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Preempting the People: The Judicial Role in Regulatory Concurrency and Its Implications for Popular Lawmaking

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INTRODUCTION

Larry Kramer and other legal scholars (many of them participants in this Symposium) are collectively responsible for the present flourishing of a mode of constitutional inquiry and analysis that is often called "popular constitutionalism." In its standard forms, the study of popular constitutionalism attempts to measure and describe—and sometimes to normatively promote—the role of the American people in framing the answers to basic interpretive questions about the Constitution's meaning. Although the discourse in the field is often at a general level, looming in the background is usually a consideration of the people's role in resolving specific constitutional questions, such as the appropriate federal-state balance, the vague "equal protection" mandate of the Fourteenth Amendment, or the scope of the right to bear arms under the Second Amendment.[1]

This essay explores a somewhat different conception of "the People's" constitution, and one that is only indirectly connected to the specific resolution of concrete interpretive questions. My concern here is structural, focusing on particular features of lawmaking under the current federal regime

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1. *See, e.g.*, Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 86 CHI.-KENT L. REV. 883, 883–84 (2006) ("The role of the militia as an agent of popular constitutionalism . . . has been largely ignored in recent legal scholarship . . . . [and this] can be blamed in part on the ideological distortions wrought by modern Second Amendment scholarship which has obscured this important theme in early American constitutional discourse."); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1039 (2004) (asserting that because, within the concept of popular constitutionalism, "nonjudicial actors retain the option of acting in defiance of law" when constitutional values are at stake, the proper balance between the Constitution and popular constitutionalism must be maintained); Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 829 (2004) (arguing that welfare rights "must be actualized through legislative action (through a 'constitutionalized politics') and not through adjudication (through a 'constitutionalized law')"); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 86 CHI.-KENT L. REV. 1127, 1129 (2006) (in arguing for constitutionally based welfare rights, exploring "the tension between . . . the state's Constitutional obligations to the poor, and . . . that no American court will discover and then impose such Constitutional obligations upon recalcitrant state or federal legislators").

of the United States that facilitate the public's robust involvement in important lawmaking choices. A central topographical feature of the nation's regulatory landscape is the fact of concurrent federal and state jurisdiction: most fields of economic and social life are regulated by both federal and state laws. Although occasionally untidy and conflictual, this basic concurrency facilitates popular lawmaking by providing multiple outlets for public preferences on important policy issues. The multiplicity of regulation also generates discourse, and in turn more public involvement, as the rules of various states and the federal government complement and conflict with each other.[2]

This emphasis on concurrent jurisdiction—and its implications for popular sovereignty—runs counter to the prevailing emphasis among scholars of constitutional federalism over the past decade. In considering "federalism" questions in the past decade, legal scholars have devoted most attention to debates that are unquestionably important, but that are fought out at the margins of the regulatory arena—over those rare activities and areas of jurisdiction that, in the Supreme Court's phrasing, are "truly national" or "truly local."[3] A central feature of the Supreme Court's "new federalism" of the past decade has been a renewed inquiry into a narrow range of behaviors that are arguably under the exclusive jurisdiction of the federal government or the states. In advancing this project, the Court announced its own central role in policing the boundaries and outer limits of the federal structure, and so touched off ample debate, not just about the substantive divisions of American federalism, but also the appropriate judicial role in enforcing these lines. Much of the academic debate on the Court's authority implicates this boundary dispute, including the line of scholarship that examines (and these days, often critiques) the Court's relative supremacy over the other branches of government.[4]

For all the controversy about the outer limits of Congress's power, however, the fact remains that Congress is free to regulate most spheres of interaction among Americans, as are the state governments. The vast expansion of the federal commerce power—which remains largely in place even after *United States v. Morrison* and *United States v. Lopez*[5]—has

2. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (discussing popular opportunities for participation in lawmaking).

3. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995).

4. It appears that the Court itself has paid heed to the chorus of criticism of its new federalism jurisprudence, or has at least acted as if it has, by ruling in favor of national authority in several more recent cases. *See, e.g.*, Gonzales v. Raich, 125 S. Ct. 2195, 2201 (2005) (upholding federal drug prohibition against Commerce Clause challenge); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding Family and Medical Leave Act against Eleventh Amendment challenge).

5. *See* United States v. Morrison, 529 U.S. 598, 627 (2000); *Lopez*, 514 U.S. at 567–68.

taken place without automatic displacement of the states' traditional police powers. The result is a vast sphere of concurrent regulatory authority that dwarfs the minor zones of "truly national" or "truly local" power that exist even after the Rehnquist Court's slight expansion of the latter category.

This fact of coexisting and overlapping jurisdiction produces a broad and multifaceted space for the public's involvement in the lawmaking process, at least when compared to a more unitary national regime. And the public's lawmaking arena is not simply divided in binary fashion, since both the national and state governments contain a variety of fora in which legal change can occur: legislatures, administrative bodies, local subdivisions, judicial rulings, and jury verdicts. The viability of multiple outlets for lawmaking at multiple levels of government permits more of the people, and different parts of the people, to have some voice in lawmaking choices. Because the mix of political interests, alignments, and opportunities will typically vary in different lawmaking fora, the variety of outlets for lawmaking will occasionally permit coalitions and groups that are losers in the national setting to see their voices translated into positive law at the state level, or vice versa. As I describe below, it may be that in particular regulatory areas this multiplicity and variety produces undesirable costs and conflicts. But all else being (relatively) equal in terms of optimal policy choices, the federal structure with ample space for concurrent lawmaking generates an independent benefit related to the public's greater involvement in lawmaking.

This regulatory concurrency is a crucial part of the people's constitution as it has come to develop, and it facilitates more and better public involvement in important lawmaking areas. Against this backdrop, a judicial decision to make national power the exclusive font of authority in particular areas has important implications. A decision to completely preempt state law strips states of important features of their lawmaking sovereignty and, with it, strips the public of one key set of outlets for its lawmaking zeal. To be sure, the constitutional structure assumes that national rules occasionally can and will trump state law, and I do not argue here that Congress lacks the power to preempt across a wide swath of state regulatory subjects if it so chooses and sufficiently expresses intent to do so.[6] But

6. Relatedly, I do not contest the power of federal courts to preempt state laws where a clear and irresolvable conflict exists with an act of Congress. Nor am I making a substantive judgment across disparate fields of regulatory policy that diversity and decentralization are always better than a uniform national rule, or evincing a particular concern for a form of state "sovereignty" that is distinct from the citizens residing therein. Like many other participants in this symposium, I am ultimately concerned with judicial power over the Constitution, and, in particular, the relationship of judicial authority to this architecture of concurrent jurisdiction, which is my topic here.

the power to preempt "the People" in the state lawmaking arena is most properly made by "the People" constituted nationally in Congress. Constriction of state lawmaking space is particularly problematic when effectuated by unelected federal judges in matters where state and federal law do not expressly and obviously conflict.

