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AND PUBLIC FINANCE

"Delegating Tax"

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SCHEDULE FOR 2014 NYU TAX POLICY COLLOQUIUM
(All sessions meet Thursday 4:00-5:50 p.m., Vanderbilt-208, NYU Law School)

1. January 21 – Saul Levmore, University of Chicago Law School, "From Helmets to Savings and Inheritance Taxes: Regulatory Intensity, Information Revelation, and Internalities." (Main discussion paper); and "Internality Regulation Through Public Choice." (Background paper).

2. January 28 – Fadi Shaheen, Rutgers-School of Law, Newark, "The GAAP Lock-Out Effect and the Investment Behavior of Multinational Firms."; "Evaluating Investments of Locked-Out Earnings (an Outline).

3. February 4 – Nancy Staudt, University of Southern California, Gould School of Law "The Supercharged IPO."

4. February 11 – Thomas J. Brennan, Northwestern University School of Law, "Smooth Retirement Accounts."

5. February 25 – Chris Sanchirico, University of Pennsylvania Law School. "As American as Apple Inc., International Tax and Ownership Nationality."

6. **March 4 – James R. Hines, Jr. and Kyle D. Logue, University of Michigan Law School, "Delegating Tax."**

7. March 11 – Stephanie Sikes, Wharton School, Accounting Department, University of Pennsylvania. "Cross-Country Evidence on the Relation between Capital Gains Taxes, Risk, And Expected Rates of Return."

8. March 25 – Matthew C. Weinzierl, Harvard Business School, "Revisiting the Classical View of Benefits-based Taxation."

9. April 1 – Andrew Biggs, American Enterprise Institute, "The Risk to State and Local Budgets Posed by Public Employee Pensions."

10. April 8 – Susannah Camic Tahk, University of Wisconsin Law School, "Charity Governance Patterns: Empirical Evidence."

11. April 15 – Nirupama Rao, NYU Wagner School, "The Price of Liquor is Too Damn High: State Facilitated Collusion and the Implications for Taxes."

12. April 22 – Kimberly Clausing, Reed College, Economics Department, "Lessons for International Tax Reform from the U.S. State Experience under Formulary Apportionment."

13. April 29 – David Gamage, Berkeley Law School, "On Double-Distortion Arguments, Distribution Policy, and the Optimal Choice of Tax Instruments."

14. May 6 – Mitchell Kane, NYU School of Law, "Reflections on the Coherence of Source Rules in International Taxation."

Delegating Tax[1]

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Abstract

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

[1] The authors thank Nick Bagley, Peter Barnes, Jill Horwitz, Matt Kahn, Nina Mendelson, Jason Oh, Richard Schmalbeck, Joel Slemrod, Kirk Stark, Paul Stephan, Alex Stremitzer, Alex Wu, Larry Zelenak, Eric Zolt, and seminar participants at Duke, UCLA, and the University of Michigan for helpful comments on an earlier draft of this paper.

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

David J. Barron & Todd D. Rakoff[2]

"Taxation is a legislative function...[and] Congress is the sole organ for legislating taxes."

Justice William O. Douglas[3]

I. Introduction

The broad delegation of lawmaking power to administrative agencies is a well-accepted feature of U.S. policy making in modern times.[4] Administrative agencies with vast lawmaking powers now oversee virtually every sector of the U.S. economy. The National Highway and Traffic Safety Administration (NHTSA) regulates not only the automobiles that Americans drive, but also the roads on which they are driven.[5] The Food and Drug Administration (FDA) has been given broad lawmaking power with respect to the food Americans eat and the drugs Americans take (legal and illegal).[6] Air and water are subject to federal regulation, since Congress has delegated extraordinary regulatory powers to the federal Environmental Protection Agency.[7] Even important aspects of the healthcare regulation have been delegated to a regulatory body. For example, under the Patient Protection and Affordable Care Act (ACA), Congress recently empowered the Secretary of Health and Human Services, with the assistance of a new Independent Payment Advisory Board (IPAB), to make recommendations for cutting Medicare expenditures that, if not overturned by a supermajority in Congress, will automatically

[2] *In Defense of Big Waiver*, 113 Colum. L. Rev. 265, 265 (2013).
[3] National Cable Television Assoc. v. US, 415 U.S. 336, 340 (1973)
[4] Id. at 266.
[5] Cite statute
[6] Cite statute
[7] Cite statute

become law.[8] One could continue at great length, listing examples illustrating the point that, from the control over the money supply (which was delegated by Congress to the Federal Reserve Board) to the process for closing military bases after the end of the cold war (which was delegated to the Base Closure and Realignment Commission), Congress regularly delegates enormous amounts of lawmaking power.[9]

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

These examples of agency-based tax lawmaking differ from the sort of regulatory role that is commonplace in other areas of law. For example, Congress rarely enacts tax statutes that set out broad tax policy principles and then authorize the Treasury Department or some other regulatory agency to fill in the details. There is no tax equivalent, for example, to the language in the Clean Air Act empowering (and requiring) the EPA administrator to set emissions standards for "any air pollutant…which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[10] In their study of all federal legislation from 1947-1992, David Epstein and Sharyn O'Halloran find that,

[8] cites
[9] cites
[10] 42 U.S.C. § 7521(a)(1).

by their measure, tax legislation granted less policy and implementation discretion to executive agencies than did laws passed by Congress in any of the 53 other substantive federal policy areas.[11]

This Article suggests that Congress should consider making more extensive delegations of authority in the tax area—or, at the very least, that Congress should think more expansively about what types of tax lawmaking power it is prepared to delegate. This is not to say that Congress should replace the Internal Revenue Code with a single sentence that reads: "The Department of Treasury shall promulgate all tax rules necessary to raise revenue sufficient to balance the federal budget and shall do so in a manner that is fair and efficient." Even if such an extreme delegation were desirable and constitutional (more on the latter question below), it is not a realistic possibility. There is, however, any number of somewhat less extreme tax-delegation alternatives that are within the realm of possibility but have never been used. Despite the fact that Congress has on occasion delegated the power to set various tariffs and fees, it has never delegated the power to set income tax rates. Why not? Likewise, although Congress regularly delegates tax-base-defining discretion to the Treasury Department, it could certainly do more of this than it does, and the grants of this discretion could be much broader than they currently are. And finally, although Congress has been known to delegate some of its most difficult decisions to independent commissions, it has never done so with tax policy. To be sure, there have been past commissions on tax reform and simplicity, but never have they been given the power to create law (or to create proposals that will then become law in the absence of some action by Congress after the fact), in the same way that the IPAB and the Base Realignment and Closure Commission were given such law-making power. Why not?

[11] David Epstein and Sharyn O'Halloran, *Delegating Powers* (Cambridge, UK: Cambridge University Press, 1999), Table 8.2, 202-203.

In this Article, we urge that these forms of broad delegation should at least be given serious consideration in the tax area as well. The reason is simple enough: There is a set of well-known arguments that justify the broad delegation of policymaking discretion to relatively independent and relatively expert agencies, and, although these arguments are not without significant limitations, they are at least as applicable to tax as they are to other areas of law, where broad delegations have become the order of the day.[12] This is not to say, of course, that there are no differences between tax law and other areas of law. The point merely is that the differences do not justify the stark differences between how discretion is delegated in most areas of law and how it is delegated in tax law. If it deploys its power wisely, Congress stands to benefit from adding greater tax delegation to its legislative arsenal.

