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Gary Lawson  
*Boston University*

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# Representative/Senator Trump?

Gary Lawson\*

The 2016 presidential election sent many people, including many otherwise seemingly sensible people, completely over the edge. College and university campuses en masse set up counseling services for disappointed students, and I suspect that many faculty and administrators probably “used” those services at least vicariously. Former friends were ostracized—or, even worse, “unfriended” on Facebook—for the heinous sin of voting for Donald Trump. Ordinarily sober scholars describe President Trump’s election as a symptom of “constitutional rot.”<sup>1</sup> At my own institution, at a post-election panel on which I participated as the faculty’s token knuckle-dragger, student questions focused largely on how President Trump could be removed from office—several months before he actually assumed that office. A list of anecdotes of this kind could go on for quite a while.

In all fairness to my grieving colleagues and students, I feel their pain. A lot of us sucked it up, without any school-provided puppies, for the eight years of the Obama Administration, but it was a thoroughly miserable time for anyone concerned about individual freedom. And although I did not vote for George W. Bush in 2000—I voted for Libertarian Harry Browne—I vividly remember that, at one brief moment during election night, I actually felt physically ill when it looked like the execrable Al Gore might ride his fevered fantasies about feverish planets into the White House. Presidential elections seem to matter a great deal to a lot of people.

From a constitutionalist standpoint,<sup>2</sup> this is something of a puzzle. The United States Constitution simply does not appear to

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\* Philip S. Beck Professor, Boston University School of Law. This article was prepared for a symposium sponsored by the *Chapman Law Review* on “Constraining the Executive,” and I thank the editors for inviting me to participate. I am grateful to R.J. Pestritto and Joe Postell for helpful suggestions, though they bear no responsibility for anything that I say here.

<sup>1</sup> Jack M. Balkin, *Constitutional Rot and Constitutional Crisis*, 77 MARYLAND L. REV. (forthcoming 2018).

<sup>2</sup> By “constitutionalist” I mean nothing more linguistically complex than “by reference to and in accordance with the meaning of the United States Constitution.” That meaning was fixed—at least for the original Constitution and quite possibly for

make the president all that important of a figure. To be sure, in times of war, the president is commander-in-chief of the armed forces,<sup>3</sup> but the Constitution gives Congress the powers to “declare War,” to “grant Letters of Marque and Reprisal,” to “make Rules regarding Captures,” to “raise and support Armies,” to “provide and maintain a Navy,” to “make Rules for the Government and Regulation of the land and naval forces,” and to provide for “calling forth” and “organizing, arming, and disciplining, the Militia.”<sup>4</sup> Congress actually has most of the constitutional war powers—so much so that the Commander-in-Chief Clause was necessary to foreclose an inference that Congress also has the un-enumerated, but implied, power to control troop movements.<sup>5</sup> Furthermore, while the president’s “executive Power”<sup>6</sup> gives him<sup>7</sup> control over the law enforcement machinery, that power is subject to duties to “take Care that the Laws be faithfully executed”<sup>8</sup> and to carry out executive responsibilities in accordance with fiduciary principles.<sup>9</sup> More fundamentally, executive power is, in all but a very small set of contexts, a purely implementational power that comes into play only to execute law that is provided from sources external to the executive.<sup>10</sup> The president can also grant pardons,<sup>11</sup> convene and adjourn Congress,<sup>12</sup> and, with the advice and consent of the

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amendments as well—in 1788, in the sense that the criteria for determining the referents of the concepts in the Constitution are determined by the cognitive framework of a reasonable reader in 1788. See Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1460–67 (2016); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

<sup>3</sup> I believe that this authority comes from the Vesting Clause of Article I rather than from the more specific Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, which states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.” This simply confirms the president’s “executive Power” to command the military, but that point is incidental to the present argument.

<sup>4</sup> U.S. CONST. art. I, § 8, cls. 11–16.

<sup>5</sup> Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 29–30 (2006).

<sup>6</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>7</sup> The Constitution consistently refers to the president by a generic male pronoun. I therefore follow that practice, without endorsing it.

<sup>8</sup> U.S. CONST. art. II, § 3.

<sup>9</sup> For a book-length defense of the proposition that all constitutional powers, including the executive power, are fiduciary powers, see GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). For an article-length defense of a duty of care on the part of federal officials, and therefore of a presidential duty of care in the execution of the laws, see Gary Lawson & Guy Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. (forthcoming 2018).

<sup>10</sup> See Gary Lawson, *Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment’s Due Process of Law Clause*, 2017 BYU L. REV. 611, 631 (2018).

<sup>11</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>12</sup> *Id.* § 3.

Senate, make appointments and treaties,<sup>13</sup> but it is hard to see how powers of this kind could generate Caesarian nightmares.

The sum total of constitutional presidential powers is far from trivial; the American president is—and always was—a formidable constitutional figure.<sup>14</sup> But it is not necessarily a life-altering huge sum either. Even if one believes, as I emphatically do, that the Article II Vesting Clause grants the president all power that falls within the conceptual category of “executive Power,”<sup>15</sup> the conceptual lines of the power limit its scope. Possessing the “executive Power” does not allow the president to take over steel mills unilaterally in order to help a war effort,<sup>16</sup> and it does not allow the president to order federal courts to dismiss pending cases in order to promote foreign policy goals.<sup>17</sup> If one looks at the presidency through a constitutional lens, it is hard to see why people would get as emotionally charged as they do about who occupies that office. As a matter of original meaning, it just would not make that much of a difference in most people’s lives. It probably matters more who is mayor of one’s city—and perhaps even who is on the local zoning board.

As a matter of political and social reality rather than original meaning, of course, strong reactions to presidential elections are more understandable. The modern presidency bears little relationship to the office created by the Constitution of 1788.<sup>18</sup> Presidents today matter far more than they should if one’s touchstone is the Constitution. For one thing, presidents have, with the blessing of Congress, assumed powers of at best dubious constitutional lineage on everything from uses of military force<sup>19</sup>

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<sup>13</sup> *Id.* § 2, cl. 2.

