

Early Delegations of Federal Powers

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ABSTRACT

Conservatives have long tried to eviscerate federal administrative law by divining an implicit constitutional doctrine forbidding Congress to delegate its legislative powers. Contemporary originalists continue the effort, arguing that the original meaning of the Constitution includes this doctrine despite its absence from the document's text. In response, critics have begun to show that early American constitutional history and theory support contemporary administrative law either as a valid delegation of legislative power to the executive branch or as the executive branch executing a statutory directive (or both).

This Essay expands on that response and critiques standard originalist arguments for a nondelegation doctrine. It demonstrates that early congressional statutes delegated federal powers to a broad group of actors including private experts acting alone, private experts acting with judicial or executive oversight, and non-federal authorities in addition to federal executive officials. Statutory guidance for exercising the delegated powers was nonexistent, aspirational, or limited to general restrictions. The delegations included areas demanding expertise or flexible decision-making and required the delegate to balance risks against economic costs. They addressed some of the most critical subjects for the nation's early government: race, shipping, and the public fisc.

The use of experts and administrative law are well within the Constitution's constraints on the federal government. Conservatives who oppose this exercise of federal power may always do so in Congress or through living constitutional arguments. But they cannot rely on history to claim that the "original meaning" of the Constitution includes a nondelegation doctrine.

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INTRODUCTION

Conservatives have long tried to eviscerate federal administrative law by divining an implicit constitutional doctrine forbidding Congress to delegate its legislative powers.¹ Contemporary originalists continue the effort, arguing that the original meaning of the Constitution includes this doctrine despite its absence from the document’s text.² Their main approach is to characterize administrative law as inconsistent with their personal views of the structure and political morality underlying the Constitution. In his dismissive article *Trust Us. We’re Experts*,³ for example, Mark Pulliam explains that originalists’ main objection to administrative law is that it “shreds institutional constraints on the growth and reach of the federal government.”⁴ He asserts that the Progressive Movement sacrifices the rule of law to the opinions of unelected experts and treats Americans as “proles” and “subjects” rather than as citizens, denying them the right to be governed by their elected representatives.⁵

In response, critics have begun to show that early American constitutional history and theory support contemporary administrative law either as a valid delegation of legislative power to the executive branch or as the executive branch “executing” the statutory directive to promulgate such law (or both).⁶ This Essay expands on that response and critiques originalist

¹ See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (tracking the latest conservative efforts beginning in the 1970s).

² See e.g., Aaron Gordon, *Nondelegation*, N.Y.U. J. L. & LIBERTY 718, 734 (2019) (“[E]ven originalist arguments [for the nondelegation doctrine] that focus intently on constitutional text must eventually resort to extrinsic historical evidence to defend their interpretation as the correct one.”).

³ Mark Pulliam, *Trust Us. We’re Experts*, MISRULE L. (Dec. 21, 2020), <https://misruleoflaw.com/2020/12/21/trust-us-were-experts/> [<https://perma.cc/9UQY-EJXF>].

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., Mortenson & Bagley, *supra* note 1, at 279–81, 290–91 (arguing administrative law constitutes either the executive branch executing the statutory directive or Congress delegating legislative power, or both because period political and legal theory were fluid on the point); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (advancing the “executing the statutory directive” view).

arguments for a nondelegation doctrine.⁷ It demonstrates that early congressional statutes delegated federal powers to a broad group of actors including private experts acting alone, private experts acting under the oversight of judicial or executive officials, and non-federal authorities in addition to federal executive officials. Statutory guidance for exercising the delegated powers was nonexistent, aspirational, or limited to general restrictions. The delegations included areas demanding expertise or flexible decision-making, applied to private rights and obligations, and required the delegate to balance risks against economic costs. They addressed some of the most critical subjects for the nation’s early government: race, shipping, and the public fisc.

The use of experts and administrative law are well within the Constitution’s institutional constraints on the federal government. Conservatives who oppose this exercise of federal power may always do so in Congress or through living constitutional arguments, of course. But there is no original meaning of the Constitution constraining the power.

I. PRACTICE

A. *To Private Experts*

A 1789 statute imposing duties on imported goods provided that one merchant appointed by the U.S. inspector and one appointed by the owner would value damaged goods and goods lacking an original invoice.⁸ The statute did not specify any valuation standards.⁹ The statute gave authority in other circumstances to “two reputable citizens of the neighbourhood, best acquainted with” the relevant matter,¹⁰ and to “three proper persons . . . sworn in open court for the faithful discharge of their duty,”¹¹ again without providing any standards for their actions.¹² It also required the use of two or more “reputable merchants” in yet other circumstances.¹³

⁷ This Essay particularly expands on the work of Mortenson and Bagley by utilizing additional statutes as well as the two that they rely on for other purposes. See Mortenson & Bagley, *supra* note 1, at 346 (discussing the Acts of July 31, 1789 and March 3, 1791).

