Reply

The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause

Seth Barrett Tillman*

I should like to thank the editors of the *Texas Law Review* for making this colloquy possible. Additionally, I should like to thank Professor Gary S. Lawson for writing (on short notice) a thorough and scholarly opposition, to which I reply below. Although I do not shy away from any position taken in *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*,[1] Professor Lawson is correct in one regard: nowhere do I clearly explain the boundaries or contours of the condition precedent interpretation of the Orders, Resolutions, and Votes Clause (the "ORV Clause") and its relation to the nondelegation doctrine. Although the reader might believe this failure on my part was somehow obvious, it seemed at the time that it was enough to resurrect the forgotten original meaning of the ORV Clause without expressly addressing the interplay between that meaning and other (albeit related) doctrines and constitutional provisions. Below I attempt to address Professor Lawson's critique and to show that the breadth of Congress's power under the ORV Clause is nearly coextensive with Congress's statutory lawmaking powers.

---

* Harvard Law School, J.D., cum laude (2000); University of Chicago, A.B., honors (1984). Member of the Bar of the District of Columbia and the State of Illinois. This Reply was written while clerking for the Honorable Jane R. Roth, United States Court of Appeals for the Third Circuit (2004–2005). Once again I find myself indebted to a number of individuals. I should like to thank: M.N. Venkatachaliah, Chief Justice of India (ret.), for his comments regarding single-house action under Indian law; Gerard W. Hogan, Senior Counsel, and T. John O'Dowd, University College of Dublin Faculty of Law Academic and Barrister, for their comments regarding single-house action under Irish law; and David M. Driesen, Professor of Law, Syracuse University College of Law, for his many helpful comments in earlier stages of this project. Additionally, I solicited and received useful comments from Professors R. Kent Newmyer, Alison G. Olson, John Vile, Kurt Lash, Murray Dry, Herbert A. Johnson, George W. Carey, Clyde E. Jacobs, Charles F. Hobson, Forrest McDonald, M.J.C. Vile, George M. Curtis, Peter Bromhead, Brent Tarter, Library of Virginia, Sir William McKay, Ian Harris, Clerk of the House of Representatives, Parliament of Australia, David Moltke-Hansen, President, Historical Society of Pennsylvania, and Alan Simcock, Executive Secretary, OSPAR Commission with regard to my use of historical and parliamentary materials. Thank you, all. Alas, all errors remain mine.

1. Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEXAS L. REV. 1265 (2005).

– I –

Professor Lawson's position, as I understand it, is that Congress cannot delegate *lawmaking* power. Professor Lawson does not tell us what lawmaking power is precisely. But whatever it is or whatever it may have meant to the eighteenth century conventioneer, ratifier, jurist, or member of the educated public—that power has been placed in *Congress* by the Legislative Powers Vesting Clause, and that precludes lawmaking by a single house. Congress is restricted by the vesting clause of Article I to those acts that can be reasonably described as consistent with the eighteenth century view of the "legislative power."[2] Moreover, were one house to act alone, Professor Lawson argues, its actions must perforce trespass on powers that are better (or only) described as executive or judicial—equally forbidden per the vesting clauses of Articles II and III.[3] Having excluded the whole of lawmaking from the ambit of the ORV Clause, Professor Lawson concludes that the remaining domain of the ORV Clause must be congressional subpoenas. The premise here is that the sort of discretion that judicial and executive actors regularly use in the performance of their duties must also be used by a single house operating (acting alone) under the aegis of the ORV Clause. Because I disagree with this assumption, I also disagree with Professor Lawson's ultimate conclusion restricting the domain of the Clause.

