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**Article**

**From Exclusivity to Concurrence**

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## INTRODUCTION

In arguing that President Washington could not interpret a mutual defense treaty that potentially required America to join battle with France—but that only Congress could interpret the

treaty on account of its power to declare war—James Madison reasoned as follows:

[T]he same *specific function or act*, cannot possibly belong to the *two* departments and be *separately* exerciseable by *each*.

....

A concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.<sup>1</sup>

Madison's approach has broad implications beyond the specific question he was examining. Because the Constitution spends most of its time allocating power to specific institutions, the question of whether constitutionally allocated power is exclusively held by a single institution (as Madison believed), or instead can be concurrently held by two, is pervasive.

Probably nowhere else has Madison's view of the basic architecture of American constitutionalism proven to be so wrong. This Article shows that concurrence—what Madison believed to be “awkward in practice . . . [and] unnatural in theory”<sup>2</sup>—is today widespread. In doing so, the Article uncovers an integral, yet largely overlooked, feature of constitutional law.

As regards separation of powers, for example, though the Constitution gives the President the “Power to grant Reprieves and Pardons,”<sup>3</sup> Congress can grant amnesties that, according to the Supreme Court, are functionally equivalent to pardons.<sup>4</sup> Similarly, while the Constitution specifies only one mechanism (treaty) through which the federal government can create international agreements,<sup>5</sup> many contemporary international obligations have been created by congressional-executive agreements, which do not require a supermajority of senators.<sup>6</sup>

With regard to “vertical” federalism, though Congress has the power to regulate interstate commerce, states *also* have power to regulate interstate commerce.<sup>7</sup> With respect to “hori-

1. JAMES MADISON, HELVIDIUS NUMBER II (1793), *reprinted in* ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 68–69 (Morton J. Frisch ed., 2007).

2. *Id.* at 69.

3. U.S. CONST. art. II, § 2, cl. 1.

4. *Brown v. Walker*, 161 U.S. 591, 601 (1896) (recognizing this and noting that the difference between pardons and amnesties is “one rather of philological interest than of legal importance” (quoting *Knote v. United States*, 95 U.S. 149, 153 (1877))).

5. *See* U.S. CONST. art. II, § 2, cl. 2.

6. *See infra* Part I.B.

7. *See* *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

zontal” federalism, multiple states frequently have power to regulate a given person, transaction, or occurrence.<sup>8</sup>

Concurrent power is found in other contexts beyond separation of powers and federalism. For example, though the Seventh Amendment allocates adjudicatory fact-finding power to the jury, institutions apart from juries also find facts: administrative law judges in Article I courts find facts in the very same contests where juries would have the constitutional power to fact-find, and Article III judges engage in fact-finding of the sort performed by juries when they decide motions for summary judgment and motions to grant judgment as a matter of law. To provide one last example, although the power to sue government contractors belongs to the executive branch, it does not rest exclusively there: *qui tam* statutes empower private citizens to sue, on behalf of the United States, anyone who has submitted a false claim to the federal government.<sup>9</sup> The power to sue government contractors to recover for false claims accordingly rests with both the federal executive *and* private citizens.<sup>10</sup>

Though commentators focusing on discrete doctrines sometimes have recognized that governmental powers can overlap,<sup>11</sup> this Article is the first to comprehensively analyze the phenomenon of concurrence. Examining multiple doctrinal contexts, this Article uncovers patterns that can lead to a more informed choice between exclusivity and concurrence in the future. This is important because many contested contemporary issues implicate the choice between exclusivity and concurrence. For example, though the Constitution specifically vests the power to declare war with Congress, does the President also have a simi-

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8. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981); Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 729–30 (2007).

9. See 31 U.S.C. § 3730 (2006).

10. See *id.* Likewise, the *posse comitatus* doctrine allowed state and federal executive officials to compel private citizens to assist in the making of arrests and in otherwise executing a wide range of state and federal laws, exemplifying yet another instance of concurrence: executive power that is jointly exercised by the executive branch and private sector. See *infra* note 337.

11. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000) (“[N]early every federal statute addresses an area in which the states also have authority to legislate . . .”); Lee H. Rosenthal, *Back in the Court’s Court*, 74 UMKC L. REV. 687, 695–96 (2006) (noting that problems arising from asbestos can be handled either by legislatures or courts).

lar power?<sup>12</sup> Or, are there mechanisms outside of Article V by which the Constitution can, in effect, be amended?<sup>13</sup>

This Article is composed of six parts. Part I formally defines concurrence and exclusivity, and then identifies seven contemporary instances of concurrence. Part I also explains concurrence's relation to the familiar concepts of checks and balances, enumerated powers, and *expressio unius est exclusio alterius*. Part I concludes by closely analyzing James Madison's argument for exclusivity that appears in his famed *Helvidius Number II*, as well as Alexander Hamilton's response in support of concurrence.<sup>14</sup>

This Article's next four parts identify and analyze recurring patterns that emerge across multiple doctrines in American constitutional law. Part II uncovers a stunning historical pattern: virtually all places where power today is held concurrently amount to reversals of the Court's original view that the power in question was held exclusively by only one institution. Part II documents the doctrinal process by which the Supreme Court came to accept concurrence in several arenas. In so doing, the Supreme Court rejected categorical application of the principle of *expressio unius est exclusio alterius*, which means "to express or include one thing implies the exclusion of the other, or of the alternative."<sup>15</sup> Part II also shows, however, that concurrence has not eclipsed exclusivity. Many of the Constitution's power allocations are, and always have been, understood as vesting power in solely one institution, and there is at least one instance of a countertrajectory where the Court stepped back somewhat from concurrence and headed back towards exclusivity.<sup>16</sup>

12. See Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 324 (2003) (concluding that the President can declare wars).

13. See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44–47 (1991) (arguing that the Reconstruction Amendments were adopted by mechanisms outside of Article V); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1326 (2006) ("[O]fficials responsible for interpreting the Constitution might respond to the shifts in popular opinion that a campaign to amend the Constitution produced, even if, by formal measures, the People endorsed the status quo.").

14. For an informative overview of the Madison-Hamilton exclusivity debates, see H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 47–51 (2002).

15. BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

16. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Part III explores how and why there has been a switch from exclusivity to concurrence. Part III first uncovers three recurring mechanisms by which concurrence is generated. It then shows that, because courts tend to start with exclusivist assumptions, concurrence typically was initiated by nonjudicial institutions, and gained judicial approval only after becoming entrenched. An array of pragmatic considerations fueled the shift from exclusivity to concurrence: concurrence has been turned to when the most obviously tasked institution has failed to act, to conscript another institution's complementary competencies and thereby improve governmental activity, to achieve administrative efficiencies, to solve problems unanticipated by the Founders, and to meet emergencies.<sup>17</sup>

Part IV points out that the choice between exclusivity and concurrence is not "all or nothing." Much power is still exclusively held by a single institution. Moreover, even where there is concurrence, there typically are limits on the degree to which power can be shared among two or more institutions. Taken as a whole, Part IV suggests that the choice between exclusivity and concurrence has been made not on the basis of transsubstantive or categorical principles, but on context-specific determinations. This suggests that slippery slope concerns articulated by some scholars—that permitting concurrence in one context could lead to the disappearance of exclusivity and concomitant chaos—are overblown.<sup>18</sup>

Part V addresses one of concurrence's crucial downsides: the chance of conflict between institutions with overlapping powers. But this is not a reason to categorically reject concurrence. Part V shows that American law has developed many methods for dealing with interinstitutional conflict. Accordingly, while the possibility of conflict is a veritable cost to be weighed against concurrence's potential benefits, it is not a basis for rejecting concurrence as an *a priori* matter.

Part VI draws lessons from this Article's findings. After considering four different "metanarratives" that help explain the shift from exclusivity to concurrence, Part VI considers the constitutional implications of its findings. Context-specific considerations have guided the choice between exclusivity and con-

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17. See *infra* Part III.B.

18. For an example of such a concern in a context relevant to concurrence, see Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1053 (2007) (arguing that delegation by the President abridges the power of the executive branch).

currence. This Article defends this practice, explaining why concurrence is not per se unconstitutional under *expressio unius est exclusio alterius* and why it is not inconsistent with the concept of enumerated powers. Concurrence has been embraced from the start of our nation, and the Constitution's text almost never forecloses it. The choice between exclusivity and concurrence is appropriately made on a context-by-context basis, though experience from other contexts may be illuminating.

## I. THE ANALYTICS OF CONCURRENCE, AND SOME EXAMPLES

After defining concurrence and exclusivity, this Part surveys seven contemporary examples of concurrence, introduces several analytical tools that deepen an understanding of concurrence, and analyzes Hamilton's and Madison's debates concerning the choice between exclusivity and concurrence—the earliest and most exhaustive discussion of the subject to date.

### A. DEFINITIONS

“Concurrence” refers to the arrangement where a given activity, *X*, can be performed by more than one institution, despite the fact that the Constitution appears to place the power to do *X* in one specified institution. “Exclusivity” refers to the situation where a given activity, *X*, can be performed by only a single institution. By “institution,” I include the different entities that are explicitly referenced in the Constitution (for example, Congress, the Supreme Court, other Article III courts, the President, states, juries, and the people), as well as novel entities not mentioned in the Constitution, such as administrative agencies and supranational tribunals.

### B. CONTEMPORARY EXAMPLES

What follows—by way of description, not justification—are seven contemporary examples of concurrence.

1. The Constitution states that “[i]n *all* Cases affecting Ambassadors . . . and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”<sup>19</sup> Though the Supreme Court indeed has original jurisdiction in these cases, inferior district courts *also* have original jurisdiction over cases brought by ambassadors and, in many cases, also over cases

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19. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

brought by states.<sup>20</sup> *Accordingly, notwithstanding the Constitution's allocation of original jurisdiction over cases affecting ambassadors and in which states are a party to the Supreme Court, district courts have concurrent authority to exercise original jurisdiction over such cases.*

2. Article III of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>21</sup> Today, however, a significant amount of adjudication concerning federal matters occurs in non-Article III federal courts.<sup>22</sup> For example, contract and property claims against the United States are heard in the non-Article III United States Court of Federal Claims,<sup>23</sup> and administrative agencies can hear disputes between private parties as to the compensation owed to an injured maritime worker.<sup>24</sup> These non-Article III institutions can oversee these adjudications despite the fact that both the above-mentioned claims *also* could have been heard in Article III courts; contract and property claims against the United States also fall within federal district courts’ jurisdiction, and federal district courts have “long handled maritime personal injury claims.”<sup>25</sup> Indeed, “at least in some circumstances, virtually all of the kinds of cases that are heard in Article III courts, including criminal cases and civil disputes arising under the Constitution, laws, and treaties of the United States,” can be heard in non-Article III federal courts.<sup>26</sup> *Accordingly, notwithstanding the Constitu-*

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20. See *Ames v. Kansas*, 111 U.S. 449, 469–72 (1884); see also *infra* Part II.A (analyzing *Ames* in detail).

21. U.S. CONST. art. III, § 1.

22. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 36–51 (1980); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004) (“Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to Article I tribunals whose judges lack salary and tenure protections.”).

23. Pfander, *supra* note 22, at 657.

24. *Crowell v. Benson*, 285 U.S. 22, 54 (1932).

25. Pfander, *supra* note 22, at 657 n.52, 659.

26. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923 (1988). Consider, as well, the various supranational adjudicatory panels created under federal law. For example, whereas the conclusions of the federal agencies tasked with administering the United States antidumping laws typically are subject to judicial review by Article III courts, the North American Free Trade Implementation Act creates new adjudicatory entities that are staffed by representatives of the two disputing countries. For a discussion of this issue, see Henry Paul Monaghan, *Article*



tion's allocation of the judicial power to Article III courts, non-Article III courts frequently have concurrent authority to adjudicate disputes.

3. The Constitution states that “[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States.”<sup>27</sup> The Supreme Court has held that this provision does not “take from Congress the power to pass acts of general amnesty,”<sup>28</sup> notwithstanding the fact that “[t]he distinction between amnesty and pardon is of no practical importance”<sup>29</sup> and “is one rather of philological interest than of legal importance.”<sup>30</sup> Accordingly, notwithstanding the Constitution's allocation of the pardon power solely to the President, Congress has concurrent authority to undertake acts that have the functionally identical effect of legally forgiving past illegalities.

4. The Constitution specifies only one mechanism by which the United States can create international agreements—the treaty—concerning which it states that the “[President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>31</sup> Many of the most important international agreements that the United States entered into during the twentieth century, however, are not treaties, but, instead, are congressional-executive agreements, which are negotiated by the President and approved by simple majorities of both houses of Congress.<sup>32</sup> The *Restatement (Third) of the Foreign Relations Law*

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*III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 835–39 (2007). These adjudicatory entities are not Article III courts, yet they have the power to “directly apply domestic American legal standards” and “issue orders directly binding federal administrative officials without a right of appeal to federal courts.” *Id.* at 837.

27. U.S. CONST. art. II, § 2, cl. 1.

28. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

29. *Id.*

30. *Id.* (quoting *Knote v. United States*, 95 U.S. 149, 153 (1877)).

31. U.S. CONST. art. II, § 2, cl. 2.

32. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) (1986). International agreements also have been created by the so-called sole executive agreements, which are negotiated by the President and subject to no congressional approval whatsoever. See *id.* § 303(4). For example, President Carter's sole executive agreement, known as the “Algiers Accords,” gained release of the U.S. diplomatic personnel who were taken hostage in 1979 in Iran. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1608 (2007). Similarly, President Clinton negotiated an agreement with German Chancellor Schroder establish-

of the United States takes the position that “any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty” and notes that “[t]he prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”<sup>33</sup> A prominent example of the congressional-executive agreement is the North American Free Trade Agreement, which received sixty-one supporting votes and thirty-eight “noes” in the Senate<sup>34</sup>—short of the two-thirds of senators present necessary for a treaty.<sup>35</sup> The agreement bringing the United States into the World Trade Organization was also a congressional-executive agreement, not a treaty.<sup>36</sup> *Accordingly, notwithstanding the Constitution’s specification of the treaty as the sole mechanism for creating international obligations, the President has concurrent authority with the Senate to create international obligations by means of congressional-executive agreements.*

5. The Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>37</sup> Most legal scholars who have examined the issue agree that many administrative agencies have virtually unfettered discretion to generate regulations that are functionally indistinguishable from statutes.<sup>38</sup> For example, the Supreme Court has upheld statutes that instruct agencies to regulate on the basis of “public interest, convenience, or necessity,”<sup>39</sup> to set “fair and equitable prices,”<sup>40</sup> or to set ambient air quality standards that are “requisite to protect the public health.”<sup>41</sup> *Accordingly, notwithstanding the Constitution’s allocation of “[a]ll legislative Powers herein granted” to Congress, administrative agencies have concurrent authority to create the rules that govern behavior.*

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ing a mechanism for handling insurance claims held by Holocaust victims. *See* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 406–08 (2003).

33. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e.

34. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801 (1995).

35. *See* U.S. CONST. art. II, § 2, cl. 2.

36. Ackerman & Golove, *supra* note 34, at 917–19.

37. U.S. CONST. art. I, § 1.

38. *See infra* Part II.D.

39. Nat’l Broad. Co. v. United States, 319 U.S. 190, 225 (1943).

40. Yakus v. United States, 321 U.S. 414, 427 (1944).

41. Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 469 (2001).

6. The Constitution states that “Congress shall have Power To . . . regulate Commerce . . . among the several States.”<sup>42</sup> The United States Supreme Court has held, however, that states *also* have the power to regulate interstate commerce.<sup>43</sup> *Accordingly, notwithstanding the Constitution’s allocation of regulatory authority over interstate commerce to Congress, states and Congress have concurrent authority to regulate interstate commerce.*

7. Congress has the power to enact laws relating to admiralty<sup>44</sup> and laws governing interstate disputes concerning such matters as water pollution.<sup>45</sup> Yet there also is a “tradition of federal common lawmaking in admiralty,”<sup>46</sup> as well as a “federal common law of nuisance” regarding interstate waters.<sup>47</sup> *Accordingly, Congress and federal courts have concurrent authority to create the rules of admiralty, as well as the rules that govern many interstate controversies.*

### C. CONCEPTUAL CLARIFICATIONS

For purposes of fully understanding concurrence, it will first prove useful to introduce three analytical tools. This subpart then considers concurrence’s relation to three familiar constitutional principles: checks and balances, the canon of *expressio unius est exclusio alterius*, and the concept of enumerated powers.

#### 1. Three Analytical Tools

##### a. *Same-Effect Versus Same-Source Concurrence*

##### i. Definition

“Same-effect” concurrence refers to the circumstance where two institutions have the power to undertake X, but pursuant to different sources of power. Consider Example 4, above: the constitutional provision that gives rise to congressional-

42. U.S. CONST. art. I, § 8.

43. *See* *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319–20 (1851) (noting that, under certain circumstances, the states have the authority to regulate interstate commerce).

44. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (“Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.”).

45. *See* *Illinois v. City of Milwaukee*, 406 U.S. 91, 101–02 (1972).

46. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994).

47. *City of Milwaukee*, 406 U.S. at 107.

executive agreements is not Article II's treaty power, but is, instead, Article I's grant of legislative power to Congress.<sup>48</sup> Similarly, whereas the President's power to issue pardons derives from Article II, Congress's power to issue immunities stems from its Commerce Clause powers under Article I.<sup>49</sup> Same-effect concurrence hence describes the situation where two (or more) of the Constitution's grants of power overlap with the result that more than one institution has the power to effectuate act X.

"Same-source" concurrence refers to the situation where two different institutions exercise the same power. For example, Professor Thomas Merrill is of the view that administrative agencies exercise the very legislative power that the Constitution grants to Congress.<sup>50</sup> Similarly, Professor Henry Monaghan believes that Article I courts can exercise much of the federal judicial power that the Constitution grants to Article III courts.<sup>51</sup>

Is it useful to distinguish between "same-effect" and "same-source" concurrence? Yes, but the distinction is less important than courts and scholars assume. The rest of this subpart discusses several Supreme Court opinions and scholarly works that have assumed the distinction to be crucial, and then considers to what extent the distinction really should matter after all.

## ii. Judicial and Scholarly Reliance on the Distinction

Many court opinions and scholars presume the importance of the distinction between same-effect and same-source concurrence. Consider the long-standing controversy as to whether non-Article III courts exercise Article III judicial power, or something else. Embracing same-effect concurrence, Chief Justice Marshall famously upheld territorial courts on the ground that they are incapable of receiving Article III judicial power,

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48. See Ackerman & Golove, *supra* note 34, at 804–05 (stating that Congress may approve congressional-executive agreements by passing "an ordinary statute or a joint resolution, or enact[ing] implementing legislation necessary for the agreement's legal effectiveness" (footnote omitted)).

49. See *Brown v. Walker*, 161 U.S. 591, 601 (1896) (stating that the statute in question, which was passed by Congress under its Commerce Clause power, was "virtually an act of general amnesty").

50. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2181 (2004).

51. See Monaghan, *supra* note 26, at 868 ("[S]ignificant federal adjudication [can] occur in non-Article III tribunals.").

and that, instead, they exercise something other than Article III judicial power.<sup>52</sup> The modern Court, by contrast, has come asymptotically close to adopting same-source concurrence when concluding that Congress may “authorize the adjudication of Article III business in a non-Article III tribunal,” provided that the congressional decision does not impermissibly threaten “the institutional integrity of the Judicial Branch.”<sup>53</sup> Professor Monaghan likewise happily describes today’s “system of *shared* adjudication between agencies and Article III courts.”<sup>54</sup> Against this current of same-source concurrence, two excellent recent works of scholarship—one by Professor James Pfander in the *Harvard Law Review*, the other by Professor Caleb Nelson in the *Columbia Law Review*—aim to revive Chief Justice Marshall’s same-effect concurrence.<sup>55</sup> Both of these sophisticated articles aim to establish that non-Article III tribunals are constitutional because they do not exercise Article III judicial power, but, instead, exercise some *other* power.<sup>56</sup>

A similar battle between same-effect and same-source concurrence appears in the nondelegation context. Undertaking an approach structurally identical to Professors Pfander and Nelson, Professors Eric Posner and Adrian Vermeule conclude that the powers exercised by agencies are fully constitutional because agencies never exercise Article I legislative powers.<sup>57</sup> Posner and Vermeule acknowledge that agency rulemaking may be functionally equivalent to lawmaking so far as the citizen is concerned, but they claim that agency rulemaking cannot constitute an exercise of legislative power because legislative power refers only to the power to enact *statutes*.<sup>58</sup> Professor Merrill, by contrast, argues on behalf of same-source concurrence: Merrill criticizes Posner and Vermeule’s idiosyncratical-

52. See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828); see also *infra* Part II.C (discussing *Canter* fully).

53. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

54. Monaghan, *supra* note 26, at 873 (emphasis added).

55. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007); Pfander, *supra* note 22, at 775.

56. See Nelson, *supra* note 55, at 564–65 (concluding that “core private rights” can only be adjudicated in Article III courts, and that non-Article III courts adjudicate other matters); Pfander, *supra* note 22, at 650–51 (arguing that what typically are called “Article I courts” actually have the status of non-Article III “tribunals” that cannot exercise federal judicial power).

57. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1756 (2002).

58. See *id.* at 1746, 1756.

ly narrow definition of “legislative power”<sup>59</sup> and concludes that the power exercised by agencies indeed constitutes legislative power.<sup>60</sup>

As a formal matter, contemporary case law treats agency powers as an aspect of same-effect concurrence, insisting that Article I’s “text permits no delegation of those [legislative] powers.”<sup>61</sup> Justices Stevens and Souter reject this same-effect account of agency power and, instead, embrace same-source concurrence; they have criticized the Court for “pretend[ing] . . . that the authority delegated” to an administrative agency “is somehow not ‘legislative power,’” advocating instead that “it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”<sup>62</sup>

### iii. Reexamining the Reasons for the Distinction

Two justifications underlie the claim that the distinction between same-source and same-effect concurrence is significant.

First, same-effect concurrence is thought to be acceptable on the ground that there is nothing inherently problematic for two institutions with different sources of power to have powers that overlap.<sup>63</sup> For example, it is utterly uncontroversial that both federal courts (which receive their power from Article III of the Constitution and federal statutes) and state courts (which receive their powers from state constitutions and state legislation) have the power to adjudicate contract disputes of more than \$75,000 between citizens of two different states.

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59. Merrill, *supra* note 50, at 2125 (noting that “[t]here is no support in decisional law for” Posner’s and Vermeule’s formal definition of legislative power as the power to enact statutes, and that their definition “is at the very least idiosyncratic, and probably would be rejected if presented to the courts”).

60. *See id.* at 2165 (arguing that “the nondelegation doctrine . . . should be rejected” and that “the Court should repudiate the idea that Article I, Section 1 precludes any congressional *sharing of legislative power*” (emphasis added)).

61. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

62. *Id.* at 488 (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment); *see also* *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting) (adopting a similar approach and explaining that “by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation”).

63. *See* Nelson, *supra* note 55, at 561.

There is force to this first reason, but it has limits. As a descriptive matter, same-effect concurrence has not been immune to sharp criticism. For example, Madison's words in *Helvidius Number II*—reproduced, in part, in this Article's opening paragraph and fully analyzed in Part I.D—were penned as an argument against same-effect concurrence: Madison argued that Congress had power to interpret a mutual defense treaty under its powers to declare war and that the President, accordingly, did *not* have power to interpret the treaty under any of his constitutional powers.<sup>64</sup> Similarly, the recent battle between Professors Ackerman and Golove, on the one hand, and Professor Tribe, on the other, with respect to the constitutionality of congressional-executive agreements, concerned the legitimacy of same-effect concurrence.<sup>65</sup> Neither the defenders nor the critics suggested that congressional-executive agreements were based on the treaty power. Rather, the debates centered on whether a power to create congressional-executive agreements premised on Congress's Article I powers can coexist with the treaty power—in other words, the constitutionality of same-effect concurrence.<sup>66</sup>

The Pacificus-Helvidius debates and the dispute surrounding congressional-executive agreements prove that same-effect concurrence is not immune from controversy. But, one might ask, why should same-effect concurrence *ever* be controversial? Two answers suggest themselves. First, the activity in question may appear to more readily fit under one of the two powers, opening the door to arguments based on *expressio unius est exclusio alterius*<sup>67</sup> and raising fears that some troublesome extension of governmental power is at work.<sup>68</sup> Second, if two or more institutions have the power to do *X*, then it is possible that the institutions will decide to act differently and thereby create a conflict.<sup>69</sup> For reasons explained later, neither of these objections is an adequate basis for flatly rejecting same-effect con-

64. MADISON, *supra* note 1, at 67.

65. Compare Ackerman & Golove, *supra* note 34, at 803, with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1275 (1995).