⁸ See Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41.

⁹ See *id.*

¹⁰ *Id.* § 12, 1 Stat. at 39 (authorizing these citizens to hear and certify exceptions to certain unloading requirements at port where wardens or other persons legally authorized to do so were not present).

¹¹ *Id.* § 36, 1 Stat. at 47 (authorizing a court to delegate appraisal of a “ship or vessel, goods, wares or merchandise” seized and libeled by the United States for nonpayment of duties).

¹² See *id.* §§ 12, 36, 1 Stat. at 39, 47.

¹³ See *id.* §§ 15, 22, 23, 32, 1 Stat. at 40–43, 45.

A 1790 statute protected the lives and health of sailors on foreign voyages.¹⁴ Among other safeguards, it prescribed minimum provisions and their proper storage: “well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board” for transatlantic voyages, and proportional amounts for voyages of different distances.¹⁵ The statute also required that every such ship of a certain size and crew owned by a U.S. citizen

shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled.¹⁶

Several apothecaries published notable books with directions for administering the medicines in the fully stocked chests that they sold.¹⁷

Medicines have costs, of course, and Congress could have balanced the costs to shipowners against the risks to sailors of illness or death at sea. Congress could have specified minimum required medicines and their proper administration, just as it specified minimum provisions and their storage. But Congress did not. Instead, it delegated to unelected medical experts the power to evaluate risks and benefits and to impose obligations on private American shipowners without providing any guidance on the types of medicines to include or their administration.

B. To Private Experts and Government Officials

The same 1790 statute addressed the fitness of ships and crews for proposed foreign voyages. It provided that if the mate or first officer of a ship and a majority of the crew believe the ship “is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions or stores,” a district court judge or a justice of the peace shall direct “three persons in the

¹⁴ See Act of July 20, 1790, ch. 29, 1 Stat. 131 (codified as amended in scattered sections of 46 U.S.C.).

¹⁵ *Id.* § 9, 1 Stat. at 135.

¹⁶ *Id.* § 8, 1 Stat. at 134–35. For the modern equivalent of this statute, see 46 U.S.C. § 11102 (requiring a medical chest without specifying who determines its contents). The penalty for “default of having such medicine chest” was that upon reaching port “the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness . . . without any deduction from the wages of such sick seaman or mariner.” Act of July 20, 1790, ch. 29, § 8, 2 Stat. at 135.

¹⁷ See U.S. PUB. HEALTH SERV. & WAR SHIPPING ADMIN., *THE SHIP’S MEDICINE CHEST AND FIRST AID AT SEA* 5–6 (1947).

neighbourhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of” and report whether the ship “is unfit to proceed on the intended voyage, and what addition of men, provisions or stores, or what repairs or alterations in the body, tackle or apparel will be necessary.”¹⁸ The judge or justice would then adjudge and endorse upon the report whether the ship “is fit to proceed on the intended voyage; and if not,” where it should be refitted, “and the master and crew shall in all things conform to the said judgment.”¹⁹

An 1840 statute extended the process to determinations of a ship’s condition at foreign ports, requiring the local U.S. consul or commercial agent to conduct the process after appointing as inspectors “two disinterested, competent practical men, acquainted with maritime affairs.”²⁰ The appointed inspectors had “full power to examine the vessel[,] . . . hear and receive [evidence],” and issue a report on the ship’s suitability for travel, which the consul or commercial agent would either certify or disapprove in writing.²¹ The statute also created a private remedy for anyone harmed by the consul or agent’s failure to timely or honestly perform the required duty.²²

Safely fitting out a ship and its crew for a foreign voyage has costs. Congress could have balanced the costs against the risks to the crew and specified minimum safety requirements, but it did not. It delegated the power to unelected private experts and a judicial, consular, or commercial official without providing any guidance on what constitutes fit crews, bodies, tackle, apparel, or furniture, or where to send ships for refitting.

C. *To Non-Federal Authorities*

Early federal statutes required both private individuals and federal officials to obey laws and regulations promulgated by non-federal authorities, including those promulgated after enactment of the federal statutes. Consequently, the statutes delegated federal power to those other authorities to issue subsequent regulations. The statutes differ significantly from directives practice in the European Union, for example, where newly

¹⁸ Act of July 20, 1790, ch. 29, § 3, 1 Stat. at 132 (noting that the report may be written by all three of the experts or any two of them).