<sup>14</sup> See generally SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015).

<sup>15</sup> See Lawson & Seidman, *supra* note 5, at 22–43. For the most powerful rebuttal to that position, see Robert G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

<sup>16</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (correctly so holding).

<sup>17</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 675–76 (1981) (not doing quite as well as *Youngstown*, and indeed pretty much making a botch of everything).

<sup>18</sup> It is conventional to use 1789 as the starting date for the United States Constitution. That is the correct date for when a fully functioning government under the Constitution, including a sworn-in Congress and president, first appeared. The Constitution, however, became law for the ratifying states on June 21, 1788 (or at most shortly thereafter), and at least some important portions of the Constitution were effective as of the summer of 1788. See generally Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

<sup>19</sup> See Gary Lawson, *Inigo Montoya Goes to War*, 95 B.U. L. REV. 1355, 1364–67 (2015) (describing constitutional controversies over the scope of presidential power to initiate hostilities).

to the unilateral establishment of military governments in peacetime within the United States.<sup>20</sup> For another thing, federal courts have routinely assumed powers far beyond those plausibly attributable to the “judicial Power”<sup>21</sup> conferred by the Constitution. Consequently, the power to appoint federal judges has acquired significance beyond anything contemplated in the eighteenth century. But most importantly, in modern times, the election of the American president effectively elects the federal legislature as well. That is because the executive has become, for all practical purposes, the legislative department (at least when the judicial department chooses not to assume that authority). Modern executive action, through regulations, adjudications, and enforcement decisions, creates law that often has far more effect on people’s lives than the entire mass of congressional legislation does. Congress has fostered that development by delegating—or, more precisely, subdelegating<sup>22</sup>—much of its legislative authority to the executive department via open-ended statutes that essentially instruct executive actors to go forth and do good. A great many federal statutes make lawmakers, not laws. As a consequence, presidential elections determine far more than the Constitution of 1788 ever had in mind. It is no wonder that people get so invested in them.

That level of investment is potentially a bad thing in several respects. It is constitutionally bad because it reflects a perversion of the constitutional design. It is socially bad if one believes that politics should not matter so much that people turn on each other for supporting different candidates and policies. And it might be intellectually bad because people who care too much about something do not always think clearly and logically about it.

Part One of this essay very briefly catalogues the extent to which the American presidency has effectively become the American Congress through subdelegation of legislative authority. Part Two just as briefly explains why that is a constitutional perversion. Part Three suggests, contrary to the fears of many who are in the throes of Trump Derangement Syndrome, how the Trump presidency may present the best opportunity in generations to reverse the trend of subdelegation and begin the long process of reining in executive power.

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<sup>20</sup> That happened? Yep, that happened. See Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing without Authority*, 95 NW. U. L. REV. 581, 617–24 (2001).

<sup>21</sup> U.S. CONST. art. III, § 1.

<sup>22</sup> See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377 (2014) (explaining that the constitutional “delegation” problem is really a subdelegation problem because Congress was delegated the legislative power in the first instance).

Ironically, the change agent, if any change actually happens, is likely to be President Trump.

In no event do I expect the presidency of 2020 to look anything like the presidency of 1788. But for the first time in a long time, there is a chance that one might see some movement on that front toward, rather than away from, the United States Constitution.

### I. "MEET THE NEW BOSS"

The American presidency has grown in power since 1788 for many reasons, and it would require someone better versed than I in both history and political science to describe and analyze them all.<sup>23</sup> But one of those reasons obviously dwarfs in magnitude all of the others: Congress has essentially designated the president as its substitute legislature. The expansion of presidential power through subdelegation of legislative authority is so enormous that any attempt to restrain executive power that does not address the subdelegation problem head-on is like putting band-aids on Butch Cassidy and the Sundance Kid after their final encounter with the Bolivian police. The federal executive now functions as the federal legislature for many, and perhaps even most, practical purposes. Federal law, in the modern world, is largely an executive construct. The observation is common enough to be almost mundane. As Professor Mila Sohoni aptly summarized the conventional wisdom:

Due to gridlock and partisanship, Congress is less able to act as an effective lawmaker and hence as an institution that actually authorizes and controls agency action. With respect to some statutes . . . , Congress has conferred primary custodianship over the shape and structure of regulatory schemes on agencies by giving agencies the power to waive and alter key statutory requirements. In other areas . . . , the accretion of complex statutory schemes and the opacity of legislative intent have together produced a system of "de facto delegation" that effectively transfers lawmaking power to the executive branch.<sup>24</sup>

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<sup>23</sup> For an outstanding effort at such an account by someone better versed than I in both history and political science, see generally JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* (2017). Professor Postell's book is an indispensable supplement and, in some cases, antidote to Professor Jerry Mashaw's seminal book on early administrative law. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW* (2012).

<sup>24</sup> Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1701 (2017) (footnotes omitted).

Professor Adrian Vermeule put it even more succinctly: “[T]he executive and administrative sector of the state . . . often overshadows the classical institutions of the Constitution of 1789 altogether.”<sup>25</sup>

There is no uniquely correct way to measure the relative influence of legislative and executive—and, for that matter, judicial—action in the creation of federal law. But even crude metrics tell an important story. At the end of 2012, the number of pages in the Code of Federal Regulations (“CFR”) exceeded the number of pages in the United States Code by a factor of nearly four.<sup>26</sup> Notwithstanding the numerous problems, vectoring in somewhat different directions, with this comparison—the Statutes at Large rather than the United States Code is the better measure of congressional lawmaking; many regulations simply parrot statutory language and thus add nothing to the legal baseline;<sup>27</sup> gross volume numbers do not convey information about relative importance; and an enormous amount of federal law is made through executive adjudication rather than executive rulemaking, and thus does not show up in measures of the CFR—there is something striking about the raw figures comparing statutes and regulations. At the very least, it constitutes a piece of concrete evidence, if any is actually needed, that executive lawmaking is central to modern governance.