Much of my concern here touches on the role of the federal judiciary in promoting or corroding the dual lawmaking space of American federalism, and, with it, the attendant normative virtues in terms of popular lawmaking. Here, as in other areas of the people's constitution, the Court has occupied a central role in defining the basic structure. But it has not been a simple story of judicial aggrandizement of power over the course of two centuries at the expense of the people's authority. Just as the substantive role of the people and the political branches have waxed and (more recently) waned relative to courts in the resolution of first-order debates over constitutional interpretation, so too have the contours of the public's structural lawmaking space expanded and contracted over time.[7] And just as with direct constitutional interpretation, the Supreme Court and other federal courts are key institutional actors in this story. Following a series of rulings in the late nineteenth and early twentieth century that were either inconsistent or outright hostile to concurrent federal and state regulation, the Supreme Court embraced a set of interpretive norms that encouraged the dual structure of lawmaking and facilitated the public's involvement at multiple levels of constitutional structure. At the same time that the Court was dramatically expanding both the scope and relative supremacy of its power within the field of constitutional law, it was expressly leaving space for greater popular involvement in important "ordinary" lawmaking in both the federal and state arenas.

The Supreme Court and other federal courts today remain at the center of debates between multiplicity and concurrent authority, and uniformity and claims of preemption. The rules and presumptions that the Court has applied in mediating these disputes have varied over the past century are in some flux today, and have important implications vis-à-vis popular lawmaking. Done right, the Court is sensitive to the popular lawmaking values inhering in a regime of concurrent jurisdiction, and adopts a restrained attitude toward preemption questions that requires express statements by Congress to preempt general state laws on the same subject. Done wrong, the Court imposes its own conception of legislative intent—often including an assertive preference for regulatory uniformity—to trump the operation

7. *See infra* Part I.

of ordinary politics at the state and federal levels. In the past decade, the Court has in several cases displayed a newfound skepticism toward the dual tiers of lawmaking and evinced a seeming preference for uniform national solutions.[8] This trend, if advanced and continued, would significantly shrink the public's lawmaking space, and it would substantially rework basic aspects of the New Deal compromise where the Supreme Court permitted ample space for ordinary lawmaking.

This essay proceeds in several parts. Part I describes some basic features of the constitutional and ordinary lawmaking dynamics in the current political structure, with emphasis on the fact that as the Supreme Court has become more supreme with respect to constitutional law it has—since the New Deal—generally left ample space for the public and political branches to generate ordinary law across a range of subjects. Part II is a more detailed discussion of the historical development of the concurrency principle as a matter of judicial doctrine and constitutional structure. Part III describes some of the normative virtues of the current dual regulatory framework in terms of the public's active involvement in the lawmaking process. I conclude with a cautionary note, discussing some recent decisions by the Supreme Court and other federal courts that suggest a judicial move away from the long prevailing embrace of concurrency in ordinary lawmaking, which potentially jeopardizes aspects of the public space described above.

I. THE SUPREME COURT, THE JUDICIALIZED CONSTITUTION, AND SPACE FOR ORDINARY LAWMAKING

Before returning to a more focused discussion of the concurrent aspect of ordinary lawmaking in the United States, a broader discussion of the related development of judicial power in constitutional law and ordinary law is warranted. This bifurcated legal structure turns on very different understandings of the authority of the people and the judiciary in constitutional law and "ordinary" law.[9] Much of the flourishing of what is generally called "popular constitutionalism" in legal academic discourse in the past decade is in response to two related features of increasing judicial power in the United States. Whether this robust judicial authority represents a gradual accretion of power or a stark newfound assertiveness of the

8. *See infra* Conclusion.

9. Note that some of what is doctrinally called "ordinary" or nonconstitutional law might be called constitutionalism by scholars such as Mark Tushnet and Reva Siegel. *See e.g.*, Mark Tushnet, *Popular Constitutionalism as Political Law*, 86 CHI.-KENT L. REV. 991, 993–94 (discussing the constitutional law aspects of a proposed statute banning the use of torture to extract information about threats to national security). For my purposes here it suffices that much of what goes on in the "ordinary" lawmaking space is felt to be extremely important by the members of the public and officials involved.

Supreme Court in the past few decades is a matter of some debate, but virtually all commentators agree that the courts—particularly the federal courts—exert significantly more authority over constitutional questions than they did at the time of the Framing. Part of this increase in authority resounds in judicial "supremacy": the idea that courts are the final and most authoritative interpreter of constitutional meaning. Once a subject is "constitutionalized" by the courts, the courts assert interpretive primacy, and the other branches and the public generally acquiesce in that claim.[10] Coupled with this increased supremacy is a dramatic expansion of the scope of the judicialized constitution in terms of the subjects, activities, and entities that it covers. Not only are courts more supreme relative to other branches than they originally were, but the federal courts in the past half century have come to treat a variety of spheres of human endeavor as federal constitutional questions that for most of United States history would have been regarded as outside that ambit.

Both of these features of increased judicial power—supremacy and scope—are often discussed and rarely doubted as a basic descriptive matter. To be sure, one can find pockets of "departmentalism" rhetoric in the current constitutional discourse, particularly involving amorphous claims of Executive authority to interpret the Constitution in time of crisis.[11] Other scholars rightly describe issues where the public itself is deeply involved in the framing of constitutional meaning, sometimes much more assiduously than the federal courts.[12] But these are exceptions to the general norm of a polity where the judicialized constitution sweeps broadly and deeply into civic life, and where the courts possess interpretive supremacy as to the subjects within that sphere of reference. By any account, courts have gotten more powerful in the past two centuries—more supreme in interpreting the judicialized constitution, and also more voracious in terms of the range of aspects of human life that have been constitutionalized in the courts.[13]

If we accept that this state of affairs represents a dramatic increase in federal judicial power over that provided by original understandings and

10. Examples of this phenomenon are myriad in recent decades, but one prominent exemplar is the opinion of the Supreme Court in *City of Boerne v. Flores*, which overruled Congress's effort to interpret the Free Exercise clause in a manner different from the Court. 521 U.S. 507, 535–36 (1997).

11. For a prominent recent example, see Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep't of Justice, to Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005) (Dec. 22, 2005), *available at* http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf (describing President's power to interpret the Constitution and conduct warrantless surveillance).

