

THE NEW GOVERNANCISM?

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* Professor, IIT Chicago-Kent College of Law. I would like to thank Heather Gerken for penning such a thought-provoking essay. Conversations with Ed Rubin proved invaluable. And thanks to Joel Goldstein for organizing so stellar a Childress Lecture. This Comment is dedicated to my children, who never cease to inspire me.

INTRODUCTION

Professor Gerken's outstanding essay, *Federalism and Nationalism: Time for a Détente?*, aims to reframe the debate between "federalism's stalwarts" and what might be called traditional nationalists. On Gerken's account, the stalwarts champion a "state-centered democracy . . . that emphasizes state power, state politics, and state polities."¹ Stalwarts aim to protect state "sovereignty" or "autonomy"—spheres of immunity from federal regulation so that states can exercise decentralized political power.² Traditional nationalists, by contrast, aim to centralize political power at the national level and are deeply skeptical of decentralized political power.³

Gerken argues that federalism's stalwarts and traditional nationalists both err insofar as each advocates a one-way ratchet: federalism stalwarts aim to devolve power to the states, whereas traditional nationalists want to centralize power at the federal level.⁴ Against these two approaches, Gerken christens "the new nationalist school of federalism," whose core insight is that "devolution can further *nationalist* aims."⁵

For example, policy contestations at the local or state levels enable advocates on both sides to refine their positions and gather empirical evidence through experimentation, thereby teeing-up battles that may later occur on the national stage. Without the experiences gained at the local and state levels, policy battles at the national level would be hamstrung, if not impossible.⁶ A second way devolution may simultaneously advance nationalist aims, Gerken argues, is that the federal government may rely on states as implementers of federal policy.⁷ This is true of many federal statutory schemes—for example, Medicaid, Medicare, and the Affordable Care Act. States surely advance federal interests when implementing federal policy, but they also have opportunities to exercise substantial power, which can include negotiating with the federal government, and to achieve many of federalism's well-catalogued benefits.

Gerken plausibly argues that when acting in these teeing-up and implementation modalities, state power "rests on neither sovereignty nor

1. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1001 (2014)

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1001–07.

6. *See, e.g.*, Gerken, *supra* note 1, at 1026 (2014) ("Because we have a robust federal system, we aren't forced to debate issues on an impossibly large national scale . . . [w]e aren't fighting every fight on a national stage, with the winner taking all. Instead, we're rehearsing those battles on a smaller scale in an iterative fashion and in a myriad of political contexts.")

7. *Id.* at 1005.

autonomy.”⁸ So, Gerken introduces two alternative metaphors to capture the nature of the state power she describes and defends. The first is deliberately provocative: states have the “power of the servant” in a master/servant relationship with the federal government.⁹ Second, states are “agents” in a principal/agent relationship. The power of the servant is very real, though it “rests on informal influence as much as formal power.”¹⁰ And as to the principal/agent relationship, Gerken reminds us of the several fields of law, like corporate law, that presuppose that agents exercise substantial powers.¹¹

Gerken is idealistic, but not naïve: she hopes her nationalist school of federalism can lead to a *détente* of sorts between stalwart federalists and traditional nationalists, but she realizes there will remain much to fight over even if both sides adopt her framework. To be sure, Gerken’s nationalist school offers real attractions to federalism’s stalwarts—a descriptively accurate account under which states matter and exercise substantial power. But as the name “the nationalist school” suggests, Gerken’s account is predominantly nationalist in orientation: states are “servants” and “agents”; “there’s not much . . . left anymore” of “open regulatory space for the states to govern freely”;¹² and “[t]he federal government can step in, one way or another, when the need arises.”¹³ Given its primarily nationalist orientation, I am uncertain whether Gerken’s account will satisfy stalwart federalists.

But this Comment’s point is neither to predict how stalwart federalists will receive Gerken’s proposal, nor to persuade them one way or the other. Rather, it questions whether the system of federal/state relations Gerken describes really is fundamentally nationalist. Hence this Comment’s title: Gerken may be identifying a new model of *governance*, rather than a *nationalist* school whose moniker can safely presuppose the federal government’s present and ongoing centrality.

To make these points, this Comment identifies, and then critically analyzes, what I take to be the three core propositions that drive Gerken’s argument. The first is that there is massive overlap between federal and state regulatory jurisdiction. Gerken’s second proposition—largely assumed, but central nonetheless—is that, as to that massive jurisdictional overlap, federal power is supreme over state power.¹⁴ Gerken’s third proposition follows from the first two: states operate as agents or servants of the federal government,

8. *Id.* at 1010.

9. *Id.*

10. *Id.* at 1022.

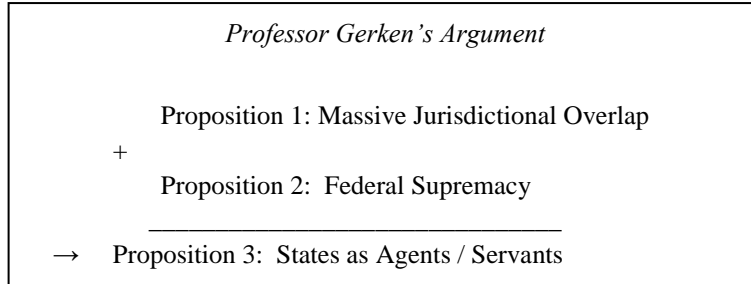
11. Gerken, *supra* note 1, at 1010.

12. *Id.*

13. *Id.* at 1006.

14. Together, the first two propositions account for Gerken’s descriptive claim that state power is not accurately captured by either ‘sovereignty’ or ‘autonomy.’ *Id.* at 1009–10.

insofar as (a) states are testing grounds for policy disputes that have not yet been, but in the future can be, resolved nationally, and (b) states act as implementers when the federal government elects to regulate but delegates enforcement power to them.¹⁵ To graphically summarize, Gerken’s argument can be represented as follows:



Part I endorses Gerken’s first proposition. Part I also contextualizes it, pointing to many other areas of law where initial expectations that power resided exclusively with one governmental institution have given way to overlapping powers between multiple institutions.¹⁶ In these other contexts, the shift from exclusivity to overlapping powers has come about due to a host of contingent factors. Similar considerations are present in the vertical federalism context and help explain why Proposition One is unsurprising and, probably, stable.