Congress cannot order a federal court to rule for a particular party in a particular case.[4] But until the last day passes for a nonprevailing party to

---

2. *Compare* Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEXAS L. REV. 1373, 1378 [hereinafter Lawson, *Burning Down the House*] (focusing on the Executive Power and Judicial Power Vesting Clauses as textual sources inconsistent with single-house action), *with* Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002) (arguing that each of the three vesting clauses has operative force as a matter of original meaning). In *Burning Down the House*, Professor Lawson primarily grounds his argument for restricting lawmaking per the ORV Clause in the vesting clauses of Articles II and III. This is not surprising. To the extent that lawmaking per the ORV Clause is just another method to *legislate*, it is embraced by the Vesting Clause of Article I in precisely the same way that the statutory lawmaking process is. They are both, after all, components of Article I, Section 7. *Cf.* Lawson, *Burning Down the House*, *supra*, at 1383 (taking the position that the Legislative Powers Vesting Clause "vests in Congress a subset of all powers conceivably labeled 'legislative' that are enumerated elsewhere *in the Constitution*" but not explaining why lawmaking per delegated authority under the aegis of the ORV Clause is not one such enumerated power).

3. *See* Lawson, *Burning Down the House*, *supra* note 2, at 1378; *see also* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 304 & n.135 (2001) (suggesting that the core of textual support for the nondelegation doctrine is in the Executive Power Vesting Clause, rather than the Necessary and Proper Clause or Legislative Powers Vesting Clause).

4. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (refusing to give effect to a statute that "prescribe[d] [a] rule[] of decision to the Judicial Department of the government in cases pending before it"); *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 405

seek reconsideration or appeal, a judicial decision has not *fully* vested an individual right.[5] Until the last moment has passed, Congress may create a new rule of decision *for that case and for like cases*—leaving the determination of the outcome under the new rule for the federal (and state) courts.[6] Although not exactly the same, similar considerations apply with regard to Congress's relationship to final determinations made by the Executive Branch. For example, a party may take possession of land in a federal territory through a grant from the United States. Once the last necessary act under then-prevailing law is done and right to the land vests in the grantee, it is too late for Congress to act under the aegis of the Territory and other Property Clause—at least not without giving rise to a cause of action for a taking.

On the other hand, prior to final action by the Executive Branch and prior to a final judgment (and the exhaustion of appellate review and reconsideration) by the Judicial Branch, Congress's power to change the legal relations between parties (between private parties, or between parties

---

(1980) (finding the constitutional infirmity in *Klein* rooted in the fact that the statute required judicial "'decision of a cause in a particular way'") (quoting *Klein*, 80 U.S. (13 Wall.) at 146).

5. *Compare* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (holding that although Congress cannot direct findings under old law, Congress may amend applicable law even if it affects pending litigation, including affecting outstanding injunctions), *with* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that in situations involving cases that have gone to final judgment and concluded appellate review, Congress has no constitutional power to make new statutes giving relief to a party whose action had already been dismissed).

6. My analysis here generally follows hornbook doctrine. Any colloquy between Professor Lawson and myself requires our taking some areas of doctrine as noncontroverted. Admittedly, I do not know Professor Lawson's precise views on this particular area of law. For example, in *Burning Down the House*, Professor Lawson wrote that in *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), the contested statute left it to the President to determine if England had ceased violating neutral United States commerce, and that Congress "could not . . . entrust that responsibility by statute to *itself*, one house, or a legislative committee." Lawson, *Burning Down the House*, *supra* note 2, at 1380 (emphasis added). I readily agree that Congress could not entrust that power to *itself—to the exclusion of the President. Cf. id.* at 1380 ("A legislative veto is a device whereby executive action implementing a statute is voided by [subsequent] legislative action—whether by Congress, one house of Congress, or a congressional committee—*which does not undergo presentment*.") (emphasis added). ORV Clause lawmaking is, of course, distinguishable from the legislative veto mechanisms described by Professor Lawson. All lawmaking, single-house or bicameral, pursuant to the ORV Clause must be presented.