12. *See, e.g.*, Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300–13 (2001) (describing the role of the women's rights movement in the development of modern sex discrimination jurisprudence).

13. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

practices—and it is hard not to come to that conclusion—it bears asking why the public and the elected branches of government have been generally willing to permit this marked accretion of judicial power. Part of the answer is a dreary one, grounded in the gradual disconnection of citizens from their government generally, and in the collectivization and bureaucratization of political parties and civic institutions. To paraphrase Larry Kramer, this is a story about "politics mov[ing] indoors," at significant cost to the breadth and richness of public discourse about constitutional subjects.[14]

Another answer, not incompatible with the first but grounded in a very different dynamic, however, is that the people largely ceded constitutional discourse to the courts because of the rising interest in, and importance of, ordinary subconstitutional law. If the story of the past two centuries is one of increased judicial authority over the Constitution, it is also a story of vast increase, particularly since the New Deal, in the scope and importance of "ordinary" positive law in people's lives. A host of crucial subjects—from health care to retirement security to employment relationships to consumer transactions—are now regulated not primarily by private ordering but by positive law and regulation, in ways that would have been inconceivable even a century ago. This ordinary law is not only pervasive, but also important. Polls suggest that these areas of law are more salient to members of the public than textbook constitutional law questions. For instance, in several recent opinion polls many more American considered issues including "unemployment/jobs," the "economy," war with Iraq, poverty and homelessness, and health care as the most pressing issues facing the nation than did the fewer than the 2.5% who considered judges, laws, and courts as most important.[15] All of this suggests a different explanation for the public's seeming concession of constitutional supremacy to the courts: the public's interest has moved on to other topics of more immediate concern, like health care, employment rights, social security, and physical safety.

This shift in emphasis has important implications for popular lawmaking. Because the Constitution's expansion has largely coexisted with the expansion of ordinary law, ample public outlets for lawmaking remain despite the courts' appropriation of most of constitutional interpretation. The modes of lawmaking, and the public's role therein, differ dramatically

14. Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 104 (2001).

15. *See* Gallup Poll Social Series: Mood of the Nation, Question 5 (field date Jan. 3–5, 2005) (on file with author); Gallup Poll Social Series: Governance, Question 5 (field date Sept. 12–15, 2005) (on file with author).

between these two basic spheres of law. Moreover, the coexistence of these two alternative spheres represents a kind of implicit (and occasionally express) structural compromise among courts and other branches of government and the public at large.

But courts have a special primacy among actors in this bifurcated regime, operating not merely within the confines of constitutional law but also playing two leading roles relative to "ordinary" or subconstitutional law. First, the Supreme Court and other federal courts police the crucial line of demarcation between constitutional law and ordinary law. Because the Constitution trumps ordinary law, and because courts possess interpretive supremacy not just over the meaning of constitutional law but also over the breadth of its coverage, the Supreme Court can effectively diminish the realm of ordinary law by constitutionalizing new portions of that sphere.

Second, courts exercise interpretive authority within the sphere of ordinary law, construing statutes and mediating actual or perceived conflicts between state and federal laws. A court's interpretation of a federal statute is, to be sure, subject to "departmental" override to a degree not seen in the constitutional context. Congress (with the President's signature) can, and occasionally does, correct or modify judicial interpretations of its statutes. But this corrective lawmaking process is difficult and often highly contingent on institutional barriers, such that judicial interpretation of "ordinary law" is more durable and influential than often described as a formal matter. At the very least, the Supreme Court and other federal courts have the power to fundamentally shift the baseline valence of federal statutory schemes in ways that may not be susceptible to Congressional modification.

How has the Supreme Court facilitated—even promoted—the growth of the public's ordinary lawmaking space even as it has appropriated for itself supremacy over constitutional law questions? The Court has several mechanisms in constitutional text and doctrine through which to delimit the boundaries between constitutional law and ordinary law, and its construction of these doctrinal levers serves to expand or restrict the space open for popular ordinary lawmaking on important subjects. So accepted are most of these doctrines that they are rarely discussed, but each represents a choice that was debatable at the time originally made.[16] In most cases, both in the

16. These available doctrinal levers include judicial application of the taxing power, the spending power, and the commerce clause authority. For representative discussions about the manner in which the New Deal-era Supreme Court relaxed judicial scrutiny of all of these powers in a manner that facilitated the expansion of federal ordinary law, see, e.g., Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 4 (1987) (discussing the prevailing modern

nineteenth century and from the New Deal forward (with a brief period of exception in between) the Supreme Court chose the path that avoided institutional conflict and facilitated the construction of ordinary law. The Court has, in general, chosen to encourage the expansion of ordinary lawmaking, even as it has expanded its own authority within the sphere of the judicialized constitution. For instance, the Court has rarely enforced limits on the taxing and spending powers, two related provisions that some early leaders thought had meaningful boundaries that operated to constrain federal authority. In 1817, President James Madison vetoed a federal statute appropriating funds on the grounds that it exceeded the scope of the spending power and thus could not be reconciled with the Constitution.[17] But the Supreme Court never adopted Madison's parsimonious formulation of the spending power, and this permissive construction is a crucial foundation on which the large modern national government rests.[18] That the basic spending discretion is rarely debated today only underscores how long, and how consistently, the Supreme Court has refused to stretch that doctrinal lever to meddle with ordinary public policy spending by Congress.

Relatedly, the Supreme Court's consistently broad construction of the Necessary and Proper Clause,[19] and the generally weak link required between legislative means and ends, are important foundations for the growth of positive ordinary law and doctrinal choices that were by no means uncontroversial. In various periods, particularly around the turn of the twentieth century, the Court applied these doctrinal mechanisms more strictly at considerable cost to the viability of state and federal legislation.[20]

"view of federal taxation as virtually immune to any constitutional restrictions"); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1150 (2000) (explaining the path of the Supreme Court's New Deal-era commerce clause jurisprudence, culminating in "[t]he Court's decision to abandon judicially-enforced limitations on the commerce power"); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (describing the evolution of the Supreme Court's spending clause jurisprudence through the New Deal era); Howard Gillman, *Disaster Relief, "Do Anything" Spending Powers, and the New Deal*, 23 LAW & HIST. REV. 443, 444 (2005) (Justice Stone's dissenting conception of a "do anything" spending power was endorsed by the late New Deal Court.); Gale Ann Norton, *The Limitless Federal Taxing Power*, 8 HARV. J.L. & PUB. POL'Y 591, 591 (1985) ("Courts overwhelmingly rely upon democratic institutions to remedy abuses in taxation, rather than exercising a strong hand in judicial review.").