¹⁹ *Id.*

²⁰ Act of July 20, 1840, ch. 48, § 12, 5 Stat. 394, 396 (codified as amended at 46 U.S.C. § 10905).

²¹ *Id.* at § 13, 5 Stat. at 396.

²² *See id.* § 18, 5 Stat. at 397 (imposing additional criminal penalties for corrupt behavior).

promulgated E.U. directives have no legal force in any nation until it affirmatively transposes them into its domestic law.²³

An 1803 statute, for example, forbade anyone to bring or cause someone to bring any person of color into any state whose law prohibited their admission.²⁴ Many members of Congress supported the legislation to protect slave states from the entry of free Blacks, particularly those experienced in West Indies liberation movements.²⁵ The statute also required specified federal officials to obey and enforce such state laws, “any law of the United States to the contrary notwithstanding.”²⁶

A 1799 statute required federal civil and military personnel overseeing interstate or international shipping to observe quarantines and other restraints established by state health laws.²⁷ It further required those personnel to enforce the state laws as directed by the Secretary of the Treasury and authorized the Secretary “to vary or dispense with” rules relating to the entry of ships and their cargo.²⁸

A 1791 statute allowed ships whose voyage was obstructed by ice to unload at the nearest port but provided that the ship, its cargo, “and all persons concerned therein, shall be under and subject to the same rules, regulations, restrictions, penalties and provisions, as if the said ship or vessel had arrived at the port of her destination, and had there proceeded to the delivery of her cargo.”²⁹ A nineteenth century editor of collected federal statutes published by authority of Congress noted that these included “the usual regulations in other countries.”³⁰ Finally, justices of the peace are state

²³ See *European Union Directives*, EUR-LEX <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:114527> [<https://perma.cc/WHF3-LAAF>].

²⁴ See Act of Feb. 28, 1803, ch. 10, § 1–2, 2 Stat. 205, 205 (applicable to “any state which by law has prohibited or shall prohibit the admission . . . of such . . . person of colour” but excepting natives, citizens, and registered seamen of the United States, and seamen native to nations beyond the Cape of Good Hope).

²⁵ See 12 ANNALS OF CONG. 471–72 (1803) (describing the legislation as necessary to exclude outlaws, exiles, and brigands from the West Indies and to protect southern states from imminent danger); see also James L. Sweeney, *Caribs, Maroons, Jacobins, Brigands, and Sugar Barons: The Last Stand of the Black Caribs on St. Vincent*, 10 AFRICAN DIASPORA ARCHAEOLOGY NEWSL., Mar. 1, 2007 at 1, 26 (discussing the Brigands and West Indies liberation movements).

²⁶ Act of Feb. 28, 1803, ch. 10, § 3, 2 Stat. at 206.

²⁷ See Act of Feb. 25, 1799, ch. 12, § 1, 1 Stat. 619, 619 (codified as amended at 42 U.S.C. § 97).

²⁸ See *id.* While the original Act gave the Secretary of the Treasury power to alter these rules, the Secretary of Health and Human Services has this authority today. See *id.*; 42 U.S.C. § 97.

²⁹ Act of Jan. 7, 1791, ch. 2, §§ 1–2, 1 Stat. 188, 188–89.

³⁰ *Id.* § 2 note, 1 Stat. at 189. It may be reading too much into the editor’s note to conclude that foreign regulations could apply at the diverted port, although Britain did reference the 1799 version of the statute in arbitration with the United States over North

officials, so their participation with the three local maritime experts in determining a crew's and ship's fitness under the 1790 statute described above was a delegation to a state official and private parties.³¹

D. To the President

A multitude of early statutes delegated powers to the President, including ones in Congress's enumerated list of powers or for which Congress expressly recognized it might legislate in the future.

Another 1791 statute, for example, authorized the President to set allowances for revenue officials subject to a cap "until the same shall be further ascertained by law."³² Congress delegated its power to the President recognizing that it might later legislate in the area.

The Constitution gives Congress exclusive legislative power over the seat of government and places purchased "for the Erection of Forts, Magazines, Arsenals," and other similar buildings.³³ It also gives Congress the power to support armies,³⁴ to borrow on the nation's credit,³⁵ to provide and maintain the navy,³⁶ and to make rules governing and regulating the naval forces.³⁷ Yet early Congresses delegated those powers to the President with few constraints.