If tax law does not differ in relevant dimensions from other laws, then why has tax delegation heretofore been limited to IRS regulations concerning enforcement and tax base definitions? There are doubtless many explanations, including a natural Congressional reluctance to relinquish authority to other bodies. Tax policy is vitally important to the economy and to constituents, though this, in itself, does not distinguish tax policy from other policy areas in which Congress has delegated great authority to regulatory bodies. One perhaps subtle difference is that the power to determine tax policy details is particularly valuable from the

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[12] Some other governments grant broader authority to their tax enforcement agencies. Ireland, for example, has a general anti-avoidance provision (section 811) that delegates the power to determine when tax avoidance has occurred to the Irish Revenue Commissioners, permitting them in so doing to disregard legislatively enacted tax statutes. In 2006 the state of California passed a law (Assembly Bill 32) requiring the California Environmental Protection Agency Air Resources Board to design and implement a market-based system to reduce California's greenhouse gas emissions, which in 2011 took the form of a cap-and-trade system roughly equivalent to carbon taxes. New Zealand formally delegates a significant part of the responsibility for proposing and designing new tax legislation to civil servants in its Inland Revenue Department (see Struan Little, Geof D. Nightingale, and Ainslie Fenwick, Development of Tax Policy in New Zealand: The Generic Tax Policy Process, available at http://www.ctf.ca/CTFWEB/EN/Publications/Tax_Policy/Tax_Policy_Roundtable_2013.aspx). And for many years Sweden has had a similar, albeit less formal, system of tax policy development that relies on delegation of authority to tax professionals in government (Sven Steinmo, The Evolution of the Swedish Model, in Sesanne Soederberg, Georg Menz, and Philip G. Cerny eds., Internalizing Globalization: The Rise of Neoliberalism and the Decline of National Varieties of Capitalism, London: Palgrave Macmillan (2006), 149-164).

standpoint of currying favor with interested parties, particularly affected taxpayers. The member of Congress who has the ability to dispense favors (and disfavors) to taxpayers also has the ability to help other legislators by assisting their constituents or by sharing campaign funds raised from those who seek favors. A member of a Congressional tax writing committee who votes to reduce the committee's authority by empowering the IRS or other agency thereby votes to reduce the value of his or her hard-won committee seat, making it perhaps unsurprising that this does not happen as a matter of course.[13]

Whether broader tax delegation is constitutional is obviously a separate but related question, and one that has been largely unexamined. On one hand, in areas other than tax, most scholars have concluded that there are very few, if any, limits on Congress's power to delegate to administrative agencies. Indeed, much has been written in recent decades about the demise of the so-called non-delegation doctrine as a matter of Constitutional law.[14] In addition, the Supreme Court itself has repeatedly held that the congressional power to delegate lawmaking authority is extremely broad, so long as the statutory delegation includes an "intelligible principle" by which a court can evaluate the agency's exercise of its discretion.[15] Moreover, the Court has in prior tax non-delegation cases stated its view that there is no difference between tax law and other areas of law when it comes to questions of delegation.[16] On the other hand, the Court has also over the years said some things, including the second quote at the start of this Article, suggesting that it regards tax as special. And the current Court—or important members

[13] For examples of tax legislation detail that Congress designed to promote the importance of tax writing committee members, see Edward J. McCaffery and Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 North Carolina Law Review 1159 (2005-2006).

[14] [cites]; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1721 (2002); and Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 Cornell Rev. 452 (2002).

[15] Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

[16] See, e.g., Mayo Foundation v. United States, 568 U.S. 675 (2011).

of it—have made clear that tax legislation is different from other types of legislation, and possibly hold similar views concerning tax delegation.

This Article argues that, when it comes to the non-delegation and related constitutional doctrines, the Court should not impose special, stricter limits on tax delegation. Tax laws, in this sense, are like other laws. In that spirit, the paper addresses three distinct types of tax delegation that are worthy of consideration, though each for a somewhat different constellation of reasons and each subject to a different set of objections. First, Congress could do more delegating in the form of enacting tax standards rather than tax rules, giving the Treasury Department relatively general statements of the policy goals it is trying to pursue in specific tax areas and giving Treasury the power to issue rules to meet those goals (and to change rules as necessary to continue to meet those goals). The rationale for this shift is the standard relative expertise or comparative advantage story that has often been used to justify general delegations of regulatory authority in non-tax contexts. As explained in the next section, Congress already does some of this, but it could do more. Second, Congress could delegate some countercyclical aspects of tax policy to the Federal Reserve, relying on the Fed's expertise, independence, and control over monetary policy to coordinate monetary and fiscal policy to dampen business cycles. The rationale for this move would be that it has the potential to address, at least in part, the standard difficulty that the legislative branch has with respect to credible pre-commitment to optimal policy plans over time. Third, in designing the tax system efficiently and fairly to promote long-run fiscal sustainability, a goal that has eluded Congress for decades, Congress should consider delegation to an independent commission similar to the Base-Realignment-and-Closure model.[17] The rationale for this move has to do with collective action problems that inhibit the legislative

[17] Indeed, a colleague has suggested that such a law might be called the TAX base realignment and LOOPHOLE closure Act.

branch from taking action, even in the face of strong evidence that such action is social welfare maximizing.

It is important to clarify the nature of delegation contemplated in this Article. There is an important sense in which Congress has delegated to its own staff, the Congressional Budget Office, the staff of the Treasury and the IRS, the Council of Economic Advisers, and other important federal policy agencies the job of conceiving and designing potential tax legislation, and suggesting modifications to existing tax provisions. Tax legislation often starts as a reaction to court opinions or decisions of the IRS, at times codifying them, at other times reversing them. Congress does not exist in a vacuum, nor is it capable of creating all tax legislation by itself without input from others. The customary conception of the degree of delegation to federal agencies is the extent to which consequential decisions are made by others following, and not prior to, the relevant Congressional votes. In that sense delegation is the choice by Congress of the stage in the process of policy development at which it inserts itself by enacting statutes. Since Congressional votes are much more deeply political than are other stages in the policy process, this choice has very important consequences for outcomes. Greater delegation means more decision making by parties whose actions follow Congressional votes—with resulting implications for the identities of the decision makers; the role of those parties' preferences, information, and constraints; and the extent to which politics shapes outcomes.

Part II of this Article surveys the arguments for and against general delegation of Congressional authority to administrative agencies. Part III describes several forms of existing tax delegation, pointing out the relatively narrow role reserved for Treasury and the IRS compared with the regulatory role given to other federal agencies. Part IV sets out three general types of expanded tax delegation, which go beyond what has been done in the tax area but that have precedents in other areas. These include (a) delegations to Treasury of the power to design tax subsidy provisions, (b) delegations of the power to set tax rates either to Treasury or to the Fed, and (c) delegations of the power, and responsibility, to adopt comprehensive tax reform proposals that would get some form of fast-track treatment in Congress. Part V addresses the question of the constitutionality of these sorts of expanded tax delegation. Part VI briefly concludes.

II. Arguments for (and against) Broad Delegation

One of the most remarked upon developments in American law, ever, is the rise of the regulatory state.[18] For many commentators, the delegation of broad lawmaking authority and the increased role of regulatory agencies were both inevitable and desirable developments given the increasing complexity of modern economies.[19] One of the traditional rationales for broad delegation has to do with relative expertise, and the notion that regulatory agencies have greater area knowledge and focus on specific issues than does Congress.[20] A perhaps extreme example is the National Science Foundation, to which Congress delegates the task of selecting which researchers will receive federal grants to do basic research. The NSF has greater knowledge than any congressional committee or its staff would realistically acquire about which scientific projects are likely to yield important results. The same principle applies to any major regulatory

[18] For surveys of the earlier literature on federal delegation see Epstein and O'Halloran op. cit. and Edward Glaeser and Andrei Shleifer, *The Rise of the Regulatory State*, 41 Journal of Economic Literature 401 (2003).

