Article

Nonexclusive Functions and Separation of Powers Law

Ilan Wurman†

---

† Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, and author, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN INTEGRATED APPROACH (Foundation Press 2021). The theory presented here is the "theory" that loosely runs through my new administrative law casebook, recently published with Foundation Press. In preparing the present elaboration of the theory, I owe thanks to Aditya Bamzai, William Baude, Emily Bremer, Jud Campbell, John Harrison, Aziz Huq, Joshua Macey, Daniel Maurer, Andrew Magloughlin, John McGinnis, Gillian Metzger, Zachary Price, and Nicholas Parrillo; to Craig Green, Brian Slocum, and the other participants of the AALS New Voices in Administrative Law workshop; to the UC Hastings faculty; and to Brian Feinstein, Robert Glicksman, Christopher Havasy, Julian Mortenson, Peter Shane, Shalev Roisman, and the participants of the administrative power workshop series; and to the participants of the Seventh Annual Administrative Law New Scholarship Roundtable at the University of Minnesota. Thanks also to Danielle Efrat for research assistance.

INTRODUCTION

The Supreme Court does not have a unified theory of the separation of powers. In some cases, the Court has adopted an approach that scholars describe as formalist: the Constitution recognizes only three kinds of power—legislative, executive, and judicial—and the Court's task is to identify the kind of power being exercised and ensure that the correct branch is exercising that power using its constitutionally mandated procedures.[1] "A pure formalist," Thomas Merrill has explained, "embraces . . . an 'exclusive functions' interpretation of the relationship between functions and branches," according to which "each of the three branches has exclusive authority to perform its assigned function," and "each function is uniquely assigned to one branch."[2] Or, as Aziz Huq has explained, formalism "emphasizes the categorical separation and autonomous functioning of each branch, chiefly by relying on historical materials to precisely fence off each branch's domain."[3] In the words of one formalist, Steven Calabresi, "any governmental power exercised in our system must be either legislative or executive or judicial: the premises of the system do not allow for the conclusion that a power could

1. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 956–59 (1983) (defining the government power at issue as legislative, and invalidating it for failure to meet the requirements of bicameralism and presentment); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (describing the power at issue as executive, and invalidating its exercise by an officer subject to congressional control); Stern v. Marshall, 564 U.S. 462, 469 (2011) (describing the power at issue as judicial, and invalidating its exercise by Article I bankruptcy courts).

2. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231–33 (1991).

3. Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1518–19 (2018) (reviewing JOSHUA A. CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)). Although Huq describes this school as a "separation model" of the separation of powers, he acknowledges that this model is often described as formalism. *Id.* at 1526–27 n.25.

be something other than one of these three (or that it could be two of them at the same time)."[4]

In other cases, the Court has applied a functionalist approach, permitting deviations from the apparent constitutional requirements to ensure more workable and efficient government while preserving an overall balance among the competing branches.[5] "All functionalists," Merrill summarizes, "reject the exclusive-functions idea, and believe that many governmental activities can be categorized as falling within more than one function."[6] Some even appear to reject the possibility that any functional differentiation is possible, at least in contested cases.[7]

---

4. Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 (1994). Seeing no contradiction, however, Calabresi does acknowledge in passing that the same function can sometimes be exercised by more than one branch. *Id.* at 1390 n.46; *see also infra* notes 46–47 and accompanying text. Calabresi's footnote is consistent with the approach presented here, which I claim ought to become the focus of separation of powers analysis. Elizabeth Magill similarly explains that formalism "emphasizes that the Constitution divides governmental power into three categories and, with some explicit textual exceptions, assigns those powers to three different branches of government." M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–09 (2001). "It is crucial, on that understanding," she writes, "that the executive department exercise executive power and no other, Congress exercise legislative power and no other, and the courts exercise judicial power and no other." *Id.* at 610. Peter Strauss has argued that formalists "suppose a radical division of government into three parts, with particular functions neatly parceled out among them" and maintain that all of government "can be allocated into three neat parts." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578, 579 (1984). The "three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law." *Id.* at 577.

5. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–55 (1986) (identifying power at issue as a "core" judicial power but holding that "this conclusion does not end our inquiry," and permitting its exercise by administrative agency); Morrison v. Olson, 487 U.S. 654, 660, 688–89 (1988) (identifying power at issue as "purely executive" but holding that restrictions on President's ability to exercise that power constitutional because they do not "impermissibly interfere with the President's authority under Article II"); Mistretta v. United States, 488 U.S. 361, 412 (1989) (permitting the exercise of legislative power by a commission that is not part of any of the three departments of government).

6. Merrill, *supra* note 2, at 232.

7. *See, e.g.*, HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 239 (2006) ("Agencies perform functions that resemble all three constitutional archetypes of power: they adjudicate

What functionalists conclude from these observations varies. Some would simply "have courts defer to the allocation established by Congress in . . . doubtful cases."[8] The "most extreme version of functionalism" would leave "only the notion of a general diffusion or balancing of power among the branches."[9] According to Merrill, most functionalists "embrace a 'core functions' theory," which "posits the existence of a nucleus of activities that uniquely belongs to each of the three branches" and would have courts "step in to prevent any tampering with the core."[10] Even this does not fully capture functionalism, however, because the Supreme Court has identified "core" executive or judicial functions and allowed Congress to assign such functions away from the President[11] or the Article III courts.[12] The key for function-

cases as do the courts, promulgate rules as does Congress, and take enforcement action as does the Executive. Hence there is no coherent functional definition of the boundary between legislation and execution."); Magill, *supra* note 4, at 604 ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers."); *id.* ("The honest assessment is that we have no way to identify the differences between the powers in contested cases, and we are not likely to have one soon."); *id.* at 605 ("[T]here is no such thing as three essential powers exercised by three undifferentiated branches . . . .").

8. Merrill, *supra* note 2, at 232. Huq similarly explains that "[t]he idea of balance provides no reliable benchmark for judicial application, since judges are unlikely to be well positioned to evaluate the effects of institutional change on the interbranch status quo." Huq, *supra* note 3, at 1533.

9. Merrill, *supra* note 2, at 232. Though in Huq's description, what Merrill describes as an extreme version of functionalism sounds like the mine run version. "Balance models of the separation of powers are premised on a rejection of the possibility of deriving from either the Constitution's text or history a delimited and determinate set of powers for assignment to each branch," Huq explains, and "they decline to draw a strong conclusion from the Constitution's text, preratification practice, or Founding-era interpretative conventions about the precise contours of each branch's authority." Huq, *supra* note 3, at 1530–31. "Their focus is upon the net effect of interactions between the branches rather than on matching specific powers to particular state entities." *Id.* at 1531. "They appeal not to the legalistic touchstones of the separation model—which is the alignment between textual allocation and institutional practice—but to the practical consequences of institutional design as a whole." *Id.* at 1532.

10. Merrill, *supra* note 2, at 232–33.

11. Morrison v. Olson, 487 U.S. 654, 659–60, 688–89.

12. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853, 857 (1986); *see also* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1953 (2011) (describing the Court in *Schor* as using "functionalist reasoning to uphold the reallocation of (what the Court described as) 'core' Article III business to a non-Article III tribunal").

alists is that Congress not tamper *too much* with these core functions—whether legislation interferes *impermissibly*[13] or "whether there is a genuine threat of 'encroachment or aggrandizement of one branch at the expense of the other.'"[14] Perhaps that is why Merrill concludes that the concept of core functions is "so indeterminant, the judicial reaction will almost always be to defer to the judgments of other branches when separation of powers controversies arise."[15]

The modern Court appears ready to take on a more thoroughgoing formalism that observers fear may lead to the invalidation of much modern administrative government.[16] "A separation model is in tension with observed practice in contemporary government," argues Huq, in part because agencies "blend together the specification of first-order conduct rules, the investigation of past violations, and (at times) adjudication of such acts."[17] "If each branch has only one function (absent a constitutional exception)," Merrill writes, "then multifunctional entities—for example, administrative agencies that perform all three functions—would be unconstitutional."[18] "Virtually every

13. *E.g.*, *Morrison*, 487 U.S. at 693 ("We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.").

14. Bowsher v. Synar, 478 U.S. 714, 770 (1986) (White, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

15. Merrill, *supra* note 2, at 234–35. Magill similarly illustrates why the concept of "core" functions differs from the account presented here: because those core functions may or may not track the definitions of legislative, executive, or judicial power. She writes that functionalism "emphasizes that the departments of government have shared and overlapping powers, as well as separate powers," and "the key question is whether an institutional arrangement upsets the overall balance among those branches by permitting one of them to compromise the 'core' function of another." Magill, *supra* note 4, at 609. But, she says, the functional approach is "flexible," and would "tolerat[e] the exercise of 'judicial' or 'legislative' power by an administrative agency." *Id.* at 611.

16. Gillian Metzger has warned that "the current"—and formalist—"judicial attack on the administrative state merits attention because of the potential harm it poses for the Court and for constitutional law." Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 6 (2017); *see also* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278 (2021) (noting that a formalist reinvigoration of the nondelegation doctrine "would mark a radical break with constitutional practice and could entail the wholesale repudiation of modern American governance").

17. Huq, *supra* note 3, at 1529–30.

18. Merrill, *supra* note 2, at 234.

part of the government Congress has created," Peter Strauss has written, "exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court."[19]

Separation of powers scholars overwhelmingly track these two theories of formalism and functionalism, though some scholars have attempted to move beyond these categories or advance the debate in unique ways. John Manning, for example, has sought to "break the stalemate between formalists and functionalists"[20] by focusing on specific textual compromises as opposed to general principles of separation of powers,[21] but he offers no suggestions as to how to differentiate among government power.[22] I myself once proposed advancing the debates by accepting the reality that Congress routinely delegates legislative power to the Executive, and then deploying formalist tools, such as a legislative veto, that follow from that one functionalist premise.[23]

Elizabeth Magill has argued that courts and scholars—including functionalists, who are still concerned with identifying "core" government functions and balance—should forget about powers and branches in separation of powers law altogether.[24] They should instead focus on how to diffuse power "among an enormous, and diverse, array of decisionmakers who populate what we call the branches"[25] because, in her view, "there is no such thing as three essential powers exercised by three undifferentiated branches."[26] Merrill, for his part, has proposed what he

19. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987). He adds, "A formal theory of separation of powers that says these functions cannot be joined is unworkable." *Id.* at 493.

20. Manning, *supra* note 12, at 1948.

21. *Id.* at 1946.

22. *Id.* at 2019–20 (noting that "deeply rooted constitutional understandings confirm that multiple branches can often bring about very nearly the same result," but offering no way to distinguish among government power).

23. Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 362–64 (2017). As should now be relatively clear, I no longer advocate that approach. To be sure, if Congress is routinely delegating *exclusively* legislative functions to agencies, and there is no hope of putting a stop to that practice, then the insights of that earlier piece still apply.

24. Magill, *supra* note 4, at 657–60.

25. *Id.* at 651.

26. *Id.* at 605. Huq labels Magill's theory as an "exogenous" model of the

calls the "minimal conception of separation of powers," by which courts would abandon trying to define the different governmental powers.[27] At least *one* of the three branches, however, would have to exercise any given power, according to the constitutional strictures relevant to that branch.[28] Thus, Congress could exercise almost any power it wished, or could authorize the Executive or the courts to exercise a particular power, but it could not create *other* institutions to exercise any of these powers.[29] Congress's choice of allocation among the three named constitutional branches would be nonjusticiable.[30]

---

separation of powers because it "starts from the proposition that it is not possible to identify ex ante a specific government action as legislative, executive, or judicial because there is commonly an observational equivalence between those forms of state action." Huq, *supra* note 3, at 1535. Huq recognizes, however, that exogenous models are really a kind of functionalism. *Id.* at 1526 n.25.

27. Merrill, *supra* note 2, at 235.

28. *Id.* at 235–37.

29. *Id.* at 236 ("Congress may not create a Fourth Branch of the federal government.").

30. *Id.* at 235–36. Martin Redish has proposed a similar idea, which he calls "pragmatic formalism," that would leave more room for the judiciary to analyze power. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 100–02 (1995). According to Redish's account, each branch must exercise power according to its constitutionally mandated procedures. *Id.* at 101 ("[T]he Court's role in separation-of-powers cases is to be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional."). He would allow, however, some functional analysis in deciding what kind of power is at issue in particular cases. *Id.* at 126 ("For unlike [the] originalist model, pragmatic formalism (as the name implies) posits that a reviewing court is not tied to particular conceptions of branch power found to be held by the Framers, but rather may treat those concepts—much as other constitutional provisions are construed—as part of an evolutionary, pragmatically based definitional process.").

It is unclear, however, how different Redish's approach is from Merrill's. Redish argues that executive power "presupposes a preexisting 'law' to be executed," and thus every exercise of law execution "must be properly characterized as enforcement of existing legislation." *Id.* at 117. But under that view, there would be nearly complete overlap with legislative power, except that Congress would have to make the decision to delegate in the first place. Redish adds that "[t]he judicial branch may establish such rules of behavior" too—but "only in the context" of deciding live cases or controversies. *Id.* Hence, Redish's standard for legislative power—"the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits, for the purpose of achieving, maintaining, or avoiding particular social policy results"—"could conceivably be employed to describe the functions performed by the judicial and

None of these proposals has gotten off the ground, and for obvious reason. To the modern, formalist Supreme Court, giving up on differentiating government power and abandoning originalist sources and reasoning are nonstarters.[31] To truly break the stalemate, we need to reorient how we think about the nature of governmental power itself, and particularly orient toward exclusive and nonexclusive functions. That is what I propose to do here. The claim is straightforward, if perhaps not altogether obvious: As a textual, structural, and historical matter, some governmental functions strictly and exclusively appertain to a particular branch of government, and to the exercise of a single vested power. But many governmental functions are nonexclusive in the sense that they partake in multiple qualities—that is, some combination of legislative, executive, and judicial characteristics—simultaneously. The claim advanced here is that exclusive functions must be exercised exclusively by the correlative branch of government, according to the constitutional

executive branches" too, with the difference being merely the "structural 'baggage' that the exercise of the judicial and executive powers are required to carry." *Id.* Redish insists that none of this implies "a fungibility of executive and legislative power," but "merely underscores that the distinctions between branch powers will often turn not on the abstract nature of the substantive decision but rather on the surrounding political and structural context." *Id.* at 118–19. That sounds a lot like Merrill's minimal conception, by which the courts would only concern themselves with ensuring that one of the three branches is exercising governmental power. Merrill, *supra* note 2, at 228. In any event, and importantly for present purposes, Redish would eschew originalism in undertaking the analysis. REDISH, *supra*, at 126.

Most recently, Nikolas Bowie and Daphna Renan have argued for something like the minimal conception of the separation of powers, whereby the institutional arrangements between Congress and the Executive are left for political contestation. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2030–31 (2022). This argument is intriguing, but the authors fail to grapple with the problem that their argument would leave little difference between the American written constitutional system and the British unwritten constitution, notwithstanding the extensive discourse in the Founding era that the written constitution imposes limits on Congress's power to restructure the separation of powers. *See generally, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 259–62 (photo reprt. 1998) (1969) (contrasting the written constitution as a fundamental aspect of American political theory with Britain's embrace of parliamentary supremacy); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1528–30 (2021) (discussing the important and differing implications of America's notion of a written constitution as opposed to Britain's constitutional conception).

31. *See supra* note 16 and accompanying text (discussing the modern Supreme Court's willingness to embrace formalism).

strictures appertaining to that branch. Nonexclusive functions, however, are nonexclusive not only in that they partake in multiple qualities, but also in that such functions can therefore be exercised by different branches exercising different vested powers.

This approach, in other words, rejects the "exclusive-only" theory of the separation of powers that marks the writings of some formalist scholars and judges, but it also rejects the calls of some scholars to abandon the inquiry into the nature of power altogether, and rejects mere functionalism in determining the nature of governmental power and its focus on balance.[32] The claim instead is that by deploying standard formalist sources—text, structure, and history—it is possible to ascertain differences among exclusive functions that must be exercised exclusively by a particular branch exercising a single vested power, and nonexclusive functions that can be exercised by different branches wielding different vested powers.

Additionally, this approach is not functionalist: it is not concerned with finding balance among the branches, but rather with identifying exclusive and nonexclusive functions. It also rejects the proposition often associated with formalism that there are *only* three kinds of governmental functions—legislative, executive, and judicial—and that any function is one to the exclusion of others that must be exercised uniquely by one branch. Strictly speaking, this approach is formalist in *method*: it reasons from the basis of the Constitution's text, structure, and history to derive the most probable original meaning of the Constitution's structural provisions and the rules they create about the nature of governmental functions and how they must be exercised. Formalism does not compel three categories of power (or anything else); there could be six or seven formal categories. The conclusion here, however, is that formalism may lead to some results and categories that are often associated with functionalism.

---

32. Indeed, the three departments of government may be "co-equal," but that does not mean they are, or were ever intended to be, equal in power. *See generally* DAVID J. SIEMERS, THE MYTH OF COEQUAL BRANCHES: RESTORING THE CONSTITUTION'S SEPARATION OF FUNCTIONS 6 (2018) ("[T]here is a different and better way to conceive of interbranch relations that is starkly at odds with the 'myth of equality.'"). For this insight and citation, I am indebted to the political scientists Matthew Brogdon of the University of Texas at San Antonio and Benjamin Kleinerman of Baylor University.

This Article takes inspiration from an important antebellum federalism doctrine. In the antebellum era, the federal commerce power was widely understood to be *exclusive* to the federal government.[33] The state governments, however, often exercised their own police powers in ways that operated on objects of interstate commerce—for example, imposing quarantine restrictions on articles of commerce—and which Congress could negate through an exercise of its own power.[34] In *Gibbons v. Ogden*, Chief Justice Marshall explained, "All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."[35] He prefaced this by stating,

> So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted [the commerce power], but from some other [the police power], which remains with the State, and may be executed by the same means.[36]

"It is no objection to the existence of distinct, substantive powers," Justice Johnson explained in concurrence, "that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease."[37] This idea—that distinct governmental entities might have *exclusive powers*, but that those powers might be functionally overlapping—does not appear to have been applied systematically in the separation of powers arena.[38]

The implications of thinking through separation of powers law in these terms are numerous. There is significant conflation in the separation of powers cases, for example in *INS v. Chadha*,

---

33. As I have explained previously. Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 837–45 (2020) (analyzing Supreme Court cases from the 1800s, and arguing the Court understood the federal commerce power as exclusive because state regulations affecting interstate commerce were upheld only if the state acted through its police power).