A 1799 statute authorized the President in the event of an epidemic at the seat of government to move "any or all the public offices to such other place or places as, in his discretion, shall be deemed most safe and convenient for conducting the public business."³⁸ A 1798 statute authorized the President to purchase ships for the navy "upon the credit of the United States, on terms, in his opinion, advantageous or convenient,"³⁹ to accept "at his discretion" donations of ships "proper for the public service,"⁴⁰ to set "the

Atlantic fisheries. See 5 PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION BEFORE THE PERMANENT COURT OF ARBITRATION AT THE HAGUE, S. DOC. NO. 870, at 1328 (3d Sess. 1912) (citing Act of Mar. 2, 1799, ch. 22, § 85, 1 Stat. 627, 694). In any event, collection districts could include ports from more than one state, so even a diversion to a different port within the same district could invoke out-of-state rules and regulations. See Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 199–200.

³¹ See Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132; *supra* text accompanying note 18.

³² See Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213.

³³ U.S. CONST. art. 1, § 8, cl. 17.

³⁴ *Id.* art. 1, § 8, cl. 12.

³⁵ *Id.* art. 1, § 8, cl. 2.

³⁶ *Id.* art. 1, § 8, cl. 13.

³⁷ *Id.* art. 1, § 8, cl. 14.

³⁸ Act of Feb. 25, 1799, ch. 12, § 6, 1 Stat. 619, 620–21.

³⁹ Act of June 30, 1798, ch. 64, § 1, 1 Stat. 575, 575.

⁴⁰ *Id.* § 3, 1 Stat. at 576.

rank, pay, and subsistence” of officers appointed pursuant to the statute as well as “the number of men to be engaged, and the pay to be allowed to them;”⁴¹ and at his discretion to vary the quotas of types of navy crews “according to the exigencies of the public service.”⁴² Congress provided only general limits on the number and types of ships to be acquired and the terms of the President’s borrowings.⁴³ And Congress authorized the President to borrow on the credit of the United States and to repay borrowings in other circumstances with few limitations as well,⁴⁴ in one case without requiring any reason for the borrowing other than it be for “the purposes of this act” and “in his opinion, the public service shall require it.”⁴⁵

A 1798 statute authorized the President to lease or purchase land for the United States to “establish founderies and armouries” and to employ “suitable artisans and laborers” to produce cannon and arms whenever he found it impractical to purchase them.⁴⁶ And another statute from the same year gave the President discretion whether to build fortifications that had already been directed and the authority instead to build any fortifications in any places “as he shall judge necessary” and as in his opinion “the public safety shall require.”⁴⁷ It also authorized the President to accept fortifications built by states in discharge of their debts to the United States.⁴⁸

E. To Other Executive Officials

Congress also authorized other executive officials to exercise powers with similar discretion. A 1798 statute authorized the Secretary of the Treasury to direct the release from debtor’s prison of persons who owed debts to the United States but could not pay, “upon a compliance . . . with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case.”⁴⁹ The statute did not release the debtor from the liability, however, so the Secretary’s authority was limited to the debtor’s personal liberty.⁵⁰ The statute provided no guidelines

⁴¹ *Id.* § 4, 1 Stat. at 576.

⁴² *Id.* § 5, 1 Stat. at 576.

⁴³ *See id.* §§ 1, 2, 4, 1 Stat. at 575–76.

⁴⁴ *See, e.g.,* Act of Feb. 28, 1793, ch. 18, § 3, 1 Stat. 325, 328–29 (authorizing the President to borrow for purposes of the act up to eight hundred thousand dollars at an interest rate not to exceed five percent and to repay the borrowing “as, in his opinion, the state of the treasury may, from time to time, admit”).

⁴⁵ Act of May 30, 1796, ch. 41, § 5, 1 Stat. 487, 487 (limiting interest rate to six percent).

⁴⁶ Act of May 4, 1798, ch. 38, § 2, 1 Stat. 555, 555–56.

⁴⁷ Act of May 3, 1798, ch. 37, § 1, 1 Stat. 554, 554–55.

⁴⁸ *See id.* § 2, 1 Stat. at 555.

⁴⁹ *See* Act of June 6, 1798, ch. 49, § 1, 1 Stat. 561, 561.

