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The Disposing Power of the Legislature

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THE DISPOSING POWER OF THE LEGISLATURE

Thomas W. Merrill*

The Constitution as we understand it includes principles that have emerged over time in a common law fashion. One such principle is the disposing power of the legislature—the understanding that only the legislature has the power to arrange, order, and distribute the power to act with the force of law among the different institutions of society. This Essay illustrates the gradual emergence of the disposing power in criminal, civil, and administrative law, and offers some reasons why it is appropriate that the legislature be given this exclusive authority. One implication of the disposing power is that another type of constitutional common law—the power of courts to prescribe rules inspired by the Constitution but subject to legislative revision, as described in Professor Henry Monaghan’s pathbreaking 1975 Harvard Law Review Foreword—may in fact be unconstitutional in many of its applications.

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I. TWO TYPES OF CONSTITUTIONAL COMMON LAW

Henry Monaghan is rightly credited with being the first to conceive of certain aspects of constitutional law as federal common law.¹ What has not been observed, to my knowledge, is that Monaghan has identified and explicated two distinct types of constitutional common law. Both types can fairly be described as common law, in that their content is defined primarily by courts through the process of case-by-case decision-making. But there are important differences between these two types, which for convenience I will call “Type I” and “Type II” constitutional common law.

Type I constitutional common law is the subject of Monaghan’s celebrated 1975 *Harvard Law Review* Foreword. It is, to use his words, “a substructure of substantive, procedural, and remedial rules drawing their in-

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1. See Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 13–14 (1975) [hereinafter Monaghan, Foreword].

spiration and authority from, but not required by, various constitutional provisions.”² The key attribute of Type I constitutional common law, in addition to its more general quality of being judge-made, is that it is revisable by ordinary legislation. Most of Monaghan’s illustrations of Type I constitutional common law were drawn from the field of criminal procedure, with the exclusionary rule and *Miranda* warnings given special prominence.³ He argued that these kinds of doctrinal elaborations need not be conceived of as *Marbury*-style interpretations of the constitutional text; rather, they can be regarded as a species of federal common law.⁴ As such, Type I constitutional common law, like other forms of federal common law, is subject to legislative modification.⁵ Professor Monaghan argued that this revisability is a good thing, at least in the context of remedial innovation. Courts will act more boldly in experimenting with different remedial or prophylactic rules if they know the legislature can correct any missteps they may make. This is especially true given the power of the legislature to develop superior remedies for constitutional violations relative to those that can be devised by courts.⁶

Type II constitutional common law shares with Type I the feature of being judge-made, or at least of deriving from evolved practice, rather than resting on the interpretation of a canonical constitutional text. In contrast to Type I constitutional common law, however, Type II has the same status as *Marbury*-style constitutional review. It is the supreme law of the land, binding on all governmental branches—legislative, executive, and judicial—at both the state and federal levels. Hence, Type II constitutional common law is not subject to legislative revision. The most prominent example of Type II constitutional common law may be the practice of judicial review itself. The Constitution contains no provision expressly authorizing courts to invalidate laws in the name of the Constitution. *Marbury* justified the power of judicial review in terms of certain basic postulates presupposed by the Constitution, such as the higher law nature of the Constitution and the judicial duty to enforce the law.⁷ The power of judicial review was thus originally rooted in unwritten assumptions, and today rests largely on longstanding practice, rather than textual exegesis. Another example is the principle of state sovereign immunity, which the Court in *Alden v. Maine* identified as a broad presupposition of the Constitution that has the status of binding constitutional law,

2. *Id.* at 2–3.

3. See *id.* at 3–10 (discussing exclusionary rule); *id.* at 20–30 (same, and discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

4. *Id.* at 10–17.

5. *Id.* at 18–26.

6. *Id.* at 27–30.

7. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803). For an explication of the background understanding that animates *Marbury*, see generally Philip Hamburger, *Law and Judicial Duty* (2008).

but does not reside in any particular text (such as the Eleventh Amendment).⁸

Although Professor Monaghan can be credited with the discovery of Type I constitutional common law, the same cannot be said of Type II constitutional common law. Others have noted that much of what we regard as supreme constitutional law has a common law quality to it.⁹ Nevertheless, Monaghan has also written with great insight about certain manifestations of Type II constitutional common law. What I have in mind in particular is his magisterial article on the protective power of the presidency.¹⁰ There he argued that the Constitution has come to embody the understanding that the Executive has no inherent power to act with the force of law, except in emergencies to protect the Nation in advance of expected congressional action.¹¹ He did not suggest that this principle, which has evolved over time in response to particular exigencies, was revisable by the legislature; it is not Type I constitutional common law. It is constitutional common law in the Type II sense—a principle not directly traceable to any clause in the document, but regarded as having the same status as the written Constitution.

In this Essay, I extend Professor Monaghan's pioneering account of the "protective power" of the presidency by considering a principle of Type II constitutional common law that applies to a coordinate branch of government, what I call the "disposing power" of the legislature. By "disposing power," I refer to the power of arranging, ordering, and distributing the power to act with the force of law among the different institutions of society. The institution that wields the disposing power determines who has the authority to make law and under what circumstances. It has the power to decide who decides.¹² My claim is that American constitu-

8. 527 U.S. 706, 733–34 (1999).

9. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch* 106 (1962) ("The Framers knew . . . that nothing but disaster could result for government under a written constitution if it were generally accepted that the specific intent of the framers of a constitutional provision is ascertainable and is forever and specifically binding, subject only to the cumbersome process of amendment."); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 705 (1975) ("[T]he courts do appropriately apply values not articulated in the constitutional text, and appropriately apply them in determining the constitutionality of legislation."); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L.J.* 221, 285–97 (1973) (justifying development of constitutional right of privacy in terms of judicial identification of evolving conceptions of "conventional morality").

10. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1 (1993) [hereinafter Monaghan, *Protective Power*].

11. *Id.* at 10–11.

12. See generally Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 3 (1994) [hereinafter Komesar, *Imperfect Alternatives*] (describing "institutional choice" as "the decision of who decides"). The greatest monument to the comparative institutional perspective, and a continuing influence on scholars and judges, is Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994).

tional law reflects an emerging Type II constitutional common law principle that the legislature is the exclusive repository of this disposing authority. Consequently, neither the executive nor the judiciary has autonomous power to make law, or to take it upon itself to enforce it, unless delegated authority to do so by the legislature. If, as Monaghan persuasively argues, the President has no inherent authority to act with the force of law, except in emergencies,¹³ then the corollary is that the legislature has exclusive authority to delegate power to make law and to determine who will enforce it, except in emergencies.

They say imitation is the sincerest form of flattery. In arguing for the disposing power of the legislature I will attempt to imitate—in a modest and incomplete way—Professor Monaghan's best work. In particular, I will try to imitate the Monaghan methodology, characterized by its broad historical sweep of vision, its attention to precedent, and its capacity to draw out latent principles from seemingly disparate sources. What I cannot hope to match are the depth of knowledge and the subtlety of mind that Monaghan always brings to the task.

The Essay is organized as follows. In Part II, I review, in a broad-brush fashion, evidence in support of the emergence of the disposing power of the legislature as a Type II constitutional common law principle. Part III offers some reasons why this disposing power is justified as a core principle of constitutionalism. Part IV considers a potential paradox of Type I and Type II constitutional common law: whether the disposing power, a form of Type II constitutional common law, calls into question the legitimacy of Monaghan's Type I constitutional common law.

II. THE EMERGENCE OF THE DISPOSING POWER

One of the most important things Professor Monaghan has taught us about Type II constitutional common law is that its core principles were not laid down for all time at the founding. Rather, they gradually revealed themselves under the pressure of historical events.¹⁴ Once revealed, however, these principles have an enduring force. They do not shift radically in response to constitutional moments,¹⁵ nor are they continually redefined in light of contemporary moral values.¹⁶ They condition and constrain the operation of government in a permanent way, al-

13. Monaghan, *Protective Power*, *supra* note 10, at 70–74.

14. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 730–34 (1988) (discussing Court decisions and *stare decisis* during New Deal); see also Monaghan, *Foreword*, *supra* note 1, at 17 (explaining Court's "constitutionally inspired common law" emerging from Commerce Clause cases).