Part II explores Proposition Two’s assumption that there is federal supremacy vis-à-vis the fields of massive jurisdictional overlap. Though constitutional text formally declares federal law to be supreme over state law, the contingent factors that have given rise to massive jurisdictional overlap suggest that formal supremacy need not translate to functional priority. Part II then explores ways that what I call “federal non-priority” might occur—and, I shall suggest, already has occurred in some regulatory fields. For these reasons, Part II suggests a friendly amendment to Gerken’s Proposition Two. I call it Proposition Two,* Contingent Federal Priority.

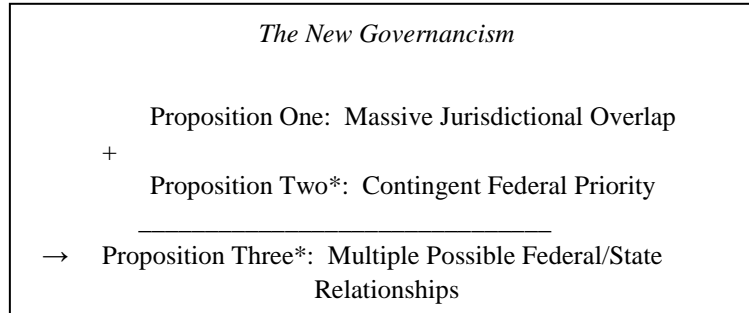
Part III argues that the conjunction of Propositions One and Two* makes it necessary to also amend Proposition Three. Contingent federal priority means there is a broader array of potential relationships between the federal and state governments: the metaphors of agents and servants do not exhaust the possibilities. Part III makes a preliminary attempt at identifying additional models of federal/state relations. Further, there is no reason to expect that federal/state relations will be characterized by any single one of these at every

15. One of Gerken’s main points, to reiterate, is that agents and servants can, and do, exercise substantial power. *Id.* at 1010.

16. See Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051 (2010) (explaining this in detail).

point in time. Instead, one field of law may be best characterized by one model, and another field of law by a different model. And that seems to most accurately describe the nature of federal/state relations today. The multiplicity of potential relations between the federal and state governments is why I resist Gerken's language of a "nationalist school" and instead suggest the more neutral designation of the "new governancism."

In short, this Comment suggests that Professor Gerken's argument should be modified as follows:



I. MASSIVE JURISDICTIONAL OVERLAP

It is hard to dispute Proposition One: that there is massive overlap between the federal government's and the states' regulatory jurisdiction. States can, for instance, have immigration policies.¹⁷ And conversely, as Gerken persuasively shows, even in those fields most deeply associated with states—criminal law, family law, and education—there is significant federal regulation. Only slightly more controversial, though in my view correct, is Gerken's descriptive claim that even following the Rehnquist and Roberts Courts' efforts to prune back federal regulatory power, the federal government usually can get what it wants, one way or another.

A historical analysis across multiple fields of constitutional law suggests that Proposition One—the phenomenon of massive regulatory overlap in the vertical federalism context—is not surprising. For it turns out that jurisdictional overlap among governmental institutions is very common, even where the Constitution allocates power to only one institution. After identifying eight such examples in Section A, the next four sections pinpoint numerous lessons these cases of jurisdictional overlap provide for vertical federalism.

17. See *Arizona v. United States*, 132 S. Ct. 2492, 2500, 2508 (2012) ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States The federal scheme thus leaves room for a [state] policy requiring state officials to contact [Immigration and Customs Enforcement] as a routine matter.").

A. *Other Examples of Overlapping Jurisdiction*

Consider the following eight examples where two governmental institutions have overlapping jurisdiction:

1. *Between Judges and Juries*: Although the Seventh Amendment grants juries the power to “tr[y] . . . fact[s]” “[i]n suits at common law,”¹⁸ federal judges today exercise substantial fact-finding powers when they issue directed verdicts, judgments as a matter of law, and summary judgments.¹⁹

2. *Between the Supreme Court and district courts*: Although the Constitution states that “[i]n all Cases affecting Ambassadors . . . and those in which a State shall be Party, the supreme Court shall have original Jurisdiction,”²⁰ inferior district courts *also* have original jurisdiction over cases brought by ambassadors and also in many cases brought by states.²¹

3. *Between the President/Senate and President/Congress*: Although the Constitution specifies only one mechanism by which the United States can create international agreements—treaties, which are a joint creation of the President and Senate²²—most recent international agreements have not been treaties, but are so-called congressional-executive agreements that are created by the ordinary legislation process.²³

4. *Between Article III courts and Article I courts*: Although Article III of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”²⁴ much adjudication concerning federal matters occurs in non-Article III federal courts.²⁵

5. *Between the President and Congress*: Although the Constitution states that “[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States,”²⁶ Congress has “the power to pass acts of general amnesty”²⁷—despite the fact that “[t]he distinction between amnesty and pardon is of no practical importance.”²⁸

18. U.S. CONST. amend. VII.

19. See Rosen, *supra* note 16, at 1080–87 (describing how the Seventh Amendment’s exclusivist scheme of jury fact-finding “was transformed into a system of concurrence”).