⁵⁰ *See id.*

for the exercise of the Secretary's discretion other than to exclude from its benefits persons imprisoned for breach of federal law or for the use of federal monies.⁵¹

A 1789 statute authorized district collectors to appoint persons other than surveyors to measure ships for the purpose of entitling them to the legal benefits of U.S. registry without specifying any qualifications for the appointees.⁵² The statute also required the collectors to pay the appointees "a reasonable compensation," without any guidelines for what compensation was reasonable.⁵³

II. THEORY

A. *Delegation: Legislative, Executive, Judicial, or All/None of the Above?*

What does it mean for Congress to delegate federal powers? Professors Eric A. Posner and Adrian Vermeule have argued that Congress does not and *cannot* delegate its legislative power:

Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power. Conversely, agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.⁵⁴

This argument does not reach the statutes that automatically created federal rights and obligations as a result of subsequently promulgated state health laws, state exclusion laws, and state and foreign landing and unloading regulations. When a state forbade persons of color to enter after 1803, for example, an 1803 statute already separately and automatically forbade anyone else to bring them into or cause them to be brought into the state—presumably under Congress's power to regulate interstate and foreign commerce—without the need for any affirmative congressional action.⁵⁵ The

⁵¹ *See id.* § 3, 1 Stat. at 562.

⁵² *See* Act of Sept. 1, 1789, ch. 11, §§ 1, 3, 1 Stat. 55, 55–56.

⁵³ *See id.* § 31, 1 Stat. at 64 (specifying that compensation was to be paid from fees otherwise payable to the applicable collectors, surveyors, and naval officers).

⁵⁴ *See* Posner & Vermeule, *supra* note 6, at 1723.

⁵⁵ *See* Act of Feb. 28, 1803, ch. 10, § 1, 2 Stat. 205, 205 (making the prohibition applicable in "any state which by law has prohibited, or shall prohibit the admission" of persons of color). Illinois, for example, enacted a Black exclusion law after 1803. *See* 1853 Ill. Laws 57; *Illinois Black Law (1853)*, OFFICE ILL. SEC'Y OF STATE, https://www.cyberdriveillinois.com/departments/archives/online_exhibits/100_documents/1853-black-law.html [<https://perma.cc/646X-GYGT>].

statute also automatically required specified federal officials to obey the state law and overrode any federal law to the contrary.⁵⁶

It is hard to characterize the state government as an agent of Congress or as exercising executive power. On the contrary, state legislation passed after the 1803 Act caused federal law to restrict interstate and foreign commerce notwithstanding any contrary federal law, just as Congress (and the President) did regarding commerce with states that had already prohibited entry of persons of color before 1804. This inverts the constitutional order that “the Laws of the United States” are “the supreme Law of the Land” notwithstanding anything contrary in state law.⁵⁷

Whether this represented a *de jure* or *de facto* exercise of the power to create federal law is unimportant. The state could, through its own subsequent and independent legislative process, create federal rights, obligations, and penalties. In the case of the 1803 statute, for example, penalties included a one thousand dollar fine and, in the event of carriage by ship, forfeiture of the ship.⁵⁸ The health, exclusion, and landing and unloading statutes delegated at least *de facto* both Congress’s power to legislate and the President’s power to sign or veto congressional legislation.⁵⁹

Posner and Vermeule’s argument does not reach the 1790 statute governing maritime medical care either.⁶⁰ It is hard to characterize the apothecaries as agents of Congress exercising executive power.⁶¹ They were neither employed nor chosen by Congress or by any other governmental entity or official, and they were not part of the executive branch.⁶²

In *Printz v. United States*,⁶³ the majority found that the same statute’s process for determining a ship’s and crew’s fitness for purpose was adjudicative, not executive.⁶⁴ Following the majority’s reasoning, the function of the apothecaries, consuls, and commercial agents would also be

⁵⁶ See Act of Feb. 28, 1803, ch. 10, § 3, 2 Stat. at 206.

⁵⁷ U.S. CONST. art. VI, cl. 2.

⁵⁸ See Act of Feb. 28, 1803, ch. 10, §§ 1–2, 2 Stat. at 205.

⁵⁹ See *supra* Section I.C.

⁶⁰ See Act of July 20, 1790, ch. 29, 1 Stat. 131.

⁶¹ See *id.* § 8, 1 Stat. at 134–35 (requiring ships of certain size and crew owned by a U.S. citizen to carry a “chest of medicines” supplied and annually examined by an apothecary “of known reputation”).

⁶² See *id.*

⁶³ 521 U.S. 898 (1997).