17. *See* JAMES MADISON, VETO MESSAGE (1817), *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 584 (James D. Richardson ed., 1896). Madison vetoed a commerce clause based spending bill "for constructing roads and canals, and improving the navigation of water courses," noting that he was "constrained by the insuperable difficulty [he felt] in reconciling the bill with the Constitution" to veto it.

18. For a comprehensive history and analysis of the Supreme Court's spending power jurisprudence, see generally Engdahl, *supra* note 16.

19. *See* M'Cullogh v. Maryland, 17 U.S. (4 Wheat.) 316, 411–23 (1819).

20. *See generally* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005) (describing *Lochner*-era judicial scrutiny of ordinary remedial legislation).

Consideration of all of these doctrinal choices by the Court suggests an institution willing to allow the wide expansion of ordinary lawmaking, federal spending, and regulation that occurred in the twentieth century. And this expansion of the ordinary lawmaking sphere happened alongside a growth in the Court's authority and breath over the judicialized constitution. Put differently, the growth of constitutional law and the Court's authority within it did not produce a zero-sum result. Instead, as the public and political institutions lost influence in the sphere of constitutional law, they found greater freedom to assert and codify policy preferences in the sphere of ordinary lawmaking. That some of this "ordinary" lawmaking was extraordinary in scope and importance—for instance, the Civil Rights Act of 1964 and the implementation of Social Security and Medicare—only underscores that much of the public's constitutional impulse was transferred to, and found outlet in, the forms of so-called ordinary law.

The above discussion about the growth of ordinary law applies primarily to the national government's expansion, and so another question to which I now turn involves the impact of national regulatory growth on the remaining authority of the state governments.

II. THE SUPREME COURT'S ROLE IN PERMITTING AND MAINTAINING CONCURRENT REGULATORY JURISDICTION

As I have noted above, my subject here involves the multiple spaces in the constitutional structure where popular lawmaking occurs, but it is also centered on the role of the Supreme Court and other federal courts in creating and preserving this structure. From the Marshall Court era forward, the Supreme Court has been a crucial institutional actor in framing the concurrency principle, and historically has shown some inconsistency in its embrace of concurrent jurisdiction as opposed to a more exclusive national regime. The story that follows is an abbreviated version of this doctrinal path, focusing on key moments and turning points in the historical development. In this area, as in other aspects of the structural contours of ordinary lawmaking, decisions by the Court were crucial to preserving space for state laws to exist concurrently with federal regulations.

The Supreme Court's central role in framing the structure of concurrent lawmaking arises in large part from the Constitution's ambiguity on the subject. Much of the Constitution, both in generative intent and in textual specificity, contains indications of a desire to dampen the scope of

state authority.[21] The text provides for uniform and exclusive areas of federal regulation, and prohibits the states from engaging in certain kinds of regulatory activities. On the other hand, the extremely limited conception of the original federal government, and the parts of the Constitution that presume state retention of general police power authority, underscore the basic understanding that much—if not most—regulation of economic and social life would remain with the states.

This original allocation of authority, coupled with the parsimonious scope of regulation at both the state and federal levels two centuries ago, dramatically minimized the potential for, and actuality of, concurrency and conflict in the earliest decades of the United States government. Because both regulatory spheres were significantly smaller in scope and the few areas of federal power were specified (and often made expressly exclusive) in the Constitution's text, overlap was rare and jurisdictional conflict rarer still. Even in the early nineteenth century, however, and dramatically so in the twentieth century, expansion of the more ambiguous federal Commerce Clause power resulted in new questions about the ability of state law to coexist with new assertions of federal authority. The Court confronted this question repeatedly in the nineteenth century, and did so in some of its leading cases of the era, including an initial treatment in *Gibbons v. Ogden*.[22]

The primary importance of *Gibbons*, both at the time of the decision and now, relates to the case's generative function in establishing the basic authority of Congress to regulate commerce among the states. By opting for a (slightly) broader conception of Congressional commerce power than some contemporaries advocated, the case was an important building block for national authority in the nineteenth century and beyond. But this relatively expansive reading of the federal commerce power necessarily produced a subsidiary inquiry that is more relevant here. The back story to *Gibbons*—and one hotly debated by the parties and Justices—involved the implication of the Court's somewhat generous reading of the federal commerce power for state laws touching on the same kind of activity. Would a finding of federal jurisdiction operate automatically to oust the states from this regulatory field? Or could the two sovereigns regulate the same or related activities so long as the specific legal commands did not conflict? Precisely because much of the Constitution's specific textual allocation of

21. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 506–18 (1969); Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 496–505 (1988).

22. 22 U.S. (9 Wheat.) 1, 197–211 (1824).

authority appeared exclusive as to specific areas (e.g., bankruptcy), the text provided little guidance on this important commerce clause question.

Many at the time, including Justice Johnson in concurrence, embraced a theory of mutually exclusive regulatory jurisdiction: once it was established that a type of economic activity was within the bounds of Congressional commerce power, it was necessarily *outside* the states' regulatory jurisdiction. Interpreting the Constitution's grant of power to Congress, Johnson wrote that "[t]he inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce . . . ."[23] Because he agreed with the Court's finding that the federal commerce power extended to the regulation of interstate steamship travel, Johnson's path to the ultimate result was straight and simple: the grant of federal power automatically ousted the states, and so the New York statute granting rights to Fulton and Livingston was *ultra vires* and void.[24]

Writing for the Court, however, Chief Justice John Marshall articulated a more nuanced view of the interaction of federal and state regulatory authority that allowed the possibility of some overlap. Like Johnson, Marshall agreed that the federal commerce authority extended to the steamship activity at issue in the case, and so the 1793 federal law under which Gibbons's ferries were licensed as "vessels employed in the coasting trade" was validly enacted and substantively controlling.[25] But Marshall did not regard the Constitution's grant of power, and the subsequent legislative exercise of it, as necessarily preclusive of state regulation. He recognized that sometimes, "in exercising the power of regulating their own purely internal affairs," states might occasionally enact laws that touched on the same subjects as federal statutes.[26] But such concurrency did not render the state law *per se* invalid: instead Marshall proposed an inquiry that appears very much like modern conflict preemption analysis. In a zone of concurrent regulation, "the validity of [state laws] depends on their interfering with, and being contrary to, an act of Congress . . . ."[27] Where such direct interference existed, the state laws would be invalid, but absent that conflict, coexistence was possible. For Marshall, the possibility of concurrent regulation required a secondary judicial inquiry into whether "in their application" the state laws had "come into collision with an act of Con-

23. *Id.* at 236 (Johnson, J., concurring).
24. *See id.*
25. *Id.* at 212 (majority opinion).
26. *Id.* at 209–10.
27. *Id.*

gress."[28] But only where such actual "collision" existed would states be ousted from their regulatory position, even when Congress also regulated in the area. As the numerosity and breadth of federal laws expanded dramatically a century after *Gibbons*, this nuanced concurrency/conflict position would be tested and debated by later Justices, and would ultimately become essential for the simultaneous growth of federal and state lawmaking during the twentieth century.