[19] For representative justifications of broad congressional delegation of lawmaking power to agencies, and thus of the regulatory state in general, see, e.g., Jerry L. Mashaw , *Prodelegation: Why Administrators Should Make Political Decisions*, 1, J. L. Econ. & Org. 81 (1985); Mark Seidenfeld, *Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992); Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law (1997); Peter Schuck, *Delegation and Democracy: Comment*, 20 CARDOZO L. REV. 775 (1999) .

[20] Mashaw, *Prodelegation*, *supra*; BRUCE ACKERMAN & WILLIAM HASSLER, CLEAN COAL, DIRTY AIR (1981); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 73 (1969); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

legislation, such as the Food and Drug Act or the Clean Air Act: Although members of Congress and congressional staff can become relatively well versed in the general policy goals to be pursued, the details of implementation simply have to delegated.[21] Of course, it is not true that individual legislators, together with their staffs, are incapable of developing considerable expertise on any number of policy questions. In theory, a congressional committee could be created for every major policy issue, and each committee could be permanently staffed with experts who would spend of all their waking hours working out detailed legislative solutions to every regulatory issue. But that would be an inefficient division of labor. That is, it would be extraordinarily inefficient to expect congressional committees and their staffs, given the broad scopes of their designated responsibilities, to be able to achieve or maintain the level of expertise necessary to implement the laws in every field that federal law reaches. However capable were their staffs, members of Congress would be inappropriate and overtaxed supervisors if they needed to work through all of the issues that are apt to arise. To the contrary, the more efficient place to insert such detailed, specialized, and constantly updated expertise in the law-making process is post enactment, with an agency.

Another common justification for broad congressional delegations of lawmaking power has to do with inherent differences between the process of issuing regulations and the process of passing statutes.[22] Even when the legislative process is working well, it may take longer for Congress to pass a new law than it takes an agency to make a new rule. As a result, agencies can

[21] The congressional staff that drafted the broad delegations in the Clean Air Act probably knew a great deal at the time about the need to regulate air quality generally and the hazards of pollution to human well being and the environment. But they would not have been expected to keep up to date on all of the subsequent scientific advances and accumulating knowledge concerning pollutants that threaten public health and what should be done about them. That is why the statute was written so that the EPA was empowered to define what constitutes a pollutant. Of course, no one really disagrees that that Congress needs to delegate the detail work. The harder question is whether Congress should delegate the more substantive policy choices, and this Article argues that it should—or that the case for delegating tax choices is as strong with tax as elsewhere.

[22] See, e.g., the review of the extensive political science literature on Congressional delegation in Epstein and O'Halloran op cit. Chapter 2.

react more quickly than Congress to certain new information, including recent scientific findings and changed circumstances. In addition, the nature of the legislative process inhibits action. This can be true, for example, when there is consensus that some action should be taken with respect to a particular problem, but there is deep division—say, between Republicans and Democrats, or within either party—on what precisely should be done. In such a case, a broad and somewhat vague delegation of authority by Congress can permit legislators to claim to have done something, while at the same time shifting blame for the final outcome to the regulator.[23]

One real world example of this phenomenon, mentioned above, was the closing of military bases in the late 1980s early 1990s.[24] It was well understood at the time that, with the rapid decline of the Soviet military threat, the size of the U.S. military needed to be radically reduced. The difficulty, however, was that any member of Congress who voted in favor of a measure that closed a base in his or her own jurisdiction risked political suicide. This presented a major collective action problem: a change that was clearly welfare enhancing, and that needed to be made, could not be directly enacted given the incentives of individual lawmakers. Congress could, however, vote to solve the problem indirectly, and it did. In 1988 Congress passed the Base Realignment and Closure Act (BRCA), which created an independent commission and gave it the legal authority to determine which bases to close, subject to Congress's right to overturn the proposal through a joint resolution. The process worked as follows: First, the head of each military service submitted a list of recommended base closures to the Secretary of Defense, who could then add to or subtract from that list. After making his own changes to the list, the Secretary then submitted it to the Commission, who in turn had the

[23] For this method to advance lawmaker interests, it is necessary that voters credit them for having addressed a problem, but not hold them fully responsible for the distress caused by the choices made by an agency or commission in exercising its broad discretion. Mashaw, *Prodelegation*, supra note 18.

[24] This section draws heavily from Kenneth R. Mayer, *Closing Military Bases (Finally)): Solving Collective Dilemmas Through Delegation* 20 Legislative Studies Quarterly 393 (1995).

power to add or subtract bases. At that point, the final list of recommended base closures went to the President who could either approve the list (with no changes) or veto it, starting the whole process over. If the list was approved by the President, the Secretary of Defense then had the authority to begin implementing the closures on the list, unless the process was stopped, within 45 days of presidential approval, by a joint resolution of both houses of Congress.[25]

The arguments *against* broad delegation of powers are also well known,[26] concentrating largely on issues of legitimacy and accountability. Granting agencies great authority raises the possibility that they will enact regulations that are inconsistent with Congressional intent. Furthermore, even if the regulations adopted by an agency reflect what Congress intends, the mere procedural fact that an agency rather than Congress is directly responsible for the final product may worsen the public perception of its legitimacy. In the U.S. form of democracy, an elected Congress is endowed with the power and responsibility to make national laws, and is answerable to voters if it performs poorly in doing so. Congress generally holds open hearings and votes, permitting voters to understand the contributions of their representatives to legislative outcomes, and to a certain degree, why legislators voted the way they did. It may be more difficult for voters to hold Congress accountable for the actions of an agency, even if Congress created the agency fully anticipating its future behavior. As a result, the democratic nature of the system is perhaps reduced, and the legitimacy of its actions undermined.

[25] Mayer, supra. There is also something similar in the ACA, which delegates enormous Medicare cost-cutting authority to the Secretary of Health and Human Services and the so-called Independent Payment Advisory Board (IPAB). http://www.whitehouse.gov/blog/2011/04/20/facts-about-independent-payment-advisory-board. The IPAB, consisting of 15 experts named by the President and confirmed by the Senate, is to recommend policies to Congress to help cut Medicare costs. This could include "ideas on coordinating care, getting rid of waste in the system, incentivizing best practices, and prioritizing primary care." Congress then has the power to accept or reject these recommendations. If Congress rejects the recommendations, and Medicare spending exceeds specific targets, Congress must either enact policies that achieve equivalent savings or let the Secretary of Health and Human Services follow IPAB's recommendations.

[26] See, e.g., Mashaw; *Prodelegation, supra*; Schuck (refuting standard arguments against broad delegation) See, e.g., DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1969).

These are valid concerns, although they have often been overstated by the leading critics of broad delegation to agencies.[27] First, if an agency acts in a way that diverges substantially from the wishes of Congress, Congress can pass another statute to restrict or remove the agency's authority. This is not a complete response, of course, since one of the reasons for delegating can be the inability of Congress to act, and the political coalition that enabled the delegating statute to pass in the first place may be difficult or impossible to put together to pass constraining or clarifying legislation. Nevertheless, Congress's power to pass new laws acts as a constraint on agency discretion. Second, in the case of executive agencies, the agencies' discretion is also constrained by the President, who is answerable to the electorate. Indeed, some argue that being accountable to the President is more democratic than being accountable to the Congress.[28] Third, there is judicial review: courts can be called on to determine whether an agency exceeds its legislative authority. Fourth, interested parties participate in the notice and comment process that agencies use in crafting regulations and that partly justifies their authority. Fifth, there is media coverage of the really big issues. Finally, there are agency norms that influence the actions of professional staff and even political appointees.