15. Cf. 1 Bruce Ackerman, *We the People: Foundations* 266–94 (1991) (describing process of "higher lawmaking" whereby "movement in constitutional politics" transforms initially contentious "ideological fractions" into constitutional law through Supreme Court delineation of "cogent doctrinal principles").

16. Cf. Ronald Dworkin, *Law's Empire* (1986) (positing model of law as integrity in which previous interpretations of Constitution are reconciled in light of "best" moral understanding of the law).

though our understanding of these principles continues to evolve in response to new events.

So it is with the disposing power of the legislature. When the Constitution was ratified in 1789, few recognized that dispositions of governmental authority were even possible beyond the allocation of powers prescribed by the Constitution itself.¹⁷ Today, it is familiar and well understood that legislatures can delegate power to act with the force of law.¹⁸ What is not as widely appreciated is that American constitutional law of the Type II common law variety is steadily evolving toward a further and significantly different understanding of delegated lawmaking: that the legislature has the *exclusive* power to delegate authority to act with the force of law.¹⁹

The idea that the legislature—and only the legislature—can dispose of the authority to act with the force of law has emerged slowly and at different times in different areas of the law. This evolution cannot be ascribed to bursts of popular lawmaking or refinements in political morality. Rather, it is the product of the gradual unfolding of consensus about appropriate institutional roles. I will consider three particularly telling developments, taken from the history of criminal law, civil law, and administrative law respectively.

A. Criminal Law

The history of criminal law provides the clearest illustration of the emergence of the disposing power. The United States inherited from England a legal system in which certain conduct was regarded as criminal even though it was not expressly proscribed by a written criminal code.²⁰ During most of the colonial era, common law crimes were regarded as a

17. The Framers gave little attention to the possibility of delegation of powers by Congress, perhaps because they were more concerned with legislative aggrandizement. See James O. Freedman, Review: Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 309 (1976).

18. See generally David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) (discussing ubiquity of delegation); Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1 (1983) [hereinafter Monaghan, *Marbury* and the Administrative State] (same).

19. See Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2101 (2004) [hereinafter Merrill, Rethinking] (elaborating on distinction between nondelegation and exclusive delegation).

20. This is revealed in Blackstone's Commentaries, which does not distinguish between common law and statutory sources of criminal liability, but melds the two together under the heading of different types of crimes. See 4 William Blackstone, *Commentaries* *41–*254. As Thomas Green comments: "It would have been difficult to do otherwise. Statutes had intervened so often over the centuries for narrow remedial purposes that there was no separate body of common law as opposed to statutory offenses." Thomas A. Green, Introduction to 4 William Blackstone, *Commentaries*, at iii, xiii n.13 (Univ. Chi. Press 1979).

legitimate feature of the legal landscape.²¹ Largely due to disputes at the end of the eighteenth century over politically motivated prosecutions for criminal sedition, the idea of common law crimes fell under a cloud.²² Perhaps as a delayed response to this controversy, the Supreme Court in *United States v. Hudson & Goodwin* emphatically disapproved of the notion of federal common law crimes.²³ The decision rested in part on federalism principles—that the federal government is one of limited and enumerated powers. But it also sounded in separation of powers concerns. Even assuming that the federal government has authority over the subject matter, the Court stated that “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”²⁴ When the Court refused to accede to Justice Story’s pleas to reconsider the matter a few years later, common law crimes—in the sense of criminal liability having no foundation in an act of Congress—disappeared from our federal law for all time.²⁵

At the state level, courts continued to assert authority to hear common law crimes throughout most of the nineteenth century. As the years wore on, however, the tide eventually turned here as well. John Jeffries, in a survey of the issue, could find only two reported decisions in the twentieth century in which courts upheld convictions based on conduct not made criminal by legislation.²⁶ He concluded: “Judicial crime creation is a thing of the past.”²⁷ Today, most states have abolished common law crimes, “or provide that no act or omission is a crime unless made so

21. James Henretta captures the gradual evolution of colonial thought regarding the appropriate source of criminal liability by recounting three episodes occurring at different times in the colonial era. See James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America*, in 1 *The Cambridge History of Law in America* 555 (Michael Grossberg & Christopher L. Tomlins eds., 2008). In 1630, magistrates in Virginia were allowed to impose the punishment of lashing for minor offences on their own say-so. *Id.* By 1712, a Connecticut court sought the permission of the legislative assembly before drawing a distinction in the midst of a trial between murder and manslaughter. *Id.* By 1793, the Vermont Chief Justice could declare: “No Court, in this State, ought ever to pronounce the sentence of death upon the authority of a common law precedent, without the authority of a statute.” *Id.*

22. See generally Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003, 1010 (1985) (discussing controversy over federal common law crimes in late eighteenth-century America and their repudiation by the Supreme Court in early nineteenth century).

23. 11 U.S. (7 Cranch) 32, 32 (1813).

24. *Id.* at 34.

25. The Court declined to revisit the matter in *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416–17 (1816), notwithstanding Justice Story’s vehement objections to the contrary, when the Attorney General refused to argue for the overruling of *Hudson & Goodwin*.

26. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 194 n.13 (1985).

27. *Id.* at 195.

by the code or applicable statute.”²⁸ A handful of states continue in theory to recognize common law crimes, but only “to the extent that [they are] not inconsistent with the code.”²⁹

The explanation for the abolition of common law crimes is sometimes framed in terms of concerns about fair notice and preventing arbitrary state action.³⁰ These concerns are said to require that conduct subject to criminal sanctions should be clearly delineated in an authoritative text, which can be consulted in advance by potential offenders and public authorities alike. But a more fundamental explanation is grounded in what I have called the disposing power, and in the understanding that this power is housed with the legislature. Certain conduct, like murder and theft, is made criminal in virtually all societies. But the criminal law in the United States also extends to conduct as to which divergent and sometimes strongly opposing views have been held at different times and places.³¹ The appropriate institution for resolving contested questions about the basic values of society under a system of separation of powers is the legislature, not the courts. It took some years for this basic proposition about the ordering of political institutions to take hold. But today it is regarded as axiomatic.

Just because authority to define conduct as criminal must come from the legislature, it does not follow that the legislature itself must do the defining. As Dan Kahan has argued, the abolition of common law crimes and related doctrines like the rule of lenity are best explained in terms of whether Congress has made a proper delegation of lawmaking authority.³² In particular, Kahan shows that the doctrine of lenity, which requires that ambiguities in criminal statutes be resolved in favor of the defendant, in effect returning the matter to the legislature for clarification, is only irregularly enforced.³³ He explains that this is because the doctrine of lenity is at war with another principle—that the legislature should be allowed to delegate authority to courts to fill in the details in criminal statutes through case-by-case interpretation.³⁴ Kahan suggests

28. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 *U. Pa. L. Rev.* 335, 338–39 (2005).

29. *Id.* at 339.

30. See Jeffries, *supra* note 26, at 205–16 (discussing notice and rule of law principles and their relation to principle of legality).

31. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 *Geo. L.J.* 2407, 2445 (1995) (discussing paradoxical nature of environmental crimes, arising because “[c]riminal law emphasizes settled norms, while environmental law constantly changes and aspires for fundamental and dramatic change”).

32. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 *Sup. Ct. Rev.* 345, 350.

33. See *id.* at 383–89 (noting “federal courts only sporadically apply lenity” and further exploring judicial “mechanism by which lenity has been rendered so largely inoperative”).