66. See *supra* note 65.

67. See, e.g., Tribe, *supra* note 65, at 1241–43. For an examination of this canon, see *infra* Part I.C.2.

68. This is the core of Professor Tribe's sharp critique of congressional-executive agreements. See Tribe, *supra* note 65, at 1302–03.

69. This concern permeates Madison's discussion. See MADISON, *supra* note 1, at 66–69.

currence,<sup>70</sup> though they do explain why same-effect concurrence can legitimately be controversial.

The second reason cited for drawing a sharp line between same-source and same-effect concurrence is that same-source concurrence sometimes is said to render the Constitution “mere surplusage.”<sup>71</sup> To provide two examples: if the Constitution goes out of its way to provide special protections for those who exercise the judicial power (life tenure and salary guarantees),<sup>72</sup> how can the same judicial power be exercised by judges lacking such protections? And, if the Constitution provides special procedures that must be followed for legislation to be enacted,<sup>73</sup> how can the same legislative power be exercised by different institutions and different procedures? To put the matter a bit differently, allowing judicial power to be exercised outside of Article III courts or the legislative power to be exercised outside of Congress could be said to sanction an end-run around the Constitution’s specifications. This is yet another way of saying that same-source concurrence violates the canon of *expressio unius est exclusio alterius*.

There are two strong counterarguments to this second concern. First, there is a plausible textual argument that the Constitution generally permits the delegations of power that give rise to same-source concurrence. This can be seen by generalizing the arguments that have been separately made by Professors Thomas Merrill and Cass Sunstein in the nondelegation context. Merrill argues that agencies properly exercise actual legislative power,<sup>74</sup> thereby forthrightly defending same-source concurrence. Merrill’s argument demonstrates that the Constitution’s text almost always can be plausibly construed to permit concurrence, even when the Constitution allocates power to only one institution. After all, one might think that Article I, Section 1 provides a particularly strong textual basis for embracing exclusivity as regards legislative power: its language that “[a]ll legislative Powers herein granted *shall be vested* in a Congress” quite plausibly could be said to require that *all* legislative power vests *only* in Congress.<sup>75</sup> Yet Merrill resists this

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70. See *infra* Part IV (discussing all or nothing), *infra* Part V (discussing conflicts).

71. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

72. See U.S. CONST. art. III, § 1.

73. See *id.* art. I, § 7.

74. See Merrill, *supra* note 50, at 2127.

75. U.S. CONST. art. I, § 1 (emphasis added).



conclusion because the “text of the Constitution is . . . silent on the question whether or to what extent legislative power may be shared.”<sup>76</sup> Cass Sunstein has made the same argument: “The Constitution does grant legislative power to Congress, *but it does not in terms forbid delegations of that power.*”<sup>77</sup>

Merrill’s and Sunstein’s arguments can be generalized beyond the nondelegation context because, with only a handful of exceptions,<sup>78</sup> the Constitution’s grants of power are not accompanied by prohibitions on the delegation of the allocated power.<sup>79</sup> It follows that the constitutional text almost never forecloses delegations that can result in what Merrill calls “shared” power<sup>80</sup> and what this Article dubs “same-source concurrence.”<sup>81</sup>

At their core, Merrill’s and Sunstein’s arguments constitute a rejection of a categorical application of *expressio unius*

76. Merrill, *supra* note 50, at 2127; *cf.* *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring) (rejecting a nondelegation challenge on the ground that the Constitution “does not set forth any special limitation on Congress’s assigning to the President the task of implementing the laws enacted pursuant to [Congress’s powers to make rules for the land and naval forces]”).

77. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (emphasis added).

78. The sole exceptions can be found in Article I, Section 10, Clause 1 of the Constitution, which specifies a handful of actions (such as entering into treaties and coining money) that federal institutions may undertake but that states may not. That the activities identified in Clause 1 are flatly prohibited to states, and may not be delegated to states, is all but impossible to deny on account of the Constitution’s next two clauses, which specify activities that states shall not do “without the Consent of the Congress.” U.S. CONST. art. I, § 10, cl. 1–3.

79. For an extended critique of delegation, see Alexander & Prakash, *supra* note 18.

80. Merrill, *supra* note 50, at 2116. Furthermore, Merrill appears to be of the view that there sometimes can be “shared” powers even without delegation. Merrill believes that institutions apart from Congress have no inherent legislative power (the “anti-inherency principle,” *id.* at 2101), and that there accordingly can be shared legislative powers only pursuant to congressional delegations, on account of Article I, Section 1’s specification that the legislative powers “herein” granted are vested in Congress. *See id.* (“[T]he reference to legislative powers ‘herein’ granted can be understood to limit the anti-inherency principle to those powers granted in Article I itself.”). This suggests that legislative powers granted to Congress outside of Article I (perhaps, for instance, under Section 5 of the Fourteenth Amendment) may be shared by institutions apart from Congress even without a delegation from Congress.

81. Indeed, the broad implications of Merrill’s argument vis-à-vis delegations of other powers led Larry Alexander and Sai Prakash to pen something of a slippery slope discourse. *See* Alexander & Prakash, *supra* note 18. I respond to their argument in Part IV.

*est exclusio alterius*.<sup>82</sup> Specifically, their arguments assume that constitutional specification alone (i.e., absent an express statement of nondelegation) does *not* mean that only the specified institution may undertake the activity in question. I revisit (and defend) this proposition later in Part VI after canvassing the degree of concurrence present in contemporary American constitutional law. For now, though, it is important to note the *dangers* that are entailed by their (and my) position. While it is true that the Constitution generally does not contain antidelegation provisions, construing this as a general license to delegate could be criticized as opening the door to wholesale evasion of the Constitution's carefully crafted mechanisms.<sup>83</sup> After all, delegation (almost) always substitutes a less demanding procedure for accomplishing *X* than what the Constitution specifies; indeed, this is typically the *motivation* behind concurrence. For example, congressional-executive agreements are pursued because there is insufficient senatorial support for a treaty, and territorial courts rather than Article III courts were created so that their judges did not have to have life tenure.<sup>84</sup> I acknowledge these concerns and dangers but, for reasons explained in Part IV, I reject the suggestion that they are appropriately addressed by adopting a categorical canon of *expressio unius est exclusio alterius*.

The second counterargument is that the "mere surplusage" concerns discussed above are not addressed simply by showing that an institutional arrangement is an instance of same-effect rather than same-source concurrence. On this second approach, the only way to give life to the canon of *expressio unius est exclusio alterius*, and the only way to ensure that the Constitution's language is not made "mere surplusage," is to conclude that same-effect concurrence is *also* impermissible. For instance, how are the concerns articulated above ameliorated by concluding that territorial courts exercise Article I rather than Article III power?

There are three plausible responses to the second counterargument. The first is to reject it by concluding that it *does* make a *constitutional* difference as to whether Article I courts exercise Article III judicial power or something else. On this

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82. See Merrill, *supra* note 50, at 2101–02; Sunstein, *supra* note 77, at 322.

83. See Alexander & Prakash, *supra* note 18, at 1036–39.

84. For an in-depth discussion of this point, see *Glidden Co. v. Zdanock*, 370 U.S. 530, 544–45 (1962); see also *infra* Part III.B.1 (discussing *Glidden*).

view, the distinction between same-source and same-effect concurrence remains important, and only same-effect concurrence is permissible. This type of rationale is more likely to be compelling to formalists than to functionalists.

Responses two and three are likely to appeal to functionalists. The second response is that the “mere surplusage” concerns only can be addressed by rejecting *all* forms of concurrence, and to conclude accordingly that only exclusivity is permissible. The third response—diametrically opposed to the second—is to conclude that sometimes constitutional provisions *are* effectively rendered “mere surplusage” and to then conclude that *both* same-effect and same-source concurrence are potentially permissible. For those functionalists to whom either responses two or three are appealing, the actual practice of American constitutional law is likely to be relevant in deciding between the two possibilities. For this reason, I shall delay further consideration of this question, and instead will proceed with a survey of concurrence in American law.

To conclude, it is not necessary for present purposes to fully settle the question of whether and to what extent the distinction between same-source and same-effect concurrence matters. What does matter, however, are the following two conclusions: (1) the distinction may matter to some, and for these people some forms of concurrence are constitutionally permissible; and (2) whether concurrence is permissible to those who think that the distinction is not significant likely turns, at least in part, on past and contemporary practice.

*b. Nonidenticality*

A second principle relevant to this Article’s analysis is that concurrence does not mean that the two institutions’ acts are wholly identical. This “nonidenticality principle” is true of both same-source and same-effect concurrence. In general, the acts of institutions with concurrent power are nonidentical with regard to both (1) what must happen to effectuate the act and (2) what must happen to negate the act. There sometimes are additional distinctions between the “concurrent” acts. For instance, administrative regulations are not identical to statutes.<sup>85</sup> Though they share much in common—for instance,

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85. Cf. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 477–78 (2002) (“Legislative rules . . . have the force and effect of law . . . akin to that of a statute. Nonlegislative rules do not have the force and effect of law; rather,

from the vantage point of most citizens, the legal obligations they impose are indistinguishable—administrative regulations do not appear in *United States Statutes at Large*, they are brought into existence by the actions of two different institutions (Congress or an agency), and they typically are easier to amend or rescind than statutes.<sup>86</sup> Consider, as well, the relation between actual constitutional amendments and what popularly are called judicial amendments by the Court. The latter might be less permanent than formal Article V amendments since they can be reversed by a simple majority of Supreme Court Justices.<sup>87</sup>

*c. Imperfect Overlap*

A third relevant principle is that concurrence does not necessarily entail perfect overlap between the powers of the two institutions.<sup>88</sup> To the contrary, there typically is imperfect overlap between the two.<sup>89</sup> For example, the early twentieth century case of *Missouri v. Holland* established that treaties “may deal with a subject that Congress could not regulate by legislation in the absence of treaty.”<sup>90</sup> Though the scope of Congress’s powers has significantly expanded since the twentieth century,<sup>91</sup> there still might be some subjects relating to interna-

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they are simply statements about what an agency intends to do in the future.”).

86. See, e.g., Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399, 409 (2008) (“Statutes are certainly harder to amend than administrative regulations . . .”).

87. Cf. *Dorr v. United States*, 195 U.S. 138, 155 (1903) (Harlan, J., dissenting) (discussing the dangers associated with judicial amendments).

88. See Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1320 (2006) (discussing the overlap, or lack thereof, between the powers of Congress and the President as Commander-in-Chief).

89. See *id.* at 1321 (“It is possible to suppose that the two powers overlap in some ways, but that each also has an exclusive sphere.” (footnote omitted)).

90. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. c (1986) (citing *Missouri v. Holland*, 252 U.S. 416 (1920)).

91. Indeed, the subject addressed in *Holland* that was then viewed as falling outside the scope of Congress’s Commerce Clause powers today could be regulated under the Commerce Clause. See Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1117 (2008) (“*Missouri v. Holland* is famous (and contested) today for the proposition that the Senate can use its treaty power to do what is otherwise beyond its power, but within a few decades after the opinion was issued, . . . Con-

tional relations that do not fall within Congress's enumerated powers. Accordingly, there is imperfect overlap between the treaty power and congressional-executive agreements.

## 2. Concurrence's Relation to Three Familiar Constitutional Principles

Three familiar concepts in constitutional law might be thought to have some connection to concurrence: checks and balances, the canon of *expressio unius est exclusio alterius*, and enumerated powers.

### a. Checks and Balances

To begin, "concurrence" and "checks and balances" are distinct concepts. Whereas "concurrence" refers to the situation where two (or more) different institutions each have the power to undertake *X*, "checks and balances" refers to the situation where two (or more) institutions have distinctive roles in completing act *X*. So, for instance, the President's veto power is an aspect of checks and balances, but is not an example of concurrence.<sup>92</sup> The same is true of the Senate's role in approving appointments of officers.<sup>93</sup>

### b. *Expressio Unius est Exclusio Alterius*

Second, consider the canon of constitutional construction known as *expressio unius est exclusio alterius*, or "to express or include one thing implies the exclusion of the other."<sup>94</sup> Here there indeed is a tension. Concurrence—in many of its forms—is orthogonally opposed to *expressio unius*. The tension is keen with same-source concurrence. When the Constitution allocates federal judicial power to Article III courts, application of the canon of *expressio unius* would mean that *only* federal courts can exercise that power. The Court's conclusion that Congress may "authorize the adjudication of Article III business in a non-

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gress's powers under the Commerce Clause had been reconceived to be capacious." (footnote omitted).

92. See Arthur A. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847, 866 (2005) ("The President's veto is one of the most significant powers in the 'checks and balances' form of government.").

93. Madison draws a similar distinction in the *Helvidius Number II*. See MADISON, *supra* note 1, at 68 ("In executive acts, the legislature, or at least a branch of it, may participate, as in the appointment to offices.").

94. BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

Article III tribunal”<sup>95</sup> reflects a decision *not* to invoke the canon. That *expressio unius* was not invoked is not particularly troubling or surprising—at least since the time of Karl Llewellyn it has been widely understood that canons of interpretation are selectively invoked.<sup>96</sup> Yet it is important to recognize it. Among other things, understanding when a canon is invoked—and when it is not—is crucial to recognizing the canon’s true strength.

*Expressio unius* also is inconsistent with many instances of same-effect concurrence. For example, under the canon, the Constitution’s allocation of the pardon power to the President would mean that Congress does *not* have a functionally identical power to issue immunities under the Commerce Clause.<sup>97</sup> The Court, however, has held that Congress *does* have such a power (Example 3 in Part I.B, above)—against a dissent sounding in *expressio unius* in its insistence that “Congress cannot grant a pardon” because pardons are “the sole prerogative of the President to grant.”<sup>98</sup> On the other hand, *expressio unius* is not implicated in the circumstance of same-effect concurrence that arises where both institutions claim authorization from only very general power grants. In that circumstance, there is no *expressio unius*.

There is one other type of concurrence that also is not inconsistent with *expressio unius*. As explained later,<sup>99</sup> concurrence frequently is created when the institution with the power to do *X* delegates some of that power to another institution—consider in this regard Congress’s grant of rulemaking power to agencies (Example 5 in Part I.B, above). *Expressio unius*, on its own, is not inconsistent with the constitutionally empowered institution’s delegation of some power. At most, an antidelegation rule is a plausible, but by no means inevitable, inference from the principle of *expressio unius*.

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95. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

96. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

97. Consider as well congressional-executive agreements (Example 4, *supra* Part I.B). The Constitution’s specification that international obligations be created via the treaty would be most naturally interpreted, upon application of *expressio unius*, that international obligations cannot be made pursuant to other more general grants of congressional power (such as the power to regulate foreign commerce).

98. *Brown v. Walker*, 161 U.S. 591, 638 (1896) (Field, J., dissenting).

99. See *infra* Part III.A.1.

The short of it is this: much of the time, though not always, concurrence reflects a context-specific repudiation of the canon of *expressio unius est exclusio alterius*. I return to a fuller consideration of the constitutional implications of this point in Part VI.

*c. Enumerated Powers*

Concurrence bears a subtle relation to the concept of enumerated powers. “Enumerated powers” typically is understood to mean that the federal government is a government of only the limited powers spelled out in the Constitution.<sup>100</sup> On the one hand, it might be thought that concurrence bears no relation to enumerated powers; whether the powers given to the federal government are exercisable exclusively or concurrently bears no relation to the concept of enumerated powers so long as the powers indeed were enumerated.

On the other hand, concurrence that is created by delegation can be said to implicate enumerated powers when the delegatee is more readily able to exercise the power than the delegator. For instance, enumerated powers may not only mean that the federal government can regulate interstate commerce, but also that the federal government was given the power to regulate interstate commerce *only by means of the specific procedure laid down in Article I*.<sup>101</sup> On this view, the fact that it is difficult to enact legislation, and that Congress could not have generated all the rules found in the *Federal Register*, would mean that the proliferation of federal regulations made possible by Congress’s rulemaking delegations represents a breach of the concept of enumerated powers, even if congressional power extends to each and every regulation enacted by an agency.

It is advisable to fully analyze enumerated powers after having comprehensively examined the phenomenon of concurrence. I accordingly return to this topic in Part VI.

D. THE PACIFICUS-HELVIDIUS DEBATES

The earliest debate concerning the choice between exclusivity and concurrence—and, perhaps surprisingly, still the most extended discussion of this issue to date—is found in the ex-

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100. See *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”).

101. For an extensive development of this line of argumentation in relation to sole executive agreements, see generally Clark, *supra* note 32.

change between Alexander Hamilton and James Madison known as the Pacificus-Helvidius debates. The occasion for the debates was President Washington's issuance of the Neutrality Proclamation of 1793.<sup>102</sup> In declaring the new nation's neutrality vis-à-vis France's war with Great Britain and Holland, President Washington's Proclamation interpreted the 1778 Treaty of Alliance with France.<sup>103</sup>

The question dividing Hamilton and Madison was whether the President had constitutional authority to interpret the Treaty. Madison, writing under the name "Helvidius" and using the words reproduced in this Article's first paragraph, took the exclusivist position, arguing that only Congress had power to interpret the Treaty on account of its power to declare war. Writing under the pseudonym of "Pacificus," Hamilton defended the Proclamation's legality, adopting what this Article dubs "concurrence" in arguing that both the President and Congress had power to interpret the Treaty.<sup>104</sup>

Hamilton acknowledged that Congress had the power to interpret the Treaty pursuant to its power to declare war, but urged that the President *also* had the power to interpret the Treaty under the President's executive powers:

[H]owever true it may be, that th(e) right of the Legislature to declare wa(r) includes the right of judging whether the N(ation) be under obligations to make War or not—it will not follow that the Executive is in any case excluded from a similar right of Judgment, in the execution of its own functions.<sup>105</sup>

This is a defense of same-effect concurrence insofar as Hamilton believed that the source of the President's power to issue the Proclamation was the Vesting Clause<sup>106</sup> and that Congress's interpretive powers derived from the Declare War Clause.<sup>107</sup>

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102. For a good introduction, see Morton J. Frisch, *Introduction* to THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra* note 1, at vii, vii.

103. *See id.*

104. *See* ALEXANDER HAMILTON, PACIFICUS NUMBER I, *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra* note 1, at 13.

105. *See id.* (emphasis added).

106. *See id.* at 16. Though this construction of the Vesting Clause was controversial then and remains disputed today, that issue is not relevant to this Article's concern of whether power is allocated on an exclusive or concurrent basis.

107. Hamilton's understanding of concurrence was not tied to his view of the Vesting Clause as shown by the fact that he presents a hypothetical in which the President interprets a treaty pursuant to his powers under the Recognition Clause and Congress also has the power under the Declare War Clause to interpret the treaty. Hamilton fully understood the import of his ar-



Madison vehemently disagreed with Hamilton's embrace of concurrence, dedicating the bulk of his *Helvidius Number II* to disputing it. His position boils down to two arguments. First, Madison claims to identify a "material error" in Hamilton's position insofar as (Madison claims) Hamilton failed to fully apply his own principles:

He had before admitted that the right to declare war . . . includes the right to judge whether the United States be obliged to declare war or not. *Can the inference be avoided, that the executive instead of having a similar right to judge, is as much excluded from the right to judge as from the right to declare?*<sup>108</sup>

Madison says that the "inference" (that the President can neither interpret the Treaty nor declare war) cannot be avoided, but why not? Madison does not further explain his position. His argument, it would seem, boils down to *ipse dixit* assertion of exclusivity—which does not amount to an argument at all insofar as it is the very principle he aims to establish. Two paragraphs later Madison tries again to drive home the same point, but with no greater success. Madison asserts that Hamilton:

[C]annot disentangle himself by considering the right of the executive to judge as *concurrent* with that of the legislature. For if the executive have a concurrent right to judge, and the right to judge be included in (it is in fact the very essence of) the right to declare, *he must go on and say that the executive has a concurrent right also to declare.*<sup>109</sup>

But why is this so if, as Hamilton hypothesized, the President's right to interpret the Treaty derives from an independent presidential power? Under Hamilton's approach, after all, it is perfectly conceivable that an independent presidential power could encompass the "right to judge" but not the "right to declare."<sup>110</sup> For this reason, Madison's argument here is wholly unavailing.

Madison's second justification for opposing concurrence is more substantive. The trouble with concurrence, he rightly observes, is that it opens the door to conflicts:

If the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen . . . that they will judge differently. . . .

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gument—that two institutions could have the power to undertake the same act—and Hamilton in fact adopted virtually the same term that this Article uses, writing that "there results . . . a *concurrent* authority" as between the President and Congress. *See id.* at 15.

108. MADISON, *supra* note 1, at 66 (emphasis added).

109. *Id.* (second emphasis added).

110. *Id.*

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In what light does this present the constitution to the people who established it? In what light would it present to the world, a nation, thus speaking, thro' two different organs, equally constitutional and authentic, two opposite languages, on the same subject and under the same existing circumstances?<sup>111</sup>

Hamilton had a response to Madison's argument that I discuss in Part V,<sup>112</sup> which examines six different mechanisms found in American law for resolving conflicts among institutions with overlapping power. As will be shown, Hamilton's response tracks one of the six mechanisms.

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Having defined "concurrency" and "exclusivity" and introduced the concepts of same-source concurrency, same-effect concurrency, nonidenticality, and imperfect overlap, we are ready to proceed to examine many intriguing patterns.

## II. THE HISTORICAL TRAJECTORY FROM EXCLUSIVITY TO CONCURRENCE

A study of Supreme Court case law reveals the tenacity of exclusivist assumptions. The judiciary virtually always adopts exclusivist assumptions and opposes claims that power can be concurrently exercised. Though the Court generally has come to acknowledge concurrency, judicial acceptance has not initiated the concurrent exercise of power but instead has been a belated recognition of a widespread practice that has taken root outside the courtroom.<sup>113</sup> In some other contexts, the Court has created doctrines that formally cling to exclusivity notwithstanding the fact that virtually all scholars acknowledge that two institutions exercise concurrent powers.<sup>114</sup>

The bottom line is that there is a clear trajectory in both practice and doctrine: initial exclusivist assumptions consistently, though not universally, have given way to concur-

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111. *Id.* at 69.

112. *See infra* Part V.B.

113. In other words, there has been an "interaction between the courts and the political branches in the creation of constitutional meaning." Mark Tushnet, *Constitutional Interpretation Outside the Courts*, 37 J. INTERDISC. HIST. 415, 418 (2007). *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Though Tushnet's words are directed to early nineteenth-century events, this Article shows that the same phenomenon has continued up to the present.

114. *See infra* Part II.D.

rence.<sup>115</sup> On the other hand, as Part II.H documents, there are many contexts where exclusivist assumptions have been unchallenged, and at least one instance of a partial countertrajectory where the Supreme Court has cut back on concurrence and turned back to exclusivity.

A. ORIGINAL JURISDICTION OF THE VARIOUS FEDERAL COURTS:  
THE ROAD FROM *MARBURY* TO *AMES*

The substantive constitutional issue raised in *Marbury v. Madison*<sup>116</sup> is both an early illustration of the choice between exclusivity or concurrence and an exemplar of the Court's initial approach to answering the query. The Constitution provides that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction."<sup>117</sup> The (still to be created) inferior federal courts and/or state courts had original jurisdiction over other matters that fell within the scope of Article III's judicial power.

The substantive question famously presented in *Marbury* was whether Congress could expand the Supreme Court's original jurisdiction beyond the three categories enumerated in the Constitution.<sup>118</sup> The issue raised in the case clearly fell within the "judicial Power of the United States,"<sup>119</sup> and the case itself clearly fell within the original jurisdiction of the inferior courts that Congress had established. This is the respect in which *Marbury* presented the Court with the choice between exclusivity and concurrence: *Marbury* presented the question of whether the Supreme Court's original jurisdiction could be made to overlap with the inferior federal courts' original jurisdiction.

The *Marbury* Court specifically considered the question of whether Congress could "assign original jurisdiction to [the Supreme Court] in other cases than those specified in" the Consti-

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115. See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 790 (2008) (discussing the "general trajectory" away from exclusivity to concurrence).

116. 5 U.S. (1 Cranch) 137 (1803).

117. U.S. CONST. art. III, § 2, cl. 2.

118. See *Marbury*, 5 U.S. (1 Cranch) at 175.

119. U.S. CONST. art. III, § 1. The issue in the case concerned a question of federal law: the legal effect of a commission for public justice that the President had signed after the Senate's advice and consent.

tution.<sup>120</sup> The Court rejected this proposition, explaining: “Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.”<sup>121</sup> As others have noted, Chief Justice Marshall’s reasoning here is an example of *expressio unius est exclusio alterius*<sup>122</sup>: from the fact that the Constitution “apportion[ed] the judicial power between the supreme and inferior courts,”<sup>123</sup> Marshall concluded that *only* the institution that had been constitutionally allocated original jurisdiction could exercise original jurisdiction.<sup>124</sup> Any other interpretation would render the Constitution’s language “mere surplusage.”<sup>125</sup> Chief Justice Marshall’s chief justification for *Marbury*’s substantive holding accordingly was an exclusivist argument.