There is a related criticism that broad congressional delegation of lawmaking authority to agencies permits Congress to avoid accountability by shifting blame to agencies if some voters are unhappy.[29] Indeed, this Article notes that the ability to shift blame may make it possible for Congress to enact some beneficial reforms that political dynamics would otherwise prevent. Critics argue that the federal government should not be able to wield its power to interfere with economic activity, with individual liberty, unless a certain number of legislators representing

[27] See generally Peter Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, Cardozo Law Review, p.784-94.
[28] Steve Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23 (1995).
[29] See generally David Schoenbrod, Power Without Responsibility (1995).

disparate parts of the country can publicly agree that doing so makes sense. Exactly how Congress ought to express its policy preferences is potentially a separate question. There are some who argue that having Congress enact more general standards, with the specifics of implementation left to agencies, actually enhances the accountability of Congress.[30] Sunstein notes that, as a general matter, "[t]here is no evidence that social welfare is more likely to be produced via specific instructions rather than via general ones."[31] More specifically, there is no evidence that agencies do better at maximizing social welfare when they are given a very specific statute than when they are given general guidance.[32]

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

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[30] Mashaw, *Prodelegation*, *supra*.
[31] Cass Sunstein, Nondelegation Canons.
[32] Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 324-28 (1987)

III. Current Tax Delegation

U.S. tax policy is, to a remarkable (and unusual) extent, determined by Congress not only in its broad outlines but also in its details. Congress enacts the statutes that together comprise the Internal Revenue Code (IRC). The IRC defines the tax base and sets tax rates, which of course are used to calculate each taxpayer's liability. The IRC contains lengthy and detailed definitions of most of the key terms in the federal tax laws, usually leaving only a modest amount of substance to be decided by the Treasury Department and the IRS, although there are notable exceptions. Thus, in the vast majority of cases, Treasury regulations serve the function of interpreting or filling in the gaps of an already very detailed IRC. Most Treasury guidance is directed at defining the tax base as well as handling issues of timing, attribution, and characterization, such as whether an item of income is capital or ordinary, and the extent to which expenses are deductible.

Congress explicitly delegates the general power to make tax regulations in IRC section 7805(a), which provides that "...the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code]…." In addition, several sections of the IRC explicitly call on the Secretary to provide regulations for their interpretation and enforcement, an example of this being section 25A, which provides education tax credits. Congress also imposes limits on the Treasury's rulemaking authority, including restrictions on any retroactive impact of new regulations[33] and limits to the duration of temporary regulations.[34] Courts grant Treasury regulations broad authority, with the U.S. Supreme Court in the 2011 *Mayo Foundation* case holding that tax regulations are eligible for *Chevron* deference, making

[33] IRC § 7805(b).
[34] IRC § 7805(e).

them enforceable unless determined to be arbitrary, capricious, or manifestly contrary to the statute to which they apply.

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

The Treasury regulations under IRC sections 162 and 263 offer rather typical examples of Congressional tax delegation. IRC section 162 permits taxpayers to claim deductions for "ordinary and necessary" expenses, but IRS section 263(a) denies taxpayers immediate tax deductions for "any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." The idea behind IRC section 263(a), which is quite consistent with the rest of the IRC, is that the costs of permanent improvements should instead be capitalized into the value of a property, so taxpayers would be entitled to deduct the cost of permanent improvement either as subsequent depreciation deductions or as greater basis when gains or losses are ultimately realized. There remains the knotty question of exactly how one distinguishes expenses for ordinary repairs, which are immediately deductible under IRC section 162, from expenses for permanent improvement, which are not.

Here the Treasury has issued a variety of guidance to taxpayers, and presumably accompanied this guidance with IRS enforcement. Regulation 1.162-4 explains that "The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense…." Regulation 1.263(a)-1(b) adds that taxpayers may not deduct "…amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use." These regulations are helpful, but less than fully clarifying. In 2001 the IRS issued Revenue Ruling 2001-4, which identified different scenarios of expenses in the particular context of airframe repair and overhaul, distinguishing types of expenditures that the IRS considered to be deductible repairs from those it considered to be nondeductible improvements. And in the new (2014) Regulation 1.263(a)-3, following earlier temporary regulations, the Treasury offered much more comprehensive (and austere) guidance intended to help taxpayers properly classify their expenditures, and to prevent tax avoidance.

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

The type of tax lawmaking authority delegated by Congress to Treasury in the case of sections 162 and 263 is rather modest and quite common. There are a few examples, however, of Congress delegating broad tax lawmaking power to the Treasury Department. One extreme example is IRC section 482. Section 482 concerns the allocation of income between related parties, an issue primarily in international transactions in which taxpayers typically have incentives to arrange the nature and pricing of intercompany deals in order to claim that income is earned in low-tax rather than high-tax jurisdictions. Section 482 is exactly two sentences long, empowering the Secretary of the Treasury to allocate income and deductions "...in order to prevent evasion of taxes or clearly to reflect ...income...." The Treasury Department, on behalf of the Secretary, has issued voluminous regulations under section 482, thereby assuming the entire responsibility for its definition and enforcement.[35] Again, Congress certainly could have legislated the regulations under IRC section 482, but instead legislated its desired outcome – that income and deductions generated in transactions between related parties reflect true income – and left the many important details to the IRS and Treasury.

IV. Expanding tax delegation

This section notes that there are types of tax delegation in which Congress rarely or never engages, and argues that the absence of Congressional delegation may not be a good thing. First, despite the delegation of broad regulatory authority to the Treasury under IRC section 7805(a) and despite a few examples such as IRC section 482, Congress rarely enacts a general standard that grants broad lawmaking power to the Treasury Department in the way that it does in other areas of law. More specifically, there are particular types of broad authority that are never delegated. For example, Congress has never given the Treasury Department the power to set

[35] In Robert J. Peroni, Charles H. Gustafson and Richard Crawford Pugh eds., *International Income Taxation Code and Regulations: Selected Sections, 2013-2014 Edition*, (Chicago: Commerce Clearing House, 2013), the (unabridged) text of IRC section 482 fills less than one-quarter of a page (p. 102), whereas the section 482 Treasury regulations occupy 184 pages (pp. 1236-1420).

marginal tax rates or levels of tax credits. Instead, Treasury regulations concern appropriate definitions of taxable income, deductions, expenditures that are eligible for tax credits, and similar features of taxpayer situations.[36] Second, Congress has never delegated any sort of tax lawmaking power to a body other than the Treasury Department – for example, to the Federal Reserve, or to an independent commission. The next section develops these examples in greater detail and suggests normative reasons why such forms of tax delegation, though largely without precedent, offer potential solutions to major problems and therefore deserve serious consideration.

1. Delegating the design of tax subsidy programs

The first way in which Congress might expand its delegation of tax lawmaking authority would be simply to enact more of the open-ended, less detailed statutes that provide general guidance as to the tax policy goals that it (Congress) wishes to achieve, leaving the Treasury Department to work out—to enact—the details. This would entail enacting more Code sections with features like those of section 482, for example. But section 482, which conveys the power to create rules for accurately measuring net incomes of large multinational corporations, is just one type of broad delegation to Treasury. A related but importantly distinct type of potential delegation to Treasury would be more of a departure from current practice: Specifically, Congress might delegate to Treasury the job of designing provisions intended to encourage particular types of investments. The Research and Experimentation (R&E) Tax Credit offers an example. It is a tax subsidy program with details that are largely, although not entirely, specified in the tax code itself. The R&E Tax Credit might be more effective if Treasury had more of a hand in its design.