34. See *id.* at 367–70 (“[L]enity is in competition with—indeed, has been largely eclipsed by—another basic principle of federal criminal jurisprudence This principle

that one way of reconciling these conflicting principles is by asking whether the gap or ambiguity that Congress has left for courts to decide lies in the "interior" of the space that Congress has criminalized or near the "boundary" between what is considered criminal and what is considered tolerable or even socially beneficial.³⁵ Courts tend to permit delegation of interior issues, but are more apt to invoke the doctrine of lenity or other nondelegation precepts when conduct lies near the boundary between what is socially unacceptable, and therefore criminally penalized, and what is socially tolerated.

The critical point established by Kahan's study, for present purposes, is that delegation must take place in order to establish criminal liability. Strict nondelegation has been rejected. Thus, the legislature does not have to resolve every detail about what conduct is criminal. But disposing judgments are, by common consensus, ones that must be made by the legislature. Neither the executive nor the courts have inherent authority to declare something a crime. The basic question of whether to make conduct criminal, and whether to spell out the details in legislation or to delegate authority to fill in the details to some other institution, is, today, always a decision made by the legislature.

The story with regard to enforcement of the criminal law is remarkably parallel. The United States inherited from England a system dominated by the private prosecution of crimes.³⁶ The decision to charge someone with a crime was made by the victim or the victim's next of kin. The American colonies moved to supplement private prosecution with public officers dedicated to this task, and by the time of the Revolution, public prosecutors handled most criminal prosecutions in the United States.³⁷ At the federal level, prosecutions were initially handled by local U.S. Attorneys, who lacked supervision from Washington.³⁸ Congress

holds that Congress may delegate, and courts legitimately exercise, criminal lawmaking authority.").

35. *Id.* at 399–406 (discussing how lenity and delegating lawmaking authority affect rule of law principles).

36. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *Am. J. Legal Hist.* 313, 317–18 (1973) ("For a very long time, really into the nineteenth century, the English relied upon a predominant, although not exclusive, component of private prosecution.").

37. See Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in 3 *Encyclopedia of Crime and Justice* 1286, 1286–87 (Sanford H. Kadish et al. eds., 1983) ("[B]y the time of the American Revolution, each colony had established some form of public prosecution and had organized it on a local basis.").

38. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 *Duke L.J.* 561, 567–68 (noting Attorney General had no authority over U.S. Attorneys, who had sole authority to represent the United States in district and circuit courts). Private citizens nevertheless remained active in the early years, for example in urging grand juries to bring criminal indictments. See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 *Am. U. L. Rev.* 275, 292–96 (1989) ("[C]itizens in the first years under the Constitution evidently presented evidence of crimes directly to the grand jury. More commonly, individuals continued as at common

deemed it appropriate that prosecution be controlled by public officials, but did not see any need for unitary supervision of this function by the President or any alter ego of the President.³⁹

In time, a general consensus emerged that prosecution is a public function. Just as common law crimes gradually vanished from the scene, so did the private prosecutor. In the 1820s, with the rise of Jacksonian democracy, state prosecutors became elected officials, and were recognized as being part of the executive branch.⁴⁰ Starting with Massachusetts in 1849, states began questioning the propriety of private prosecution.⁴¹ Soon, a number of state supreme courts refused to affirm convictions procured by private prosecutors; other states enacted legislation outlawing private prosecutors.⁴² Today, only three states allow private prosecutions without the consent or supervision of a public prosecutor.⁴³ For practical purposes, the public prosecutor has come to have a monopoly on criminal enforcement authority. One of many illustrations of this new understanding came in 1987 when the Supreme Court, exercising its "supervisory authority," invalidated a criminal contempt verdict obtained by a private prosecutor appointed by a judge.⁴⁴ The decision confirmed the widespread perception that private prosecution of crimes is anachronistic and disfavored.

Various rationales have been offered by commentators for the movement toward conferring a monopoly of prosecutorial authority on public officials. Private prosecutors are viewed as excessively partisan and biased, zealously seeking conviction at the expense of any and all countervailing values.⁴⁵ Some commentators have even suggested that permitting private prosecution of crimes violates due process rights.⁴⁶ Public

law to bring evidence of crimes before magistrates and then, upon the magistrate's approval, to obtain a bench warrant for the defendant's arrest." (citation omitted)).

39. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 658 (1994) ("The U.S. Attorneys, created in the Judiciary Act to prosecute suits on behalf of the United States, were not put explicitly under the control of the Attorney General or the President.").

40. See Goldstein, *supra* note 37, at 1287-88 (describing election of prosecutors "as an incident of the election of judges" but noting their placement "as . . . member[s] of the executive branch, along with other officials of local government").

41. *Commonwealth v. Williams*, 56 Mass. (2 Cush.) 582, 585 (1849) ("As a general rule . . . the conducting of the case before the court and jury is to be confined to the public prosecutor.").

42. See Goldstein, *supra* note 37, at 1288 (describing state court decisions limiting private prosecutions).

43. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 *Ark. L. Rev.* 511, 529-30 (1994) ("[T]he majority of jurisdictions allow participation only with the public prosecutor's consent and retention of control over the case.").

44. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987).

45. See *id.* at 805-06 (noting potential for impropriety associated with "promises [of] financial or legal rewards for a private client" also exists for private prosecutors).

46. See Bessler, *supra* note 43, at 514 (arguing private prosecutors violate due process rights because they are not required to enforce concerns of "public interest").

prosecutors are more likely to hold a broader conception of the public interest, balancing the needs of law enforcement against concerns for protecting the innocent or those who do not deserve the ordeal of being put to trial.⁴⁷

In functional terms, the professionalization of the prosecutorial office is an integral feature of the modern criminal justice system. That system produces many more potential defendants than the system can process through formal criminal trials.⁴⁸ Inevitably, we must devise some mechanism for determining which subset of criminal behavior should be prosecuted. One mechanism would be to rely on private initiative, prosecuting only those crimes that elicit a private prosecutor. But this is widely perceived as being unacceptable because there would be no guaranteed match between the seriousness of the crime—and the threat that the offender poses to the community—and the likelihood of prosecution. Instead, we use plea bargaining to determine which crimes to prosecute. Thus, the public prosecutor performs a screening mechanism: The prosecutorial office selects the strongest and most serious cases for trial, dismisses the weakest and least serious, and negotiates pleas in the rest. In order for this system to work properly, it is necessary to have a professional office that can exercise broad discretion in handling each case as it arises. Such an office, if it is to perform the screening in an acceptable fashion, must have a *de facto* monopoly over all criminal prosecutions.

The broader and more fundamental point, for present purposes, is that we no longer think of the prosecution of crime as an inherent right of the victim or victim's family. It is now universally understood to be a public function. This was not true in 1789, when the Constitution was adopted, but became part of our unwritten constitution in the nineteenth century. And concomitantly with the understanding that prosecution is a public function, the legislature is understood to have broad authority to designate the process by which public prosecutors are selected and supervised. The primary reason for this may be practical rather than theoretical. As the prosecutorial function has come to be understood to require a public office, no institution other than the legislature has had the authority to create, structure, and fund such an office. Whatever the cause, the understanding emerged that the legislature has an exclusive disposing authority in determining the organization of the prosecutorial office.

B. *Civil Law*

When we turn to civil law, we also see powerful evidence of the emergence of the disposing power. With respect to substantive law, the *Erie*

47. See Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 797–99 (2003) (discussing federal prosecutors as “reflectors of community values” and noting their “sense of perspective and unique commitment to procedural justice”).