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

21. Rosen, *supra* note 16, at 1057–58.

22. U.S. CONST. art. II, § 2, cl. 2.

23. Rosen, *supra* note 16, at 1059–60.

24. U.S. CONST. art. III, § 1.

25. Rosen, *supra* note 16, at 1058.

26. U.S. CONST. art. II, § 2, cl. 1.

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

28. *Id.* at 601–02. The Supreme Court noted that “[a]mnesty is defined by the lexicographers” to be a “general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons,” but the Court did not suggest that Congress could not grant amnesty to individuals. *Id.* To the contrary, the

6. *Between Congress and Agencies*: Although the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,”²⁹ most scholars agree that administrative agencies have broad discretion to generate regulations that are functionally indistinguishable from statutes.³⁰

7. *Between Congress and Federal Courts*: Although Congress has the power to enact laws relating to admiralty³¹ and to govern interstate disputes,³² there also is a “tradition of federal common lawmaking in admiralty,”³³ as well as a “federal common law of nuisance” regarding interstate waters.³⁴

8. *Between the Sister States (horizontal federalism)*: Though it originally was thought that “no state . . . can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein,”³⁵ today’s restatements and model codes acknowledge that states can apply their laws extraterritorially, and the Supreme Court has observed that “a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”³⁶

B. *From Exclusivity to Overlap*

In almost all the above overlap-relationships, the Supreme Court’s first view was that only one institution had power—the one institution to which the Constitution explicitly granted the power.³⁷ So, for example, the Supreme Court long asserted that only juries could find facts,³⁸ “[t]hat Congress cannot

Brown Court approved of an earlier case that upheld the secretary of the treasury’s power to remit a penalty against a single steam vessel on the ground that this constituted an exercise of the pardon power and explained that “the power vested in the President [is] not exclusive.” *Id.* at 601.

29. U.S. CONST. art. I, § 1.

30. See Rosen, *supra* note 16, at 1099–1103 (discussing the Courts reluctance to part with the “myth of exclusivity” as it relates to agency power).

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

32. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 101–02 (1972) (discussing Congressional lawmaking concerning interstate waters).

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

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

35. Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 750 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (1834)) (internal quotation marks omitted).

36. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981); Rosen, *supra* note 35, at 751.

37. An exception was horizontal jurisdiction, where the Constitution did not make an explicit allocation.

38. *E.g.*, *Baylis v. Travellers’ Ins. Co.*, 113 U.S. 316, 320–21 (1885) (“[T]he court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.”); see also Rosen, *supra* note 16, at 1082–83 (discussing *Baylis*).

delegate legislative power to the President,”³⁹ and that only Article III courts could exercise the “judicial power” of the United States.⁴⁰

The Court’s initial expectation is not surprising, insofar as *expressio unius est exclusio alterius*—the principle that “to express or include one thing implies the exclusion of the other, or of the alternative”⁴¹—is a natural way to interpret a legal text like the Constitution. And further—as James Madison argued during the Pacificus-Helvidius debates concerning the question of whether President Washington had power to issue a neutrality proclamation—the idea that two institutions have power to “perform the same function” may be thought to be “as awkward in practice, as it is unnatural in theory.”⁴²

But though *expressio unius est exclusio alterius* may seem natural, and jurisdictional overlap “awkward” and “unnatural,” neither position is logically axiomatic. It is possible, after all, that constitutional text could make an initial allocation of power that thereafter may be altered, for example by delegation.⁴³ Or that a second governmental institution might have explicit or implied powers that coincide with those the Constitution explicitly grants the first. (Alexander Hamilton made just this argument in the Pacificus-Helvidius debate, and President Washington relied upon Hamilton’s approach when he issued the Neutrality Proclamation, in which he interpreted a treaty with France notwithstanding the fact that Congress’ power to declare war encompassed the power to interpret the treaty with France).⁴⁴

More generally, the eight examples provided above—and there are many others—are instances where *expressio unius est exclusio alterius* was not determinative, and initial expectations of jurisdictional exclusivity gave way to jurisdictional overlap.⁴⁵ But how does this happen? And why?

39. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *see also* Rosen, *supra* note 16, at 1098–99 (discussing *Marshall Field & Co.*)

40. *See* Rosen, *supra* note 16, at 1093–97.

41. BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

42. JAMES MADISON, HELVIDIUS NUMBER II (1793), *reprinted in* ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 65, 69 (Morton J. Frisch ed., 2007). Madison’s full quotation reads as follows: [T]he same *specific function or act*, cannot possibly belong to the *two* departments and be *separately* exerciseable by *each*. . . . A concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory. *Id.* at 68–69.

43. *See* Rosen, *supra* note 16, at 1066–68 (discussing “plausible textual arguments” for delegation).

44. *See id.* at 1073–76 (discussing the Pacificus-Helvidius debates).

45. As I observed in an earlier article, “[p]robably nowhere else has Madison’s view of the basic architecture of American constitutionalism proven to be so wrong.” *Id.* at 1053.

C. *Constitutional Construction Outside the Supreme Court*

Perhaps because *expressio unius est exclusio alterius* and jurisdictional exclusivity are the more natural conclusions reached during the relatively formal activity of interpreting legal texts, the shift from jurisdictional exclusivity to jurisdictional overlap tends to be initiated by institutions ‘in the trenches,’ not high appellate courts.

For example, lower courts and legislatures began expanding the circumstances where cases could be kept from juries for lack of evidence and first authorized district court judges to issue judgments without (or, alternatively, contrary to) a jury’s determination,⁴⁶ the Supreme Court originally resisted, but ultimately relented.⁴⁷ For another example, Congress delegated legislative-like powers to administrative agencies, notwithstanding cases declaring delegations to be impermissible.⁴⁸ And when Congress stopped declaring war in the middle of the twentieth century, the President began introducing troops to the theater of war on his own.⁴⁹

D. *Functional Considerations*

Functional factors—not formal considerations such as a legal text’s wording—seem to account for the shift from jurisdictional exclusivity to jurisdictional overlap. Elsewhere I have catalogued seven such considerations:

1. *Efficiency*: For example, allowing federal judges to issue verdicts contrary to a jury’s, despite the jury’s power to find facts, seems to have been motivated by the goal of saving “the valuable time of the court, jury, and parties.”⁵⁰

2. *Necessity*: For example, the Supreme Court approved a non-Article III procedure for collecting federal taxes on the ground that “[i]mperative necessity has forced a distinction between such claims and all others.”⁵¹

3. *Pragmatics*: For example, the Court has explained that the non-delegation doctrine’s allowance of delegation “has been driven by a practical understanding that in our increasingly complex society . . . Congress simply

46. *See id.* at 1081–87 (discussing the erosion of exclusivity in American jurisprudence).