[36] Certain tax base definitions can influence marginal tax rates by conditioning the availability of tax credits, deductions, or income inclusions on receipt of marginal income; but these are typically small and indirect effects.

Under current IRC section 41(a)(1), there is a credit allowed for 20% of "qualified research expenditures" over the "base amount." Qualified research is defined in the Internal Revenue Code and in the Treasury regulations. The base amount is the product of average annual gross receipts in the previous four years and the average ratio of qualified research spending relative to gross receipts by the same taxpayer during 1984-1988, with these and other details specified in the Internal Revenue Code. The Treasury has issued regulations, and other guidance, to adjust around the edges – to refine the definition of qualified expenditure – but otherwise, very little of the substance of the R&E Tax Credit has been delegated to Treasury.

One could easily imagine delegating more authority to Treasury on this issue. The complicated design of the R&E Tax Credit is a product of wanting to encourage greater research spending without unnecessarily providing tax credits for research that firms would have undertaken in the absence of the credit. As a general matter, it is impossible empirically to distinguish research that would have taken place in the absence of the credit from marginal research for which the credit is responsible.[37] The R&E Tax Credit design takes a stab at doing so, offering greater tax benefits to firms that significantly increase their research spending relative to historical averages (adjusted for changes in gross revenues). One could imagine delegating more authority to the Treasury to pursue Congress's goal of encouraging research. Instead of enacting a statute that details how the credit will work, the statute could be more open ended, articulating the general goals that Congress wants the agency to pursue. Treasury could be given the task of increasing investment in research and experimentation that maximizes the long-run benefit to the U.S. economy, and be left to structure the tax benefit in the way that most

[37] Note that this is not inconsistent with the many statistical findings, reviewed in Nirupama Rao, *Do Tax Credits Stimulate R&D Spending? The Effect of the R&D Tax Credit in its First Decade* (NYU Working Paper, April 2013, available at http://wagner.nyu.edu/files/faculty/publications/do-tax-credits-stimulate-r-d-spending.pdf), that tax benefits encourage significantly greater research spending.

efficiently achieves these goals. It might well choose to offer a credit for research exceeding historical levels, or it might not; and the credit percentage might vary over time, depending on what produces the best response and how demand for various types of research investments changes over time. Likewise, Treasury might fine-tune the definition of qualified expense, as experience and ongoing research reveals where the credit should be focused. Importantly, Treasury could experiment with tailoring the tax credit different ways in different years, or for different activities during the same years, to see which is the most effective at encouraging research. An executive agency charged by Congress with trying to stimulate research might be more willing than Congress itself to experiment with alternative approaches despite hostile reactions from some affected taxpayers, understanding that some approaches will be unsuccessful, but persisting with the experiments in the belief that they improve tax policy in the long run.

Congress might even give the Treasury Department an R&E budget to accompany its greater discretion. That is, Treasury could be given a target amount of money that it may (or even must) spend on encouraging research and experimentation. U.S. corporations claimed $8.5 billion of research credits in 2010 (http://www.irs.gov/uac/SOI-Tax-Stats-Corporation-Research-Credit); and according to Treasury, the R&E Tax Credit was responsible for at least $1 of additional private sector research investment for every $1 of tax credit provided.[38] The Obama administration has proposed making permanent and increasing the credit percentage, in hope of spending $100 billion on R&E Tax Credits over 10 years. This spending plan could be delegated, with the spending limit perhaps monitored by the GAO. The same sort of delegation could occur with other types of tax incentive provisions. For example, Congress could delegate

[38] http://www.treasury.gov/resource-center/tax-policy/Documents/Investing-in-US-Competitiveness-Benefits-of-RandE-Tax-Credit-3-2011.pdf

the design of other, more narrowly tailored credits (such as the electric vehicle credit) and deductions meant to encourage equipment investment (such as bonus depreciation).

2. Delegating tax rates

Although Congressional delegation of income tax base definition is certainly not unprecedented, delegation of the power to set income tax rates is. Traditionally, income tax rates are specified by statute in excruciating detail in IRC sections 1 (for individuals) and 11 (for corporations), with different marginal tax rates applying to different "brackets" of income. These legislated marginal tax rates change from time to time, either as the result of a change in the political party controlling the federal government (since the major parties often disagree about the appropriate degree of progressivity in the rate structure) or as the result of an unexpected need for additional revenue or fiscal stimulus.[39] However, other than delegating to Treasury the job of indexing brackets for inflation, Congress maintains sole responsibility for determining the rate structure. That is, Congress has never delegated the power to set these tax rates to the Treasury Department or to any other regulatory body.[40] Why not?

One possibility is that Congress retains control over income tax rates because income tax rates play an especially important role in the distribution of tax burdens. Some view the distribution of tax burdens to be a quintessentially political decision entailing tradeoffs among different groups of taxpayers whose interests are best represented and given voice in the rough-and-tumble of the tax legislative process. These choices are never easy, implicating, as they do, core national values. The difficulty with attributing Congressional reluctance to delegate rate setting to this consideration, however, is that Congress frequently delegates to other agencies

[39] In addition, there are nominal changes in marginal tax rate brackets due to automatic inflation indexing.
[40] As discussed in Part V below, Congress frequently delegates to an agency the power to set "rates" or "fees." The claim here is that they have not before delegated the power to set income tax rates, individual or corporate.

decisions that have distributional consequences similar to those of tax policy choices. For example, Congress permits the Occupational Safety and Health Administration to craft rules that impose significant responsibility for workplace safety, with accompanying distributional consequences for workers and firms; rules enacted by the Environmental Protection Agency similarly affect the distribution of benefits and burdens of protecting the environment; and prior to the wave of federal deregulation of the 1970s and afterward, federal regulation of energy, telecommunications, and other utilities was often explicitly focused on pricing structures designed to achieve distributional objectives. The efficiency and distributional goals that motivated, and that motivate, this and other federal regulation bear uncanny resemblance to those that underlie tax policy. All of which leaves unanswered the central question: why should the regulatory approach to tax policy differ from regulatory approaches to other areas of federal policy? Notably, it is not that the design of the income tax rates is not delegated at all. It is just delegated *prior to enactment* to the tax writing committees—the Senate Committee on Finance, the House Ways & Means Committee, and the Joint Committee on Taxation. For that reason, perhaps the better way to put the question is why, in the tax area like no other, are important distributional decisions—such as what rates apply to what levels of income—delegated by Congress only to Congressional committees before enactment?

One possible explanation is that locating the power to set tax rates with Congress and its committees is essential to the bargaining that characterizes a successful legislative process. In this view, if Congress were to delegate to an agency control over income tax rates, such a delegation would remove from the legislative process an issue with respect to which legislators can bargain. The absence of this bargaining chip would make it more difficult for Congress to reach tax and other legislative deals. For example, suppose that conservative members of

Congress would agree to raise tax rates only in exchange for significant spending cuts, and liberals would concede on government spending reductions only in return for higher tax rates. In this example the only way to find common ground would be to bundle tax increases with spending cuts. If, however, Congress were to give the Treasury all authority over tax rates, the deal might not be concluded.