Casual anecdotalism<sup>28</sup> sheds further light on the relative importance of executive and legislative action in the creation of federal law. Two of the most important statutes enacted during the Obama Administration—The Patient Protection and Affordable Care Act<sup>29</sup> and the Dodd-Frank Act<sup>30</sup>—consume thousands of pages of text between them, but they are both toothless in important respects until implemented through significant regulatory action. As with most modern regulatory

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<sup>25</sup> ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 3 (2016).

<sup>26</sup> See Tom Cummins, *Code Words*, 5 J. LEGAL METRICS 89, 98 (2015).

<sup>27</sup> Such “parroting” regulations could add to the legal baseline if they were given deference by courts. But regulations that simply repeat what is said in statutes do not receive deference. See *Gonzalez v. Oregon*, 546 U.S. 243, 257–58 (2006). To be sure, regulations do not seem to need to differ much from statutory language in order to avoid the “anti-parroting” rule of *Gonzalez*. See *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm’n*, 519 F.3d 1176, 1192–93 (10th Cir. 2008).

<sup>28</sup> Yes, it is a word. I looked it up.

<sup>29</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified primarily in scattered sections of 42 U.S.C.).

<sup>30</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

statutes, they frequently authorize executive agencies to make law rather than prescribe rules of conduct for executive agencies to implement.

Consider, as just one example, some interlocking provisions from the Affordable Care Act (“ACA”).<sup>31</sup> One of the central concepts underlying the ACA is the “qualified health plan,” which is the only kind of plan that can be sold on the ACA exchanges. It is therefore vital under the statute to know what makes a health care plan “qualified.” The basic statutory definition of a “qualified health plan” is one that “has in effect a certification . . . that such plan meets the criteria for certification described in section 18031(c) of this title.”<sup>32</sup> The criteria for certification prescribed by section 18031(c) are: “The Secretary [of Health and Human Services] shall, by regulation, establish criteria for the certification of health plans as qualified health plans.”<sup>33</sup> In other words, the statute does not establish the criteria but instructs an executive official to provide them. To be sure, the statute then sets out nine considerations that must be part of that executive prescription, but those considerations are basically drivel,<sup>34</sup> much as were the statutory “constraints” in the National Industrial Recovery Act<sup>35</sup> or the directions to the United States Sentencing Commission in the Sentencing Reform Act of 1984.<sup>36</sup> The ACA also makes clear that a qualified health plan must “provide[] the essential health benefits package described in section 18022(a).”<sup>37</sup> It is anticlimactic to point out that section 18022(a) reads in relevant part: “[T]he term ‘essential health benefits package’ means, with respect to any health plan, coverage that . . . provides for the essential health benefits defined by the Secretary [of Health and Human Services] under subsection (b).”<sup>38</sup>

These provisions are noteworthy in modern times for being *more specific* than one has come to expect from major

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<sup>31</sup> For an interesting discussion of subdelegation of legislative authority under the Dodd-Frank Act and other securities laws, see Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L. J. 435, 437 (2017). See also Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 566 (2017) (noting that the Dodd-Frank Act contains “398 specific calls in the statute for regulatory agencies, including the newly created Consumer Financial Protection Bureau, to issue rules, interpreting vague concepts such as ‘unfairness’ by financial institutions, and ‘systemic risk’”) (footnote omitted).

<sup>32</sup> 42 U.S.C. § 18021(a)(1)(A) (2012).

<sup>33</sup> *Id.* § 18031(c)(1).

<sup>34</sup> See *id.* § 18031(c)(1)(A)–(I).

<sup>35</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534–35 (1935).

<sup>36</sup> See *Mistretta v. United States*, 488 U.S. 361, 374–77 (1989).

<sup>37</sup> 42 U.S.C. § 18021(a)(1)(B). The plan must also be provided by a properly licensed insurer. See *id.* § 18021(a)(1)(C).

<sup>38</sup> *Id.* § 18022(a)(1).

congressional legislation. The Emergency Economic Stabilization Act of 2008,<sup>39</sup> one of the most famous (or infamous) legislative legacies to emerge from the second Bush Administration, handed the Secretary of the Treasury three quarters of a trillion dollars with which to “purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.”<sup>40</sup> “Troubled assets,” in case anyone wonders, are mortgages and “any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability . . . .”<sup>41</sup> Throw on such old standards that populate the United States Code as the Communications Act of 1934<sup>42</sup> and the Clean Air Act,<sup>43</sup> and one can see that much modern legislation does not make law, but instead merely designates executive agents as lawmakers.<sup>44</sup> The president, as the ultimate repository of all executive power, thereby becomes the de facto Congress. The president and other executive agents make the law. President Trump is thus also, over a staggeringly large range of cases, Representative Trump and Senator Trump to boot—with no requirements of quorums, cloture, or majority votes to stand in the way of his lawmaking.

To be sure, in the real world it is “other executive agents” far more than it is the president who makes the law. The federal executive apparatus is so enormous that even the most

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<sup>39</sup> Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified in scattered sections of 12 & 26 U.S.C.).

<sup>40</sup> 12 U.S.C. § 5211 (2012).

<sup>41</sup> *Id.* § 5202 (2012). The subdelegation problem was just one of many constitutional infirmities with the Troubled Assets Relief Program (“TARP”). See Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 57–58 (2010).

<sup>42</sup> 47 U.S.C. § 307 (2012) (providing that the Federal Communications Commission shall grant broadcast licenses to applicants “if public convenience, interest, or necessity will be served thereby”).

<sup>43</sup> 42 U.S.C. § 7409 (2012) (providing that the Administrator of the Environmental Protection Agency shall set primary air quality standards, “the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health”).