34. *See id.*

35. 22 U.S. (9 Wheat.) 1, 204 (1824).

36. *Id.*

37. *Id.* at 235 (Johnson, J., concurring).

38. For an alternative identification of the importance of this idea in *Gibbons* to the ongoing separation of powers debates, see Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. (forthcoming 2023) (manuscript at 52 n.218), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247 [https://perma.cc/UM8G-BXD2].

between *powers* and *functions*.[39] Reorienting toward *exclusive* and *nonexclusive functions* provides tremendous analytical clarity. At a minimum, doing so is helpful for students of administrative law, which is why this approach runs through my new administrative law casebook.[40] It clarifies not only *Chadha*, but also provides students with a better framework for thinking about *Humphrey's Executor*;[41] it helps them understand why "legislative rules" are not necessarily the same thing as *the legislative power*;[42] and it even clarifies debates over judicial deference once it is recognized that, in such cases, agencies are often not interpreting law, but exercising a nonexclusive legislative and policymaking function of filling in interstitial legislative-like details.[43]

This approach does not merely clarify; new insights also emerge. For example, it suggests the possibility that Supreme Court appellate jurisdiction might apply when there has been an exercise of a judicial *function*, even if that function was not exercised by a court wielding judicial *power*.[44] And in the nondelegation cases and literature, both courts and scholars tend to assume that "legislative power" is the power to make the important policy decisions affecting private rights. Legislative power is much broader; if Congress cannot "delegate" a portion of that power it is because the definitions of executive and judicial power do not reach it.[45]

To be sure, prominent formalists have recognized, at least in passing, the existence of some nonexclusive functions.[46] Nev-

---

39. *See infra* Part I.

40. ILAN WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN INTEGRATED APPROACH (Foundation Press 2021).

41. *See infra* Part III.C.

42. *See infra* Part III.B.

43. *See infra* Part III.A.

44. *See infra* Part II.A.3.

45. *See infra* Part II.B.4.

46. Manning, for example, has noted that "deeply rooted constitutional understandings confirm that multiple branches can often bring about very nearly the same result, provided that they do so in a manner consistent with the operating procedures prescribed by the [Constitution]." Manning, *supra* note 12, at 2019. Calabresi has acknowledged that "[t]here are certain kinds of actions . . . which can be undertaken by the executive, but which can also be undertaken by Congress or by the Article III federal courts," namely certain kinds of regulations and the adjudication of public rights cases. Calabresi, *supra* note 4, at 1390 n.46. And Gary Lawson has written that "an activity is not exclusively judicial

ertheless, no formalist has theorized systematically about functionally overlapping government powers, applied the concept to several separation of powers and administrative law doctrines, or squared the existence of such power with originalist methodology. As Huq has written, "Overlap between branches . . . is conceptually possible. But it does not often play a motivating role in [formalist] theory."[47] And some formalists, notwithstanding the occasional passing recognition of some amount of overlapping powers, often lapse into the rigid, exclusive-functions-only version of the theory.[48] Certainly that is how functionalists tend to

---

merely because it is adjudicative." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246 (1994). Justice Gorsuch has stated, in the context of nondelegation, that "[w]hile the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch." Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

Justice Thomas, in a concurring opinion, has come closest to describing the approach presented here, explaining that claims against the government, which could historically be resolved in any of the three branches, did not fall within any branch's exclusive power. Thomas explained as follows:

> The allocation of powers in the Constitution is absolute, but it does not follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. Resolution of claims against the Government is the classic example. At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. Or Congress may resolve the claims itself, legislating by special Act. The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it. For example, although this Court has long recognized that it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself, there are certain core functions that require the exercise of legislative power and that only Congress can perform.

Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 69 (2015) (Thomas, J., concurring) (citations omitted).

47. Huq, *supra* note 3, at 1529.

48. *See, e.g.*, Calabresi, *supra* note 4, at 1390 ("For reasons I have explained elsewhere, the three powers of government described in the Vesting Clauses constitute a finite set of all the governmental powers that our Constitution sanctions. Thus, any governmental power exercised in our system must be either legislative or executive or judicial: the premises of the system do not allow for

understand formalism,[49] and some functionalists appear to believe that the very existence of overlapping powers refutes formalism.[50] A theory in which overlapping powers does play a motivating role goes a long way to resolving many existing doctrinal confusions; can be squared with originalism; and would lead to the conclusion that more administrative government might be constitutional than is traditionally suggested by formalist commentators.[51]

---

the conclusion that a power could be something other than one of these three (*or that it could be two of them at the same time*).") (emphasis added). More recently, he has written that "the President is knee-deep in the business of lawmaking" because "Presidents functionally make law when they issue executive orders, proclamations, or signing statements, and when their subordinates promulgate the many rules and regulations that fill the pages of the Federal Register." Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 538–39 (2012).

49. *See, e.g.*, Merrill, *supra* note 2 and accompanying text.

50. For example, Magill writes:

> Is the legislative veto the exercise of legislative power? Do administrative agencies improperly exercise judicial power when they adjudicate controversies? Would a statute that constrains prosecutorial discretion invade the executive power? None of these situations involves the uncontested core of the government functions. Yet, if one is committed to functional separation, these cases must be properly sorted into one category of power or another.

Magill, *supra* note 4, at 615. She adds, "Both creating and implementing the law can govern individuals' rights and obligations and thus that feature does not usefully distinguish legislative from executive power." *Id.* at 618. She continues: "Given that we now have no satisfactory definitions of the three functions of government—and little prospect of developing them—current approaches are misdirected." *Id.* at 625. Strauss has similarly asked, "The Department of Agriculture and the Securities and Exchange Commission both adopt rules, execute laws, and adjudicate cases, all pursuant to statutory authority. Why is that not the forbidden conjoining of powers?" Strauss, *supra* note 4, at 579. "If the constitutional scheme were to require locating these agencies in one or another part of government," he continues, "as more formalistic separation-of-powers opinions have sometimes hinted, which part would they be in?" *Id.* Thus, he argues, administrative agencies routinely "join[] judicial, legislative and executive functions," *id.* at 578, and so functionalists accept that for agencies "the same body often does exercise all three of the characteristic governmental powers," *id.* at 577.

51. Philip Hamburger, in a recent paper, articulates an approach almost identical to the one presented here. *See* Hamburger, *supra* note 38 (manuscript at 48–55). He states that the "overlap in authority explains much about the separation of powers that has seemed puzzling." *Id.* (manuscript at 50). Ham-

Part I describes the widespread confusion in the Supreme Court about the separation of powers and the nature of governmental power. This is necessary because only then will the explanatory power of the present framing become clear. Part II will begin to establish, on the basis of originalist sources and reasoning, the existence of exclusive but also functionally overlapping government powers. Part III will then apply this framework to existing debates and cases involving administrative law, including judicial deference to agency legal interpretations, the nature of legislative rules under the Administrative Procedure Act, and the existence of independent agencies. It will show how this framework clears up much conceptual confusion among both courts and scholars.

I. SEPARATION OF POWERS AT THE COURT

To see the value of the proposed reorientation, one must first have some grasp of the existing approaches to the separation of powers among both courts and scholars. The Introduction canvassed significant parts of the existing literature to demonstrate that a framework of exclusive and nonexclusive functions has largely gone unrecognized or undertheorized. This Part now analyzes a series of judicial opinions in which confusion over the nature of government power is evident and begins to show how a reorientation toward exclusive and nonexclusive functions would go a long way toward clarifying the confusion.

A. *INS v. CHADHA*

One of the key events in the evolution of these separation of powers debates is the Supreme Court's decision in *INS v.*

---

burger's paper helped clarify my own thinking, which has been reflected in revisions to this Article. There are, however, still differences between us, principally as to the scope of the exclusive functions of government and the extent of the nonexclusive functions. Hamburger also uses distinct language; he distinguishes between exclusive power and "nonexclusive *authority*," *id.* (manuscript at 49–50), but in my view, "function" or "activity" are better terms because authority implies the legitimate use of power, which raises different questions. I am indebted to Jud Campbell for suggesting this distinction to me. Additionally, Hamburger claims that if we distinguish exclusive and nonexclusive *powers*, then "the justices must confront the insuperable problem of how to draw a line between the exclusive and nonexclusive legislative powers." *Id.* (manuscript at 51). But in my view, this problem persists, for we must still find the line between exclusive and nonexclusive functions. That line is not obvious according to Hamburger's definitions of legislative and executive powers.

Chadha.[52] In both that case and the scholarly response to it, confusion about the nature of governmental power is evident. *Chadha* involved section 244 of the Immigration and Nationality Act, which authorized the Attorney General to suspend deportation proceedings for noncitizens who could show good moral character and that their deportation would result in extreme hardship.[53] The Attorney General, exercising his authority through an immigration judge, found that Jagdish Chadha met the requirements for suspension of deportation, and submitted a report of that suspension to Congress as required in that section's legislative veto provision.[54] That provision authorized the House of Representatives to negative the Attorney General's determination that deportation should be suspended.[55] Waiting until the last possible moment to act, the Judiciary Subcommittee on Immigration, Citizenship, and International Law; the full House Committee on the Judiciary; and then the full House of Representatives vetoed Chadha's suspension without discussion, solely on the subcommittee chairman's representations that Chadha and the other five noncitizens did not meet the statutory criteria for suspension of deportation.[56] When the immigration court reopened his case to implement the veto, Chadha moved to terminate the proceedings on the ground that section 244 was unconstitutional.[57]

The majority of the Supreme Court held that the House of Representative's action was legislative because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[58] Thus, the House could not constitutionally undertake that action without meeting the requirements of bicameralism and presentment in Article I, Sections 1 and 7 of the Constitution.[59] The House's

52. 462 U.S. 919 (1983). This and the next two paragraphs are adapted from one of my previous works. Wurman, *supra* note 23, at 384–85.

53. *Chadha*, 462 U.S. at 924.

54. *Id.* at 924–25.

55. *Id.* at 923, 925.

56. *Id.* at 926.

57. *Id.* at 928.

58. *Id.* at 952.

59. *Id.* at 954–57; U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a

attempt to veto Chadha's suspension was therefore unconstitutional.[60]

The exact same act, however, when done by the Attorney General, was assumed to be executive power, even though that act "had the purpose and effect of altering the legal rights, duties, and relations of . . . [primarily] Chadha."[61] "When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II," the Court mused.[62] The Court thus held that the Attorney General's underlying action was executive, stating, "When the Attorney General performs his duties pursuant to § 244, he does not exercise 'legislative' power. . . . [H]is administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7."[63]

To make matters more confusing still, Justice Powell would have held the House's action to be judicial. "When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country," he proposed, "it has assumed a judicial function."[64] "[T]he House's action appears clearly adjudicatory," he explained.[65] "The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria," and thus "undertook the type of decision that traditionally has been left to other branches," and particularly one "ordinarily entrusted to the federal courts."[66]

Powell argued that the majority's "presumption" that each branch is exercising its assigned power, and the fact that a legal status was altered, do "not conclude the inquiry."[67] "In determining whether one branch unconstitutionally has assumed a power central to another branch, the traditional characterization of the

---

Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it."). *See generally Chadha*, 462 U.S. at 946–51 (providing a historical analysis regarding the Framers' inclusion of the bicameralism and presentment clauses of the Constitution).

60. *Chadha*, 462 U.S. at 957–59.

61. *Id.* at 952.

62. *Id.* at 951–52.

63. *Id.* at 953 n.16.

64. *Id.* at 960 (Powell, J., concurring).

65. *Id.* at 964.

66. *Id.* at 964–65.

67. *Id.* at 964–65 n.7.

assumed power as legislative, executive, or judicial may provide some guidance."[68] But because "reasonable minds may disagree over the character of an act," he thought it more helpful to inquire "whether the act in question raises the dangers the Framers sought to avoid,"[69] namely, "that a legislature should not be able unilaterally to impose a substantial deprivation on one person."[70]

Justice White, in dissent, would have upheld the legislative veto in part because the Court's modern delegation precedents effectively authorize lawmaking by the executive branch,[71] thus suggesting "that Art. I does not require all action with the effect of legislation to be passed as a law."[72] "[B]y virtue of congressional delegation," White wrote, "legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation."[73] White argued that agencies routinely make "law," that is, "the substantive rules that regulate private conduct and direct the operation of government," and that "agency rulemaking is lawmaking in any functional or realistic sense of the term."[74]

Thus, to some Justices in *Chadha*, the act when done by the House was legislative, but the exact same act when done by the Attorney General was executive; for another the act was judicial; and for yet a third the act was legislative when done by either the House or the Attorney General.[75] No Justice raised the possibility that the act in question could look like legislative, executive, and judicial power because the act was in its nature *nonexclusive* and could in fact be constitutionally exercised by any of the three departments of government. If that is in fact the case, as the next Parts will argue, then the nonexclusive nature of the function would explain why different Justices saw the same act so differently.[76]

---

68. *Id.*

69. *Id.*

70. *Id.* at 962.

71. *Id.* at 984 (White, J., dissenting) ("The Court's holding today that all legislative-type action must be enacted through the law-making process ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups.").

72. *Id.* at 985.

73. *Id.*

74. *Id.* at 985–86.

75. *Id.* at 951–86.

76. Of course, that may not have mattered for the resolution of the case

To be more specific—and to prefigure Part III—it is likely that the decision whether to admit Chadha could be decided by Congress itself in the first instance (with presentment) because the right to immigrate was historically a public right[77] and any suit challenging one's immigration status required the waiver of sovereign immunity.[78] Only if such a decision were within Congress's *exclusively* legislative power, however, would it be odd to describe the same action when done by the Attorney General as executive. If it is a nonexclusive function—a power that could be done either by Congress or delegated to the Executive because it has both legislative and (once delegated) executive characteristics—then there is no need to "presume" it is legislative when done by Congress and executive when done by the Executive. It is simply a single function that either can exercise because it has sufficiently legislative and executive qualities.[79] As to White's observations, it is true that regulations resemble lawmaking—but that does not necessarily mean they fall exclusively within the legislative power. Whether they do or do not will depend on the scope of the nondelegation doctrine.[80] Finally, the adjudication of public rights is amenable to judicial or executive resolution,[81] hence why the House's action appeared judicial in nature to Justice Powell.

The scholarly response to *Chadha* has been largely to recapitulate the standard debate between formalists and functionalists. Functionalists, for their part, cite *Chadha* as "Exhibit A" that powers cannot be functionally distinguished. Magill argues that *Chadha* demonstrates that "[t]he sporadic judicial efforts to identify the differences among the governmental powers are

---

because no matter the power being exercised, it must still be exercised according to the strictures appertaining to each branch.

77. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 967–70 (1988).

78. *See infra* notes 141–48 and accompanying text.

79. To be sure, Congress has to make the decision to delegate in the first instance; that decision to make an initial delegation is an exclusively legislative power. *See infra* Part II.B.4. And once it has delegated that power, the delegation imbues the power with an executive quality, and Congress would need the President's agreement to undo the delegation. But it remains the case that either Congress (through bicameralism and presentment) or the President (through directory authority and removal) could exercise the power in question: deciding whether Chadha should be removed from the United States.

80. *See infra* Part II.

81. *See infra* Parts II.A.1, II.C.1.

nearly universally thought to be unhelpful,"[82] and claims that commentators have also been unable to "distinguish[] among the three powers of government."[83] Merrill uses *Chadha* as the prime example of the flaw in formalism's substantive assumption "that each function is uniquely assigned to one branch."[84] He goes on to propose that we could "break away from the shared preoccupation with the functional classification of government activities, and focus instead on the three branches of government as distinct organizations subject to specific constitutional limitations on how they exercise governmental authority"—his "minimal conception" of the separation of powers.[85] Additionally, Victoria Nourse has written that commentators have been "mystified by *Chadha* and its categories."[86]

Formalists, as noted, accept in passing that some governmental powers could overlap, but they have not theorized systematically about which powers can overlap and how the Constitution accounts for such powers.[87] Nor have they tried to explain the power at issue in *Chadha*, perhaps because, for a formalist, describing the nature of the power does not matter for the outcome in that case.[88] Until formalists develop a theory that can account for functionally overlapping powers and provide some method for distinguishing among those functions that are exclusive and those that overlap—and provide some method for classifying the function at issue in *Chadha*—formalism will always be vulnerable to the functionalist critique that it is impossible to differentiate among government functions outside the procedures used for those functions.

B. JUSTICE STEVENS: *BOWSHER* AND *WHITMAN*

The debate over the nature of governmental power has persisted since *Chadha*. Justice Stevens's two concurring opinions in *Bowsher v. Synar*[89] and *Whitman v. American Trucking*

82. Magill, *supra* note 4, at 612.

83. *Id.* at 613.

84. Merrill, *supra* note 2, at 233.

85. *Id.* at 235–36.

86. Victoria Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 858 (2004).

87. *See supra* notes 46–49 and accompanying text.

88. That is because if the act is legislative, it must go through bicameralism and presentment; if executive, it must be exercised by the executive department; and if judicial, it must be exercised by the courts.

89. 478 U.S. 714, 736–59 (1986) (Stevens, J., concurring).

Ass'ns[90] provide another prominent example. In the former case, Stevens observed that "the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government" because "governmental power cannot always be readily characterized with only one of those three labels."[91] "On the contrary," Stevens wrote, "our cases demonstrate" that "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."[92] Under the majority's analysis in that case, Stevens argued, "the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by the Congress."[93] In his view, however, the same function can "appropriately be labeled 'legislative,'" whether "performed by the Comptroller General or by an executive agency."[94] The problem in that case was that the power was not exercised by any of the constitutionally named branches.

In *Whitman*, Justice Stevens elaborated on his view. "The Court has two choices," he argued.[95] The Court could "frankly acknowledg[e] that the power delegated to the EPA is 'legislative,'" or it could "pretend" otherwise.[96] He thought "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.'"[97] In Stevens' view, "The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it."[98] If the EPA regulations there at issue "had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of 'legislative power,'" and thus "[t]he same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress."[99]

---

90. 531 U.S. 457, 487–90 (2001) (Stevens, J., concurring).
91. *Bowsher*, 478 U.S. at 749 (Stevens, J., concurring in the judgment).
92. *Id.*
93. *Id.* at 751.
94. *Id.* at 751–52.
95. 531 U.S. at 488 (Stevens, J., concurring in part).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 489.