One response to this argument is that the same sort of logrolling consideration applies equally forcefully to most other policy areas other than tax, and in those areas Congress has nevertheless agreed to delegate enormous lawmaking power to agencies, including power over decisions with large distributional consequences. For example, delegating to the EPA the power to determine what constitutes a pollutant removes that chip from the Congressional bargaining table. So it is difficult to see why tax policy is exceptional in this regard. Furthermore, even if this consideration is important, it follows only that Congress should not irreversibly delegate all of its power to change tax rates, which it constitutionally is unable to do in any case. Just as Congress can always enact a law to rein in the EPA if it goes too far in defining a pollutant, Congress could pass a law undoing any rate change enacted by Treasury that went too far. What these political arguments imply is not that Congress is unable usefully to delegate at least some of its discretion over tax rate setting. Rather, they suggest that Congress might want to delegate only *some* of its control over rates.[41]

[41] Help in policing the boundary between the rate-setting power Congress delegates to Treasury and the rate-setting power it retains for itself can come from the courts. Treasury would be required by principles of administrative law not to act beyond the congressional grant of rate-setting authority. Taxpayers who were affected by whatever rate increases Treasury adopted would have standing to sue to question whether those increases were beyond what Congress intended, although *Chevron* deference would presumably be accorded to Treasury rate-setting decisions, just as such deference is applied to other agency decisions in the tax field. For general discussion of the use of administrative law to constrain agency discretion, see, e.g., Lisa Schultz Bressman, Disciplining Delegation After Whitman v. American Trucking Ass'ns, 87 Cornell L. Rev. 452 (2002); and Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev. 303 (1999).

There are several reasons why Congress might want to delegate control over tax rates. The first echoes the arguments for Congressional delegation of broad authority to agencies in general and to Treasury in particular. It is already the case that Congress delegates considerable authority to the Treasury Department to interpret Code sections and to enforce tax laws. These delegations presumably reflect Congressional determination that Treasury and the IRS have comparative advantages, in terms of expertise and time, with respect to these aspects of tax law. The question this Article poses is why the same point does not apply to tax rates. Assuming that Congress delegates regulatory authority to the Treasury in the expectation that Treasury will deploy its expertise to craft sensible regulations that are consistent with Congressional intent, Congress might want to permit the Treasury also to modify tax rates with similar results. Second, tax bases and tax rates together determine tax obligations, so regulatory changes to tax base definitions, which the Treasury already undertakes, automatically carry implications for the distribution of tax burdens. Congress might have a strong interest in granting the Treasury the power to adjust tax bases and tax rates together in a distribution-neutral fashion, which will usually require tax rate adjustments to accompany changes in tax bases.

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

An argument can be made that the Treasury Department, being answerable to the President, would be more responsive than Congress to changes in circumstances that affect the majority of Americans, because the President answers to a majority of the electorate in a way that no single legislator or even group of legislators does. If this is true, it would mean that Treasury might be better than Congress itself at responding to such changes in circumstances. However, such responsiveness is a liability in settings in which effective policy requires committing to a consistent plan over time.[42] In that case, and for that reason, the Federal Reserve might be a better locus for delegated tax-rate setting authority than Treasury. The customary rationale for central bank independence is indeed to reduce political influence over monetary policy and thereby reassure financial markets of the credibility of long-run monetary policy: specifically, to commit governments not to run large budget deficits that they then monetize, causing inflation and implicitly taxing holders of government bonds.[43] An independent monetary authority such as the Federal Reserve is instead charged with maintaining steady long-run monetary stability while using policy mechanisms to reduce the amplitude of economic cycles. It would be natural likewise to delegate some countercyclical tax policy tools to the Federal Reserve, permitting it, say, to adjust tax rates within a band (set statutorily by Congress) in response to short- and medium-run economic fluctuations.

A fourth, and related, reason to delegate tax rate authority is to avoid Congressional determination of tax policy features that Congress is unwilling or unable to undertake. Congress might, for example, pass a law requiring the Treasury to select tax rates and bases that raise a given amount of tax revenue in a manner consistent with broad income tax progressivity and that

[42] Finn E. Kydland and Edward C. Prescott, Rules Rather than Discretion: The Inconsistency of Optimal Plans, 85 Journal of Political Economy 473 (1977).

[43] For a survey of the literature and evidence of the effectiveness of central bank independence, see Christopher Crowe and Ellen E. Meade, The Evolution of Central Bank Governance around the World, 21 Journal of Economic Perspectives 69 (2007).

distributes the burden fairly—or, if that is too much discretion to delegate, to do so in a way that distributes the tax burden according to some prescribed distributional table, leaving Treasury to determine the rates that best achieve that result, subject perhaps to Congressional override by joint resolution majority vote of both houses. Insofar as tax rate changes are driven by fiscal stimulus concerns, Congress could delegate the power temporarily to lower marginal rates, within set boundaries. For example, current individual income tax rates are 10, 15, 25, 28, 33, 36, and 39.6 percent. Congress could enact a law permitting Treasury or the Federal Reserve, on determining that a tax rate reduction is necessary for the economy, to reduce all rate brackets by up to 10 percent of their prior levels for 6 to 18 months, which would have immediate effect unless Congress passed a joint resolution reversing the rate change.

One objection to delegating control over tax rate-setting to the Treasury Department is that such a delegation gives too much control over fiscal policy to one branch of government. The Treasury Department ultimately answers to the President, who appoints the Secretary of the Treasury as well as many other high ranking Treasury officials. Presidential appointees might be tempted to make tax rate changes that benefit the President's political future and that of his or her political party. For example, they might want to cut tax rates to boost the economy in the period leading up to an election, or to exercise the power to set tax rates in a way that maximized the advantage to the President's election base or swing voters in the next election.[44]

These are serious considerations, though they would seem to apply with equal force to delegation of policy in areas other than taxation, where Congress is evidently not uncomfortable delegating regulatory authority. For example, one could imagine political manipulation of

[44] These political considerations are distinct from the pre-commitment and time-inconsistency problems already mentioned. Here the argument is not that the executive branch—seeking only to maximize social welfare—will find it difficult to maintain a time consistent policy plan, but rather that the executive on occasion may have an incentive to use the office of the Treasury for purely partisan political purposes.

environmental regulations – to favor certain consumers, or certain industries – around the timing of sensitive elections, yet either this happens very little or else its occurrence has not prompted widespread alarm. Furthermore, the President answers to a larger fraction of the voting population than does any member of Congress and is arguably likely to be more responsive to the needs of the overall majority of the population.[45] Finally, concern over excessive presidential influence over rate setting could in theory be dealt with by delegating only a limited amount of rate setting power, requiring that the Treasury coordinate its actions with the Congressional Budget Office, or else the use of an independent agency or commission styled on the Federal Reserve – or possibly just giving this authority to the Federal Reserve, which it could exercise along with its power over the money supply. Indeed, there is some research suggesting that, if countercyclical fiscal policy is to be used, the optimal approach is to coordinate monetary and fiscal stimulus, which may be easier to do if one body has both powers.[46]

Another alternative to delegating to the Federal Reserve tax rate setting power, and the fiscal stimulus that it provides, would be to delegate that power to a formula. That is, Congress could enact a statute providing that, in the event unemployment were to rise above a given threshold (say, 7.5% or some other point at which fiscal stimulus is generally deemed

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[45] Cite literature on benefits of powerful unitary executive

