

CONGRESS AS ELEPHANT

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Congress, considered in its entirety, seldom is an object of legal study. Scholars tend to concentrate on discrete features—its Commerce Clause authority, its power to declare war, or the impeachment functions of its chambers. This inclination toward a narrow focus reflects the fact that Congress is so multifaceted that even fathoming its complexity is rather daunting. So intimidating, in fact, that it has caused most scholars to shy away from a comprehensive treatment. This Essay attempts to fill that gap. The Constitution’s text and context suggest that the Founders envisioned Congress playing multiple constitutional functions. After comparing our Congress with its predecessor, the Continental Congress, this Essay describes six roles for Congress, only a few of which are familiar: Chief Lawmaker, Secondary Executive, Chief Facilitator and Overseer of the Magisterial Branches, State Overseer, and Enforcer of Constitutional Rights and Duties. Only when we appreciate Congress in all its complexity can we appreciate why Congress, as an institution, is more than the first branch amongst equals.

INTRODUCTION 798

I. THE FEEBLE CONTINENTAL CONGRESS 802

II. A COMPLEX AND TRANSFORMED CONGRESS..... 806

III. THE CHIEF LAWMAKER..... 809

A. The Scope of its Legislative Powers..... 809

B. Federal Lawmaking via Treaties 814

C. Constitutional Amendments 819

IV. THE SECONDARY, PLURAL EXECUTIVE..... 820

A. Congress, War, and the Military..... 821

B. The Executive Senate 826

V. THE CHIEF FACILITATOR OF THE MAGISTERIAL BRANCHES 826

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VI. THE CHIEF OVERSEER OF THE MAGISTERIAL BRANCHES.....	831
VII. AN OVERSEER OF THE STATES.....	836
VIII. AN ENFORCER OF CONSTITUTIONAL RIGHTS AND DUTIES.....	839
CONCLUSION	841

INTRODUCTION

After ambling through the preamble, a reader of the Constitution first encounters Congress. The initial Article, the longest by far,¹ is replete with rules about the two chambers, the qualifications and privileges of their members, how legislators may act in concert to make laws, the proper subjects of lawmaking, and the laws that Congress may not enact. Wending her way through the rest of the Constitution, the reader learns that Congress is the most cited, empowered, and checked institution.² Congress manifestly took pride of place in the minds of the Framers.

Though its placement suggests it is *primus inter pares*, Congress, considered as a whole, seldom is an object of constitutional exploration. Constitutional scholars tend to discuss discrete aspects of the institution—say, its Commerce Clause authority, its power to declare war, or the impeachment functions of its chambers.³ This disposition to narrow the field of study perhaps reflects Congress’s complexity. Scholars justifiably find focusing on a discrete matter more tractable and therefore shy away from a comprehensive consideration.⁴

¹ Article I contains more than 2,200 words. Article II, the next lengthiest, has less than half that number, with a little more than 1,000 words.

² In the original Constitution, “Congress” is mentioned some twenty-nine times across the first five constitutional articles. The “President” (as distinct from the Vice President or President of the Senate) is referenced a little over twenty times, but only in Articles I and II. If we consider the amendments, a similar pattern emerges. Congress is mentioned more often (in over fourteen amendments) while references to the President are almost wholly concentrated in the amendments dealing with presidential election and disability (the Twelfth, Twentieth, Twenty-second, and Twenty-fifth Amendments).

³ There are notable exceptions. See, e.g., Josh Chafetz, *Congress’s Constitution*, 160 U. Pa. L. Rev. 715 (2012) (discussing “hard” and “soft power[s]” of Congress, relating to annual appropriations, contempt, speech or debate privilege, ethics enforcement, and cameral rules). Professor Chafetz has recently authored a book that builds upon his previous work. See Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* (2017). For a chapter-length treatment of Congress, see Akhil Reed Amar, *America’s Constitution: A Biography* 45–301 (2005). None of these treatments, as interesting as they are, speak to the breadth of congressional roles addressed herein.

⁴ There are sound reasons for focusing on individual parts and not the whole. For instance, an in-depth consideration of the nuances of particular provisions is not possible when one adopts a bird’s-eye perspective. Yet a narrow perspective can often cause us to miss the

This Essay begins to fill that considerable gap.⁵ Professor Edward S. Corwin famously described roles for the President: administrative chief, chief executive, commander in chief, organ of foreign relations, and foremost legislator.⁶ I borrow Corwin's approach (and some of his nomenclature) but shift the focus to Congress. The Constitution's text and context suggest that the Founders envisioned Congress playing several constitutional functions. Were we to anthropomorphize Congress—to treat it not as a “they,”⁷ but as a “he” or “she”—we could say with confidence that the Constitution empowers Congress to play multiple, vital roles in our scheme of government. Congress's extensive constitutional authorities straddle rights, federalism, and the separation of powers.

To perceive the many roles that the Constitution assigns our Congress, Part I considers its precursor. The Constitution's radical transformation of Congress becomes evident when we compare and contrast the two institutions that, though they bear the exact same name, are somewhat distinct in their organization, powers, and duties.

Part II focuses on our Congress's structure and the legislators who populate its two chambers. Congress went from something of a unicameral league of nations exercising executive power and populated by quasi-diplomatic “delegates” to a bicameral legislature composed of autonomous lawmakers. Though the Chief Executive can serve as the most important voice in the legislative process, *Congress* enjoys the legislative power and may ignore his recommendations and override his objections. A cohesive Congress may make laws unilaterally, without the need to heed the President or his preferences.

Part III argues that, notwithstanding Corwin's claim, Congress is the “Chief Lawmaker,” uniquely empowered to act across several

forest for the trees. We will not understand Congress if we focus on all its individual parts in isolation.

⁵ This Essay focuses on the constitutional aspects of Congress and does not directly address the *political* role that Congress plays (or was meant to play). Hence, it does not address questions about the representational dimension of Congress, including such matters as whether members are supposed to represent the whole nation or whether members may represent the parochial interests of their electorates. Moreover, while the Essay will discuss the separation of powers from a legal point of view, it will not discuss, in detail, whether Congress has shrunk from its task of checking the other branches. Though the questions omitted are worthy of discussion, it is a mistake for a single paper to attempt too much.

⁶ See Edward S. Corwin, *The President: Office and Powers* (2d ed. 1941).

⁷ See Kenneth A. Shepsle, *Congress is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 *Int'l Rev. L. & Econ.* 239 (1992).

lawmaking fronts. The Constitution vastly expanded Congress's lawmaking powers, converting it into a bona fide legislature. Relatedly, the Senate was to serve as the President's council on treaties. Many correctly suppose that the Senate was meant to police the international inclinations of presidents. But just as the President may spur legislation, the Senate may also serve as a treaty accelerant, by encouraging the President to enter international talks. Lastly, Congress serves as something of a constitutional gatekeeper. It may propose amendments⁸ and send them to the states, something it has done thirty-three times.⁹ Moreover, it must convene a constitutional convention when enough states have called for one.¹⁰ With this duty comes the implied right to decide whether a supermajority of states have demanded a convention. Because the states may cast their calls for a convention in different ways and because it is hardly obvious how Congress ought to treat these variations in expression, Congress has leeway in how it responds to appeals for a convention.

Congress is much more than a legislature; it also is a "Secondary Executive," or so Part IV contends. The Congress under the Articles of Confederation was primarily a plural executive because most of its powers were executive. Many of these powers now rest with the President by virtue of the grant of executive power. Yet the Constitution continues to stamp Congress as a plural executive. To begin with, many powers traditionally conceived of as executive rest with our Congress. It has the war power, authority over letters of marque and reprisal, government of the armed forces, regulation of foreign commerce, and authority to create offices and institutions. Moreover, the Senate checks the President's ability to make treaties and power to appoint officers. Hence, while Congress is often perceived as purely legislative, it retains an extensive array of executive authorities.

Part V maintains that Congress is the "Chief Facilitator" of the magisterial branches. The Constitution constructs a presidency, but no substructure beneath it. Congress fashions the executive departments, establishes offices, and provides the funds necessary for departments, officers, and employees. Similarly, while the Constitution sketches out a Supreme Court, it does not detail its features, much less create a system

⁸ See U.S. Const. art. V.

⁹ John R. Vile, *A Companion to the United States Constitution and its Amendments* 104 (5th ed. 2011).

¹⁰ See U.S. Const. art. V.

of inferior courts. Congress decides how many Justices will serve on the Supreme Court, whether to have inferior federal courts, and what structure the latter will take.

Part VI argues that Congress functions as the “Chief Overseer” of the magisterial branches. Officers of the executive and judicial branches take an oath to the Constitution, are obliged to honor and enforce federal law, and are bound by official duties. Congress may monitor compliance with these obligations, ensuring that they constrain officers. Additionally, because the Article II impeachment clause imports a standard—“high Crimes and Misdemeanors”—that necessarily gives a political tincture to impeachments and trials, acts that are not themselves violations of federal statutory law may nonetheless constitute impeachable offenses. The authority to expose and penalize such acts grants Congress significant authority over the executive and judicial branches. Relatedly, subsumed into the legislative powers of Congress is implied authority to investigate the other branches as a means of reforming them. In extreme situations, Congress may arrest members of the other branches as a means of punishing obduracy or obstruction of congressional investigations. Finally, Congress has the power of the purse, authority that may be wielded to favor, disfavor, and cajole the other branches and thereby influence exercises of their constitutional authorities. In sum, Congress has many levers. Its hearings can expose bad practices. Its laws can slash funds to show its displeasure and refashion the substructure of the executive branch. Its resolves may censure officials. And its trials may fire the worst offenders.

Part VII argues that the Constitution empowers Congress to serve as a “State Superintendent.” To be sure, Congress does not enjoy anything resembling omnipotence over the states. Nevertheless, Congress wields significant authority. Where Congress has legislative authority over a subject matter, it may supersede related state laws. Because Congress has considerable legislative authority, it can preempt many branches of state law. Moreover, though states may negotiate compacts with each other and with foreign countries, Congress must sanction these intra- and international contracts. Congress is also the gatekeeper and preserver of state sovereignty, choosing when to admit new states and serving as a check on the division of existing states. Finally, the Republican Guarantee Clause implicitly obliges Congress to ensure that states retain republican practices.

Part VIII contends that Congress was meant to be an “Enforcer” of constitutional rights and duties. While the original Constitution is less than clear about Congress’s power to safeguard constitutional rights, over time Congress has acquired express authority to “enforce” constitutional rights. Moreover, with respect to constitutional duties (such as the Oaths and Fugitive Slave Clauses), federal legislators have long held the view that they may legislate to ensure their satisfaction.

All in all, while modern scholars tend to obsess about the imperial presidency, Congress has the tools to dominate its interbranch rivals. There were sound reasons why many Founders considered the legislature the most formidable. As Publius warned, “The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”¹¹ In time, Congress could reassert its many latent prerogatives and rediscover the ability to bend the executive to its will.

I. THE FEEBLE CONTINENTAL CONGRESS

Congress, with its two chambers and its task of creating federal law, is an institution familiar even to schoolchildren. But our acquaintance with it obscures the importance of elements and traits that, while crucial to our perception of the institution, were hardly obvious choices when the Framers formed Congress over the summer of the 1787 Philadelphia Convention.

The paths not taken become more apparent when we consider our Congress’s namesake. We will better appreciate our Congress once we become better acquainted with its forerunner: the Congress of the Confederation period. Many of us know it as the “Continental Congress”—and I shall generally follow that convention—but it was originally styled the “Congress.” As we shall see, the Framers of the Federal Constitution did not so much fashion Congress as much as they *refashioned* it.

In 1774, Boston sought to suspend trade between America and England.¹² Irregular committees within the colonies responded by suggesting a “Congress” or a meeting of deputies from the states.¹³ The

¹¹ The Federalist No. 48, at 250–51 (James Madison) (Garry Wills ed., 1982).

¹² See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 21 (1979).

¹³ *Id.* at 22–25.

word conjured up diplomatic parleys between European sovereigns, such as the Congress of Aix-la-Chapelle and the Congress of Utrecht. Indeed, Samuel Johnson's Dictionary of the English Language gave one definition of "Congress" as an "appointed meeting for settlement of affairs between different nations."¹⁴ Americans had used the appellation before, as when the colonies held a "Stamp Act Congress" in 1765.¹⁵

Meeting for over a month in late 1774, the Continental Congress passed a declaration of rights and agreed to suspend trade with England.¹⁶ Later, the Continental Congress passed a "Declaration of the Causes and the Necessity for Taking up Arms" and, of course, the Declaration of Independence.¹⁷ These early Congresses had something of an irregular air to them. Delegates purported to be acting on behalf of the states, but there was no joint instrument that empowered them to act collectively.