<sup>44</sup> For a less consequential, but no less legally significant, example, consider the law underlying the events in *Yates v. United States*, 135 S. Ct. 1074 (2015). Captain Yates threw overboard some undersized grouper that he had caught in the Gulf of Mexico, and he was prosecuted for concealing a “tangible object with the intent to impede, obstruct, or influence” a federal investigation. 18 U.S.C. § 1519 (2012). The *Yates* Supreme Court decision focused on whether fish were “tangible object[s]” within the meaning of this statute, *Yates*, 135 S. Ct. at 1077, but consider for a moment why Captain Yates felt the need to throw his fish overboard. What federal statute prescribed the maximum length of red grouper for American fishing vessels? There was no such statute; the only relevant statute made it illegal “to violate . . . any regulation or permit” issued by the National Marine Fisheries Services. 16 U.S.C. § 1857(1)(A) (2012). For a more detailed account of the federal “law”—all stemming from executive regulations—regarding the permissible size of Gulf of Mexico red grouper, see LAWSON & SEIDMAN, *supra* note 9, at 108–09.

committed president can control only a tiny fraction of what actually goes on within it. Congressional subdelegation thus creates an alternative multi-member Congress within the executive whose institutional functioning is too complex to be captured by any simple analogy. Nonetheless, as a formal matter, all executive power is lodged in the president, even if he cannot always effectively exercise it in the face of a “deep state” that has its own agenda(s).

Of course, there are serious limits even to this expanded executive power, as recent (as of July 2017) events concerning efforts to repeal or amend the ACA demonstrate. The president cannot simply wave a law into or out of existence. The legislature is not irrelevant. But the constitutional role of the legislature is not to be “not irrelevant.” It is to make the law, which is then executed by the president and other executive agents. Much of the time, that is simply not how it works.

## II. “WHY SHOULD I CARE, WHY SHOULD I CARE?”

Is it really a constitutional problem if the president makes the law? To ask the question is to answer it, at least as a matter of original meaning. Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality of subdelegations of legislative authority. I have spent much of the past quarter century defending that claim, and I will not repeat those extensive arguments here beyond the brief references in this section.

One can discern a constitutional principle against subdelegation of legislative authority through any number of convergent lines of reasoning. The basic principle of enumerated powers reserves all “legislative powers herein granted” to Congress and thus denies them to executive (or judicial) agents,<sup>45</sup> whose enumerated powers do not include the power to legislate. A law subdelegating legislative power to the president or an executive official would not be “necessary and proper for carrying into Execution” federal powers.<sup>46</sup> To let the president make, rather than execute, law would violate the principle of legality that has been part of the Anglo-American legal tradition since the Magna Carta and that underlies the constitutional idea of due process of law.<sup>47</sup> And, most powerfully and fundamentally,

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<sup>45</sup> See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 180–81 (7th ed. 2016).

<sup>46</sup> See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 *GEO. WASH. L. REV.* 235, 242–67 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 345–52 (2002).

<sup>47</sup> See Lawson, *supra* note 10, at 618–26.

subdelegation violates the fiduciary principles that underlie the Constitution. The United States Constitution is most aptly characterized as a kind of fiduciary instrument,<sup>48</sup> and the background principles of interpretation for the document are therefore at least partially defined by the background rules for interpretation of eighteenth-century fiduciary instruments.<sup>49</sup> One of the best-established eighteenth-century fiduciary duties is the requirement that agents exercising delegated discretionary authority personally exercise rather than subdelegate that authority.<sup>50</sup> Accordingly, if a fiduciary instrument is to allow the agent to subdelegate discretionary authority,<sup>51</sup> the instrument needs specifically to provide for such authority, at least where authority to subdelegate is not incidental to the granted power. The United States Constitution contains no specific authorization for the subdelegation of legislative—or, for that matter, of executive or judicial—power. As Guy Seidman and I have said:

There is no affirmative grant of power in the Constitution to subdelegate legislative authority. The necessary and proper clause, the only plausible source of such authority, only authorizes incidental powers, and the power to sub-delegate can be incidental only with respect to ministerial tasks, or where delegation is necessary in a strict sense, or where there was in the eighteenth century an established custom or usage of subdelegation. In other words, understanding the agency-law foundations of the Constitution confirms what textual, intratextual, and structural analysis all reveal: Congress may not delegate its legislative power to other actors, be they executive agents, judicial agents, state governments, foreign sovereigns, or private parties. The rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine.<sup>52</sup>

Outside of governance of occupied territory during wartime<sup>53</sup> and the constitutionally specified power to make treaties,<sup>54</sup> the president is not supposed to make laws. That is the job of the constitutionally vested legislative authority. The president is supposed to execute (and faithfully execute) the laws provided by others.

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<sup>48</sup> See LAWSON & SEIDMAN, *supra* note 9, at 49–75.

<sup>49</sup> See *id.* at 8–11, 76–78.

<sup>50</sup> See *id.* at 113–17.

<sup>51</sup> Agents are generally free, absent specification in the governing instrument, to subdelegate the performance of ministerial tasks.

<sup>52</sup> LAWSON & SEIDMAN, *supra* note 9, at 117.

<sup>53</sup> See GARY LAWSON & GUY I. SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 47–51 (2004).

<sup>54</sup> See U.S. CONST. art. II, § 2, cl. 2.

The real question is not whether Congress can subdelegate discretionary authority—the short answer is “no.” The real question is what constitutes an act of subdelegation. Surely Congress cannot subdelegate its formal Article I, Section 7 power to vote on bills, but suppose Congress exercises that formal power by enacting Article I, Section 7 laws that tell executive agents to go find problems and then fix them. Does the constitutional anti-subdelegation principle control the *content* of the laws that Congress can enact? Does it forbid granting executive (and judicial) agents a certain kind, quantity, and quality of discretion, even if those grants fulfill the formal procedural requirements for constitutional lawmaking?