My intention here is not to suggest that the Court incorrectly decided this portion of *Marbury*,<sup>126</sup> but instead to show that its exclusivist justification has not fared well. Consider in this regard the Court’s decision in *Ames v. Kansas*.<sup>127</sup> Kansas had sued several corporations in Kansas state courts, and defendants had removed to an inferior federal court in reliance on the federal question statute, which granted inferior federal courts jurisdiction over cases raising questions of federal law.<sup>128</sup> At issue in *Ames* was the constitutionality of the federal question statute’s application to a case in which a state was a party: could Congress assign original jurisdiction to an inferior federal

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120. *Marbury*, 5 U.S. (1 Cranch) at 174.

121. *Id.*

122. See Tribe, *supra* note 65, at 1275.

123. *Marbury*, 5 U.S. (1 Cranch) at 174.

124. *Id.*

125. *Id.*

126. Indeed, there was strong constitutional language on which the Chief Justice could have relied. After enumerating the cases in which the Supreme Court is to have original jurisdiction, Article III provides that “[i]n all the other cases . . . , the supreme Court shall have appellate jurisdiction.” U.S. CONST. art. III, § 2, cl. 2 (emphasis added). Extending the Supreme Court’s original jurisdiction to include mandamus correspondingly diminishes its appellate jurisdiction and hence could be said to run afoul of this constitutional language. On the other hand, the very last phrase of the above sentence from Article III appears to grant Congress the power to make “Exceptions” to the Supreme Court’s appellate jurisdiction. *Id.* For a collection of sources that examine these competing textual arguments, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1517 & n.5 (2001).

127. 111 U.S. 449 (1884).

128. See *id.* at 462–63.

court given the fact that the Constitution granted the Supreme Court “original Jurisdiction” in “*all Cases . . . in which a State shall be Party*”?<sup>129</sup>

The Court in *Ames* acknowledged that *Marbury* “used language . . . which might, perhaps, imply that such original jurisdiction as had been granted by the Constitution was exclusive.”<sup>130</sup> On this approach, the Supreme Court alone (among federal courts) would have had original jurisdiction over cases such as this in which a state was a party.

But *Ames* rejected *Marbury*’s approach and upheld Congress’s power to grant inferior courts original jurisdiction over the same subjects that fall within the Supreme Court’s constitutionally granted original jurisdiction.<sup>131</sup> Instead of *Marbury*’s exclusivity, *Ames* reasoned as follows:

[T]he grant of jurisdiction over a certain subject matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question [in the Constitution] *there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject matter.*<sup>132</sup>

The italicized language, it should be noted, is precisely the same type of argument that Professors Merrill and Sunstein have made in defense of Congress’s powers to delegate legislative authority to agencies.<sup>133</sup>

Three important lessons emerge from considering the relationship between *Ames*’s rationale and *Marbury*’s reasoning. First, the two are at loggerheads. *Marbury* instructs that the Constitution’s grants of power are conclusively presumed to be exclusive. Otherwise, said Chief Justice Marshall, the Constitution’s language would be “mere surplusage.”<sup>134</sup> *Ames*, by contrast, strips any presumption of exclusivity from the Constitution’s grant of power to a particular institution.

Second, insofar as much of the Constitution’s text consists of affirmative grants of power to particular institutions, the in-

129. U.S. CONST. art. III, § 2, cl. 2.

130. *Ames*, 111 U.S. at 467.

131. *See id.* at 447 (“[W]e are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the constitution with original jurisdiction.”).

132. *Id.* at 468 (quoting *Gittings v. Crawford*, 10 F. Cas. 447, 450 (C.C.D. Md. 1838) (No. 5465) (emphasis added)).

133. *See supra* Part I.C.1.a.

134. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

terpretive question that both *Marbury* and *Ames* address—whether the Constitution’s affirmative grant of power is to be construed as a constitutional mandate that *only* that institution has the specified power—is pervasive.

Third, and finally, *Ames*’s and *Marbury*’s contrary resolutions to the interpretive question strongly suggest that constitutional text alone does not answer the question of whether constitutional grants are exclusive. How then *is* the decision to be made as to whether the Constitution’s power grants are exclusive or potentially concurrent? This important question will be taken up in Part III.

#### B. FACT-FINDING IN CIVIL ADJUDICATION: OF JURIES, JUDGES, AND NON-ARTICLE III ADJUDICATIVE TRIBUNALS

The Seventh Amendment allocates power to juries, granting them the power to “tr[y] . . . fact[s] . . . [i]n Suits at common law.”<sup>135</sup> The Seventh Amendment simultaneously limits the power of federal judges, providing that courts are not permitted to reexamine the jury’s findings “otherwise . . . than according to the rules of the common law.”<sup>136</sup> The Court long has held that “common law” for these purposes refers to the procedures for reexamining jury verdicts that were available in English common law in 1791, when the Seventh Amendment was adopted.<sup>137</sup>

This subpart examines how an exclusivist regime in which only juries had the power to find facts was transformed into a system of concurrence in which adjudicatory fact-finding authority is held jointly by juries, Article III judges, and judges in non-Article III courts. Subpart 1 examines the trajectory from exclusivity to concurrence as between juries and Article III judges. To this day, the Court has been reluctant to formally acknowledge the concurrence that exists. Subpart 2 examines the trajectory from exclusivity to concurrence as between juries and Article I tribunals, where a different story appears: after initially denying and thereafter seeking to tightly cabin concur-

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135. U.S. CONST. amend. VII.

136. *Id.*

137. *See, e.g.,* *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435–36, & 436 n.20 (1996). While riding circuit, Justice Story was among the first of the American jurists to equate the Seventh Amendment’s language of “common law” with the “common law of England.” *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); *see also* *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 377 (1913) (quoting approvingly this language from Justice Story’s *Wonson* opinion).

rence, the Court ultimately came to frankly acknowledge the existence of significant concurrence.

### 1. Juries and Judges

Professor Suja Thomas has shown that English common law as of 1791 adopted what this Article dubs an “exclusivist” allocation of duties in which only the jury, not the judge, had the power to find facts.<sup>138</sup> Early American jurisprudence tracked England’s exclusivist approach to dividing power between judge and jury. The early twentieth-century case of *Slocum v. New York Life Insurance Co.*<sup>139</sup> and the cases on which it relied are representative. Before 1938, a federal statute directed federal courts to apply state procedural rules in diversity suits.<sup>140</sup> Pennsylvania law at the time of the *Slocum* decision permitted what today would be called judgment as a matter of law: Pennsylvania procedure authorized judges to disregard a jury’s verdict for insufficient evidence and instead to directly

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138. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007) (showing that only “the jury or the parties determined the facts,” not the judge, under English common law at the time of 1791). Under three common law procedures, neither the judge nor jury found facts: instead, the parties stipulated to the facts (the “demurrer to the pleadings,” the “demurrer to the evidence,” and the “special case” under the parties’ agreement as to the facts), and the judge thereafter applied the law to the stipulated facts. See *id.* at 148–54, 156–57. Under the demurrer to the pleadings and demurrer to the evidence, one party admitted to the facts alleged by the other party (the former after the pleadings had been filed, the latter during the trial itself). See *id.* at 148–54. Under the special case, the parties could jointly stipulate to specific facts. See *id.* at 156–57. Under the other common law procedures, the jury’s finding of facts provided the ground for the case’s outcome. In the special case following a jury’s general verdict, the court decided a disputed question of law but used the jury’s findings of fact. Common law courts could grant motions for a new trial on the ground that the evidence did not support the jury’s verdict, but the result was a new trial during which time a (new) jury would find the facts. See *id.* at 157–58. Finally, under a compulsory nonsuit, a common law court could enter judgment for a defendant following jury verdict for plaintiff, but “only if the jury’s verdict was unsupported as to a particular matter of law.” *Id.* at 155. Of particular relevance to the discussion above, insufficient evidence was *not* a basis for a compulsory nonsuit. See *id.*

139. 228 U.S. at 382 (“To the [court] is committed a power of direction and superintendence, and to the [jury] the ultimate determination of the issues of fact. Only through the cooperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied.”).

140. See Practice Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872). For a discussion, see Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 583 & n.63 (2003).

enter judgment for the other party.<sup>141</sup> The *Slocum* Court ruled that this procedure, when applied by federal courts, violated the Seventh Amendment.<sup>142</sup> The problem was not that the federal court had set aside the verdict, for procedures available under the common law (such as the motion for new trial) authorized courts to set aside jury verdicts under specific circumstances. The sole problem, according to *Slocum*, was that Pennsylvania's procedural rule permitted the judge to "pass on the issues of fact" by issuing a judgment for the other party.<sup>143</sup>

The assumption of exclusivity—the notion that the jury's and judge's constitutional duties vis-à-vis facts were wholly distinct and nonoverlapping—pervaded the *Slocum* decision. The following statement of the Court is illustrative:

In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, *and to the latter the ultimate determination of the issues of fact*. Only through the cooperation of the two, *each acting within its appropriate sphere*, can the constitutional right be satisfied. And so, to . . . permit one to disregard *the province of the other* is to impinge on that right.<sup>144</sup>

Indeed, the *Slocum* Court quoted considerable precedent that supported its exclusivist conception regarding the division of labor between judge and jury. In 1812, Justice Story, sitting as a circuit justice, had observed that "the facts once tried by a jury are never reexamined, unless a new trial is granted in the discretion of the court, before which the suit is depending . . . or unless the judgment of such court is reversed by a superior tribunal."<sup>145</sup> The logic of exclusivity was even more clearly stated in an 1885 case in which the Supreme Court reversed a federal court that had awarded judgment for the defendant after the jury had returned a verdict for the plaintiff because "without a waiver of the right of trial by jury, by consent of parties, *the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue,*

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141. See *Slocum*, 228 U.S. at 387–88.

142. See *id.* at 339 ("This we hold could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be reexamined otherwise than 'according to the rules of the common law.'").

143. *Id.* at 387–88.

144. *Id.* at 382 (emphasis added).

145. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). Justice Story reiterated this understanding while writing for the Supreme Court in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447–48 (1830).



and renders judgment thereon.”<sup>146</sup> An 1899 Supreme Court decision likewise stated:

The facts there tried and decided cannot be re-examined in any court of the United States . . . ; no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law . . . .<sup>147</sup>

But exclusivity did not hold for long. Two lines of Supreme Court decisions together had the effect of giving judges significant fact-finding powers. The first line of decisions addressed the question of when federal courts could keep cases from juries on the ground that insufficient evidence had been put forward. The second line of cases concerned what federal courts could do upon determining the evidence was not legally sufficient. Because this augmentation of the judge’s power occurred without depriving juries of their fact-finding powers, the result was a regime in which judges and juries both had fact-finding powers.

As to the first line of cases, the traditional rule was that a “case must go to the jury unless there was ‘no evidence.’”<sup>148</sup> The Court, in *Improvement Co. v. Munson*,<sup>149</sup> acknowledged (though derogatorily renamed) the traditional rule, and then proceeded to “completely repudiate[]”<sup>150</sup> it:

Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury *can properly proceed* to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.<sup>151</sup>

In shifting from one legal test to another,<sup>152</sup> the Court opened the door to judges assuming significant fact-finding powers.

146. *Baylis v. Travellers’ Ins. Co.*, 113 U.S. 316, 320–21 (1885) (emphasis added), *quoted in Slocum*, 228 U.S. at 386–87.

147. *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899), *quoted in Slocum*, 228 U.S. at 379.

148. *See Galloway v. United States*, 319 U.S. 372, 404 (1943) (Black, J., dissenting). There are many examples of the traditional rule. *See, e.g., Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 201 (1869) (ruling that where there is no evidence against the defendant the judge is in error if he does not order the jury to acquit); *Drakely v. Gregg*, 75 U.S. (8 Wall.) 242, 268 (1868) (holding that the case should go the jury “if the evidence *tended* to prove the position” of the party).

149. 81 U.S. (14 Wall.) 442 (1871).

150. *Galloway*, 319 U.S. at 404 (Black, J., dissenting).

151. *Munson*, 81 U.S. (14 Wall.) at 448 (second emphasis added).

152. The “recent decisions of high authority” on which the Supreme Court

Under the traditional rule, judges could not fact-find because the jury heard the case if there was “any evidence’ to support a party’s contention;”<sup>153</sup> the judge could keep a matter from the jury only if there was *no* evidence to be weighed or analyzed and hence no facts to be found.<sup>154</sup> *Munson*’s replacement test, by contrast, authorized judges to keep matters from the jury if the facts could not “properly” ground a verdict.<sup>155</sup>

After the *Munson* rule took root,<sup>156</sup> there was little question that federal judges exercised fact-finding powers. This is well illustrated by the case of *Pennsylvania Railroad v. Chamberlain*,<sup>157</sup> which concerned the propriety of a trial court’s order that a jury grant a verdict for the defendant. Writing for the Second Circuit, Judge Learned Hand had reversed the district court’s judgment, ruling that the case should have proceeded to the jury because there was sufficient evidence to support a verdict for the plaintiff.<sup>158</sup> Citing to the *Munson* rule, the Supreme Court reversed Judge Hand, deciding that the testimony of plaintiff’s witness could not have supported a verdict for the plaintiff. A fair reading of the case reveals that the Supreme Court made credibility determinations and weighed conflicting evidence.<sup>159</sup> The Court tried to rebuff the accusation that it was finding facts by claiming there was no evidence of a collision insofar as plaintiff’s witness had said he heard a “loud crash” but did not use the word “collision.”<sup>160</sup> This is an utterly unpersuasive reading of the evidentiary record. Plaintiff’s witness, an experienced train yard worker, testified that he saw a faster-moving nine-car train closely trailing a slower-moving two-

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relied all were decisions from England that postdated 1791. *See id.* They accordingly had absolutely no binding authority on the Supreme Court’s interpretation of the Seventh Amendment.

153. *Galloway*, 319 U.S. at 404 (Black, J., dissenting).

154. *Cf. Greenleaf v. Birth*, 34 U.S. (9 Pet.) 292, 299 (1835) (“Where there is no evidence tending to prove a particular fact, the court[s] are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.”).

155. *Munson*, 81 U.S. (14 Wall.) at 448.

156. For some time after *Munson*, the Supreme Court continued to recite the pre-*Munson* “any evidence” test. *See, e.g., Hepner v. United States*, 213 U.S. 103, 115 (1909) (summarizing the law as “requiring the court to send a case to the jury . . . where the evidence is conflicting on any essential point”).

157. 288 U.S. 333 (1933).

158. *See Chamberlain v. Pa. R.R.*, 59 F.2d 986, 988 (2d Cir. 1932), *rev’d*, 288 U.S. 333.

159. *See Pa. R.R.*, 288 U.S. at 344.

160. *Id.* at 338.

car train, heard a loud crash, and thereafter discovered the decedent's body.<sup>161</sup> This testimony plainly was sufficient to constitute evidence of a collision, and the Court's holding amounted to a decision to instead credit the testimony of the defendant's witness that there had not been a train crash. Consider as well the Court's blatant credibility assessment when it asserted that "[t]he fact that [the defendant railroad's] witnesses were employees of the [railroad] . . . does not impair" their testimony.<sup>162</sup>

The second line of cases responsible for the shift from exclusivity to concurrence of fact-finding authority addressed what judges were permitted to do upon determining the evidence to be insufficient to support a judgment. Two common law features had assured that juries, not judges, made ultimate findings of fact. First, the common law in 1791 did not have a procedure akin to the directed verdict under which a party could ask the court to rule in his favor after trial but before the jury's verdict.<sup>163</sup> Second, although the common law permitted the losing party to challenge verdicts on grounds of insufficient evidence, a winning motion netted a new trial before another jury, not a judge-awarded verdict.

Twentieth century cases eliminated these two limitations, allowing the judge to wholly circumvent the jury. The Court in *Galloway v. United States*<sup>164</sup> upheld the directed verdict under the newly adopted Federal Rules of Civil Procedure, permitting the judge to enter judgment after trial but before verdict on the ground of insufficient evidence.<sup>165</sup> And *Baltimore & Carolina Line v. Redman*<sup>166</sup> held that federal judges could not only disregard a jury's verdict on grounds of insufficient evidence, but also immediately enter a verdict for the other party—the equiva-

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161. See *id.* at 336–37.

162. *Id.* at 343. For another example of the Court's fact-finding, see the discussion of *Galloway v. United States*, 319 U.S. 372 (1943), *infra* note 168.

163. The common law procedure permitting a party to move for judgment after trial but before verdict, the demurrer to the evidence, required that the moving party stipulate to the facts alleged by the nonmoving party. *Galloway*, 319 U.S. at 390. The judge accordingly did not find facts, but took the facts stipulated by the moving party and applied the stipulated facts to the law. See Thomas, *supra* note 138, at 150–54.

164. 319 U.S. 372.

165. See *id.* at 389–90; see also Sward, *supra* note 140, at 599–613 (showing that earlier decisions had upheld directed verdicts where one of the parties had offered no evidence at all or where the court was asked to apply undisputed facts to the law).

166. 295 U.S. 654 (1935).

lent of a judgment notwithstanding the verdict.<sup>167</sup> A careful read of both the *Galloway* and *Redman* decisions reveals that these cases (unwittingly) showcased federal judges' new fact-finding powers.<sup>168</sup>

Finally, fully understanding today's regime of concurrent fact-finding authority requires consideration of the all-

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167. *Redman* predated the Federal Rules of Civil Procedure and, pursuant to a federal statute then in force, applied the procedures of the state in which the federal court sat. *See id.* at 661. *Redman* was an abrupt break with the *Slocum* decision discussed above, which only twenty years before had held precisely the opposite. To be sure, the *Redman* Court distinguished *Slocum* on the ground that the trial court had not yet decided the defendant's motion to dismiss and motion for directed verdict, both of which had been submitted to the court before the jury began its deliberations. *See id.* at 658–59. The Second Circuit had not deemed this technical difference to be material, and even the *Redman* Court acknowledged that “some parts of the [*Slocum*] opinion . . . give color to the interpretation put on it by the Court of Appeals.” *Id.* at 661. A fair reading of *Slocum* shows *Redman*'s acknowledgment to be a decided understatement. Commentators justifiably have understood *Redman* as having effectively reversed *Slocum*. *See, e.g.,* Sward, *supra* note 140, at 613–24 (“contrast[ing]” *Redman* and *Slocum* and showing that *Redman* was not supported by other cases the opinion had relied upon); Thomas, *supra* note 138, at 168–73 (concluding that *Redman* was a “drastic change” from *Slocum*).

168. With respect to *Galloway*, three dissenting Justices carefully reviewed the documentary and testimonial evidence that had been adduced at trial and convincingly demonstrated that the majority in the case, as well as the trial judge, had “weigh[ed] conflicting evidence” and made credibility assessments. *See Galloway*, 319 U.S. at 397 (Black, J., dissenting). In doing so, the Court upheld a directed verdict against a veteran who had sued for benefits due under a war risk insurance policy. The veteran had the burden of proving “total and permanent” disability no later than May 31, 1919. *Id.* at 383–84 (majority opinion). The veteran's guardian introduced testimony from a doctor who had diagnosed the veteran as suffering from a form of dementia that had been triggered by the shock of conflict on the battle field before 1919. *Id.* at 408 (Black, J., dissenting). The veteran also had offered the testimony of two fellow soldiers, a friend who had known him both before and after the war, and his commanding officer, all of whom testified to behaviors that were consistent with the symptoms of insanity that the testifying doctor had identified. *Id.* at 408–12. Reviewing this testimony in detail, three Justices reasonably concluded in dissent that the majority of the Court “re-examine[d] testimony offered in a common law suit [and] weigh[ed] conflicting evidence.” *Id.* at 397; *see also* Sward, *supra* note 140, at 603 (“The issue in *Galloway* could not be classified as anything other than a question of fact: was Galloway permanently and totally disabled by reason of mental illness as of May 31, 1919, or not?”). Simply put, the majority's assertion that they gave “full credence to all of the testimony” is not credible. *Galloway*, 319 U.S. at 396.

By the time *Redman* came before the Supreme Court, “four judges had considered the sufficiency of the evidence, with two believing that the evidence was sufficient, and two believing that it was not.” Sward, *supra* note 140, at 616. This alone strongly suggests that the judges' determination that the evidence was insufficient was itself based on judicial fact-finding, a conclusion confirmed by a fair review of the record. *Id.*

important summary judgment procedure. Federal courts deciding motions for summary judgment must determine if there is a “genuine issue as to any material fact”<sup>169</sup> by asking whether “a reasonable jury could return a verdict for the nonmoving party.”<sup>170</sup> Under these standards, federal judges now “decide[] whether factual inferences from the evidence are reasonable,” with the result that “[c]ases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.”<sup>171</sup> To date, however, the Court has not been willing to acknowledge the degree to which federal courts now possess the fact-finding powers that used to belong solely to juries.

To be clear, the cases explored above did not *displace* the jury’s fact-finding powers and replace one exclusivist regime with another. Rather, these decisions created a regime in which judges *also* had fact-finding powers. The contemporary result is a regime of concurrence in which judges and juries *both* have fact-finding powers: juries still find facts and return verdicts, but judges *also* exercise fact-finding powers when they issue directed verdicts, judgments as a matter of law, and summary judgments.

## 2. Juries and Non-Article III Adjudicatory Tribunals

Juries today share adjudicatory fact-finding power not only with Article III judges, but with yet another governmental institution: judges on non-Article III tribunals. Administrative agencies are the most important of these non-Article III tribunals. The rule today, as stated in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, is that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency” whose non-Article III administrative judge has the power to find facts.<sup>172</sup> Further, “[t]his is the case even if the Seventh Amendment would have required a jury [were] the adjudication of those rights [to be] assigned instead to a federal court.”<sup>173</sup> In other

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169. FED. R. CIV. P. 56(c)(2).

170. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

171. Thomas, *supra* note 138, at 143.

172. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977).

173. *Id.* Independent of the Seventh Amendment question of whether administrative judges rather than juries can find facts is the question of whether adjudicatory facts can be found by non-Article III courts. This second inquiry is variously conceptualized as either a due process or an Article III question.

words, as regards public rights, the Supreme Court has forthrightly acknowledged that administrative agencies and juries have concurrent authority to fact-find. This amounts to a significant degree of concurrent fact-finding authority because, as Professor Monaghan recently reminded us, “[t]he ‘public rights’ exception is a wide and significant one” that “has been significantly enlarged so as to absorb much of what hitherto had fallen into the private rights domain.”<sup>174</sup>

As with the trajectory from exclusivity to concurrence detailed above in other doctrinal contexts, the Supreme Court has not always acknowledged this concurrent regime. To the contrary, during most of our country’s history, the Court has understood the Constitution’s allocation of adjudicatory fact-finding authority in exclusivist terms. Cases from the nineteenth and early twentieth centuries regularly asserted that federal lawsuits brought by the federal government for civil penalties in violation of federal statutes—in other words, lawsuits premised on what today would be called “public rights”—qualified as suits at common law that accordingly entitled the defendant to a fact-finding jury under the Seventh Amendment.<sup>175</sup>

The first case upholding a statute that transferred adjudication from trial courts to a jury-free administrative agency did so on the grounds that there existed an “exigency” on account of the First World War, which justified the “suspension of [the] ordinary remedies” of trial by jury.<sup>176</sup> The “publicly notorious . . . emergency” consisted of inadequate rental properties in the District of Columbia, which meant that there were not adequate accommodations for federal employees.<sup>177</sup> An Act of Congress addressed the problem by permitting tenants to re-

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Most federal legislative schemes provide that agency facts are reviewable by federal courts—sometimes district courts, sometimes only courts of appeals—under a substantial-evidence test. *Id.* at 455 & n.13. This has repeatedly been held constitutional. *Id.* at 456. The Supreme Court has not yet decided whether Congress could “commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings.” *Id.* at 455 n.13.

174. Monaghan, *supra* note 26, at 868, 873.

175. See, e.g., *Hepner v. United States*, 213 U.S. 103, 115 (1909) (stating that the defendant was “entitled to have a jury summoned” in an action of debt brought by the United States to recover a penalty under federal statute regulating the immigration of aliens); see also *United States v. Regan*, 232 U.S. 37, 47 (1914) (same).

176. *Block v. Hirsh*, 256 U.S. 135, 156, 158 (1921).

177. *Id.* at 154.

main in possession at the same rent they had been paying so long as the rent paid was “reasonable” in the determination of a housing commission established by the act.<sup>178</sup>

The bulk of Justice Holmes’s opinion in the *Block v. Hirsh* decision did not address the Seventh Amendment, but instead considered whether the rent control statute violated the Due Process, Takings, and Contracts Clauses.<sup>179</sup> Only after concluding that “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation” did the Court, in its final paragraph, address the Seventh Amendment.<sup>180</sup> It cursorily concluded:

If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection [based on the Seventh Amendment] amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.<sup>181</sup>

In other words, so long as constitutional limitations apart from the Seventh Amendment did not render the statute’s substantive provisions unconstitutional, the Seventh Amendment was not violated either. To this not very self-evident proposition<sup>182</sup> Holmes added two more brief justifications. The very emergency justifying the act’s substantive provisions equally excuses the summary procedures because “[a] part of the exigency is to secure a speedy and summary administration of the law.”<sup>183</sup> In any event, concluded Holmes, not much jury fact-finding was displaced because “[w]hile the act is in force there is little to decide except whether the rent allowed is reasonable.”<sup>184</sup>

178. *Id.* at 154–57.