47. *See id.* at 1085–86 (discussing *Galloway v. United States*, 319 U.S. 372 (1943) and *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935)).

48. *See id.* at 1098–1105 (discussing the contemporary “myth of exclusivity” and Congressional delegation).

49. Though Congress ultimately exercises a check through appropriations, this is not equivalent to Congress making the initial determination of whether the United States should go to war insofar as the presence of American troops abroad typically operates as a thumb on the scales in favor of appropriations.

50. Rosen, *supra* note 16, at 1125–28.

51. *See id.* at 1124 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281 (1855)).

cannot do its job absent an ability to delegate power.”⁵² Similarly, the Court explained the constitutionality of a statute vesting original jurisdiction in district courts over lawsuits filed by ambassadors, though the Constitution provides that “the supreme Court shall have original Jurisdiction” in “*all Cases affecting Ambassadors*,”⁵³ on pragmatic grounds:

[K]eep[ing] open the highest court of the nation for the determination, in the first instance, of suits involving . . . a diplomatic or commercial representative of a foreign government . . . was due to the rank and dignity of those for whom the [constitutional] provision was made; but to . . . deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.⁵⁴

4. *Circumstances unanticipated by the Founders*: For example, the Court has justified the constitutionality of non-Article III territorial courts on the Founders’ failure to anticipate that Congress would have to create interim courts in territories before they became states. If such courts counted as Article III courts, then the judges would have life tenure—resulting in an unwelcome surfeit of judges after newly admitted states created their own judiciaries.⁵⁵

5. *Workarounds where the institution explicitly tasked by the Constitution has not acted*:⁵⁶ The Supreme Court has not explicitly invoked this consideration to justify jurisdictional overlap, but some scholars have. For example, Professors Bruce Ackerman and David Golove have defended the treaty-substitute known as presidential-congressional agreements on the ground that the Senate problematically failed to create treaties.⁵⁷ And defenders of presidential initiatives in deploying the armed forces explain it as a justifiable response to Congress’s failure to responsibly exercise its constitutional power to declare war. Justice Jackson’s famed dictum in his concurring opinion in the *Steel Seizure Case* that unexercised congressional

52. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see also* Rosen, *supra* note 16, 1123–24 (“[T]he same confluence of practical considerations that dictated the result in [Chief Justice Marshall’s opinion in the *Canter* case] has governed the decisions in later cases sanctioning the creation of other courts with judges of limited tenure and that otherwise do not conform to the requirements of Article III.” (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962) (internal quotation marks omitted))).

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

54. *Ames v. Kansas*, 111 U.S. 449, 464 (1884); *see also* Rosen, *supra* note 16, at 1121–23 (discussing *Ames*).

55. *Glidden*, 370 U.S. at 545–47.

56. *See* Rosen, *supra* note 16, at 1129–30 (discussing concurrence as a workaround).

57. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 861–96 (1995) (describing the conflict that arose between isolationists and internationalists prior to and during World War II as the result of the Senate’s “monopoly” on foreign policy).

power is likely to be filled by presidential initiative⁵⁸ is a rare instance where a Supreme Court Justice has acknowledged this force behind jurisdictional overlap.

6. *Where there are institutional synergies between two institutions, such that overlapping jurisdiction leads to better results than exclusivity likely would:*⁵⁹ For example, the Court in *United States v. Midwest Oil Co.* upheld a presidential proclamation withdrawing petroleum extraction rights, despite the fact that Congress could have amended the statute that permitted such extraction so as to withdraw those rights. As *Midwest Oil* explained, “rules or laws for the disposal of public land are necessarily general in their nature,” and “[e]mergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale.”⁶⁰ If the President did not act, a suboptimal outcome would have resulted.

The aim of harnessing institutional synergies also helps account for federal common law and dormant commerce clause doctrine⁶¹—court-created law that Congress had the power to, but did not, generate. As I have explained elsewhere, the “phenomenon of courts taking the first step may occur in fields that are better-suited to inductive, ground-up reasoning than the legislature’s more deductive process of laying down prospective general principles.”⁶² Congress always has the power to modify the court-created federal common law.

7. *Emergencies:*⁶³ For example, the Court in *Midwest Oil* justified the president’s overlapping power to terminate extraction rights on the grounds of emergency.⁶⁴ And in *Block v. Hirsh*, the Court upheld an administrative agency’s assumption of jury fact-finding duties on the ground that remedying

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that ‘The tools belong to the man who can use them.’ We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”).

59. See Rosen, *supra* note 16, at 1131–33 (discussing interinstitutional synergies and concurrence).

60. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

61. Rosen, *supra* note 16, at 1132–33. The fifth function factor (‘workarounds’ where the explicitly tasked institution has not acted) also is frequently operative here.

62. *Id.* at 1132.

63. *Id.* at 1133–34.

64. See *supra* note 60 and accompanying text.

the “exigency” of a housing shortage required fast action that only administrative fact-finding could accomplish.⁶⁵

E. Two Variables Concerning Overlap

Two additional variables must be mentioned if the reader is to have a full and proper understanding of this nation’s practice of jurisdictional overlap.

1. Enduring Exclusivity

First, while the movement toward jurisdictional overlap is a strong pattern, it is not inexorable. “[M]any of the Constitution’s power allocations still are understood exclusively.”⁶⁶ This is unsurprising insofar as functional, rather than formal, considerations best account for the rise of jurisdictional overlap. After all, the extent to which one or more of the above-discussed functional considerations giving rise to overlap is present is highly context-specific.