48. William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2555 (2004).

doctrine⁴⁹ and the overruling of *Swift v. Tyson*⁵⁰ loom large. The Court announced in *Erie* that “[t]here is no federal general common law.”⁵¹ As in the case of *Hudson & Goodwin*,⁵² federalism concerns were a large factor in the decision. But separation of powers also lurked below the surface. The *Swift* regime was condemned because it ultimately rested on a claim of inherent judicial power to declare substantive rules of common law, yet “no clause in the Constitution purports to confer such a power upon the federal courts.”⁵³ *Swift* was also condemned because it misread congressional signals, reflected in the Rules of Decision Act, about whether federal courts were to follow state rules of decision in all cases where there is no controlling federal law.⁵⁴ *Erie* can thus be seen as a powerful recognition of the disposing power of the legislature, both in its perception that federal courts have no inherent lawmaking power, and in its declaration that Congress has ultimate authority to direct the federal courts as to the source of law to apply for resolving cases and controversies.

Something called “specialized federal common law” survived *Erie*,⁵⁵ but it is on the ropes. A turning point of sorts came in *Boyle v. United Technologies Corp.*, where a bare majority of five justices, invoking federal common law, recognized a “Government contractor defense” in a products liability suit brought by the family of a deceased Marine pilot against a helicopter firm.⁵⁶ The majority opinion, written by a then relatively new member of the Court, Justice Scalia, engaged in wide-ranging policy analysis of the consequences of products liability judgments against government contractors, and prescribed in detail the elements of the defense.⁵⁷ Justice Brennan, writing for the dissent, pointedly observed that Congress had declined to adopt a government contractor defense, and accused the majority, “unelected and unaccountable to the people,” of usurping the legislative role in an area where it lacked “both authority and expertise.”⁵⁸ Justice Stevens, cutting to the heart of the matter, said that the majority had breached “a special duty to identify the proper decision maker before trying to make the proper decision.”⁵⁹

49. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

50. 41 U.S. (16 Pet.) 1 (1842).

51. *Erie*, 304 U.S. at 78.

52. See *supra* notes 23–25 and accompanying text.

53. *Erie*, 304 U.S. at 78.

54. *Id.* at 72 (holding “construction” of Act by *Swift* Court was “erroneous”).

55. See Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405 (1964) (noting “the emergence of federal decisional law in areas of national concern that is truly uniform”).

56. 487 U.S. 500, 512 (1988).

57. *Id.* at 512–13 (outlining scope of defense).

58. *Id.* at 515–16 (Brennan, J., dissenting).

59. *Id.* at 531 (Stevens, J., dissenting).

Boyle now appears to be an aberration. Both before and after the decision, recourse to federal common law was noticeably diminishing.⁶⁰ In areas ranging from public lands⁶¹ to transboundary nuisances⁶² to financial regulation,⁶³ the Court has gradually trimmed back on the use of federal common law. The Court increasingly avoids invoking federal common law in support of its decisions, preferring to cast its rulings in terms of interpretation of authoritative federal texts or preemption.⁶⁴ Although it would be rash to declare that federal common law is dead, a heavy aura of illegitimacy hangs over any claim for newly minted federal common law rules.

At the state level, the common law has had much broader influence and greater staying power. Yet even here, one can easily perceive a powerful movement toward the “statutorification” of law.⁶⁵ As statutes increasingly become the primary source of legal duties, there are signs of uneasiness with judicial lawmaking that lacks any sanction from the legislature. A good example is the recent campaign by the personal injury bar to dust off public nuisance law as a kind of “super tort” that can be deployed against any and all social ills, ranging from tobacco use, to removal of lead paint, to sales of handguns, to use of the gasoline additive MTBE, to global warming.⁶⁶ Occasionally, these claims have survived mo-

60. See, e.g., Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895, 899 (1996) (noting recent pattern of Court “restricting the federal common law making powers of the federal courts”).

61. Compare *Hughes v. Washington*, 389 U.S. 290, 292–93 (1967) (applying federal common law), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 320–21 (1973) (same), with *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977) (overruling *Bonelli* and applying state law).

62. Compare *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972) (applying federal common law), with *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (declaring federal common law displaced by statutory law).

63. Compare *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (applying federal common law), with *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (declining to apply federal common law), and *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108–09 (1991) (adopting state law as federal rule of decision).

64. Justice Scalia’s freewheeling, policy-based analysis in *Boyle* contrasts sharply with his subsequent decision for the Court in *O’Melveny & Myers*, where he declined to apply federal common law to determine the duty of a law firm to investigate fraud committed by a savings and loan client subsequently taken over by the FDIC. 512 U.S. at 89. The latter decision stresses the illegitimacy of lawmaking by courts, and observes that the “function of weighing and appraising” multiple variables is best left for the legislature. *Id.*

65. See generally, Guido Calabresi, *A Common Law for the Age of Statutes* 5 (1982) (“[S]tarting with the Progressive Era but with increasing rapidity since the New Deal, we have become a nation governed by written laws.”).

66. For an overview of these actions, see Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006) (discussing attempts to extend public nuisance tort liability, particularly in regards to product liability). The two most prominent global warming suits are *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 392–93 (2d Cir. 2009) (rejecting political question and standing objections and finding a federal common law of nuisance claim survives comprehensive federal legislation on air pollution), and *California*

tions to dismiss,⁶⁷ and a two-member panel of the Second Circuit, in a decision that may be destined for reversal, recently declined to dismiss an ambitious lawsuit challenging greenhouse gas emissions as a public nuisance.⁶⁸ But so far such suits have yielded no findings of liability.⁶⁹ The days of courts inventing new common law actions to deal with widespread social problems may be drawing to a close.

When considering who can call upon the authority of the courts to enforce rights through civil actions, the possibilities are unusually complicated, and some important Monaghanian qualifications are in order. One is the distinction between public and private rights, and especially the special role of courts in protecting private rights against government aggression.⁷⁰ Whether as a matter of construction of Article III, or of due process, Congress is not completely free to delegate the defense of private rights to nonjudicial institutions.⁷¹ The Court's recent decision in *Boumediene* makes this clear with respect to rights of liberty and the suspension of habeas corpus.⁷² Similarly, it is understood that Congress cannot delegate authority to try crimes to a nonjudicial tribunal, and probably cannot delegate the power to take property to an administrative agency, certainly not without any possibility of judicial review.⁷³

But these important qualifications aside, history has established that in federal law, Congress is the gatekeeper in determining whether individuals aggrieved by government action can make their way to court to obtain redress of their grievances. In the nineteenth century, the con-

v. General Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (dismissing complaint for lack of justiciable controversy, and thus never reaching issue of whether federal common law recognizes plaintiff's global warming nuisance claim).

67. Appellate courts in Rhode Island, California, and New Jersey permitted lead paint claims to go to trial. See Schwartz & Goldberg, *supra* note 66, at 559–60 (outlining cases dealing with lead paint liability).

68. See *Am. Elec. Power Co.*, 582 F.3d at 393.

69. Only one tobacco suit yielded a decision on the merits. See *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (rejecting public nuisance liability).

70. See Monaghan, *Marbury* and the Administrative State, *supra* note 18, at 14–20 (“[T]here has always been in our traditions particular concern with the judicial role where governmental interference with the ‘private rights’ of ‘liberty’ and ‘property’ was involved.”).

71. See Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell* to *Schor*, 35 Buff. L. Rev. 765, 849 (1986) (noting if “constitutional or state-created rights are at issue” adjudication must generally be subject to supervision of an Article III court); see also Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 571 (2007) (synthesizing nineteenth-century understanding that private rights are uniquely entitled to protection by Article III courts).

72. *Boumediene v. Bush*, 128 S. Ct. 2229, 2235 (2008) (reaffirming that Congress can suspend writ of habeas corpus only in event of invasion or insurrection).