In 1777, the Continental Congress suggested the "Articles of Confederation and Perpetual Union Between the States."¹⁸ Through this proposal, Congress sought to better legitimize itself. In 1781, the de facto confederation belatedly acquired the sought-after de jure legitimacy when Maryland became the last state to ratify the Articles.¹⁹

Under the Articles, the Continental Congress was hardly front and center. After Article I bestowed the title "United States of America" on the "confederacy" of states, Article II steered clear of nationhood, insisting that the constituent states retained their "sovereignty, freedom and independence" and reserving to them "every power, jurisdiction and right" not "expressly delegated" to Congress.²⁰ Article III created an interstate alliance, establishing a duty of mutual defense.²¹ Article IV turned to interstate comity, such as the rights of citizens to travel to, and work in, other states and the obligation to give full faith and credit to the official proceedings of sister states.²²

¹⁴ "Congress", 1 Samuel Johnson, *A Dictionary of the English Language* (1755), http://johnsonsdictionaryonline.com/?page_id=7070&i=448 [<https://perma.cc/97G4-FT7T>].

¹⁵ See C. A. Weslager, *The Stamp Act Congress* (1976).

¹⁶ See Rakove, *supra* note 12, at 48–62.

¹⁷ See *id.* at 78, 108–10.

¹⁸ See *Articles of Confederation of 1781*.

¹⁹ See *19 Journals of the Continental Congress 1774–1789*, at 213–14 (Gaillard Hunt ed., 1912).

²⁰ *Articles of Confederation of 1781*, arts. I–II.

²¹ *Id.* art. III.

²² *Id.* art. IV.

At last, in Article V, Congress entered the scene.²³ Structurally, it was rather simple. To begin with, it was unicameral.²⁴ Though each state could send two to seven delegates, the choice mattered little because each had but one vote.²⁵ That is to say the Articles adopted a one-state, one-vote rule, meaning that tiny Delaware enjoyed the same sway as populous Virginia. Moreover, delegates seemed to be ambassadors from their states, for states compensated,²⁶ instructed,²⁷ and removed them.²⁸ The resemblance to international congresses was patent.

Rather than turn to powers of the Congress, Article VI, a precursor to our Constitution's Article I, Section 10, switched back to the states, denying the latter authorities related to war, foreign affairs, and interstate relations.²⁹ The shift back to the states intimated, again, that Congress was not in the forefront. Article VII addressed the appointment of officers raised by the states for the common defense.³⁰ Article VIII outlined how the states would contribute funds for the Confederation, establishing a system of federal requisitions and state quotas.³¹ In other words, the Continental Congress lacked authority to tax and had to rely upon the states to supply funds.

Article IX belatedly listed powers of the Continental Congress.³² Paragraph 1 granted Congress exclusive authority over war, peace, and treaties, thereby ceding some of the Crown's executive powers to Congress.³³ Paragraph 4 conveyed to Congress exclusive rights over coinage, weights and measures, post offices, and appointing continental officers, civilian and military.³⁴ Paragraph 5 authorized it to establish a "Committee of the States," with power to act when Congress was in recess.³⁵ The same paragraph also empowered Congress to budget,

²³ *Id.* art. V.

²⁴ *See id.*

²⁵ *Id.*

²⁶ *See* Heritage Guide to the Constitution 98 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

²⁷ *See* Rakove, *supra* note 12, at 348 (noting that instructions were given to delegates and that these instructions were sometimes ignored).

²⁸ *See* Articles of Confederation of 1781, art. V, ¶ 1.

²⁹ Compare Articles of Confederation of 1781, art. VI, with U.S. Const. art. I, § 10.

³⁰ *See* Articles of Confederation of 1781, art. VII.

³¹ *Id.* art. VIII.

³² *Id.* art. IX.

³³ *Id.* art. IX, ¶ 1.

³⁴ *Id.* art. IX, ¶ 4.

³⁵ *Id.* art. IX, ¶ 5.

borrow, and appropriate, and to raise an army and navy.³⁶ Paragraph 6 created a supermajority rule for certain matters, requiring nine states to authorize war, make treaties, and borrow or appropriate funds.³⁷ Congress could decide more mundane matters by a simple majority.³⁸ Paragraph 7 concerned adjournment, recordkeeping, and publication of a journal.³⁹

Article XIII established something of a proto-Supremacy Clause, obliging states to “abide” by determinations on all questions committed to congressional care.⁴⁰ It also granted Congress a check on all amendments to the Articles, by requiring that they originate in Congress before being sent to the states.⁴¹ Finally, it required that successful amendments secure the unanimous consent of the states.⁴²

A recap is in order. First, while Congress was the most noteworthy national institution, the enumeration of its modest powers under the Articles of Confederation took a back seat to formalizing the union of the states. Second, Congress had a simple structure, with one chamber rather than two, and with each state casting one vote, no matter its population.⁴³ For a modern analogue, think of the United Nations General Assembly, where every nation enjoys one vote, no matter its inhabitants, land mass, or international significance. Third, the Congress’s puniness was highlighted by its utter dependence upon the states for the two requisites of governments: soldiers and money.⁴⁴ No government can long endure without both, and yet Congress was left without a means of self-help when it came to these fundamental features of sovereignty. Fourth, critical matters required a supermajority of nine states.⁴⁵ Vital questions, related to war, treaties, and appropriations among other things, would be made by a consensus or not at all. Finally, the Continental Congress was a rather different creature than our

³⁶ *Id.*

³⁷ *Id.* art. IX, ¶ 6.

³⁸ *Id.*

³⁹ *Id.* art. IX, ¶ 7.

⁴⁰ *Id.* art. XIII.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* art. V.

⁴⁴ *Id.* art. IX, ¶ 5; *id.* art. VIII (national funds “shall be supplied by the several States, in proportion to the value of all land within each State”). The manner of raising the money was left to state legislatures.

⁴⁵ *Id.* art. IX (certain decisions, like making war, borrowing money, or appropriating, could not be taken “unless nine States assent to the same”).

Congress because the former wielded some judicial power over interstate disputes,⁴⁶ far less legislative authority than we associate with our Congress,⁴⁷ and comprehensive executive authority over war, foreign affairs, and public officers.⁴⁸ Because the latter branch of authorities was the most significant by far, most contemporaries regarded Congress as a plural executive rather than as a legislature.⁴⁹ That is to say, Congress was an executive institution with modest legislative and judicial authorities.

II. A COMPLEX AND TRANSFORMED CONGRESS

Though many of the Constitution's congressional clauses echo provisions from the Articles, our Congress has a fundamentally different architecture. As a result of the Connecticut Compromise⁵⁰ forged at the Philadelphia Convention, our Congress has two chambers rather than one, with one chamber apportioned based on state population and the other based on equal state suffrage.

In our Congress, the states no longer play a central role. First, legislators generally do not vote by state.⁵¹ Rather, each casts a vote of his or her own and hence members from a state can (and often do) act at cross-purposes.⁵² Second, each lawmaker receives a federal salary and is not beholden to his state for income.⁵³ Third, once elected, federal legislators cannot be recalled.⁵⁴ This fact renders any state instructions feckless because if states cannot oust legislators, they generally will be unable to direct them. Fourth, the manner of election removes the sway that comes from state appointment. Under the Constitution, the people elect the Representatives in the House, meaning that, compared to the

⁴⁶ Id. art. IX, ¶ 2.

⁴⁷ Id. art. IX, ¶ 5.

⁴⁸ Id. art. IX, ¶¶ 1, 5.

⁴⁹ See Rakove, *supra* note 12, at 383.

⁵⁰ See Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution 194–95* (2016).

⁵¹ But see U.S. Const. art. II, § 1, cl. 3; id. amend. XII (noting that when the House must choose a President, each state casts one vote).

⁵² See id. art. I, §§ 2–3.

⁵³ Id. art. I, § 6 (“The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.”).

⁵⁴ Recall that under the Articles, states could recall their delegates. See Articles of Confederation of 1781, art. V (noting that each state reserved the power to recall its delegates). The elimination of such authority signals that the states no longer enjoy such authority.

Articles, state legislators lost the influence that stemmed from their appointment of all legislators.⁵⁵ The Seventeenth Amendment completed the transformation by establishing popular election as the Senate's foundation.⁵⁶ Finally, even subtle differences in terminology signal state feebleness. Members are no longer "delegates," a term that implies that the delegators (the states) may control their delegees. Instead they are "Members," "Representatives," or "Senators."⁵⁷ In sum, the Constitution signals that federal legislators could be freer agents than their forerunners, with the caveat that members often will gratify the desires of their electors as a means of securing reelection.

With several exceptions,⁵⁸ each chamber decides matters by simple majority vote.⁵⁹ The existence of two chambers and the need for bicameral passage of legislation means that the Constitution creates something of a structural supermajority rule.⁶⁰ Unanimity in one chamber is irrelevant if the other lacks the majority necessary to enact bills. Moreover, the Constitution never expressly authorizes Congress to delegate legislative power to a subcommittee, to be exercised during a congressional recess. The Constitution creates no analog to the Committee of the States contemplated under the Articles of Confederation.⁶¹ One possible implication of the omission of authority to delegate is that federal laws cannot be made by entities other than Congress, be it a committee of Congress or otherwise. Indeed, the

⁵⁵ See U.S. Const. art. I, § 2, cl. 1.

⁵⁶ See *id.* amend. XVII.

⁵⁷ Compare Articles of Confederation of 1781, art. V, with U.S. Const. art. I, §§ 2, 3, 5.

⁵⁸ In five situations, the Constitution requires a two-thirds vote of either the House, the Senate, or both: (1) convicting officers of high Crimes and Misdemeanors by two-thirds vote of the Senate, U.S. Const. art. I, § 3, cl. 6; (2) expelling members from the House or Senate, U.S. Const. art. I, § 5, cl. 2; (3) overriding presidential vetoes, U.S. Const. art. I, § 7, cl. 2; (4) ratifying treaties by two-thirds vote of the Senate, U.S. Const. art. II, § 2, cl. 2; and (5) proposing constitutional amendments, U.S. Const. art. V.

⁵⁹ Though there is no provision expressly imposing majoritarian rule in each chamber, such rule is implicit in the failure to adopt a different standard for various decisions that Congress may or must make. See *United States v. Ballin*, 144 U.S. 1, 5–6 (1892).

⁶⁰ See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 2 (2013).

⁶¹ See Articles of Confederation of 1781, art. X ("The committee of the States, or any nine of them, shall be authorized to execute in the recess of Congress, such of the powers of Congress as the United States in Congress . . . shall from time to time think expedient to vest . . .").

nondelegation doctrine enunciated (but rarely enforced) by the courts,⁶² could be thought to rest in part on the Constitution's conspicuous failure to reauthorize delegations of legislative power. The power that Congress had to delegate legislative power might have expired with the Articles of Confederation.

Finally, some brief words about the President and his role in Congress are in order. Under Article I, Section 7, all bills must be sent to the President for his signature.⁶³ If he balks at a bill, he may return it to Congress with constitutional or policy objections.⁶⁴ Congress may override his objections with a two-thirds vote in both chambers.⁶⁵ In limited (and complicated) situations, the President can prevent bills from becoming law without first returning them to Congress.⁶⁶ Moreover, the President can make legislative recommendations to Congress and must also provide information regarding the State of the Union,⁶⁷ knowledge useful for the exercise of Congress's various authorities.

Despite the President's prominence in the federal statute-making process, the President is not a part of Congress. He casts no vote in either chamber. Moreover, he is not technically a third chamber of the legislature. Unlike in Great Britain, where laws were (and are) made by the Crown, "by and with the advice and consent of the Lords Spiritual and Temporal, and Commons,"⁶⁸ the President is typically not seen as part of the legislature. From the beginning of legislation under the Constitution, the enactment clauses of bills listed the chambers as ordaining the laws, with no mention of the President.⁶⁹ This practice reflects what the Constitution declares. Article I, Section 1 vests the enumerated "legislative powers" in the House and Senate and never

⁶² The nondelegation doctrine is a judicial doctrine that forbids Congress from delegating its legislative power. The difficulty in enforcing the doctrine lies in distinguishing permissible delegations of discretion from unconstitutional delegations of lawmaking authority. See, e.g., *Field v. Clark*, 143 U.S. 649, 694 (1892).

⁶³ See U.S. Const. art. I, § 7, cl. 2.

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ See *id.* ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

⁶⁷ See *id.* art. II, § 3.

⁶⁸ See Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* 143 (2014).