2. Varying Relationships Among the Institutions with Overlapping Jurisdiction

Second, even where there is jurisdictional overlap among institutions, there is an array of relationships between the institutions. On one side of the spectrum, consider the judge/jury relationship: though judges exercise fact-finding powers when they issue Rule 50 motions for judgment as a matter of law, juries still play the predominant fact-finding role in federal litigation. The judge/jury relationship accordingly may be described as a circumstance of “Unsurprising Priority”—‘unsurprising’ in the sense that the institution allocated power by the formal legal materials plays the primary role. At the other extreme, most of the rules concerning admiralty and interstate disputes are court-created federal common law, notwithstanding Congress’s explicit constitutional authority to regulate such matters. Label this “Surprising Priority”—‘surprising’ insofar as the institution to which the Constitution formally allocates power does not play the primary governing role. Between the two poles of Unsurprising and Surprising Priority lies what might be called “Partnership”—a circumstance where both institutions play an important governing role. A good example of Partnership is the Congress/Agency relationship.

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

66. *Rosen*, *supra* note 16, at 1109. For some examples, see *id.* at 1109–10.

Table A provides a simplified graphic depiction of the range of possible relationships between institutions with overlapping jurisdiction:

TABLE A: RANGE OF POSSIBLE OVERLAP-RELATIONSHIPS			
Unsurprising Priority	↔	Partnership	↔ Surprising Priority

To be sure, there are many possible criteria that could be said to be relevant to determining where on the spectrum a particular overlap-relationship belongs. Two likely candidates are how extensively each institution acts pursuant to its jurisdiction, and whether one institution has the power to formally trump the other. Since these, and other relevant considerations, are unlikely to be strictly commensurable, there is no single uncontroversial way to determine precisely where on the continuum a particular overlap relationship objectively should be situated. While this is true, it need not concern us now. All that matters is the recognition that all overlap relationships are not the same. And I think that even the relatively crude, highly qualitative diagnostic tool I've provided above facilitates recognition of this important fact.

With these caveats in mind, Table B provides my ballpark estimates as to where each of the overlap-relationships identified in Part I.A lies on the relationship continuum, along with brief explanations as to why:

TABLE B							
Unsurprising Priority	↔	Partnership				↔	Surprising Priority
(5)	(1)	(6)	(4)	(8)	(7)	(3)	(2)
<i>Legend and brief explanation:</i>							
(1) = overlap between Judge/Jury: explained above.							
(2) = overlap between district courts/Supreme Court original jurisdiction (in cases brought by ambassadors and by states against parties that are not states): most of these cases today are brought in district court.							
(3) = overlap between congressional-executive agreements and treaties: most international agreements today are created by congressional-executive agreements.							
(4) = overlap between Article III and Article I courts: substantial litigation occurs in both contexts.							
(5) = overlap between President's pardon power and Congress' amnesty power: virtually all pardons come from the President.							
(6) = overlap between Congress and Administrative Agencies: both entities are extremely important as a practical matter, though Congress has formal trumping and supervisory power that it not infrequently exercises.							
(7) = overlap between Congress' powers over interstate controversies and admiralty and Courts' federal common law powers: mostly federal common law and Congress seldom exercises its formal trumping power.							
(8) = overlap between states' powers (horizontal federalism): there is substantial overlap between the states' regulatory powers, with the result that many matters can be regulated by more than one state.							

In short, many different relationships can be found among the institutions that have overlapping jurisdiction. Such diversity is not startling, for the same reason there remain domains where a single institution has exclusive jurisdiction: overlapping jurisdiction generally is a result of functional considerations that inevitably are context-specific.

F. Implications Vis-à-vis Vertical Federalism

How are the foregoing overlap-relationships relevant to our subject of vertical federalism? To begin, the degree of jurisdictional overlap is

remarkable. Though Hume's Law quite rightly instructs that "is" does not on its own imply "ought"⁶⁷—meaning that the mere fact that so much jurisdictional overlap has evolved does not make it a good thing—so widespread a pattern in a generally well-functioning constitutional democracy, in conjunction with an appreciation of the factors that have given rise to the jurisdictional overlap, strongly suggest that jurisdictional overlap is a beneficial governance technique.⁶⁸ As a purely descriptive matter, the widespread phenomenon of jurisdictional overlap observed in Part I makes Proposition One—massive jurisdictional overlap between the federal and state governments—less surprising than it otherwise might appear. Other implications are that massive jurisdictional overlap likely is a stable phenomenon, and that efforts to work against it may be Sisyphean. To translate these lessons to the federal context, the effort to define distinct spheres of federal and state regulatory authority—a project pursued by many of federalism's stalwarts under the banner of 'sovereignty' and 'autonomy'—may be doomed.

II. CONTINGENT FEDERAL PRIORITY

The rest of this Comment applies other insights from the other overlap-relationships explored in Part I to vertical federalism. Part II focuses on Proposition Two of federal supremacy, and Part III addresses Proposition Three—that states are servants and agents of the federal government.

A. *Priority Versus Supremacy*

There is one important difference between vertical federalism and other contexts of jurisdictional overlap: only in vertical federalism is there constitutional text—the Supremacy Clause—proclaiming one of the institutions supreme. The force of this distinction is blunted by overlap-relationships that qualify as Surprising Priority where the Constitution creates only one of the institutions in the overlap-relationship. After all, it might be assumed that the constitutionally-created institution would always have priority—yet it does not. Further, the constitutionally-created institution does not necessarily have priority (as a descriptive matter) even where it is formally supreme as a matter of black letter law. This is the case, for example, with the Congress/Agency relationship, which falls in the Partnership range of the spectrum. Accordingly, the absence of constitutional text proclaiming Congress supreme to agencies does not render that overlap-relationship irrelevant to vertical federalism.