73. As to criminal trials, the Constitution itself requires a “public trial” by an “impartial jury.” See U.S. Const. amend. VI; see also *id.* art. III, § 2, cl. 2. On judicial review where takings of property are involved, see Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 247–63 (1985).

cepts of jurisdiction and sovereign immunity ensured that Congress maintained a disposing authority over civil litigation involving federal rights. *Marbury v. Madison*,⁷⁴ to the limited extent it was cited in the nineteenth century, was authority for the proposition that mandamus may not issue unless a court has been given jurisdiction to issue the writ.⁷⁵ Over time, these limitations on access to courts have diminished in importance, although it is generally acknowledged that they could be revived if Congress so desired.⁷⁶

In the twentieth century, the more interesting issue concerns the requirement that a claimant must have a cause of action, and in particular whether courts have authority to recognize “implied” private rights of action to enforce regulatory statutes.⁷⁷ The sequence of events here is familiar. Early in the twentieth century, in *Texas & Pacific Railway Co. v. Rigsby*, the Court broadly suggested that the beneficiaries of a federal regulatory statute always enjoy an implied cause of action to enforce the statute, since every right presumes a remedy.⁷⁸ Later, the Warren Court pronounced that private rights of action should be implied so long as this would promote the purposes of Congress in enacting the statute.⁷⁹ The Burger Court, as was its wont, introduced a four-factor balancing test for determining whether to imply a private right of action; congressional intent was one factor.⁸⁰ The doctrine reached a turning point in 1979, when Justice Powell authored a powerful dissent in *Cannon v. University of Chicago*, arguing that the practice of implying private rights of action violates principles of separation of powers.⁸¹ According to Powell, “[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.”⁸² With the Rehnquist and then the Roberts Courts, the Powell dissent in *Cannon* has effectively become the law, as the Court has emphasized only a single factor in determining whether to recognize a private right of action: whether Congress intended to create such an action.⁸³ Today, there appears to be a broad

74. 5 U.S. (1 Cranch) 137 (1803).

75. Thomas W. Merrill, *Marbury v. Madison* as the First Great Administrative Law Decision, 37 J. Marshall L. Rev. 481, 485 (2004).

76. See generally Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 916 (1984).

77. See Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 48–53 (1985) [hereinafter Merrill, Common Law Powers] (providing overview of implied remedies).

78. 241 U.S. 33, 39–40 (1916).

79. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–33 (1964).

80. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

81. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

82. *Id.* at 730–31.

83. See, e.g., *Horne v. Flores*, 129 S. Ct. 2579, 2598 n.6 (2009) (noting No Child Left Behind Act “does not provide a private right of action” and thus “is enforceable only by the agency charged with administering it”); *Stoneridge Inv. Partners v. Scientific Atlanta*, 552

consensus on the Court in support of this precept, although no majority opinion has yet to enforce Justice Scalia's position that any cause of action must be found in the express language of the statute, not derived by inference from legislative history.⁸⁴

It is no coincidence that as the authority of courts to declare implied rights of action has waned, express legislative authorization of "citizen suits" to enforce statutory rights has flourished. The environmental laws are a prime example. These statutes typically include express causes of action allowing citizens to sue the government for the failure to perform "nondiscretionary" duties and polluters who are in violation of permit conditions or administrative orders.⁸⁵ Citizen suit provisions spell out in detail how private actions are to be coordinated with public actions, where suits should be filed, what remedies are available, and whether awards of attorneys' fees are possible. The example of these statutes undoubtedly has helped persuade the Court that it is best to leave the allocation of civil enforcement authority for Congress to determine.⁸⁶

In short, the twentieth-century history of civil law is broadly parallel to the nineteenth-century history of criminal law. In both instances, the original understanding tolerated and even encouraged judge-made rights and private enforcement of rights without the express sanction of the legislature. In both instances, this understanding changed over time, in response to growing recognition that both the creation of rights and the designation of enforcement authority entail highly contested policy questions about the disposition of governmental authority. In both instances, political actors—including both courts and legislatures—gradually came to the conclusion that the disposition of authority must be controlled by the legislature.

U.S. 148, 162–63 (2008) (holding Congress did not intend for private right of action for securities fraud to extend to liability for aiders and abettors).

84. See *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) (arguing for shift from congressional intent test to "categorical position that federal private rights of action will not be implied"); cf. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (declining to recognize implied right of action to enforce administrative regulations issued under statute as to which the Court had previously recognized implied private right of action and observing there was "no evidence anywhere in the text to suggest that Congress intended to create a private right" of action).

85. See, e.g., *Clean Water Act*, 33 U.S.C. § 1365 (2006) (authorizing civil action by "any citizen" alleging point source of pollution is in violation of permit or order or alleging that Administrator has failed to perform nondiscretionary duty); *Clean Air Act*, 42 U.S.C. § 7604 (2006) (authorizing civil action by "any person" under similar circumstances).

86. The connection is made explicit in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981), where the Court, after describing the citizen suit provisions in the *Clean Water Act*, observed that "[i]n view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens."

C. *The Allocation of Administrative Authority*

My third example is the most recent instantiation of the disposing power and takes us into the twenty-first century. The question involves the allocation of legal authority between courts and administrative agencies.

One controversy that pushed this question to the fore erupted in the 1970s. This was whether courts could impose additional procedural requirements on agencies in order to assure that adequate consideration was given to issues on the frontiers of scientific knowledge. Several D.C. Circuit judges, in both judicial and extra-judicial writing, argued in favor of such inherent judicial power.⁸⁷ The Supreme Court would have none of it. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court held that the procedures set forth in the Administrative Procedure Act are “the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”⁸⁸ Accordingly, the Court concluded, courts have no authority to “engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.”⁸⁹ This was an emphatic endorsement of the disposing power. Congress gets to decide who will decide what procedures an agency will follow in discharging its regulatory functions. If Congress sets down statutory minima, and allows agencies to determine whether to adopt additional procedures beyond the statutory minima, then courts are required to respect this allocation of decisional authority.⁹⁰

An even more far-reaching controversy involves the allocation of authority between courts and agencies to “say what the law is” when the statute the agency administers is unclear. For the first two hundred years of our constitutional history, it was assumed that the courts have inherent authority to determine the allocation of interpretational power.⁹¹ Then, in 1984, the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹² *Chevron* broke new ground by recognizing that the resolution of interpretational disputes, when statutes are unclear,

87. See generally Antonin Scalia, *Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345 (providing overview of internal D.C. Circuit debate).

88. 435 U.S. 519, 524 (1978).

89. *Id.* at 525.

90. See Jack M. Beermann & Gary Lawson, Reprocessing *Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 858 (2007) (describing this as “canonical understanding” of *Vermont Yankee*).

91. See Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 562 n.95 (1985) (listing factors cited by Court in determining whether to grant deference to administrative action); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 972 (1992) (discussing pre-*Chevron* “multiple factors regime” for determining when deference to agency statutory interpretation is appropriate).

92. 467 U.S. 837 (1984).

entails a judgment about appropriate public policy.⁹³ It also broke ground by holding that in certain circumstances, deference to reasonable agency interpretations is required, not discretionary.⁹⁴ But *Chevron* did not explain exactly what those circumstances were. Was such deference required when issues of law application were involved, as opposed to pure questions of law?⁹⁵ Was it required when agencies have some special expertise in the subject matter?⁹⁶ Was it required in any case where the agency could plausibly claim it has greater accountability to the public than an Article III court has?⁹⁷

In three important decisions rendered at the dawn of the twenty-first century, the Court finally began to answer these questions. The decisions were *United States v. Mead Corp.*,⁹⁸ *Gonzales v. Oregon*,⁹⁹ and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.¹⁰⁰ These decisions establish in effect that the allocation of interpretational authority is to be determined by Congress. As *Mead* put it, the *Chevron* framework applies to an agency interpretation when Congress has delegated authority to the agency to act with the force of law, and the agency interpretation was rendered in the exercise of that authority.¹⁰¹ *Gonzales* added that the agency must be acting within the scope of its delegated authority.¹⁰² *Brand X* held that *Chevron*-eligible agency interpretations trump prior inconsistent judicial interpretations.¹⁰³

With this trio of decisions, the Court assimilated the *Chevron* doctrine to the disposing power of the legislature. *Chevron* only applies when Congress decides it applies, which it does by expressly delegating the appropriate authority to the agency. The Court, in laying down some principles for allocating interpretational authority among competing institu-

93. *Id.* at 865–66.