[46] For evidence of the effectiveness of countercyclical fiscal policy, see Alan J. Auerbach, William G. Gale and Benjamin H. Harris, Activist Fiscal Policy, 24 Journal of Economic Perspectives 141 (2010). For analysis of the benefits of coordinating monetary and fiscal policy, see Klaus Adam and Roberto M. Billi, Distortionary Fiscal Policy and Monetary Policy Goals, 122 Economics Letters 1 (2014), Klaus Adam and Roberto M. Billi Monetary Conservatism and Fiscal Policy, 55 Journal of Monetary Economics 1376 (2008), Jess Benhabib and Stefano Eusepi, The Design of Monetary and Fiscal Policy: A Global Perspective, 123 Journal of Economic Theory 40 (2005), William Branch, Troy Davig and Bruce McGough, Monetary-Fiscal Policy Interactions under Implementable Monetary Policy Rules, 40 Journal of Money, Credit and Banking 1095 (2008), Jagjit S. Chadha and Charles Nolan, Optimal Simple Rules for the Conduct of Monetary and Fiscal Policy, 29 Journal of Macroeconomics 665 (2007), Avinash K. Dixit and Luisa Lambertini, Interactions of Commitment and Discretion in Monetary and Fiscal Policies, 93 American Economic Review 1522 (2003), Stefano Eusepi and Bruce Preston, Stabilizing Expectations under Monetary and Fiscal Policy Coordination, National Bureau of Economic Research Working Paper No. 14391 (2008), Mats Persson, Torsten Persson, and Lars E.O. Svensson, Time Consistency of Fiscal and Monetary Policy: A Solution, 74 Econometrica 193 (2006), and Diana N. Weymark, Inflation, Government Transfers, and Optimal Central Bank Independence, 51 European Economic Review 297 (2007).

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

3. *Delegating tax reform*

Many have described the need for tax reform as a problem analogous to the base-closing problem: everyone wants it to happen, but no one wants to vote for anything that imposes burdens on themselves or others about whom they care particularly strongly. There have been many U.S. tax reform efforts, even tax reform commissions, with extensive reports and nothing legislatively to show for the effort, possibly in part due to the absence of a shared national consensus on the desirability of tax reform, but also due to the reluctance of legislators to enact new tax laws that heavily burden certain groups. Three recent examples are illustrative.

The President's Advisory Panel on Federal Tax Reform was empaneled by President Bush in January 2005, and issued its report in November 2005.[47] This was a bipartisan commission that included political and academic tax experts, with an outstanding staff, and was charged with recommending tax options to make the U.S. tax system simpler, fairer, and more conducive to economic growth. The commission developed two promising blueprints for major federal tax reform, which the Treasury was then supposed to evaluate, possibly amend, and selectively recommend to Congress – except that the political winds shifted and the Treasury never forwarded either recommendation. In 2010 Congress considered legislation that would have created a bipartisan National Commission on Fiscal Responsibility and Reform that would recommend policies to improve the fiscal situation in the medium term and achieve fiscal stability over the long run, with the commission's recommendations subject without amendment to up-or-down Congressional votes. This was defeated in the Senate, after which President Obama nonetheless created the commission (known informally as the Bowles-Simpson commission, after its co-chairs) giving it the membership and charge it would have had under the failed legislation, but without any special status for its recommendations. Its December 2010 report was passed over considerable dissent within the commission, and its recommendations were never brought to a vote in Congress. Finally, as part of a political deal to raise the federal debt ceiling and thereby avoid defaulting on the debt, the Budget Control Act of 2011 created the Joint Select Committee on Deficit Reduction (informally known as the Supercommittee), a bipartisan joint committee of Congress charged with developing a plan to reduce federal deficits by $1.5 trillion over 10 years. The committee's recommendations were to be subject without amendment to up-or-down Congressional votes; in the absence of committee recommendations

[47] Simple, Fair and Pro-Growth: Proposals to Fix America's Tax System, Report of the President's Advisory Panel on Federal Tax Reform, Washington DC: U.S. Government Printing Office, November 2005.

and successful passage by Congress by 23 December 2010, the bill authorized automatic $1.2 trillion spending cuts over 10 years. In the event, the committee failed to reach agreement, no recommendations were forthcoming, and the automatic spending cuts took effect.

One could imagine Congress more forcefully passing legislation empowering a commission to propose tax legislation that would automatically become law in the absence of specified Congressional intervention, a design similar to that of the base closing commission. Congress could instruct the commission to raise a specified amount of revenue, or revenue equal to a specified fraction of national income, with its tax plan, and Congress could identify the tax burden distribution (as a function of income, age, geography, or other variables) that it wishes the tax plan to impose. This would be a very strong form of delegation that might permit Congress to achieve goals that it has so far found elusive.

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

The commitment associated with delegation has the most potential value in circumstances in which the absence of commitment is most problematic. Long-run fiscal imbalance is arguably the primary tax and spending problem subject to commitment problems, dwarfing (and at time coinciding with) the problems associated with lobbying and special interests. Long-run problems, such as structural fiscal deficits and long-run environmental problems, are paradigmatic cases of collective action problems, because many of the affected parties are unborn and therefore unable to bargain. Congress and other legislatures are notoriously willing to forego policy sustainability in return for short-term advantages. One possibility would be for Congress to empanel a commission with authority – subject to some form of Congressional override – to enact tax and spending policies that bring the country's accounts into long run fiscal balance. In a nod to reality, such a commission's actions might have binding force starting several election cycles from the enactment date. In the absence of truly binding constraints, it is admittedly uncertain just what impact the commission's output would have – though the general unwillingness of Congress to tamper excessively with existing regulations offers a glimmer of hope that policy commitments, even if not fully binding, can have important and beneficial effects on policy outcomes.

V. The Constitutionality of Expanded Tax Delegation

Expanded tax delegation must be constitutional in order to be feasible, and while it has not been directly tested before the Supreme Court, there are strong reasons to expect that the Court would uphold its constitutionality. The main argument is that the so-called nondelegation doctrine, the most likely constitutional grounds on which expanded tax delegations might be challenged, is dead; or at least the nondelegation doctrine is so weak that it no longer matters. According this argument, the Constitution actually places very few limits on the types of authority Congress can delegate to an agency or commission, and the limits that remain are easily satisfied. The interesting question is whether the same statement applies to delegations of tax law, given that the Constitution expressly mentions taxation as one of the powers granted to Congress. And the Court has occasionally suggested that tax is different, as evidence by Justice Douglas's line in the *National Cable Television Association* case quoted at the start of this Article.[48] Nevertheless, the conventional wisdom seems to be that Congress has just as much freedom to delegate tax lawmaking power as it has to delegate any sort of lawmaking power.

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

[48] National Cable Television Assoc. v. US, 415 U.S. 336, 340 (1973) ("Taxation is a legislative function...[and] Congress is the sole organ for legislating taxes.") (Douglas, J.).

that the delegation lacked an intelligible principle, only twice. And both times were in the 1930s.[49] As a result, constitutional scholars and Supreme Court Justices alike seem to agree that the doctrine no longer has any bite.[50]

A number of rationales have been offered to justify the disappearance of the nondelegation doctrine as a constraint on Congress's power to delegate. Some of these rationales track the justifications for delegation reviewed in Part II: the relative expertise and flexibility and distance from the political process of agencies compared with Congress.[51] Another commonly cited reason why the Court has been reluctant to use the Constitution to strike down congressional delegations of authority is that the Court does not want the job of policing the line between what is delegable and what is not delegable.[52] Rather, this is the sort of political question that the Court prefers to leave to the elected members of government. In addition, to the extent a vigorous nondelegation doctrine would be motivated by a desire to make sure that Congress is held accountable for the laws promulgated under its authority, such accountability remains, even without a nondelegation doctrine to impose constitutional limits, since federal agencies cannot make law without first receiving some congressional legislative authorization that could always be legislatively revoked.[53] Moreover, scholars have pointed out

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

[50] Many have pronounced the doctrine either "moribund" or "dead." See, e.g., FPC v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes. ..); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 132-33 (1980); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000); and Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721 (2010) ("In our view there just is no constitutional nondelegation rule, nor has there ever been.") But some scholars argue that the doctrine should be brought back to life; see, for example, Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327 (2002).