⁶⁹ See, e.g., Act of June 1, 1789, ch. 1, 1 Stat. 23.

announces that the President enjoys any portion of them.⁷⁰ So while the President is an integral player in legislation and almost seems like a third chamber, due to his ability to propose and block bills, he remains something of an outsider looking in.

III. THE CHIEF LAWMAKER

Our Congress is foremost a lawmaking institution. In keeping with its principal function, Congress plays a fundamental role in all three constitutionally authorized means of creating federal law. Congress makes statutes. One of its chambers, the Senate, checks the making of treaties. And Congress serves as a gatekeeper for constitutional amendments.

A. The Scope of its Legislative Powers

When we turn to the statute-making powers of Congress, we can divide them into six classes. First are fiscal powers that invigorated Congress by eradicating its reliance upon the states. Second are powers that greatly expanded Congress's authority to legislate. Third are executive prerogatives linked to foreign affairs and wars. Fourth are authorities relating to the other branches. Fifth are a multitude of powers concerning the states. Sixth are powers enforcing rights and duties. This subpart considers the first two.

As compared to the Continental Congress, our Congress has considerably more power over individuals, meaning that it may confer benefits and impose burdens, including punitive ones. The enlargement of authority over persons is betokened by the vesting of "[a]ll legislative Powers herein granted" to Congress.⁷¹ The prototypical exercise of "legislative power" generates laws regulating private conduct. While Article I of the Constitution opens with that reference to "legislative powers," the Articles nowhere mentioned the phrase in relation to the Continental Congress.

No augmentation of authority over persons was more critical than the power to lay and collect taxes, direct and indirect.⁷² Congress must

⁷⁰ U.S. Const. art. I, § 1.

⁷¹ *Id.*

⁷² See *id.* art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.").

apportion direct taxes across the states by reference to their populations, while indirect taxes face no such constraint.⁷³ The power to decide what to tax invariably comes with a measure of “regulatory” authority.⁷⁴ By choosing what and how to tax, taxers necessarily influence the choices of the taxed. Relatedly, Congress could use federal officers to collect taxes, thereby ensuring that collections go directly into the federal treasury. These augmentations mattered because although the States had been responsible for funding the Confederation’s operations, they were rather unreliable remitters.⁷⁵ Reliance on the states for funds was misplaced because the states naturally put their own needs first. Indeed, one may doubt whether a government lacking a ready source of funds has any genuine claim to being a government at all. The Constitution put Congress on a sounder fiscal footing because it would no longer have to beg and beseech. The price of this upgrade was the loss of the power to requisition state contributions to the federal fisc.⁷⁶ Since that power had proven “fallacious and delusive,” its forfeiture mattered little.⁷⁷

Congress acquired other legislative powers as well. Under the Articles, the Continental Congress had some legislative power over coinage, weights and measures, trade with Indian tribes, and post offices.⁷⁸ That was it. Under the Constitution, Congress has these powers, plus authority over bankruptcy, naturalization, interstate and international commerce, copyrights and patents, the counterfeiting of coins and securities, and authority to carry these powers into execution.⁷⁹

One impetus for granting Congress authority over interstate commerce was the desire to blunt the effects of state protectionist measures meant to favor in-staters over out-of-staters.⁸⁰ Congress could

⁷³ See *id.* art. I, § 9, cl. 4.

⁷⁴ All taxes have regulatory influences. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 *Va. L. Rev.* 1, 68 (2004).

⁷⁵ For a discussion of why states failed to satisfy Continental requisitions, see Keith L. Dougherty, *Collective Action under the Articles of Confederation* 7–13 (2001).

⁷⁶ See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 *Va. L. Rev.* 1957, 1974–88 (1993).

⁷⁷ *The Federalist* No. 30, *supra* note 11, at 144 (Alexander Hamilton).

⁷⁸ *Articles of Confederation of 1781*, art. IX.

⁷⁹ U.S. Const. art. I, § 8.

⁸⁰ See, e.g., James Madison, *Vices of the Political System of the United States*, reprinted in 9 *The Papers of James Madison* 346, 349–50 (Robert A. Rutland ed., 1975) (“See the law of Virginia restricting foreign vessels to certain ports – of Maryland in favor of vessels belonging to her own citizens – of N. York in favor of the same . . . The practice of many States in restricting the commercial intercourse with other States, and putting their

wield its authority over interstate commerce to help foster one domestic market, consisting of the entire United States. Moreover, federal authority over foreign commerce could be wielded to wring concessions from foreign nations. In particular, the nation could stand united (rather than divided) on matters of international trade and could, via Congress, credibly threaten to close its markets if other nations closed their ports to American ships and goods. More generally, legislative authority over foreign commerce meant that Congress could dictate the terms of such trade, including such matters as tariffs and navigation.⁸¹

The Articles did not confer any authority over naturalization, suggesting that they were constructed on the assumption that states determined citizenship.⁸² By requiring uniformity in naturalization rules, the Constitution prevents rules that vary across the nation (e.g., foreigners in different parts of the country cannot be subject to different naturalization standards).⁸³ But the uniformity requirement might also be understood to implicitly bar the states from crafting their own rules. In any event, when Congress generates a uniform rule of naturalization, it displaces any state rules on the matter.

Uniformity also must exist with respect to federal bankruptcy legislation. The Constitution grants Congress new authority to create “uniform Laws on the subject of Bankruptcies.”⁸⁴ As an original matter, Congress’s authority seemed to extend only to insolvent debtors, rather than to all debts, because not all debts relate to bankruptcy. This federal power, when coupled with the Contracts Clause of Article I, Section 10, could be used by Congress to further curb the plethora of state debt-relief laws. Moreover, though there were some Founding-era disputes over the scope of federal power over bankruptcy, one view, soon supported by the Supreme Court, supposed that Congress’s power over bankruptcy extended to insolvent businesses *and* to insolvent individuals.⁸⁵

While the Continental Congress could regulate and create its own coins and regulate state coins, it had no express authority to punish

productions and manufactures on the same footing with those of foreign nations . . . is certainly adverse to the spirit of the Union and tends to beget retaliating regulations . . .”).

⁸¹ The Federalist No. 30, *supra* note 11, at 144 (Alexander Hamilton).

⁸² See Heritage Guide to the Constitution, *supra* note 26, at 139.

⁸³ U.S. Const. art. I, § 8, cl. 4. See also *Gibbons v. Ogden*, 22 U.S. 1, 35–36, 178 (1824) (involving federal and state regulation of steamboat navigation).

⁸⁴ U.S. Const. art. I, § 8, cl. 4.

⁸⁵ See Heritage Guide to the Constitution, *supra* note 26, at 143.

counterfeiters. Under the Constitution, Congress may protect the value of its coins and securities by criminalizing the creation of false coins and notes.⁸⁶ Some have speculated that the express grant of this power was unnecessary because the Necessary and Proper Clause would have encompassed authority to prohibit the counterfeiting of federal coins.⁸⁷

By granting Congress power to confer monopolies for certain forms of intellectual property, Congress could promote the dissemination of knowledge (copyright) and innovation in devices (patent).⁸⁸ Although states could grant such monopolies prior to the Constitution,⁸⁹ the promise of a *nationwide* monopoly would be a more powerful spur to composing works and inventing devices.

Considering the new provisions as a whole, one cannot escape the conclusion that the Framers sought to grant Congress more authority over markets. Congress would go from an entity with limited powers over markets (coinage, weights, measures, and Indian trade) to one with considerably more. And yet there was no comprehensive grant of authority over all markets. The enumeration of three new branches of commerce made the absence of power over intrastate commerce all the more conspicuous.⁹⁰

More generally, the Constitution lacked a generic grant of legislative power of the sort sometimes found in early state constitutions.⁹¹ This was not a case where particular legislative grants were accompanied by a catchall grant of all lawmaking authority. Accordingly, it seems evident that subjects such as property, tort, family law, and most crimes were generally left to the states, save where Congress did enjoy generic lawmaking authority, as it did over the territories and any capital district that might be created.⁹² In other words, Congress was a limited lawmaker as to the states and a general lawgiver with respect to federal enclaves. As Chief Justice John Marshall put it, the “enumeration

⁸⁶ U.S. Const. art. I, § 8, cl. 6.

⁸⁷ See Heritage Guide to the Constitution, *supra* note 26, at 149.

⁸⁸ U.S. Const. art. I, § 8, cl. 8.

⁸⁹ See Tyler T. Ochoa & Mark Rose, The Anti-Monopoly Origins of the Patent and Copyright Clause, 84 J. Pat. & Trademark Off. Soc’y 909, 921 (2002).

⁹⁰ See *Gibbons v. Ogden*, 22 U.S. 1, 194–95 (1824) (“[T]he enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.”).

⁹¹ See Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 78–79 (2015) [hereinafter Prakash, *Imperial from the Beginning*].

⁹² See U.S. Const. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.

presupposes something not enumerated,”⁹³ namely the mass of legislative powers not entrusted to Congress and instead left with the states.

During the debates over whether to ratify the Constitution, Anti-Federalists complained that Congress would enjoy alarming legislative power over the entire country.⁹⁴ They cited the “general welfare” language of the preamble and the dreaded “Sweeping Clause,” also known as the Necessary and Proper Clause.⁹⁵ But the general welfare language was a carryover from the Articles; no one thought that such language meant the Continental Congress could pass any law that advanced “the general welfare.”⁹⁶ The repetition of this innocuous phrase in the Constitution could not serve to vastly expand national power when it lacked such force under the old regime.

As for the Necessary and Proper Clause, it ensured that the federal government had the means of implementing its authority, including legislative authority. For instance, even though there was no specific federal power to criminalize interference with the mail, the Necessary and Proper Clause granted authority to prohibit and penalize such interference. Hence, Congress could sanction interferences with the mail or falsifying a court record despite the absence of specific legislative authority over either act.⁹⁷

In fact, the Sweeping Clause was not as sweeping as Anti-Federalists argued. But its effect on the scope of federal power was not as minimal as some Federalists were prone to insist. Going forward it would be cited to give a patina of respectability to many assertions of federal legislative authority, including those that transgressed the bounds of the Constitution’s limited grants of such authority.⁹⁸ Because the Clause creates no easily administrable rule that can be used to divine what sorts

⁹³ *Gibbons*, 22 U.S. at 195. For a claim that the Constitution “might” authorize general legislative authority, see Richard Primus, *The Limits of Enumeration*, 124 *Yale L.J.* 576 (2014).

⁹⁴ See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 270–71, 284–85 (1993).

⁹⁵ See *id.* at 284–85, 315, 321.

⁹⁶ Compare Articles of Confederation of 1781, arts. III, VIII (referencing “general welfare”) with U.S. Const. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

⁹⁷ *McCulloch v. Maryland*, 17 U.S. 316, 417 (1819).

⁹⁸ One such instance occurred during the debate over the controversial Sedition Act enacted under the presidency of John Adams. See James M. Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* 135 (1956).

of acts are “necessary and proper for carrying into Execution”⁹⁹ federal powers, there always will be genuine disputes about the scope of federal legislative powers.

The notion that the Constitution grants Congress only limited legislative authorities is, in large measure, now a vestige of a bygone era; the idea of constrained lawmaking powers continues to exist in the pages of the Constitution but not in reality. Modern judicial doctrine and contemporary federal lawmaking are dominated by a belief that Congress enjoys broad authority over the economy, all such power emanating from the once unexceptional, but now almost boundless, Commerce Clause.¹⁰⁰ Virtually everything is commerce or intimately connected to it and hence regulable. This way of thinking obliterates the distinction between intrastate commerce and its counterparts, commerce among the states and international commerce.¹⁰¹ It also makes a hash of the limited grants of legislative power over markets, for Congress, under a mistakenly expansive view of the Commerce Clause, can regulate debts, trademarks, corporate law, all contracts, and any other economic activity that influences commerce.¹⁰² In sum, because almost everything is either commerce or connected to it, Congress can regulate almost anything under the pretense of regulating commerce. It can truly be said that under modern readings, the Commerce Clause has swallowed Article I, Section 8, making the rest of it largely, if not entirely, superfluous.¹⁰³

B. Federal Lawmaking via Treaties

Under the Constitution, the President may negotiate and ratify treaties. But before the President ratifies a treaty, he must first secure the

⁹⁹ U.S. Const. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

¹⁰⁰ See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (stating that Congress’s Commerce Clause power “extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.” (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942))). To be sure, the modern Court has reimposed some limits on the Commerce Clause’s sweep. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). But there is no escaping that the overall thrust of modern doctrine consists of a generous, even exaggerated reading of the Clause’s scope.

¹⁰¹ Cf. *United States v. Lopez*, 514 U.S. 549, 566–67 (1995) (distinguishing among types of commerce).