Some say no. For example, in the early 2000s, Eric Posner and Adrian Vermeule argued that Congress can *only* be said to subdelegate its power when it transfers its formal authority under Article I, Section 7; it can *never* be said to subdelegate when it vests substantive authority in executive agents, no matter how open-ended the grant of authority may be.<sup>55</sup> I have an article-length response to that argument elsewhere,<sup>56</sup> and that response is both supported and supplanted by subsequent work on the fiduciary underpinnings of the Constitution.<sup>57</sup> Congress is not granted a general legislative power. It is charged with specific tasks and given tools with which to perform those tasks. Those charges call for the exercise of discretionary authority, and in the absence of specific authorization to subdelegate those authorities, Congress must exercise those powers itself. Under basic fiduciary principles, Congress cannot pass off the exercise of those discretionary acts to others, even by enactments that follow the form of Article I, Section 7:

Consider just the structure of Article I, Section 8. Its first seventeen clauses contain provisions that give Congress power to perform such actions as to “lay and collect,” “borrow,” “regulate,” “establish,” “coin . . . , regulate . . . , and fix,” “provide,” “establish,” “promote . . . by securing,” “constitute,” “define and punish,” “declare . . . , grant . . . , and make Rules concerning,” “raise and support,” “provide and maintain,” “make Rules for the Government and Regulation of,”

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<sup>55</sup> See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003).

<sup>56</sup> See Lawson, *Discretion as Delegation*, *supra* note 46.

<sup>57</sup> See LAWSON & SEIDMAN, *supra* note 9, at 107–26. I would be remiss if I did not thank Robert Natelson for making me aware of the importance of understanding the fiduciary character of the Constitution. My long-time collaborator Guy Seidman saw that point before I did, and he pushed me a bit in that direction, but Mr. Natelson’s work is what really brought home to both me and Professor Seidman the need to bring fiduciary concepts to bear on constitutional interpretation across the board.

“provide for calling forth,” “provide for organizing, arming, and disciplining,” and “exercise exclusive Legislation in all Cases whatsoever, over” . . . Exactly who, in this governmental scheme, is supposed to be doing the lion’s share of the laying and collecting, borrowing, regulating, establishing, coining, regulating, fixing, providing, establishing, promoting by securing, constituting, defining and punishing, declaring, granting, making Rules concerning, raising and supporting, providing and maintaining, making Rules for the Government and Regulation of, providing for calling forth, providing for organizing, arming, and disciplining, and exercising exclusive Legislation in all Cases whatsoever, over?<sup>58</sup>

Just as not everything done by presidents through procedurally proper means is necessarily a constitutionally valid exercise of “executive Power,” and not everything done by courts through procedurally proper means is necessarily a constitutionally valid exercise of “judicial Power,” not everything done by Congress through procedurally proper means is necessarily a constitutionally valid exercise of the various “legislative Powers herein granted” with which Congress is vested. The principle against subdelegation is substantive, not formal.

To be sure, the conceptual lines between the constitutionally vested legislative and executive powers are not always crisp. It does not necessarily violate the Constitution for Congress to pass a law that requires some measure of interpretation. Figuring out where the executive power ends and the legislative power begins “is a subject of delicate and difficult inquiry,”<sup>59</sup> and James Madison drily observed that “[q]uestions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”<sup>60</sup>

That adept-puzzling obscurity, however, did not stop Madison from categorically declaring that various powers of government are “in their nature . . . legislative, executive, or judiciary.” Nor did it stop John Adams from stating that the “three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . . ; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government . . . .” Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, the legislative from the executive from the judicial powers. Nor did it prevent the United States Constitution from basing its entire scheme

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<sup>58</sup> Lawson, *Discretion as Delegation*, *supra* note 46, at 263.

<sup>59</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

<sup>60</sup> THE FEDERALIST NO. 37 (James Madison).

of governance on the distinctions among those powers. However difficult it may be at the margins to distinguish those categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing.<sup>61</sup>

As Chief Justice John Marshall memorably put it:

The line has not been exactly drawn which separate those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>62</sup>

But wherever and however that line is properly drawn, huge swaths of modern law go beyond any plausible boundaries. Going forth and doing good pursuant to a statute that instructs the executive to go forth and do good is not an exercise of “executive Power” under any sensible eighteenth-century understanding of that concept, and that simple observation is enough to sweep in many of the statutes at the core of modern law. Nor is enactment of such a law a valid exercise of legislative power. Congress, under the Constitution, must enact laws, not empty collections of words.

This is as good a place as any to respond to a recent critique of this argument from Adrian Vermeule. Professor Vermeule maintains that “*the institutional innovations that appall Lawson [such as subdelegation of legislative authority] were themselves generated by the very system of lawmaking-by-separation-of-powers that he wants to defend.*” Lawson never comes to grip with the problem of abnegation, the brute fact that everything Lawson deems inconsistent with the Constitution of 1789 emerged *through and by means of* the operation of that very Constitution, not despite it.”<sup>63</sup> More broadly:

We have an administrative state that has been created and limited by the sustained and bipartisan action of Congress and the President over time; that is supervised and checked by the President as it operates; and that has been blessed by an enduring bipartisan consensus on the Supreme Court. The classical Constitution of separated powers, cooperating in joint lawmaking across all three

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<sup>61</sup> Lawson, *supra* note 10, at 623–34 (footnotes omitted).

<sup>62</sup> *Wayman*, 23 U.S. (10 Wheat.) at 43.

<sup>63</sup> VERMEULE, *supra* note 25, at 42.

branches, *itself* gave rise to the administrative state. When critics of the administrative state call for a return to the classical Constitution, they do not seem to realize they are asking for the butterfly to return to its own chrysalis. If political legitimacy is not to be found in this long-sustained and judicially-approved joint action of Congress and the President, the premier democratically elected and democratically legitimate bodies in our constitutional system . . . and the real complaint of the critics is not that the administrative state is illegitimate, but that our whole constitutional order is intrinsically misguided.<sup>64</sup>

This argument rests on a distressingly common error: it conflates arguments about textual meaning with arguments about political and moral legitimacy. I have in the past made, and am here making, *no* claims whatsoever about the political legitimacy vel non of the administrative state, the Constitution in general, or any form of governmental organization. As I have said elsewhere:

I have nothing interesting to say about such matters, and so I choose to say nothing about them. Legitimacy is a political and moral concept, and I am not a political or moral theorist . . . . To be sure, political legitimacy is an important thing about which to think. It just is not the province of legal theory, and I would prefer not to venture outside that relatively narrow zone of comfort in professional academic work.<sup>65</sup>

My only claim, here and elsewhere, is that subdelegation of legislative authority is contrary to the meaning of the Constitution. I declare nothing about what any real-world person ought to do with that information or how any past, present, or future political actors should respond to it.<sup>66</sup> And I emphatically make *no* claim that constitutional infidelity is a distinctively modern phenomenon. The very first statute enacted by the very first Congress was wildly, flagrantly, and knowingly unconstitutional.<sup>67</sup> So are a great many statutes that have been enacted by past and present congresses, signed and enforced by past and present presidents, and upheld and applied by past and present judges. That is not “hubris.”<sup>68</sup> That is empirical fact, as all claims of constitutional meaning are claims of empirical fact. It may or may not be an intellectually interesting empirical fact, depending upon one’s intellectual interests, but it is an empirical fact. In other words, in my professional guise, I do not see myself

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<sup>64</sup> *Id.* at 46 (citation omitted).