67. DAVID HUME, A TREATISE OF HUMAN NATURE, book III, part I, §1, at 469–70.

68. See Rosen, *supra* note 16, at 1140–49 (developing the normative argument for jurisdictional overlap).

To put it differently, there is an important difference between supremacy and priority. “Supremacy” is a formal legal concept that determines which institution trumps in circumstances where two act in inconsistent ways, whereas “priority” is a phenomenological description that captures a comparative measure of the practical importance of the two institutions. Formal supremacy likely is one component in a priority assessment, though it possibly could become virtually irrelevant in some circumstances.⁶⁹ Insofar as jurisdictional overlap is primarily shaped by functional rather than formal considerations, it is sensible to assess it not only through formal legal analysis (such as determining which institution has supremacy), but also through functional measures (such as determining each institution’s relative priority).⁷⁰

B. Factors Giving Rise to Federal/State Overlap

So what lessons from the overlap-relationships examined in Part I might carry over to vertical federalism? A starting hypothesis is that some or all the factors that gave rise to jurisdictional overlap in those contexts may be operative in vertical federalism. For example, notwithstanding formal federal supremacy, states may exercise power where it is believed that overlapping jurisdiction (1) generates efficiencies, (2) addresses necessities, (3) responds to emergencies, or (4) promises other pragmatic benefits. Further, states can be expected to exercise power to (5) fill lacunae where the federal government has not acted, and where there are (6) institutional synergies between state and federal power.

In fact, almost all these considerations have led to overlapping jurisdiction, where states exercised power that could have been solely exercised by the (formally supreme) federal government. For instance, the federal government relied upon non-federal actors to enforce the Brady Act’s provisions governing gun registration for an array of pragmatic reasons that fall under the first four factors: it was going to take some time to get federal enforcers up and going, and Congress did not want to delay the Act’s implementation.⁷¹ As to the fifth factor, federal inaction in immigration reform has left room for, and thus led, some states to step in to formulate immigration policies of their own. And Congress’s decision to rely heavily on states for implementing the Health Care Act likely was driven by the sixth factor: because states know local conditions better than the federal government, tailored implementation by states may be

69. I shall not fully defend this point in this Comment, though its potential validity is implicit in much of what follows.

70. I expect Professor Gerken would agree, given her interest in assessing the actual power exercised by states, even when that power is the result of informal mechanisms.

71. The Court invalidated this part of the Brady Act in *Printz v. United States*, 521 U.S. 898 (1997).

more efficient and states can better respond to differing local needs and sensibilities, than centralized implementation can.⁷²

C. The Contingency of Priority

The recognition that multiple factors give rise to jurisdictional overlap generates many interesting lessons. First, the degree of jurisdictional overlap in the vertical federalism context is likely to be contingent on variables that have no relationship to the Constitution's language. For instance, efficiency considerations can be expected to turn on such things as whether states have prior experience in an arena Congress elects to regulate, and whether pre-existing state institutions can implement the federal law. If so, avoiding costly and unnecessary duplication is a reason to rely on states rather than creating a new federal implementing body. Another contingent variable determining the degree of jurisdictional overlap is how well, or poorly, the federal government works. For example, congressional dysfunction that leaves important matters unregulated or unfixed may result in states 'stepping into the breach.'

Further, the fact that multiple factors determine the degree of jurisdictional overlap suggests several possible dynamics. First, there might be healthful shifts over time in the degree of jurisdictional overlap. To illustrate, rising population and growing heterogeneity may impact the value of the synergies between the federal and state governments. For instance, increasing population and growing homogeneity may increase the desirability of differentiated implementation of certain federal programs across the country, favoring reliance on states. On the other hand, the same factors may lead to the opposite conclusion with respect to other federal programs: a uniform, centralized approach may be preferable to fight against a growing national fragmentation. The point for present purposes is not to definitively determine when changes such as our nation's growing population push in favor of more or less jurisdictional overlap, but to suggest that (1) some jurisdictional shift over time is both expected and desirable, and (2) the direction of the shift may be policy-specific, rather than trans-substantively oriented toward one direction.

An awareness that multiple factors account for the degree of jurisdictional overlap also suggests there can be unhealthy dynamics. For one, jurisdictional overlap can create a moral hazard. For example, the federal government's knowledge that states may step in if it does not act might lessen the perceived urgency of federal action, contributing to federal dysfunction. Perhaps this dynamic is partly at play in the current immigration impasse in Washington.

Second, jurisdictional overlap can lead to two types of suboptimal, first-mover entrenchments—what we might call "pragmatic entrenchment" and

72. The first factor, efficiency, likely also played a role insofar as the states had institutional infrastructures that could be deployed to help implement the Act.

“conceptual entrenchment.” As to pragmatic entrenchment, the first-mover might generate a set of institutions and learned experience that make jurisdictional change inefficient, expensive, or otherwise pragmatically unlikely despite the fact that, all things considered, the other institution is better situated at this time to discharge a particular task. Conceptual entrenchment refers to the possibility that the first-moving institution might displace a political culture’s ability to perceive that a particular task could be discharged by the other institution. Logic suggests the federal government can be either the beneficiary or victim of both forms of entrenchment, depending on whether the federal government or the states were the first-movers.⁷³ And the contemporary costs of either entrenchment are independent of the normativity of the first-mover’s action at the time it originally acted.⁷⁴

It might be useful to offer some suggestions of entrenchment. Since this Section addresses the contingency of federal priority, I will explore two arenas where states may have become entrenched.⁷⁵ And a caveat: though any examples will be controversial insofar as they suggest that regulatory domains long associated with the states may be more properly the responsibility of the federal government, I will not be able to fully defend in this Comment the proposition that either of the two example I offer ought to be federalized. The goal, instead, is to enhance the plausibility of my claim that these two types of entrenchment might occur.

First, education long has been the primary domain of states and localities, and to this day there remains a wide consensus that this is normatively correct and should continue.⁷⁶ But arguments for educational decentralization are weakened insofar as “Americans move a great deal.”⁷⁷ For example, 43.4 million Americans moved in a representative one-year period—approximately sixteen percent of the entire country—a large percentage of which were to

73. It follows that the states, too, can be either victims or beneficiaries of each form of entrenchment.

74. That is to say, there can be entrenchment costs whether (a) the first-mover was the proper institution to have acted when it did, but is no longer proper due to changing circumstances, or (b) the first-mover was never the normatively preferred institution, but simply was an effective first-mover.