179. *See id.* at 153–57.

180. *Id.* at 156, 158.

181. *Id.* at 158.

182. Holmes’s proposition here is not self-evident because the Seventh Amendment is a constitutional limitation that is independent of the Due Process Clause, the Takings Clause, and the Contracts Clause. Accordingly, the mere fact that a statute does not violate these other clauses does not mean that it could not violate the Seventh Amendment for it is elementary that a set of facts might violate one doctrine but not another. For a similar argument, see Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1041–42, 1099–1105 (1999) (describing the Seventh Amendment as an “independent constitutional right”).

183. *Block*, 256 U.S. at 158.

184. *Id.* In fact, however, questions about whether the rent was “reasonable” also could arise under the Act. Because the Act provided that the owner shall have possession following thirty days notice “for actual and bona fide occupancy by himself, or his wife, children or dependents,” the question could arise as to whether an owner seeking to displace a tenant on this ground indeed was going to occupy the residence. *Id.* at 154. Indeed, the owner in the

In short, the *Block* decision upheld what it deemed to be only a limited incursion by an administrative agency into the jury's fact-finding domain, and did so on the narrow ground of necessity to remedy a national emergency. A corollary was that a citizen's "ordinary remedies" included the right to have a jury decide the issues that were being decided by the administrative agency.<sup>185</sup>

The next two Supreme Court decisions upholding administrative agencies' fact-finding powers did so with rationales fully consistent with exclusivity. The 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*,<sup>186</sup> best known for its Commerce Clause holding, also decided that the National Labor Relations Board's power to decide whether an unfair labor practice had been committed and to order backpay did not violate the Seventh Amendment. The Court reasoned that the NLRB's power did not trench at all on the jury's role guarded by the Seventh Amendment because "[t]he instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding."<sup>187</sup> Because the Seventh Amendment by its terms applies only to "Suits at common law," and because the NLRB adjudicated a statutory proceeding rather than a suit at common law, the Court reasoned that the NLRB was performing functions to which the Seventh Amendment did not apply.<sup>188</sup>

The Court was still relying on the same exclusivity-friendly rationale in the 1960s. *Katchen v. Landy*<sup>189</sup> upheld the power of a bankruptcy court, sitting without a jury, to adjudicate issues that would have been entitled to a jury trial if the trustee had pressed the issues in a separate lawsuit in federal court.<sup>190</sup> The

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*Block* case had alleged that he wanted the premises for his own use and the tenant had denied this. *Id.* at 156.

185. *Id.* at 158.

186. 301 U.S. 1 (1937).

187. *Id.* at 48–49.

188. *Id.* The NLRB Court provided a second rationale that also was consistent with exclusivity. The Seventh Amendment's application to cases at common law long had been understood to mean that Seventh Amendment rights did not attach to cases in equity, and the NLRB Court ruled that the case brought by the NLRB was analogous to a case in equity rather than law. *Id.* The Court further held that any monetary relief via orders of backpay were merely "incident[al] to [nonlegal relief] even though damages might have been recovered in an action at law." *Id.* at 48.

189. 382 U.S. 323 (1966).

190. *Id.* at 336 (holding that bankruptcy judges can decide voidable preferences without a jury).



Court reasoned that what would have been a legal claim if pursued on its own in an Article III federal court is “convert[ed]” into an equitable claim when it arises “as part of the process of allowance and disallowance of claims” in bankruptcy.<sup>191</sup> Because the Seventh Amendment does not attach to equitable proceedings—its reference to “Suits at common law” long has been understood to mean that the Seventh Amendment applies to suits in law but not in equity<sup>192</sup>—the Seventh Amendment did not allocate power to the jury to hear voidable preference claims raised in the context of a bankruptcy proceeding.<sup>193</sup> This reasoning is consistent with exclusivity because, as in *Jones & Laughlin Steel*, the Court’s rationale meant that the Seventh Amendment did not apply at all to the bankruptcy judge’s activities.

Two cases in 1974 radically shifted the rationale for agencies’ powers to engage in adjudicatory fact-finding and, in the process, created an explicit regime of concurrence. The question in *Curtis v. Loether* was whether the Seventh Amendment entitled litigants to a jury trial in actions for damages under the Civil Rights Act’s fair housing provisions.<sup>194</sup> According to the logic of *Jones & Laughlin Steel* the answer should have been “no” because the housing right at issue in *Curtis* was “unknown to the common law” and instead was “a statutory proceeding.”<sup>195</sup> In finding that litigants *were* entitled to a jury, *Curtis* wholly reconceptualized *Jones & Laughlin Steel*, asserting that the case “merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB’s role in the statutory scheme.”<sup>196</sup>

Three aspects of *Curtis* merit notice. First, whereas *Jones & Laughlin* justified its conclusion on the nature of the legal right at issue (that the legal right was statutory rather than common law-based), *Curtis*’s holding instead turned on *where* the litigation occurred (a jury-free administrative proceeding

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191. *Id.*

192. *See* *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446–47 (1830).

193. *Katchen*, 382 U.S. at 336–38.

194. *Curtis v. Loether*, 415 U.S. 189, 190 (1974).

195. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1936).

196. *Curtis*, 415 U.S. at 194.

rather than a federal court).<sup>197</sup> Second, this shift created a regime of concurrence: under *Curtis's* approach, the identical legal right could be decided by *either* a jury-free administrative agency *or* a court with a jury. Third, *Curtis* justified administrative agencies' adjudicatory powers on the basis of naked pragmatism: the Seventh Amendment is "generally inapplicable to administrative proceedings" because "jury trials would be *incompatible with the whole concept of administrative adjudication*."<sup>198</sup>

The same three elements are on display in the 1974 case of *Pernell v. Southall Realty*.<sup>199</sup> Like the *Curtis* decision, *Pernell* rereasoned an earlier decision—this time *Block v. Hirsh*—that had cabined the extent to which agencies could invade the jury's turf.<sup>200</sup> Whereas *Block* had upheld the agency's jury-free adjudicatory powers on the ground that exigent circumstances justified an exception to a litigant's "ordinary remedies,"<sup>201</sup> *Pernell* recharacterized *Block* as standing for a business-as-usual principle, stating that the case "merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings."<sup>202</sup> As in *Curtis*, the Seventh Amendment's inapplicability was justified purely on practical grounds.<sup>203</sup> Finally, *Pernell* explicitly acknowledged the regime of concurrence it had created. *Pernell* ruled that the Seventh Amendment required a jury to adjudicate the right to possession of real property at issue in the case because the adjudication took place in an ordinary federal court.<sup>204</sup> The Court went on to observe that "[w]e may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."<sup>205</sup>

The *Pernell* decision thus expressly acknowledges that the identical dispute could be resolved either by a jury before a court or a jury-free administrative agency. Concurrence was

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197. *See id.* at 195.

198. *Id.* at 194 (emphasis added).

199. 416 U.S. 363 (1974).

200. *See id.* at 382–83.

201. *Block v. Hirsh*, 256 U.S. 135, 158 (1921).

202. *Pernell*, 416 U.S. at 383.

203. *See id.* ("[J]ury trials would be incompatible with the whole concept of administrative adjudication.").

204. *See id.* at 383.

205. *Id.*; *see also* *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977) (affirming this rule).

fully acknowledged. As this subpart's tour through the case law shows, though, such a forthright acknowledgment was a long time coming.

### C. ADJUDICATORY JURISDICTION OF ARTICLE III AND NON-ARTICLE III COURTS

Article III's language that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"<sup>206</sup> could readily be interpreted to mean that federal judicial power *only* can be vested in Article III courts<sup>207</sup>—in other words, in an exclusivist manner.

And exclusivity indeed is the first approach that was taken. Consider in this regard the circuit court opinion in *United States v. More*.<sup>208</sup> An 1801 federal statute allowed justices of the peace for the District of Columbia to collect fees from litigants for the judicial services they performed.<sup>209</sup> Though this provision was repealed a year later, justice of the peace Benjamin More continued to collect fees.<sup>210</sup> When More was indicted, he contended that the 1802 repeal was a reduction in compensation in violation of Article III, Section 1.<sup>211</sup> The Circuit Court of the District of Columbia agreed. Dismissing the indictment, the court said:

It is difficult to conceive how a magistrate can lawfully sit in judgment, exercising judicial powers, and enforcing his judgments by process of law, without holding a court. I consider such a court, thus exercising a part of the judicial power of the United States, as an inferior court, and the justice of the peace as the judge of that court.<sup>212</sup>

206. U.S. CONST. art. III, § 1.

207. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986) (Brennan, J., dissenting) ("On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch."); Nelson, *supra* note 55, at 565 (arguing that Article III "strongly implies that neither Congress nor entities within the executive branch can exercise" judicial authority); cf. Monaghan, *supra* note 26, at 868 ("Article III might (at least as an original matter) have been understood to require that if any adjudication by federal tribunals occurs, it must occur in Article III courts.").

208. 7 U.S. (3 Cranch) 159 (1805). The *More* case was brought to my attention by an intriguing article by Professor Gary Lawson. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 878–86 (1990) (discussing Article III and territorial judges).

209. See Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

210. See *More*, 7 U.S. (3 Cranch) at 159.

211. See *id.* at 165–66.

212. *Id.* at 161 n.\*.

The circuit court's holding was predicated on an unspoken assumption of exclusivity. Having decided that the justice of the peace served on a federally created court that acted judicially, the circuit court automatically concluded that the District of Columbia's court was an Article III tribunal that accordingly enjoyed protection against diminishment of compensation.<sup>213</sup> Without the assumption of exclusivity, the fact that the justice of the peace served on a federal court exercising judicial power would not automatically have meant that it was an *Article III* federal court.<sup>214</sup>

But exclusivity did not hold for long. As Professor Monaghan has written, "[t]he expanding national government and the rapidly expanding national domain quickly rendered any such conception untenable. From the very beginning, the Court recognized 'exceptions,' i.e., that significant federal adjudication could occur in non-Article III tribunals."<sup>215</sup>

Same-effect concurrence was first adopted in the 1828 decision of *American Insurance Co. v. Canter*.<sup>216</sup> The case concerned a ship carrying a large quantity of cotton that had been lost off the coast of the territory of Florida.<sup>217</sup> A portion of the cotton had been saved by rescue ships, and the issue was whether a federally created territorial court was competent to adjudicate salvage cases.<sup>218</sup> *Canter* acknowledged that salvage

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213. *Id.*; see also *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) (holding that judges of the District of Columbia's Supreme Court and Court of Appeals are constitutionally protected from having their compensation reduced).

214. Incontrovertible evidence of this proposition is that the United States Supreme Court reasoned in just this fashion 170 years after *More* was decided, ruling that Congress had the power to create a non-Article III court known as the Superior Court of the District of Columbia, which could try criminal cases for violations of federal law but that the court's judges enjoyed neither life tenure nor salary protection since they did not sit on an Article III court. See *Palmore v. United States*, 411 U.S. 389, 390 (1973). Gary Lawson also has pointed out this relationship between the *More* and *Palmore* decisions. See Lawson, *supra* note 208, at 893.

215. Monaghan, *supra* note 26, at 868; see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 241-42 (1990) ("[A]rticle I courts and the article III courts frequently exercise a concurrent jurisdiction or otherwise share portions of the judicial business.").

216. 26 U.S. (1 Pet.) 511 (1828).

217. See *id.* at 513.

218. The court that heard the salvage claim was created by the Florida territorial legislature pursuant to a federal statute, which had empowered the legislature to do so. See *Canter*, 26 U.S. (1 Pet.) at 532. Though the petitioner argued that "Congress cannot vest admiralty jurisdiction in Courts created by

fell within the admiralty jurisdiction that itself is part of what Article III calls the “judicial Power of the United States.” Yet the judges on the territorial courts held “their offices for four years,” not the life tenure guaranteed by Article III.<sup>219</sup> *Canter* held that although the territorial courts were not Article III “constitutional Courts,” they nonetheless had jurisdiction to hear salvage claims.<sup>220</sup>

In upholding concurrent adjudicatory powers as between Article III federal courts and non-Article III territorial courts, *Canter* accepted same-effect concurrence. In doing so, Chief Justice Marshall vociferously rejected same-source concurrence, explaining that:

[The territorial courts were] not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. *They are incapable of receiving it . . . . The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.*<sup>221</sup>

Two observations are in order. First, *Canter* is an early example of the rejection of a strong form of *expressio unius est exclusio alterius*: that Article III vests federal judicial power in “constitutional Courts” did not preclude Congress from conferring adjudicatory jurisdiction in other entities. Second, *Canter*’s reasoning depended on a strong distinction between same-effect and same-source concurrence. The Court proclaimed that Florida salvage courts could do what they did, despite their being run by judges without life tenure, only because their judicial powers did not qualify as part of the “judicial Power of the United States.”<sup>222</sup>

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the territorial legislature,” the Court quite reasonably collapsed the distinction between delegator and delegate and instead analyzed the issue as if Congress itself had directly created the salvage court in question. *See id.* at 546. Professor Lawson treats *Canter*’s discussion as mere dictum because the salvage court had been created by the territorial legislature rather than by Congress. *See* Lawson, *supra* note 208, at 888, 892. But he offers no reason for believing that the delegate (the territorial legislature) should have more power to create a non-Article III court than the delegator (Congress). In any event, as Lawson himself notes, subsequent Supreme Court decisions treated *Canter*’s discussion as a holding, not dicta. *See id.* at 892.

219. *Canter*, 26 U.S. (1 Pet.) at 512.

220. *Id.* at 546.

221. *Id.* (emphasis added).

222. To be clear, I mean simply to characterize *Canter*’s reasoning from the internal perspective of its authors, not to praise it. Many have trenchantly critiqued *Canter* for failing to explain *why* the federal territorial court’s exercise of admiralty adjudication was not part of the “judicial Power of the United

The other great opinions of the nineteenth century upholding non-Article III federal tribunals likewise justified their holdings on the distinction between same-effect concurrence, which they tolerated, and same-source concurrence, which they did not. Consider the important case of *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>223</sup> Samuel Swartwout was a federal collector of customs for the port of New York.<sup>224</sup> Pursuant to an 1820 statute, the Treasury Department conducted an internal audit and determined that Swartwout had collected almost \$1.4 million more than he had remitted to the government.<sup>225</sup> Under authority of the statute, the solicitor of the treasury issued a "distress warrant" that directed a federal marshal to levy against and thereafter sell certain of Swartwout's real property to satisfy his debt.<sup>226</sup>

It was argued in *Murray's Lessee* that the marshal's sale of Swartwout's property was unconstitutional because the Treasury officials' acts (auditing Swartwout's account, ascertaining its balance, and issuing the distress warrant) constituted the exercise of United States judicial power that only could have been undertaken by an Article III court.<sup>227</sup> In upholding the Treasury officials' acts, *Murray's Lessee* famously announced what has become known as the "public rights" doctrine.<sup>228</sup> In the Court's own words:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.<sup>229</sup>

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States." See, e.g., REDISH, *supra* note 22, at 36–39 ("[S]upporting policy and constitutional arguments [for the status of territorial courts] are far from settled."); Bator, *supra* note 215, at 241–42 (contending that Justice Marshall "invent[ed]" the position of territorial courts as non-Article III, "legislative Courts"); Lawson, *supra* note 208, at 887–93 ("[T]he Court made no attempt to reconcile this dictum with its prior, and at least arguably inconsistent, case law . . ."). Below I discuss Justice Harlan's reralization of this part of *Canter's* rationale. See *infra* notes 233–35 and accompanying text.

223. 59 U.S. (18 How.) 272 (1856).

224. *Id.* at 275.

225. *Id.*

226. *Id.* at 274.

227. *Id.* at 275.

228. See Monaghan, *supra* note 26, at 871 (noting that *Murray's Lessee* "still remains the fountainhead for the modern public rights doctrine"); Nelson, *supra* note 55, at 586–90 (discussing *Murray's Lessee* and the special exception for tax collection).

229. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

The “public rights” doctrine is an example of concurrence insofar as such rights may be adjudicated in Article III tribunals or Article I tribunals. Like *Canter*, *Murray’s Lessee* relied on a strong distinction between same-effect and same-source concurrence. The Court upheld the challenged arrangement on the ground that the Article I official was not acting judicially and, conversely, “admitted” that “if the auditing of [Swartout’s] account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power.”<sup>230</sup> The treasury officials’ acts were constitutional only because the subject-matter was not “necessarily . . . a judicial controversy”<sup>231</sup> despite the fact that it was something over “which the judicial power c[ould] be exerted.”<sup>232</sup>

Though *Canter* and *Murray’s Lessee* both embraced same-effect concurrence, the two decisions also suggested a discomfort with concurrence. Consider Chief Justice Marshall’s adamant yet unjustified insistence that territorial courts’ adjudicatory powers were not part of Article III’s judicial power, and *Murray’s Lessee*’s resolve that the Article I official was not acting judicially. By contrast, the Court’s comfort with concurrence grew immeasurably in the twentieth century. This can be seen in Justice Harlan’s opinion for the Court in *Glidden Co. v. Zdanok*,<sup>233</sup> where Harlan reworked Chief Justice Marshall’s reasoning in the *Canter* decision. *Glidden* acknowledged Chief Justice Marshall’s averment that territorial courts were not courts “in which the judicial power conferred by the Constitution . . . can be deposited” and were “incapable of receiving” the judicial power of which the Constitution spoke,<sup>234</sup> but Justice Harlan went on to state that “[f]ar from being ‘incapable of receiving’ federal-question jurisdiction, *the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts.*”<sup>235</sup>

230. *Id.* at 275.

231. *Id.* at 281.

232. *Id.*

233. 370 U.S. 530 (1962).

234. *Id.* at 544 (quoting *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)).

235. *Id.* at 545 n.13 (emphasis added). Though Harlan labored to show that his and Marshall’s words in *Canter* were consistent—“[a]ll the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted

By the end of the twentieth century, the Supreme Court had become fully at ease with concurrence. This is most clearly seen in the decision of *Commodities Futures Trading Commission v. Schor*.<sup>236</sup> Going the final step beyond *Glidden*'s talk of "commensurate" power, *Schor* observed that Congress could "authorize the adjudication of Article III business in a non-Article III tribunal."<sup>237</sup> Though the counterclaim at issue in the case was a "'private' right for which state law provide[d] the rule of decision," and which accordingly was "a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts,"<sup>238</sup> *Schor* rejected the view that "bright-line rules" confined such claims to Article III courts<sup>239</sup> and upheld the non-Article III court's exercise of jurisdiction. Surely Professor Monaghan is correct when he speaks of today's "system of *shared* adjudication between agencies and Article III courts"<sup>240</sup> and, in so doing, Monaghan provides a full-throated recognition of concurrence.

#### D. LEGISLATIVE POWER: CONGRESS AND AGENCIES

Early Supreme Court decisions and early treatises understood Article I, Section 1's declaration that "[a]ll legislative Powers herein granted *shall be vested* in a Congress" in exclusivist terms: that *only* Congress may legislate.<sup>241</sup> The threat to congressional exclusivity in the early days came in the form of apparent congressional delegations of legislative power to other governmental institutions.<sup>242</sup> The response to such actions was

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without regard to the limitations of that article," *id.* at 544–45—surely Harlan's words reflect a greater comfort with concurrence.

236. 478 U.S. 833 (1986). In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Justice Brennan also acknowledged nonexclusivity while advancing a very different approach to understanding non-Article III courts. Justice Brennan later explained that although "Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch . . . [t]he Court has, however, recognized three narrow exceptions to the otherwise absolute mandate of Article III." *Schor*, 478 U.S. at 859 (Brennan, J., dissenting).

237. *Schor*, 478 U.S. at 851.

238. *Id.* at 853.

239. *Id.* at 857.

240. Monaghan, *supra* note 26, at 873 (emphasis added).

241. Merrill, *supra* note 50, at 2098 (quoting U.S. CONST. art. I, § 1) (emphasis added).

242. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 353–72 (2002) (describing early cases involving delegation of legislative power).



unequivocal.<sup>243</sup> With respect to congressional delegations to the executive branch, the 1892 decision of *Marshall Field & Co. v. Clark* asserted “[t]hat congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>244</sup> Addressing legislative delegations to courts, Chief Justice Marshall stated in *Wayman v. Southard* that “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>245</sup> Speaking more generally, Thomas Cooley’s nineteenth-century treatise declares that “[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.”<sup>246</sup>

Virtually everyone today acknowledges, however, that these nineteenth-century statements of congressional exclusivity do not describe contemporary American government.<sup>247</sup> A significant amount of lawmaking today occurs in the extracongressional governmental entities known as administrative agencies.<sup>248</sup>

243. See *id.* Perhaps this was only rhetorical: in none of the early cases did the Court strike down a federal statute on nondelegation grounds. See Merrill, *supra* note 50, at 2103 (explaining that early cases did not result in invalidation of a statute).

244. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

245. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). Chief Justice Marshall’s formulation here concededly is ambiguous as to whether legislative power can be delegated: it might be thought that he meant to say that powers that are “strictly and exclusively legislative” cannot be delegated, but that matters that are legislative in character but not “exclusively legislative” may be delegated. When read in context, however, it is clear that the Chief Justice meant to contrast “strictly and exclusively legislative” with matters that are non-legislative yet still may be undertaken by the Congress, not with matters that are legislative and yet delegable. See *id.* at 43 (stating that “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself” and using the example of congressional delegation to courts of functions associated with the judicial process); see Lawson, *supra* note 242, at 358–59 (reaching a similar conclusion).

246. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927).

247. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40–46 (1985) (discussing delegation to courts); Posner & Vermeule, *supra* note 57, at 1762 (“Delegation of powers is . . . common in public and private life . . .”).

248. See, e.g., Merrill, *supra* note 50, at 2099 (“Congress has massively delegated legislative rulemaking authority to administrative agencies.”); Posner & Vermeule, *supra* note 57, at 1745–53 (justifying delegation to agencies); Sunstein, *supra* note 77, at 315 (“[T]he United States Code has become littered

As a formal doctrinal matter, though, contemporary constitutional doctrine has not been willing to part with the myth of exclusivity. The nondelegation doctrine still purports to absolutely prohibit the delegation of legislative power.<sup>249</sup> A recent nondelegation decision, *Whitman v. American Trucking Associations, Inc.*,<sup>250</sup> is representative of contemporary doctrine<sup>251</sup> when it asserts that “[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, Section 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ *This text permits no delegation of those powers.*”<sup>252</sup>

How can this exclusivist rationale be harmonized with the contemporary reality of widespread rulemaking by agencies? There is a simple formal answer: the Court has equated legislative power with discretion and has concluded that no legislative power is delegated so long as Congress provides an “intelligible principle” that cabins the administrative agency’s discretion.<sup>253</sup>

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with provisions asking one or another administrative agency to do whatever it thinks best.”).

249. See Merrill, *supra* note 50, at 2119 (“[T]he sharing of the legislative power is not permitted . . .”).

250. 531 U.S. 457 (2001).

251. Earlier case law formulated the constraint on Congress’s ability to delegate differently. Chief Justice Marshall stated that there is some inexact “line . . . which separates 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.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Today’s “intelligible principle” formulation originated in the 1928 decision of *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1935). Scholars debate to what degree *Hampton*’s formulation represented a change in the doctrine. Compare Lawson, *supra* note 242, at 368–72 (arguing against the view that *Hampton* altered the doctrine announced by Chief Justice Marshall), with Posner & Vermeule, *supra* note 57, at 1740 (“The critical passage from *Wayman v. Southard*, then, adopts a different theory than the one modern nondelegation proponents have read into it.”).

252. *Whitman*, 531 U.S. at 472 (emphasis added). Other cases have reasoned similarly. See, e.g., *Touby v. United States*, 500 U.S. 160, 165 (1991) (“Congress may not constitutionally delegate its legislative power to another branch of Government.”); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (“That the legislative power of Congress cannot be delegated is, of course, clear.”); *J.W. Hampton, Jr. & Co.*, 276 U.S. at 407 (explaining that Congress may not delegate lawmaking power).