⁶⁴ See *id.* at 908 n.2. The dissent argued instead that the process was executive, much like modern agency practice. See *id.* at 950–51 (Stevens, J., dissenting). The case involved the federal government’s power to command a state executive official, so it did not address the delegation of federal powers. See *id.* at 902.

properly characterized as judicial.⁶⁵ So too would be the function of the President in borrowing on the credit of the United States for the purposes of a given statute where, “in his opinion, the public service shall require it,”⁶⁶ and the Secretary of the Treasury in setting terms and conditions for the release from prison of debtors “as the said secretary may judge reasonable and proper, under all the circumstances of the case.”⁶⁷ Private persons acting alone, private persons acting together with a judge, justice of the peace, consul or commercial agent, and executive branch officials could all regulate private conduct like protecting personal liberty, health, and safety by exercising an adjudicative function.

Early statutory history supports administrative law regulating fitness for purpose, recalls, health and safety standards, wages, protection of the public fisc, and all other matters within federal purview whether enacted by private experts acting alone or with the approval of a judicial or executive official exercising a functionally adjudicative review of the experts’ opinions. Of course, none of the apothecaries, Presidents, consuls, commercial agents, or Secretaries of the Treasury was formally a judicial authority. If any of these actors exercised adjudicative functions, they would have done so through a delegation of federal power by the properly enacted federal statutes described above—which Congress recognized it could repeal and replace with its own rules if it chose.

One could argue that at least some of these actors exercised executive rather than judicial functions. But it does not matter whether the statutes authorized legislative, executive, or judicial powers. As Professors Julian Davis Mortenson and Nicholas Bagley argue, “the Founders thought of the separation of powers in nonexclusive and relational terms. . . . [E]arly Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct.”⁶⁸ Said more comprehensively, early Congresses adopted dozens of laws that broadly empowered executive, judicial, private, state and foreign actors to adopt rules of conduct binding under federal law. Congress delegated the powers and could withdraw them at will. That is all that matters.

⁶⁵ See Act of July 20, 1790, ch. 29, § 8, 1 Stat. at 134–35; Act of July 20, 1840, ch. 48, § 12, 5 Stat. 394, 396 (directing consuls and commercial agents to appoint persons to evaluate a ship’s fitness for purpose and provide a report to the consul or agent).

⁶⁶ See Act of May 30, 1796, ch. 41, § 5, 1 Stat. 487, 487.

⁶⁷ See Act of June 6, 1798, ch. 49, § 1, 1 Stat. 561, 561.

⁶⁸ See Mortenson & Bagley, *supra* note 1, at 281.

B. *Originalist Claims*

1. *Private Rights and Obligations*

Professor Ilan Wurman explains that

[t]he standard originalist position is that there are certain kinds of things that Congress must do and the executive (or judicial) branch may never do, namely the formulation of rules regulating private conduct, i.e. telling private people (as opposed to government officials) what they can and can't do or altering their rights or obligations.⁶⁹

Yet early Congresses empowered many other actors to do precisely that.

Apothecaries could tell shipowners what medicines to carry.⁷⁰ Maritime experts together with a judicial, consular or commercial official could tell shipowners how to staff, provision, and maintain their ships and where to take them to correct any deficiencies.⁷¹ These decisions required balancing risks and benefits, despite conservatives' claims that only Congress may do that.⁷²

In addition, merchants could tell importers how much duty to pay.⁷³ The Secretary of the Treasury could direct federal personnel to require private persons to quarantine and follow other health restraints.⁷⁴ State and foreign governments could alter private persons' federal rights and obligations through subsequently promulgated exclusion, landing and unloading, and other rules.⁷⁵ Early congressional practice is inconsistent with any claim that "Congress must do" that or that another branch may not.

2. *Institutional Constraints*

Mark Pulliam explains that originalists' main objection to administrative law is that it "shreds institutional constraints on the growth and reach of the federal government."⁷⁶ But early congressional statutes are inconsistent with that objection. The 1803 exclusion statute passed with

⁶⁹ See Ilan Wurman, *No Nondelegation at the Founding? Not So Fast*, YALE J. REG.: NOTICE & COMMENT (Jan. 5, 2020), <https://www.yalejreg.com/nc/no-nondelegation-at-the-founding-not-so-fast-by-ilan-wurman/> (last visited Mar. 28, 2021).

⁷⁰ See Act of July 20, 1790, ch. 29, § 8, 1 Stat. at 134–35.

⁷¹ See *id.* § 3, 1 Stat. at 132; Act of July 20, 1840, ch. 48, § 12, 5 Stat. 394, 396.

⁷² See, e.g., Mortenson & Bagley, *supra* note 1, at 285–87 (reviewing the rise of arguments by conservative scholars in favor of the nondelegation doctrine).

⁷³ See Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41.