75. As indicated above, the federal government sometimes may be the first-mover and hence the beneficiary of one or both types of entrenchment.

76. A crucial passage in *United States v. Lopez* is characteristic of this, assuming without argument state priority in education. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (“Under the theories that the Government presents in support of [the Brady Act], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”).

77. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1607 (2005).

homes in different school districts.⁷⁸ The forces of nationalization and globalization further reduce the extent to which a child's educational needs are determined by local circumstances, as does education's long association with our national commitment to being a country of equal opportunity. This is not to suggest there are no valid contemporary arguments for decentralized education in the United States.⁷⁹ But the dogma that education is local has been virtually unchallenged in this country, and the dearth of its reconsideration may at least in part be due to the pragmatic and conceptual entrenchment that has resulted from states having been first-movers in this domain.

The second example of possible first-mover entrenchment comes from the field of conflicts-of-law, the body of law that determines which state's law applies when activities straddle multiple states. It long has been understood by scholars that the Constitution gives Congress the power to enact a federal body of conflict-of-laws rules.⁸⁰ Early Congresses recognized this as well.⁸¹ But Congress left this power largely unexercised, with the result that almost the entire field has been created by state courts and has come to be viewed as having the status of state law.⁸²

Courts and scholars alike have recognized for a century that choice-of-law is a chaotic mess.⁸³ But almost nobody has considered that the source of the problem may be that only federal law can provide what a rational body of choice-of-law requires.⁸⁴ In short, choice-of-law is an area where states as first-movers may have led to a conceptual entrenchment of state law. State law has priority in choice-of-law notwithstanding formal federal supremacy, and despite powerful conceptual and practical reasons for federal law to have priority.⁸⁵

78. *Id.* Forty-four percent of the moves were to homes in another county. *Id.* Many of the fifty-six percent intra-county moves likely were to homes in different school districts, for most counties have tens of school districts. *See id.*

79. Consider, for example, the claim that decentralization works against a totalitarian state where the federal government alone determined what children learned.

80. *See* Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1093–95 (2015) (discussing the source of congressional authority to enact choice-of-law rules).

81. *Id.* at 1093.

82. *See id.* at 1040–47 (explaining Joseph Beale's reconceptualization of choice-of-law as state law).

83. *Id.* at 1019.

84. *Id.* at 1021 (explaining that "while choice-of-law presupposes variations across states in the substantive law to which it applies, choice-of-law cannot effectively serve its managerial function of predictably determining which state's law applies if choice-of-law *itself* varies across states").

85. *See* Rosen, *supra* note 80, at 1075–93 (explaining why choice-of-law is best understood as having the status of federal law).

III. MULTIPLE POSSIBLE FEDERAL/STATE RELATIONSHIPS

As a consequence of the contingency of federal priority (Proposition Two*), there is a wide range of possible federal/state relationships that may arise (Proposition Three*) over the domain of massive regulatory overlap between the federal and state governments (Proposition One). Professor Gerken is quite right in identifying two surprising, non-standard metaphors for federal/state (states as servants and states as agents), and in arguing that states can exercise substantial power in both these capacities. But the contingency of federal priority means there are many other possible federal/state relationships. This Part III aims to identify this range of possibilities by drawing on lessons that arise from the overlap-relationships identified in Part I.

A. *The Range of Possible Federal/State Relationships*

Let us start by revisiting the range of possible relationships between institutions with overlapping jurisdiction that we examined in Part I, but fitting it to the context of vertical federalism:

TABLE C: RANGE OF POSSIBLE FEDERAL/STATE RELATIONSHIPS										
Unsurprising Federal Priority			↔	Partnership			↔	Surprising State Priority		
A	B	C	D	E	F	G	H	I	J	

The main point of Professor Gerken’s two metaphors is that states can exercise substantial and meaningful power, despite their not having formal supremacy. Gerken’s position can be mapped onto Table C’s *Range of Possible Federal/State Relationships*. Her first metaphor, the “Principal/Agent relationship,” can be graphically translated as indicating that states may be located anywhere from “D” to “G” when they serve as agents to the federal government. In fact, the *Range of Possible Federal/State Relationships* graph facilitates recognition that the Principal/Agent metaphor can be further subdivided. Some federal statutes have very specific mandates that leave states little discretionary room. In such circumstances, states may be said to act as “Directed Agents,” and the federal/state relationship would fall somewhere around “D.” Other statutes utilize broad standards and other methods for giving states more implementation leeway. States may be said to serve as “Trusted Deleegees” in such circumstances, and the federal/state relationship would fall closer to “G.”

Professor Gerken’s essay identifies another type of federal/state relationship. She notes that states can serve as battlegrounds of issues that are later fought out on the national stage. This is another type of partnership relationship, in the sense that states play a surprisingly important role in a domain over which there is formal federal supremacy, though this state role ultimately gives way to federal priority. Call this the “Teeing-Up” relationship.

What might be some other possible relationships between the federal and state governments? Toward the pole of Unsurprising Federal Priority (from “A” to “B”) are instances where the federal government fully or largely preempts state law and relies exclusively on federal agencies to enforce the law. Patent and copyright belong here. Even here the role of the state may not be wholly displaced—for example, state trade secrets law can be viewed as a supplement to federal intellectual property law. But the federal government has priority. Let’s call this “Federal Priority.”