Stevens missed another possibility: that the regulation at issue was an exercise of a nonexclusive function with both legislative and executive characteristics. Congress could therefore exercise that function through the use of its legislative power, and the Executive could exercise the same function through the use of its executive power. Whether the function was instead exclusively legislative in nature such that it could *only* be accomplished by an exercise of Congress's legislative power will depend on the scope of the nondelegation doctrine and the contours of that exclusive category. But it is at least possible that both Congress and the Executive can undertake the exact same action because that action is not exclusively legislative and not exclusively executive in nature. We need not pretend that the exact same function, like a chameleon, shifts its nature depending on the branch exercising that power, but neither do we have to believe that both Congress and the EPA would be exercising an exclusively legislative function. It is possible, at least, that they could both undertake the same action because it is nonexclusive.

C. JUSTICES THOMAS, ROBERTS, AND SCALIA

This possibility is ignored by conservative Justices in more recent cases. In *Michigan v. EPA*,[100] for example, Justice Thomas questioned judicial deference to agency legal interpretations[101] on the ground that such deference either violated Article III by giving judicial power to the Executive, or Article I by giving legislative power to the Executive. Judicial deference "wrests from Courts the ultimate interpretative authority to 'say what the law is,'" and thus transfers judicial power to the Executive.[102] "Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies."[103] Thomas recognizes that agencies are often not actually interpreting statutes at all, but are rather engaged in the "formulation of policy."[104] This fact then "runs headlong into the teeth of" Article I's Vesting Clause, "[f]or if we give the 'force of law' to agency pronouncements on matters of private conduct as to which Congress did not actually have an

100. 576 U.S. 743 (2015).
101. *Id.* at 761 (Thomas, J., concurring).
102. *Id.* at 761.
103. *Id.* at 762.
104. *Id.*

intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power."[105]

In this opinion, Justice Thomas speaks relatively carefully. Because his view is that the power to make binding rules on matters of "private conduct" falls within the category of legislative power that Congress cannot delegate,[106] he is surely correct that if agencies are exercising that power under the guise of "interpreting" statutes, then the agency is impermissibly exercising legislative power. But even assuming that view of nondelegation to be correct, agencies might fill gaps that do not affect private conduct. Would "deference" be appropriate in those cases? Thomas also does not address the possibility that courts need not have final say over "what the law is" in all cases, particularly in public rights cases.[107] Thus, whether judicial deference is appropriate or unconstitutional may very well depend on whether the agency is exercising an *exclusively* judicial or legislative function or is rather exercising a nonexclusive function that different branches could exercise through their respective powers.

A final illustration of the importance of this reframing is the exchange between Chief Justice Roberts and Justice Scalia in *City of Arlington v. FCC*.[108] The case also involved judicial deference, and specifically whether such deference ought to be afforded to an agency's determination of its own jurisdiction.[109] "Although modern administrative agencies fit most comfortably within the Executive Branch," Chief Justice Roberts stated somewhat orthogonally to the matter at hand, "as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."[110] "The accumulation of these powers in the same hands is not an occasional or isolated exception to

105. *Id.* (cleaned up).

106. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S 43, 70 (2015) (Thomas, J., concurring in the judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct.").

107. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring).

108. 569 U.S. 290.

109. *Id.* at 293.

110. *Id.* at 312–13 (Roberts, C.J., dissenting).

the constitutional plan," he added, "it is a central feature of modern American government."[111]

Justice Scalia, writing for the majority, responded that "the dissent overstates when it claims that agencies exercise 'legislative power' and 'judicial power,'" because "[t]he former is vested exclusively in Congress," and "the latter in the 'one supreme Court' and 'such inferior Courts as the Congress may from time to time ordain and establish.'"[112] Agencies do "make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic," Scalia acknowledged.[113] "These activities take 'legislative' and 'judicial' forms," he said, "but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power.'"[114]

This exchange illustrates rather starkly the confusion over the nature of governmental power. What Chief Justice Roberts described as exercises of legislative and judicial power, Justice Scalia recognized as merely executive power. But Scalia also recognized that executive power can sometimes look legislative and judicial because it takes legislative or judicial "forms." Agencies never exercise legislative and judicial *power*, Scalia suggested, or at least, to the extent they do, that would be unconstitutional. Both Chief Justice Roberts and Justice Scalia have identified features of modern administrative government, and although their claims appear opposed to one another, they can both be true. Administrative action often takes on legislative or judicial "forms" because they could *also* be done by the legislature or the courts. The agencies, that is, might be exercising nonexclusive functions. But it also could be the case that at least some of the time, agencies are improperly exercising functions that exclusively belong to other departments. Whether they are in fact doing so will depend on the nature and definitions of the powers vested by the Constitution in the three branches, the scope of the exclusive functions that can only be assigned to one of the three branches, and the nonexclusive functions that can be exercised by more than one.

111. *Id.* at 313.
112. *Id.* at 305 n.4 (internal citations omitted).
113. *Id.*
114. *Id.*

II. EXCLUSIVE POWERS AND NONEXCLUSIVE FUNCTIONS

The previous Parts demonstrated the confusion in the courts and the literature over the nature of governmental power. This Part begins the reorientation toward exclusive and nonexclusive functions—in other words, toward functionally overlapping government powers. Much of what this Part argues is not novel, but rather brings together different areas of scholarship to create new insights. For example, the federal courts literature on public rights demonstrates that the idea of a nonexclusive judicial function that can, but need not, be accomplished by an exercise of a court's judicial power is consistent with originalist sources.[115] And some work on nondelegation (including my own) has shown that there are nonexclusive legislative functions that Congress can exercise itself through its legislative power, but that Congress can also delegate to other branches to exercise through their respective powers.[116] The central objective of this Part is to bring together these areas of scholarship, flesh them out, and synthesize them into a theory of the separation of powers that has been largely missed by the existing literature.

In so doing, however, novel insights emerge. This framing, for example, may shed light on James Madison's contested suggestion to insulate the Comptroller of the Treasury from the President, which has perplexed scholars on both sides of the unitary executive debate.[117] The Comptroller should perhaps be insulated from presidential control, Madison argued, because his

115. *Infra* Part II.A.

116. *See, e.g.*, Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689 (2020).

117. *See, e.g.*, Brief of Harold Bruff et al. as Amici Curiae at 14–15, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7) (relying on Comptroller episode as evidence that early Congresses treated financial regulators differently from other executive officers); Jonathan L. Entin, *The Removal Power and the Federal Deficit*, 75 KY. L.J. 699, 717 n.75 (1987) (noting that Madison's suggestion, in any event, did not obtain approval from a majority of the House); Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. LEGIS. 219, 224–25 (2008) (claiming that "[a]s a result of this debate [over the Comptroller] and others, Congress created a number of officers operating independently from the President so long as they were faithfully executing the laws."); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1285 (2006) (noting that, although Madison withdrew his proposal, it still indicated that some officers "had independent, quasi-judicial authority"); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and*

duties were "not purely of an executive nature," but rather "they partake of a judiciary quality as well as executive."[118] The reorientation to nonexclusive functions also allows us to make more sense of the nature of military courts and can potentially answer whether Congress can provide for direct appellate review of those courts in the Supreme Court.[119] And it clarifies the question that nondelegation scholars should be asking.[120]

Section II.A begins with judicial power and judicial functions because the concept of nonexclusive judicial functions should be the least controversial given the apparent acceptance of such an idea in the federal courts literature. This Section also analyzes Madison's proposal for the Comptroller, as well as potential implications for the question whether the Supreme Court can hear a case directly from the military courts. Section II.B pivots to legislative power and legislative functions and demonstrates that the concept of nonexclusive legislative functions is also consistent with originalist sources. Section II.C then turns to executive power and specifically shows that the administering of public rights was sometimes assigned to courts or judges in the Founding era, suggesting yet another category of nonexclusive function.

Importantly, the scope of the exclusive categories will be contested. Not everyone agrees on the scope of the public rights doctrine, nor does everyone agree on the scope of the nondelegation doctrine (that is, what falls within the exclusively legislative category that only Congress can exercise). Thus, the contours of the exclusive and nonexclusive categories will depend on one's views of these various doctrines. The point is only to establish that both exclusive and nonexclusive functions are conceptually possible, consistent with the originalist Constitution, and provide significant analytical clarity.

Demise of the Reagan Administration's Theory of the Unitary Executive, 57 GEO. WASH. L. REV. 627, 655 (1989) (arguing that, in *Marbury v. Madison*, the "Supreme Court confirmed distinctions like Madison's [respecting the Comptroller] as a matter of fundamental constitutional law" because Chief Justice Marshall "sought to emphasize the importance of the principle that a quasi-judicial officer" with a fixed term could not be removed at will).

118. 1 ANNALS OF CONG. 611 (1789) (Joseph Gales ed., 1834).

119. *Infra* Part II.A.3.

120. *Infra* Part II.B.4.

A. JUDICIAL POWER

Article III of the Constitution provides 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," whose judges enjoy good-behavior tenure and salary protections.[121] Further, the judicial power "shall extend" to, among other cases and controversies, "all Cases . . . arising under . . . the Laws of the United States."[122] One puzzle presented by these provisions is why certain kinds of cases that appear to arise under the laws of the United States—in particular, claims against the government—need not in fact be heard by courts whose judges have lifetime tenure and salary protections, in apparent conflict with Article III's plain text.[123] For purposes of separation of powers law, we are (for now) less interested in the exercise of the federal judicial power by other judicial bodies, such as state courts or territorial courts, who themselves exercise judicial power.[124] We are interested rather in whether and why the Executive can adjudicate certain kinds of cases that otherwise appear to arise under federal law.

As this Section shall explain, following in the footsteps of other scholars of federal jurisdiction, the answer is likely that the judicial power is *exclusive* over the divesting of private rights—that is, matters in which the state officially declares that a citizen's rights to life, liberty, and property have in some manner been forfeited.[125] Matters of "public right," however, may be resolved either by the judiciary, or by the Executive (and even by Congress itself). The function of resolving such matters is therefore "nonexclusive" in that it has legislative, executive, and judicial characteristics all at once. Subsection II.A.1 briefly describes the public rights doctrine as explicated by scholars of federal jurisdiction and, importantly, why that doctrine is consistent with the text of Article III under an originalist methodology. Subsection II.A.2 then applies the insight to the brief debate in the First Congress over whether the Comptroller of the Treasury could be insulated from presidential control.

---

121. U.S. CONST. art. III, § 1.

122. *Id.* § 2.

123. *Id.*

124. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1523–40 (2020).

125. I am indebted to Adam Crews for this formulation of the exclusive judicial category.

Subsection II.A.3 then suggests there may be implications for whether the Supreme Court can hear a direct appeal from military courts established by Congress.[126]

1. Public Rights

As others have argued, the core of the judicial power is to establish the scope of a subject's rights to life, liberty, and property under existing law, and lawfully to divest subjects of these rights.[127] That is, when a dispute involves a subject's private rights, whether in a case between two private citizens or between the citizen and the government, the definitive resolution of such matters rests exclusively with the judicial power. Such matters can never[128] be resolved by the executive branch (or by the legislature). But when a citizen is seeking something *from* the government—such as a welfare benefit, a patent, or a public land grant—the matter involves not private rights that existed in the state of nature, but rather "public rights" that the government may or may not afford to its citizens based on its particular policy.

Caleb Nelson has described the distinction as follows. He explains that in the antebellum period, "core private rights" were "legal entitlements that belonged to discrete individuals (rather than the public as a whole) and that were considered 'rights'" rather than mere "privileges."[129] In contrast, public rights belonged to the people as a whole, and typically included "proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury" and collective rights such as the "rights to sail on public waters or to use public roads."[130] Nelson further distinguishes

126. Which was at issue recently in *Ortiz v. United States*, 422 U.S. 891 (2018).

127. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Baude, *supra* note 124; *see also, e.g.*, N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) ("Private-rights disputes . . . lie at the core of the historically recognized judicial power."); *id.* at 90 (Rehnquist, J., concurring in the judgment) (noting that "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" are within the core of the judicial power).

128. *But see infra* note 136 (detailing exceptions).

129. Nelson, *supra* note 127, at 565.

130. *Id.* at 566. He also includes the "less tangible rights to compliance with the laws established by public authority 'for the government and tranquillity of the whole.'" *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *7).

both of these from "privileges" or "franchises" which "could operate just like private rights,"[131] but which "originated with the state rather than the individual."[132] Importantly, certain public rights and privileges could *become* core private rights, as when a public land grant *vested* in a private individual.[133]

Courts have long held that the federal judicial power need not reach matters of public right. In the most famous dictum on the question, the Supreme Court held:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there 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.[134]

The Court in *Murray's Lessee* identified three categories of power: exclusively judicial functions, which only the courts can exercise through their judicial power; nonjudicial functions, which no court can exercise; and nonexclusive judicial functions that are amenable to judicial resolution and that Congress may or may not assign to the courts as it sees fit.[135] The final determination of matters of private right falls within the first cate-

131. *Id.* at 567.

132. *Id.* at 568 (quoting Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1022 (2006)).

133. *Id.* at 578.

134. Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. (18 How.) 272, 284 (1855).

135. Modern doctrine tracks this distinction, at least in principle. *See* Stern v. Marshall, 564 U.S. 462, 484 (2011) (distinguishing between bankruptcy claims upon which the non-Article III bankruptcy court may enter final judgment, and a common-law counterclaim involving a private right, which must be adjudicated by an Article III court); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70–72 (1982) (similarly distinguishing public rights and "the adjudication of state-created private rights" in bankruptcy cases).

gory, and the adjudication of public rights cases in the last category.[136]

136. There are, however, historical exceptions. Military tribunals constitute one example. *See infra* Part II.A.3. The Executive also takes actions that bear on private rights where there will be no appeal or remedy for the destruction of such rights. Policing provides the quintessential example. The Executive *does* often deprive a person of liberty or property—and sometimes even life—by engaging in searches and seizures. If a warrant issues, then there is some judicial involvement to be sure; but often the Executive undertakes such actions without a warrant. I am inclined to agree with William Baude that these examples are of "a temporary deprivation antecedent to judicial review," and that "an immediate but brief deprivation of liberty or property is permissible when judicial adjudication is soon to follow." Baude, *supra* note 124, at 1553. Having said that, even some of these private rights cases might never be adjudicated, for example if the political question doctrine applies. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (refusing to decide a trespass claim because the question depended on which of two competing governments was the legitimate government of Rhode Island, a question committed to the political branches of government).

Another related exception may be taxation, which obviously involves a core private right. In *Murray's Lessee*—the key case inaugurating this distinction as a matter of judicial doctrine—the Supreme Court noted that "few governments" can or do "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," and that "[i]mperative necessity has forced a distinction between such claims and all others." *Murray's Lessee*, 59 U.S. (18 How.) at 282. But even here, it should be noted, judicial review may be required after the fact. Baude, *supra* note 124, at 1553 (citing James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV L. REV. 643, 736 n.433 (2004); Nelson, *supra* note 127, at 589 n.109). The "public right" here is the right of the government to demand payment of taxes up front; the judicial challenge must come later. *See also* James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 539 (2021) ("The public right in question" in *Murray's Lessee* "encompassed only the issue of priority; it did not extend to the final determination of any disputed amounts between the government and its debtor.").

Murray's Lessee also labeled "private land claims" of foreigners in ceded territory as matters of "public right," which has led some scholars to question the public/private dichotomy. *See* Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of Private Land Claims*, 74 STAN. L. REV. 277, 278 (2022) ("The history does not offer a new bright-line test to distinguish public from private rights."). However, the distinction Ablavsky draws between titles that had been perfected under the prior regimes, and those that had not been perfected, tracks the dichotomy exactly. As Ablavsky writes with respect to imperfect titles, because Congress was now the new sovereign, it "had full discretion to determine when, and how, these rights could become complete titles to land." *Id.* at 316. "[U]ntil these rights had been perfected, the formal legal title *remained in the United States* by virtue of the cession from the prior sovereigns." *Id.* (emphasis added). Thus, it was in the public domain and a public right—

This treatment of public rights cases may seem atextual and unoriginalist—the judicial power *shall* extend to *all* cases arising under the laws of the United States—but it is not, for two reasons. First, we must understand why the judicial power *can* reach such matters. Whether it can or cannot depends on what it means to possess judicial power. If judicial power means definitively resolving controversies between adversarial parties under the law as defined and which the parties have presented to the tribunal for such final resolution, then surely the judicial power *can* reach such cases if, for example, Congress assigns to courts the resolution of those claims without a revisionary power in any executive officer.

But the courts need not resolve such matters if they can *also* be resolved through an exercise of some other power—either legislative power or executive power. Whether those powers reach such matters depends on the definitions of *those* powers. And as Gary Lawson has written, "Much adjudicative activity by executive officials—such as granting or denying benefits under entitlement statutes—is *execution* of the laws by any rational standard, though it also fits comfortably within the concept of the judicial power if conducted by judicial officers."[137] He goes on to say that "[t]his overlap between the executive and judicial functions is not surprising; under many pre-American conceptions of separation of powers, the judicial power was treated as an aspect of the executive power."[138]

---

regardless of whether imperfect titles could be considered "vested" and the right to such land determined by the courts when between two private claimants. *See id.* at 307, 316, 325. So long as the "formal legal title" remained in the United States, it was in the United States' discretion what to do with the land. *Id.* at 316.

Bankruptcy may be yet another exception. The Supreme Court has assumed that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right.'" *N. Pipeline*, 458 U.S. at 71. It would have to be if such claims could be adjudicated by non-Article III courts. But even debtor-creditor relations would appear to be private rights matters. A full discussion of these potential exceptions—taxation, bankruptcy—would take us far afield. For present purposes it is sufficient to notice that a distinction between exclusive and nonexclusive judicial power is widely accepted, even if the exact boundary between the two is disputed.

137. Lawson, *supra* note 46, at 1246.

138. *Id.* Lawson's discussion echoes the statements made by members of the First Congress when debating Madison's proposal to insulate the Comptroller of the Treasury from presidential control. *See infra* Part II.A.2. Madison argued

A reasonable definition of legislative power would allow it to reach public rights cases. The most expansive definition of legislative power is the power to alter legal relations—that is, altering the legal rights and obligations of both public and private actors.[139] Distributing public benefits—granting a patent, or a slice of public land—alters legal relations by creating new legal rights in the recipient, and not by adjudicating any other existing rights. Thus, Congress can exercise its legislative power by assigning and distributing such benefits directly, or by authorizing the executive or judicial departments to do so.