253. See, e.g., *Whitman*, 531 U.S. at 472 (stating that Congress may delegate “decisionmaking authority [to] agencies” as long as the legislative act includes some guiding “intelligible principle” (quoting *J.W. Hampton, Jr. & Co.*,

But the Court has applied this standard extraordinarily loosely.<sup>254</sup> It has been deemed to be met by statutes that instruct agencies to regulate on the basis of “public interest, convenience, or necessity,”<sup>255</sup> to set “fair and equitable prices,”<sup>256</sup> or to set ambient air quality standards that are “requisite to protect public health.”<sup>257</sup> In fact, the Court struck down statutes on nondelegation grounds on only two occasions—and both occurred in 1935 before (the first) Justice Roberts’s famous “switch in time.”<sup>258</sup> Cass Sunstein puts it nicely when he says that “it is more accurate, speaking purely descriptively, to see 1935 as the real anomaly. We might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).”<sup>259</sup>

As a formal matter, defining legislative power as it has permits the Court to continue to assert that no legislative power has been delegated. As a pragmatic matter, however, by construing the nondelegation doctrine’s “intelligible principle” so broadly, the Court has sanctioned a regime of concurrence under which more than one governmental entity—Congress and agencies—exercise de facto legislative power. This is what has led Justices Stevens and Souter to criticize the Court for “pretend[ing] . . . that the authority delegated” to administrative agencies “is somehow not ‘legislative power,’” advocating instead that “it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency

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276 U.S. at 409)); Merrill, *supra* note 50, at 2119 (explaining that the Supreme Court’s current version of the nondelegation doctrine uses “the discretionary meaning of ‘legislative power’”).

254. For example, Thomas Merrill recently has argued that “legislative power” entails “the power to make rules for the governance of society,” Merrill, *supra* note 50, at 2115, that administrative agencies exercise precisely this power today, and that they properly do so as long as Congress explicitly delegates them this power. *Id.* at 2120. Gary Lawson describes the status quo as one where the Court has found the intelligible principle standard to be satisfied by “any collection of words that Congress chose to string together.” Lawson, *supra* note 242, at 371. Other scholars who have noted that the nondelegation doctrine fails to curb delegations of de facto lawmaking authority to agencies include David Schoenbrod and Martin Redish. See generally REDISH, *supra* note 22; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

255. See *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225 (1943).

256. *Yakus v. United States*, 321 U.S. 414, 427 (1944).

257. *Whitman*, 531 U.S. at 473.

258. Sunstein, *supra* note 77, at 318.

259. *Id.* at 322.

rulemaking authority is ‘legislative power.’”<sup>260</sup> To use this Article’s terminology, Justices Stevens and Souter have argued that the federal legislative power today is concurrently exercised by Congress and administrative agencies.

Virtually the entire scholarly community concurs that Justices Stevens and Souter have the better of the argument as a purely descriptive matter: it is widely agreed that the Court’s expansive interpretation of “intelligible principle” means that agencies exercise de facto legislative power.<sup>261</sup> This raises an interesting question: why does a majority of the Court continue to cling to the exclusivist rationale that no legislative power has been, nor can be, delegated? Precedent provides a large part of the answer: as Justices Stevens and Souter acknowledge, the Court’s past opinions have uniformly asserted that agencies do not make law but instead make something else<sup>262</sup>—akin to the nineteenth-century cases explored in the previous subpart that insisted that Article I courts do not exercise federal judicial power.<sup>263</sup>

But that only pushes back the question, for then it must be asked why *earlier* Courts adopted the exclusivist assumption that only Congress could exercise legislative power. Answering this question is complicated by the fact that early Congresses enacted statutes that are naturally understood as having delegated lawmaking power to the executive and judicial branches:<sup>264</sup> one “statute provid[ed] for military pensions ‘under such regulations as the President of the United States may direct,’”<sup>265</sup> another authorized members of the executive branch “to license ‘any proper person[.]’ to trade with Indian tribes ‘[by] such rules and regulations as the President [shall] pre-

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260. *Whitman*, 531 U.S. at 488 (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment).

261. See *supra* note 254. The consensus breaks down with respect to what, if anything, should be done about this. Compare Merrill, *supra* note 50, at 2158, 2165 (arguing that delegation is preferable to nondelegation and advocating for rejection of the nondelegation doctrine), with SCHOENBROD, *supra* note 254, at 155–80 (arguing that the court should bar delegation).

262. See *Whitman*, 531 U.S. at 488 (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (acknowledging that “there is language in our opinions that supports the Court’s articulation of our holding” and citing to a raft of such cases).

263. See *supra* Part II.C.

264. See Posner & Vermeule, *supra* note 57, at 1735–36 (setting forth a list of such statutes).

265. *Id.* at 1735 (quoting Act of September 29, 1789, ch. 24, 1 Stat. 95, 95).

scribe,”<sup>266</sup> and yet another “authorized the courts to ‘make and establish all necessary rules for the orderly conducting of business in the [federal] courts.’”<sup>267</sup> Congress delegated portions of its nonlegislative powers as well. For instance, although the Constitution grants Congress the power to call forth the state militias,<sup>268</sup> the Militia Act of 1792 granted the President the power to activate militias “whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe.”<sup>269</sup>

In short, the early Supreme Court decisions’ assertions that Congress’s powers could not be delegated flew in the face of contrary contemporary practice.<sup>270</sup> What then explains the Court’s insistence on exclusivity? The same question can be applied to the Court’s contemporary doctrine, which to this day formally denies that legislative power can be delegated and asserts that *only* Congress can legislate. The best answer I can muster is that the Court’s continual exclusivist rhetoric strongly evidences the ongoing power of exclusivist sensibilities.

Finally, to fully appreciate the degree to which institutions apart from Congress exercise de facto legislative power we must not confine our inquiry to administrative agencies. There is yet another governmental institution outside of Congress where significant lawmaking occurs: courts, particularly when they interpret vague statutes that do not fall under the rule-making aegis of an administrative agency.<sup>271</sup> Federal antitrust law is an excellent example, for almost the entirety of antitrust law is the creation of courts.<sup>272</sup> Copyright’s fair use doctrine is another example.<sup>273</sup>

266. *Id.* (quoting Act of July 22, 1790, ch. 33, 1 Stat. 137, 137).

267. *Id.* (quoting Act of September 24, 1789, ch. 20, 1 Stat. 73, 83).

268. U.S. CONST. art. I, § 8, cl. 15.

269. Act of May 2, 1792, ch. 28, 1 Stat. 264, 264.

270. As shown above, this is also true of the Court’s early approaches to non-Article III courts, *supra* Part II.C, and its early insistence that only juries find facts, *supra* Part II.B.

271. This is typically, but not wholly, overlooked. Professors Martin Redish and Gary Lawson are two exceptional scholars who have discussed these sorts of delegations. See REDISH, *supra* note 22; Lawson, *supra* note 242.

272. See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978) (explaining that the legislative history of the Sherman Act “makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate”).

273. The 1976 copyright statute codified the common law fair use doctrine, see 17 U.S.C. § 107 (2006), but used open-ended language that was not intended to “freeze the doctrine in the statute, especially during a period of rapid

In other words, when Congress enacts vague statutory language without delegating rulemaking authority to an executive agency, courts in effect must generate the law as they decide questions unresolved by Congress on a case-by-case basis—a process that is variously called statutory interpretation or federal common law.<sup>274</sup> Constitutional doctrine imposes virtually no limits on this sort of congressional delegation. To begin, the nondelegation doctrine does not apply at all. Though the void-for-vagueness doctrine at one point was conceptualized, *inter alia*, as an antidelegation separation of powers principle, today courts almost exclusively treat void-for-vagueness as a due process principle designed to provide notice and to ensure non-arbitrary enforcement.<sup>275</sup> Further, as a practical matter, the void-for-vagueness doctrine primarily has been applied to state laws,<sup>276</sup> and is limited almost exclusively to the criminal and First Amendment contexts.<sup>277</sup>

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technological change.” H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680. For a full discussion, see Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. (forthcoming 2010).

274. See Rosen, *supra* note 115, at 804–05 (describing statutory interpretation and the creation of federal common law in the context of preemption).

275. See *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.”). Some earlier void-for-vagueness cases conceptualized the doctrine as ameliorating legislative delegations of authority to courts and juries. See, e.g., *United States v. Ragen*, 314 U.S. 513, 523–24 (1942) (holding that the statute was “not vague nor does it delegate policy-making powers to either court or jury”); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927) (voiding a statute because it impermissibly “submit[ted] to the jury” an issue that is “legislative, not judicial”). However, this antidelegation rationale has “largely been abandoned in favor of . . . preventing arbitrary and discriminatory law enforcement.” Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 282 (2003). One modern Supreme Court decision has revived the nondelegation concept, but assimilated it under the concern of arbitrary enforcement. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”). No recent case has relied on the delegation concept as a basis for finding a law to be void for vagueness.

276. An influential student Note written by now-Professor Amsterdam both noted this and proffered an explanation as to why the void-for-vagueness doctrine primarily limited states rather than the federal government. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 82–85 (1960). A recent article confirms that this trend has continued. See Goldsmith, *supra* note 275, at 290.

277. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455

In short, Congress's legislative power frequently is shared with administrative agencies and courts.

#### E. THE TREATY POWER

Professors Ackerman and Golove have shown that Congress and Presidents originally believed that some international agreements only could be created by treaty, and that it was only in the mid-twentieth century that Congress and Presidents came to believe that treaties and congressional-executive agreements were wholly "interchangeable;" in other words, that the Senate's treaty powers and Congress's ordinary legislative powers are wholly (or virtually wholly) concurrent.<sup>278</sup> As shown earlier, the *Restatement (Third) of the Foreign Relations Law of the United States* takes the position that "any agreement concluded as a congressional-executive agreement could also be concluded by treaty" and states that "[t]he prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."<sup>279</sup>

#### F. HORIZONTAL FEDERALISM: STATES' REGULATORY JURISDICTION

The trajectory from exclusivity to concurrence also is present in the "horizontal federalism" context with respect to the scope of states' regulatory powers. The early approach, expressed by Justice Story in his *Commentaries on the Conflict of Laws*, was a strictly territorialist conception of state power that gave rise to exclusivity. Justice Story averred that "the laws of every state affect and bind directly all property . . . within its territory [] . . . and all persons who are resident within it" and "no state . . . can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein."<sup>280</sup> On this approach, states had absolutely no power to regulate extraterritorially. Because each state's power extended to its physical borders, and no further, each state's regulatory powers were nonoverlapping and hence exclusive.

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U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

278. See Ackerman & Golove, *supra* note 34, at 861–96 (discussing how the doctrine of interchangeability came to be adopted).

279. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1986).

280. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (2d ed. 1841).

Early Supreme Court cases adopted similar exclusivist rhetoric. An 1881 decision declared that “[n]o State can legislate except with reference to its own jurisdiction,” meaning within its own physical borders, and that “[e]ach State is independent of all the others in this particular.”<sup>281</sup> An opinion eleven years later asserted that “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them.”<sup>282</sup> A 1914 decision stated that “it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority.”<sup>283</sup> In all these cases, the Court used the term “jurisdiction” interchangeably with “physical borders.”

This exclusivist approach to state regulatory powers, however, never squared with actual practice. States early-on applied their laws to persons, transactions, and occurrences that laid beyond their physical borders. For example, in 1819 the General Court of Virginia held that a Virginia statute which criminalized “all felonies committed by citizen against citizen, in any such place” supported the Virginia Attorney General’s prosecution of a Virginia citizen for having stolen a fellow Virginian’s horse in the District of Columbia.<sup>284</sup> Consider as well a nineteenth-century Texas law that provided that “[p]ersons out of the State may commit, and be liable to indictment and conviction for committing, any of the offenses enumerated in this chapter, *which do not in their commission necessarily require a personal presence in this State.*”<sup>285</sup> Interpreting this law, an 1882 Texas decision upheld the application of Texas’s criminal law to an act of forgery of a land certificate for Texas property

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281. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

282. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

283. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

284. *See Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 174 (1819). Interestingly, the Virginia court’s decision contained an important choice-of-law holding: what qualified as a “felony” was to be determined by Virginia law, not the law of the place where the activity occurred. *See id.* at 181. The dissenters in the case acknowledged that “it is competent for a State to legislate rules of conduct for its citizens while resident beyond its territorial limits,” but did not believe that the Virginia legislature had intended to create such an extraterritorial regulation. *Id.* at 183 (Holmes, J., dissenting). The Virginia legislature modified the statute in 1819 to make clear that they did not intend to extend extraterritorial jurisdiction. *See id.* at 182 (“[T]he Legislature, in changing essentially the terms of this Law, have rendered it very plain in future cases. They have made of it an entirely new Law.”).

285. 1879 Tex. Crim. Stat. 454 (emphasis added).



even though all the criminal acts had occurred in Louisiana.<sup>286</sup> The court further observed that Texas criminal law could be applied even if the defendants' acts were "no crime against the State in which it [was] perpetrated."<sup>287</sup>

In the twentieth century, the Supreme Court formally recognized the power of states to regulate persons and things that lay beyond their physical borders. In *Strassheim v. Daily*, the Court permitted Michigan to prosecute a non-Michigander for acts defrauding Michigan that were undertaken outside of Michigan.<sup>288</sup> Writing for the Court, Justice Holmes wrote that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect."<sup>289</sup>

Today's restatements and model codes explicitly acknowledge states' significant extraterritorial regulatory powers. *The Restatement (Third) of the Foreign Relations Law of the United States* provides that states within the United States "may apply at least some laws to a person outside [State] territory on the basis that he is a citizen, resident, or domiciliary of the State."<sup>290</sup> The *Restatement* further states that this extraterritoriality principle applies to both criminal and civil legislative powers.<sup>291</sup> Directed to the criminal context, the *Model Penal Code* provides that State A may impose liability if "the offense is based on a statute of this State that expressly prohibits conduct outside the State."<sup>292</sup> The *Model Penal Code* affirms that State A has extraterritorial legislative jurisdiction even if the

286. *Hanks v. State*, 13 Tex. Ct. App. 289, 305–09 (1882).

287. *Id.* at 309. For more examples, see Rosen, *supra* note 8, at 719–20.

288. *Strassheim v. Daily*, 221 U.S. 280, 281 (1911).

289. *Id.* at 285. Thirty years later, in *Skiriotes v. Florida*, 313 U.S. 69 (1941), the Court upheld the application of a Florida statute prohibiting sponge fishing to a Florida citizen's activities that occurred wholly outside of Florida's territorial waters. The *Skiriotes* Court analogized Florida's extraterritorial regulatory powers to the unquestioned power of the federal government to regulate its citizens when they are "upon the high seas or even in foreign countries," *id.* at 73, and adverted to Florida's "status of a sovereign" as the source of similar state extraterritorial powers. *Id.* at 77.

290. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 5 (1986).

291. See *id.* § 403 cmt. f ("The principles governing jurisdiction to prescribe set forth in § 402 and in this section apply to criminal as well as to civil regulation.").

292. MODEL PENAL CODE § 1.03(1)(f) (1962).

activity it prohibits occurs in a State in which the activity is permissible.<sup>293</sup>

The significant extent to which states can regulate extra-territorially means that more than one state's laws frequently can apply to a given person, transaction, or occurrence—something that the Court explicitly acknowledged in 1981 when it wrote that “a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”<sup>294</sup> In the context of horizontal federalism, then, early exclusivist assumptions also have given way to accepting that states frequently have concurrent regulatory authority.<sup>295</sup>

#### G. THE PARDON POWER

The Constitution gives the President the power to grant pardons.<sup>296</sup> The earliest Supreme Court opinions understood this grant in exclusivist terms: “To the executive *alone* is intrusted the power of pardon.”<sup>297</sup> On the basis of this understanding, the Court described a statute whose provisions purported to authorize the President to grant certain pardons and amnesties as only a “*suggestion* of pardon by Congress, for such it was, rather than authority.”<sup>298</sup>

Here, as elsewhere, exclusivity soon gave way to concurrence. At issue in *Brown v. Walker* was the constitutionality of a statute that granted immunity from prosecution, penalty, or forfeiture to persons who gave testimony or other evidence to the Interstate Commerce Commission.<sup>299</sup> The Court held that “testimony,” under the statute, “operate[d] as a complete pardon for the offense to which it relates,” and understood the con-

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293. *See id.* § 1.03(2).

294. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

295. To be clear, states do not enjoy plenary extraterritorial regulatory authority. For example, “Alabama does not have the power . . . to punish [a company] for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996). In fact, multiple constitutional principles constrain the scope of state extraterritorial regulatory powers. *See generally* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 896–945 (2002). In this context of overlapping powers, as elsewhere, concurrency is not “all or nothing.” *See infra* Part IV.

296. U.S. CONST. art II, § 2.

297. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (emphasis added).

298. *Id.* at 139 (emphasis added).

299. *Brown v. Walker*, 161 U.S. 591, 591 (1896).

stitutional question to be whether Congress had the power to issue pardons.<sup>300</sup> Upholding the statute, the Court held that “[a]lthough the Constitution vests in the President ‘power to grant reprieves and pardons for offenses against the United States . . . ,’ this power has never been held to take from Congress the power to pass acts of general amnesty.”<sup>301</sup> The Court then equated amnesties with pardons, stating that “[t]he distinction between amnesty and pardon is of no practical importance. . . . [But] ‘is one rather of philological interest than of legal importance.’”<sup>302</sup> Insofar as Congress enacted the immunity statute pursuant to its Commerce Clause powers, *Brown* accordingly upheld an instance of same-effect concurrence.<sup>303</sup> Justice Field’s dissent rejected the Court’s embrace of concurrence and propounded an exclusivist rationale.<sup>304</sup> The immunity statute was unconstitutional, Justice Field thought, because “Congress cannot grant a pardon. That is an act of grace *which can only be performed by the President.*”<sup>305</sup>

#### H. CONTEXTUALIZING THE TRAJECTORY: THE REMAINING IMPORTANCE OF EXCLUSIVITY AND SOME INSTANCES OF A COUNTERTRAJECTORY

While there is a significant incidence of concurrence in United States law, one should not lose sight of the fact that many of the Constitution’s power allocations still are understood exclusively. Nobody to date has suggested that any institution apart from Congress has the power to raise and support armies and appropriate monies for war,<sup>306</sup> that institutions apart from the Senate can try impeachments,<sup>307</sup> or that institu-

300. *Id.* at 595.

301. *Id.* at 601 (quoting U.S. CONST. art II, § 2).

302. *Id.* (citing *Knote v. United States*, 95 U.S. 149, 152 (1877)).

303. *See id.* at 609–10. Though *Brown* rejected *Klein*’s exclusivist assumptions, the two cases are not necessarily incompatible. *Brown* addressed the question of whether Congress has the power to grant pardons, whereas *Klein* concerned the very different question of whether Congress could regulate so as to affect the President’s exercise of his pardon power. *See id.* at 593–94; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136 (1871).

304. *See Brown*, 161 U.S. at 638 (Field, J., dissenting).

305. *Id.* (emphasis added).

306. Even here some concurrence-type questions have arisen. For instance: do the President’s executive powers include the prerogative to elect *not* to spend monies that have been allocated?

307. *But see Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding that it is a political question whether only a subset of the Senate may hear testimony and submit proposed findings for a vote of the entire Senate).

tions apart from the President can recognize foreign countries.<sup>308</sup> In these contexts, there has been no trajectory from exclusivity to concurrence. Rather, exclusivist understandings have endured, and indeed have been unchallenged.

On the other hand, the longevity of universally held exclusivist assumptions does not guarantee that they will forever endure. Indeed, some of the most controversial proposals that have been put forward by contemporary scholars amount to suggestions that activities long thought to belong exclusively to one institution actually are shared concurrently with others. Consider in this regard Professor Bruce Ackerman's argument that there are mechanisms outside of Article V by which "the People" can amend the Constitution, and Professor Michael Ramsey's thesis that the President can declare war.<sup>309</sup> Whether these particular proposals for new areas of concurrence gain traction remains to be seen. But many academics embrace yet another form of concurrence: the theory that the Supreme Court effectuates extra-Article V amendments by means of creative constitutional interpretation.<sup>310</sup>

Finally, to fully understand the relation between exclusivist and concurrent power allocations in contemporary United States constitutionalism, one must take account of those instances where there has been a countertrajectory from concurrence to exclusivity. There are not many such instances in contemporary constitutional law, but there are a few in the Court's vertical federalism jurisprudence.

The trajectory is complex. Early case law toyed with the exclusivist prospect that regulatory powers held by Congress necessarily were *not* also held by States.<sup>311</sup> The Court soon

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308. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1986) ("Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.").

309. See 1 ACKERMAN, *supra* note 13, at 266–69; Ramsey, *supra* note 12, at 324.

310. See, e.g., Siegel, *supra* note 13, at 1351; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001). This is most plausibly conceptualized as a species of same-effect concurrence; Article III judicial power encompasses common law reasoning that has the power to alter constitutional meaning for all intents and purposes. See Strauss, *supra*, at 1468.

311. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 200 (1824) (refusing to answer whether state power to regulate commerce "is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We

opted for same-effect concurrence, ruling that the Constitution's grant of congressional power to regulate interstate commerce did *not* deprive states of power to regulate interstate commerce under their historic police powers.<sup>312</sup> But exclusivity's attractions had not been vanquished, for exclusivity played a prominent role fifty years later in the *Civil Rights Cases*, where the Court asserted that Section 5 of the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects which are within the domain of State legislation."<sup>313</sup> The grounding of this conclusion was the exclusivist assumption that matters falling within the regulatory authority of states perforce cannot also lie within Congress's regulatory authority.<sup>314</sup> In later cases the Court understood Section 5 to authorize Congress to regulate matters that the States also had power to regulate,<sup>315</sup> though the *Civil Rights Cases*' doctrinal limits that were justified on the basis of exclusivity remain with us to this day.<sup>316</sup>

A different story pertains to the Commerce Clause where, throughout most of the twentieth century, it was understood that Congress could regulate things that the states could regulate under their historic police powers.<sup>317</sup> But in the recent

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may dismiss that inquiry, because it has been exercised . . ."). In his concurring opinion, Justice Johnson was willing to decide the question squarely in favor of exclusivity. *See id.* at 227 (Johnson, J., concurring) ("[T]he power [to regulate commerce] must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.").

312. *See Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251–52 (1829).

313. *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (relying on this argument to conclude that Congress was without the power to regulate private persons under Section 5 of the Fourteenth Amendment).

314. *See id.* at 14–15.

315. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (holding that Congress had the power under Section 5 to legislate regarding voting requirements, which states unquestionably also have the power to regulate).

316. *See United States v. Morrison*, 529 U.S. 598, 620–27 (2000) (reaffirming *Civil Rights Cases*' holding that Congress's Section 5 powers extend only to state action, not to "private persons").

317. The entire doctrine of preemption reflects this: the doctrine addresses whether a federal statute displaces state regulations that, before the federal statute's enactment, were perfectly valid exercises of state authority. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008). Preemption doctrine explicitly recognizes that federal statutes may displace even state regulations that fall within the states' "historic police powers." *See Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (noting the circumstances under which the "historic police powers of the States" may be superseded by federal law). Many (if not most) cases finding preemption in-

Commerce Clause holdings in *United States v. Lopez* and *United States v. Morrison* the Supreme Court has returned to exclusivity to some extent, ruling that Congress did not have power to regulate a particular subject because the States *did* have regulatory power.<sup>318</sup> Dissenting, Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer) recognized and criticized the majority's exclusivist assumptions, arguing that the fact that states have the power to regulate such matters as education and the family says absolutely nothing about whether Congress *also* has power to regulate these subjects.<sup>319</sup> This is not to suggest that the Court has retrenched to a strong form of exclusivity; preemption doctrine's continuing recognition that Congress can regulate to displace states' historical police powers rests on recognition of same-effect concurrence.<sup>320</sup> Nonetheless, *Lopez* and *Morrison* at the very least illustrate the resilience of exclusivity's pull.

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To conclude, in context after context the Supreme Court has begun with exclusivist assumptions only to ultimately conclude that more than one institution can exercise the type of power that the Constitution's text appeared to grant to only a single specified institution. A nonexhaustive<sup>321</sup> list follows.

1. The Court's initial understanding in *Marbury* that the Supreme Court could not be given original jurisdiction beyond

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volve statutes enacted pursuant to Congress's Commerce Clause powers. *See, e.g.,* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 (1992).

318. *See Morrison*, 529 U.S. at 617–19, 626–27; *United States v. Lopez*, 514 U.S. 549, 552–54 (1995). The case of *City of Boerne v. Flores*, however, is not properly understood as part of the countertrajectory from concurrence to exclusivity. *See* 521 U.S. 507, 519 (1997). *Boerne* does not embrace a principle of exclusivity that only the Supreme Court has the power to interpret the Constitution, but instead lays down a categorical rule of conflict-resolution to the effect that the Supreme Court's constitutional interpretations categorically trump the interpretations of other institutions. *See id.* at 535–36. There is a sharp and important analytical distinction between an exclusivist rule that denies power to a second institution and a conflict-resolution rule. For more on conflict-resolution rules, see *infra* Part V.

319. *See Morrison*, 529 U.S. at 639 (Souter, J., dissenting) (“It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on . . . the authority of a State to regulate it along with Congress.”).

