany R. Pickett, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 442 (2016) (arguing in favor of congressional institutional standing particularly when the executive declines to enforce a law); Nicholas Bagley, *Oh Boy. Here We Go Again*, INCIDENTAL ECONOMIST (Sept. 9, 2015), <http://theincidentaleconomist.com/wordpress/oh-boy-here-we-go-again/> (arguing against standing).

injury.”³⁵¹ Although the House controls appropriations, the enactment of appropriations still must satisfy the requirements of collective decisionmaking in Article I, Section 7. Does the House count separately as an institutional plaintiff because of its role in originating appropriations? Would it make a difference if Congress as a whole, both the House and Senate, had authorized the lawsuit? The Constitution carefully structures Congress so that it can overrule the action of one of the coordinate branches only when acting collectively.³⁵² A successful lawsuit by the House would allow a single chamber to change the President’s execution of the laws. This result may run afoul of the collective Congress, because it allows a part of Congress to use the judiciary against the executive.

In a related series of cases, courts have held that members of Congress cannot sue the executive for enforcement of the laws because “[t]he failure or refusal of the executive branch to execute accomplished legislation does not affect the legal status of such legislation; nor does it invade, usurp, or infringe upon a Congressman’s power to make law.”³⁵³ Congress, and individual representatives and senators, have no power to execute the laws and cannot use the judicial process to force a certain type or degree of execution.³⁵⁴

The Supreme Court has also recently reaffirmed that a legislator’s vote belongs to the office, not to the legislator personally.³⁵⁵ The case involved a constitutional challenge to Nevada’s recusal law on the question of whether legislators have a “personal, First Amendment right to vote on any given matter.”³⁵⁶ The Supreme Court upheld the recusal law and explained that restrictions on voting are not restrictions upon a legislator’s protected speech because “a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the

351. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2664 (2015).

352. One might suggest that the Senate’s advice and consent power for appointments and treaties allows for a one-house check on executive power. These powers of the Senate, however, are different from overruling an action of the President. When the Senate declines to approve a nomination or a treaty it does not overrule an action of the President; instead that appointment or treaty never takes effect. By contrast, to remove an officer requires both houses to impeach and remove, and to abrogate a treaty requires both houses to enact a new statute, which would control over the earlier treaty.

353. *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978).

354. Members may use other legislative tools to influence the execution of the laws, sometimes quite effectively. See Beermann, *supra* note 326, at 144; Rao, *supra* note 9, at 1494.

355. *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011).

356. *Id.* at 119.

legislator has no personal right to it.”³⁵⁷ This echoes the rationale in *Raines v. Byrd* that members are agents of the people and have no individual right to the lawmaking power of their offices.³⁵⁸ Thus, the individual act of voting does not, at least for expressive purposes, belong to the legislator, but instead stems from the office that he holds.

The nondelegation cases stand as a notable departure from these decisions, because the Supreme Court regularly reaffirms even the most open-ended delegations of authority to agencies. In part, the Court does not recognize delegations as aggrandizing the power of individual members of Congress; but instead has maintained that Congress will police delegations because of its competition with the Executive Branch.³⁵⁹ Delegation, however, unravels the collective Congress and more likely leads to collusion between members of Congress and administrative agencies.³⁶⁰ Understanding delegation as a mechanism for undermining the collectivity and exclusivity of legislative power might provide for closer judicial scrutiny of delegated authority.³⁶¹

The collective Congress within the constitutional structure reinforces important principles of separation of powers. The allocation of legislative power to a collective Congress provides the most legitimate mechanism for identifying and promoting the general good. Our Constitution fundamentally connects the collective and representative Congress with the lawmaking power. The structure of the collective Congress reinforces the integrity and strength of Congress because a stronger and more effective Congress will further its members’ interests. Mechanisms such as delegation that unravel the collective Congress undermine the legitimacy of lawmaking and upset the balance of powers, thereby threatening individual liberty.

357. *Id.* at 125–26.

358. *See also* Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (“In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. . . . They have a private right to the office itself, and to the emoluments of the office, but the powers of the office belong to the people and not to them.” (citations omitted)).