94. *Id.* at 843–44.

95. See *Negusie v. Holder*, 129 S. Ct. 1159, 1170–76 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing question before Court is a “pure question of statutory construction for the courts to decide” and therefore not one delegated to administrative agency (internal quotation marks omitted) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987))); *Cardoza-Fonseca*, 480 U.S. at 446, 448 (noting difference between “a pure question of statutory construction for the court to decide” and “the question of interpretation that arises in each case in which the agency” applies standard to set of facts).

96. See *Chevron*, 467 U.S. at 865 (noting that in light of “manifestly competing interests” it is reasonable to surmise that Congress “desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”).

97. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (“[I]t seems to me desirable that . . . continuing political accountability be assured[] through direct political pressures upon the Executive and . . . congressional oversight.”).

98. 533 U.S. 218 (2001).

99. 546 U.S. 243 (2006).

100. 545 U.S. 967 (2005).

101. *Mead*, 533 U.S. at 226–27.

102. *Gonzales*, 546 U.S. at 258.

103. *Brand X*, 545 U.S. at 982–83.

tions, has prescribed a set of signals that can be used by Congress to resolve the question of which entity has primary interpretational authority. Interestingly, Congress did not devise the signals itself, and presumably did not even know about them when it enacted most of the statutes that are now to be examined to see what signal it sent. Nevertheless, the Court has acknowledged that Congress is the correct institution to resolve questions about the allocation of policymaking authority, i.e., to decide who decides. And the Court has identified a set of signals that Congress can deploy in carrying out this function, including default rules that apply when no clear signal is sent. All of this invites, but does not compel, Congress to assume the role of deciding who decides.

Congress episodically decides that it should be the decider, sometimes in microscopic and misguided detail, rather than concentrating on disposing governmental authority. And the courts are all too often tempted to resolve matters themselves, rather than attending to signals from Congress that suggest they should be resolved elsewhere. Many important questions, such as who has authority to preempt state law and under what circumstances, do not yet have a definitive set of signals identified for Congress to follow.¹⁰⁴ But, in administrative law, as in criminal and civil law more generally, the Court has made a start toward recognizing the disposing power of Congress.

I do not mean to suggest that the disposing power reigns everywhere triumphant. I have described it rather as an emerging postulate of Type II constitutional common law. As my examples suggest, it has been emerging since the early years of the nineteenth century. It still has a way to go, yet we can clearly discern the outlines of a major principle of unwritten constitutional law. The role of the legislature is not necessarily to resolve contested questions of policy itself, but to clarify who is to make policy and over what domain. And only the legislature may exercise this disposing power.

III. JUSTIFYING THE DISPOSING POWER

If I am correct that the disposing power of the legislature is an emerging postulate of Type II common law constitutionalism, the question remains whether this is a desirable development. Can we identify a more general justification for the gradual recognition of the dominant role of the legislative branch in coordinating the exercise of policymaking authority in society?

The extensive literature on the delegation doctrine suggests that perhaps the underlying principle is grounded in ideas about institutional

104. The Court began to make headway in this direction in *Wyeth v. Levine*, where it held that agency views about the preemptive effect of federal law are generally entitled to an intermediate level of deference, rather than strong *Chevron*-style deference. 129 S. Ct. 1187, 1201 (2009).

legitimacy.¹⁰⁵ As a matter of separation of powers, determining who will make law for society, and how it will be enforced, are questions of far reaching consequence. The resolution of such questions has traditionally been vested in the legislature. The legislature is also the branch of government most closely associated with the voice of the people, and in a democracy it is fitting that basic questions about the allocation and enforcement of power should be determined by the most democratic body.¹⁰⁶

The proponents of a resurrected nondelegation doctrine would argue that these considerations of legitimacy dictate that the legislature should not *dispose* of critical questions of policy at all, but should *decide* them itself. For better or worse, however, strict nondelegation has proven unworkable—and undesirable—as a constitutional precept.¹⁰⁷ Just as constitutional common law has given us new understandings not perceived at the founding, it has taken away the original understanding (if indeed it was such) that the legislature may not delegate the authority to make law.¹⁰⁸ Yet when lawmaking and law enforcing authority can be delegated, the considerations of legitimacy that make strict nondelegation an alluring if unattainable ideal surely suggest that higher order questions about when and what to delegate should not themselves be delegated. In a world of widespread delegation, the most important policy decisions are those that concern who gets to make laws and how they are to be enforced. The legislature, as the body most closely associated with

105. See Sotorios Barber, *The Constitution and the Delegation of Congressional Power* 37 (1975) (explaining how nondelegation principle follows from principle that “neither the government nor any of its parts should change constitutional arrangement of officers and powers”); Martin H. Redish, *The Constitution as Political Structure* 138–43 (1995) (“Unlimited legislative delegation to administrative agencies effectively undermines all three of the instrumental values that underlie the political structure dictated by the Constitution: diversification, accountability, and checking.”); Schoenbrod, *supra* note 18, at 13–18 (discussing impact of delegation on democratic process, liberty, and protection of population).

106. See, e.g., Victoria F. Nourse, *Toward a New Constitutional Anatomy*, 56 *Stan. L. Rev.* 835, 850–57 (2004) (emphasizing close constitutive relationship between the people and the legislature).

107. See, e.g., Merrill, *Rethinking*, *supra* note 19, at 2103–09 and sources cited therein (noting that “notwithstanding the modern Court’s occasional flirtation with stricter enforcement of separation-of-powers requirements,” nondelegation challenges are now uniformly rejected).

108. For debate about the original understanding regarding nondelegation, compare Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death are Greatly Exaggerated*, 70 *U. Chi. L. Rev.* 1297, 1298 (2003) (interpreting nondelegation principle as limiting all rulemaking power of legislators elected by the people), and Gary Lawson, *Delegation and Original Meaning*, 88 *Va. L. Rev.* 327, 333 (2002) (emphasizing Constitution’s “discernible, textually grounded nondelegation principle”), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. Chi. L. Rev.* 1721, 1723 (2002) (interpreting nondelegation principle as barring only delegation of voting or de jure legislative powers to third parties), and Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 *U. Chi. L. Rev.* 1331, 1331–32 (2003) (same).

the resolution of important policy questions, is clearly the proper institution to make these higher order judgments about the allocation of power.¹⁰⁹

These concerns about legitimacy are obviously important. But I would also emphasize a more practical set of considerations. If delegation of lawmaking and law enforcing authority is permitted, the legislature is the only feasible institution for coordinating the exercise of governmental authority. Only the legislature has the authority to resolve questions of institutional choice and timing in a way that is binding on all other institutions. Only the legislature has the capacity to select among the full range of regulatory targets and tools. Likewise, only the legislature has the ability to implement the choices made in ways that are comprehensive and fair. In other words, the disposing power must be given to the legislature because we have no other feasible option.

Lawyers and especially law professors are apt to nominate the courts to be the institution that should perform the function of integrating and coordinating competing claims of authority to act with the force of law.¹¹⁰ This is not just because they have the most familiarity and influence with courts, although I am sure these factors play a role. A more fundamental explanation is the yearning to resolve questions about the allocation of lawmaking authority through “reasoned elaboration” rather than brute politics.¹¹¹ Courts, as the “forum of principle,” hold forth the promise that questions of institutional roles can be resolved by disinterested argument. Lawyers and law professors are naturally drawn to this prospect.

The courts unquestionably have considerable assets weighing in their favor in deciding who decides. They have a long tradition of exercising impartial judgment, which gives them a strong claim to be able to play the role of the umpire.¹¹² In addition, the sorting out process will inevitably involve the interpretation of authoritative texts, including the Constitution, federal statutes, federal regulations, and state laws. Courts have a well-established reputation as interpretative specialists, and so on

109. The proponents of a resurrected nondelegation doctrine argue in a variety of ways that the legislature should decide all issues that are sufficiently “important.” See Lawson, *supra* note 108, at 360–61. In a world in which delegation is permitted, the issues that are sufficiently important to be decided by the legislature are issues about when, where, and to whom to delegate.