320. *See supra* note 317.

321. To provide yet another example, Justice Jackson's *Youngstown* concurrence expressly recognizes that presidential and congressional powers overlap to some extent. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

what the Constitution granted gave way to the *Ames* decision, which permitted inferior federal courts to exercise original jurisdiction over matters that the Constitution had granted to the Supreme Court.<sup>322</sup>

2. The Court's original understanding that only juries could find facts has been displaced by a regime in which federal judges and administrative judges find facts during adjudication.<sup>323</sup>

3. The Court's original view that only Article III courts can exercise federal judicial power has given way to the understanding that non-Article III courts can exercise federal adjudicatory power.<sup>324</sup>

4. The original view that only Congress can exercise legislative power has given way to the understanding that administrative agencies have the power to create de facto law.<sup>325</sup>

5. The original view that certain international obligations could be created only through the treaty process has given way to the understanding that virtually all international obligations can be created either by treaty or by congressional-executive agreements.<sup>326</sup>

6. The original view that each state's regulatory authority extended only up to its borders has given way to the understanding that often more than one state has the power to regulate a given person, transaction, or occurrence.<sup>327</sup>

7. The early view that only the President can pardon has given way to the understanding that Congress can create functionally equivalent amnesties.<sup>328</sup>

In short, there has been a strong pattern across many doctrinal contexts where the Court's initial exclusivist assumptions have given way to an acceptance of concurrence. The shift has not occurred everywhere, and sometimes has been followed by a retrenchment back to exclusivity.<sup>329</sup> But, as a purely descriptive matter, many important governmental powers are now understood to be exercisable by more than one governmental institution.

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322. See *supra* Part II.A.

323. See *supra* Part II.B.

324. See *supra* Part II.C.

325. See *supra* Part II.D.

326. See *supra* Part II.E.

327. See *supra* Part II.F.

328. See *supra* Part II.G.

329. See *supra* Part II.H.

### III. HOW AND WHY CONCURRENCE IS CREATED

This Part examines the mechanisms by which concurrence has been created as well as the reasons for the shift from exclusivity to concurrence.

#### A. MECHANISMS FOR CREATING CONCURRENCE

As shown in Part II, the judiciary tends to start with exclusivist assumptions. Consequently, the move toward concurrence typically has been initiated by nonjudicial institutions. There are three mechanisms by which concurrence has been created: delegation, inherency, and breach-stepping.

##### 1. Delegation

The most widespread mechanism for creating concurrence is delegation.<sup>330</sup> For example, Congress regularly delegates explicit rulemaking authority to agencies.<sup>331</sup> Congress implicitly delegates similar authority to courts when it enacts open-ended statutory language and decides against tasking agencies with rulemaking authority to flesh out the statutory language.<sup>332</sup> I will call these “Type 1 delegations.” Type 1 delegations result in concurrence because Congress does not divest itself of its legislative power, but instead retains the power to make law as well.

“Type 2 delegations” are exemplified by congressional delegations of adjudicatory authority to Article I courts.<sup>333</sup> Type 2 delegations also result in concurrence. For instance, as shown in Part II.C, Article I and Article III courts share significant adjudicatory jurisdiction.

Why distinguish between Type 1 and Type 2 delegations? In Type 1 delegations the delegator delegates its own authority, whereas in Type 2 delegations the delegator delegates another institution’s authority.<sup>334</sup> The distinction between the two

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330. Cf. Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–39 (1994) (discussing the prevalence of congressional delegation and the growth of the administrative state).

331. See *supra* note 248.

332. See Merrill, *supra* note 247, at 40–46.

333. See, e.g., 48 U.S.C. § 1424(b) (2006) (vesting the District Court of Guam with “the jurisdiction of a district court of the United States . . . and that of a bankruptcy court of the United States”).

334. Compare *Touby v. United States*, 500 U.S. 160, 164–65 (1991) (delegating congressional power to designate drugs as controlled substances to the Attorney General), with *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 24 (1828)



forms of delegation may be important because institutional self-interest may operate as a check against overly extensive Type 1 delegations but not Type 2 delegations.<sup>335</sup> On the other hand, self-interest sometimes may lead to excessive Type 1 delegations as, for instance, when Congress delegates so as to blur lines of political accountability.<sup>336</sup>

Three further observations concerning delegation are in order. First, Congress is not the only institution that can delegate. For example, the *posse comitatus* doctrine is an instance of executive delegation to the private sector; the doctrine required private citizens to assist in the enforcement of federal law.<sup>337</sup>

Second, delegation is the mechanism most closely associated with same-source concurrence. For example, executive agencies are readily conceptualized as exercising legislative authority that has been delegated by Congress when they make rules.<sup>338</sup> On the other hand, delegation does not invariably give rise to same-source concurrence. As we have seen, many courts and scholars have insisted that Article I courts do *not* exercise Article III judicial power,<sup>339</sup> and that agencies do *not* exercise Article I legislative power.<sup>340</sup>

Third, the propriety of a particular delegation demands consideration of not only the nature of the powers delegated, but also the identity of the delegee. In this regard, it frequently is easier to delegate powers to a new institution than to an institution created by the Constitution with respect to which delegated powers might be incompatible with its constitutional duties.<sup>341</sup>

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(delegating the authority of admiralty jurisdiction from Article III courts to non-Article III territorial courts).

335. See Merrill, *supra* note 50, at 2099.

336. See Sunstein, *supra* note 77, at 319–20.

337. See generally Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 LAW & HIST. REV. 1, 1–11 (2008) (providing an overview of the *posse comitatus* doctrine and its application during the mid-nineteenth century in the United States).

338. See Merrill, *supra* note 50, at 2099.

339. See *supra* Part II.C.

340. See *supra* Part I.C.1.a.ii.

341. See Lawson, *supra* note 330, at 1240.

## 2. Inherency

Let us call the second mechanism for creating concurrence “inherency.”<sup>342</sup> Under inherency, an institution claims that its constitutionally granted powers authorize it to undertake act *X*, where that act is (at least) functionally identical to what another institution can undertake. For instance, the Court has held that Congress’s power to regulate commerce<sup>343</sup> subsumes the power to enact immunity statutes that are functionally equivalent to the President’s pardon power.<sup>344</sup> Inherency almost always gives rise to same-effect concurrence, though it theoretically can create same-source concurrence where the Constitution does not clearly indicate which institution is allocated a particular power. For example, the Guarantee Clause states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>345</sup> The Supreme Court has held that the “United States” refers to Congress,<sup>346</sup> and has suggested that the language also can encompass the President.<sup>347</sup> The Guarantee Clause accordingly may give rise to the rare phenomenon of inherency-created same-source concurrence.

## 3. Breach-Stepping

The third mechanism for creating concurrence is when one institution with clear authority to undertake act *X* does not, and a second proactive institution “steps into the breach.”<sup>348</sup> Though breach-stepping typically can be described as an in-

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342. I borrow this excellent term from Professor Merrill. See Merrill, *supra* note 50, at 2101.

343. U.S. CONST. art. I, § 8, cl. 3.

344. See *Brown v. Walker*, 161 U.S. 591, 601 (1896).

345. U.S. CONST. art. IV, § 4 (emphasis added).

346. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–44 (1849); see also *Baker v. Carr*, 369 U.S. 186, 219–23 (1962) (explaining the Court’s holding in *Luther*).

347. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 729–30 (1868) (noting “measures which have been taken, under [the Guarantee Clause], by the executive and legislative departments of the National government,” though ultimately concluding that “the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress”), *overruled in part on other grounds* by *Morgan v. United States*, 113 U.S. 476 (1885).

348. Justice Jackson alluded to this sort of mechanism in his *Youngstown* concurrence when he observed that “[w]e may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers,” and suggested that the President likely would act in such circumstances. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

stance of either delegation or inherency, it merits distinct treatment insofar as there are circumstances where the proactive institution appears to be driven to act by a perceived need; in a breach-stepping circumstance, the proactive institution does not seem to be acting on the view that it is merely exercising delegated or inherent powers.

A good illustration is provided by the facts in *United States v. Midwest Oil Co.*<sup>349</sup> An act of Congress provided that public lands containing petroleum or other mineral oils were to be “free and open to occupation, exploration, and purchase by citizens of the United States.”<sup>350</sup> After deciding that oil was being extracted too rapidly, with the result that the government soon would be “obliged to repurchase the very oil that it ha[d] practically given away” due to the Navy’s increasing use of fuel, the President issued a proclamation withdrawing the rights to extract petroleum from select public lands.<sup>351</sup>

Midwest Oil Company continued to extract oil following the President’s decree, and was sued for doing so.<sup>352</sup> Midwest argued in court that the executive order was null insofar as it was not authorized by statute but, to the contrary, contradicted an act of Congress that permitted petroleum extraction.<sup>353</sup> The Supreme Court upheld the President’s proclamation.<sup>354</sup> The Court provided two primary justifications. One was that although “no . . . express authority has been granted” to the President to withdraw rights to drill for oil, “there is nothing in the nature of the power exercised which prevents Congress from granting it by implication.”<sup>355</sup> This rationale reduces to an (implied) delegation justification for the President’s exercise of essentially legislative powers, but it is unpersuasive: why should the statute opening public lands be understood as impliedly authorizing the President to withdraw those lands?

The Court’s second justification is far more compelling.<sup>356</sup> “[G]overnment is a practical affair, intended for practical men,” said the Court, and Congress’s “rules or laws for the disposal of

349. 236 U.S. 459 (1915).

350. *Id.* at 466 (quoting Act of Feb. 11, 1897, ch. 216, 29 Stat. 526, *superse- ded by* 30 U.S.C. §§ 181–287 (2006)).

351. *Id.* at 466–67.

352. *Id.* at 468–69.

353. *See id.* at 468.

354. *See id.* at 483.

355. *Id.* at 474.

356. The Court also pointed to a past practice of executive withdrawal of public lands. *See id.* at 469–72.

public land are necessarily general in their nature” such that “[e]mergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale.”<sup>357</sup> In other words, congressional inaction provided the justification for presidential initiative. Though this could be redescribed as an instance of inherency—that executive authority encompasses the power to deviate from general legislative dictates when necessary—the Court did not justify the President’s actions in such terms.<sup>358</sup>

Breach-stepping is the mechanism that has given rise to the concurrent rulemaking authority as between Congress and federal courts that characterizes the dormant Commerce Clause. Congress has unquestioned authority to disallow (or approve) all the state regulations that federal courts have deemed presumptively unlawful under the dormant Commerce Clause.<sup>359</sup> The Supreme Court has not yet pointed to a persuasive doctrinal basis in which to ground its dormant Commerce Clause doctrine,<sup>360</sup> so why has the Court proceeded to generate federal common law in this area? The most likely answer is that the Court deems federal inaction in the face of discriminatory state laws to be unacceptable, and so it has stepped into the breach of congressional inaction and taken the initiative.<sup>361</sup>

The same can be said of federal common law itself. Although federal common law-making plausibly can be justified on inherency grounds—on the theory that Article III’s judicial power encompasses common law-making powers<sup>362</sup> over mat-

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357. *Id.* at 474.

358. The Court refused to endorse the President’s effort to ground his powers to issue the Proclamation in his Commander-in-Chief powers. *See id.* at 468. Additionally, much of the Court’s reasoning seemed to turn on the fact that the case concerned public lands. *See id.* at 474–75. For an illuminating analysis of the case, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 44–45 (1993).

359. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986).

360. *See Camps Newfound v. Town of Harrison*, 520 U.S. 564, 610–18 (1997) (Thomas, J., dissenting).

361. *See id.* at 618–20.

362. I would add the caveat that federal courts’ common law-making powers exist only to the extent that they were not statutorily preempted, as it were, by the Rules of Decision Act. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 795 (1989). This suggests that the Court’s dormant Commerce Clause jurisprudence is harder to justify than run-of-the-mill federal common law insofar as dormant Commerce Clause doctrine operates as federal law where state law otherwise would seem to be appropriately applied under the Rules of Decision Act. *See id.*

ters that do not lie within the competency of states<sup>363</sup>—what actually has driven the Court to create federal common law is better described as breach-stepping than as inherency. After all, even after the embrace of legal positivism in *Erie Railroad v. Tompkins*, which made it important to identify the source of judges' power to generate common law,<sup>364</sup> the Supreme Court typically neglects to specify the source of the federal common law rules it announces and instead justifies its common law-making on the grounds of necessity. For example, in *Clearfield Trust Co. v. United States*, one of the first post-*Erie* federal common law cases, the Court held that “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.”<sup>365</sup> Explaining that “[i]n the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards,” the Court failed to explain the source of federal courts' power to fashion law absent congressional action.<sup>366</sup> Similarly, in a decision handed down the same day as *Erie*, Justice Brandeis wrote that the apportionment of an interstate stream's water presents a “question of ‘federal common law.’”<sup>367</sup> Brandeis cited to earlier cases for the principle, but neither he nor the cited cases explained the *source* of federal courts' powers to create such federal common law—an essential issue following *Erie*'s embrace of positivism.<sup>368</sup>

363. In other words, the rule first announced in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), perhaps is best understood as a federalism doctrine rather than a doctrine that addresses the nature of federal judicial power. Federal courts have common law authority, except in diversity cases where state law provides the substantive rule of decision. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 922–24 (1986) (making a similar argument).

364. Prior to *Erie*, common law was widely understood as being judicial articulation of preexisting natural law rather than judicial creation. See *Erie*, 304 U.S. at 79 (asserting that *Swift v. Tyson*'s sanctioning of federal courts' common law powers rested on the “fallac[ious]” natural law belief that there is a “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute”). But see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 683 (1998) (challenging this account). If, following *Erie*, there was no “transcendental body” of law that courts merely declared when they announced common law, then what was the source of the common law rule that a federal court declared?

365. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

366. *Id.* at 366–67.

367. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

368. See *id.* Though some lower courts and modern commentators similarly

To be sure, in some contexts the Court has attempted to explain the source of its powers to generate federal common law. Yet even here it is hard to escape the conclusion that a perceived need to act, rather than firm belief in its inherent powers, drove the Court's decision because its inherency justifications have been remarkably flimsy. First consider the federal common law of admiralty and interstate conflicts. The Court has said that the source of federal courts' authority to generate admiralty law is the Constitution's "grant of general admiralty jurisdiction to the federal courts."<sup>369</sup> As many have observed, however, this justification is inconsistent with *Erie's* holding that the Constitution's grant of diversity jurisdiction does not empower federal courts to create general common law in diversity cases insofar as "there is no obviously relevant difference in the texts of the diversity and admiralty jurisdictional grants."<sup>370</sup> In other words, if the diversity grant gives courts adjudicatory jurisdiction but not the power to fashion substantive common law rules, why should the admiralty grant operate differently?

Consider, as well, the Court's holding in *Textile Workers Union v. Lincoln Mills*<sup>371</sup> that federal courts' powers to create a body of federal law to enforce collective bargaining agreements came from the Labor Management Relations Act's (LMRA) provision stating that federal courts have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . in an industry affecting commerce."<sup>372</sup> Fairly read, this statutory provision is a jurisdictional grant—which the Court acknowledged.<sup>373</sup> Reliance on a jurisdictional grant as the source of a court's power to generate federal common law

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have sought to ground federal common law-making power in the Constitution's jurisdictional grant over interstate controversies, see RICHARD H. FALLOON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 732–43 (5th ed. 2003) (gathering sources), the same *Erie*-based critique leveled at the Court's reliance on the Admiralty Jurisdiction Clause applies here. If the diversity grant gives courts adjudicatory jurisdiction but not the power to fashion substantive common law rules, why should the interstate controversy grant operate differently?

369. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95–96 (1981).

370. Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 312 (1999).

371. 353 U.S. 448, 451–52 (1957).

372. *Id.* at 449–50 (relying on 29 U.S.C. § 185(a) (2006)).

373. *Id.* at 452 (stating the question before the Court as being whether the statutory provision at issue is "more than jurisdictional").

accordingly is subject to the same sort of post-*Erie* critique leveled against the Court's federal common law of admiralty: why should the LMRA's jurisdictional grant be the source of common law powers if the diversity grant is not?<sup>374</sup> *Lincoln Mills* also relied on what Justice Douglas's opinion for the Court termed "a few shafts of light" in the legislative history to buttress its conclusion,<sup>375</sup> but "[t]he Court's handling of the legislative history was severely criticized by the dissent and, subsequently, by commentators."<sup>376</sup>

In all these cases, breach-stepping rather than inherency better describes what prompted the Court's decision to go forward with federal common law-making and thereby create concurrency.

#### B. REASONS FOR CONCURRENCE

This subpart explains why there has been a shift from exclusivity to concurrence in so many contexts. The analysis begins by exploring the Court's explanations, all of which have stressed situation-specific pragmatic considerations. Frequently, the Court also was able to point either to historical precedents or to the fact that the practice of concurrence had become deeply entrenched.

The Court's pragmatic explanations, however, typically do not venture beyond relatively undeveloped assertions that concurrence is practical or efficient in the circumstance at hand. Concurrence's benefits can be further cashed out. Not limiting analysis to the justifications provided in the case law seems particularly appropriate in view of the fact that concurrence typically originates extrajudicially. By analyzing concurrence as a phenomenon that occurs across multiple doctrinal contexts, rather than confining analysis to only one context at a time, one can find recurring patterns as to what concurrence can accomplish.

##### 1. Pragmatics and Past Practice

The *Ames* Court, it should be recalled, reversed course from *Marbury* and upheld Congress's allocation of original jurisdiction to inferior federal courts of cases involving states and

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374. See *supra* note 368 (noting a similar critique that can be leveled at the various efforts that have been made to explain federal courts' powers to create federal common law to resolve interstate controversies).

375. *Lincoln Mills*, 353 U.S. at 452.

376. Merrill, *supra* note 247, at 40 & nn.180–81.

ambassadors.<sup>377</sup> It premised its holding on the basis of longstanding practice and practicality.<sup>378</sup> *Ames* reasoned on the basis of an analogous practice that had arisen in relation to inferior federal courts' jurisdiction over cases involving ambassadors.<sup>379</sup> The same section of the Constitution that grants the Supreme Court original jurisdiction over suits involving states provides that "the supreme Court shall have original Jurisdiction . . . [i]n *all* Cases affecting Ambassadors."<sup>380</sup> Since the early days of our Republic, however, this language has not been understood to mean that only the Supreme Court has original jurisdiction in cases affecting Ambassadors. The 1789 Judiciary Act provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings *against* ambassadors" but "original, *but not exclusive*, jurisdiction of all suits brought *by* ambassadors . . ."<sup>381</sup> The Court specifically noted that this legislation reflected Congress's "construction" of the Constitution,<sup>382</sup> and the Court provided a practical rationale for Congress's "understand[ing] that the original jurisdiction vested in the Supreme Court was [not] necessarily exclusive"<sup>383</sup>:

[K]eep[ing] open the highest court of the nation for the determination, in the first instance, of suits involving . . . a diplomat or commercial

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377. See *supra* Part II.A.

378. See *Ames v. Kansas*, 111 U.S. 449, 469 (1883) (noting Congress's "practical construction" of the provision and that "no court of the United States has ever in its actual adjudications determined" that the provision did not confer concurrent jurisdiction). Tellingly, the *Ames* Court did not distinguish *Marbury* on the basis of the Constitution's specification that "[i]n *all other Cases*, the supreme Court shall have appellate Jurisdiction." See U.S. CONST. art. III, § 2, cl. 2 (emphasis added). It quite plausibly could have been argued on the basis of this language that the Supreme Court could not have original jurisdiction over matters for which the Constitution granted it appellate jurisdiction.

379. See *Ames*, 111 U.S. at 463–64 (noting that the Judiciary Act of 1789 provided the Supreme Court with concurrent jurisdiction over suits brought by ambassadors).

380. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

381. *Ames*, 111 U.S. at 463–64 (quoting the Judiciary Act of 1789) (emphasis added).

382. *Id.* at 464. The *Ames* Court also observed that this construction was provided by "the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it." *Id.* This raises an obvious question: shouldn't these same considerations have led the Court to decide *Marbury* differently?

383. *Id.*



representative of a foreign government . . . was due to the rank and dignity of those for whom the [constitutional] provision was made; but to . . . deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.<sup>384</sup>

The *Ames* Court also was impressed that this longstanding practice was popularly accepted.<sup>385</sup>

Likewise, the Supreme Court and commentators<sup>386</sup> have acknowledged that considerations of practicality drove the Court's jurisprudence upholding concurrent power as between Article I tribunals and Article III courts. Justice Harlan's decision for the Court in the *Glidden Co. v. Zdanok*<sup>387</sup> decision is exemplary. Justice Harlan traced non-Article III federal courts back to Chief Justice Marshall's opinion in the above-discussed *Canter* case, which upheld a territorial court's power to hear a case that also fell under Article III admiralty jurisdiction.<sup>388</sup> Applauding *Canter's* holding, Harlan said "[t]he reasons for [*Canter's* holding] are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind."<sup>389</sup> There was "no state government to assume the burden of local regulation," with the result that "courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State."<sup>390</sup> It was imperative that these territorial courts not be staffed by life-tenured Article III judges be-

384. *Id.*

385. *See id.* at 465–66. *Ames* noted that one of the opinions was contemporaneous with the decision of *Chisholm v. Georgia*, which famously caused immediate controversy and led to the quick adoption of the Eleventh Amendment. "It is a fact of some significance, in this connection, that although the decision in [*Chisholm*] attracted immediate attention, and caused great irritation in some of the states," that the decisions concerning ambassadors, "which in effect held that the original jurisdiction of the supreme court was not necessarily exclusive, seems to have provoked no special comment." *Id.* at 466.

386. *See* Bator, *supra* note 215, at 254 ("The justification for the existence of territorial courts has always been essentially pragmatic."); Monaghan, *supra* note 26, at 868 ("The expanding national government and the rapidly expanding national domain quickly rendered [exclusivity] untenable.").

387. 370 U.S. 530, 584 (1962) (holding that the Court of Claims and the Court of Customs and Patent Appeals are Article III courts).

388. *Id.* at 544 ("The concept of a legislative court derives from the opinion of Chief Justice Marshall in [*Canter*], dealing with courts established in a territory." (citation omitted)).

389. *Id.* at 545 (emphasis added).

390. *Id.*

cause there would have been no need for them after the territories became states and created their own (state) courts.

This consideration, as well as other “problems not foreseen by the Framers of Article III,” Justice Harlan says, explained *Canter*: “Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. *It would have been doctrinaire in the extreme*”<sup>391</sup> to rule otherwise. Instead, continued Harlan, Chief Justice Marshall was “conscious as ever of his responsibility to see the Constitution work” and accordingly “recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.”<sup>392</sup> Harlan then generalized, explaining that “[t]he same confluence of practical considerations that dictated the result in *Canter* has governed the decisions in later cases sanctioning the creation of other courts with judges of limited tenure” and that otherwise do not conform to the requirements of Article III.<sup>393</sup>

The Court also has relied on historical practice and practical considerations in its other decisions upholding non-Article III tribunals. In the landmark case of *Murray’s Lessee v. Hoboken Land & Improvement Co.*, for instance, the Court upheld the non-Article III procedure for collecting federal taxes on the historical grounds that it did “not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know without objection.”<sup>394</sup> The Court then explained the pragmatic basis for this practice:

[P]robably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. *Imperative necessity* has forced a distinction between such claims and all others . . . .<sup>395</sup>

The nation’s courts-martial similarly have been justified on the basis of historical practice and practicality. Emphasizing the former, the early decision of *Dynes v. Hoover* concluded that “Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and

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391. *Id.* at 546 (emphasis added).

392. *Id.* at 547.

393. *Id.*

394. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281 (1855); see also *supra* Part II.C (laying out the facts of this case in detail).

395. *Murray’s Lessee*, 59 U.S. (18 How.) at 282 (emphasis added).

now practiced by civilized nations.”<sup>396</sup> Emphasizing considerations of practicality, *Ex parte Quirin* rejected the view that offenses against the laws of war are subject to the requirements of the Fifth and Sixth Amendments, holding instead that such offenses can be tried in military tribunals, “which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures.”<sup>397</sup> Consistent with *Ex parte Quirin*, the landmark decision of *Hamdan v. Rumsfeld* candidly acknowledged that “[t]he military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”<sup>398</sup>

Sometimes pragmatic considerations alone, absent historical pedigree, have proven to be sufficient justification for the Court. Consider in this regard its forgiving nondelegation doctrine. As the Court has said in its more candid moments, “[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power.”<sup>399</sup> This justification has been elaborated and defended by multiple scholars.<sup>400</sup>

## 2. Efficiency

Pragmatics without pedigree has been a sufficient justification for concurrence in the Court’s Seventh Amendment jurisprudence examined above in Part II.B. The judicial decisions allowing concurrent fact-finding powers between judge and jury were driven primarily by considerations of efficiency and re-

396. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

397. *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (citations omitted).

398. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

399. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) (“To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (“The judicial approval accorded these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems.”).

400. Merrill, *supra* note 50, at 2151–59, 2164–65 (summarizing the arguments in support of broad delegation powers and concluding that agencies are “far better” at making federal policy on “many and perhaps most issues”); Posner & Vermeule, *supra* note 57, at 1743–45 (“All institutions must take direction from a person, or a small group of people, but the leader of an institution cannot possibly perform all of its tasks directly. Instead, the leader or principal delegates broad authority to agents.”).

source preservation. The *Munson* decision, which rejected the rule under which questions were submitted to the jury as long as there was “any evidence,” justified its new approach by citing to “recent decisions of high authority” that “have established a *more reasonable* rule.”<sup>401</sup> The “high authority” that the Supreme Court cited all were *English* cases that postdated 1791, the year that the Seventh Amendment was adopted, and hence were not legally binding authority.<sup>402</sup> Moreover, none of the cases went so far as to support the Court’s rule that judges can “take cases away from the jury when there are disputes of pure questions of fact.”<sup>403</sup> The conclusion is inescapable that what ultimately led the Supreme Court to adopt its new rule in *Munson* was its belief that the new rule was—as the Court itself said—“more reasonable” than the old one: why let a case go to the jury, even if there were some evidence in support of the plaintiff’s position, if a jury could not “*properly* proceed to find a verdict” for the nonmoving party?<sup>404</sup> Doing so would only waste the valuable time of the court, jury, and parties.<sup>405</sup>

The *Galloway* decision, which determined that directed verdicts on grounds of insufficiency of evidence did not violate the Seventh Amendment, likewise grounded its holding on considerations of practice and practicality. The “short answer” as to why “the Amendment [does not] deprive[] the federal courts of power to direct a verdict for insufficiency of evidence,” explained the Court, is that any contention to the contrary “has been foreclosed by repeated decisions made here consistently for nearly a century” with the result that any “objection therefore comes too late.”<sup>406</sup> But the *Galloway* Court did not end its analysis there, as it also aimed to establish that “the consequences flowing from” the proposition that a judge’s only response to insufficient evidence was to order a new trial “are sufficient to refute it.”<sup>407</sup> The conclusion that the Seventh Amendment demanded a new trial after the plaintiff had failed to provide sufficient evidence in the first, said the Court, would

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401. *Schuylkill & Dauphin Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871) (emphasis added).

402. *See Sward*, *supra* note 140, at 594 (noting that the earliest of these cases had been decided in 1853).

403. *Id.* at 599.

404. *Munson*, 81 U.S. (14 Wall.) at 448 (emphasis added).

405. *See Pa. R.R. v. Chamberlain*, 288 U.S. 333, 343 (1933) (“Such a practice . . . saves time and expense . . .”).

406. *Galloway v. United States*, 319 U.S. 372, 389 (1943).

407. *Id.* at 392.

lead to “endless repetition of litigation and unlimited chance, by education gained at the opposing party’s expense, for perfecting a case at other trials.”<sup>408</sup>

Sometimes considerations of practicality alone—despite the absence of longstanding practice and, sometimes, even contrary to longstanding practice—have been sufficient to motivate the Court to accept concurrence. Consider in this regard the *Redman* Court’s decision that a federal court could disregard a jury’s verdict and substitute its own by granting an immediate verdict on behalf of the party who had lost in the jury’s eyes.<sup>409</sup> Unlike *Munson* and *Galloway*, the *Redman* Court was unable to justify its new rule on grounds of past practice because the Court only twenty years earlier, in the *Slocum* case, had flatly rejected the proposition that *Redman* embraced.<sup>410</sup>

Remarkably, *Slocum* notwithstanding, the *Redman* Court labored to demonstrate that its holding was consistent with precedent. This effort is not at all convincing.<sup>411</sup> Since the legal

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408. *Id.* at 393.

409. See *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 661 (1935) (“[W]e reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial.”); see also *supra* note 167.

410. See *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 380 (1913) (“When the verdict was set aside the issues of fact were left undetermined, and . . . no judgment on the merits could be given. The new determination . . . could be had only through a new trial, with the same right to a jury as before.”). Indeed, the Second Circuit decision that the Supreme Court’s ruling reversed in *Redman* had relied on *Slocum* for the proposition that a new trial was the only remedy for a judge’s determination that a jury’s verdict had been based on insufficient evidence. See *Redman*, 295 U.S. at 656 (“But the court of appeals ruled that under our decision in *Slocum v. New York Life Insurance Co.* the direction must be for a new trial.” (footnote omitted)). The Supreme Court in the *Redman* decision itself acknowledged that “some parts of the [*Slocum*] opinion give color to the interpretation put on it by the Court of Appeals.” *Id.* at 661. This is an understatement: as explained in Part II.B, *Slocum* had cited to many earlier-decided Supreme Court cases that had flatly asserted that only juries could make the ultimate determinations as to facts that ground the verdict.

411. See *Redman*, 295 U.S. at 659–60 (distinguishing *Slocum*). *Redman*’s holding turned on a highly technical distinction. Unlike *Slocum*, the defendant in *Redman* had moved for a directed verdict on the grounds of insufficient evidence after evidence had been adduced at trial but before the verdict was rendered, and the trial court had reserved its decision on the defendant’s motion. The *Redman* Court then pointed to the common law procedure known as the “special case,” under which courts could submit the case to the jury subject to reserved questions of law and, following the verdict, award the verdict to a different party than the jury depending upon how the court resolved the reserved question. *Id.* at 659–60.

materials before the *Redman* Court alone cannot explain its decision, the efficiency-minded practical reasons the Court adduced most likely are what fueled its decision. Like other practices that had been approved, allowing the judge to disregard a jury's verdict and grant an immediate verdict would give "better opportunity for considered rulings, ma[ke] new trials less frequent" and for these reasons could be expected to "command[] . . . general approval" of litigants over time.<sup>412</sup>

### 3. Circumstances Not Anticipated by the Founders

In several contexts, the Court has justified concurrence on the ground that it was necessary to meet circumstances not anticipated by our Constitution's Founders. Justice Harlan justified Article I courts on this basis, explaining that they were necessary to meet "problems not foreseen by the Framers of Article III."<sup>413</sup> Administrative agencies' rulemaking powers similarly have been justified on the ground that "in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power."<sup>414</sup> Scholars arguing in favor of congressional-executive agreements have argued that the Founders did not anticipate exactly how difficult the treaty process would be, or the prominent role that the United States would play on the international stage.<sup>415</sup> Similar arguments have been proffered as to the unanticipated difficulty of Article V's amendment requirements to explain de facto amendments by the Court via constitutional interpretation.<sup>416</sup>

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412. *Id.* at 660.

413. *Glidden Co. v. Zdanok*, 370 U.S. 530, 546 (1962).

414. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see also* *Loving v. United States*, 517 U.S. 748, 758 (1996); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

415. *See* Ackerman & Golove, *supra* note 34, at 861–96 (describing the conflict that arose between isolationists and internationalists prior to and during World War II as the result of the Senate's "monopoly" on foreign policy).

416. *See, e.g.*, Thomas Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 824 (2005) ("[T]he American Constitution . . . contains no adequate mechanism for making needed changes in the assignment of powers between the levels of government. . . . [T]he solution . . . has been judicial amendments of the Constitution . . . ."); Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1514 (2009) ("[O]ur practice of judicial interpretation uses Article III to work around the obstruction to good governance produced by the difficult amendment procedures of Article V.").

## 4. Workarounds

Concurrence has been turned to as a workaround because the institution most obviously tasked by the Constitution has not acted.<sup>417</sup> Sometimes there are obvious practical barriers that account for the most suitable candidate's inaction. For instance, in theory, Congress *could* enact as legislation every administrative agency's rule. Given the size of the country today and the perceived need for the federal government's involvement, however, this simply is not possible.

Sometimes concurrence has been created when it is less obvious why the most obviously tasked institution has failed to act. Consider in this regard the federal courts' dormant Commerce Clause doctrine and federal common law.<sup>418</sup> As discussed in the next subpart, however, considerations of the different institutional characteristics of courts and legislatures may help to explain why courts rather than Congress have acted here.

Finally, and most controversial of all, concurrence occasionally has been used to avoid constitutional limitations that hindered the most obvious institution from undertaking a particular task. Consider in this regard Professor Pfander's discussion of the Article I tribunal known as the Court of Claims.<sup>419</sup> When the colonies were settled, a private party (such as contractors and other public creditors) who had a "public claim" against government would submit petitions for payment directly to the legislature.<sup>420</sup> "Shortly after the Revolution, states began to experiment with the judicial determination of public claims."<sup>421</sup> Congress wished to meld these two practices together by having courts take the first crack at public claims, but retaining ultimate control in deciding what public claims to ultimately authorize.<sup>422</sup> The Invalid Pensions Act of 1792 required

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417. After writing this Article, I came across a piece written by Mark Tushnet that addresses a similar phenomenon by means of the identical terminology. See Tushnet, *supra* note 416.

418. See *supra* notes 359–76 and accompanying text.

419. See Pfander, *supra* note 22, at 699–706 (arguing that the creation of the Court of Claims was driven by the Supreme Court's refusal to submit decisions of the courts to executive or legislative review).

420. See *id.* at 701 ("Contractors and other public creditors would submit legislative petitions for payment, which were funneled to the proper committee of the assembly; if favorably impressed, the committee would recommend inclusion of payment in the annual appropriations bill.")

421. See *id.*

422. See *id.* at 699 (describing the claims process imposed by the Invalid Pensions Act of 1792).

Article III courts to “hear the pension claims of veterans, to estimate the degree of their disability, and to propose the proper amount of compensation due them.”<sup>423</sup> The federal court’s estimates thereafter were to be “review[ed] first by the Secretary of War and then by Congress.”<sup>424</sup>

However, the Court in *Hayburn’s Case* strongly disapproved of this mechanism of initial judicial review followed by executive and legislative review, and argued that Article III requires that the judiciary’s decisions be final in the sense of not being reviewable by nonjudicial institutions.<sup>425</sup> *Hayburn’s Case*’s finality requirement led Congress to create the non-Article III Court of Claims in 1855.<sup>426</sup> “In creating the Court of Claims, Congress was said to have created an Article I tribunal subject to legislative oversight and free from the constraints of Article III.”<sup>427</sup> As Pfander nicely puts it, *Hayburn’s Case* “purchased judicial independence at the price of forcing Congress to turn to other institutions to perform the function of preliminary adjudication.”<sup>428</sup> The Court of Claims is not unique in this regard; other non-Article III tribunals were created to circumvent other Article III requirements.<sup>429</sup>

Such a use of concurrence presents difficult legitimacy challenges: was the Court of Claims a brilliant workaround, or an unconstitutional end-run around Article III’s finality requirement? I return to this query in Part VI.<sup>430</sup>

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423. *Id.*

424. *Id.*

425. *See Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 409 n.(a) (1792) (“[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.” (quoting the Circuit Court for the District of New York)).

426. *See Pfander, supra* note 22, at 703–04 (“By disclaiming an advisory or preliminary role in the determination of benefit claims, the federal courts required Congress to fashion a non-Article III tribunal for the adjudication of such claims.”).

427. *Id.* at 702–03.

428. *Id.* at 702.

429. *See id.* at 706–15 (arguing that Congress originally created non-Article III territorial courts because it believed that inhabitants of territories “lacked federal rights to enforce” and that territorial courts were local rather than national courts).

430. *See infra* note 501.



## 5. Interinstitutional Synergies

Although only occasionally justified in these terms, concurrence frequently arises in circumstances where the characteristics of the overlapping institutions are complementary such that concurrence likely results in superior decision making and action taking than exclusivity would. The *Midwest Oil* decision is a rare instance where the Court justified concurrence in terms of such institutional synergies.<sup>431</sup> As discussed above, the Court upheld the President's decision to bar mineral extraction from public lands, despite a statute that permitted such extraction, on the ground that "[e]mergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale."<sup>432</sup> Two institutional characteristics explain why the President is better situated to respond to emergencies than Congress. First, Congress primarily operates prospectively, enacting statutes that have enduring effects, whereas the executive branch generally operates in the present, applying past congressional enactments to present-day events. Call this the executive branch's "presentist" orientation. For these reasons, the President is better positioned than Congress to respond to changed circumstances and emergencies. Second, the President can act much faster than our bicameral, 535-member national legislature.

Courts and commentators point to similar institutional synergies in relation to agency rulemaking. Agencies bring a level of substantive expertise and deep experience that Congress cannot.<sup>433</sup> Furthermore, since it is cheaper and easier to modify agency rules than statutes,<sup>434</sup> rules can more readily be

431. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (upholding a presidential proclamation withdrawing petroleum extraction rights on select public lands).

432. *Id.* It is worth adding that the Court refused to endorse the President's effort to ground his powers to issue the proclamation on his Commander-in-Chief powers. See *id.* at 468 (noting that the government argued that the President's proclamation was grounded in his power "as Commander in Chief of the Army and Navy," but deciding the issue on other grounds). Much of the Court's reasoning arguably turned on the fact that the case concerned public lands. See *id.* at 474–75. For an illuminating analysis of the *Midwest Oil* precedent, see Monaghan, *supra* note 358, at 44–45.

433. For a comprehensive discussion of the relative institutional competencies of agencies and Congress, see Merrill, *supra* note 317.

434. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 95–97 (1994) (arguing that the comparative complexity of rulemaking increases information costs, reduc-

tailored to account for unanticipated effects and changed circumstances—yet another facet of the executive branch’s presentist orientation.

Much federal common law also can be understood through the lens of institutional synergy. To see this, it is necessary to disaggregate federal common law. First consider contexts where federal courts have engaged in wholesale lawmaking with virtually no congressional participation, as in admiralty, interstate controversies,<sup>435</sup> and (with the close conceptual relative to federal common law known as) dormant Commerce Clause cases.<sup>436</sup> This phenomenon of courts taking the first step may occur in fields that are better-suited to inductive, ground-up reasoning than the legislature’s more deductive process of laying down prospective general principles. Inductive reasoning can be expected to be a better method where it is difficult to anticipate the relevant decision-making criteria on an *ex ante* basis, or where there is uncertainty as to how multiple competing considerations ought to be prioritized.<sup>437</sup> In these contexts, legislatures either never intervene (but instead leave the field to courts) or later codify (and frequently amend) the Court’s initial resolutions. Either way, there is good reason to believe that the ultimate outcomes will be better than what would have resulted if the courts had not first acted.

Institutional synergies also are found in the facet of federal common law that consists of filling significant gaps in a statutory scheme. As with the executive’s relationship to Congress discussed above, the institutional synergy in this context re-

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ing participation in rulemaking and lowering the cost of influencing outcomes).

435. It should be noted, though, that Congress may not have power to decide all interstate controversies. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1323–26 (1996) (suggesting that Congress could not enact a statute to decide the boundaries between two states).

436. Henry Monaghan was among the first to point out the close relationship between federal common law and the dormant Commerce Clause doctrine. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 15 (1975) (noting that “one of the most salient illustrations of the Supreme Court’s derivation of federal rules of decision from the Constitution” is the invalidation of state laws under the dormant Commerce Clause).

437. There is an extensive literature that addresses the choice between inductive and deductive decision making. See generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) (using the concepts of deductive and inductive reasoning to help define the terms “legal formalism” and “legal realism”).

sults from the judiciary's more presentist orientation vis-à-vis legislatures. Whereas legislatures operate prospectively, invariably suffering from imperfect foresight, courts operate on the front lines, hearing live controversies. Consequently, courts are regularly presented with scenarios unanticipated by legislatures and, relatedly, with the need to harmonize apparently conflicting legal duties. Although legislatures have the power to create as statutes the rules that courts fashion as federal common law in such circumstances, it may be advantageous to allow courts to take the first crack rather than leaving the gap unfilled until Congress acts. Congress can always amend the Court's efforts, if it should so choose.

## 6. Emergencies

Finally, concurrence occasionally has been justified on the ground that an emergency required either immediate action or a deviation from ordinary institutional arrangements. Justice Holmes upheld an administrative agency's assumption of jury fact-finding duties in *Block v. Hirsh* on the basis of the latter justification—remedying the District of Columbia's housing shortage required fast action that only administrative fact-finding could accomplish.<sup>438</sup> And though the Court equivocated, it may have upheld President Lincoln's issuance of a proclamation appointing a provisional governor of Texas following the Civil War and providing for the assembling of a convention to adopt a new state constitution on the ground that immediate action was necessary.<sup>439</sup> The danger exists, of course, that the emergency giving rise to the exception will be forgotten and the

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438. See *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (“A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.”).

439. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868), *overruled in part on other grounds by* *Morgan v. United States*, 113 U.S. 476 (1885). The Court said such actions “primarily” fell under Congress’s “legislative power” under the Guarantee Clause, but then stated that the President’s actions were appropriately “considered as provisional” in light of the fact that it was “taken after the term of the 38th Congress had expired.” *Id.* Elsewhere in the opinion, the Court suggested that the President may have some independent powers under the Guarantee Clause. See *id.* at 729 (determining that it was unnecessary to review the actions taken “by the executive and legislative departments” under the Guarantee Clause, and noting that it is “essential only that the means must be necessary and proper” to restoring a republican form of government, and that no action be taken “which is either prohibited or unsanctioned by the Constitution”).

exception generalized. As explained above, that in fact is what occurred with the *Block* case.<sup>440</sup>

#### IV. NOT ALL OR NOTHING

There is a chapter in the Hebrew Bible that consists of only two sentences.<sup>441</sup> The lesson: sometimes short but important points deserve to be broken out on their own so they receive the emphasis they deserve.

So too here. The choice between exclusivity and concurrence is not an “all or nothing” affair. This is true in two key respects.

First, though there are many instances of concurrence, there also are many contexts where power is held exclusively by a single institution.<sup>442</sup>

Second, even where concurrence exists, there typically are limits. For example, although federal courts have significant power to create federal common law—and where they have this power they accordingly share de facto lawmaking powers with Congress—their common law-making powers are not coterminous with Congress’s lawmaking powers or with the federal courts’ adjudicatory jurisdiction. Instead, there are all sorts of (judge-made) limits that have been imposed or identified.<sup>443</sup> Similarly, in the context of Article I courts, the Supreme Court has labored to identify the limits to Congress’s powers to task non-Article III courts with the sort of adjudicatory business that falls within Article III jurisdiction.<sup>444</sup> As well, the President’s “lawmaking” powers are limited to circumstances where Congress has delegated to him rulemaking authority or, as the great *Steel Seizure* case makes clear, the President has independent powers and Congress has not acted.<sup>445</sup>

The lesson that emerges from the fact that the choice between exclusivity and concurrence has not been “all or nothing”

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440. See *supra* notes 176–85 and accompanying text; see also R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* 21 SW. U. L. REV. 1019, 1029–30 (1992) (noting that although the Court struck down the District of Columbia’s rent control ordinance in 1924 because the exigency no longer existed, the concept of rent control has persisted).

441. *Psalms* 117.

442. See *supra* notes 306–08 and accompanying text.

443. See Field, *supra* note 363, at 927–34.

444. See Pfander, *supra* note 22, at 646–47, 656–57.

445. Mark D. Rosen, *Revisiting Youngstown: Against the View That Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1705–06 (2007).

is that slippery slope arguments regarding the choice between exclusivity and concurrence are unconvincing;<sup>446</sup> allowing concurrence in one context has not meant that exclusivity has been rejected across the board. The choice between exclusivity and concurrence has not been made on the basis of transsubstantive principles (such as *expressio unius est exclusio alterius* to support exclusivity or an across-the-board rejection of *expressio unius* to support concurrency), but instead has been made by means of context-specific analysis.<sup>447</sup>

## V. METHODS FOR ADDRESSING CONFLICTS

If two or more institutions have overlapping powers, it is possible that they could exercise their powers in inconsistent ways and thereby generate conflicts. Indeed, the possibility of conflict frequently is deemed to be a strong, and sometimes definitive, argument against concurrency.<sup>448</sup>

Such conflict anxiety, however, is overblown. There are many contexts where two or more institutions have overlapping powers, and American law has developed six different methods for addressing such interinstitutional conflicts.<sup>449</sup> Context-specific institutional considerations, rather than transsubstantive principles, typically explain the selection of the method.<sup>450</sup> That we already have at our disposal multiple mechanisms for dealing with conflict suggests that the prospect of conflict is not on its own a sufficient reason to rule out concurrence. At most, the prospect of conflict constitutes a cost of concurrence that appropriately is weighed against the benefits that concurrence promises in a particular context.

### A. SIX CONFLICT-RESOLUTION APPROACHES

Here is an overview of the six conflict-resolution approaches that can be found in American law.

1. *Categorical Institution-Based Conflict Rule*. One institution's action categorically trumps the other institution. The Supremacy Clause is one such example, providing that federal law

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446. See, e.g., Alexander & Prakash, *supra* note 18, at 1051–55.

447. There are two competing ways this can be described: either as wise, case-by-case, common law reasoning or as unprincipled, ad hoc decision making. I return to this question in Part VI.

448. See, e.g., MADISON, *supra* note 1, at 66.

449. Much of what follows in this Part is drawn from Rosen, *supra* note 445, at 1717–31.

450. *Id.* at 1743–44.

categorically trumps state law.<sup>451</sup> Another is the rule under which federal statutes categorically trump federal common law and dormant Commerce Clause doctrine. A final example comes from Justice Jackson's famed concurrence in the *Steel Seizure* case.<sup>452</sup> His Category Two recognized the possibility of same-effect concurrence as between Congress and the President,<sup>453</sup> but Category Three provides that the President can act contrary to a statute only if he has independent power and Congress's statute exceeded its powers.<sup>454</sup> Together, these two categories mean that where the President and Congress have concurrent powers, Congress's acts categorically trump presidential acts.

2. *Presumptive Institution-Based Conflict Rule.* One institution presumptively, but noncategorically, trumps. For example, juries presumptively have the power to find facts in Article III adjudications. The jury's fact-finding powers, however, are only presumptive insofar as they can be displaced by the judge in limited circumstances: (1) before the jury has heard the case if the judge determines that a reasonable jury could not return a verdict for one of the parties<sup>455</sup>—a determination that almost invariably involves fact-finding by the judge—and (2) during trial or after the jury has rendered its verdict should the judge decide that there was no legally sufficient evidentiary basis for a reasonable jury to find on behalf of one of the parties<sup>456</sup>—another determination that almost invariably involves judicial fact-finding.

3. *First-in-Time Conflict Rule.* The institution that acts first trumps. Examples include the application of the Full Faith and Credit Clause, as well as the common law doctrines of res judicata and collateral estoppel, all of which resolve potential conflicts among courts with overlapping adjudicatory jurisdiction by providing that the second court is bound by the first court's ruling.<sup>457</sup>

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451. U.S. CONST. art. VI, cl. 2.

452. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). For a full discussion, see Rosen, *supra* note 445, at 1704–06.

453. *Steel Seizure*, 343 U.S. at 637.

454. *Id.* at 637–38.

455. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (laying out the standard for granting summary judgment).

456. *See* FED. R. CIV. P. 50(a), (b).

457. For a particularly bracing example of the Full Faith and Credit Clause's first-in-time rule, see *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

4. *Last-in-Time Conflict Rule.* The institution that acts last trumps. Examples include the relation among treaties, congressional-executive agreements, and sole executive agreements, where conflicts are resolved on the basis of a last-in-time rule.<sup>458</sup> Another example can be found in the *res judicata* rule applicable to the unusual circumstance where the party in the second lawsuit neglected to assert the defense of *res judicata*: “When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of *res judicata*.”<sup>459</sup>

5. *Multifactor Conflict-Resolution Principles.* Multifactor conflict-resolution principles identify multiple factors that are to be considered to resolve conflicts.<sup>460</sup> An example includes the *Restatement (Second) of Conflicts of Laws*, which seeks to resolve conflicts where multiple states have overlapping regulatory jurisdiction by means of a virtual laundry list of considerations.<sup>461</sup>

6. *No-Sorting Principles.* Under a no-sorting principle, the two institutions with overlapping authority are permitted to simultaneously act, even if they act inconsistently.<sup>462</sup> There are several possible outcomes. First, the regulated entities may be subject to multiple rules simultaneously, some of which may conflict, and are expected to conform their behavior nonetheless.<sup>463</sup> Other times, the different institutions with overlapping authority may formally or informally negotiate among themselves to coordinate their actions.<sup>464</sup> Such coordination typically

458. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (regarding treaties). For a description and defense, see Julian Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 325, 326–27 (2005).

459. See RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1980). The Restatement rule is based on several Supreme Court cases. See Rosen, *supra* note 445, at 1724 n.72.

460. See Rosen, *supra* note 445, at 1725–28.

461. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2) (1969).

462. For an example of a no-sorting principle in relation to congressional and judicial power to interpret the Constitution, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2030–31 (2003).