Is there any reason to believe that Congress, at the time the events of the *Brig Aurora* unfolded, could not have altered the terms of its delegation to the Executive Branch by a later statute? Likewise, Congress might by statute have limited the legal effect of a prior exercise of presidential discretion to a specified time period—effectively requiring statutory ratification of the presidential finding. In neither of the scenarios just described would Congress be "implementing federal law"—to use Professor Lawson's terminology. Congress would simply be making new statutory law. If such lawmaking by statute, terminating or effectively overriding Executive Branch discretion, passes constitutional muster and is not a forbidden use of executive or judicial discretion by Congress, then one house of Congress (subject to presentment) can also achieve the same result under delegated statutory authority, nondelegation concerns notwithstanding. *See infra* note 7 (discussing the nondelegation doctrine and enforcement of federal law).

vis-à-vis the United States) is largely unimpaired, notwithstanding a party's upset expectations when "relying" on extant law and notwithstanding the unfairness of perceived retroactivity. When Congress makes use of this undoubted plenary power (within those substantive areas of lawmaking constitutionally committed to Congress), what procedural mechanism does Congress use? *It acts by statute*.

Accepting this result has consequences for Professor Lawson's position. It means that Congress's power to upset (modify, terminate, or create ab initio) what would otherwise be the legal relations between parties is a valid, constitutional exercise of power, properly described as *legislative* in nature, and not a forbidden use of judicial or executive discretion. This is then the answer to Professor Lawson's query. If and when Congress can validly control legal relations by statute, then it can also constitutionally achieve the *same* result acting under the aegis of the ORV Clause.[7] ORV Clause lawmaking and traditional statutory lawmaking are merely *alternative* congressional instruments to achieve the same goal: legislation broadly understood. If Congress's use of discretion in enacting a statute is properly denominated as "legislative" in nature, then that use of discretion is not magically transformed into forbidden "executive" or "judicial" discretion when Congress adopts a different intracongressional procedure[8] or statutory instrument achieving precisely the same end.[9]

---

7. I see no cause for concern that operating under the aegis of the ORV Clause, Congress might usurp the Executive Branch's role in law enforcement. Congress and its officers cannot generally enforce federal statutory law against nonmembers and nonemployees, particularly beyond the bounds of the Capitol or when Congress is not in session. Just as Congress cannot assign such responsibilities to itself or to its officers via statute, it cannot sidestep that result acting under the aegis of the ORV Clause or other delegated authority. *See supra* note 6 (discussing the nondelegation doctrine and the implementation of federal law).

8. My characterization of ORV Clause lawmaking as self-delegation or intracongressional delegation is no idle fancy. Professor Lawson's position relies on scholarship surrounding the nondelegation doctrine and case law going back to the *Brig Aurora*. I believe such reliance is somewhat misplaced. Such case law generally discusses the propriety of cross-branch delegations, i.e., the propriety of Congress's delegating to the courts or to the executive. ORV Clause lawmaking is more akin to waiver: Congress is delegating to one of its constituent components, not to a rival branch. Separation of powers concerns here are misplaced. I do acknowledge that my view is not universally shared. *See* United States v. Munoz-Flores, 495 U.S. 385, 395 (1990) ("Provisions for the separation of powers within the Legislative Branch are thus *not* different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."); *id.* at 394 ("What the Court has said of the allocation of powers *among* branches is no less true of such allocations *within* the Legislative Branch.") (citing INS v. Chadha, 462 U.S. 919, 948–51 (1983)). Although the Supreme Court is a high authority whose opinions deserve our every consideration and respect, its modern opinions add little to a discussion regarding original meaning, understanding, purpose, or intent. *See, e.g.*, Tillman, *supra* note 1, at 1343 nn.167–68 (noting the *Chadha* Court's inability to fathom either the elements of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), or the Constitution's technical use of the term "advice and consent" as opposed to "ratify" with regard to the treaty process).

Although Professor Lawson does not make this precise argument, some might take the position that Congress is only acting in a legislative capacity, consistent with the Legislative Powers Vesting Clause, when it writes statutes. This opinion is, in fact, probably widely held.