359. *See* Mistretta v. United States, 488 U.S. 361, 396 (1989) (Scalia, J., dissenting); *see also* Rao, *supra* note 9 at 1471–73.

360. *See generally* Rao, *supra* note 9.

361. *Id.* at 1409–12 (arguing for more robust judicial enforcement of the nondelegation principle because political safeguards and competition between Congress and the Executive fail to prevent delegations of lawmaking power).

CONCLUSION: THE COLLECTIVE CONGRESS AND THE ADMINISTRATIVE STATE

This Article forms part of a larger project to understand how the collective Congress relates to difficult separation of powers problems. A complete consideration of the implications goes beyond the scope of this Article, but most significantly, the collective Congress calls into question certain aspects of the administrative state.

Underlying the growth of delegation to executive agencies and the expansion of administrative power rests a narrative about particular values, namely expertise, efficiency, and flexibility. These values can further good administration and execution of the laws, but they are not the values connected with lawmaking. The Constitution's collective legislative power is designed to promote representation, deliberation, and the general good. Indeed, modern administrative law scholarship seeks to demonstrate how administration can promote some of the values traditionally associated with Congress, including deliberation and accountability to the public.³⁶² Administrative agencies can try to pursue legislative values through internal checks and balances and public participation, yet these are second-best approximations when implemented within the executive branch through the bureaucracy. The existence and operation of the collective Congress forms the basic foundation of the nation and society; and executive branch lawmaking cannot provide a substitute for several reasons.

First, in a pluralistic society with many diverse interests, private interests conflict and disagreements will arise as to how best to identify and to pursue the general good. Given the conflicting nature of such interests, the Constitution establishes representative lawmaking as the mechanism for ascertaining and pursuing the general good. The Framers were hardly political naïfs and did not imagine that all acts of Congress would pursue the public good, or that legislation would never serve narrow factional interests. As Madison observed, the Constitution created a system representing many diverse interests.³⁶³ In a nation of

362. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992). Seidenfeld argues "civic republicanism provides a strong justification for the assignment of broad policymaking discretion to administrative agencies" because agencies provide "the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity." *Id.*; see also *supra* note 6 and accompanying text (citing articles about the "administrative constitution").

363. THE FEDERALIST NO. 51, *supra* note 11, at 295–96 (James Madison) ("[B]y comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable[,] . . . the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of

sufficient size, the collective Congress would provide a forum for the negotiation and deliberation of different interests and would protect individual rights and liberty.

The Constitution creates a Congress with the structure most conducive to and most legitimate for pursuing the general good when private rights are at stake. The exercise of the legislative power requires a meeting of the minds between representatives. The administrative construction of regulation draws from public inputs and executive expertise, but ultimately expresses a bureaucratic decision about how to proceed. Regulation can never share the fundamental features of collective, representative lawmaking.³⁶⁴

Second, although nearly all discussions of the administrative state assume the inevitability of massive delegations to executive agencies, the collective Congress reinforces that nondelegation is a deep feature of the constitutional structure and republican government. In addition to other problems, delegation radically undermines the collective Congress. When Congress delegates in open-ended terms, it creates discretion within agencies. This expands the power of the executive branch, but it can also expand the power of individual members of Congress who can work with agencies to secure particular policies or waivers or exemptions for favored groups. As I have explained:

Delegations can expand the influence and control of individual congressmen who will have persistent incentives to delegate. In such an environment, the competitive tension between the branches fails. This cross-branch collusion undermines individual liberty by allowing both branches to combine lawmaking and law interpretation and to exercise government functions without the requisite constitutional checks.³⁶⁵

Delegation allows for a dangerous combination of lawmaking with execution—both in the agencies and in Congress. As Locke, Rousseau, and Montesquieu all cautioned, the lawmaker cannot control particular applications, because this corrupts the process of making laws for the general good.³⁶⁶ Moreover, one of the greatest dangers to the legislative

individuals, or of the minority, will be in little danger from interested combinations of the majority.”).