Before then, however, the Court would revisit the terms of debate between Johnson and Marshall on several occasions during the nineteenth century. During this period the Court's attitude was characterized as much by a continuing dissensus among various different Justices as by any clear resolution of the conflict. I will not recount in detail every instance of this exclusivity/concurrency debate as it appeared in cases during the 1800s, but I will note some of the more prominent explications of both sides. In this summary I rely heavily on Stephen Gardbaum's detailed exploration of the Supreme Court's preemption jurisprudence during this era.[29]

After the Gibbons debate the same dissensus reappeared a decade later in the case of *Houston v. Moore*,[30] which considered the impact of a state law imposing penalties upon state militiamen who refuse to serve when called into active duty by the President, despite federal authority to organize the militia in the first place. In his dissenting opinion, Justice Story opted for the Marshall position of potentially concurrent regulation, stating that a federal statute would have preemptive effect only in instances of "direct repugnancy or incompatibility" with a state law. Absent a Constitutional expression of exclusivity (as with bankruptcy or coinage), or a "direct and manifest collision" between state and federal statutes, to Story "it seem[ed] unquestionable that the States retain concurrent authority with Congress."[31] Reflecting the disagreement that prevailed on this question in the era, however, Justice Washington, in his majority opinion, denounced as a "novel and unconstitutional doctrine" the idea that "[s]tate governments have a concurrent power of legislation" that may be exercised so long as the state and national laws are not "contradictory and repugnant to each other."[32] Looking just to these two opinions, the clear dichotomy that would continue throughout much of the nineteenth century is revealed.

28. *Id.*

29. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 787–800 (1994).

30. 18 U.S. (5 Wheat.) 1, 12 (1820).

31. *Id.* at 49–50 (Story, J., dissenting).

32. *Id.* at 24 (majority opinion). Justice Johnson concurred in *Houston* and expressed a view similar to the Marshall/Story concurrency position. Though stressing that federal law would be supreme

Even Justice Story himself seemed internally undecided on the question. After his endorsement of concurrent jurisdiction in *Houston*, he did an about face and reversed his own view in the later case of *Prigg v Pennsylvania*.[33] Story's *Prigg* opinion articulated a strong view of complete field preemption once Congress had legislated in an area. He wrote that valid federal enactments

> the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.[34]

Despite Justice Story's defection, the doctrine of concurrency received important support from the Court in the 1851 case of *Cooley v. Board of Wardens*.[35] There a Pennsylvania statute requiring local pilots on all ships using the port of Philadelphia was challenged as unconstitutionally invading the federal commerce power. The Court declined to invalidate the state law on exclusivity grounds, and in so doing expressly endorsed the principle of concurrent regulation. Justice Curtis, writing for the Court, stated that the Pennsylvania law was valid so long as "it is not in conflict with any law of Congress" and "does not interfere with any system which Congress has established by making regulations."[36]

As the nineteenth century ended, the debate between exclusive and concurrent conceptions of state and federal regulatory authority remained unsettled but by and large unimportant. So long as both the federal and state governments' regulatory sweep was relatively limited in scope, the areas of overlap that implicated the exclusivity/concurrency debate were few in number. This rarity of overlap would change around the turn of the century and reach dramatic proportions a few decades later. As Progressives and New Deal reformers sought positive legal change, often in the form of new regulatory statutes, and advanced their agenda both in Washington, D.C. and in various state capitals, increased friction between state and federal regulatory regimes forced the question of exclusivity before the Supreme Court again, in much more salient form.

Surprisingly, from a modern vantage point, the Court's initial resolution of the issue in the early twentieth century favored a strong federal ex-

and preemptive in areas where state laws "[ran] counter to the laws of Congress," he adamantly opposed "the exploded doctrine, that within the scope in which Congress may legislate, the States shall not legislate." *Id.* at 45 (Story, J., concurring).

33. 41 U.S. (16 Pet.) 539, 617–18 (1842).

34. *Id.* at 618.

35. 53 U.S. (12 How.) 299, 318–21 (1851).

36. *Id.* at 321.

clusivity position. In a series of cases in the first decades of the century, the Court promulgated an idea of "latent exclusivity" that provided that any Congressional action at all in a given regulatory field completely ousted the states from that area of regulation. This ouster occurred automatically in the wake of Congressional action—regardless of whether the federal and state laws were actually in conflict. Justice McKenna expressed this new view in characteristic language in the case of *Southern Railway Co. v. Reid*,[37] which raised the issue of whether a North Carolina statute requiring railroad companies to transport tendered freight could coexist with the federal Interstate Commerce Act ("ICA"). Without any inquiry into actual conflict, the Court ruled that by passing the ICA the Congress had "taken possession of the field" of railroad regulation.[38] The states were thus ousted from the area even if their laws did not produce actual or implied conflict. Justice McKenna wrote that "[i]t is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised."[39] In another representative case of the era, Chief Justice White gave voice to an even more absolute version of this exclusivity rule, holding that "it must follow . . . that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject."[40]

Given the broad tendency of this doctrine to override entire areas of state remedial legislation, it is possible to regard the latent exclusivity doctrine as part of a bundle of doctrines the Court applied in cases like *Lochner v. New York*[41] to invalidate state remedial laws on various grounds. But perhaps surprisingly, this exclusivity position also attracted the endorsement of Justice Oliver Wendell Holmes, who dissented in *Lochner* and some of the Supreme Court's other similar decisions of the time. Holmes had no problem, however, agreeing with his brethren on the idea of latent exclusivity, with the result that he joined and wrote opinions that were effectively hostile to entire schemes of state regulation. In the 1915 case of *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*,[42] Justice Holmes described his version of the new exclusivity analysis. He wrote that the existence of actual conflict was not necessary to supersede state law, explaining that the alleged absence of conflict

37. 222 U.S. 424, 431 (1912).

38. *Id.* at 442.

39. *Id.* at 436.

40. Chi., Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913).

41. 198 U.S. 45 (1905).