¹⁰² See *id.*

¹⁰³ See *id.* at 589 (Thomas, J., concurring). See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1395 (1987) (discussing the interpretation of the Commerce Clause when considered “in light of the overall constitutional structure”).

Senate's concurrence, by a vote of two-thirds of senators present.¹⁰⁴ Although the Constitution never specifies the international aspects of treaties, those features are front and center because every concluded treaty is, by definition, necessarily a contract with one or more nations.¹⁰⁵ Part IV discusses this feature of federal treaties.

In the American system, treaties may have additional domestic aspects. First, American treaty makers may elect to have their treaty preempt state laws and constitutions. The displacement of conflicting state law arises from the text of the Supremacy Clause, for federal treaties are made supreme over contrary state law, either constitutional or statutory.¹⁰⁶ This means that a treaty, without the aid of a subsequent federal statute, may supersede inconsistent state law.¹⁰⁷

The Constitution does not specify the relationship between treaties and federal statutes. More generically, there is no clause specifying the lexical priority of various forms of federal law. It seems that everyone at the Founding supposed that the Constitution was the highest form of federal law, meaning that it prevailed over inconsistent federal statutes and treaties.¹⁰⁸ But the relationship between treaties and statutes was uncertain. Prior to the Constitution's ratification, some suggested that a statute could not override a treaty.¹⁰⁹ If true, the Constitution would be supreme over treaties and treaties would be supreme over federal statutes. Eventually, the Supreme Court held that federal statutes and treaties were on the same lexical plane, meaning that either might supersede the other.¹¹⁰ A statute might preempt a federal treaty and vice versa, with the later-in-time enactment always prevailing in cases of inconsistency.

There is a distinct question concerning whether there are any limitations on the ability of treaties to make federal law. In particular, do

¹⁰⁴ U.S. Const. art. II, § 2, cl. 2.

¹⁰⁵ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law.”).

¹⁰⁶ U.S. Const. art. VI, § 2.

¹⁰⁷ Preemption of state law that conflicts with a treaty is not automatic because the Supreme Court has held that treaties do no more than make an international contract and hence do not attempt to create domestic law. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

¹⁰⁸ See generally Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 *U. Chi. L. Rev.* 887, 904 n.70 (2003) (explaining how “as a historical matter, Americans of the founding era came to understand constitutions as ordinary (though supreme) law cognizable by the courts prior to the Constitution’s drafting and ratification”).

¹⁰⁹ See, e.g., *The Federalist* No. 64, *supra* note 11, at 328–29 (John Jay).

¹¹⁰ See *Whitney*, 124 U.S. at 194.

some of the grants of lawmaking power to Congress (e.g., commerce and taxes) signal that treaties cannot make federal law on such matters? When the Constitution was first put before the states, Americans debated a treaty's ability to make domestic rules on matters committed to Congress.¹¹¹ No easy answers were at hand. The Constitution generally does not specify which federal powers are exclusive. Notable exceptions are the "District Clause" and the impeachment clauses. The Congress has power to "exercise exclusive Legislation" over a federal capital.¹¹² The impeachment clauses speak of each chamber having a "sole power."¹¹³ These provisions might well signal that even though treaties may make federal law, they cannot intrude into the federal district or impeachment matters. Other than these unique clauses, grants to Congress do not necessarily imply exclusivity vis-à-vis either the states or treaty-makers.

In practice, no American treaty has ever created a crime or appropriated funds.¹¹⁴ But treaties have altered federal law related to commerce and taxes.¹¹⁵ The reasons for this difference in treatment are hardly obvious. Hence, practice presents no intelligible pattern for when treaties may create domestic law on legislative matters also committed to Congress.

Finally, there is the related and difficult question about whether treaties are limited to particular subject matters. The listing of almost two dozen powers for Congress in the Constitution clearly implies a finite sphere of federal legislative power. Speaking of federal powers generally, James Madison insisted that they were "few and defined."¹¹⁶

¹¹¹ See *The Pennsylvanian Convention (Dec. 11, 1787) in 2 Documentary History of the Ratification of the Constitution* 550, 563 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino, eds., 1976) (James Wilson declaring that Congress might have to enact, repeal, or modify existing laws for treaties to have domestic effect); Letter from James Madison to George Nicholas (May 17, 1799) *in* 9 *id.* at 804, 808 (John P. Kaminski & Gaspare J. Saladino, eds., 1990) (James Madison declaring the same); Letter from Federal Farmer XI, January 11, 1788 *in* 17 *id.* at 301, 309–10 (John P. Kaminski & Gaspare J. Saladino, eds., 1995) (same).

¹¹² U.S. Const. art. I, § 8, cl. 17.

¹¹³ U.S. Const. art. I, § 2, cl. 5; *id.* § 3, cl. 6.

¹¹⁴ See Curtis Bradley, *International Law in the U.S. Legal System* 49–50 (2015).

¹¹⁵ See, e.g., Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Belg.-U.S., art. 2(3)(b), Nov. 27, 2006, T.I.A.S. No. 07-1228.2.; U.N. Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

¹¹⁶ See *The Federalist* No. 45, *supra* note 11, at 236 (James Madison). Madison was speaking of the Constitution while it was before the states.

But saying federal powers are “few and defined” does not rule out the possibility that some of those powers have a broad scope. The treaty power is such a power because it enjoys a wide-ranging ambit.¹¹⁷

The treaty power’s breadth certainly was a feature of the previous regime. Under the Articles, Congress could make treaties on subjects not otherwise committed to the care of the Continental Congress. In part, we know this because of the text of the Articles. Though the Continental Congress had no express or implied authority over foreign commerce, the treaty power clearly extended to such commerce.¹¹⁸ By limiting the scope of the power to make a “treaty of commerce”¹¹⁹ without simultaneously granting any specific authority to make commercial regulations or commercial treaties, the authors of the Articles made clear their understanding that the generic treaty power conveyed to the Continental Congress—the power to enter “into treaties and alliances”—clearly extended to commercial treaties.¹²⁰ When we consider the treaties actually made under the auspices of the Articles, we discover that Congress made treaties on other subjects not expressly committed to Congress, including the rights of aliens.¹²¹

Though the Constitution introduced a new player in treaty making, the President, it contained nothing to suggest that it was curbing the proper subject matters of American treaties. The President has the power, “by and with the Advice and Consent of the Senate, to make Treaties.”¹²² There is no express limitation on the scope of the treaty power, as there was under the Articles.¹²³ Moreover, there is no hint that

¹¹⁷ Much of the argument in the next several paragraphs comes from Saikrishna Bangalore Prakash, *The Boundless Treaty Power Within a Bounded Constitution*, 90 *Notre Dame L. Rev.* 1499 (2015) [hereinafter Prakash, *The Boundless Treaty Power*].

¹¹⁸ See Articles of Confederation of 1781, art. IX (“[N]o treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . .”).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See, e.g., Treaty of Amity and Commerce, U.S.-Prussia, art. X–XI, Sept. 10, 1785, 8 Stat. 84, 88–90 (Congress agreed to grant aliens of a certain country free exercise rights and the rights to bequeath, inherit, transport, and dispose of property).

¹²² U.S. Const. art. II, § 2, cl. 2.

¹²³ The omission of “alliances” from the Treaty Clause should be understood as a deletion of a superfluity. Since the greater category of “treaties” included alliances, the deletion was of no moment. Similarly, though Article I, Section 10, bars states from making “treaties,

the subjects of treaties must now relate to matters otherwise within the spheres of enumerated legislative and executive powers. Further, some treaties that predated the Constitution, and that were made supreme law by the Supremacy Clause, covered subjects outside the legislative sphere of the Constitution's Congress.¹²⁴ For instance, though our Congress lacks power to make alliances or regulate the rights of aliens vis-à-vis the states, the treaties that predated the Constitution and that were grandfathered into the new regime did both.¹²⁵ In other words, the Constitution granted supreme law status to existing treaties that went beyond the scope of the new Congress's legislative authority. Finally, treaties made under the Constitution continued to touch upon matters not within the legislative powers vested in Congress. That is, early presidents and senates made treaties that exceeded the enumerated powers of Congress.¹²⁶

Relatedly, there is little reason to suppose that the treaty power only extended to matters of international concern, with matters of domestic concern, however defined, off limits. The better view is that treaties could be made about any subject that was of interest to the other nation (or nations). Hence, should a treaty regulate some matter that many Americans conceived as entirely internal, the treaty would evince the views of the President, senators, and other nations that the subject was properly of international concern. When one examines foreign treaties that predate the Constitution, one discovers many subjects covered, including internal governmental structure and religious freedoms for aliens and citizens, matters that might seem quintessentially domestic.¹²⁷

In sum, although federal legislative power is limited to the enumerated grants, the treaty power is best read to impose no subject-matter limits. Politics was to be the safeguard for federalism in the treaty context, particularly the constraint flowing from the necessity of securing a supermajority of Senate support. By their votes on proposed treaties, senators could serve to shield state autonomy and power.

alliances, and confederations," see U.S. Const. art. I, § 10, cl. 1, the latter two types should be read as being subsumed in the first (and more capacious) category.

¹²⁴ See Prakash, *The Boundless Treaty Power*, supra note 117, at 1503, 1506–09.

¹²⁵ See Treaty of Amity and Commerce, U.S.-Prussia, art. I, X, Sept. 10, 1785, 8 Stat. 84, 88.

¹²⁶ See, e.g., Treaty of Amity, Commerce and Navigation (The Jay Treaty), U.S.-Gr. Brit., art. IX, Nov. 19, 1794, 8 Stat. 13, 21 (giving British subjects the right to own property in the United States).

¹²⁷ See Prakash, *The Boundless Treaty Power*, supra note 117, at 1504–05.

C. Constitutional Amendments

Under Article V, Congress may inaugurate the process of amending the document that constitutes it. With a two-thirds vote in both chambers, Congress may send amendments to the states for their approval.¹²⁸ Congress can thus try to augment its authority, as it has done repeatedly, and ameliorate the Constitution's many imperfections.

Moreover, Congress must call for a constitutional convention if two-thirds of state legislatures request one.¹²⁹ In practice, this duty cedes to Congress tremendous discretion. Although almost all states have called for some sort of constitutional convention, their requests have been differently worded and have reflected divergent purposes.¹³⁰ Moreover, some states have attempted to rescind their calls for a convention.¹³¹ Taken together, the dissimilar demands and the attempts to annul outstanding (if often stale) applications effectively authorize Congress to judge, with impunity, whether the states have properly applied for an Article V convention. Given its inaction, one might suppose that Congress has implicitly concluded that there are insufficient calls for a convention.¹³²

Finally, Congress selects the ratification path. It decides whether state legislatures or state conventions will ratify proposed amendments.¹³³ Congress may act strategically, in a bid to affect the chances of passage. When Congress seeks to diminish the authority of the states, it may vest amendment approval with popular conventions, bypassing state legislatures that might be bent on preserving the power of state institutions. Congress took this route with the Twenty-first

¹²⁸ U.S. Const. art. V.

¹²⁹ *Id.* (“on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments”).

¹³⁰ See Vile, *supra* note 9, at 104.

¹³¹ See Larry J. Sabato, *A More Perfect Constitution* 57 (2007).

¹³² For a claim that enough states have called for a convention and that Congress therefore must call one, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 *Yale L.J.* 677, 756 (1993) (“There are, at present, forty-five states with their lights ‘on’ for a general convention—eleven more than are needed to trigger Congress’s duty to call a convention.”). But see Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 *Harv. J.L. & Pub. Pol.* 837, 857–58 (2011) (“Thirty-three states are currently in a condition of validly applying for a ‘general’ Article V convention—just one state short of the total needed to trigger Congress’s obligation to call such a convention.”).

¹³³ See U.S. Const. art. V.

Amendment.¹³⁴ Every other proposed amendment went to the legislatures.¹³⁵

IV. THE SECONDARY, PLURAL EXECUTIVE

In the transition from the Articles of Confederation to the Constitution, Congress retained powers relating to the commencement and conduct of wars, namely the Declare War, Marque and Reprisal, and Capture powers.¹³⁶ It also kept sweeping authority over the military, including power over whether (and how) to create, fund, and provision the armed forces.¹³⁷ Because the modern Congress is principally conceived of as a legislature, some suppose that all of these authorities over wars and the military must be legislative.¹³⁸ After all, they rest with a legislature.