The reason courts can therefore resolve adjudicatory cases involving either private or public rights is because the judicial power reaches both types of cases. The reason why *only* the courts can resolve one set of these cases—private rights cases—is because the definitions of legislative and executive power simply do not extend to such cases. Legislative power is the power to alter legal rights and relations prospectively, not the power to adjudicate existing rights. And executive power (more anon) is the power to execute the will, or policy choices, of the lawmaker and to administer the resources of the government; and because the lawmaker cannot adjudicate existing rights, neither can the Executive in carrying into execution the lawmaker's will. That leaves only the judicial power available definitively to resolve matters of private right under the existing laws and to divest individuals of such rights. Of course, these terms do not define themselves; we can only know that these other two powers do not reach such matters based on the political theory of the Founders who deployed such terms and the historical uses of those terms.[140]

---

that the Comptroller was a partly judicial office; Representative Sedgwick responded that the office bore "a strong affinity" to the executive branch because the Comptroller was "to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for delinquencies; he is to preserve the public accounts, to countersign warrants, and to report to the Secretary." 1 ANNALS OF CONG. 613 (1789) (Joseph Gales ed., 1834). To be sure, Sedgwick is not here referring specifically to the adjudication of claims subsisting between the government and its citizens.

139. As noted later, it is important to see that the legislative power is not merely the power to prescribe rules of conduct governing private rights; it very much reaches governmental actors too.

140. Put another way, determining the kinds of cases to which the judicial power must extend because the other powers cannot reach them is an empirical and historical inquiry about the meaning and reach of the three respective powers. And as Nelson has explained, to the Founding generation, the nature of the

The second reason why it is not atextual to exclude public rights cases from the judicial power, even though such matters arise under the laws of the United States, has to do with sovereign immunity.[141] Because public rights and privileges are created by government, sovereign immunity protects the government from suit without its consent when a private citizen complains that such rights have been wrongfully withheld.[142] And if sovereign immunity would bar a suit in the judicial courts, then this greater power to deny consent to suit surely includes the lesser power to an executive-branch adjudication, or such an adjudication with limited Article III appellate review.[143] Sovereign immunity does not apply, however, in matters involving private rights. After all, in a suit between two private parties to adjudicate their respective rights, the government is not involved as a party. And where the government seeks to deprive a person of life, liberty, or property, whether in a criminal or civil proceeding, the government itself has consented to the suit as a plaintiff.

---

right at stake determined whether it *had to be* subject to the judicial power. As he argues, core private rights to life, liberty, and property are "associated" in the "Lockean tradition . . . with the natural rights that individuals would enjoy even in the absence of political society." Nelson, *supra* note 127, at 567. Public rights and privileges, on the other hand, only exist in political society and by the grace of the government. That was an important difference: the Founding generation believed that judicial power was *necessary* to resolve matters involving the former type of right, but not the latter. *Id.* at 572 ("The administration of core private rights was thought to involve different political considerations than the administration of public rights, and the constitutional separation of powers was thought to reflect those differences."); *id.* at 569 (examining antebellum sources to elucidate the meaning of "the judicial power" and how it is necessary for the adjudication of private rights).

141. For purposes of the present argument, I assume that the Constitution did not abrogate the sovereign immunity that states (or the federal government) traditionally enjoyed. On this point I find Brad Clark's work particularly persuasive. *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010).

142. Nelson, *supra* note 127, at 582 (noting that with respect to claims against the government, "Congress could waive the government's sovereign immunity and provide for judicial resolution of such claims," but "it could also handle the claims entirely by itself or through executive agencies acting pursuant to congressional delegation"); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 963 (1997) ("In its broadest formulation, sovereign immunity purports to bar all unconsented suits against the government itself or its officers, agencies, or instrumentalities . . . .").

143. Nelson, *supra* note 127, at 582.

The textual connection has been explained by Nelson in other writing. The judicial power extends only to certain "cases" and "controversies."[144] To be either, one needs a proper plaintiff and defendant. But in matters involving public rights, there would be no way for a defendant to haul the government into court unless the government had consented to suit. Sovereign immunity thus operated as a kind of doctrine of personal jurisdiction.[145] If there were no waiver, there was no plaintiff; if there was no plaintiff, there was no "case" within the meaning of Article III.[146]

This Subsection has shown that nonexclusive functions that can be accomplished by different branches exercising their different powers are consistent with an originalist framework. In particular, claims against the government are amenable to judicial resolution and can be assigned to the courts, or they can be assigned to the Executive. And Congress itself can also act by a private bill waiving sovereign immunity and granting a public right or privilege to a particular individual, which prospectively alters (by expanding) that individual's legal rights. Thus, as Justice Thomas has correctly observed, "[r]esolution of claims against the Government is the classic" illustration that "[c]ertain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution."[147] He explains,

> At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. Or Congress may resolve the claims itself, legislating by special Act. The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it.[148]

Justice Thomas's analysis is consistent with originalist methodology. The question then becomes, if this category of nonexclusive function is consistent with the original Constitution, then might there be others? Sections II.B and C turn to that question. But first, the next Subsections address two additional

---

144. U.S. CONST. art. III, § 2.

145. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002).

146. *Id.*

147. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 69 (2015) (Thomas, J., concurring in the judgment).

148. *Id.* (cleaned up).

issues related to judicial power and nonexclusive judicial functions.

2. Madison's Comptroller

In May of 1789, the House of Representatives considered the creation of a Treasury Department.[149] In addition to creating the principal officer of the department, the statute created an Auditor, a Register, a Treasurer, and a Comptroller.[150] The Comptroller's duties were "to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register," and "to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law."[151] He was to "provide for the regular and punctual payment of all monies which may be collected," and was in charge of directing "prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States."[152]

On June 29, Madison argued that the House should make some "provision respecting the tenure by which the Comptroller is to hold his office."[153] For context, the House had just resolved that the principal Secretaries of the Departments of Foreign Affairs, War, and Treasury should all be removable by the President, at least arguably because the Constitution required that the President have an unrestricted removal power over executive officers.[154] According to the Reporter, Madison argued as follows with respect to the Comptroller:

> It will be necessary, said he, to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its

149. *E.g.*, 1 ANNALS OF CONG. 384 (1789) (Joseph Gales ed., 1834).

150. An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).

151. *Id.* § 3.

152. *Id.*

153. 1 ANNALS OF CONG. 611 (1789) (Joseph Gales ed., 1834).

154. Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 140–42 (2020) [hereinafter Wurman, *Prerogative*] (describing Madison's and Ames's arguments); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 176–78 (describing the ultimate vote taken on the matter). Some scholars have questioned whether the decision was made on constitutional grounds. *See, e.g.*, Myers v. United States, 272 U.S. 52, 285–86 n.75 (1926) (Brandeis, J., dissenting); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 362–63 (1927); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 40–41 (1997).

> properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter [sic] obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government. . . .
>
> Whatever, Mr. Chairman, may be my opinion with respect to the tenure by which an Executive officer may hold his office according to the meaning of the Constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed.[155]

Madison's proposal was something of a puzzle. He proposed that "the Comptroller should hold his office during ——— years, unless sooner removed by the President."[156] In other words, although Madison seemed to desire some independence from the Executive, his proposal would have made the Comptroller nevertheless responsible to the President. Madison's proposal thus created some confusion. Representative Sedgwick "conceived that . . . all officers concerned in Executive business should depend upon the will of the President for their continuance in office."[157] Representative Benson agreed that the tenure of offices was "well fixed now," namely "[t]he judges hold theirs during good behaviour, as established by the Constitution; all others, during pleasure."[158] He worried "that the present motion would lead to a different construction from the one lately adopted."[159]

Yet Madison does not appear to have challenged the prior determination of the House that executive officials should be removable by the President. His proposal, after all, stated that the officer could be removed by the President prior to the expiration of the term.[160] The confusion appears to have resulted from the inclusion of a term of years. As Jane Manners and Lev Menand have recently shown, the Framers understood a term of years to

---

155. 1 ANNALS OF CONG. 611–12 (1789) (Joseph Gales ed., 1834). Based on the context, it appears that the Reporter mistakenly wrote—or Madison mistakenly said—"latter" when he meant "former."

156. *Id.* at 612.

157. *Id.* at 613.

158. *Id.* at 614.

159. *Id.*

160. *Id.* at 612.

convey good-behavior tenure for that period of time.[161] Representative Stone appears to have understood Madison to be proposing a term of years where the officer would be automatically reappointed unless impeached.[162] This would create a form of good-behavior tenure, which Stone thought should apply only to judges, while all other officers "hold their offices during pleasure."[163]

Madison eventually corrected the record, noting that he meant to make the officer reappointable, not automatically reappointed.[164] Representative Sedgwick then thought that, "so far from making [the Comptroller] independent, as a judge ought to be, it subjected him to more subordination than any other officer"—because the Comptroller would be dependent on both the President and the Senate that would have to reappoint him.[165] That does appear to be the thrust of what Madison had intended. By making the term expire, the officer would be responsible both to the President and to Congress (and to the House for his salary).[166] Interestingly, because Madison thought this would make the officer "thoroughly dependent," he thought it was "necessary to secure his impartiality, with respect to the individual."[167] He proposed the solution of giving any aggrieved person "a right to

161. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 25 (2021) ("At the time of the Founding and for at least several decades thereafter, [Chief Justice] Marshall's understanding—that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal—was uncontroversial and widely accepted.").

162. 1 ANNALS OF CONG. 613 (1789) (Joseph Gales ed., 1834) ("He did not know whether the office should be held during good behaviour, as the gentleman [Madison] proposed; for if it was intended to be held during a term of years, and then the officer to be reappointed, if he had not been convicted on impeachment, it would be tantamount to holding it during all the time he behaved well.").

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 612 ("[B]y this means the Comptroller would be dependent upon the President, because he can be removed by him; he will be dependent upon the Senate, because they must consent to his election for every term of years; and he will be dependent upon this House, through the means of impeachment and the power we shall reserve over his salary; by which means we shall effectually secure the dependence of this officer upon the government.").

167. *Id.*

petition the Supreme Court for redress, and they should be empowered to do right therein," which "will enable the individual to carry his claim before an independent tribunal."[168]

Thus far there is certainly nothing inconsistent with the so-called "decision of 1789," that is, the prior determination that the President may be constitutionally invested with a removal power.[169] What is odd is that Madison went on to repeat that he did think the Comptroller should be independent of the President. Madison responded to the criticisms of his proposal as follows:

> Several arguments were adduced to show the Executive Magistrate had Constitutionally a right to remove subordinate officers at pleasure. Among others it was urged, with some force, that these officers were merely to assist him in the performance of duties, which, from the nature of man, he could not execute without them, although he had an unquestionable right to do them if he were able; but I question very much whether he can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States.
>
> The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government.[170]

In any event, Madison withdrew his proposal the next day.[171] This sequence of events has perplexed at least some courts and scholars in the unitary executive debate.[172] Some have argued that Madison's proposal suggests that Congress has discretion to structure removal for at least some kind of officers, depending on how closely they relate to the core of executive prerogatives.[173] Thus, the D.C. Circuit held in a case—later abrogated by the Supreme Court—that Congress can structure the

---

168. *Id.*

169. See *infra* notes 170–82 and accompanying text for more on the removal power.

170. 1 ANNALS OF CONG. 614 (1789) (Joseph Gales ed., 1834) (paragraph break added).

171. *Id.* at 615.

172. *See* Rosenberg, *supra* note 117, at 653–56 (discussing Supreme Court opinions following Madison's distinction of purely executive and quasi-judicial officers).

173. Corwin, *supra* note 154, at 366–69 (noting Madison's view that Comptroller was a "creature of the legislature").

removal of financial officers.[174] Numerous scholars argued for that position in briefing before the Supreme Court.[175]

A close read of the debate suggests that the matter may have had more to do with nonexclusive functions and, in particular, nonexclusive judicial functions. Importantly, the issue was *not* about restricting the President's removal power; it was rather about whether limiting the tenure of an executive officer to a term of years, *even if* removable by the President, might have been unconstitutional by making the officer too responsible to the Congress that would have to reappoint him. This is exactly what Sedgwick[176] and Benson appear to have thought, and that makes some sense: Suppose Congress established a term of a single year for all principal officers "unless sooner removed by the President." Although the President could remove them, Congress *also* would have had the ability to remove them by refusing to reappoint them. Benson thus thought that limiting the tenure in this manner "might overthrow the Executive power,"[177] not by *limiting* the President's removal power, but rather by *interfering* with it.

Madison responded in two ways. On the one hand, he argued that if Congress had the power to limit salaries and to establish offices in the first place, then "it can never be said that, by limiting the tenure of an office, we devise schemes for the overthrow of the Executive department."[178] On the other hand, he "question[ed] very much whether [the President] can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States."[179]

---

174. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 91 (D.C. Cir. 2018) (using Madison's suggestion for the proposition that officers related to finance can be insulated), *abrogated by* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (declining to extend congressional limits on presidential removal power beyond the exceptions in *Humphrey's Executor* and *Morrison v. Olson*).

175. Brief of Harold Bruff et al., *supra* note 117, at 18 ("In short, that the United States' financial institutions and regulators would be insulated from direct presidential control seems to have been accepted by the nation's founders and early political figures.").

176. 1 ANNALS OF CONG. 613 (1789) (Joseph Gales ed., 1834) ("[S]o far from making [the Comptroller] independent, as a judge ought to be, [Madison's proposal] subjected him to more subordination than any other officer.").

177. *Id.* at 614.

178. *Id.*

179. *Id.*

It is possible to understand Madison as thus proposing arguments in the alternative: that limiting the tenure of offices (but not restricting the President's removal power) was constitutional generally; and, even if Congress could not restrict the tenure of purely executive officers because doing so would make the officer too responsible to Congress, Congress could nevertheless restrict the tenure of an office that is not purely executive or judicial, but that "partakes of each" characteristic. The aim of restricting the tenure would be to lessen the President's control over the officer and ensure that the officer is responsive to the Congress that will reappoint him—and to the courts that would review his decisions independently.

One could have taken the point even further than Madison did. With respect to the adjudicatory component of the Comptroller's duties, Congress could have assigned such duties to the courts altogether. The President then would not have had any control over such matters. If that were the case, then arguably the President should have no interference in such matters, which is the strongest version of Madison's argument; he could have even proposed good-behavior tenure for such an officer, at least one who had no other executive duties.[180] But Congress could have done so only if an appeal of the decision was to be had in the courts (whose review would, presumably, be de novo), as Madison also seemed to envision.[181] This possibility is intriguing, but its constitutionality would still not be entirely clear;

180. Representative Sedgwick argued that the officer was more executive than judicial. He stated that the office bore "a strong affinity" to the executive branch because the Comptroller was "to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for delinquencies; he is to preserve the public accounts, to countersign warrants, and to report to the Secretary." *Id.* at 613.

181. One might counter this argument, as David Currie did, with the suggestion that "[i]t was by no means clear that the Comptroller's function was judicial," because "until the Treasury had rejected the claim, it was hard to find the adverse parties who characterized the ordinary judicial proceeding." CURRIE, *supra* note 154, at 41 n.245. But as Aditya Bamzai has pointed out, the Comptroller did act upon adverse parties in reviewing the decisions of the Auditor. Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1327–34 (2019). The statute provided merely that it shall be the Auditor's duty to "receive all public accounts" and "certify the balance," and that anyone "dissatisfied" with such an audit may "appeal" to the Comptroller. An Act to Establish the Treasury Department, ch. 12, § 5, 1 Stat. 65, 66–67 (1789). Bamzai explains that this was similar to the Comptroller's duties under the Confederation Congress, which authorized any person "aggrieved by the judgment of

as noted, Congress can assign nonexclusive power to more than one branch, but that power must still be exercised in accordance with the strictures associated with whatever branch is exercising it.[182] If the administration or resolution of these claims is not assigned to judges, then the officer to whom it is assigned—if not removable by the President—would likely have to be considered as an adjunct to those judges.

In any event, one should be careful not to make too much of one incident in the House and in particular one representative's potentially idiosyncratic views. Still, Madison was one of the most brilliant constitutional thinkers of the era and, whether or not his proposal was consistent with his aim, Madison believed that an officer exercising adjudicatory power over matters of public right should be insulated from presidential control. And perhaps Congress could so insulate such an officer if matters of public right could have been assigned to the courts altogether; and perhaps that means Congress can in fact insulate administrative officers engaging in public-rights adjudication, so long as de novo judicial review is available.

3. Military Justice

This framing potentially clarifies another puzzle: the nature of the military justice system and whether it exercises executive or judicial power. The nature of the power matters, as *Ortiz v. United States*[183] recently illustrated. *Ortiz* was an appeal from a court-martial conviction for possession of child pornography.[184] As provided for by Congress, Ortiz appealed the conviction to the Court of Criminal Appeals for the Air Force and then to the Court of Appeals for the Armed Forces—both Article I courts whose judges do not enjoy lifetime tenure or salary protections—and from there to the Supreme Court of the United States.[185]

---

the auditor" to appeal to the Comptroller. Bamzai, *supra*, at 1329–30 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 949 (Gaillard Hunt, ed., 1912)). Moreover, it is possible that the administration of public rights was a sufficiently judicial task that could be assigned to judges—as naturalization was. *Infra* Part II.C.1.

182. One might also think of these officers as adjuncts to the courts, and in that way they would not violate the rule that if the executive branch exercises nonexclusive power, it must nevertheless exercise that power according to the rules of Article II (namely, removal).

183. 138 S. Ct. 2165 (2018).

184. *Id.* at 2170.

185. *Id.* at 2171; 28 U.S.C. § 1259.

Professor Aditya Bamzai filed a brief[186] arguing that the Court had no jurisdiction to hear the case because, as all students of *Marbury v. Madison*[187] know, Congress cannot expand the Supreme Court's original jurisdiction beyond cases affecting ambassadors or in which a state is a party.[188] Thus, its jurisdiction had to be appellate. But was it? Not if the exercise of power in the court-martial system is executive power. If, on the other hand, the exercise of such power is judicial power, then that raises the puzzle of how is it that various Article I courts (and courts martial) whose judges do not enjoy lifetime tenure and salary protection can exercise that judicial power, in apparent contravention of Article III.

Justice Kagan, writing for the *Ortiz* majority, largely sidestepped the question as a matter of originalist methodology. She argued that the military court system was judicial enough in character such that the Supreme Court could exercise its appellate jurisdiction.[189] The petition asked the Court to "revise and correct" the latest decision made through military "proceedings."[190] "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law . . . ."[191] "The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."[192] Additionally, the jurisdiction of the court-martial system overlaps with civilian jurisdiction: today, courts martial "can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service."[193] Thus, the majority concluded, "the judicial character and constitutional pedigree of the court-martial system enable this Court, in

186. The brief was filed in the consolidated case *Dalmazzi v. United States*. *See* Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, 138 S. Ct. 2273 (2018) (No. 16-961), 2017 WL 5495453.

187. 5 U.S. (1 Cranch) 137 (1803).