42. 237 U.S. 597, 604 (1915).

is immaterial. "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[43]

Before turning to the New Deal's modification of this doctrine, it is interesting to pause here and consider how different the structure of popular lawmaking would be if this latent exclusivity doctrine remained the law of the land during and after the New Deal's vast expansion of federal legislation. Consider the expansive conception of federal field preemption articulated by Chief Justice White and quoted above: "[T]he power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject."[44] The breadth of this principle is striking, and so too is its radical departure from current ideas of overlapping regulatory jurisdiction. Under this exclusivity framework, the later twentieth century would have developed with dramatically less state law, since every new federal lawmaking initiative would have necessarily jettisoned states from that field. This dynamic would, I suspect, have significantly curtailed federal lawmaking as well, since the implications of new acts of Congress in terms of superseding state power would have been vastly greater, and with this great cost would have come more reluctance to legislate. In sum, the regulatory landscape would have been almost unrecognizable to anyone who studies or practices within the regime of concurrent jurisdiction that prevails today. Furthermore, for reasons discussed in the following section, the unitary and zero-sum nature of this exclusive regulatory framework may have produced undesirable procedural effects on the public's participation in lawmaking because groups with power in Washington could effectively trump all lawmaking on a subject by inducing Congressional action.

All of this, of course, is mere speculation. The Supreme Court did not hold fast to its doctrine of latent exclusivity as the twentieth century progressed, and by midcentury had changed its basic rule to permit substantial concurrency in regulation. The Court's change in course on this issue can be regarded as part of its larger New Deal compromise that entailed a broadened conception of the federal Commerce Clause and other necessary preconditions for robust ordinary lawmaking. At the same time that the Supreme Court would begin to assert unprecedented authority over the breadth and definition of constitutional rules, it framed many of the Constitution's basic structural provisions in a manner that allowed the political

43. *Id.*

44. *Chi., Rock Island & Pac. Ry. Co.*, 226 U.S. at 435.

branches and the public unprecedented latitude to engage in other kinds of lawmaking. The Justices must have sensed the dire implications for state law of their newly permissive attitude toward Congressional regulation if the latent exclusivity doctrine persisted. By returning to a preemptive rationale grounded in the existence of actual conflict, the Court helped frame the regulatory architecture of the rest of the twentieth century, and with it preserved multiple spaces for popular lawmaking.

The specific method by which the Court disavowed its latent exclusivity jurisprudence took the form of several cases in the New Deal era and just afterward. The leading explications are in *Mintz v. Baldwin*,[45] a 1933 case, and *Rice v. Santa Fe Elevator Corp.*,[46] a 1947 case. The move away from the exclusivity idea was evident in *Mintz*, which involved overlapping—but not conflicting—state and federal laws to prevent infectious cattle diseases. The Supreme Court found no conflict and therefore no preemption, and introduced a new clear statement rule focused on Congressional intent, stating that "[t]he purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred," and to trump state law, an "intention so to do must definitely and clearly appear [in the statute]."[47] The same idea was maintained and expanded a decade later in *Rice*, with an explicit nod to the federalism concerns that justified a move away from the exclusivity doctrine. Justice Douglas wrote that "Congress legislated here in a field which the States have traditionally occupied," which compelled the initial "assumption that the historic police powers of the States were not to be superseded by [federal statute] unless that was the clear and manifest purpose of Congress."[48]

With these cases and others establishing that state and federal regulation on the same subjects could and would coexist, the path was cleared for the significant growth of both state and federal lawmaking in the second half of the century, and with that shift came multiple avenues for various parts of the public to participate in the framing of such laws. The midcentury doctrine represents something both old and new. On one hand, the embrace of concurrency and the search for actual conflict resembles the original view of John Marshall in *Gibbons v. Ogden* that vied for predominance on the Supreme Court throughout the nineteenth century. But the New Deal Court's emphasis on Congressional clear statement reflected a new institutional sensitivity. The Court properly recognized that a judicial

45. 289 U.S. 346, 350–52 (1933).
46. 331 U.S. 218, 229–36 (1947).
47. *Mintz*, 289 U.S. at 350.
48. *Rice*, 331 U.S. at 230.

construction of a federal statute's preemptive force by implication corroded the political process in the states and truncated the breadth of the people's lawmaking space. By forcing Congress to speak clearly to supersede state laws, the Court ensured that the public as constituted nationally in Congress would be the institution to trump the public in the states where appropriate.

III. CONCURRENCY AND THE MULTIPLE SPACES FOR POPULAR LAWMAKING

The end result of the Supreme Court's doctrinal shift described above is that the expansion of positive and administrative lawmaking at the federal level in the early- and mid-twentieth century has, by and large, not displaced state lawmaking on similar subjects. Federal involvement in a particular area is not a zero-sum game, automatically displacing state lawmaking in fields where it occurs. Nor has state lawmaking ossified since the New Deal for other reasons. In many areas, such as health care, employment, and education, for instance, the expansion of state regulation and administrative form in the past half century have rivaled the federal government in scope and diversity of coverage. Even in an era of judicial supremacy over most constitutional law, meaningful ordinary lawmaking—and the public's participation therein—has flourished in a manner not generally seen in the nineteenth century.

My focus in this essay is on the public's involvement in these important areas of lawmaking and on the salutary effect that the concurrent regulatory architecture of the United States has on the extent and variety of this involvement. I will return to that feature of the concurrency idea, but I will first treat a few other aspects of this federal structure that are of tangential concern.

One justification that is commonly given to support decentralized federalism in the United States is utilitarian in nature, and grounded in the assumption that even in 2006 there exist regional or state differences among Americans in various policy fields. So, for instance, Larry Kramer has argued elsewhere that "[t]he whole point of federalism . . . is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking."[49] My colleague Seth Kreimer has expressed a

49. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000). *See also* Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536–37 (1997) (supporting decentralization in environmental policy to accommodate different preferences); Ernest A. Young, *The*

similar point in more specified language, maintaining that "the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules."[50] If the preferences of residents in different states vary significantly, and if policy choices in given subjects do not generate dramatic externalities, the argument goes, utility is optimized by permitting each state's citizens to select the policy options that best fit their collective preferences. I do not dispute this justification for state-by-state lawmaking, and in many areas it complements this essay's emphasis on the participation of the public in various states in the lawmaking enterprise. But this preference-specification rationale emphasizes something different than the actual lawmaking process, and so is not directly implicated in the discussion here. It would be possible, for instance, to achieve much of the preference optimization that occurs in a federal system through a single uniform government with regional branch offices and decentralized variation in rules. This kind of regional variation to comport with local preferences occurs today among some United States government entities, such as the practice of various U.S. Attorney's offices in tailoring prosecution choices in accordance with regional norms.[51] But this kind of single-sovereign decentralization fails to capture the participatory benefits of the concurrent lawmaking structure actually in place in the United States. If the concern is the people's involvement in the creation and operation of law, the multiple outlets and forms of lawmaking that exist in a dual sovereignty system provide a distinct procedural advantage that has little to do with substantive preference optimization.