Yet, as discussed earlier, these comprehensive authorities over the military and war making led many of the Founders to regard the Continental Congress as a plural executive.¹³⁹ By retaining these powers and acquiring others, the new Congress continued to have some mixture of powers—legislative (lawmaking), judicial (impeachment), and executive (war, military, and foreign affairs). But because the legislative powers (taxing, spending, commerce, bankruptcy, etc.) clearly predominate and because executive power is habitually associated with unity, the President is widely seen as *the* executive under the Constitution, while Congress is often regarded as nothing more than legislative. And yet, the early tendency to regard the Senate as partly executive, due to its role in appointments and treaties, runs counter to such views.¹⁴⁰ If people could perceive that the Senate had a mix of

¹³⁴ See U.S. Const. amend. XXI, § 3 (stating that an amendment would be operative if state conventions approved such amendment within seven years of the date submitted to the states).

¹³⁵ See Heritage Guide to the Constitution, *supra* note 26, at 535.

¹³⁶ See U.S. Const. art. I, § 8, cl. 11.

¹³⁷ See U.S. Const. art. I, § 8, cl. 12.

¹³⁸ See Saikrishna B. Prakash & Michael D. Ramsey, Foreign Affairs and the Jeffersonian Executive: A Defense, 89 *Minn. L. Rev.* 1591, 1612, 1642 (2005) [hereinafter Prakash & Ramsey, Foreign Affairs and the Jeffersonian Executive].

¹³⁹ See Rakove, *supra* note 12, at 383.

¹⁴⁰ See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 *Yale L.J.* 231, 290 (2001) [hereinafter Prakash & Ramsey, The Executive Power]. See also Prakash & Ramsey, Foreign Affairs and the Jeffersonian Executive, *supra* note 138 at 1642–47 (2005) (discussing historical evidence showing how Congress was regarded as having legislative, judicial, and executive powers).

executive and legislative authority, surely Congress as a whole likewise can be seen as an entity with some degree of executive authority.

A. Congress, War, and the Military

Perhaps classification matters less than the scope of Congress's powers over war and the military. That range is extraordinarily broad. The numerous constitutional grants empower Congress to legislate over almost all matters war and military.

Consider the Declare War Clause. In the eighteenth century, a declaration of war indicated a nation's resolve to wage war.¹⁴¹ Because a declaration primarily evinced a decision that a nation had chosen to wage hostilities, *any* formal or informal signal that revealed that a nation had chosen to go to war was a declaration of war.¹⁴²

Though formal declarations existed at the time of the Founding, they were often not issued and rarely marked the onset of hostilities.¹⁴³ Yet, the absence of formal declarations did not mean that almost all eighteenth-century wars were undeclared. Instead, individuals from that era adopted a functional conception in which informal words and actions could also constitute declarations of war.¹⁴⁴ What mattered was whether the words or actions reflected a decision to wage hostilities. If they did, those words or actions were a declaration of war, no less than a formal declaration containing the phrase "declare war." Sometimes a verbal or written statement dripping with enmity served as an informal declaration of war because such harsh words signified that a nation had chosen war. The Declaration of Independence's savaging of the English Crown marked it as an informal declaration of war.¹⁴⁵ Likewise, France's treaty of alliance with the rebellious Americans (and the rude announcement of it to the British) was an informal declaration of war against England.¹⁴⁶

The commencement of hostilities was the "strongest declaration of war" because in fighting a war, a nation obviously had chosen to declare

¹⁴¹ Prakash, *Imperial from the Beginning*, supra note 91, at 145–46.

¹⁴² *Id.*

¹⁴³ See *The Federalist* No. 25, supra note 11, at 123 (Alexander Hamilton). ("[T]he ceremony of a formal denunciation of war has of late fallen into disuse . . .").

¹⁴⁴ Prakash, *Imperial from the Beginning*, supra note 91, at 146.

¹⁴⁵ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Cal. L. Rev.* 167, 246–47 (1996).

¹⁴⁶ See, e.g., *The Annual Register, or a View of History, Politics, and Literature, for the Year 1779*, at 411 (2d ed., London, J. Dodsley 1786) (describing the announcement of France's treaty of alliance as a "true declaration of war" on the part of the French).

it.¹⁴⁷ It was not only the clearest and fiercest declaration, it also was the most common, with almost all eighteenth-century wars first informally declared via the “Mouths of Cannons.”¹⁴⁸ Indeed, numerous monarchs, legislators, and diplomats described the commencement of hostilities as a declaration of war.¹⁴⁹ For instance, John Adams noted that by attacking each other during the Revolutionary War, France and England had declared war on each other.¹⁵⁰

Besides revealing a decision to go to war, declarations also ordered military force, authorized civilian participation, enumerated rules for trading with the enemy, specified the rights of enemy residents, and declared the status of treaties with the enemy.¹⁵¹ Because Congress may declare war, it may decide whether the United States will wage war and which of these many functions the nation’s declarations will serve. In a way, the Declare War power resembles the Constitution’s grant to the President of a generic executive power. Just as the Executive Power Clause¹⁵² is best read as granting a host of executive powers to the President,¹⁵³ the Declare War Clause is properly understood as conveying a panoply of war powers to Congress.

¹⁴⁷ See 1 Jacques M. Necker, *An Essay on the True Principles of Executive Power in Great States* 273 (London, G. G. J. & J. Robinson 1792).

¹⁴⁸ See 10 *The History and Proceedings of the House of Commons from the Restoration to the Present Time: 1737–1739* 304 (London, Richard Chandler 1742) (presenting Robert Walpole’s observation that “of late most Wars have been declar’d from the Mouths of Cannons, before any formal Declaration”).

¹⁴⁹ See, e.g., Letter from King George III to Frederick North (Letter 512) (July 18, 1778), in 2 *The Correspondence of King George the Third with Lord North from 1768 to 1783*, at 205 (W. Bodham Donne ed., London, John Murray 1867) (claiming that, by its engagement in a skirmish with the British Navy, France had “cast off the mask and declared war”). See also J.F. Maurice, *Hostilities without Declaration of War* 44 (London, Her Majesty’s Stationery Office 1883) (quoting Czar Alexander’s claim that “Napoleon, by a sudden attack on our troops at Kowno, has declared war”).

¹⁵⁰ Letter from John Adams to Samuel Adams (Feb. 14, 1779), in 3 *The Revolutionary Diplomatic Correspondence of the United States* 47, 48 (Francis Wharton ed., Washington, Government Printing Office 1889) (noting that war between England and France was “sufficiently declared by actual hostilities in most parts of the world”).

¹⁵¹ For a complete account of the functions served by war declarations, see Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 *Geo. Wash. L. Rev.* 89, 107–20 (2008).

¹⁵² See U.S. Const. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

¹⁵³ For a discussion of the domestic and foreign-affairs powers granted to the President by virtue of the grant of the Executive power, see generally, Steven J. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 570 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. Ill. L. Rev.* 701,

The power to grant letters of marque and reprisal is closely related. At one time, these letters authorized limited private reprisal against another nation as a means of securing compensation for some relatively narrow wrong.¹⁵⁴ Over time, nations issued general letters of marque and reprisal to anyone willing to attack an enemy's vessels.¹⁵⁵ General letters were a cheap and effective means for a nation to expand its naval forces.¹⁵⁶ An associated authority was the power to "make Rules concerning Captures on Land and Water."¹⁵⁷ Pursuant to this power, early Congresses decided which enemy and neutral property could be captured, set limits on the means of capturing property, and established the division of spoils between the government and privateers.¹⁵⁸

Wars cannot be fought absent soldiers, sailors, militias, or supplies. Congress's authority again is far reaching. It decides whether to have an army, navy, or both.¹⁵⁹ The first Congress sanctioned a small army.¹⁶⁰ In Washington's second term, Congress authorized a small navy.¹⁶¹ Congress resolves when the President may summon the state militias, as it did in the early acts.¹⁶² Congress also decides on the funding and equipping of federal forces.¹⁶³ Finally, Congress has a sweeping power to make rules "for the Government and Regulation" of the army, navy,

714 (2003); Prakash & Ramsey, *The Executive Power*, supra note 140, at 265–66; and Prakash & Ramsey, *Foreign Affairs and the Jeffersonian Executive*, supra note 138, at 1592–93.

¹⁵⁴ See Stephen C. Neff, *War and the Law of Nations* 77–78 (2005) (explaining that letters of reprisal authorized the taking of property from the fellow nationals of a wrongdoer "[i]f satisfaction could not be obtained from the thief himself at the time of the offence" because "the wrong being remedied was not, strictly speaking, the original theft, but rather the subsequent denial of justice - a failure for which the foreign *state* was responsible, and, by extension, all of its members").

¹⁵⁵ See *id.* at 109 ("During [the late 1700s], the common practice of states was to issue letters of marque not, in the medieval fashion, during peacetime to a single individual as a measure of reprisal, but instead during war as a means of augmenting the issuing state's naval capacity on short notice").

¹⁵⁶ See *id.*

¹⁵⁷ U.S. Const. art. I, § 8, cl. 11.

¹⁵⁸ See, e.g., Act of July 9, 1798, ch. 68, 1 Stat. 578 (authorizing attacks on armed French vessels found on the high seas or in American waters); Act of June 25, 1798, ch. 60, 1 Stat. 572 (discussing capture rules applicable to aggressive French ships).

¹⁵⁹ U.S. Const. art. I, § 8, cl. 12–13.

¹⁶⁰ See Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (repealed 1790).

¹⁶¹ See Act of Mar. 27, 1794, ch. 12, 1 Stat. 350.

¹⁶² See Act of Nov. 29, 1794, ch. 1, 1 Stat. 403.

¹⁶³ See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 *Tex. L. Rev.* 299, 322–23 (2008) [hereinafter Prakash, *Separation and Overlap*].

and federalized militia.¹⁶⁴ This authorizes uniquely military offenses (e.g., abandonment of posts) and, more generally, the comprehensive regulation of the conduct of the members of the armed forces.¹⁶⁵

Taken together, Congress's power over the military is almost without limit. Under the original system, Congress decides whether to wage war and how it ought to be fought. Sometimes Congress authorized general warfare, as in the War of 1812.¹⁶⁶ Other times, Congress sanctioned only limited hostilities, as in the case of the Quasi-War with France,¹⁶⁷ or the naval wars against Tripoli and Algeria.¹⁶⁸ Relatedly, in the war with France, Congress specified where American ships could patrol, which enemy ships to target, and where they could be attacked.¹⁶⁹ In one case, Congress required retaliation against foreign prisoners to counteract the mistreatment of American prisoners.¹⁷⁰

Some will recoil at this picture of congressional dominance over war and the military. The Commander in Chief Clause¹⁷¹ might seem to suggest that the President must have some measure of autonomy over the military. Yet that was not the view at the Founding. During the Revolutionary War, the commander in chief was wholly subordinate to Congress and its laws.¹⁷² The office, taken from the English, came with no autonomy and merely signified command of a particular military unit.¹⁷³ Hence there were commanders in chief of platoons and local armies.¹⁷⁴ Despite the fact that George Washington was commander in

¹⁶⁴ U.S. Const. art. I, § 8, cl. 14.

¹⁶⁵ Prakash, *Separation and Overlap*, supra note 163, at 329.

¹⁶⁶ See Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring that war exists between the United States and United Kingdom and authorizing President to use armed forces to wage war).

¹⁶⁷ See, e.g., Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578.

¹⁶⁸ See Act of Mar. 3, 1815, ch. 90, § 2, 3 Stat. 230; see also Act of Feb. 6, 1802, ch. 4, 2 Stat. 129 (authorizing the President to use navy against Tripoli to protect commerce).

¹⁶⁹ Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578–579 (providing that armed French vessels could be attacked only on high seas or in American waters); Act of June 22, 1798, ch. 55, § 1, 1 Stat. 569 (noting that revenue cutters could be used “near the sea coast”); Act of May 28, 1798, ch. 48, 1 Stat. 561 (authorizing President to seize French armed vessels found “hovering on the coasts of the United States”); Act of July 1, 1797, ch. 7, § 12, 1 Stat. 523, 525 (providing that sea cutters may be used to defend sea coast).

¹⁷⁰ See, e.g., Act of Mar. 3, 1799, ch. 45, 1 Stat. 743.

¹⁷¹ See U.S. Const. art. II, § 2, cl. 1.

¹⁷² See Prakash, *Separation and Overlap*, supra note 163, at 369.

¹⁷³ *Id.* at 352–53, 368.

¹⁷⁴ *Id.* at 368.

chief of the Continental Army, he was, as regards the legal authority of the Continental Congress, no different than a lowly private.

The Constitution did not alter the established meaning of commander in chief.¹⁷⁵ As commander of the entire army and navy, the President is subject to the commands of Congress, just as George Washington was both before and after the Constitution's creation.¹⁷⁶ That is why Congress can, in time of war, establish the enemy, the objectives, and the tactics and strategies, as it has done numerous times. The President commands the military subject to these congressional instructions.