188. U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

189. *Ortiz*, 138 S. Ct. at 2170.

190. *Id.* at 2174.

191. *Id.*

192. *Id.*

193. *Id.*

exercising appellate jurisdiction, to review the decisions of the court sitting at its apex."[194]

Justice Thomas argued in concurrence that the military courts exercise judicial power, and that military courts are simply an exception to the requirements of Article III.[195] That is also the predominant view among federal courts scholars.[196] That is, this view maintains that courts martial do exercise judicial power, even though their judges do not enjoy Article III protections. Under this view, appellate jurisdiction in Ortiz's case was constitutional: so long as the decision under review is judicial in nature, it does not much matter from which tribunal it came.[197] Although this view is of course plausible, it is a bit textually unsatisfying.

Justice Thomas also suggested, somewhat in tension with his view that military courts exercise judicial power, that perhaps the "judicial power" in Article III refers as a matter of original meaning only to the *civilian* judicial power.[198] But if that is the case, then no federal court, let alone the Supreme Court, should have any jurisdiction over any military cases at all—even those involving child pornography, murder, and other non-military-specific offenses—because it would be outside the Article III judicial power altogether. It is highly unlikely that that is what Justice Thomas intended. Thomas relied on *Dynes v. Hoover*,[199] but there it was observed that Congress had not empowered the

194. *Id.* at 2173.

195. *Id.* at 2184–89 (Thomas, J., concurring in the judgment). The majority also noted that antebellum sources often described the military justice system as exercising judicial power. *Id.* at 2175–76.

196. Fallon, *supra* note 77, at 973–74 (arguing that military tribunals implicate Article III); Nelson, *supra* note 127, at 576 (military tribunals "have long been understood to exercise 'judicial' power"); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.25 (1982) (military crimes are "exception" to Article III). *But see* Baude, *supra* note 124, at 1549 (describing military courts as exercising executive, not judicial, power).

197. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 338 (1816) ("It is the case . . . and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends."); *Ortiz*, 138 S. Ct. at 2185 (Thomas, J., concurring) (noting that Article III "does not require appeals to come from any specific type of tribunal").

198. *Ortiz*, 138 S. Ct. at 2186 (Thomas, J., concurring) (quoting Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 712 (2015) (Thomas, J., dissenting)).

199. 61 U.S. 65 (1857).

judicial courts to review the actions of the military courts.[200] If anything, that points to the distinction that this Subsection will advance presently: Article III courts have *exclusive* power over "civilian" judicial cases involving private rights, but also *nonexclusive* power over "military" judicial cases involving private rights.

A third view maintains that military courts do not exercise any judicial power at all, but rather executive power.[201] This was the dissent's view in *Ortiz*. Justices Alito and Gorsuch argued that courts martial "have always been understood to be Executive Branch entities that help the President, as Commander in Chief, to discipline the Armed Forces."[202] "[T]hey have always been understood to be an arm of military command exercising executive power . . . ."[203] Blackstone, they write, "declared that the court-martial system of the British Empire was based solely on 'the necessity of order and discipline' in the military," and that "courts-martial exercise a 'discretionary power' to 'inflict' 'punishment . . . extend[ing] to death itself,' which was 'to be guided by the directions of the crown,' in express contrast to 'the king's courts' which dispense 'justice according to the laws of the land.'"[204] "As Blackstone recognized," they summarize, "the enforcement of military discipline, an essential feature of any effective fighting force, was viewed as an *executive* prerogative. It represented the exercise of the power given to the President as the head of the Executive Branch and the Commander in Chief and delegated by him to military commanders."[205]

Justices Alito and Gorsuch further explain that the military courts cannot be exercising judicial power because Article III vests "every single drop" of the federal judicial power in Article III courts.[206] And the Supreme Court "may not hear an appeal directly from any tribunal that has not been lawfully vested with

200. *Id.* at 82 (discussing military courts, "from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts").

201. Baude, *supra* note 124, at 1549, 1558–61 (maintaining that military justice is executive power and disagreeing with the majority in *Ortiz*); Craig A. Stern, *What's a Constitution Among Friends? Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1055 (1998) ("[C]ourts-martial do not exercise the judicial power. Instead, they exercise the executive power, the power of a military command to discipline its troops.").

202. 138 S. Ct. at 2190 (Alito & Gorsuch, JJ., dissenting).

203. *Id.* at 2199.

204. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *400, *402).

205. *Id.*

206. *Id.* at 2190.

judicial *power*."[207] Neither the majority nor the concurrence, Alito and Gorsuch argue, can explain "how the Constitution's various provisions relating to the military, through their penumbras and emanations, can be said to produce a hybrid executive-judicial power that is nowhere mentioned in the Constitution's text."[208] William Baude has made a similar criticism.[209]

It would seem that the concurring and dissenting opinions are talking past each other, and the nonexclusive functions framework has the potential to advance the ball. The power to adjudicate most cases arising out of the armed forces is, in fact, a nonexclusive function that can be assigned *either* to the Executive or to the judiciary. It is not merely executive, and it is not merely judicial; rather, courts martial have characteristics of both. This conclusion is consistent with text, history, and structure. It explains why military courts are not an "exception" to Article III: Just like public rights cases, military cases are *amenable* to judicial resolution, but Congress may assign them to the executive branch. And the President—either by virtue of the Vesting Clause or the Commander-in-Chief power—may exercise that power.[210]

---

207. *Id.* at 2195.

208. *Id.* at 2198.

209. Baude argues:

> [Military courts create] one of the harder characterization problems presented by non-Article III adjudication. But the executive power view seems more straightforward as a matter of constitutional structure and logic. Describing military courts as exercising "the military judicial power of the United States"—Article III notwithstanding—requires us to impose a surprising defeasibility on the judicial Vesting Clause. And it seems to require us to make other surprising claims about the separation of powers as well. For instance, when the executive branch makes rules to govern a military base, or broad decisions about military policy, ought we now describe that as the exercise of military "legislative power," to match the military "judicial power"?

Baude, *supra* note 124, at 1550.

210. Alternatively, it could be that the Commander-in-Chief power, which is a grant of power *in addition* to Article II's grant of executive power, includes a historically judicial power in this context. In which case Justice Alito is wrong to suggest that the Constitution only vests judicial power in the government via Article III; it would also vest some such power by virtue of the Commander-in-Chief Clause. But Justice Thomas would also have been wrong to suggest that the President's exercise of this power is merely an "exception" to Article III rooted merely in "commonly accepted background understandings" that "general constitutional rules could apply 'differently to civil than to military entities." *Ortiz*, 138 S. Ct. at 2186 (quoting Jennifer L. Mascott, *Who Are "Officers*

This approach is buttressed by historical practice. In 1806, Congress assigned cases to the civilian courts that are today reached by the military courts.[211] It was not until the Civil War that military jurisdiction extended to any common law offenses, and then only during wartime;[212] this jurisdiction was expanded in 1916, but Congress still provided that capital offenses committed during peacetime would be tried by the civilian courts.[213] It was not until the modern Uniform Code of Military Justice (UCMJ) was enacted in 1950 that most "garden-variety" offenses could be tried by military courts in peacetime and for off-duty conduct.[214] Significant historical sources suggest that courts martial were always at least partly judicial in nature.[215] More

of the United States"?, 70 STAN. L. REV. 443, 480–83 (2018)). If this approach is correct, the nonexclusive powers framework does not really contribute to it; after all, the power at issue would be judicial, but it would be shared by virtue of the Constitution's specific clauses. But it does not appear to be the approach taken by anyone on the Court in any event.

211. Act of Apr. 10, 1806, ch. 20, art. 33, 2 Stat. 359, 364.

212. Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736. I am indebted to Dan Maurer for this citation.

213. Act of Aug. 29, 1916, ch. 418, § 3, arts. 92–93, 39 Stat. 619, 664. I thank Dan Maurer for this citation as well.

214. 10 U.S.C. §§ 801–946(a).

215. English writers on military law, for example, explained that the officers who exercised power in such courts historically exercised both executive and judicial power. STEPHEN PAYNE ADYE, A TREATISE ON COURTS MARTIAL 4–5 (7th ed. 1805) (explaining that original military courts exercised a "double power" as they had historically "ministerial" duties but also "judicial power"); *id.* at 11–13 (describing how Parliament provided in the sixteenth century that even ordinary military offenses like desertion were to be tried by the ordinary "justices of the peace" or the "justices of assize"). Sir Edward Coke even argued that any trial by military courts in times of peace was contrary to Magna Charta. *Id.* at 32; EDWARD COKE, 3 INSTITUTES OF THE LAWES OF ENGLAND 52 (1809); 1 BLACKSTONE, *supra* note 204, at *413. And Matthew Hale argued that because "order and discipline is the only thing that can give [martial law] countenance," it ought not to be available in times of peace "when the king's courts are open for all persons to receive justice." ADYE, *supra*, at 32–33 (citing MATTHEW HALE, THE HISTORY OF THE COMMON LAW 34–35 (1713)); *see also* 1 BLACKSTONE, *supra* note 204, at *400 (referencing Hale as well). Turning to American sources, Attorney General Edward Bates wrote in 1864 that courts martial are "judicial." President's Approval of the Sentence of a Court Martial, 11 Ops. Att'ys Gen. 19, 21 (1864) ("The whole proceeding from its inception is judicial."). And William De Hart wrote in 1859 that courts martial are "clothed with judicial powers, and which may be exerted in the consideration and decision of questions of the most momentous description, affecting . . . even life itself." WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 14 (photo. Reprt. 1859) (1846). He

importantly, the fact that some military discipline is undeniably executive does not mean that the *new* jurisdiction given to the military courts in the UCMJ are not judicial in character.[216]

Finally, constitutional structure: There is no question that Blackstone's description of prerogative powers was hugely influential on the Framers, who distributed these prerogatives to various institutions, giving most of them to Congress.[217] That includes the power to make rules and regulations for the armed forces.[218] But this suggests not that courts martial are an executive prerogative, but rather that it is up to Congress whether the courts or the Executive should exercise these prerogatives.[219] Indeed, Blackstone objected to military courts deciding matters of

---

argued that those "who are called upon" to "administer justice through its means" take on the "character of judges." *Id.*; *see also id.* at 4 (describing the military "courts" of "superior" and "inferior jurisdiction"); *id.* at 5 (describing these courts as exercising "judicial powers"); *id.* at 6 (describing a general court martial appointed by the President as "the highest military judicial authority," distinguished from "inferior courts," such as the "regimental" or "garrison" court martial).

216. Numerous scholars have observed the ongoing "civilianization" of the military courts, namely, the ongoing efforts to make procedure in the military courts mirror those in the civilian courts. *See, e.g.*, David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 40 (2013); Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL L. REV. 512 (2017); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 287 (John T. Parry & L. Song Richardson eds., 2013). Although most commentators do not make this point, one obvious reason for this civilianization is the expansion of military jurisdiction to ordinary "civilian" offenses. *Cf.* Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH. L. REV. 669, 675 (2021) (observing the importance of the expanded jurisdiction of military courts). I am indebted to Dan Maurer for the other citations in this note.

217. Wurman, *Prerogative*, *supra* note 154, at 104 & n.37 (citing sources regarding Blackstone's influence in this regard).

218. *Compare* 1 BLACKSTONE, *supra* note 204, at *254 (describing royal prerogative of "raising and regulating fleets and armies" including the "enlisting and governing" the military), *with* U.S. CONST. art. I, § 8, cls. 12–14 (granting Congress the powers "to raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces").

219. *Cf.* DE HART, *supra* note 215, at 2 (noting it was up to Parliament to "establish[] the principles of criminal jurisprudence to which it is necessary to subject the soldier") (quoting 1 CHARLES DUPIN, VIEW OF THE HISTORY AND ACTUAL STATE OF THE MILITARY FORCE OF GREAT BRITAIN 5 ("An Officer" trans., 1822)).

life and liberty in peacetime.[220] It would thus be odd to rely on Blackstone for the proposition that such courts martial are an executive prerogative. Blackstone's passage on which Justices Alito and Gorsuch rely was in the context of Blackstone's opposition to military justice. Military justice, Blackstone argued, could only be justified *if* and *when* necessary for good order and discipline.[221] Additionally, as Chief Justice Warren observed in 1962, conceiving of military tribunals solely as a matter of discipline may have made sense in 1789 when there was a standing army consisting of 672 soldiers; it may not make sense as a structural matter to treat them as such in an army of millions of soldiers and where every citizen is subject to conscription.[222] And where, he might have added, these citizens are subject to military punishment for garden-variety, common-law and civilian offenses. That is not to deny that other components of the military justice might fall exclusively within the power of the Executive, such as when military-specific offenses are involved[223] or military commissions trying enemies under the laws of war.[224]

---

220. 1 BLACKSTONE, *supra* note 204, at *413.

221. *Id.* at 400.

222. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187–88 (1962).

223. Such as absence without leave, hazarding a vessel, dangerous flying, maltreating subordinates, hazing, desertion, making false records, contravention of standing orders, disobedience to lawful commands, disrespecting noncommissioned officers, desertion, misconduct as a sentry or guard, disclosure of information useful to the enemy, mutiny, sedition, espionage, disgraceful conduct of a cruel or indecent kind, conduct unbecoming an officer and gentlemen, or conduct of a nature to bring discredit upon the armed forces. *See* Dan Maurer, *Larrabee at the District Court: Misunderstanding Military Criminal Law is Far from Retired*, 2021 U. ILL. L. REV. ONLINE 23, 43–44.

224. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831–36 (2d ed. 1920); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 249 (1863) ("[M]ilitary jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county. In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the rules and regulations of war, or the jurisdiction conferred by statute or court-martial, are tried by military commissions.") (internal quotation marks omitted). That would explain *Ex parte Vallandigham*, on which the majority and dissenting opinions in *Ortiz* relied heavily. The Supreme Court held in *Ex parte Vallandigham* that it could not hear a direct appeal from the military commission because it was not judicial in nature, at least not in the

So far it is not entirely clear that the dissenting Justices would disagree with much of the above. Although some of their language suggested that courts martial are an exclusively executive prerogative, other parts of their argument suggested merely that *if* such power is vested in the Executive, then it was not judicial power and therefore could not be directly appealed to the Supreme Court because there had not yet been a judicial case below. The nonexclusive functions framework at least clarifies the first assertion, and it suggests that Justice Thomas's view that military justice is "judicial power" may not be quite right.[225]

But what's more, once we cleanly separate power and function, the majority's opinion becomes more plausible as a formalist matter. Whether direct Supreme Court review would comport with the strictures of Article III is a question about the nature and meaning of *appellate* jurisdiction. If the military court is in fact exercising what can be characterized as a judicial *function*, one which is also amenable to resolution by ordinary courts exercising the judicial power, then direct review would be no different than direct review of the decisions of other tribunals like state or territorial courts that exercise judicial functions. True, those tribunals are typically understood to be exercising judicial functions through use of their own judicial *power*. But whether appellate jurisdiction requires a prior exercise of judicial *power*, as opposed to a prior exercise of a judicial *function* that is *ordinarily* resolved by tribunals wielding judicial power, is hardly obvious.

For example, I am not sure why a state, at least prior to the adoption of the Fourteenth Amendment,[226] could not have established a Star Chamber equivalent in its executive department. And if Congress had provided for appellate jurisdiction directly to the Supreme Court over this tribunal's cases, presumably that would have met the requirements of Article III. Put simply, it may be that the court-martial power over common law offenses is sufficiently executive such that the President can exercise that power (pursuant to the relevant constitutional requirements),

---

sense of Article III. 68 U.S. at 253. And, arguably, it was not: the commission conducted a trial of an enemy citizen during the operation of martial law under the customary laws of war. *Id.* at 243–45.

225. Ortiz v. United States, 138 S. Ct. 2165, 2184 (2018) (Thomas, J., concurring).

226. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .").

but it also may be sufficiently judicial such that the Supreme Court can then review the President's exercise of that power through its appellate jurisdiction.

The most pressing objection to this claim is that this approach might imply that Congress could assign public rights cases to executive officers with direct appeal to the Supreme Court, a question reserved by the majority in *Ortiz* for another day.[227] To so hold would at least arguably be inconsistent with important early precedents in which the Supreme Court refused to hear direct appeals from the Court of Claims.[228] This objection is not fatal, however, because the Court in the central case focused mostly on the fact that under the statute neither the Supreme Court nor the Court of Claims had the power to render a judgment, but rather its opinions would be merely advisory; it was up to the Secretary of Treasury whether to include the claim in a request for appropriations.[229] To return to Madison's Comptroller example, a direct appeal to the Supreme Court would have been inappropriate if the Comptroller's actions were subject to revision by Congress or another executive-branch officer. But if his actions were not subject to such revisions, such that the Comptroller's functions could have been assigned to a court exercising judicial power, then it is actually not at all clear why direct review to the Supreme Court would be unconstitutional.

To summarize, there is an important difference between public rights cases and courts martial. In the former, there is usually no final judgment until Congress or an executive officer

---

227. 138 S. Ct. at 2180.

228. Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864); *In re* Sanborn, 148 U.S. 222, 224 (1893).

229. Gordon v. United States, 117 U.S. 697, 698–99 (1885) ("Neither the Court of Claims nor the Supreme Court can do anything more than certify opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress."). To be sure, the Court implied that it could only issue mandates to inferior courts of the United States. *Id.* at 705 ("[T]he court can give no judgment, and award no execution, unless there is an inferior court of the United States, in possession of the original record, over which this court has appellate power, and which it may compel to execute its judgments."). But, of course, that is incorrect; the Court can also issue mandates to executive officers in appropriate cases. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

makes a specific decision to pay a claim; in the latter, final judgments are a central feature of the system. In the former, there is no appellate review because the decision below was not judicial, irrespective of who made the initial decision; in the latter, there can be appellate review if the decision below resulted in a judicial judgment, irrespective of who made that judgment (a court or the Executive). Congress could surely structure the court-martial system in such a way that it would not have these judicial characteristics, but if Congress does structure the system to include such characteristics, then it is unclear why it would not be a judicial case for the purpose of Article III's division of original and appellate jurisdiction.

What this Subpart has tried to show is that, at a minimum, the concurrence and dissent in *Ortiz* were likely both wrong to the extent their opinions can be interpreted for the propositions that military courts either exercise simply judicial power, or simply executive power. The better answer is that they exercise a blended power—or at least a blended *function*—that resembles the hybrid kind of power that Justice Alito mocked. More controversially, if the function at issue can be characterized as judicial, then at least arguably nothing prevents Congress from granting a direct appeal to the Supreme Court.