463. This is true of state criminal law generally, and also is reflected in the Double Jeopardy Clause’s “dual sovereignty” doctrine. See Rosen, *supra* note 445, at 1728–30.

464. See, e.g., Rosen, *supra* note 115, at 803 & n.95 (discussing the negotiation among states that led to the Uniform Child Custody Jurisdiction Act,

is undertaken by the political branches of government, not the courts.

#### B. IMPLICATIONS

That there are multiple conflict-resolution principles in United States law has many implications that merit article-length treatment. Some crucial preliminary points nonetheless bear mention here.

First and foremost, this array of principles should reduce anxiety over the possibility of concurrence-induced conflict. Simply put, there is an array of well-recognized methods for dealing with conflicts.

Second, it is implicit in the multiplicity of conflict-resolution principles that the possibility of conflict does not invariably lead to the deployment of any particular conflict-resolution rule. Rather, some choice must be made among them.

Past practice and logic point to many illuminating observations in relation to the choice among conflict-resolution principles. The first two principles—categorical institution-based and presumptive institution-based conflicts rules—are applicable where there is a hierarchical relationship between the institutions with overlapping powers.<sup>465</sup> The fact that hierarchical supremacy does not invariably result in categorical supremacy is likely to be surprising to many, but the fact-finding powers exercised by Article III judges in jury trials proves the point; though the Seventh Amendment long has been understood as allocating fact-finding power to juries, and though the judge cannot act as a “thirteenth juror” and substitute her judgment for that of the jury, the judge can disregard the jury’s findings, make credibility assessments, and engage in other fact-finding in the process, in certain circumstances.<sup>466</sup>

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which resolved conflicts among states’ overlapping adjudicatory jurisdiction in child custody cases). A similar process of negotiation is present when bills from the House and Senate must be reconciled insofar as neither legislative body has the authority to trump the other’s inconsistent provisions.

465. Sometimes the hierarchical relationship is patently obvious, as in the cases of the Supremacy Clause and the supremacy of statute to judge-made federal common law. Other times the hierarchical relationship is less obvious. See Rosen, *supra* note 445, at 1732–39 (arguing that a definitive argument has not yet been made as to why Congress categorically trumps the President in relation to the latter’s Commander-in-Chief powers).

466. See *supra* Part II.B.1; see also Rosen, *supra* note 445, at 1718–19 (describing the dynamic between judge and jury created by FED. R. CIV. P. 50(b)).



The last four conflict-resolution principles are available when there is no obvious hierarchy among the institutions with overlapping powers. Though courts to date have not explicitly discussed on what basis they have decided among the four, institution-specific and context-specific considerations appear to have guided their choices. For example, institutional interests in preserving judicial resources and ensuring the finality of judgments have given rise to *res judicata* and collateral estoppel's first-in-time principles.<sup>467</sup> Likewise, the one exception to *res judicata*'s first-in-time principle—the so-called last-in-time rule in the case of multiple inconsistent final judgments—also was selected by the Supreme Court for institution-specific reasons: the second inconsistent judgment came about because the parties to the second lawsuit neglected to press their *res judicata* arguments, and the last-in-time rule refuses to reward such neglect or abuse.<sup>468</sup>

Multifactor conflict-resolution principles are utilized where institutions have equivalent hierarchical rank and a timing rule either would not work or would exclude too many normatively relevant considerations. As the number of relevant considerations grows, however, multifactor conflict-resolution principles risk becoming *ad hoc* and unpredictable.

The last conflict-resolution principle—a no-sorting principle that eschews any method for resolving conflict—holds surprising promise. Though it could conceivably lead to chaos, it may instead lead to formal or informal negotiations among the institutions, particularly if they are repeat players who have a common interest in jointly solving a problem or presenting a united front.<sup>469</sup> Indeed, a no-sorting principle may be desirable for any number of reasons: to encourage interinstitutional competition, to spur coordination or compromise, or when there appears to be no viable alternative conflict-resolution approach.<sup>470</sup>

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467. See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–28 (1979).

468. See *Morris v. Jones*, 329 U.S. 545, 552 (1947); Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 811 (1969).

469. For discussion of a similar concept in a parallel context, see Robert A. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 5, 23–29 (2007) (speaking of the role of “persuasion” rather than coercion in “intersystemic governance”).

470. See *id.* at 18–26.

Interestingly, Alexander Hamilton proposed a no-sorting principle in the course of the Pacificus-Helvidius debates.<sup>471</sup> Hamilton's solution to the problem of possible conflicts appears when he discusses a hypothetical that pitted the President's recognition power against Congress's power to declare wars. Hamilton asks the reader to consider a circumstance where the United States had both a defensive and offensive treaty of alliance with France. If there were a revolution in France after the treaty were in place, the President would have to decide whether the "new rulers are competent organs of the National Will and ought to (be) recognized or not" pursuant to the President's powers to "receive ambassadors"<sup>472</sup> even though the act of recognition would "have laid the Legislature under an obligation . . . of exercising its power of declaring war" against the old government under the terms of the treaty of alliance.<sup>473</sup> From this, Hamilton reasons that the President has the right, "in certain cases, to determine the condition of the Nation, though it may consequentially affect the proper or improper exercise of the Power of the Legislature to declare war."<sup>474</sup> Hamilton advances a no-sorting principle when he states that, notwithstanding the President's recognition of the new government, the President:

[C]annot control the exercise of [Congress's] power [to declare war] . . . The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions.<sup>475</sup>

In short, for Hamilton there is no formal mechanism for sorting out this potential interinstitutional conflict. Though one institution's actions (the President's) "*ought to weigh*"<sup>476</sup> in the decisions of the other, each institution ultimately is free to act according to its own best judgment.

## VI. THE BIG PICTURE: METANARRATIVES AND CONSTITUTIONAL IMPLICATIONS

### A. METANARRATIVES

Is there a larger narrative or set of narratives that ex-

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471. See *supra* Part I.D.

472. U.S. CONST. art. II, § 3; HAMILTON, *supra* note 104, at 14–15.

473. HAMILTON, *supra* note 104, at 15.

474. *Id.*

475. *Id.*

476. *Id.* (emphasis added).

plains the shift from exclusivity to concurrence across so many different doctrinal contexts? Four mutually compatible possibilities suggest themselves.

First, perhaps this Article has merely documented examples of the political analogy of the natural process of entropy; power allocated to one place does not remain there for long. This may have some explanatory power, but clearly more than entropy must be at work because the move from exclusivity to concurrence has not occurred everywhere.

A second hypothesis—more powerful than the first—is that this Article has documented instances where the “law-on-the-books” has caught up with the “law-in-action.”<sup>477</sup> On this view, concurrence is not new, but just newly recognized by formal law.

This perspective has some force. For example, though there have been non-Article III federal courts since the early days of the Republic, the Court long and vociferously denied that they exercised federal judicial power.<sup>478</sup> The Court’s ultimate acknowledgment in the latter twentieth century that Article I courts and Article III courts have significant swaths of concurrent power was a formal recognition of what had been rather than a judicial creation of a new system of overlapping powers.<sup>479</sup> A corollary of the second hypothesis is that we likely have not yet reached the end of history, meaning that the “law-on-the-books” has not caught up with the “law-in-action” everywhere. For instance, a majority of the Supreme Court still insists that administrative agencies do not exercise legislative power, though several Justices and the bulk of the scholarly community disagree.<sup>480</sup>

A weakness of the second hypothesis is that it ignores, and thereby threatens to obscure, the fact that in some contexts there have been changes that have led to increasing concurrence. Consider the overlapping fact-finding power of judge and jury. Consistent with the second hypothesis, it is true that judges always have exercised important fact-finding powers through such devices as evidentiary rules, burdens of proof,

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477. For a brief discussion, see Richard H. McAdams, *Beyond the Prisoner’s Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 255 n.194 (2009).

478. See, e.g., *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828).

479. See *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

480. See *supra* Part II.D.

and presumptions (nineteenth century averments of exclusivity notwithstanding). Yet caselaw (such as the *Munson* decision) and modern procedural innovations (like summary judgment and judgment as a matter of law) have given judges even more fact-finding powers, significantly augmenting judges' and juries' overlapping powers.<sup>481</sup>

A third possible metanarrative is that the trajectory from exclusivity to concurrence reflects an adaptation to changing times and needs. There is great power in this narrative. Sometimes the Court has said as much,<sup>482</sup> and many of the reasons for concurrence documented in Part III<sup>483</sup> boil down to this metanarrative. The only respect in which this narrative does not fit the data is vis-à-vis those instances where concurrence has been with us from our nation's start—such as President Washington's Neutrality Proclamation and Chief Justice Marshall's early acceptance of territorial courts.

A final metanarrative is that the move from exclusivity to concurrence reflects a power-grab. The shift to concurrence has systematically extended one institution's powers at the expense of other institutions; concurrence has made it easier for federal institutions to act, thereby extending federal power at the expense of states and the private sector. For instance, whereas federal statutes, which have the power to displace state law, can be created only via the cumbersome process of bicameralism and presentment, agency rules, which also displace state law, are generated by a far more streamlined process. As a result, the federal government displaces far more state law than would an agency-free federal government. Likewise, more international obligations can be made in today's world of interchangeable treaties and congressional-executive agreements than in a treaty-only world where international obligations were created only when a supermajority of senators concurred.

This final metanarrative does not explain all contexts where there has been a shift from exclusivity to concurrence; for example, it does not fit states' exercise of extraterritorial regulatory powers.<sup>484</sup> Further, it is contestable as to whether the narrative is applicable in respect of concurrence created by delegations. For example, is Congress's delegation of rulemak-

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481. See *supra* Part II.B.1.

482. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (discussing the nondelegation doctrine).

483. See *supra* Part III.B.

484. See *supra* Part II.F.

ing authority properly characterized as a power-grab? It all depends on what institution is said to be doing the grabbing: the answer must be “no” from the perspective of Congress, but conceivably could be “yes” from the vantage point of federal governmental powers insofar as agencies can create more federal law than Congress on its own could. Finally, even assuming the power-grab narrative to be applicable to large swaths of contemporary concurrence, it is unclear what if any normative or doctrinal significance power-grab has because it is a virtual tautology of concurrence for two reasons. First, concurrence facilitates government action, and in this sense is amenable to being described as a governmental power-grab; after all, concurrence frequently arises because the governmental entity that plausibly could be said to hold an exclusive power has not acted sufficiently. Second, because action by one governmental institution almost always comes at the expense of some other societal institution, concurrence’s facilitation of governmental action necessarily constitutes a shift of decision-making authority to the institution now exercising concurrent power, and in that sense always can be described as a power-grab.<sup>485</sup>

#### B. CONSTITUTIONAL IMPLICATIONS

Since reams have been written on the constitutionality of virtually every instance of concurrence examined herein, this Article cannot hope to definitively address any particular example. By bringing together so many examples of concurrence from diverse doctrines, though, this Article highlights considerations that are relevant to the constitutional analysis of each instance of concurrence.

First, although it is not the case that the constitutional fortunes of all instances of concurrence are intertwined such that they all either stand or fall together, in analyzing any particular instance of concurrence it is relevant to recognize that concurrence is not an unusual structural feature of United States constitutional law. Concurrence’s omnipresence should undermine the knee-jerk exclusivist opposition that frequently greets new proposals of concurrence. For example, the argument that courts should not devise common law solutions to asbestos or firearms problems because such issues fall within the legislature’s powers suffers from an unexamined exclusivist assump-

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485. For example, federal action displaces states and the private sector, and state action displaces the private sector and (possibly) other states.

tion that *only* one institution has the constitutional power to address the problems. Concurrence's widespread use puts a burden on those who make such exclusivity assumptions;<sup>486</sup> opponents of common law solutions must supply arguments as to why concurrence is undesirable in this context.

Second, it is not the case that originalism is flatly hostile to concurrence. Alexander Hamilton endorsed concurrence in the Pacificus-Helvidius debates,<sup>487</sup> and President Washington acted consistently with Hamilton's position when he issued the Neutrality Proclamation.<sup>488</sup> And there are other instances of concurrence that date back to our country's early days. For example, Congress delegated lawmaking authority to the President beginning in the 1790s, and there have been non-Article III federal courts in the form of territorial courts from very early on as well.<sup>489</sup> On the other hand, at least one instance of contemporary concurrence is patently contrary to the Founders' understandings: the Framers thought that certain international obligations could *only* be created by treaty, and certainly would have rejected the contemporary consensus that treaties and congressional-executive agreements are interchangeable.<sup>490</sup> In short, originalism is not invariably inconsistent with concurrence, though particular instances of concurrence may be in tension with originalist understandings.

Third, textualism is not invariably hostile to concurrence for two reasons. First, plausible arguments typically can be made that two institutions have overlapping powers on account of the different constitutional provisions that empower them; in other words, textualism is perfectly compatible with inherency-generated same-effect concurrence. For example, given the long Anglo-American tradition of judicial common law powers, it seems perfectly plausible to suggest that federal courts' Article III-granted judicial power creates a presumptive federal common law power that overlaps with Congress's legislative powers.<sup>491</sup> Second, because the Constitution almost never specifies

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486. For a fascinating example of a court devising a common law solution to the problem of mass torts, see *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 699–711 (E.D.N.Y. 1984).

487. See *supra* notes 104–07 and accompanying text.

488. See *supra* notes 102–03 and accompanying text.

489. See *supra* Part II.C–D.

490. Ackerman & Golove, *supra* note 34, at 808–13.

491. For such an argument, see Field, *supra* note 363, at 923–24. Field notes that the Supreme Court has left open the possibility that federal courts can adopt federal common law as broadly as Congress's legislative authority.

that a granted power may not be delegated, textualism is not inconsistent with delegation-generated concurrence.<sup>492</sup>

In fact, textualism is in tension with concurrence only if it is bundled with a very strong principle of *expressio unius est exclusio alterius*.<sup>493</sup> But, as this Article demonstrates, constitutional law quite frequently refuses to invoke the canon of *expressio unius* (consider, for instance, Chief Justice Marshall's opinion in the 1828 *Canter* decision upholding territorial courts).<sup>494</sup> And this is not patently mistaken, for textualism on its own does not entail *expressio unius*. That canon is an interpretive presumption rather than an ironclad logical inference because a text's express articulation plausibly can mean that the text takes a firm position *only* with respect to what is expressly articulated and *no* position with regard to unspecified matters. The First Congress, for example, took this approach to Article III's grant of original jurisdiction to the Supreme Court over "all Cases affecting Ambassadors,"<sup>495</sup> for the 1789 Judiciary Act provided that federal district courts *also* had original jurisdiction over certain cases affecting ambassadors.<sup>496</sup> This statutory provision was found to be constitutional by the Supreme Court in the *Ames* decision.<sup>497</sup>

Fourth, for those who belong to any of the "living constitutionalism" schools of constitutional interpretation, it is illuminating to observe the broad array of pragmatic considerations that has given rise to concurrence in past. Noteworthy as well is that the shift from exclusivity to concurrence generally occurs at the initiative of extrajudicial institutions.

At the end of the day, there are two types of concurrence that present difficult constitutional challenges. The first is constitutional workarounds. Consider, for instance, the non-Article III Court of Claims that was created to get around Article III's finality requirement.<sup>498</sup> Is this a brilliant workaround, or an

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*See id.* The Rules of Decision Act is appropriately understood as a statutory limitation on federal courts' common law powers. *See* Redish, *supra* note 362, at 795.

492. *See supra* notes 74–84 and accompanying text (discussing arguments of Professors Merrill and Sunstein to this effect).

493. *See* BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

494. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828).

495. U.S. CONST. art. III, § 2.

496. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

497. *Ames v. Kansas*, 111 U.S. 449, 469 (1884).

498. *See supra* Part III.B.4.

unconstitutional end-run around Article III's finality requirement?

The second constitutional challenge is present when concurrence allows the federal government to act in a circumstance where, without concurrence, the federal government would not, as a practical matter, have been able to act. The constitutional question is whether concurrence violates the principle of enumerated powers insofar as federal obligations triggering the Supremacy Clause are created outside of constitutionally created mechanisms; it plausibly could be said that such mechanisms are deliberately cumbersome so as to constrain the quantity of federal law, thereby leaving more room for state regulation and private ordering.<sup>499</sup> Consider in this regard rulemaking by federal agencies, which has enabled far more federal lawmaking than could have occurred if Congress alone acted. Another example is congressional-executive agreements (such as NAFTA) that create international obligations where less than two-thirds of the Senate would have voted for a treaty. Indeed, many of the examples of concurrence explored in this Article plausibly could be said to implicate this enumerated powers-based concern.<sup>500</sup>

The workaround and enumerated-powers challenges both respond to a similar phenomenon: concurrence's facilitating governmental action in a circumstance where exclusivity would have resulted in governmental inaction. In the end, though, these two objections reduce to a single question: does the principle of *expressio unius* preclude concurrence? For example, without regard to Article III, Congress undoubtedly could establish, under any number of its Article I, Section 8 powers, courts of claims to adjudicate contract claims on behalf of and against the federal government. Similarly, without regard to the Treaty Power, NAFTA plausibly could be said to have fallen under Congress's power to regulate foreign commerce. The question accordingly becomes whether Article III gives rise to the negative inference that the *only* types of federal adjudicatory bodies that can be created are those that comply with Article

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499. *Cf. supra* Part I.C.2.c (noting that prodigious federal rulemaking is evidence of a breach of enumerated powers as it is otherwise impossible for Congress alone to be similarly prolific if its powers were confined to Article I procedure).

500. Perhaps the only exceptions would be the Seventh Amendment's allocation of fact-finding authority and states' extraterritorial regulatory powers.



III's requirements—and this is another way of stating the principle of *expressio unius est exclusio alterius*.

These are hard constitutional challenges. They are not sufficiently strong to sustain a transsubstantive anticoncurrence principle, however, for two principal reasons.<sup>501</sup>

First, particularly as regards the workaround challenge, the burden rests with those who would aim to establish a transsubstantive exclusivity principle on account of the fact that concurrence is a “long-continued practice, known to and acquiesced in by” all three branches of the federal government.<sup>502</sup> For purposes of determining whether there exists a transsubstantive constitutional principle of exclusivity, it is relevant to look not at any single instance of concurrence, but instead at the wide range of concurrence that this Article documents. The sheer quantity of concurrence across multiple contexts and across time defeats the proposition that there exists a transsubstantive anticoncurrence principle. The longstanding and widespread practice of concurrence has acted as a “gloss” on the Constitution,<sup>503</sup> definitively establishing that there is no transsubstantive constitutional principle of *expressio unius* that categorically disallows concurrence.

To be clear, this does not mean that all instances of concurrence are (or would be) constitutional.<sup>504</sup> It does mean, however, that the constitutionality of any given instance of concurrence must be determined on the basis of context-specific analysis, not a transsubstantive anticoncurrence principle.

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501. To be clear, I do not mean to suggest that concurrence is never impermissible. This Article is not the place to identify the criteria that distinguish between permissible and impermissible instances of concurrence. For an illuminating preliminary consideration as to how to distinguish between permissible and impermissible workarounds, see Tushnet, *supra* note 416, at 1505–08. For purposes of this Article it suffices to establish that concurrence is not per se impermissible.

502. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). One conceivably might ask why acquiescence by the *federal* government can justify a practice that comes at the expense of state governments (as when concurrence facilitates actions by the federal government that have the power of displacing state law). The best, though perhaps not entirely adequate, answer is that the federal government is structured to take account of states' interests. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552–59 (1985) (discussing the political safeguards of federalism). The extent to which this suffices certainly merits additional consideration.

503. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

504. See *supra* note 501.

Second, the force of the two hard constitutional challenges is largely blunted by the hoary case of *McCulloch v. Maryland*.<sup>505</sup> In upholding Congress's power to charter a national bank under the Necessary and Proper Clause, the Court rejected a strong principle of *expressio unius est exclusio alterius* in favor of a "useful" interpretation that gave Congress the power to adopt "any means which tended directly to the execution of the constitutional powers of the government."<sup>506</sup> In the course of its opinion, the *McCulloch* Court asked, "whence arises the power to punish in cases not prescribed by the constitution" due to the fact that the power to punish "is expressly given [by the Constitution] in some cases."<sup>507</sup> *Expressio unius est exclusio alterius* is what fuels this interpretive question, and Chief Justice Marshall's opinion for the Court rejected the canon, reasoning that Congress's powers to establish post offices included the power to "punish those who steal letters from the post office, or rob the mail" despite the Constitution's silence vis-à-vis such punishments.<sup>508</sup> In so doing, the *McCulloch* opinion could be accused of treating as "mere surplusage"<sup>509</sup> the constitutional text specifying Congress's powers to punish counterfeiters insofar as that power could have been inferred from Congress's power to "coin Money."<sup>510</sup> *McCulloch*'s holding likewise put pressure on the concept of enumerated powers. What led to a "useful" outcome and workable government overrode these considerations.

The pragmatic considerations relied on by the Court in *McCulloch* are directly relevant to concurrence. The Court rejected a narrow construction grounded in *expressio unius est exclusio alterius* because the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."<sup>511</sup> *McCulloch* refused to interpret the Constitution as having "prescribed the means by which government should, in all future time, execute its powers" and

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505. 17 U.S. (4 Wheat.) 316 (1819).

506. *Id.* at 419.

507. *Id.* at 416. Because the Constitution gives Congress the power "to provide for the punishment of counterfeiting the securities and current coin of the United States," *McCulloch* recognized that it could be concluded that "no punishment should be inflicted in cases where the right to punish is not expressly given." *Id.* at 416–17.

508. *Id.* at 417.

509. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

510. U.S. CONST. art. I, § 8, cl. 5.

511. *See McCulloch*, 17 U.S. (4 Wheat.) at 415.

instead selected the construction that granted “the legislature . . . the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”<sup>512</sup> In this regard, the widespread and longstanding examples of concurrence explored in this Article reflect experience’s lesson that concurrence is, at the very least, “convenient, or useful”<sup>513</sup> for the execution of governmental powers. Indeed—even more than this—concurrence may be a necessary mechanism for ensuring that government functions well in some contexts.

To conclude, nothing in the Constitution expressly bars concurrence. Concurrence is no more inconsistent with *expressio unius est exclusio alterius* and the concept of enumerated powers than was *M’Culloch*’s construction of the Necessary and Proper Clause. If anything, concurrence implicates enumerated powers to a lesser degree than *M’Culloch*, for when a secondary federal actor (for example, an administrative agency) undertakes actions that unquestionably fall within the power of a primary federal actor (such as Congress) there can be no concern that the federal action has displaced authority that the Constitution intended to leave to states or to the private sector. Concurrence may be improper in particular contexts,<sup>514</sup> but it cannot be declared unconstitutional across the board.

### CONCLUSION

Concurrence—the circumstance where multiple institutions have the power to undertake act *X* despite the fact that constitutional text plausibly could be said to have allocated that power to a single institution—is a common, yet frequently overlooked, feature of American constitutional law. Concurrence has been present from our nation’s earliest days. For example, President Washington’s Neutrality Proclamation reflected an understanding that both he and Congress had power to interpret a treaty that could have obligated the United States to go to war. And, too, the First Congress enacted several statutes that gave the President rulemaking authority. Nevertheless, the Supreme Court almost always has initially resisted claims of concurrence, insisting instead on exclusivist interpretations of the Constitution’s power-grants. For this reason, concurrence typically has been initiated by nonjudicial in-

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512. *Id.* at 415–16.

513. *Cf. id.* at 413 (defining what constitutes “necessary” in the Necessary and Proper Clause).

514. *See supra* note 501.

stitutions, and has been judicially acknowledged only after becoming deeply entrenched.

Concurrence carries an array of pragmatic benefits. Concurrence frequently is turned to when the most obviously tasked institution has failed to act. Concurrence oftentimes is a mechanism for engaging competencies enjoyed by a second institution that are not present in the primarily tasked institution, holding out the promise of superior governmental decision making and action taking. Concurrence has been justified on the ground that it was necessary to address problems unforeseen by the Founders, to deal with emergencies, and to augment efficiency.

The risk of generating conflicts is perhaps the main anxiety occasioned by concurrence, but there are multiple tools present in United States law that address conflicts among institutions with overlapping powers. Accordingly, the risk of conflicts constitutes a cost of concurrence to be weighed against its potential benefits, but is not a reason for flatly rejecting concurrence.

Although widespread, concurrence is not found everywhere; many of the Constitution's provisions always have been understood to allocate power exclusively, not concurrently. There is no general, transsubstantive principle that explains when constitutional power will be deemed to be exclusively or concurrently granted. No transsubstantive principle requires concurrence, nor do any transsubstantive principles (such as *expressio unius est exclusio alterius* or enumerated powers) render it *a priori* unconstitutional. Instead, the choice between exclusivity and concurrence has been made on a context-by-context basis. There are good reasons to think this context-specific analysis to be desirable, though the choice in any given context can be aided by considering concurrence's costs and benefits in other contexts.