There were, certainly, some rather significant changes on the peripheries of the office of commander in chief. First, Congress has no general power to appoint the commander, that power consigned in most cases to presidential electors.¹⁷⁷ Second, and relatedly, Congress cannot create an autonomous general or admiral because doing so would be inconsistent with the constitutional rule that the President is the commander in chief of the entire army and navy.¹⁷⁸ Third, Congress no longer has broad power to remove the commander, as it could under the Articles.¹⁷⁹ Rather Congress may remove the President only for high crimes and misdemeanors.¹⁸⁰ Fourth, the President may nominate and remove military officers, with the Senate enjoying a check only on their appointment. The unilateral powers to nominate and remove officers ensure that the President is not saddled with an ineffectual or insubordinate officer corps. Finally, the President's veto power, found in Article I, Section 7, enables the President to check congressional micromanagement of the military.¹⁸¹ Hence, Commanders in Chief under the Constitution have greater autonomy not because of powers inherent in the office of the commander in chief, but rather because other provisions in the Constitution strengthen the office of the Presidency.

¹⁷⁵ Prakash, *Imperial from the Beginning*, supra note 91, at 162–65.

¹⁷⁶ *Id.* at 165.

¹⁷⁷ U.S. Const. art. II, § 1, cl. 2.

¹⁷⁸ See *id.* art. II, § 2, cl. 1. In other words, the Constitution's grant of the office of commander in chief to the President is not some default rule that Congress may depart from via statute.

¹⁷⁹ See Prakash, *Separation and Overlap*, supra note 163, at 380.

¹⁸⁰ U.S. Const. art. II, § 4.

¹⁸¹ *Id.* art. I § 7, cl. 2 (allowing the President to veto bills passed by Congress).

B. The Executive Senate

Some early observers deemed the Senate “executive” because it had (and has) two roles closely associated with executive authority.¹⁸² The first relates to appointments. As a default rule, the President may not appoint to offices without first securing the Senate’s consent.¹⁸³ This gives the Senate a weighty check on those the President might appoint. Senators may ensure that nominees are not mere sycophants but are instead competent, qualified, and trustworthy. Of course, senators may wield their check as leverage to secure patronage for their associates. Early senators realized this and adopted senatorial “courtesy” whereby if a senator objected to the appointment of an office associated with his state, other senators would typically defer to the senator.¹⁸⁴ This practice has led presidents to be quite solicitous of senators.¹⁸⁵

The Senate’s second distinct executive function relates to treaties. Under the Constitution the President needs the two-thirds consent of the Senate prior to ratifying a treaty.¹⁸⁶ The Senate check was not only meant to curb the President, it was also designed to make it difficult for the nation to make significant international commitments.¹⁸⁷ The requirement of two-thirds support was a high threshold, one meant to constrain the making of treaties that might be injurious to particular regions of the country.

V. THE CHIEF FACILITATOR OF THE MAGISTERIAL BRANCHES

The Constitution decrees that there shall be a President and a Supreme Court, but it does not flesh out the substrata of those branches. Congress decides whether there will be executive departments, their features, and their link to each other.¹⁸⁸ Congress judges whether there

¹⁸² Prakash & Ramsey, *The Executive Power*, supra note 140, at 290–91 (noting that many ratifiers regarded the Senate as an executive institution).

¹⁸³ See U.S. Const. art. II, § 2, cl. 2.

¹⁸⁴ See Mitchell A. Sollenberger, *The President Shall Nominate: How Congress Trumps Executive Power 24–27* (2008) (examining the first use of senatorial courtesy to reject the nomination of Benjamin Fishbourn for Savannah revenue collector).

¹⁸⁵ See *id.* at 163–64 (highlighting the use of blue slips in the Bush presidency, whereby the Senate would not confirm an executive nomination unless the nominee had been approved by the home-state senators of the president’s party).

¹⁸⁶ See U.S. Const. art. II, § 2, cl. 2.

¹⁸⁷ See *Heritage Guide to the Constitution*, supra note 26, at 263.

¹⁸⁸ See U.S. Const. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2.

will be inferior courts, their structure, and how they will function under the Supreme Court.¹⁸⁹

As to the presidency, Article II grants it certain authorities and specifies the selection of its occupant. Article II also references other institutions that will aide in the execution of the President's numerous constitutional functions. It references "principle Officer[s]" in the "executive Departments," from whom the President may demand an "Opinion, in writing."¹⁹⁰ It notes that the President is commander in chief of the "Army and Navy."¹⁹¹ It mentions "inferior Officers."¹⁹²

The Constitution implicitly demands that any executive officers, military or civilian, serve at the direction and pleasure of the President. That is the import of the grant of executive power, as the Father of the Constitution, James Madison, so persuasively reasoned in 1789.¹⁹³ Executive officers, after all, help exercise and implement the President's constitutionally granted "executive power" over law execution and foreign affairs. They are his "instruments"—the principal means by which he wields executive power.¹⁹⁴

Beyond presidential superintendence of executives, the Constitution demands little else. Surprisingly, it does not oblige Congress to create secretaries, principle officers, inferior officers, or employees. Nor does it require the establishment of departments. A fortiori, it does not compel that any departments have an internal hierarchy.

Of course, there were executive departments under the Articles, and the Founders likely thought that these would continue—War, Treasury, and Foreign Affairs.¹⁹⁵ This explains the Constitution's assumption that there would be "executive departments."¹⁹⁶ But there is no constitutional requirement that Congress create hierarchical departments, each superintended by a dominant "Secretary." These are matters for Congress to decide, in consultation with (or over the objections of) the President.

¹⁸⁹ See *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

¹⁹⁰ *Id.* art. II, § 2, cl. 1.

¹⁹¹ See *id.*

¹⁹² *Id.* art. II, § 2, cl. 2.

¹⁹³ 1 *Annals of Cong.* 481–82, 517–18 (1789). For a discussion of Madison's claims, see Prakash, *Imperial from the Beginning*, *supra* note 91, at 195–96.

¹⁹⁴ See 1 *Annals of Cong.* 637 (1789).

¹⁹⁵ See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 *Wm. & Mary L. Rev.* 211, 239 (1989).

¹⁹⁶ See U.S. Const. art. II, § 2, cl. 1.

Consider the Treasury Department. Though its secretary was the topmost official in his agency, he was not invariably empowered to command the obedience of his associates. For instance, the secretary could not draw funds unless the comptroller first countersigned the withdrawal warrants and the registrar recorded them.¹⁹⁷ Obviously the secretary could not order officers to countersign or record because the point of these constraints was to thwart embezzlement of funds. The first Congress had imposed a system of internal checks in the Treasury in order to prevent such misappropriation.

Or consider the absence of an early Justice Department. Early presidents supervised federal attorneys, including attorneys general, without the structure of a department, hierarchical or otherwise.¹⁹⁸ Indeed, President Washington and his successors often directly corresponded with district attorneys, giving them instructions about prosecutions and the proper representation of the United States.¹⁹⁹ It was not until the mid-nineteenth century that Congress belatedly created a hierarchical structure, the “Justice Department,” under the direction of the attorney general.²⁰⁰

Similarly, Congress did not create a Department of the Navy until the Adams administration.²⁰¹ Even the 1789 creation of the Department of War²⁰² was scarcely inevitable given that the Constitution did not require a standing army.²⁰³ In fact, the fear of a standing army was so prevalent that certain Anti-Federalists disparaged the Constitution for authorizing the creation of a peacetime army.²⁰⁴ Such criticisms made it possible to suppose that the first Congress might refuse to reauthorize such an army.

Nor was the Department of Foreign Affairs inevitable, at least in the sense that Congress could have left the President with no intermediary (no departmental Secretary) to pass on (and amplify) his orders to the American diplomatic corps stationed overseas. The President might have

¹⁹⁷ See An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. 65, 66 (1789).

¹⁹⁸ See Saikrishna Prakash, *The Chief Prosecutor*, 73 *Geo. Wash. L. Rev.* 521, 527 (2005).

¹⁹⁹ See *id.* at 546, 553.

²⁰⁰ *Id.* at 530. For a discussion of the executive’s control over prosecution and the early absence of a Department of Justice, see generally *id.*

²⁰¹ See Act of Mar. 27, 1794, ch. 12, 1 Stat. 350.

²⁰² See Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

²⁰³ The Constitution granted Congress an option to create an army, never imposing an obligation. See U.S. Const. art. I, § 8, cl. 12.

²⁰⁴ See, e.g., Letter from “Centinel” to the Freeman of Pennsylvania (Oct. 5, 1787), in *The Antifederalists* 2, 8–9 (Cecelia M. Kenyon ed., 1966) (arguing that a peacetime army was a “grand engine of oppression”).

communicated with foreign heads of state and their representatives, as well as with U.S. diplomats stationed overseas, without the aid of a principal officer overseeing and implementing the President's vision.

Some establishments had rather complicated structures. Take the Bureau of the Mint, created in 1792.²⁰⁵ The Mint had a "Director" and a host of officers, including a treasurer, assayer, chief coiner, and engraver.²⁰⁶ Yet, it lacked any sort of hierarchy and, perhaps for that reason, Congress's organic act did not call it a "department." To ensure high casting standards for its coinage, Congress required an outside board to conduct a yearly assay of a sample.²⁰⁷ The board included the Chief Justice, the attorney general, and the secretary of state, among others.²⁰⁸ This cross-branch board served as an external means of ensuring the satisfaction of Congress's coinage standards.

Professor Charles Black long ago observed that Congress could transform the chief executive familiar to us. "'To what state could Congress, without violating the Constitution, reduce the President?' I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail."²⁰⁹ The President would still enjoy his constitutional powers, noted Black,²¹⁰ but he would have no constitutional right to the vast and familiar array of officials.

Congress's authority over the structure of the federal judiciary is broader still. While the Constitution requires the creation of a Supreme Court and specifies its original and appellate jurisdiction, it does not establish much else.²¹¹ The first Congress took the initiative, setting the number of Justices, the quorum necessary for the Court to function, its yearly sessions, and the oath for Justices (and judges).²¹² Using its express authority to make exceptions to the Supreme Court's jurisdiction, the first Congress also implicitly curbed some of the former's appellate authority.²¹³

²⁰⁵ See Act of Apr. 2, 1792, ch. 16, 1 Stat. 246.

²⁰⁶ See id. § 1, 1 Stat. at 246.

²⁰⁷ See id. § 18, 1 Stat. at 250.

²⁰⁸ See id.

²⁰⁹ See Charles L. Black Jr., *Some Thoughts on the Veto*, 40 *Law & Contemp. Probs.* 87, 89 (1976).

²¹⁰ See id.

²¹¹ See U.S. Const. art. III.

²¹² See generally Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing the basic rules for the judiciary).

²¹³ See id. § 13, 1 Stat. at 80–81.

Though the Constitution makes clear that the Supreme Court will have judges,²¹⁴ implies that it must have a “Chief Justice,”²¹⁵ and signals that the Court will decide cases,²¹⁶ Congress felt free to add to the duties of the first Justices. To begin with, all of those Justices had the task of riding circuit and serving as the intermediate federal court between the federal trial courts and the Supreme Court.²¹⁷ Thus every Justice served on two different courts. Moreover, Congress imposed nonjudicial duties on federal judges. Besides the Chief Justice’s administrative functions,²¹⁸ Congress required that circuit judges (and therefore the Supreme Court Justices) serve as pension commissioners to determine whether veterans were disabled.²¹⁹

Congress’s dominion over the lower federal courts is even more comprehensive. By virtue of the Madisonian Compromise, the national government is under no obligation to create lower federal courts.²²⁰ Moreover, when Congress creates such courts, it can choose their jurisdiction, interrelationships, and connection to the state judiciaries. Other than being “inferior” to the Supreme Court—a somewhat vague constraint—the contours of the lower federal courts are left to Congress’s discretion.²²¹ Congress could choose to have courts specialize in particular legal questions without regard to geography—say commerce, naturalization, or fiscal matters. Congress could elect to have no appellate courts between the Supreme Court and trial courts. Congress could even make state court decisions appealable to a federal court other than the Supreme Court.

Sometimes Congress’s authority over the architecture of the other branches derives from particular clauses. Article 1, Section 8 vests Congress with power to “constitute Tribunals inferior to the supreme Court.”²²² Section 2 of Article III empowers Congress to make

²¹⁴ See U.S. Const. art. II, § 2, cl. 2 (mentioning “Judges of the supreme Court”).