110. See, e.g., Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 Sup. Ct. Rev. 429, 437 (depicting courts as institutions that orchestrate administrative and judicial interpretations in dynamic, integrative fashion).

111. This of course is a fundamental aspiration of the legal process school. See Hart & Sacks, *supra* note 12, at 145–52 (positing allocation of authority through “reasoned elaboration”).

112. See Komesar, *Imperfect Alternatives*, *supra* note 12, at 128 (noting greater independence of judges allows courts to resolve controversies “without some of the biases and pressures that distort other institutions”).

this dimension too it is logical to think that they should be the ones who decide who decides.¹¹³

Nevertheless, courts labor under some very serious limitations that disable them from exercising the integrative function on a comprehensive basis. I will emphasize three.

First, courts do not have the institutional capacity to oversee the allocation of institutional authority on a comprehensive basis. The U.S. Supreme Court today decides only about eighty cases per year.¹¹⁴ Most adjudication that implicates institutional authority occurs in one of the lower federal courts or, even more likely, in the state courts. If the lower courts are divided, or if they have addressed only part of the problem but not all of it, the allocation of authority may remain unresolved. Even the Supreme Court's decisions may be narrow ones that fail to address all dimensions of the problem, or may be unstable if the Court is closely divided and personnel changes occur.¹¹⁵ Moreover, there is every reason to believe that the problem of constrained judicial capacity will only grow worse with time. As Neil Komesar has observed: "As numbers and complexity increase, judicial activity will decrease relative to the activity of larger institutions such as the market and the political process Even the most activist U.S. courts have been able to review only very limited categories of government actions."¹¹⁶

Second, courts can enter the fray only *ex post*, after some dispute has broken out between two or more entities over which department of government is to have primary or ultimate policymaking authority over a particular issue. After Oregon gets into a fight with Attorney General Ashcroft about whether to permit physician-assisted suicide, we can call on the courts to sort things out and declare who has authority to decide

113. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 758 (2008) ("[T]he courts have a strong tradition of engaging in principled interpretation.").

114. See David Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. 947, 965–68 (2007) (discussing decline in number of signed opinions per term and percentage of cases in which certiorari is granted by Court).

115. Preemption of state regulation of cigarette advertising is an example of an area in which the Supreme Court's understanding of the allocation of authority remains unsteady and hence unresolved. Compare *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524–25 (1992) (holding state tort law is sometimes preempted), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550–51 (2001) (holding state regulation preempted), with *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008) (holding state tort liability not preempted). Likewise, consider the Supreme Court's decisions on whether state tort liability for FDA-approved medical devices and drugs is preempted. Compare *Wyeth v. Levine*, 129 S. Ct. 1187, 1203–04 (2009) (holding tort liability not preempted), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486–87 (1996) (same), with *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007–08 (2008) (holding tort liability preempted).

116. Neil K. Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* 165–66 (2001).

the matter.¹¹⁷ But what are we going to do before the courts rule, or in the many cases where there is no court ruling at all? What if no one has standing to sue, or the issue is a political question, or no one group cares strongly enough to finance litigation? We need an institution to decide who decides that is always on call, and is not limited to justiciable controversies.

Third, the courts have a severely limited base of information on which to decide who decides. Choosing institutions entails resolving empirical questions, policy questions, and outright political questions based on predictions about how different institutions will handle the issues placed before them. Judges, who spend much of their time with their noses in law books, may not be particularly well suited to make these empirical and predictive judgments.¹¹⁸

Given these inherent limitations of courts, one is tempted to turn to the executive branch to perform the role of integrating regulatory authority in the modern administrative state. The President has been widely praised as the representative of all the people, and is said to enjoy a unique degree of legitimacy in setting the political agenda for the nation.¹¹⁹ And Presidents have begun to play an integrative function, most conspicuously through oversight of major agency rulemaking by the Office of Information and Regulatory Affairs within the Office of Management and Budget. Although early versions of this oversight were confined to asking whether the benefits of proposed rules exceed their costs, commentators have noted that this review could be expanded to include more wide-ranging policy variables.¹²⁰ Moreover, the President and his staff are not plagued by the weaknesses endemic to courts. The President can act in anticipation of problems, can address problems in a comprehensive fashion, and has access to much more information than do the courts. One can thus perceive the outlines of an argument for assigning the task of deciding who decides to the President.

A moment's reflection, however, also reveals the weaknesses of the President as the source of the disposing power. The President has no

117. See *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006) (invalidating federal interpretative rule that would have effectively blocked state laws permitting physician-assisted suicide).

118. See generally Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 153–68 (2006) (emphasizing limitations of courts in terms of empirical knowledge).

119. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 58–63 (1995) (“[T]he President is unique in our constitutional system as being the only official who is accountable to a national voting electorate and no one else.”); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331–39 (2001) (“[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”).

120. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1312–24 (2006) (providing history of OIRA review and recommending standard be expanded beyond narrow cost-benefit analysis).

inherent authority to make law, create institutions, set appropriation levels, or allocate enforcement authority among rival institutions. The President is utterly dependent on Congress for all of this. The President may be able to oversee rulemaking by agencies, and even bring a degree of coherence to different regulatory initiatives. But the President cannot create the agencies that engage in the rulemaking, establish the legal authority under which they act, give them a budget with which to gather information and policy alternatives, or determine when and how the resulting rules will be enforced. If courts are interstitial lawmakers, then the President is at best an interstitial wielder of the disposing power.

Given these limitations of courts and executives, the only conceivable institution to task with deciding who decides is the legislature. Here, I can do no better than to quote an eminent legal authority:

Congress has . . . a special ability to develop and consider the factual basis of a problem. More importantly, it has the ability to make either rough or finely tuned distinctions, justified by practical considerations though perhaps not by principle, in a manner not generally thought open to a court. In addition, Congress has at its command a range of remedies exceeding those available to a court from which it can craft a solution for a problem. These include wholesale suspension of offending state law, the formulation of rules to be enforced by courts, education programs, administrative schemes, and spending programs. In contrast . . . a court is limited in its capacity to affect the behavior of those not before it. And a common law court can seldom do more than announce a rule and create a sanction for its violation.¹²¹

I would add to this list that the legislature can allocate decisional responsibility *ex ante*, before disputes arise, rather than waiting until disputes arise and acting *ex post*. The legislature can act comprehensively, deciding all or nearly all relevant questions about decisional responsibility in a single legislative act, rather than proceeding incrementally in bits and pieces. The legislature, under the principle of legislative supremacy, can bind the other branches of government to its allocative decisions. One particularly important legislative body—the United States Congress—has the authority under the Supremacy Clause to resolve conflicts between the federal government and the states.¹²² Finally, the legislature is composed of elected politicians and therefore should be collectively well-informed and sensitive to the political implications of deciding who decides.

In endorsing the legislature as the decider of who decides, I am not claiming that the legislature will discharge this function in a fashion that will inspire those who yearn for reasoned elaboration or principled decisionmaking. The decision to award the disposing power to Congress is

121. Monaghan, Foreword, *supra* note 1, at 28–29 (citations omitted).

122. U.S. Const. art. VI, cl. 2.

grounded in necessity, not a prediction about the merits of the choices that will be made. No other institution can perform this function. Therefore, we should bow to necessity and support the legislature in the discharge of this function. Resistance—whether in the form of assertions of inherent executive authority or judicial invalidation of legislative choices in the name of the Constitution—will in the end only lead to greater uncertainty about the allocation of authority among the institutions of society.