<sup>65</sup> Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1567 (2012) (footnotes omitted).

<sup>66</sup> For more on the oft-elided distinction between claims of *constitutional meaning* and claims of *political obligation*, see Gary Lawson, *Originalism without Obligation*, 93 B.U. L. REV. 1309 (2013).

<sup>67</sup> See Gary Lawson, *The Constitution’s Congress*, 89 B.U. L. REV. 399, 403–06 (2009).

<sup>68</sup> VERMEULE, *supra* note 25, at 45.

as a “critic[] of the administrative state.”<sup>69</sup> I see myself as a disinterested expositor of the Constitution.<sup>70</sup> As a straightforward interpretative matter, the Constitution forbids the subdelegation of legislative authority, no matter how socially inevitable, normatively desirable, or politically legitimate it may be. One can certainly elect to choose social inevitability, normative desirability, or political legitimacy over the Constitution, but that has no bearing on what the Constitution actually says.

### III. “YOU NEED A NEW SONG”

Assuming that one regards unconstitutional subdelegation as a problem,<sup>71</sup> it is beyond pointless to look to Congress for solutions to that problem. Congress created the problem by giving away its authority in the first place. Psychologists, historians, and political scientists are better situated than I to say why this has happened, but some fairly obvious considerations come to mind. “By delegating the ultimate decision to an agency, Congress can take credit for doing something while dodging the blame from disappointed constituents.”<sup>72</sup> Realistically, though, can this kind of transparent ploy actually work to improve legislators’ electoral prospects? Evidently so: “[P]olitical scientists have documented the value of ‘credit-claiming’ and ‘position-taking’ in legislators’ efforts to maximize the probability of re-election.”<sup>73</sup> Moreover, subdelegation has efficiency benefits for legislators: “Legislators delegate authority in order to reduce various costs of legislating, which allows them to legislate more private goods. Stated differently, delegation reduces the legislator’s marginal cost of private-goods production[.]”<sup>74</sup> It also offers efficiency of access for interest groups: By “unbundling” specific items (such as energy regulation) from everything else on the legislative

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<sup>69</sup> *Id.* at 23.

<sup>70</sup> Of course, anyone who knows me knows that, in my personal rather than professional guise, I am emphatically a critic of the administrative state. They also know, however, that in that guise I am emphatically a critic of *non*-administrative states as well. I dispute the moral legitimacy of all governments—big, small, state, federal, administrative, non-administrative, constitutional, and non-constitutional. That personal position has, I believe, no bearing whatsoever on my empirical scholarly claims regarding constitutional meaning, which stand or fall on the quality of the observations and arguments offered for them.

<sup>71</sup> Because I do not maintain that anyone must so assume, everything beyond this point is in the form of a hypothetical imperative.

<sup>72</sup> Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 369–70 (2010).

<sup>73</sup> David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000).

<sup>74</sup> Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56 (1982).

agenda (such as monetary policy, drug policy, and foreign trade) it allows parties with concentrated interests to focus their attention on institutions (agencies) wholly dedicated to their precise area of concern. It is not surprising that Congress and those who seek to influence Congress would find subdelegation very attractive.<sup>75</sup>

To be sure, there are occasional token thrusts in Congress to gain some measure of legislative control over executive lawmaking. The Congressional Review Act, which is part of the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>76</sup> provides a mechanism for fast-track legislative cancellation of major agency rules,<sup>77</sup> and the statute has been employed more than a dozen times in 2017 after being used only once in its first two decades.<sup>78</sup> A version of the so-called REINS (“Regulations from the Executive [I]n Need of Scrutiny”) Act, which would require Congress legislatively to approve major rules before they take effect, has made it farther through Congress in 2017 than it has ever gone before,<sup>79</sup> though its prospects for ultimate passage are dubious. Through all of this, however, the simple expedient of passing real statutes instead of vague mush and/or amending the old enactments that are really subdelegations masquerading as statutes is nowhere on the congressional agenda. Hence the first sentence of this section.<sup>80</sup>

Nor can one plausibly rely on the courts to police legislative subdelegations. The Supreme Court’s complete retreat from the field of subdelegation is too well known to require elaborate summary.<sup>81</sup> Liberal and conservative jurisprudes disagree on

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<sup>75</sup> For more background on the positive political science literature regarding rationales for congressional delegation, see Rodrigues, *supra* note 31, at 447–49.

<sup>76</sup> Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 857–74 (1996) (codified in scattered sections of Titles 5 and 15 of the United States Code).

<sup>77</sup> For a brief description of the statute, see LAWSON, *supra* note 45, at 173–74.

<sup>78</sup> See Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (July 22, 2017), <http://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congress/> [<http://perma.cc/Z8G4-HX5A>].

<sup>79</sup> See Eric Boehm, *Rand Paul’s REINS Act Finally Makes It to Senate Floor*, REASON.COM (July 17, 2017, 5:32 PM), <http://reason.com/blog/2017/05/17/rand-pauls-reins-act-finally-makes-it-to> [<http://perma.cc/BK83-85E8>].

<sup>80</sup> Cf. VERMEULE, *supra* note 25, at 9 (“Congress episodically rouses itself to enact framework statutes intended to constrain executive power in a global way . . . . But these statutes are mostly dead letters, for the spasm of congressional resolve that leads to their enactment is not sustained over time.”).