However, this view is somewhat problematic. This position assumes an identity between *legislation* (per the Legislative Powers Vesting Clause) and *statutes* or *statutory law* (per Article I, Section 7, Clause 2). First, the Constitution's text does not support such an identity of meaning between the two terms.[10] Indeed, the Supremacy Clause expressly includes nonstatutory forms of lawmaking—treaties (another form of single-house action subject to presidential ratification) and constitutional amendments—as the supreme *law*

I believe the same conclusions could be arrived at under the Rules of Proceedings Clause. *See* U.S. CONST. art. I, § 5, cl. 2. There is now a wide body of persuasive scholarly literature arguing that each house of Congress has an independent power to delegate (its share of statutory) lawmaking to an internal *supermajority* or *submajority*. For example, substantial scholarly authority has maintained that a Senate majority may, by single-house rule, delegate the Senate's lawmaking powers to sixty members, fifty members, or to forty members . . . or to one member—as opposed to simple majority rule. ORV Clause lawmaking is merely delegating to a zero submajority—with a concomitant waiver of Senate authentication. *See Munoz-Flores*, 495 U.S. at 392 n.4 ("[C]ourts accept as passed all bills authenticated in the manner provided by Congress.").

9. However, intraparliamentary delegation comes with not insubstantial costs. Consider the example of the United Kingdom: There, single-house lawmaking per delegated authority is authorized under the Parliament Act of 1911. This has led to supremacy conundrums. *See* Parliament Act of 1911, 1 & 2 Geo. 5, c. 13 (U.K.) (limiting the House of Lords's ability to delay a bill to a maximum of two years, after which the House of Commons could act without participation of the Lords—but the crown's assent was still required), *amended by*, Parliament Act of 1949, 12, 13 & 14 Geo. 6, c. 103 (U.K.) (further limiting the House of Lords's ability to delay passage of a bill: Lords could delay passage of a bill for no more than one year). *Compare* Peter Oborne, *The Dubious Means by which Labour Hopes to Ban Hunting by Christmas*, THE SPECTATOR, June 26, 2004, at 10 ("[S]erious legal opinion has always doubted the validity of that 1949 Act. The problem is that the Atlee government used the 1911 Act itself to press through the 1949 measure. Right from the very start Britain's leading jurists pointed out that the 1911 Act—a piece of delegated legislation—did not permit the monarch and Commons acting alone to change its own terms [from the 1911 Act]."), *and* Francis Bennion, *Lord Donaldson of Lymington and the Parliament Acts*, 150 NEW L.J. 1789, 1789 (2000) ("Lord Donaldson says doubts have been raised [about the 1949 Act] by . . . the constitutional lawyers Sir William Wade, Professor Zellick and [the late] Professor [O.] Hood Phillips."), *with* The Queen on the Application of Jackson v. H.M. Attorney General, [2005] EWHC 94 (QBD (admin) 2005), 2005 WL 62254 (upholding application of the 1949 Act), *aff'd* [2005] EWCA CIV 126 (Eng. Ct. App.), 2005 WL 291000, *appeal to the House of Lords filed*.

10. Indeed, modern usage recognizes the distinction between lawmaking and statutes. *See* Motion for Leave to File Brief of American Bar Association as *Amicus Curiae*, at 11, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, and 80-2171) ("Used in one sense, law is the body of governmental prescriptions binding upon the public, including agency rules . . . . Used in another sense, law connotes only those prescriptions that are the work of Congress . . . .") (submitted by Professor Antonin Scalia et al.). If Justice Scalia, or anyone else, wishes to identify statutes with orders, resolutions, and votes, he or they will now have to make an argument to that effect. *Compare* State v. Delesdenier, 7 Tex. 76, 95 (1851) (adjudicating state analogue of the ORV Clause and holding that "[b]ills and resolutions are named in contradistinction; both do not mean one and the same thing; if they do, unnecessary terms are made use of in the Constitution"), *with* Knowlton v. Moore, 178 U.S. 41, 87 (1900) (noting "elementary canon of construction which requires that effect be given to each word of the Constitution").