At the other end of the spectrum (toward “I” and “J”) are instances where states have surprising priority notwithstanding formal federal supremacy. Choice-of-law is such an example: it is almost exclusively state-law driven, and the few instances of federal law have the intention and effect of enhancing, rather than displacing, coordination among state officials.⁸⁶ Call this “State Priority.” Only slightly to the left—in the range of “G” and “H”—is a federal/state relationship that might be called the “Federal Enforcer,” where the federal government approves agreements made by states concerning matters that could have been regulated by the federal government. A good example is the Low-Level Radioactive Waste Policy Amendments Act of 1985, a federal law that authorized an interstate agreement concerning articles of interstate commerce that could have been regulated by Congress.⁸⁷

Another possible federal/state relationship, located in the “E”–“G” range but distinguishable from Principal/Agent, might be called the “Joint Venture.” In this circumstance, federal regulation does not fully preempt state law, leaving each government’s regulatory jurisdiction intact. Federal and state governments operate independently, though they sometimes may coordinate. Examples include the law of unfair trade practices and parts of discrimination law.

Finally, let us consider Professor Gerken’s second metaphor, the “Power of the Servant.” It does not describe a distinct type of federal/state relationship, but instead serves as a gloss on the entire range of relationships. The Power of the Servant draws on the intellectual tradition flowing from Hegel’s famed master/slave dialectic, which undermines the stability and integrity of formal power asymmetries. We might translate the implications of the Power of the Servant to our context of vertical federalism in two complementary ways. First,

86. *See* *Welch-Doden v. Roberts*, 42 P.3d 1166, 1171–73 (Ariz. Ct. App. 2002) (discussing states’ adoption of the Uniform Child Custody Jurisdiction Act (UCCJA), problems with the Act that led Congress to enact the Parental Kidnapping Prevention Act (PKPA), and the follow-up uniform law known as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) which, with the assistance of the PKPA, now operates to resolve choice-of-law questions concerning child custody).

87. *See* *New York v. United States*, 505 U.S. 144, 190 (1992) (White, J., dissenting) (noting that the act was a “congressional sanction of interstate compromise [the states] had reached”).

the federal government's election to govern in conjunction with states matters that the federal government has formally supreme power to govern alone empowers the states, and in so doing creates risks from the vantage point of the federal government. Second, from the perspective of the states, the lesson of the Power of the Servant is that states may be able to exercise greater power than would be expected in each and every one of the possible federal/state relationships.⁸⁸

For example, Gerken's observation that states in the Principal/Agent relationship may have de facto power to negotiate with the federal government⁸⁹ is a manifestation of the Power of the Servant, and suggests that Principal/Agent may extend to the range of H (and perhaps even beyond that). Recent state experiments with de-criminalizing marijuana, though its use and sale remain formally prohibited under federal law, may be another manifestation of the Power of the Servant. Finally, the Affordable Care Act's heavy reliance on states—something that could have been avoided (for instance through a single payer system)—has ceded substantial control over the Act's effective implementation to the states.

To summarize, the abovementioned examples of federal/state relationships might be graphically depicted as follows:

88. Indeed, Gerken's recognition of the Power of the Servant is a powerful reason internal to her own account for revisiting the descriptor of "the new nationalism."

89. Gerken, *supra* note 1, at 1025.

TABLE D: RANGE OF POSSIBLE FEDERAL/STATE RELATIONSHIPS

Unsurprising Federal Priority			↔	Partnership			↔	Surprising State Priority		
A	B	C	D	E	F	G	H	I	J	
<i>Federal Priority</i>						<i>State Priority</i>				
<i>Directed Agent</i>				<i>Trusted Delegee</i>			<i>Federal Enforcer</i>			
<i>Teeing-Up</i>				<i>Joint Venture</i>						

One final note: the Power of the Servant suggests the possibility that the entire list of possible federal/state relationships (except Federal Priority) may be subject to a rightward shift towards Surprising State Priority in some circumstances.

B. Some Implications

I do not purport to have exhausted the types of federal/state relationships over the domain of regulatory overlap. My point instead was to illustrate that there are a large number of possible relationships and to provide a sense of the range of possibilities—something conveyed (I hope) by the distance between Unsurprising Federal Priority and Surprising State Priority. It would be illuminating in future work to identify other federal/state relationships and to more fully flesh out their contours.

An interesting implication of Section A’s discussion is that there is no *a priori* reason to think there is, or should be, a single prototypical federal/state relationship across the domain of overlapping jurisdiction. To the contrary, as a descriptive matter, there are different federal/state relationships in the subdomains of jurisdictional overlap; the federal government has priority in some areas of regulatory overlap, and states have priority in others. Such variations are unsurprising in light of the context-specific factors that account for overlapping jurisdiction.

Furthermore, because context-specific factors determine whether there is overlapping jurisdiction and what form it takes, there is no reason to expect a convergence over time to one overlap-relationship. The multiplicity of federal/state relationships may be a reason to ratchet down the rhetoric when we confront disputes about the appropriate federal and state roles in particular contests, insofar as skirmishes in one subdomain do not necessarily—and indeed generally do not appear to—carry over to the entire domain of

overlapping jurisdiction. Put differently, there is reason to think that vertical federalism presents not a giant slippery slope, but a series of context-specific decisions.

CONCLUSION

The massive jurisdictional overlap between the federal and state governments likely is a stable enduring phenomenon of contemporary governance. This does not mean the states are meaningless, powerless, or irrelevant. To the contrary, they exercise power in many unexpected ways, and sometimes have functional priority notwithstanding the federal government's formal supremacy.

While Professor Gerken is correct that decentralization of power to the states can further national ends, it need not. There is a wide range of possible relationships between the federal and state governments—for instance, Federal Priority, Directed Agent, Trusted Delegee, Teeing-Up, Join Venture, Federal Enforcer, and State Priority—and there is no reason to expect that the relationship will take only one of these forms across the entire domain of overlapping federal/state jurisdiction. For these reasons, Professor Gerken's illuminating essay may better be said to be describing a system of *governancism* rather than a "nationalist school of federalism" whose very name seems to presuppose the federal government's present and continued centrality. The massive contingency entailed by our system of *governancism*—the vast array of potential relationships that can emerge from our system of massive overlapping jurisdiction—should be of great interest to both federalism's stalwarts and traditional nationalists.