<sup>81</sup> See Lawson, *Delegation and Original Meaning*, *supra* note 46, at 328–29 (“After 1935, the Court has steadfastly maintained that Congress need only provide an ‘intelligible principle’ to guide decisionmaking [sic], and it has steadfastly found intelligible principles where less discerning readers find gibberish.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“[T]he conventional [delegation] doctrine has had one good year, and 211 bad ones (and counting).”). To be

many things, but they have found common cause—or, more precisely, an overlapping consensus—in capitulation to congressional desire to subdelegate its authority. Some Justices fly the flag of surrender because, on policy grounds, they want to grease the wheels of the administrative state. As a near-unanimous Supreme Court said with admirable candor (if perhaps less admirable lack of regard for law): “[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job[?!] absent an ability to delegate power under broad general directives.”<sup>82</sup> Others flee the battlefield because of an extra-constitutional concern about judicial discretion: “[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”<sup>83</sup> Although Justice Thomas has expressed some interest in enforcing a constitutional ban on subdelegations,<sup>84</sup> and Justice Gorsuch may be more receptive to such arguments than was Justice Scalia,<sup>85</sup> no one seriously expects the federal courts to rise up and smite major portions of the administrative state in the name of the Constitution of 1788.

That leaves, as the last line of constitutional defense, the president.<sup>86</sup> There is any number of tools available to presidents

sure, Professor Sunstein and I may both be overstating our cases. It is surely a mistake to gauge the effectiveness of a principle against subdelegation by how many laws get overturned by courts rather than by how closely legislatures hew to that principle without need for judicial invalidation. See Joseph Postell & Paul D. Moreno, *Not Dead Yet – or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUDIES (forthcoming 2017). And while the subdelegation doctrine has been dead in the Supreme Court for a long time, it has occasional sparks of life in the lower courts (and, quite possibly, has a new ally on the Supreme Court). See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>82</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989). And what, precisely, is Congress’s constitutional “job”? To regulate in a way and to a degree that is pleasing to the political sensibilities of a majority of the Supreme Court? One might think, looking at the Constitution, that Congress’s job is to legislate in accordance with the substantive and procedural norms prescribed by the Constitution. But, then again, one might think, looking at the Constitution, many things which are at odds with statements in Supreme Court opinions. The explanation, of course, is that statements in Supreme Court opinions almost never try to ascertain the meaning of the Constitution, so it is not at all surprising that they almost uniformly fail to do so.

<sup>83</sup> *Id.* at 415 (Scalia, J., dissenting). For an explanation of why this concern about judicial discretion is extra-constitutional, see Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

<sup>84</sup> See *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1240–52 (Thomas, J., concurring in the judgment).

<sup>85</sup> See *Gutierrez-Brizuela*, 834 F.3d at 1153–54.

<sup>86</sup> Technically, the last line of constitutional defense is an armed citizenry, but it would surely take more than some unconstitutional subdelegations to warrant outright revolution.

to resist unconstitutional subdelegations if they are inclined to use those tools. Most obviously, presidents can veto proposed legislation that fails to make law. Congress can override those vetoes with a two-thirds majority in each House, but a presidential veto can be a serious roadblock to subdelegation. Moreover, the president could issue a veto message communicating the constitutional grounds for the action and thereby raise public awareness of Congress's constitutional failure. The president could also recommend legislation amending or repealing past laws that unconstitutionally subdelegate authority. Appointing judges who take the Constitution seriously could also indirectly help in this regard. Finally, and most dramatically (and therefore least plausibly), the president could refuse to enforce laws that unconstitutionally subdelegate legislative power. Presidents have a power and duty of executive review that is equal to, and derives from the same source as, the collateral power of judicial review.<sup>87</sup> If courts are allowed, and indeed required, to refuse to give legal effect to unconstitutional laws, the same is true of presidents (and everyone else in the constitutional order). At this point, however, the shade of Andrew Johnson will surely begin whispering about the possible consequences of presidential nonenforcement of statutes on constitutional grounds. A genuine constitutionalist will respond that the president nonetheless has an unconditional obligation to the Constitution, consequences be damned.<sup>88</sup> Even if one does not take this extreme tack, however, there is no obvious reason why presidents cannot, and constitutionally should not, make use of the other tools at their disposal to resist subdelegation. All that is needed is the will to use those tools.

At first glance, it may seem even more absurd to rely on the president to police subdelegations of legislative authority than to rely on Congress or the courts. Don't such subdelegations by definition increase the power of the executive, both absolutely and relative to its chief institutional competitors? If Congress is willing to cede some, or even most, of its authority to the president, who would expect the president to decline the offer?

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<sup>87</sup> For a lengthy explication of this position, see generally Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

<sup>88</sup> See U.S. CONST. art. II, § 1, cl. 8 (prescribing the presidential oath of office as: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States").

As with the Spanish Inquisition, no one expects it. But, as with the Spanish Inquisition, it just might appear anyway. To be sure, history is on the side of the skeptics. The Reagan Administration made a great fuss over constitutional fidelity, especially in the realm of separation of powers. In the 1980s, Attorney General Edwin Meese III gave voice to some monumental, and monumentally important, constitutional principles dealing with the separation of powers, such as departmentalism and the unitary executive.<sup>89</sup> The Justice Department was filled with constitutional originalists who understood quite well that the Constitution does not authorize subdelegation of legislative authority. With all of that intellectual and political firepower assembled, what was the number of bills vetoed by President Reagan on the ground that they unconstitutionally subdelegated legislative power to the president? That would be zero. The number of bills introduced or supported by the Reagan Administration to repeal or replace old statutes that unconstitutionally subdelegate legislative power to the president? That would also be zero. The number of such bills vetoed or championed, respectively, by either of the Bush Administrations? Yep, zero again. (I assume that no one finds it necessary for me to repeat these numbers for modern Democrat administrations.) All conventional grounds for judgment suggest that the executive department is a central part of the problem of subdelegation of legislative authority and likely the last place that one should look for a solution.