⁷⁴ See Act of Feb. 25, 1799, ch. 12, § 1, 1 Stat. 619, 619.

⁷⁵ See *supra* Section I.C.

⁷⁶ See Pulliam, *supra* note 3; *supra* text accompanying notes 3–4.

support across both parties and regions of the country.⁷⁷ An outright majority of only one state's House delegation voted against the statute.⁷⁸ What if Congress had to legislate to apply the statute to every subsequently enacted state exclusion law? There is no assurance that such legislation would have garnered a majority in Congress given the later hardening of lines between the North and the South.

What of the 1799 health statute, which as amended is still in force today?⁷⁹ It automatically applies to state quarantines and other restraints imposed to prevent the spread of COVID-19, requiring some federal civil and military personnel to obey those restraints and authorizing the Secretary of Health and Human Services to require those personnel to enforce them.⁸⁰ If Congress had to legislate to apply the statute to each newly-promulgated state COVID-19 restraint, there is little chance that the legislation would have become law under the Trump administration.

Early statutes authorized Presidents at their discretion to move federal offices, to erect forts and arms production facilities, and to fail to erect previously directed forts.⁸¹ These location decisions have significant political and economic benefits for localities. And moving federal offices out of the seat of government removes them from Congress's exclusive jurisdiction. Subjecting these decisions to institutional constraints (i.e., individual federal legislation) on a case-by-case basis could result in paralysis. Allowing the President to choose was more efficient and practical. It was an early and discretionary version of the contemporary base realignment and closure process.⁸²

In all of these cases one could interpret the early statutes as unconstitutionally shredding institutional constraints on federal power. Alternatively, one could interpret them as validly authorizing future

⁷⁷ See 12 ANNALS OF CONG. 273, 534 (1803); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, H.R. DOC. 108-222, at 59–61 (2005) [hereinafter CONG. DIRECTORY].

⁷⁸ See 12 ANNALS OF CONG. 273, 534 (1803). Three of the five New Jersey Representatives present voted no—John Condit, James Mott, and Henry Southard. *See id.* Ebenezer Elmer and William Helms voted yes. *See id.* The Rhode Island and Vermont delegations each had one no vote and one Representative not voting. *See id.*; CONG. DIRECTORY, *supra* note 77, at 60. The voting members of the Connecticut, Massachusetts, and New Hampshire delegations were evenly split. *See* 12 ANNALS OF CONG. 273, 534 (1803).

⁷⁹ See Act of Feb. 25, 1799, ch. 12, § 1, 1 Stat. 619, 619 (codified as amended at 42 U.S.C. § 97).

⁸⁰ See 42 U.S.C. § 97.

⁸¹ See Act of May 3, 1798, ch. 37, § 1, 1 Stat. 554, 554–55.

⁸² *Cf.*, e.g., CHRISTOPHER T. MANN, CONG. RSCH. SERV., R45705, BASE CLOSURE AND REALIGNMENT (BRAC): BACKGROUND AND ISSUES FOR Congress (2019) (discussing statutory constraints on presidential authority regarding U.S. military installations).

exercises of federal power because they satisfied all institutional constraints at the time of enactment—just as early Congresses treated them. Moreover, the originalist view that *private* rights and obligations are institutionally privileged but others are not is arbitrary. Institutional constraints on the separate branches are part of the explicit text of the Constitution and are also important. Congress’s power to borrow against the credit of the United States, for example, is important, yet early statutes delegated it to the President.⁸³

Professor Wurman makes a different, practical argument regarding institutional constraints. Although Congress technically could reclaim powers delegated to the executive branch, it might be exceedingly difficult to do so in practice.⁸⁴ Wurman quotes John Randolph opposing a delegation to President Jefferson: “If we give this power out of our hands, it may be irrevocable until Congress shall have made legislative provision; that is, a single branch of the Government, the Executive branch, with a small minority of either House, may prevent its resumption.”⁸⁵ But the same argument could be made about any of the delegations described above. And in one case Congress gave power to Presidents expressly recognizing that they would retain it “until the same shall be further ascertained by law.”⁸⁶

Moreover, the same objection applies to any congressional statute. Once enacted, it may be very hard in practice to repeal. Thomas Jefferson asserted that the earth belongs to the living and therefore all constitutions and laws should naturally sunset:

It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited In the first place, this objection admits the right, in proposing an equivalent. But the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly & without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal & vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law

⁸³ See, e.g., Act of June 30, 1798, ch. 64, § 1, 1 Stat. 575, 575 (authorizing the President to purchase ships for the navy “upon the credit of the United States, on terms, in his opinion, advantageous or convenient”).