B. LEGISLATIVE POWER

This Section began with judicial power because the existence of nonexclusive judicial functions is likely to be less controversial. After all, many federal courts scholars accept some distinction between public and private rights. The possibility of nonexclusive legislative functions may be more controversial, but it, too, is justified by originalist sources. We shall begin with an opinion by Chief Justice Marshall from 1825, thirty-five years removed from the Founding. Marshall's opinion is not the best evidence of the original meaning of the Constitution, but if he is correct, it would establish the existence of nonexclusive legislative functions—functions that are legislative in nature and could be exercised by Congress, but need not be. From there we shall work backward to the statements of important figures and historical practice closer in time to the Founding itself.

1. John Marshall

Wayman v. Southard[230] provides some support for the idea of what I have previously called nonexclusive legislative power, but which may with more accuracy be described as nonexclusive legislative functions.[231] In that case, Chief Justice John Marshall elaborated upon the meaning of the grant of "legislative power" to Congress in the Constitution.[232] The 1792 Process Act at issue in *Wayman* established that the practices prevailing in each respective state supreme court as of 1789, respecting "the forms of writs and executions" and the "modes of process . . . in suits at common law," would govern in federal court proceedings in those states.[233] The statute included a proviso: subject to the rules and regulations prescribed by the federal courts.[234] The nondelegation question in *Wayman* (which the Court did not even have to decide)[235] was whether this proviso was an unconstitutional delegation of legislative power to the courts.[236]

The plaintiff in *Wayman* had sought an execution of judgment against the defendant in hard currency.[237] The defendant sought the application of a 1792 Kentucky law providing that a plaintiff must accept state paper currency in satisfaction of a judgment.[238] The Court agreed with the plaintiff that the 1792 Kentucky law did not govern in a federal court suit at common law because the federal acts provided that only those state practices established as of 1789 applied.[239] The defendant then pressed a nondelegation argument: the 1792 Process Act for the governing of process and suits at common law would be an unconstitutional delegation of legislative power in light of its proviso, if that proviso were interpreted to extend to matters outside

230. 23 U.S. (10 Wheat.) 1 (1825).

231. Some of the next paragraphs are borrowed from Wurman, *supra* note 116, at 715–18, and Wurman, *supra* note 30, at 1516–17.

232. *Wayman*, 23 U.S. (10 Wheat.) at 4.

233. *Id.* at 27.

234. The process prescribed was subject to "such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same." *Id.* at 31.

235. *Id.* at 48–49 ("But the question . . . does not arise in this case.").

236. *Id.* at 3–4.

237. *Id.* at 2.

238. *Id.* at 2–3.

239. *Id.* at 32, 41.

of courtroom proceedings and to the manner of executions.[240] Thus, Congress could not have intended for it to reach outside the courtroom to the manner in which a judgment was executed.[241]

The Court, however, rejected this argument, holding that the law did in fact reach to matters outside of courtroom procedures to all "proceedings in suits at common law," including execution of judgments.[242] Chief Justice Marshall proceeded to address the nondelegation argument. He wrote: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[243] The Judiciary Act and the Process Act "empower the Courts respectively to regulate their practice," and "[i]t certainly will not be contended, that this might not be done by Congress."[244] Yet it also "will not be contended" that "mak[ing] rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description . . . . may not be conferred on the judicial department."[245] "The line has not been exactly drawn," Chief Justice Marshall continued, "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*."[246]

In other words, the power to make rules "fill[ing] up the details" of a general legislative provision is a *nonexclusive* legislative function, partly but not wholly legislative in character and which Congress can exercise itself but which it can also confer on one of the other departments.

Put another way, Chief Justice Marshall seems to have recognized that there is a category of "exclusively" legislative functions that fall exclusively within the grant of legislative power to Congress, and that Congress therefore could not delegate to the Executive or the courts. But, he argued, there are things that

240. *Id.* at 13–17, 42.
241. *Id.*
242. *Id.* at 36.
243. *Id.* at 42–43.
244. *Id.* at 43.
245. *Id.*
246. *Id.* (emphasis added).

could be done by Congress or by the Executive or by the courts. For example, many regulations are partly legislative in nature in the sense that Congress *could* have enacted them into law, but they involve mere matters of detail and therefore can also be characterized as executive power. And in *Wayman* itself, Congress could have established the procedural rules for the federal courts itself, but it could also leave it up to the courts to alter those rules as necessary.[247]

In two other episodes Marshall also suggested the existence of overlapping powers. In *McCulloch v. Maryland*,[248] Marshall explained that Congress need not have specified the locations of the subordinate branches of the Bank of the United States in the bank's charter because "[t]he great duties of the bank are prescribed" and "the selection of places where [the] branches shall be fixed" can be safely entrusted to the bank itself; but, Marshall added, "reserving always to the government the right to require that a branch shall be located where it may be deemed necessary."[249] Some legislative functions—over administrative details—can be shared.

Earlier in 1800, as a member of the U.S. House of Representatives, Marshall made a similar argument. Commenting on the enforcement of a treaty and the President's duty to "take care that the laws be faithfully executed," Marshall wrote that Congress may unquestionably "prescribe the mode" by which the President is to execute the treaty, but, he added, "till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses."[250] Here, again, Marshall seems to have identified a kind of nonexclusive legislative power or function. Indeed, the idea of concurrent and shared power be-

247. It is certainly possible to think that the courts would have had inherent power to establish rules for their proceedings in the absence of congressional legislation, but inherent power is not necessarily exclusive power; it could still be shared. Indeed, the statute in *Wayman* supports the proposition that the Supreme Court does not have inherent supervisory authority over the procedures used in lower courts, but that Congress can authorize such supervision. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (arguing that the Supreme Court does not have inherent supervisory authority but that Congress may confer it); *Wayman*, 23 U.S. (10 Wheat.) at 31 (stating that the 1792 Process Act authorized the Supreme Court "to prescribe [rules] to any Circuit or District Court concerning" process).

248. 17 U.S. (4 Wheat.) 316 (1819).

249. *Id.* at 424–25.

250. 10 ANNALS OF CONG. 614 (1800).

tween Congress and the President is well accepted in foreign policy and national security disputes today,[251] and, as noted, it was important in antebellum federalism disputes.[252]

2. Founding-Era Discussions

The idea of nonexclusive legislative functions can be traced further back to the Founding generation itself. Such nonexclusivity is not mentioned explicitly but can be inferred from a series of statements by early members of Congress or the Constitutional Convention. Additionally, some executive regulations demonstrate the Executive can be delegated regulatory functions that Congress could (and sometimes did) exercise itself.

The first hint of overlapping powers—although not too much can be read into this episode—is James Madison's proposal at the Constitutional Convention to institute a national executive "with power to carry into effect. the national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers ⟨'not Legislative nor Judiciary in their nature.'⟩ as may from time to time be delegated by the national Legislature."[253] Madison explained that "[t]he words ⟨'not legislative nor judiciary in their nature'⟩ were added to the proposed amendment in consequence of a suggestion by Genl Pinkney that improper powers might ⟨otherwise⟩ be delegated."[254] It is possible that this proposal recognizes the existence of functionally overlapping powers, according to which certain functions not strictly legislative or judicial could be either exercised through the legislature itself or delegated to the Executive. The power (or function) to make regulations "filling up the details" of a legislative program—which even George Washington and his principal officers exercised early on[255]—would be an example of this kind of delegation.

Pinkney suggested the words of the last clause "were unnecessary, the object of them being included in the 'power to carry

---

251. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (identifying a category of concurrent power); *cf.* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) ("Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.").

252. *Supra* notes 29, 129, 144, 196 and accompanying text.

253. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (Max Farrand ed., Yale Univ. Press 1911).

254. *Id.*

255. *Infra* Part II.B.3.

into effect the national laws'."[256] That is, the power to execute law surely includes the power to exercise any proper power delegated by Congress. Madison "did not know that the words were absolutely necessary," but did not "see any inconveniency in retaining them . . . to prevent doubts and misconstructions."[257] Pinkney carried the day, and the clause was struck out.[258]

Congress's first extensive[259] debate over whether a particular law would violate the nondelegation doctrine is also a potential source of insight into this framework.[260] The Constitution grants Congress the power to "establish Post Offices and post Roads."[261] A committee of the Second Congress introduced a bill for the establishment of the Post Office and post roads that specified in great detail where the post roads would be.[262] Representative Sedgwick introduced an amendment to strike the enumerated routes and replace them with the provision "by such route as the President of the United States shall, from time to time, cause to be established."[263]

Several members objected that this proposal would unconstitutionally delegate legislative power to the Executive.[264] Representative Benson chimed in to defend Sedgwick's proposal. "Much has been observed respecting the Legislative and Executive powers, and the committee are cautioned against delegating the powers of the Legislature to the Supreme Executive," Benson declared.[265] "Without attempting a definition of their powers, or determining their respective limits, which he conceived it was extremely difficult to do, he would only observe that much must necessarily be left to the discretion of the Legislature."[266] Sedg-

256. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 253, at 67.

257. *Id.*

258. *Id.* This episode also lends some additional support for a nondelegation doctrine. It suggests that the power to enforce laws does *not* include the power to implement just any law enacted by Congress; such laws cannot delegate judicial *or* legislative power to the Executive.

259. *See* Wurman, *supra* note 30, at 1506 n.71.

260. I have written about this episode previously. *See id.* at 1506–12; Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 991–93 (2018).

261. U.S. CONST. art. I, § 8, cl. 7.

262. Wurman, *supra* note 30, at 1506 n.77.

263. 3 ANNALS OF CONG. 229 (1791).

264. Wurman, *supra* note 30, at 1506–12.

265. 3 ANNALS OF CONG. 236 (1791).

266. *Id.*

wick responded to Benson that it was "true . . . that it was impossible precisely to define a boundary line between the business of Legislative and Executive," but proposed "that as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter."[267] Thus, he would "as much as possible, avoid going into detail."[268] Here in defense of this proposal to delegate, Benson suggested that there is some degree of overlap between legislative and executive power and thus Congress must necessarily have some amount of discretion in deciding what to delegate and what to keep for itself; and Sedgwick similarly suggested that both Congress and the Executive might be able to resolve "details" of legislation.

Some members even suggested that either branch could exercise the function in question. Representative Bourne declared that "[t]he Constitution meant no more than that Congress should possess the exclusive right of [marking out the roads], by themselves or by any other person, which amounts to the same thing."[269] This, however, would leave almost no content to the nondelegation doctrine, if applied to all things that Congress might do. In any case, Bourne thought Congress could delegate the power to designate the roads to the President with an expiration provision, at which point the power would "revert" to Congress, which "might then retain the exercise of it" if "any improper use had been made of it."[270] Representative Hartley thought Congress should designate the roads but that, if Congress found itself "incompetent to the duty" after a few years, it could "grant the power to the Executive"—at least, if the Constitution "allow[s]" for such a delegation.[271]

One cannot read too much into these statements. After all, Sedgwick's proposal was defeated, and several members of the House seemed to think that the proposal would violate the nondelegation doctrine.[272] And no one expressed the view that some power was nondelegable and that other power might be shared. The absence of this view from this nondelegation debate constitutes some evidence against the proposition that the distinction between exclusive and nonexclusive functions is "originalist." It

267. *Id.* at 239–40.
268. *Id.* at 240.
269. *Id.* at 232.
270. *Id.* at 233.
271. *Id.* at 232.
272. Wurman, *supra* note 30, at 1506–12.

is worth noting, however, that at least some members of Congress believed that either institution could exercise this particular function, and that even those who thought this delegation unconstitutional never expressly stated there was *no* functional overlap in the various grants of power in the Constitution—only that this particular function was exclusively legislative in nature. Overall, the debate is probably not particularly instructive.[273]

3. Founding-Era Practice

Early practice is perhaps more instructive and reveals that Congress and the Executive often undertook similar regulatory actions. One early statute provided that the military pensions that had been granted and paid by the states pursuant to the acts of the Confederation Congress to the wounded and disabled veterans of the Revolutionary War "shall be continued and paid by the United States, from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct."[274] President Washington's regulations stated that the sums owed were to be paid in "two equal payments," the first on March 5, 1790, and the second on June 5, 1790; and that each application for payment was to be accompanied by vouchers and affidavits from the state that had previously made payment and from a justice of the peace affirming that the invalid served in a particular regiment or vessel at the time he was disabled.[275]

---

273. Madison accepted the difficulty of distinguishing legislative and executive power.

> However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers, [Madison] was of opinion that those arguments were not well founded, for they admit of such construction as will lead to blending those powers so as to leave no line of separation whatever.

3 ANNALS OF CONG. 238 (1791). Here one might also recall Madison's statement in Federalist No. 37 that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive and judiciary." THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961). These statements do not imply that there is overlap between the powers; rather, Madison could simply have believed that the line was difficult to draw, but once drawn, it demarcated the exclusive boundaries. Still, the acknowledgement that it is impossible to draw precise boundaries is some indication that there may be overlap.

274. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

275. *Id. reprinted in* LIBRARY OF CONG., https://www.loc.gov/resource/rbpe

It should go without saying that this regulation *could have* been made by Congress. That is, Congress by legislation could have provided additional details, including that the payments were to be made on those two dates and what proofs would be required to demonstrate eligibility for payment. These regulations, in other words, were an exercise of a nonexclusive legislative function. Congress indeed legislated similar specifics in the subsequent 1792 invalid pensioner statute.[276] The Act created a permanent pension list for disabled veterans of the late war, and provided that in every case of application "the rules and regulations following shall be complied with," including the submission of "the following proofs."[277] These included "[a] certificate from the commanding officer of the ship, regiment, corps or company, in which he served, setting forth his disability, and that he was thus disabled while in the service of the United States; or the affidavits of two credible witnesses to the same effect," and "[t]he affidavits of three reputable freeholders" of the same vicinity ascertaining "the mode of life, employment, labour, or means of support of such applicant, for the last twelve months."[278]

Another example is the establishment of forms to be used by the customs collectors. It was left to Alexander Hamilton to devise various forms under the original customs and treasury statutes.[279] For example, in a 1789 letter to the collector of customs in Baltimore, Hamilton attached a form for the quarterly abstract of duties arising on imported merchandise, a form for the weekly accounts of receipts and payments, and a form for the quarterly abstract of duties arising on the tonnage of vessels.[280] In a letter dated a week later, Hamilton noted that the customs laws required vessels to deliver manifests of their cargoes, and that "[t]o render these returns uniform, I shall shortly transmit a model."[281] Such matters were clearly sufficiently detail-ori-

---

.21201200/?st=text [https://perma.cc/FXB4-3JFR] (including President Washington's regulations effectuating the Act).

276. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

277. *Id.* at 244.

278. *Id.*

279. LEONARD WHITE, A STUDY IN ADMINISTRATIVE HISTORY: THE FEDERALISTS 206 (1956).

280. Letter from Alexander Hamilton to Otto H. Williams (Oct. 2, 1789), *in* 3 THE WORKS OF ALEXANDER HAMILTON 539 (John C. Hamilton ed., 1850).

281. Letter from Alexander Hamilton to Otto H. Williams (Oct. 10, 1789), *in* THE WORKS OF ALEXANDER HAMILTON, *supra* note 280, at 539–40; *see also* THE

ented that they could be considered executive power. Yet Congress, in the Collection Act of 1799, provided the precise form of such documents, and particularly the manifests, in the statute.[282]

As noted above, concurrent powers are generally accepted in matters of foreign affairs and national security.[283] And another scholar has observed in a more modern context that President Nixon may have had authority to manage the internal workings of the executive branch, but that Congress could supersede any of the President's regulations and policies in this regard pursuant to the Necessary and Proper Clause, so long as Congress was plausibly carrying into execution the powers of the United States or any of its departments or officers, and not hindering the exercise of any such powers.[284]

Thus, there are at least some examples, and likely additional examples, of Congress and the Executive undertaking similar regulatory action in the first decade pursuant to their respect grants of legislative and executive power. There are also examples of other powers in the Constitution that functionally overlap, suggesting that functionally overlapping powers may have been generally recognized. For example, the President may have power as commander in chief to provide for disciplining the armed forces in the absence of contrary legislation from Congress.[285] But Congress, which has the power to provide for the government of the armed forces, can surely supersede anything the President has done.[286] And President Washington early on issued passports without any specific congressional authorization,[287] perhaps stemming from a residual foreign affairs

---

WORKS OF ALEXANDER HAMILTON, *supra*, at 542–43 (further instructions on filling out manifests).

282. Act of Mar. 2, 1799, ch. 22, 1 Stat. 627 *passim* (showing various forms for manifests); *id.* § 93 (specifying the "'form of manifest' to be controlled within").

283. *See supra* note 251 and accompanying text.

284. Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 327–35 (1989).

285. U.S. CONST. art. II, § 2, cl. 1, para. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

286. *Id.* art. I, § 8, cl. 14 ("Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . .").

287. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 43 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (citing GAILLARD

power.[288] In 1856, presumably pursuant to its naturalization power and the Necessary and Proper Clause, Congress delegated broad power to the President to prescribe the form of passports and other related rules.[289] Prior to that, in 1803, it regulated the issuance of passports by prohibiting consuls from issuing them to aliens.[290]

4. Implications

At this juncture, one might encounter an important objection: that the text of the Constitution seems inconsistent with the notion of nonexclusive legislative functions.[291] Article I provides *all* legislative powers herein granted shall be vested in Congress.[292] This objection, however, is not fatal. Article III also provides that *the* judicial power shall be vested in the courts and extends to cases arising under the laws of the United States. Yet we saw that the Executive can also determine certain matters that arise under the laws of the United States, namely the resolution of public rights claims.

The question is rather what are the definitions of the various powers granted in the Constitution and whether one, two, or all three of them can reach a particular governmental function

---

HUNT, THE AMERICAN PASSPORT: ITS HISTORY: AND A DIGEST OF LAWS, RULINGS AND REGULATIONS GOVERNING ITS ISSUANCE BY THE DEPARTMENT OF STATE 3 (1898)).

288. As Justice Thomas argues. *Id.* at 41. I have written previously, however, of my skepticism that the grant of the "executive power" in Article II was anything but a grant of law-execution power. Wurman, *Prerogative*, *supra* note 154. I wonder whether the granting (or merely writing) of letters of safe conduct is a constitutional power at all. It certainly does not alter or determine legal relations, it merely advised foreign powers of the citizenship status of certain persons. Perhaps that is why, as Justice Scalia noted, prior to 1856, "passports were also issued by governors, mayors, and even . . . notaries public." *Zivotofsky*, 576 U.S. at 82 (Scalia, J., dissenting) (quoting ASS'N OF THE BAR OF THE CITY OF N.Y., FREEDOM TO TRAVEL: REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES 6 (1958)).