364. HAMBURGER, *supra* note 8, at 361. Hamburger notes that the President, the only elected member of the executive branch, “is not a representative body. A representative body must to some extent represent the nation’s diversity. It therefore cannot consist of a single person, and it must be elected in a way that to some extent reflects diversity, even if only because it is elected by the people in their different states and districts.” *Id.*

365. Rao, *supra* note 9, at 1506.

366. *See supra* Section I.A.

power comes from representatives who usurp the power that should be exercised collectively.³⁶⁷

Delegation also fractures Congress and threatens the Constitution's lawmaking structure. The Constitution's primary, perhaps only, mechanism for ensuring Congress remains independent and effective is the collective legislative power, which aligns the incentives and ambitions of members with Congress as an institution. As discussed above, the Constitution carefully insulates Congress and its members from exercising the executive or judicial powers—legislative power has double exclusivity. To realize their ambitions, members must work toward an effective Congress. If members can accomplish their policy goals outside of the legislative process, such as through regulatory policy, then Congress will be just a hollow shell.

Moreover, when delegated to agencies, legislative power is dispersed and isolated. Specialized agencies, often further subdivided by subject and expertise, attend to narrow issues. Perhaps this is suited to the administration of laws, but not to the making of laws. The expertise of agencies is not designed to represent and reflect the broader interests of society or to promote the general good.

Delegation also eliminates the exclusivity of the lawmaking power, because once regulatory authority has been delegated, in effect, there exist *two* “lawmaking” entities. The agency has power to issue a regulation within its delegated authority and yet Congress always retains the power to enact legislation on those same issues. Under existing delegations, Congress and the agencies both have power over a very wide sweep of regulatory policy—which undermines both collectivity and exclusivity and unravels the separation of powers.

Once open-ended authority is delegated to an agency, it is easy to lose sight of why Congress matters. Those seeking regulatory action can go *either* to Congress or an agency—and agencies generally move more quickly and are easier to control or to capture. Indeed, even members of Congress often look to agencies to accomplish their goals, rather than working to legislate.

Finally, the collective Congress provides another reason for trying to draw a substantive line between legislative and executive power. Commentators and the Supreme Court agree in theory that the “legislative power” cannot be delegated.³⁶⁸ Yet the cases and articles either have no particular conception of the substance of the legislative power, or a very thin view of legislative power as requiring only an

367. See *supra* notes 32–34 and accompanying text.

368. See *supra* note 68 and accompanying text.

“intelligible principle.”³⁶⁹ The collective Congress gives substance to the legislative power as a representative meeting of the minds on difficult problems that might benefit from government action. It protects individual liberty by ensuring that all interests are represented in a particular type of lawmaking process.

The foregoing suggests how the collective Congress can serve as an interpretive guide to analyzing separation of powers questions, particularly in the context of the administrative state. The collective Congress also can provide a useful framework for understanding other separation of powers disputes regarding issues such as the Speech and Debate privilege for members of Congress,³⁷⁰ the legitimacy of supermajority rules for legislation,³⁷¹ and standing in court for Congress to challenge executive branch action.³⁷² These topics and others I hope will form the basis for future research and analysis.

Congress still matters in our complex modern society. The Framers vested the legislative power exclusively in a collective Congress to create a legitimate mechanism for ascertaining the general good and resolving conflicting interests in the enactment of laws. Whatever the other virtues of executive branch agencies, they can never replicate the collective and representative Congress. The “administrative constitution” may improve accountability and restraint, but it does not therefore follow that wholesale lawmaking by agencies fits into the Constitution. The Constitution carefully creates and protects the collective and exclusive nature of the legislative power by vesting it in Congress. The legitimacy of our system of government and the security and liberty of individuals depends on the people’s representatives in Congress exercising the legislative power.

369. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring in the judgment) (concluding that “[t]oday, the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power” and explaining that the “intelligible principle” test “does not keep executive ‘lawmaking’ within the bounds of inherent executive discretion”); see also VERMEULE, *supra* note 4, at 1 (“Although there is still a sense in which law is constitutive of the administrative state, that is so only in a thin sense—the way a picture frame can be constitutive of the picture yet otherwise unimportant, compared to the rich content at the center.”).

370. See *supra* notes 260–64 and accompanying text.

371. See *supra* notes 291–93 and accompanying text.

372. See *supra* notes 347–52 and accompanying text.