²¹⁵ See U.S. Const. art. I, § 3, cl. 6.

²¹⁶ See U.S. Const. art. III, § 2, cl. 1 (extending jurisdiction to “cases,” implying decision thereon).

²¹⁷ See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

²¹⁸ See Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (ex officio member of board of assay for coins); see also Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186 (ex officio member of committee to decide when to purchase federal debt).

²¹⁹ See Invalid Pension Act of 1792, ch. 11, § 2, 1 Stat. 243, 244.

²²⁰ See U.S. Const. art. III, § 1 (making clear that Congress chooses whether to have lower federal courts).

²²¹ See *id.*

²²² U.S. Const. art. I, § 8, cl. 9.

“Exceptions” and “Regulations” related to the Supreme Court’s appellate jurisdiction.²²³ As noted, Article I, Section 8 authorizes the creation of an army and navy.²²⁴ Further, Article II, Section 2 allows Congress to decide in whom (the President, a department head, or a court of law) to vest power to appoint inferior officers,²²⁵ thus bypassing the Senate consideration of certain nominees.

Quite often, however, the source of Congress’s authority to specify the architecture of the magisterial branches is the Necessary and Proper Clause. Professor William Van Alstyne wrote long ago of the “horizontal effects” of the “Sweeping Clause” and of Congress’s power to assist the other departments and thereby determine how those departments ought to be structured and supplied.²²⁶ Using its horizontal power, Congress may do more than create “blank offices,”²²⁷ the contours of which will be shaped by the President. Indeed, it has invariably created offices with particular authorities and obligations.²²⁸ Similarly, Congress has created numerous departments, not content to let the President form the executive branch himself via statutory grants of discretion. For instance, Congress decided that there would be a separation of the bureaucracies of diplomacy, warfare, and funds, resulting in the creation of three great departments, State, War, and Treasury.²²⁹ Subsequent Congresses have made such decisions repeatedly over centuries, creating today’s byzantine executive branch.

VI. THE CHIEF OVERSEER OF THE MAGISTERIAL BRANCHES

Although Congress is the Chief Facilitator of the other branches, somewhat paradoxically, it was also to serve as their Chief Overseer, one of their principal checks. To serve this role, the Framers granted Congress investigative, prosecutorial, and adjudicatory authorities. This limited amalgamation of powers—this violation of Montesquieu’s famed separation maxim—enables federal legislators to serve as

²²³ Id. art. III, § 2, cl. 2.

²²⁴ Id. art. I, § 8, cl. 12–13.

²²⁵ Id. art. II, § 2, cl. 2.

²²⁶ See William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 Ohio St. L.J. 788, 793–94 (1975).

²²⁷ See Prakash, *Imperial from the Beginning*, supra note 91, at 172–76 (discussing Congress’s power to create, and shape contours of, offices).

²²⁸ See id.

²²⁹ See Casper, supra note 195, at 239.

effective, wise, and informed lawmakers. The mixture of authorities also may be wielded to pressure errant or defiant officials, and in extreme cases, to oust them.

As the federal lawmaker, Congress has a keen interest in gauging whether the other branches are faithfully executing the law, if law reform would be beneficial, and if new laws are requisite. To make such judgments, Congress needs information. Fortunately, the power to legislate implies the power to gather information necessary to enact wise, just, and beneficial laws.²³⁰ Often Congress can get useful information from private parties, via voluntary testimony or compliance with requests for information. Where private parties refuse these appeals, Congress can compel information by subpoena.²³¹

The same dynamic exists with respect to the other two branches. Oftentimes the most valuable facts and opinions rest with officials in the executive and judicial branches. Executives and judges may offer up their expertise to Congress; in fact, the executive branch is under a duty to do so.²³² When executives and judges voluntarily testify about the needs of law enforcement and difficulties with existing law, they aid Congress in the latter's task of carefully wielding legislative power.

Occasionally more compulsive means are necessary because officers with information may decline to testify or turn over information. In these situations, the use of legislative subpoenas enables Congress to obtain the information it needs to legislate effectively. Those who fail to comply with such subpoenas face the prospect of contempt of Congress.²³³ By itself, contempt is no more than a denunciation of sorts. Yet the inherent legislative power of contempt extends to arresting the contemnor. In a number of incidents stretching across centuries, the chambers of Congress have held private persons and federal officers in

²³⁰ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 160–75 (1927) (adjudicating “whether the Senate—or the House of Representatives . . . has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution”).

²³¹ See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (affirming Congress's ability to subpoena private parties).

²³² See U.S. Const. art. II, § 3 (“[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .”).

²³³ See *Eastland*, 421 U.S. at 515.

contempt and sometimes have had such parties arrested and jailed.²³⁴ As late as 1916, the House arrested an executive branch official for contempt of Congress.²³⁵ In 2012, the House held Eric Holder in contempt, a first for a sitting member of the Cabinet.²³⁶

The impeachment process is a means by which Congress polices who may remain in federal office, for a finding of contempt, even when coupled with arrest and time in Congress's jail, does not actually remove an officer. Officers may be impeached and removed if they have committed treason, bribery, or other high crimes and misdemeanors.²³⁷ The House decides whether to impeach, acting as a grand jury.²³⁸ The Senate, by a two-thirds vote of present members, judges whether the officer has committed the offenses.²³⁹

Although some suppose that the standard turns on criminality, the phrase "high crimes and misdemeanors" was not so limited at the Founding. Certain offenses against the state, though they were not crimes, were nonetheless impeachable. For instance, Parliament repeatedly impeached and punished advisers to the Crown.²⁴⁰ In other words, wicked or wrongful advice was impeachable, for the Crown might heed such advice. Moreover, as Professor Michael J. Gerhardt has argued, "high crimes and misdemeanors" included so-called "political crimes."²⁴¹ Political crimes involved an abuse of office, whereby the nation was injured in some way by the act in question.²⁴²

Hence Congress may impeach, convict, and remove federal officials when they fail to adhere to the law or when they abuse their office. The

²³⁴ See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1128–29, 1137 (2009) (noting that early Congresses thought they could arrest officials and that the practice existed as late as the early 20th century).

²³⁵ See *Marshall v. Gordon*, 243 U.S. 521, 531–32, 548 (1917) (affirming the power of the House to hold a member of the Executive Branch in contempt, but ordering the release of Marshall since the dissemination of a "defamatory and insulting" letter did not inherently obstruct or prevent the discharge of legislative duty).

²³⁶ See Jonathan Weisman & Charlie Savage, *House Finds Holder in Contempt Over Inquiry on Guns*, N.Y. Times (June 28, 2012), <http://www.nytimes.com/2012/06/29/us/politics/fast-and-furious-holder-contempt-citation-battle.html>. The House made no move to arrest the attorney general.

²³⁷ U.S. Const. art. I, § 3, cl. 6; id. art. II, § 4.

²³⁸ Id. art. I, § 2, cl. 5.

²³⁹ U.S. Const. art. I, § 3, cl. 6.

²⁴⁰ See Raoul Berger, *Impeachment: The Constitutional Problems* 67–73 (1973).

²⁴¹ See Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 Geo. Wash. L. Rev. 603, 603 (1999).

²⁴² See id.

failure of an official to honor laws circumscribing their powers or imposing duties is the quintessential example of an impeachable offense. If an officer expends funds without an appropriation from Congress, the officer has committed a high crime and misdemeanor. If a judge decides cases without regard to the contours of the law, she may be impeached and removed.

More generally, the misuse of governmental power is grounds for impeachment and removal. If a President appointed officers on mere whim or chose to indiscriminately veto all bills, either would constitute an impeachable offense because both involve an abuse of power. While the President has wide discretion as to both, the discretion must be tethered to further some proper governmental objective. Similarly, if a judge misused her discretion, say by abusing litigants or haranguing witnesses, her conduct would constitute an abuse of judicial power and be impeachable as such.²⁴³

Impeachment by the House is rare and conviction by the Senate rarer still.²⁴⁴ Multiple factors account for this disuse. When accused of wrongdoing, the most blameworthy officials typically resign. They see the writing on the wall—they suspect that they will be impeached and removed and seek to avoid that humiliating ordeal. And even if they suppose that the Senate will not convict, some wish to avoid a public spectacle. In the particular case of executive officials, the President may remove them, hoping to spare his administration the embarrassment of an official in the dock of Congress. Finally, members of both chambers may be reluctant to invoke a time-consuming process that may not lead anywhere and that detracts from the business of legislation. Impeachments are engrossing, both in terms of time and mental energy. Representatives often see little to be gained from impeaching an official if removal by the Senate seems unlikely. Senators are also aware that conviction requires an extraordinarily high threshold and hence may shrink from the prospect of a trial.

Through reform, the chambers could minimize the costs of impeachment. First, in situations where the conduct of multiple officials is at issue, each chamber could consider their wrongdoing in one proceeding, rather than conducting separate inquiries for each officer.

²⁴³ Justice Samuel Chase was impeached by the House and tried by the Senate in part because of his mistreatment of jurors and his partisan remarks to the grand jury. See H.R. Journal, 8th Cong., 2d Sess. 31–34 (1804).

²⁴⁴ See Heritage Guide to the Constitution, *supra* note 26, at 75.

The House might jointly impeach several officials and the Senate might conduct a single trial for all of them.²⁴⁵

Second, the Constitution does not require a drawn-out process. Given the rather limited sanction visited upon officials—removal from office and bar on holding future office—it is a mistake to insist that the Constitution implicitly demands burdensome procedures. The Constitution requires the House to conclude that someone has committed an impeachable offense.²⁴⁶ To reach this determination, representatives must make political, quasi-legal, and factual judgments. None of these necessarily requires lengthy investigation. Similarly, while the Constitution obliges the Senate to conduct a trial and puts senators under oath,²⁴⁷ Senate trials need not last weeks or months. In modern times, the Senate employs a committee to take all testimony and cross-examine witnesses, and nothing prevents other innovations that would further streamline the process.²⁴⁸

Finally, dubious lessons drawn from earlier impeachments have undermined the impeachment tool. If we impeach judges too readily, it will unduly curb the independence of judges. That seems to be a message many draw from the impeachment of Associate Justice Samuel Chase.²⁴⁹ If we impeach presidents too often, it will cripple the presidency. The Johnson and Clinton impeachments supposedly impart this wisdom.

But perhaps the lesson of these failed impeachments is that legislators should have been *more* disposed to convict. Maybe some of those failed trials demonstrate that members of Congress, senators in particular, have been too unwilling to call officials to account for their abuses of office. The two-thirds conviction requirement already ensures that neither judges nor executives will face a regular, recurring threat of removal. Given that demanding barrier and the rather limited set of sanctions

²⁴⁵ Over the years, various reforms have been suggested as a means of improving the process. See Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 149–72 (2d ed. 2000).

²⁴⁶ U.S. Const. art. I, § 2, cl. 5 (granting the House the power of impeachment but including no requirements on the process through which it impeaches officials).

²⁴⁷ U.S. Const. art. I, § 3, cl. 6.

²⁴⁸ See *Nixon v. United States*, 506 U.S. 224, 227–30 (1993) (discussing Senate Rule XI and the use of committees to receive evidence and take testimony).

²⁴⁹ See Chief Justice William Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 114 (1992) (discussing how the acquittal of Samuel Chase by the Senate assured the independence of federal judges from congressional oversight for their decisions in cases before them).

(removal and future disqualification from federal office), there is no reason to layer on top of that an additional (and excessive) concern for the independence of judicial and executive officers. The supermajority requirement sufficiently ensures the relative independence of both executive and judicial officers. When legislators allow concerns about independence to cloud their judgments, they shrink from the serious oversight the Constitution requires for its proper functioning. Impeachment will remain less than a “scarecrow”²⁵⁰ if we overlay a reluctance to wield it on top of the formidable structural checks on its use. We require more impeachments, not less.

VII. AN OVERSEER OF THE STATES

While the Constitution does not render the states subservient to Congress—they are not field offices of the federal government²⁵¹—Congress nevertheless enjoys sizable authority over them. First, where Congress has legislative power, it may supersede any state laws that interfere with the exercise of that authority.²⁵² For instance, Congress may bar the states from regulating commerce, bankruptcy, naturalization, etc.²⁵³ Similarly, Congress may regulate the time, place, and manner in which states hold federal elections, using its superseding authority.²⁵⁴ Congress even may supplant state inspection laws.²⁵⁵

Second and relatedly, Congress has wide power to authorize certain state activities. The Constitution specifically provides that states may engage in certain activities only with the consent of Congress. The list includes the imposition of imposts or duties on exports and imports, duties on vessels, keeping peacetime troops or warships, making compacts with foreign states, and engaging in war.²⁵⁶

Third, Congress may regulate matters of comity between the states. It decides whether states may enter into interstate compacts on matters of mutual concern, meaning that two or more states may not reach

²⁵⁰ See 12 *The Works of Thomas Jefferson* 137 (Paul Ford ed., Federal Ed. 1905) (“For experience has already shown that the impeachment it [Article I, Section 8, Clause 18] has provided is not even a scarecrow”).