289. *Zivotofsky*, 576 U.S. at 43 (Thomas, J., concurring in the judgment in part and dissenting in part) (citing Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60–61 (regulating the diplomatic and consular systems of the United States)).

290. Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 203, 205.

291. *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2128–29 (2004).

292. U.S. CONST. art. I, § 1; *see* Merrill, *supra* note 291, at 2128–29 (describing the idea that "only Congress may legislate," though arguing that it is not conclusive).

according to those definitions. If legislative power is altering legal duties and relationships among both private and public actors—the definition in *Chadha*,[293] and a pretty good definition at that—then it clearly cannot reach, for example, bringing prosecutions in court or determining existing legal duties and relationships; but it can certainly reach interstitial and administrative rulemaking. Whether there is a category of *exclusively* legislative functions that can only be exercised by Congress and not by the Executive will depend on the historical meaning of the executive power and whether there is anything within the reach of legislative power that the executive power cannot reach.

In this regard, all agree that there is at least one category of functions that is exclusively legislative: the decisions to delegate to the Executive in the first place. Whatever the degree of detail that is required, however much discretion Congress may have in resolving or not resolving certain details, what no one denies is that it is *Congress's* discretion. The Executive cannot exercise any functions (outside its other assigned powers), let alone nonexclusive legislative functions, if there is no law first enacted by Congress to implement and delegating such authority. The question then becomes whether there are *other* functions that are exclusively legislative in nature because they cannot be reached by the executive power. This again will be a historical and empirical inquiry, overlapping with an inquiry into the nondelegation doctrine.

It is at least plausible to conclude that the executive power is the power to execute the policy judgments of the legislature, and therefore that Congress must resolve at least the important policy questions lest the Executive actually exercise legislative rather than executive power. In other words, if executive power is the power to execute the will of the lawmaker, that presupposes that the lawmaker has conveyed its will; it is not sufficient for the lawmaker to legislate so vaguely and broadly that the Executive is in effect exercising "will" within the historical understanding of legislative power.

This framing also suggests that proponents of nondelegation may need to rethink their private/public rights approach. Prominent defenses of the nondelegation doctrine as uniquely applying to regulations of private conduct have focused on definitions

293. INS v. Chadha, 462 U.S. 919, 952 (1983).

of legislative power as the power to "prescribe rules for the regulation of the society."[294] But that is not the right way to look at it. The legislative power is much more expansive; as noted, it is the power to alter any legal relations, including those of government officials. Thus, establishing post roads can be reached by the legislative power, as can structuring the government departments and creating programs for the distribution of welfare benefits (a classic public right).

If it is true that only the legislative power can reach generally applicable rules of private conduct, it is because the definitions of executive and judicial power do not extend to those functions. The private/public rights distinction—which has been ridiculed by some nondelegation critics[295]—makes more sense once we pivot toward definitions of executive power. As discussed below, administration and distribution of public rights falls comfortably within any definition of executive power;[296] making rules concerning private rights and conduct fits less comfortably. Because establishing and distributing public rights is within the definition of legislative power, however, it also follows that Congress cannot freely delegate those matters merely

294. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310–17 (2003) (citing THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 186 (2017) (citing THE FEDERALIST NO. 75, *supra*, at 450 (Alexander Hamilton)); Cody Ray Milner, Comment, *Into the Multiverse: Replacing the Intelligible Principle Standard with Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395, 425 (2020) (citing THE FEDERALIST NO. 75, *supra*, at 450 (Alexander Hamilton)); Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1022 (2016) (citing THE FEDERALIST NO. 75, *supra*, at 450 (Alexander Hamilton)); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 73 (2015) (Thomas, J., concurring) (quoting 1 BLACKSTONE, *supra* note 204, at *44). I myself have relied on this definition before. Wurman, *supra* note 23, at 393 n.150 (2017).

295. Brief of Julian Davis Mortenson as Amicus Curiae in Support of Respondents at 3, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530), 2022 WL 278665 ("To explain away the powerful evidence of early congressional enactments, nondelegation proponents have devised various limiting principles: Congress may delegate questions involving public rights but not private rights, 'overlapping' powers but not 'core' legislative powers, the authority to 'fill in the details' but not to resolve 'important subjects.' These distinctions, however, are entirely a modern invention. No one articulated them in the Founding era.").

296. *See id.*

because they involve public rights.[297] In my view, this approach supports a claim that I have made previously that the nondelegation doctrine should turn on whether "important subjects" have been addressed by the legislature, and not merely on whether the matter involves private or public rights.[298] Under this approach, the "exclusively legislative" functions category would likely be smaller than under the traditional private-rights approach.[299]

C. EXECUTIVE POWER

Originalist sources also point to some categories of functions that are exclusively executive. The previous Sections have already illustrated examples of nonexclusive functions that can be exercised by the Executive or one of the other branches: for example, the function of filling in details of statutory schemes or to resolve matters of public right.[300]

The meaning of the "executive power" granted to the President has been extensively discussed in the literature.[301] There is no need to reinvent the wheel here. I have argued previously, as have several other scholars, that this power is only the power to execute law and is not a grant of residual prerogative powers.[302] But even if it were a grant of residual power, all agree that, at a

297. Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo* 3–4 (Univ. of Va. Sch. of L., Pub. L. & Legal Theory Rsch. Paper Series 2022-09, 2022), https://ssrn.com/abstract=4003530 [https://perma.cc/ZND8-3Y6E] (suggesting that nondelegation doctrine is relaxed in context of public rights).

298. Wurman, *supra* note 30, at 1538, 1548–49, 1554–55.

299. *Id.*

300. *See supra* Parts II.A–B.

301. Wurman, *supra* note 30 at 1503–04 n.60.

302. Wurman, *Prerogative*, *supra* note 154; *see also* Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 563, 642 (2018); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019). *But see, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 258–59 (2020) (arguing for a residual vesting of executive power); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 310–11 (2012) (also arguing the vesting of executive power remains); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 185–89 (2005) (arguing the same).

minimum, it would include the power to execute law.[303] The power to execute law includes the power to exercise any discretion left by law;[304] Congress can always diminish or increase discretion by legislating more or less specifically, but only the President can exercise whatever discretion is left. Additionally, for purposes of administrative law doctrine, it is plausible to think that the power to execute law includes the power to appoint, direct, and remove assistants because it is impossible for a single individual to execute the laws alone, unaided by others.[305] The implication is that the power to remove officials who are exercising discretion in a manner opposed to the President's wishes may be constitutionally part of this exclusively executive function of law execution.[306]

For present purposes, the aim of this Section is to make the novel suggestion that there may be a constitutionally significant distinction between the administration of matters involving private rights and those involving public rights. As I have argued previously, the prosecution of offenses—whether criminal or civil—was an exclusively executive function that could only be exercised by the Executive,[307] although Congress could limit prosecutorial discretion.[308] What this Section now aims to show is that early Congresses often assigned the administration of public rights to courts or judges, over whom the President of course had no directory control.

---

303. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704; MCCONNELL, *supra* note 302, at 142–44.

304. Subject of course to the condition described in the previous Part, that some discretion must be resolved by Congress lest the President's exercise of power no longer be executive. *Supra* Part II.B.

305. Wurman, *Prerogative, supra* note 154, at 138–45.

306. *Id.* at 140–45.

307. *Id.* at 145–53. In particular, Blackstone described the prosecutorial power as executive. "In criminal proceedings, or prosecutions for offences," it would be absurd for the king "personally" to sit in judgment because he is also the "prosecutor." 1 BLACKSTONE, *supra* note 204, at *257–58. Because the public "has delegated all it's power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him," and the king "is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law." *Id.* at *258–59.

308. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 711–16 (2014).

This is likely because, as James Madison seemed to believe, officers involved in the resolution of claims between the individual and the government are hybrid executive and judicial creatures. Early Congresses thus assigned immigration and invalid pensioner claims to courts or judges directly. If the administration of the immigration and invalid pensioner laws was exclusively executive in nature, then the Executive would have to control the relevant initial determinations even if Congress made such determinations judicially reviewable. But if the initial determinations are not exclusively executive and can be assigned to courts, then perhaps Congress could insulate officers administering such claims from presidential interference—as Madison suggested with respect to the Comptroller[309]—so long as there is de novo judicial review.

1. Administering Public Rights

There are a handful of early statutes in which federal judges or courts were made part of the administrative apparatus of the federal government.[310] This should not be surprising. In a far-flung country such as the new United States, there were few federal officials in the farther reaches of the country. Often a federal judge might be one of the few officials in an area. Federal judges were relatively underworked and assigning them duties would save expense.[311]

Thus, Congress in 1790 assigned to courts—both state and federal—the task of naturalizing any alien who has resided in the United States at least two years and who was of good character.[312] And Congress provided in an act "for the government and regulation of seamen in the merchant service" that district judges, if applied to by the first officer and majority of a vessel's

309. *Supra* Part II.A.2.

310. These statutes are all discussed in Mashaw, *supra* note 117, at 1331–33.

311. *See, e.g.*, CURRIE, *supra* note 154, at 155 n.175 (noting that Congress often assigned duties to "underworked" federal judges).

312. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (providing that "any common law court of record" could be applied to by an alien). A similar statute was enacted in 1795. Act of Jan. 29, 1975, ch. 20, 1 Stat. 414.

crew, were to determine the seaworthiness of vessels.[313] Judges were also empowered to administer oaths to owners of vessels.[314]

The most famous examples are that Congress empowered judges to adjudicate invalid pensioner claims and claims for the remission of fines and forfeitures. In the latter statutes, judges were authorized merely to find facts, and to submit those factual findings to the Secretary of Treasury for decision.[315] As to invalid pensioner claims, Congress first provided that circuit courts were to hear and determine such claims, but provided that the Secretary of War "shall have the power to withhold the name" of

---

313. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132. Upon a report of three skillful persons appointed by the judge:

> the said judge or justice shall adjudge and determine, and shall endorse on the said report his judgement, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays . . . and the master and crew shall in all things conform to the said judgment . . . .

Id.

314. Act of Dec. 31, 1792, ch. 1, § 5, 1 Stat. 287, 290.

315. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23; Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506:

> That whenever any person or persons, who shall have incurred any fine, penalty, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise, which shall have been subject to any seizure, forfeiture, or disability, by force of any present or future law of the United States [relating to the customs, coasting trade, or fisheries laws] . . . shall prefer his petition to the judge of the district, in which such fine, penalty, forfeiture, or disability shall have accrued, truly and particularly setting forth the circumstances of his case; and shall pray, that the same may be mitigated or remitted, the said judge shall inquire, in a summary manner into the circumstances of the case; first, causing reasonable notice to be given to the person or persons claiming such fine, penalty, or forfeiture, and to the attorney of the United States, for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts which shall appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury of the United States, who shall thereupon, have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud . . . and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms and conditions as he may deem reasonable and just.

any applicant from the pension list if the Secretary has "cause to suspect imposition or mistake."[316]

Several justices of the Supreme Court, while riding circuit, refused to implement this invalid pensioner law on the grounds that it assigned nonjudicial power to the courts, or that it required the courts to act nonjudicially because it subjected their judgements to revision by the Secretary or Congress.[317] Some of the judges agreed to act as "commissioners" instead, and Congress subsequently amended the statute to require the judges themselves—not the courts—to take evidence on these petitions, and to submit them to the Secretary of War so they can be compared with "the muster-rolls, and other documents in his office; and the said Secretary shall make a statement of the cases of the said claimants to Congress, with such circumstances and remarks, as may be necessary, in order to enable them to take such order thereon, as they may judge proper."[318] It appears that out of an abundance of caution, Congress both assigned the duties to the judges themselves rather than the courts and removed the Secretary's revisionary power.

If judges but not courts could hear such claims, it is unclear why courts could naturalize foreigners. Some distinctions do come to mind: In the naturalization statute, the court's decision appears to have been final, or at least no executive officer exercised any revisionary power. Additionally, naturalizing a foreigner would not compel any payments from the United States treasury, but finding an invalid veteran eligible for a pension would. Perhaps that is what makes the former nonjudicial.[319]

316. Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244, § 2 ("The circuit court . . . shall forthwith proceed to examine into the nature of the wound, or other cause of disability of such applicant, and having ascertained the degree thereof, shall certify the same, and transmit the result of their inquiry, in case, in their opinion, the applicant should be put on the pension list, to the Secretary at War, together with their opinion in writing, what proportion of the monthly pay of such applicant will be equivalent to the degree of disability ascertained in manner aforesaid."); *id.* § 4 (detailing the Secretary's revisionary power).

317. CURRIE, *supra* note 154, at 155 n.172; Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (collecting the various circuit court opinions).

318. Act of Feb. 28, 1793, ch. 17, § 2, 1 Stat. 324, 325.

319. *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) at 413 n.† ("[I]t would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law.").

Even if judges but not courts can be used to administer public rights, that also raises some puzzles for administrative theory. David Currie has pointed out that there is no incompatibility clause[320] for judges, and therefore "Congress evidently saw no constitutional impediment to giving the same officer both judicial and executive duties,"[321] and again some of the judges themselves thought that was appropriate.[322] But this raises a difficult question: if these are executive duties, then should the President not have control over such officers?

In this regard, it is important to distinguish the naturalization and seaworthiness statutes, where the court or judge apparently had finality of judgment, from the statutes involving pensions and remissions, where they did not. The naturalization laws surely could have been assigned to executive officers, as they are today;[323] but adjudicating the admission of aliens is also a matter of public right[324] amenable to judicial resolution.[325] The same can be said for the seaworthiness of vessels: such a power could be administered by, say, Occupational Safety and Health Administration regulators, but also by courts.[326] In both cases, the courts and judges had the power of final judgment to the extent they were involved.

The matters of pensions and remissions are more challenging because the judges did not have any power of final judgment. The best answer, it seems, is that both the remission statute and the revised pension statute did not really grant the judges any governmental power at all. In both cases, the judges were simply

---

320. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

321. CURRIE, *supra* note 154, at 51 n.305.

322. *Hayburn's Case*, 2 U.S. (2 Dall.) at 413 n.†.

323. 8 U.S.C. § 1421(a) (conferring naturalization authority upon the Attorney General).

324. Fallon, *supra* note 77, at 967–70; Developments in the Law, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1318 (1983) (noting the rights-privileges distinction as applied to these cases).

325. It should be noted that it is not clear there was any adverse party to the adjudication, suggesting an even more expansive view of judicial power.

326. Although the scope of the public rights doctrine is contested, see *supra* Part II.A.1, licensing vessels on interstate waters can be understood as administering the government's own resources. John C. Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, in THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT (Peter J. Wallison & John Yoo eds., 2022) (making this argument).

to determine facts, but there was no power to bind anyone until the Secretary of Treasury (in the case of remissions) or Congress (in the case of pensions) made a decision, and they were free to reassess all matters for themselves.[327] This may suggest that insulating adjudicative officials is constitutional, so long as the head of an agency has ultimate decisionmaking authority—a version of the modern Administrative Procedure Act's (APA) revisionary power[328]—or the judges merely make reports to Congress for their decision.[329]

The upshot for present purposes is that the *administration* of public rights—not just claims for public rights—may be yet another example of a nonexclusive function at the Founding. As Currie noted, these early laws "suggest . . . a relaxed view of the boundaries between judicial and executive power."[330] There are some things neither courts nor judges can do: direct executive officers, prosecute offenses, or, say, command troops in war. But the administration of public rights is itself sufficiently similar to the adjudication of those rights that this task can perhaps be assigned to courts or judges, as well as to administrative officials.[331] The early statutes suggest that the judges either had to have final judgment (as in the case of naturalization and seaworthiness), or a mere fact-finding power that did not bind the executive officer who would subsequently review any factual determination. And the executive department, of course, could have administered the regulatory schemes without any judicial involvement at all.

III. OTHER IMPLICATIONS

The previous Parts sought principally to establish the proposition that the existence of exclusive and nonexclusive functions, or functionally overlapping powers, is consistent with Founding-era sources and originalist reasoning, and to suggest

327. Though presumably they would tend to defer to the initial fact-finder's factual conclusions.

328. 5 U.S.C. § 557(b).

329. *See also* Mashaw, *supra* note 117, at 1333 ("The use of courts as administrative tribunals to make initial or recommended decisions seems analogous to the modern role of the administrative law judge.").

330. CURRIE, *supra* note 154, at 156.

331. Ideally, there would be an adverse party; but again, it is not clear that there was such an adverse party under the naturalization or invalid pensioner statutes.

some tentative implications for military justice, the administration of public rights, and adjudicatory officials. The remaining Part briefly describes some additional implications of this proposed reframing for administrative law doctrine. It demonstrates that this reframing helps to clarify much conceptual confusion. This Part will discuss (briefly) the potential implications of exclusive and nonexclusive functions for judicial deference to agency legal interpretations; the nature of legislative rules; how to think about independent agencies; and, finally, the power at issue in *INS v. Chadha*.

A. DEFERENCE

It is blackletter doctrine that statutory ambiguities are implicit delegations of authority to the Executive to resolve those ambiguities.[332] Courts must therefore defer to the Executive's reasonable interpretations even if those interpretations are not the "best" interpretation—that is, those the courts would have reached had it decided the matter for itself.[333] Many scholars have questioned whether such deference violates either the APA's provision that a reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,"[334] or the grant of "judicial Power" to the courts.[335]

An additional rationale for deference, however, is that agencies are more politically accountable, technically expert, and in-

332. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

333. *Chevron*, 467 U.S. at 842–43; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . . Instead, the agency may . . . choose a different construction, since the agency remains the authoritative interpreter . . . of such statutes.").

334. 5 U.S.C. § 706 (2018).

335. U.S. CONST. art. III.

stitutionally competent than courts to interpret statutory ambiguities.[336] This raises the question, how is it that executive officers are more competent than courts to do what courts quintessentially do: interpret law.[337] The answer, according to many scholars, and also some court opinions, is that interpretation really involves questions of policy.[338]

The framing of exclusive and nonexclusive functions advances the debate. Because the function of adjudicating matters of public right is not exclusively judicial, Congress could certainly authorize courts to give deference to any of the Executive's determinations, including on legal interpretations, in such cases.[339] If Congress can preclude courts from hearing such matters altogether, then it can authorize deferential review. Whether Congress has in fact authorized deferential review in such matters is another question.[340] In private rights cases, any interpretive matter would have to be resolved by the courts.