This does not mean that the courts have no role in the institutional choice process. But I would argue their primary role should be one of enforcing the authority of the *legislature* to make choices about regulatory targets, institutions, tools, and timing. Provided courts perform this important backstopping function, there is no reason why the legislature cannot decide in particular circumstances that the courts should play a frontline role in regulating specific problems that warrant governmental intervention. If Congress wants to give the courts authority to resolve a particular problem, whether it be eliminating workplace discrimination or even combating climate change, the courts should take up the challenge and perform as best they can. But courts should take on these tasks only if the legislature has first affirmatively chosen to delegate responsibility to them to perform this function.

IV. THE DISPOSING POWER AND THE FATE OF TYPE I CONSTITUTIONAL COMMON LAW

History has not been kind to Type I constitutional common law, the peculiar type of constitutional common law first identified by Professor Monaghan in his 1975 *Harvard Law Review* Foreword.¹²³ In his foreword, Monaghan used the *Miranda* warnings as one of the principal illustrations of Type I constitutional common law. The Supreme Court rejected this characterization in *Dickerson v. United States*, where it held that *Miranda* is not based on constitutional common law but rather is grounded in the Court's understanding of the Constitution itself.¹²⁴ In so ruling, the Court dealt a severe blow to Type I constitutional common law. If we follow *Dickerson* in conceiving of *Miranda* as a species of *Marbury*-style review, then little space is left for Type I constitutional common law.

Dickerson can be seen as a kind of judicial power grab; the Court decided it did not want to share power with Congress when it comes to implementing the Constitution's limits on compulsory self-incrimination. On this view, the Court slammed the door on Type I constitutional common law, with its appealing vision of experimentalism and a division of

123. See *supra* notes 1–3 & 7 and accompanying text (introducing Type I and Type II constitutional common law).

124. 530 U.S. 428, 431–32 (2000) (refusing to follow federal statute that made confessions admissible without regard to compliance with *Miranda* warnings if voluntary under all circumstances).

labor based on relative competencies, because the Court was anxious to preserve its monopoly over the prescription of rules for enforcing these sorts of constitutional rights.

Yet I think there is a deeper explanation for the Court's rejection of Type I constitutional common law in *Dickerson*, an explanation that brings us back to Type II constitutional common law and the disposing power of the legislature. Type I constitutional common law, as Monaghan made clear, was modeled on federal common law. Federal common law, at least in its purest manifestations, is grounded in the assumption of the judiciary's inherent lawmaking authority.¹²⁵ As we have seen, however, the disposing power of the legislature has implications for any claim of inherent legal authority, whether by the executive or the courts. The disposing power effectively means the judiciary has no inherent authority to act with the force of law. It must trace its authority to exercise legal authority to some source in enacted law, most typically a delegation from the legislature.¹²⁶ If the federal legislature, Congress, has exclusive authority to delegate power to make and enforce law, then much of what is called federal common law—federal common law grounded in a claim of inherent authority to make law—is unconstitutional.

In short, starting with the Type II constitutional common law that Monaghan identified as the "protective power" of the presidency,¹²⁷ it is but a short step to the "disposing power" of the legislature.¹²⁸ From there, we can see that the federal common law, at least in its purest form, is problematic. This in turn suggests that Type I constitutional common law, which is based on federal common law, is problematic.

I am not suggesting that the Court in *Dickerson* engaged in any explicit process of reasoning along these lines. But Type II constitutional common law—which after all is regarded as the supreme law of the land—can exert a powerful constraining force on the judicial mind. It is possible the *Dickerson* Court perceived, on some level, that Type I constitutional common law, for all its appealing modesty and its invitation to share power with the legislature, reflects a model of the judicial role that violates an emerging understanding disfavoring claims of inherent judicial authority to make law.¹²⁹ The Type II principle that calls into doubt claims of inherent lawmaking authority by either the executive or the judiciary is the legislature's disposing power.

125. By "purest manifestation" of federal common law, I mean a claim of authority to create federal rules of decision based solely on the court's inherent authority, rather than on authority grounded in an implied delegation, or the need to preempt state law to preserve the integrity of federal law. Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 328–29 (1992).

126. See *supra* notes 105–106 and accompanying text.

127. Monaghan, *Protective Power*, *supra* note 10, at 11.

128. See *supra* note 12 and accompanying text.

129. See *Dickerson*, 530 U.S. at 438–39 (noting federal courts have no "supervisory" authority over state courts and so their authority to impose procedural requirements on states must be grounded in Constitution).

Does this mean that all of Professor Monaghan's Type I constitutional common law is illegitimate? Not necessarily. Much of what has been called federal common law can be sustained as resting on an implied delegation to courts or on the need to preempt state law to preserve enacted law from being frustrated.¹³⁰ Some exercises of Type I constitutional common law can perhaps be sustained on the same basis. The *Bivens* action,¹³¹ which is revisable by Congress, is a possible candidate for viable Type I constitutional common law, even after *Dickerson's* rejection of the concept in the context of the *Miranda* warnings. Nevertheless, when we consider Type I constitutional common law in light of the disposing power, there is no doubt that some significant trimming back of Type I constitutional common law is required.¹³²

If the disposing power renders Type I constitutional common law problematic, why does it not do the same for Type II constitutional common law? The disposing power rests on the idea that any exercise of governmental authority must be grounded in a clear delegation of authority in enacted law, whether it be an act of Congress or the Constitution itself. But the disposing power, like other forms of Type II constitutional law, cannot be found in the constitutional text. Why then does the disposing power not turn on and invalidate itself?

Perhaps the answer lies in the fact that Type II constitutional common law tends to be grounded in widespread consensus. Propositions of Type II constitutional common law tend to reflect practices and traditions that enjoy broad public support and are recognized as legitimate by all three branches of government.¹³³ Type I constitutional common law, in contrast, tends more often to take on the aspect of unilaterally declared "judicial legislation." In the end, though, there remains a deep paradox here. We have slowly evolved, in the common law fashion, toward an understanding that the executive and judicial branches must trace their power to act to some authoritative written text, either a provision of the written Constitution or a law passed by Congress. That evolved understanding, in turn, seems to call into question an important mode of American constitutional lawmaking, which is to develop under-

130. See Merrill, *Common Law Powers*, supra note 77, at 60–61 ("The principal feature distinguishing implied delegated lawmaking under the Constitution is that the delegation comes directly from the framers.").

131. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (recognizing cause of action for damages for violation of plaintiff's Fourth Amendment rights by federal drug agents).

132. Merrill, *Common Law Powers*, supra note 77, at 66–69 (discussing delegation of lawmaking power to federal courts under different constitutional amendments).

133. For a persuasive account that three-branch cooperation was necessary in establishing the institution of judicial review—a prime example of Type II constitutional common law—see Keith E. Whittington, *Political Foundations of Judicial Supremacy* 105–14 (2007) (discussing history of judicial review and related formation of theory surrounding the practice).

standings of the constitutional order without regard to the text of the Constitution, in the fashion of the common law.

CONCLUSION

Henry Monaghan has taught us to speak of constitutional common law, and has provided sophisticated analyses of two different types of constitutional common law. He has unpacked one constitutional common law principle, which he has called the “protective power” of the presidency. I have suggested that this principle is closely linked with another constitutional common law principle, the disposing power of the legislature. The disposing power has some far-reaching implications, including the implication that federal common law, and with it one of Monaghan’s types of constitutional common law, may be suspect in many of its applications.

As we retreat from the ideal of nondelegation, a crucial question arises: What exactly is the constitutional future of the First Branch of government in America? I have suggested one constitutional cornerstone of the function of the legislature in a post-nondelegation world. The disposing power—arranging, ordering and distributing governmental authority among the different institutions of society—is something that can be exercised effectively only by the legislature. The disposing power is not mentioned in the text of the Constitution. But it has slowly emerged as a principle of Type II constitutional common law. It is a principle of vital importance if the modern regulatory state is to hold together. We should recognize, honor, and nurture it as best we can.