[51] Mashaw; Schuck; Posner & Vermeule.

[52] Id.

[53] An interesting argument has been made that under certain conditions the President has the power to alter tax laws, including raising tax rates, even in the absence of authorizing congressional legislation. The argument, put forward by Neil Buchanan and Michael Dorf, applies when the President is put in a situation in which there is no

that, even though the Constitution does little to limit congressional delegation (other than imposing the "intelligible principle requirement"), there are other interpretive tools available to the courts to limit agency discretion.[54] Given these reasons, the demise of nondelegation as a freestanding limit on Congress's power to delegate seems wholly unexceptional.

But what about tax law? A serious argument can be made that, even if the Constitution generally places few limits on the power of Congress to delegate, there are three reasons why tax law should be treated differently.[55] First, in the political and social history of the country's founding period (leading up to and including the drafting of the Constitution), taxes played a uniquely pivotal role. Second, the Constitution itself expressly assigned the tax power to Congress. Specifically Article I, section 8, provides that "Congress shall have power to lay and collect taxes." Indeed, the Supreme Court has long held, and recently reaffirmed, that Congress's power to tax is broader than its power to regulate.[56] Third, not only does the Constitution specifically assign the taxing power to Congress, it goes so far as to specify how tax laws must be enacted. Article I, section 7 expressly states that "[a]ll bills for raising revenue

constitutional alternative; that is, because of the nature of the circumstances, all of the President's options are arguably contrary to the Constitution. Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lesson for the President (and Others) from the Debt Ceiling Standoff, 112 Colum. L. Rev. 1175 (2012). In such a situation, they argue, the "most constitutional" thing for the President to do is to choose the "least unconstitutional course." The specific example they discuss involves the following "trilemma" that faced President Obama in 2011 and may well face him or his successors again (and again): When the amount of federal borrowing necessary to pay the Country's outstanding spending obligations, which are the product of a duly enacted federal statute, approaches the limit imposed by the so-called debt ceiling , also the product of a duly enacted federal statute, must either "ignore the debt ceiling and unilaterally issue new bonds, thus usurping Congress's borrowing power; unilaterally raise taxes, thus usurping Congress's taxing power; or unilaterally cut spending, thus usurping Congress's spending power." Buchanan and Dorf favor first unilaterally raising the debt ceiling, but, if that proves insufficient to calm the credit markets, then raising tax rates, with spending cuts the least preferred option.

[54] Some scholars argue that the function once played by the doctrine has been relocated elsewhere, especially to various interpretive doctrines. Sunstein, supra, at 322, 328; Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1408-15 (2000).

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

[56] National Federation of Independent Business v. Sebelius, 567 U.S. __ 212 (2012) (Roberts, J.) (holding that, although the Commerce Clause does not provide Congress with the authority to require individuals to purchase health insurance, the taxing clause does provide Congress with the power to tax people for not buying health insurance); id. ("the breadth of Congress's power to tax is greater than its power to regulate").

shall originate in the House of Representatives." On the basis of these reasons, one might argue that Congress's ability to delegate tax lawmaking power should be more limited that its power to delegate other types of regulatory authority.

The argument, however, faces the difficulty that its conclusions do not follow from its premises. Even if taxes did play an important, even a central, role in the founding of the country and in the drafting of the Constitution, that fact does not necessarily imply anything about Congress's power to delegate; more specifically, it does not imply that delegation should be more difficult in the tax area than in other areas. Likewise, the fact that the Constitution expressly locates the federal taxing power with Congress, and specifically requires that revenue bills originate in the House of representatives, imposes no obvious limit on Congress's power to delegate its tax lawmaking authority, *so long as the delegation takes the form of a statute that originates in the House*. What is more, so long as Congress retains the power to alter or claw back whatever version of the taxing power it delegates, then Congress has effectively retained the power to tax. In addition, and perhaps most important, no Supreme Court case has ever struck down a congressional delegation of tax lawmaking authority on nondelegation grounds, and no case has held that the limits on tax delegation are any different than the limits on other types of delegation—which, by general agreement, are trivial. Thus, so long as Congress articulates an intelligible principle in authorizing legislation (that originates in the House), all of the expanded forms of tax delegation discussed in this Article should pass constitutional muster.

This conclusion is, however, subject to a few caveats. First, it is notoriously difficult to predict how the Supreme Court will decide particular cases. Second, to the extent that Congress were to make radical departures from prior delegations in the tax area, it is conceivable that the Court could be provoked to announce a new distinction between tax delegations and other regulatory delegations, imposing greater limits on the former. This possibility seems more likely for the types of expanded tax delegation that are most unlike prior tax delegations. In other words, delegating to Treasury more of a role in designing tax subsidy provisions seems unlikely to be enough of a departure from what Congress has done in the past (when it has delegated the job of defining the tax base) to concern the Court, even one that wanted to reinvigorate the nondelegation doctrine. However, delegating control over individual or corporate rates to Treasury or to the Federal Reserve, or delegating tax reform to a commission, would be a departure from anything that has been done in the tax area before—although, again, the Base Closure case would provide one helpful and relevant precedent (though not in the tax area). In the extreme, if Congress passed a law repealing the entire Internal Revenue Code and replacing it with a single sentence giving Treasury power to create a new income tax system that is "fair and efficient and that collects revenue sufficient to balance the budget," one wonders if the Court might not take that as the occasion to revisit the limits of the "intelligible principle" idea. In addition, if Congress does decide to delegate tax law in a more expansive way, the Court has made clear that some ways of doing so are not acceptable, although not necessarily on classic non-delegation grounds. For example, after the Court's decision in *Clinton v. City of New York,* Congressional delegation of authority by granting the President the power to cancel or invalidate particular types of laws (including tax laws) is off the table, because, according to the Court, doing so violates the Presentment Clause.[57] None of the expanded tax delegations discussed above, however, has this structure.[58]

[57] 524 U.S. 417 (1998) (holding, among other things, that the Line-Item Veto statute, which empowered President to strike certain types duly enacted of laws from a statute without approval of Congress, violated U. S. Const. Art. 1, § 7, cl. 2 & 3); see also *INS v. Chadha,* 462 U.S. 919 (1983).

[58] Although the majority's opinion in *Clinton* is put in terms of concerns about compliance with the Presentment Clause, a number of commentators have pointed out that the real, albeit largely unstated, concern is with excessive delegation or with delegation of a particular sort. And the particular type of delegation that the Court seems to find problematic is delegation of the power to "unmake" law rather delegation of the power to make law.

VI. Conclusion

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

It is noteworthy that the same argument is consistent with a reverse implication: that instead of expanding tax delegation to mimic other areas of federal policy, Congress should perhaps conform delegation in other policy areas to mimic the way in which tax policy is currently made. Congress could consider wresting authority from the agencies and giving that authority to Congressional committees, who would be responsible for providing all of the important details of regulatory regimes, with the executive agencies being given primarily the job of filling in the gaps around the edges and, importantly, focusing on enforcement. This is not the path that Congress has taken in areas other than tax law; and while it is not necessary that the policy process work similarly in all areas of law, it is difficult to identify principles that

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See, e.g., Barron & Rakoff, supra note __, at 314. None of the delegations that we have been describing are of the power to unmake existing law.

support approaching tax law so differently. Perhaps there nonetheless exist real and important differences between tax law and every other area of law that make tax delegation different from every other type of delegation; and if so, it would be very useful to understand their implications and their limits.