of the land. This indicates that things other than statutes are law, even if not statutory law. All these instruments—constitutional amendments, statutes, and treaties—are equally legislation. And it is no surprise that ORV Clause lawmaking is not included in the Supremacy Clause. ORV Clause lawmaking is lawmaking per delegated authority—it can never be supreme relative to its authorizing or ratifying statute. Second, views contemporaneous with ratification do not support an identity between legislation and statutory lawmaking.[11] Third, history does not support identifying legislation with statutory lawmaking: pre-1787 British and American parliaments and legislatures availed themselves of a variety of alternative statutory instruments.[12] Lastly, the structure of Article I, Section 7 is some support for the position that both procedures—statutory lawmaking, and ORV Clause lawmaking—are both valid expressions of Congress's legislative power. Article I, Section 8 lays out the broad heads of substantive congressional jurisdiction. Article I, Section 7 lays out the procedures under which Congress may exercise power in the areas committed to its jurisdiction. The only procedural restriction in Section 7 restricts the statutory lawmaking process: the first clause requires that bills for raising revenue originate in the House.[13] There are no similar Section 7 procedural restrictions limiting the scope of ORV Clause lawmaking. (However, as explained in *A Textualist Defense*, many—but not all—of the Article I heads of substantive congressional jurisdiction preclude ORV Clause lawmaking by expressly limiting congressional power to statutory

11. *Compare* THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("Law is defined to be a rule of action . . . ."), *and* WALTER BAGEHOT, THE ENGLISH CONSTITUTION 153–54 (R. H. S. Crossman intro., 1963) (1867) ("An immense mass, indeed, of the legislation is not, *in the proper language of jurisprudence*, legislation at all. A law is a general command applicable to many cases. The 'special acts' . . . are applicable to one case only.") (emphasis added), *with* THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("What is a LEGISLATIVE power, but a power of making LAWS?").

12. *See* The Statute of Proclamations, 1539, 31 Hen. 8, ch. 8 (Eng.) (directing that the King's proclamations were to be "obeyed, observed and kept as thoughe they were made by Acte of Parliament"); SIR WM. GRAHAM-HARRISON, NOTES ON THE DELEGATION BY PARLIAMENT OF LEGISLATIVE POWERS, WITH A PARTICULAR EXAMINATION OF THE CASE OF THE INSTITUTE OF PATENT AGENTS V. LOCKWOOD, AND SOME CONSIDERATIONS WITH RESPECT TO THE FUTURE GRANTING, EXERCISE AND CONTROL OF SUCH POWERS 4 (1931) ("[T]he *legislative* power won for the Parliament from the King was used to authorize the King to *legislate* without a Parliament.") (emphasis added); *see also* Tillman, *supra* note 1, at 1310–11 n.100 (discussing British lawmaking by order and ordinance); *id.* at 1324–26 n.125 (discussing British lawmaking by single-house order, resolution or vote for the purpose of expenditure or taxation ratified by subsequent statute); *id.* at 1326–27 n.126, 1335 n.146 (noting lawmaking by American colonies by single-house order, resolution or vote, particularly in the financial context); *cf. id.* at 1357–63 nn.203–23 (citing the celebrated *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), which held that the newly independent state of Virginia may issue a legislative pardon, although expressing disagreement as to whether it extended to a single-house pardon).

13. *See* U.S. CONST. art. I, § 7, cl. 1.

lawmaking.[14]) The placement of procedural restrictions on the statutory lawmaking procedure within Section 7, but the absence of any coordinate procedural restrictions on the ORV Clause, is some additional reason to believe that Congress's power to act under the ORV Clause is generally coextensive with its power to act by statute.

Of course, it must be remembered that ORV Clause lawmaking is delegated authority. Congress can only delegate what it has.[15] If Congress could not achieve a result by statutory lawmaking, it cannot achieve it indirectly by a prior statute and a later-in-time order. Similarly, if the Bill of Rights precludes certain congressional actions, just as Congress cannot trespass on those rights by statute, it cannot do so indirectly by order, resolution or vote.

Let's recapitulate these results. When may Congress engage in lawmaking under the aegis of the ORV Clause? The first question to ask is whether or not Congress could act by statute to achieve the same result. If not, then Congress cannot act under the aegis of the ORV Clause. If so, then the second question to ask is whether or not Congress's power to legislate per single-house action has been precluded by a constitutional provision demanding congressional action "by law."[16] If so, then ORV Clause lawmaking is precluded. Otherwise, Congress has plenary power to act via statute or under the aegis of the ORV Clause.