⁸⁴ See Wurman, *supra* note 69.

⁸⁵ See *id.* (quoting 13 ANNALS OF CONG. 498 (1803)).

⁸⁶ See Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213.

of limited duration is much more manageable than one which needs a repeal.⁸⁷

Despite these practical impediments, the Founders imposed only one constitutional sunset. They limited appropriations in support of armies to two years,⁸⁸ the term of membership in the House of Representatives.⁸⁹ The Constitution allows other legislation—including delegations of power to alter private rights and obligations—to last indefinitely regardless of the practical difficulty of repeal.

3. *Limits on Further Delegation*

The people delegated powers to Congress.⁹⁰ What stops Congress from further delegating them? Wurman asserts that further delegation is only permissible if Congress can control the delegate.⁹¹ He argues that this distinguishes delegations to the President, whom Congress cannot control, from early federal delegations like those from a superior executive official to a subordinate or from the federal government to territorial governments.⁹² But the early Congresses did not control the apothecaries, the merchants, the maritime experts and the judicial official, consul or commercial agent, the Secretary of the Treasury, or the state or foreign authorities whose new promulgations automatically created federal rights and obligations.⁹³

Delegation of power to other authorities to alter federal rights and obligations cannot even be characterized as returning power to the people. States that enacted Black exclusion laws after 1803 caused federal law to forbid out-of-state persons who had no say in the enactments to convey persons of color in interstate and international carriage.⁹⁴ And federal enforcement of subsequently promulgated landing and unloading regulations delegated power over persons dealing with a diverted ship to the authorities that governed the ship's scheduled port.⁹⁵

⁸⁷ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0248> [https://perma.cc/H87A-QSXP].

⁸⁸ See U.S. CONST. art. 1, § 8, cl. 12.

⁸⁹ See *id.* art. 1, § 2, cl. 1.

⁹⁰ See *id.* pmbl. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).

⁹¹ See Wurman, *supra* note 69.

⁹² See *id.*

⁹³ See *supra* Part I.

⁹⁴ See *supra* notes 55–58 and accompanying text.

⁹⁵ See *supra* notes 29–31 and accompanying text.

CONCLUSION

Early congressional statutes delegated federal powers to a broad range of actors including private experts acting alone, private experts acting together with a judicial, consular or commercial authority, the President, other executive branch officials, and state and foreign authorities. The delegations governed private as well as public rights and obligations. They addressed some of the most critical subjects for the nation's early government: race, shipping, and the public fisc.⁹⁶ Legal history does not support the assertion of a nondelegation doctrine, whether general or limited to powers to alter private rights and obligations.

How broad is the power to delegate? Would the following statute be constitutional: "The President may issue regulations carrying into effect any of the powers vested in Congress in Article I, Section 8"⁹⁷ Perhaps not. But early congressional practice supports a statute setting forth general purposes and authorizing the President to issue regulations carrying into effect any of those powers for "the purposes of this act" if "in his opinion, the public service shall require it."⁹⁸

The claim that the Constitution's "original meaning" includes a nondelegation doctrine that is non-textual and somehow discretely limited to powers over private rights and obligations tortures the meaning of "meaning" beyond comprehension. For a nondelegation doctrine to exist, it must be hewn like all others using text, structure, practice, political morality, and other tools of constitutional argument.⁹⁹ Conservatives may dislike the federal government imposing obligations on them or granting rights to others. They may dislike the fact that it can be difficult in practice to repeal federal statutes, including those delegating federal powers. They are free to oppose proposals to exercise or delegate federal powers in Congress or through living constitutional arguments. But they cannot rely on history to assert that the "original meaning" of the Constitution includes a nondelegation doctrine.

⁹⁶ From 1789 through 1862, customs duties provided almost all federal revenues. *See* U.S. INT'L TRADE COMM'N, A CENTENNIAL HISTORY OF THE USITC 35 (2017). An early federal statute forbade the importation of dutiable goods other than by ship. *See* Act of July 31, 1789, ch. 5, § 40, 1 Stat. 29, 48–49.

⁹⁷ *See* Wurman, *supra* note 69.

⁹⁸ Act of May 30, 1796, ch. 41, § 5, 1 Stat. 487, 487; *see supra* note 45 and accompanying text.

⁹⁹ *Cf.* Antonin Scalia, *A Note on the Benzene Case*, REGULATION, July/Aug. 1980, at 28 ("[T]he unconstitutional delegation doctrine is worth hewing from the ice.").