Similarly, I recognize but do not necessarily endorse another justification occasionally proffered for a dual sovereignty regime: the idea that the public will feel more connected to local and state governments than to Washington, D.C., and thus will feel more able to influence and participate in state lawmaking initiatives.[52] There is something to this claim, both conceptually and empirically, and one can think of instances where reasons of proximity and affinity make the state government a more accessible outlet for public lawmaking zeal than Congress or other parts of the federal gov-

Rehnquist Court's Two Federalisms, 83 TEX. L. REV. 1, 54 (2004) (describing the preference-maximizing benefits of decentralized federalism).

50. Seth F. Kreimer, *Federalism and Freedom*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 66, 72.

51. An insight I gained working in the Saint Louis U.S. Attorney's Office.

52. *See, e.g.*, New York v. United States, 505 U.S. 144, 168 (1992) (describing accountability benefits from federalism because "state governments remain responsive to the local electorate's preferences" and "state officials remain accountable to the people").

ernment. But I am willing to be somewhat agnostic about which venue—the state or national polity—is characteristically more open to input and participation from various segments of the interested public. Certainly there are prominent examples of national lawmaking—the Civil Rights Act of 1964, for instance—where a process national in scope was necessary to trump entrenched interests in many state capitols and make a broader set of voices heard.

One need not select a single preferred forum, however, to recognize the general benefits of concurrent jurisdiction for popular participation in the lawmaking process. The real benefits of concurrent jurisdiction are produced by the multiplicity itself, together with the fact that the various states and federal government vary in terms of the particular interest group matrix, office holder characteristics, and procedural format for lawmaking. These differences may produce meaningful variation in the ability of different subgroups of the people to translate their preferences into positive law reform. If we accept the obvious fact that "the People" do not exist in undifferentiated form, but rather are segmented by party, region, and specific interest group, it follows that some groups of the people who have little or no meaningful voice in one set of lawmaking institutions might have substantive input in a different forum. The losers in one forum (state or federal) may be able to resort to the other forum to have their views at least partially translated into policy.

Nor, given institutional complexity at both the federal and state level, are there only two binary outlets for this kind of popular lawmaking. Within each state and within the federal system, multiple institutions interact to form policy outcomes. Legislatures, agencies, juries, and judges all shape regulatory policy, either collectively or (more often) sequentially and responsively. Even at the same level of the federal system, different opportunities exist for public participation that vary in important ways.

This horizontal dynamic of the concurrent regulatory framework is illustrated by the role of the civil jury. When mainstream constitutional law scholars discuss jury decision making today, it is to a great extent as an historical artifact of a bygone populist era. Around the time of the Framing, citizens serving on juries could and did play an active role in shaping and applying constitutional rules, and the jury was recognized as an important outlet of popular constitutionalism.[53] But as nineteenth-century courts ex-

53. *See* Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 345–46 (2003) (quoting De Tocqueville and others on the "democratic character" of the American jury); H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 740 (1994) (describing early theory of multimodal constitutional interpretation, which included juries as important interpreters).

erted more assertive control of legal doctrine—both constitutional and otherwise—the idea of a jury as a substantive constitutional policymaker became greatly diminished. To the extent the judicial branch came to assert supremacy over constitutional interpretation, it was emphatically the legal role of the judges, not juries, that was exalted.

Just as nineteenth-century judges displaced the jury in constitutional interpretation, so too did the judiciary, over the same period, largely eviscerate the jury as a policymaking institution in the fields of "ordinary" law: tort, contract, and property rights. As Morton Horwitz describes, nineteenth-century courts assiduously sought to leverage control of ordinary law away from popular outlets like juries and legislatures, and successfully did so by promulgating a new set of judicialized doctrines and decision rules.[54]

It is here that the concurrency principle, applied since the New Deal, has operated powerfully not just to permit dual outlets for ordinary lawmaking, but also to bring the jury back in as a meaningful outlet for popular sentiment. The New Deal revolution's focus on legislative and administrative solutions to crucial problems might have signaled a further reduction of the role of the jury—even beyond the judicial curtailment that had taken place in the previous hundred years. But such has not been the result of the twentieth century's expansion of positive law. Instead, the federal courts' generally permissive attitude toward concurrency has resulted not just in space remaining for state positive lawmaking, but also for popular outlets in common law. At the same time, state judiciaries in the past half century have relaxed the nineteenth-century doctrines sufficiently to let the jury back into lawmaking. Public attitudes toward health care arrangements, corporate power, and employment disputes that are muted or unheard in the ordinary legislative process are occasionally filtered through and given voice in jury verdicts, particularly so in cases with impact that resonates more broadly.[55]

It bears repeating that this multiplicity and diversity of form in lawmaking entails costs as well as benefits, and in particular areas the conflict-

54. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

55. *See, e.g.*, Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH L. REV. 683, 695–706 (1993) (describing the dramatic evolution and expansion of tort law in the twentieth century, spurred by judicial innovators like Justice Traynor of the California Supreme Court); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of American Tort Law*, 26 GA. L. REV. 601, 601 (1992) (discussing the "rise" and "huge growth" of tort law in the twentieth century); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2408 (2000) (Since 1900, "the common law has expanded to find new duties where few people earlier would have dreamed they could exist.").

ing impulses of multiple layers of regulation and decentralized jury verdicts may produce unworkable results that will demand national correction. Basic supremacy principles empower Congress to impose such a uniform solution—and selectively to trump inconsistent state laws—where it decides to do so. Although potentially burdensome, even this process of working out inconsistency produces ancillary discursive benefits as various public and private actors discuss and debate the optimal regulatory strategy. When multiplicity is presumed, by the time pressure for a uniform national solution reaches its height, various states undoubtedly will have implemented different kinds of regulatory strategies, permitting some empirical analysis of the optimal uniform solution to impose. The process of finalizing the national rule will once again often involve public debate and opportunity for public participation.

In sum, there is a distinct procedural advantage to the *ex ante* presumption of concurrent regulatory jurisdiction, with the corollary fact of multiple outlets for public involvement. This multifaceted process is part of the People's constitution as much as other more specific doctrines or practices. The fact of concurrency represents a conscious structural choice made by judges and other officials in the past, and reaffirmed in the past half century of jurisprudence and regulatory practice. Precisely because this multilayered process is an important part of the public's Constitution, it is important that decisions to constrict the spaces for public lawmaking—by moving toward a uniform national policy in a given area—be made by the people themselves as constituted in the national Congress, rather than by a set of unelected judges.