Congressional action pursuant to the ORV Clause is amenable to adjudication testing to see whether the single-house order is ultra vires under the terms of its organic act.

– II –

What about legislative vetoes? Aren't legislative vetoes in their very nature or essence a use of discretion that can only be categorized as judicial or executive and hence forbidden under the aegis of the ORV Clause because they are not properly legislative in character?

Consider *Chadha*. Congress provided by statute that the Attorney General's use of discretion—overturning the immigration judge's decision to deport—was not final until the end of Congress's next session. Does anyone

---

14. *See* Tillman, *supra* note 1, at 1328–29 & n.129.

15. In correspondence with Professor Lawson, I had previously expressed a different position: "I believe that anything that Congress might delegate to the President (or the Executive Branch generally), Congress might *alternatively* or *additionally* delegate to a single-house with presentment . . . ." Letter from Seth Barrett Tillman to Gary S. Lawson, Professor of Law, Boston University School of Law 1 (Apr. 9, 2004) (on file with the Texas Law Review). Professor Lawson's comment and subsequent correspondence have convinced me that my initial views were incorrect.

16. *See supra* note 14.

doubt that during that period of time, Congress—by means of a suitably general statute—might have (effectively) overridden the decision of the Executive Branch? I suppose some might doubt the validity of such a statute. Such a position is at odds with settled law, but it is not a wholly frivolous position. A person taking such a point of view would preclude even *statutes* from functioning as legislative vetoes.[17] And if such statutes are precluded, then Congress cannot achieve a functional legislative veto under the aegis of the ORV Clause.

On the other hand, if Congress could constitutionally override the Attorney General, by a suitably general statute, then it could with equal propriety embody the terms of that statute in the form of a single-house order, assuming presentment of the order and an authorizing or ratifying statute. Again, the test is simple: If Congress can validly achieve its goal by statute, then the same action is equally permissible under the aegis of the ORV Clause, absent a constitutional provision mandating congressional action "by law."

The constitutional problem for such legislation, legislation effectively overriding judicial or executive branch determinations absent (fully) vested rights, to the extent that a problem exists, is not in the *procedural form* such *legislation* takes, but in the substance—the terms of the override. Is the override suitably general and prospective, operating on cases yet unknown (in addition to the known case stimulating congressional action)? Does it look like a rule governing primary nonlitigation future activity? Or is the legislation specific, temporary in operation, or effectively retrospective because it reaches only a particular party—expressly named or implicitly described? In other words, is it attainder-like? Has Congress commanded the courts to rule for a particular party in a particular cause in a pending case? Is it the *Klein* problem? Here I need only note that any such defect would equally implicate a statute and a congressional order under delegated statutory authority. If the Vesting Clauses of the Constitution exclude from the domain of the ORV Clause some or all legislative vetoes (even subject to presentment), then it is only because statutes are similarly limited. Likewise, the domain of the ORV Clause might also be limited by the nondelegation doctrine. If it is, it is limited in precisely the same way that statutes achieving the same ends are limited.

---

17. *See, e.g.*, Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers upon the Expiration of a Presidential Term, 11 OPINIONS OFF. LEGAL COUNS. U.S. DEP'T JUST. 25, 26 (1987) (taking the position that "the exclusivity of the President's removal power cannot be circumvented . . . by 'ripper' legislation which purports to abolish an office and immediately recreate it" although acknowledging that bona fide abolition of an office is possible).

The ORV Clause tells us nothing with regard to the validity of the nondelegation doctrine as a matter of original meaning circa 1787. Nor does the ORV Clause teach us anything with regard to the precise contours that doctrine imposes on statutes or on alternative statutory instruments. What does the ORV Clause teach us? Only this: Congress may create legal instruments other than statutes, equally demanding recognition from the public and from the other branches. That is all. And to the extent that the Bill of Rights, the nondelegation doctrine, or other constitutional doctrines or provisions restrict the constitutional domain of statutes, those doctrines and provisions apply with equal (if not greater) force against alternative statutory instruments passed per delegated statutory authority.