²⁵¹ See *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁵² See U.S. Const. art. VI, cl. 2.

²⁵³ See, e.g., *id.* art. I, § 8, cl. 3–4.

²⁵⁴ See *id.* art. I, § 4, cl. 1.

²⁵⁵ See *id.* art. I, § 10, cl. 2.

²⁵⁶ See *id.* art. I, § 10, cl. 2–3.

agreements that harm the interest of other states without first securing congressional approval.²⁵⁷ Congress may also provide the “Manner” and “Effect” of acts, records, and judicial proceedings of sister states, thereby shaping the scope of the full faith and credit obligation that the Constitution imposes on the states.²⁵⁸

Fourth, Congress is a gatekeeper for new states, deciding which territories shall become states.²⁵⁹ If Congress wishes to create a new state out of an existing one, it must secure the permission of the state that it proposes to split.²⁶⁰ Yet the admission of West Virginia out of Virginia proves that discerning whether the legislature has granted permission is not always self-evident.²⁶¹ Sometimes more than one entity claims to be the legislature of a state and Congress may decide which claimant to recognize.²⁶²

Finally, Congress is an implicit guarantor of state republicanism. Under Article IV, the “United States” guarantees each state a republican form of government.²⁶³ Though that Article does not specify the federal institutions that may (or must) take action to fulfill the assurance, Congress has long been thought to be the principle guarantor of that pledge.²⁶⁴ As a matter of text, each chamber decides whether to seat legislators,²⁶⁵ by deciding not to accept certain men and women from a supposed state government, each chamber helps to implement the Guarantee Clause.²⁶⁶ Moreover, Congress may have power to enact

²⁵⁷ See *id.* art. I, § 10, cl. 3.

²⁵⁸ See *id.* art. IV, § 1.

²⁵⁹ See *id.* art. IV, § 3, cl. 1.

²⁶⁰ *Id.*

²⁶¹ The secession of West Virginia from Virginia occurred after Virginia voted to secede from the Union after the outbreak of the Civil War. Delegates from West Virginia met at Wheeling and nullified the Virginian ordinance of secession and established a loyal Virginia government. The new loyalist Virginia legislature, composed of citizens from the western parts of Virginia, later approved the secession of West Virginia from Virginia. For a discussion of the constitutional questions, see Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal. L. Rev. 291 (2002).

²⁶² See *Luther v. Borden*, 48 U.S. 1, 42–43 (1849) (holding that Congress decides which government is the established one for a state).

²⁶³ See U.S. Const. art. IV, § 4.

²⁶⁴ See *Luther*, 48 U.S. at 42–43 (1849).

²⁶⁵ U.S. Const. art. I, § 5, cl. 1 (each chamber is the judge of the election, returns, and qualifications of members).

²⁶⁶ Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 81 (2012).

legislation policing the outer boundaries of republicanism, legislation that will supersede state laws that transgress those outer boundaries.

Of course, there are limits to Congress's powers over the states. By virtue of the Constitution, the states retain autonomy and sovereignty principally because the Constitution only partially encroaches on their autonomy and sovereignty. Moreover, Congress lacks legislative authority to completely extinguish that reserved autonomy and sovereignty. In other words, the Constitution neither destroys state authority nor grants Congress power to do so via federal laws.

For instance, Congress cannot impose the precise republican forms it favors.²⁶⁷ For instance, because neither a hyperpowerful executive nor a cipher yields an unrepublican government, Congress cannot require that states tailor their executives to suit federal preferences.²⁶⁸ Similarly, various sorts of judicial tenure are consistent with republicanism, ranging from judicial election to life tenure, meaning that Congress generally cannot refashion the state judiciaries.²⁶⁹ The point is that Congress lacks sweeping authority to reorganize state institutions.

More generally, Congress does not have anything resembling authority to supersede all state laws. A proposal to grant Congress a "negative" on state law failed in the Philadelphia Convention.²⁷⁰ That failure (and the evident absence of any analogous grant in Article I, Section 8, or elsewhere) signals that Congress is powerless over subjects not committed to its care, be it property law or the law of wills.²⁷¹ In practice, states can enact all sorts of unwise or irresponsible laws without any means for Congress to terminate them. Policy differences, even the most profound and intractable, are not grounds for enacting federal legislation that supersedes state law.

²⁶⁷ See U.S. Const. art. IV, § 4.

²⁶⁸ At the Founding, some states had a weak executive while others had a more powerful executive. It seems likely that neither of these extremes, without more, constituted an unrepublican form of government. After all, no one noted, much less complained, that the Guarantee Clause meant that some existing state governments were unconstitutional.

²⁶⁹ The tenure of judges at the state level has varied considerably over two centuries. For a discussion of the changes wrought in early America, see Evan Haynes, *The Selection and Tenure of Judges* (1944). For modern tenure provisions, see National Center for State Courts, *Methods of Judicial Selection: Removal of Judges*, http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm [<https://perma.cc/Z4VH-WYD2>].

²⁷⁰ See Madison's Notes (June 8, 1787), in 1 *The Records of the Federal Convention of 1787*, at 164–68 (Max Farrand ed., 1911).

²⁷¹ 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 40 (Jonathan Elliot ed., 1854) (comments of Edmund Pendleton).

VIII. AN ENFORCER OF CONSTITUTIONAL RIGHTS AND DUTIES

When we consider enforcement of federal law, the Chief Executive perhaps first comes to mind, with his express duty to take care that the laws be faithfully executed.²⁷² Next comes the judiciary, with its authority to serve as a check on executive enforcement and as the ultimate vindicator of federal law.²⁷³ Some modern scholars regard the courts as the principal defenders of federal law and the Constitution, both because the Constitution extends the “judicial power of the United States” to cases implicating the Constitution, laws, and treaties,²⁷⁴ but also because public acclamation and acceptance has carved out this role for the courts.

Yet the Constitution also reveals that Congress may serve as an enforcer, at least of constitutional rights. By virtue of the final substantive sections of numerous post-Civil War amendments to the Constitution, Congress has the power to pass legislation meant to “enforce” these amendments.²⁷⁵ While the most significant of such enforcement clauses are found in the Thirteenth, Fourteenth, and Fifteenth Amendments, numerous amendments have such clauses.²⁷⁶ All seem to agree that Congress can specify the remedies for violations of these amendments. Less clear is whether Congress has authority to define (or shape the contours of) the relevant substantive provisions. May Congress, in enforcing the Fourteenth Amendment, determine what is a violation of the privileges or immunities of citizenship? May Congress decide what constitutes slavery under the Thirteenth Amendment?

Many scholars assert that the Civil War Amendments, at least, were meant to give Congress tremendous authority over the content of these amendments.²⁷⁷ They suppose that the Amendments reflect the era’s distrust of slave-power courts and a (relative) faith in Congress.²⁷⁸ With the reviled *Dred Scott* decision still a recent memory and with

²⁷² U.S. Const. art. II, § 3.

²⁷³ See *id.* art. III.

²⁷⁴ See *id.* at § 2, cl. 1.

²⁷⁵ See *id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

²⁷⁶ See *id.* amend. XVIII, § 2; *id.* amend. XIX; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

²⁷⁷ See, e.g., Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 182–83 (1997).

²⁷⁸ See *id.*

confidence in the righteousness of their cause, radical Republicans thought Congress would be a better repository of power than reliance on the courts alone, or so the argument goes.²⁷⁹ Though this reading of the enforcement clauses has its merits, the Supreme Court favors its own constructions of the Civil War Amendments and, by adopting a relatively tight means–ends fit between legislation and those amendments, the Court effectively minimizes the scope of congressional enforcement power.²⁸⁰

The question of congressional power to enforce constitutional rights and duties is almost as old as the Constitution. The Fugitive Slave Act of 1793 compelled federal judges and state officials (“magistrates”) to hold hearings on whether a seized person “owed service or labor” in another state.²⁸¹ The Act also made it a federal offense, punishable with a \$500 penalty, to obstruct the seizing or arresting of a fugitive from labor.²⁸² Because the Constitution’s Fugitive Slave Clause merely imposed a duty on states to return fugitive slaves and laborers and granted Congress no specific authority over this duty, the federal legislative power to enact the Act must have come from elsewhere. In *Prigg v. Pennsylvania*, Justice Joseph Story wrote that the Necessary and Proper Clause authorized Congress to pass the statute.

[Congress] has, on various occasions, exercised powers which were necessary and proper, as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.²⁸³

Story’s opinion spoke of broad federal power, even as it studiously said nothing about whether the Act could constitutionally compel state officials to aid in the recapture of slaves. Whatever doubts Justice Story may have had about the latter authority, the Act purported to compel state officials and was passed shortly after the Constitution’s ratification. There apparently was no congressional or executive debate about the constitutionality of federal statutes enforcing the Fugitive Clauses or,

²⁷⁹ See *id.*

²⁸⁰ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁸¹ Fugitive Slave Act, ch. 7, § 3, 1 Stat. 302, 302–305 (1793).

²⁸² *Id.* at 305.

²⁸³ See *Prigg v. Pennsylvania*, 41 U.S. 539, 618–19 (1842).

more particularly, about the constitutionality of federal laws imposing specific duties on particular state officers in order to effectuate constitutionally mandated duties. The absence of debate over the Fugitive Slave Act's imposition of statutory duties at least suggests that Congress has broad authority to ensure the vindication of federal rights.

Justice Story's discussion of duties also hints that Congress can enact legislation meant to flesh out other constitutional duties. The very first federal Act, the Oaths Act,²⁸⁴ created an oath meant to carry into execution the constitutional requirement that federal and state legislatures and officers take an oath to support the Constitution.²⁸⁵ Shortly thereafter, Congress crafted a unique oath for federal judges.²⁸⁶ Congress had no express power to dictate the terms of the oath of support. Nor did it have specific authority to create different oaths for different branches. It could impose such obligations because it had the power to implement federal powers and duties, including the constitutional duty to take an oath of support.

CONCLUSION

There is an Indian parable, from the fabled Panchatantra, of the six blind men and their entertaining attempts to describe an elephant. Each grasps a particular portion of the elephant and insists that only his individual description is true. Grasping the elephant's belly, one insists that an elephant is like a wall. Another clutches a tusk and says an elephant is comparable to a spear. More like a snake, another insists, upon gripping the trunk. The pachyderm is akin to a tree trunk, insists the fifth man who puts his arms around a stout leg. It has the traits of a fan, claims the man grasping the ears. A rope, says the final man, as he pats the tail.

Resembling an elephant, our Congress is a lumbering massive creature of immense complexity. While we typically regard Congress as a legislature, it has many other features as well, ones that we can recognize if we are open to the idea of Congress being more than a lawmaker. Congress also is an executive institution, with authorities over war, the military, and foreign affairs, each of which were long deemed executive. Congress promotes and implements the

²⁸⁴ See Act of June 1, 1789, ch. 1, 1 Stat. 23.

²⁸⁵ U.S. Const. art. VI, cl. 3.

²⁸⁶ See The Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76.

Constitution's system of separated powers, by passing statutes that facilitate the independence and authority of the other branches and by, somewhat contradictorily, using its constitutional authority to check the very institutions that Congress also empowers. Congress is an umpire regarding the duties that states owe each other. Congress also is a vindicator of constitutional rights and duties, as when it enforces the Civil War Amendments and compels the satisfaction of duties.

Although elephants are said to remember, Congress is unaware of its vast authority. More precisely, members of Congress often seem unmindful of all the levers of power at their disposal. Perhaps this reflects a failure to adopt the institutional perspective and move beyond party politics. Perhaps this reflects that fact that the cohort of post-Watergate legislators, ones that wielded these powers to curb the presidency, is aging or dying out.

Lord John Russell once remarked that “[e]very political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed.”²⁸⁷ True enough. But different bodies do not truly *share* supreme powers if one body abases itself and forgets its rightful place. Moreover, too much forbearance is a vice, just as too much virtue can be. If Congress is to check the executive and the courts and reassert itself, it must abjure its modern forbearance. Supinuity and timidity must be cast aside for Congress to live up to its status as the first branch.

²⁸⁷ Woodrow Wilson, *Congressional Government: A Study in American Politics* 242 (Houghton, Mifflin & Co. 1901) (1885) (quoting Lord John Russell).