CONCLUSION: A CAUTIONARY NOTE

I have described the multiple concurrent outlets for lawmaking in the current constitutional structure, and have advanced the proposition that this concurrency is a normative good. I now conclude with a reexamination of the judicial role in constructing and maintaining this concurrent structure. To a great extent the existing architecture is a construction of the Supreme Court's doctrinal choices, particularly at the time of the New Deal when the Court similarly established other doctrines that facilitated robust ordinary lawmaking. The Court facilitated the expansion of ordinary law as part of an implicit compromise: it would support robust and diverse ordinary lawmaking spaces, while at the same time embracing judicial supremacy in constitutional law.

Just as the Supreme Court has permitted these multiple spaces to flourish, however, it possesses the doctrinal levers to truncate this multi-

plicity and return the presumptive sweep of federal legislation to something closer to the latent exclusivity idea of a century ago. Federal statutes and agency regulations are both numerous enough and ambiguous enough to present many opportunities for judges to plausibly imply a kind of field preemption or exclusivity even where Congress has not spoken directly on the matter. Such broadening decisions have the potential to fundamentally alter the basic concurrent constitutional structure and foreclose a portion of the public's current lawmaking space. Supreme Court decisions that speak to the preemptive scope of ordinary federal legislation are thus fundamentally constitutional law decisions, though they are rarely labeled as such.

To date, the Supreme Court has nominally not disavowed the doctrine of *Rice*, requiring that Congress must speak clearly and unequivocally to preempt state law in a given regulatory area. But a variety of recent cases suggests that the current Supreme Court is willing only halfheartedly to embrace the concurrency principle in all its potential messiness and multiplicity. In the past decade several doctrinal tendencies have emerged in various cases that possibly evidence a changing judicial outlook on concurrency.

First, the Supreme Court and the lower federal courts has been a newfound willingness to find implied preemption of state law based on the actions, statements, or even nonactions of administrative agencies. For instance, in *Geier v. American Honda Motor Co.*,[56] a closely divided Court construed ambiguous language in a federal automobile safety statute as preempting a state tort lawsuit over airbag safety. The Court agreed that no clear evidence to preempt was apparent on the face of the statute Congress passed, but the Court inferred an implied preemption based on the decision of a federal agency not to move ahead with a new airbag standard. The analysis and result in *Geier* is a far cry from *Rice*'s clear statement rule, and a similar departure from the political theory underlying *Rice*—that the displacement of state law that preemption entails should typically only emanate from Congress, not from courts and administrative agencies. The *Geier* approach to preemption analysis has emboldened various agencies to consciously pursue new preemptive strategies and federal courts have accepted the agency arguments in favor of novel implied preemption rationales.[57]

56. 529 U.S. 861, 874–75 (2000).

57. For instance, the FDA has adopted a new position that its approval of a medical device or drug in some instances preempts state common law suits. Numerous lower federal courts have agreed with the FDA and found preemption, despite the lack of a clear congressional statement to preempt state tort law. *See* Theodore Ruger, *Left to Their Own Devices*, LEGAL AFF., September/October 2005, at 24. [hereinafter Ruger, *Own Devices*].

Other scholars have noticed this development, discerning in the Supreme Court's preemption jurisprudence a "discernible trend toward federalization . . . in the direction of national law for a national market."[58] In the 2004 case of *Aetna v. Davila*, for instance, the Court broadly construed the preemption clause of ERISA to supersede state tort remedies against managed care organizations for wrongful denial of benefits.[59] In the Court's recent cases, the textual command of a statute's preemptive scope is rarely crystal clear, given Congress's characteristic (and often strategic) ambiguity in crafting preemption clauses and savings clauses in the same statutes. Against this backdrop of statutory uncertainty, the Court's increasing willingness to find preemption stands in contrast with the clear statement principle of *Rice*, which articulated the assumption "that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."[60] And in departing from *Rice*'s presumption, the Court strays from the earlier era's solicitude for the lawmaking choices made by the citizens of different states. There is a cost to such rulings in terms of popular involvement with important lawmaking choices that is independent of the substantive decisions in each case.

Moreover, federal agencies appear to be listening to the Court's new message on implied preemption, and modifying their own policymaking behavior in ways that give even greater force to this preemption trend. In a recent essay, Catherine Sharkey describes the manner in which some federal agencies are more aggressively asserting the preemptive force of their own regulations, positing a plausible near future "where federal agency regulations come armed with directives to displace competing or conflicting state regulations or common law as a matter of course."[61] Agencies have also asserted broad preemption through methods less visible than proposed regulations. The federal Food and Drug Administration, for instance, has recently advocated a new preemptive scope of its medical device approval decisions by strategic amicus intervention in private tort lawsuits. Through these amicus brief filings the agency has pressed its

58. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization: Grappling with the "Risk to the Rest of the Country,"* 53 UCLA L. REV. (forthcoming Aug. 2006). *See also* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Reform*, 55 DEPAUL L. REV. (forthcoming 2006) [hereinafter Sharkey, *Preamble*] (describing the Supreme Court as a "willing partner" in the "momentum towards increased preemption").

59. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004); *see also* Theodore W. Ruger, *The Supreme Court Federalizes Managed Care Liability*, 32 J.L. MED. & ETHICS 528 (2004).

60. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

61. Sharkey, *Preamble*, *supra* note 58.

broad preemption position, typically with a receptive audience in the lower federal courts.[62]

The combination of these recent developments—federal agency assertion of, and federal judicial acquiescence in, implied preemption claims—places one significant feature of the New Deal compromise in jeopardy. The increased judicialization of much of constitutional law that occurred during the twentieth century was coupled with the Supreme Court's expansion of space for popular involvement in ordinary lawmaking. The Court's recent decision in *Gonzales v. Raich*[63] confirms that—despite hints to the contrary in *Lopez and Morrison*—the public's ability through Congress to shape important policies at the national level under a capacious Commerce Clause remains virtually unlimited. But for the past half-century the Court has, through embracing the idea of concurrent state and federal jurisdiction, also protected alternative outlets for public involvement in policy formation in state legislatures and through state common law juries. To the extent the Court's recent suggestions on implied preemption represent a new willingness to opt for national uniformity even in the face of statutory ambiguity, this is a crucial new direction with potentially corrosive effects on the opportunities for popular lawmaking in the United States.

62. *See* Ruger, *Own Devices*, *supra* note 57.
63. 125 S. Ct. 2195 (2005).