As to those matters that involve policy determinations, it is entirely possible, as I have argued before, that in many such cases the question does not involve any interpretation at all.[341] In *Chevron* itself, for example, the agency was required to regulate "stationary sources."[342] The Act defined stationary source as

---

336. *Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)); *see also, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 n.30 (1986) (noting that the deference in *Chevron* was "predicated on expertise").

337. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judiciary to say what the law is.").

338. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2597–98 (2006) ("[T]he general argument for judicial deference to executive interpretations rests on the undeniable claims that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach.").

339. And thus deference in social security cases is, for example, permissible. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212 (2002); Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541 (2012).

340. Again, the APA provides that courts shall decide all relevant questions of law. 5 U.S.C. § 706.

341. *See* Wurman, *supra* note 116.

342. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 859 (1984) (quoting Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111(a)(3), 84 Stat. 1676, 1683 (codified at 42 U.S.C. § 7411(a)(3)).

"any building, structure, facility, or installation" which emits air pollution.[343] This raised the question what unit of emission to regulate when more than one definition applied—for example when there was an installation or facility with multiple buildings or structures that emitted a certain amount of air pollution.[344] The Reagan Administration chose to treat an entire plant as a "bubble" and thus as a single stationary source, which would save significant costs to the energy industry.[345]

Arguably, anyway, this is not an interpretive question at all: it is rather a gap in the statute that needs to be filled in order to execute the statute.[346] That is why the Court stated that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress," and "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[347]

Even in private rights cases involving such gap-filling and policymaking, "deference" would be owed. It is not even appropriate to call it deference because the making of policy is not generally within the courts' competence. But, as Justice Thomas has argued, that then raises the question whether such gap-filling violates the grant of legislative power to Congress.[348] That criticism is valid only if such gap-filling is a function falling *exclusively* within the grant of legislative power to Congress. That depends on the nondelegation doctrine.

---

343. *Id.* (quoting Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111(a)(3), 84 Stat. 1676, 1683 (codified at 42 U.S.C. § 7411(a)(3))).

344. *Id.*

345. *Id.* at 858–59; Jack L. Landau, Chevron, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENV'T. L. 285, 287 (1985) (claiming the bubble concept saves millions of dollars without sacrificing air quality).

346. Of course, whether a statutory provision creates an interpretive ambiguity or instead calls for gap-filling is itself a question of interpretation. The point is only that, at some point, the law runs out—and then there is nothing left to interpret. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("[S]ometimes the law runs out, and policy-laden choice is what is left over."). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53–55 (1st ed. 2012) (arguing that interpretation is necessary to identify gaps in statutes).

347. *Chevron*, 467 U.S. at 843–44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

348. *See supra* Part I.C.

Is deciding whether to apply Congress's instruction with respect to stationary sources to an entire plant or to an entire emitting unit the kind of decision that Congress *must* make, thus falling within its exclusively legislative power? Under Justice Thomas's private-rights account of exclusively legislative power, the answer in *Chevron* would have to be "yes."[349] But that is a stark answer. After all, the agency *has* to make a choice: it has to decide whether to regulate one or the other, per the statute's instruction. Either choice would affect private rights. Justice Thomas's view appears to be that the *courts* could nevertheless resolve such matter.[350] But it is not at all clear why that would be true. If it is an exclusively legislative function such that Congress must exercise it, then surely neither the Executive nor the courts could exercise that power.[351] There are only two possible options: either Congress has delegated an exclusively legislative function by failing to anticipate this problem, in which case the

349. *Id.*

350. *Id.*

351. This quite properly raises doubt on one of the Supreme Court's incarnations of the "major questions" doctrine. In *King v. Burwell*, the Supreme Court dealt with the question of whether an exchange "established by the State" under the Affordable Care Act could include an exchange established by the federal government where a State refuses to establish a healthcare exchange. 576 U.S. 473, 483 (2015). The Court refused to apply *Chevron* deference because the question was of "deep 'economic and political significance' that is central to this statutory scheme," and thus "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* at 486. This major-questions exception to *Chevron* has often been described as a canon of construction that enforces the nondelegation doctrine. Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 57–63 (2010); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 236–37, 242–43.

But this then raises the question: if it would have violated the nondelegation doctrine for an agency to make such a decision, then why can the Court make the decision? Chief Justice Roberts recognized the problem in *Burwell*, explaining, "Reliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'" *Burwell*, 576 U.S. at 497–98 (quoting Palmer v. Massachusetts, 308 U.S. 79, 83 (1939)). Under the understanding proposed here, it is likely that if a matter is sufficiently important that it cannot be resolved by the agency, then it cannot be resolved by the courts, either; but if it is a policymaking matter that can be resolved by the latter, it can be resolved by the former, too. Of course, if it is genuinely an interpretive matter, then it belongs to the courts; but the majorness of the issue has no bearing on who gets to decide it.

whole provision falls apart and cannot be enforced, or it is a non-exclusive legislative function: the kind of function that either Congress or the agency can exercise.

B. LEGISLATIVE RULES

A recognition of nonexclusive functions may also help clarify the nature of and doctrine surrounding "legislative rules" under the APA.[352] The APA distinguishes between legislative rules and interpretative rules, procedural rules, and policy statements.[353] The former must go through notice-and-comment rulemaking whereas the latter do not.[354] Additionally, before an agency can enact legislatives rules, it must be authorized by statute to do so.[355] Although the distinction among these categories of rules is fuzzy, legislative rules are binding rules that affect private rights and obligations.[356] Interpretative rules merely interpret existing statutory rights and obligations;[357] policy statements merely indicate how the agency intends to exercise discretion left

352. *See* 5 U.S.C. § 553(b).

353. *Id.*

354. *Id.*

355. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 673–74 (D.C. Cir. 1973); *see also* Merrill, *supra* note 291, at 2109 ("[I]t is hornbook law among administrative lawyers that 'an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so.'") (quoting 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 234 (3d ed. 1994)).

356. The distinction is normally stated as whether the rule has "binding legal effect" or not. *See, e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010). I add the additional qualification that such rules must also bind private parties because procedural rules are often "binding" on an agency, but do not affect private rights and obligations, and therefore are not considered legislative. *See, e.g.*, James v. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 281 (D.C. Cir. 2000) (holding that a procedural rule binding on agency was not a legislative rule because it "[did] not change the substantive criteria" under the statute); United States *ex rel.* Accardi v. Shaugnessy, 347 U.S. 260 (1954) (noting that an agency's procedural rules bind the agency). Of course, many rules do purport to bind agency officials, but in doing so, they in fact alter the rights and obligations of private parties. *See, e.g.*, Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987) (explaining that action levels directed at enforcement officials altered the private rights and obligations of the regulated parties).

357. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993); Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997).

by law;[358] and procedural rules, while obviously having an effect on rights (as do interpretative rules and policy statements), theoretically involve merely how an individual presents him or herself to an agency.[359]

As Merrill has explained, "little effort has been made by the courts or commentators to spell out the source of congressional authority to confer . . . on agencies" the power to promulgate legislative rules.[360] The present framework may help clarify. One reason that an agency need not wait for statutory authorization to promulgate interpretative rules and policy statements is because such rules are merely an exercise of exclusively executive functions.[361] That is, exercising discretion left by law is what the executive power simply is. It is not something Congress can do; Congress cannot interpret existing law or order the Executive to exercise discretion left by law, unless Congress enacts a new law. That is, Congress can always expand or limit discretion by law; but whatever discretion is left by law is for the Executive to exercise.

The formulation of legislative rules, on the other hand, is a nonexclusive legislative function. This helps us make sense of why they are called legislative rules, but why their promulgation might not constitute an exercise of *the* legislative power vested exclusively in Congress: because some legislative functions can be shared.[362] It also may explain why the agency must wait for

---

358. 5 U.S.C. § 553(b); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.").

359. Chamber of Com. of U.S. v. U.S. Dep't of Lab., 174 F.3d 206, 211 (D.C. Cir. 1999) ("A procedural rule is one that does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'") (quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)).

360. Merrill, *supra* note 291, at 2114.

361. It is possible to have a *policy* about how to interpret a statute, where the statute leaves open multiple possibilities, and therefore the interpretation is itself a discretionary matter. Whether that interpretation will be binding on the courts depends on the analysis in the previous Section. *See supra* Part III.A.

362. Of course, if any rule that affects private rights and conduct is exclusively legislative, then all legislative rules are unconstitutional. *Cf.* Merrill, *supra* note 291, at 2120 n.90 ("[Schoenbrod] says that Congress may not delegate the legislative power, and the legislative power is the power to make rules for the governance of private conduct. It would appear to be a logical corollary of

an authorization: because at least arguably any nonexclusive legislative function, being also within the power of Congress to exercise, must first be delegated by Congress before another branch can exercise it.

To be sure, this is not a complete explanation. Some nonexclusive functions can arguably be done by the Executive without waiting for authorization from Congress. Recall President Washington's regulations respecting the timing of payments to be made to the invalid veterans of the Revolutionary War, and the vouchers they would need to submit as proof of entitlement.[363] Congress specifically authorized such regulations—it provided that the payments shall be made "under such regulations as the President of the United States may direct"[364]—but it is hardly clear that the President would have been unable to make such regulations without this congressional authorization.

This raises the question whether some nonexclusive functions are so executive in nature that although Congress could exercise such functions, they are at least sufficiently executive that the President does not need to wait for Congress to delegate the authority. There may be some kinds of nonexclusive functions, however, that more partake of legislative qualities that the President must wait for authorization. This suggests that there are three categories of legislative functions: exclusively legislative functions that only Congress can exercise through wielding its grant of legislative power; nonexclusive legislative functions in furtherance of a statutory scheme that the Executive can exercise without waiting for specific statutory authorization, but which Congress can also exercise; and nonexclusive legislative functions that Congress can exercise, or the Executive can exercise after a delegation of such authority.[365] This possibility warrants a fuller exploration in future work. The present claim is

---

these propositions that only Congress can make legislative rules. But Schoenbrod never explicitly embraces this corollary.") (internal citation omitted).

363. *See supra* Part II.B.3.

364. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

365. Merrill has argued that there are three views of legislative power and whether it can be shared. The first is that legislative power cannot be shared and Congress must exercise all such power. The second Merrill describes as the "first-mover" account by which Congress can delegate legislative power. The third is the "legislative supremacy" account, by which the Executive can exercise legislative power at any time, subject to override by Congress. Merrill, *supra* note 291, at 2117–18. Under the account presented here, all three are possible simultaneously.

that the nonexclusive functions framework helps to clarify the nature of legislative rules and allows us to ask the right questions about them.

C. INDEPENDENT AGENCIES

Exclusive and nonexclusive functions also help us to see why independent agencies are unconstitutional, at least on originalist grounds, but also why the Supreme Court might have been led astray in *Humphrey's Executor*.[366] The case involved President Franklin Roosevelt's removal of a commissioner of the Federal Trade Commission (FTC) from office.[367] The statute provided that an FTC commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[368] President Roosevelt did not provide cause for the removal, but simply wrote to the commissioner:

> You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.[369]

The Supreme Court held that this removal was illegal and that the removal restriction in the statute was constitutional.[370] It distinguished prior cases holding that officers appointed by and with advice and consent must be removable at-will by the President[371] by arguing that those cases involved a "purely executive officer[]" who was "charged with no duty at all related to either the legislative or judicial power."[372] The Court held that "[i]n administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say, in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially."[373]

The Court was obviously right to intuit that some executive or administrative power at least appears partly legislative or judicial; hence its identification of "quasi" legislative and "quasi"

366. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
367. *See id.*
368. *Id.* at 620.
369. *Id.* at 619.
370. *Id.* at 626, 631–32.
371. Myers v. United States, 272 U.S. 52, 176 (1926).
372. *Humphrey's Ex'r*, 295 U.S. at 627–28.
373. *Id.* at 628.

judicial power. That is because, as we can now see, some governmental functions partake in multiple qualities and are nonexclusive. When an agency "fill[s] in" the details of a statute with a regulation, it is exercising a nonexclusive legislative function that could be exercised by Congress itself.[374] And when it "administers" a statute, particularly by adjudicating disputes, it is at least possibly exercising a nonexclusive judicial function. Whether the agency is unconstitutionally exercising *exclusively* legislative or judicial functions will depend on the scope of the nondelegation and public rights doctrines. The flaw in *Humphrey's Executor* was that it assumed the nonexclusive functions that it identified could be exercised by some body (i.e., an independent agency) *other* than one of the three named constitutional actors in the Constitution.

Even though the above analysis casts doubt on *Humphrey's Executor*, that does not necessarily mean Congress has no discretion to structure officers exercising nonexclusive judicial functions in interesting ways. Recall that in public rights cases, Congress could assign such cases to the judiciary and give them final say over such matters.[375] If such cases can effectively be decided by the judiciary *or* the Executive, perhaps Congress could assign them to an officer insulated from presidential control and removal, so long as the courts have de novo judicial review over such matters. Although, to be sure, if such power is assigned to the Executive, the exercise of that power must comport with Article II (i.e., removal), it is at least possible to conceive of such officers as adjuncts of the courts themselves.[376] Alternatively, as noted, perhaps initial factual findings (and even legal conclusions) in public rights matters are not exercises of governmental power at all, so long as another executive officer must first approve or revise those findings.[377] And finally, Congress could potentially provide for direct appellate review in the Supreme Court of an executive officer exercising a judicial function (but that officer would still have to follow the strictures of Article II).[378]

---

374. As I have explained in more detail elsewhere, this power to fill in the details is distinct from the power to interpret law as it exists, which is a function belonging only to the Executive and to the courts. Wurman, *supra* note 116, at 693.

375. *See supra* Part II.A.1.

376. Wurman, *supra* note 23, at 420, 423–24.

377. *See supra* Part II.C.1.

378. *See supra* notes 188–229 and accompanying text.

Incidentally, we can now also see why Justice Stevens was right to suggest that power is often chameleon-like[379]: because it is often overlapping, and the functions of government are often nonexclusive. He therefore proposed that, because the same action would be legislative if done by Congress, it should be deemed legislative when done by the Executive.[380] We now see that Justice Stevens had a reasonably correct intuition, but he was not altogether right. Some functions are nonexclusive which is why they can be described as legislative whether done by Congress or the Executive. But some power might be exclusively legislative, in which case it cannot be done by the Executive at all.

D. *CHADHA*

We are in a position, finally, to make sense of *INS v. Chadha*.[381] Recall that the majority found the act in question—the vetoing of the decision to withhold removal—to be legislative when done by Congress, but executive when done by the Executive.[382] Justice Powell thought the act to be judicial.[383] The dissent effectively argued that the act was legislative whether done by Congress or the Executive.[384] Several scholars believe the decision to withhold removal to have been executive power.[385] Functionalists have taken the case for the proposition that governmental power is too hard to classify in contested cases for formalism to work.[386]

The reason the governmental function in that case can be classified as any of the three powers—legislative, executive, ju-

379. *See* s*upra* note 92 and accompanying text.

380. *See* supra note 94 and accompanying text.

381. INS v. Chadha, 462 U.S. 919 (1983).

382. *See supra* notes 58–63 and accompanying text.

383. *See supra* notes 64–70 and accompanying text.

384. *See supra* notes 72–74 and accompanying text.

385. *See* Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 522 (1984) ("[O]ne of the most common arguments offered to invalidate the legislative veto is that it vests executive power in Congress."); Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 39 (1994) ("The INS' decision to suspend Mr. Chadha's deportation could be characterized as a legislative, executive, or judicial act."); Wurman, *supra* note 23, at 425 ("[The legislative veto] could also be considered executive because it directed official discretion in a particular case.").

386. *See supra* notes 6–7 and accompanying text.

dicial—is because it involved public rights. As noted previously,[387] the right to reside in this country as a non-citizen was historically a matter of public right. If the Executive deported an immigrant or denied entry, there was nothing the claimant could do, at least not without a waiver of sovereign immunity.[388] Congress could assign such cases to the judiciary, as it did early on;[389] and it could assign such cases to the Executive, with or without judicial review.[390] And it could resolve individual petitions itself (with presentment) because doing so alters the legal rights of the petitioners.[391] Thus, the act at issue in *Chadha* could be described as legislative, executive, or judicial because it partook of all three characteristics and could have been exercised by any of the three branches of government. *Chadha* does not prove that governmental action is too hard to define in contested cases. It proves that there are nonexclusive functions.[392]

CONCLUSION

For too long, separation of powers disputes and scholarship have centered on two competing conceptions of the separation of powers, neither of which is adequately supported by text, structure, and history. Formalists for too long have assumed that government power can be neatly divided and allocated among three branches with three distinct functions. And functionalists for too long have argued that all governmental power is inherently indeterminate, or that we should focus on more amorphous concepts such as aggrandizement or balance. A separation of powers theory rooted in the distinction between exclusive and nonexclusive functions—that focuses on the functionally overlapping nature of the vested powers of government—is more faithful to

387. *See* Part II.C.1.

388. For the proposition that immigration cases are public rights cases, see *supra* note 324. For the relation to sovereign immunity, see *supra* notes 142–48 and accompanying text.

389. *See supra* notes 312–16 and accompanying text.

390. *See supra* notes 315–18 and accompanying text.

391. As Congress routinely did and still does. Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1698–701 (1966).

392. *Chadha* was still rightly decided for the same reason that *Humphrey's Executor* was wrongly decided: because one of the three named constitutional actors must still exercise the function in question, according to its vested power and the constitutional strictures appertaining to that branch. The House of Representatives is not Congress, and the legislative veto was not accomplished through bicameralism and presentment.

Founding-era sources on which constitutional interpretation generally relies.

I have previously suggested that we might think of historical practice as fencing off multiple categories of *powers*—exclusive legislative, executive, and judicial powers, and nonexclusive legislative powers (over certain rulemakings, for example) and nonexclusive judicial powers (over public rights, for example). This framing may, however, be less faithful to the *text*, which grants *all* legislative and judicial powers in the respective branches. My point is only that the existence of what I previously described as exclusive and nonexclusive powers, which I think is faithful to how governmental power works, is *consistent* with the text of the Constitution if one understands each department to have an exclusive power that in many circumstances is functionally overlapping.

Whichever framing one adopts, this theory better explains persistent puzzles in administrative law doctrine and history, from Madison's understanding of the office of the Comptroller, the nature of military justice, and the administration of public rights, to questions about judicial deference, independent agencies, and legislative rules. The aim here has been to start a reorientation toward this kind of separation of powers theory, to sketch out how thinking systematically about functionally overlapping powers might clarify much that is currently confusing in administrative law and separation of powers law. This theory may not always provide easy answers and is unlikely to answer all questions. But it may make the most sense of text and structure, as well as constitutional history both early and modern.