Enter Donald Trump. Exit conventional grounds for judgment. Whatever one thinks of Donald Trump (and I confess that I have a higher regard for him than do most of the people with whom I usually associate), one must acknowledge that the usual rules of politics do not apply to him. Indeed, his election was, at least for many who voted for him, precisely a pair of double-barreled middle fingers thrust into the face of political convention (with a loud razzberry added for good measure). The fact that invoking a constitutional principle against subdelegation of legislative authority would elicit shrieks of horror from the political and cultural establishment would not necessarily deter President Trump from doing it. Indeed, it just might be an added incentive.

The question is whether there is anything substantive that would or could motivate President Trump to take a stand against

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<sup>89</sup> See Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 701 (2005).

legislative subdelegation, perhaps by vetoing proposed legislation on constitutional subdelegation grounds and issuing a stinging veto message. Several considerations suggest—and I emphasize that I deliberately use the word “suggest” in its literal and modest sense—that there might be.

First, President Trump’s key appointments to legal offices speak to a commitment to constitutional first principles that exceeds that of any president in my lifetime. His first appointment to the Supreme Court was Neil Gorsuch, who, as a court of appeals judge, specifically raised the idea of reviving the subdelegation doctrine.<sup>90</sup> President Trump’s nominations to the lower federal courts thus far also have originalists cheering and maybe even salivating. And both of his appointees to top executive department legal positions—Attorney General Jeff Sessions and White House Counsel Don McGahn—are long-time advocates (if not necessarily consistent practitioners) of originalism. The pairing is significant. My recollection from three-plus decades ago is that the Reagan Justice Department was more than occasionally at odds with the White House Counsel’s Office, which had considerably less enthusiasm than did Attorney General Meese and his staff for picking fights about broad structural principles. That kind of internal conflict reduces the likelihood of bold action. If the Department of Justice and White House Counsel’s Office are both strongly committed to originalism, they can speak with a united front on subdelegation. No originalist can defend, with a straight face, the gross subdelegations of legislative power that pervade modern government as consistent with the Constitution.<sup>91</sup>

Second, all of the foregoing considerations suggest that President Trump is inclined to defer, on legal and constitutional matters, to those who he regards as reliable experts on those subjects. No one seriously believes that Donald Trump entered the political arena in 2015 with a well-formed theory of constitutional interpretation in mind. Obviously, he has decided that originalists are the go-to folks in this area. If, hypothetically, President Trump’s Attorney General and White House Counsel both recommend a veto on constitutional grounds, it is not

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<sup>90</sup> See *Gutierrez-Brizuela*, 834 F.3d at 1153–54.

<sup>91</sup> At the risk of repetition: They can certainly defend those subdelegations as consistent with all manner of things besides the Constitution, and those other things might well be more important to any given person than is the meaning of the Constitution. I am *not* saying unconditionally that originalists must urge the president to oppose subdelegations. I am only saying that they have good reason to do so if they regard the meaning of the Constitution as normatively relevant, and that they must do so if they regard the meaning of the Constitution as normatively decisive.

absurd to imagine that President Trump would take that recommendation very seriously.

Third, former White House strategist Steve Bannon declared in February 2017 that the Trump Administration was committed to “deconstruction of the administrative state.”<sup>92</sup> The exact meaning of the phrase is not important here. The significance for present purposes is that the standard response to any attempt to revive a constitutional principle against subdelegation is to complain that it would be an assault on the administrative state.<sup>93</sup> That certainly seemed to be an important driver of the decision in *Mistretta*,<sup>94</sup> and I have heard something like it from my colleagues for decades. If Mr. Bannon truly speaks for the Administration on this point, it suggests that the standard establishment response will not resonate all that well with the current president. To be sure, there are nontrivial arguments to be made that the unbundling afforded by subdelegation increases democratic responsiveness in some respects,<sup>95</sup> but these do not seem like arguments that will carry much weight with a constitutionalist who wants to deconstruct the administrative state.

Fourth, every force in the legal universe is currently aligned to jump at the chance to constrain executive power. The political, legal, and cultural establishments all despise the current occupant of the White House. If there is ever going to be a time for limits on executive power, this is it. And if those limits come from the White House itself, would the establishment really find it within themselves to resist?

Perhaps there never will be a time for such limits. Certainly, those who think of President Trump as a swaggering, overbearing, tin-plated dictator with delusions of godhood (or perhaps even as a Denebian slime devil)<sup>96</sup> will regard as laughable the idea that he would turn down power. I am more inclined than many to think that Donald Trump cannot be written off as a power-mad autocrat, but maybe the many are

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<sup>92</sup> See Tim Hains, *Stephen Bannon: Core of Trump's Platform Is "Deconstruction of the Administrative State,"* REAL CLEAR POLITICS (July 17, 2017), [https://www.realclearpolitics.com/video/2017/02/23/stephen\\_bannon\\_pillar\\_of\\_trumps\\_platform\\_is\\_deconstruction\\_of\\_the\\_administrative\\_state.html](https://www.realclearpolitics.com/video/2017/02/23/stephen_bannon_pillar_of_trumps_platform_is_deconstruction_of_the_administrative_state.html) [<http://perma.cc/F7RS-MWES>].

<sup>93</sup> See, e.g., Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327–28 (1987). I use this citation only because I happen to have it on hand when writing this footnote. I am sure that any reader will have favorite examples of their own.

<sup>94</sup> See generally *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>95</sup> See generally David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).

<sup>96</sup> With apologies to David Gerrold.

right. Maybe Adrian Vermeuele is right about the inevitability of the administrative state; it certainly would not surprise me if he was right about that. Perhaps, as with every other modern president before him, Donald Trump will choose expanded executive power over the Constitution, and perhaps the establishment's love for the administrative state is stronger than its hatred for President Trump. But maybe, just maybe, an odd combination of originalism, swamp draining, and the looming specter of Trump-as-Congress will lead to something that no one expects—maybe even something constitutionally more significant than a comfy chair.