THE CONSTITUTIVE AND ENTRENCHMENT FUNCTIONS OF CONSTITUTIONS: A RESEARCH AGENDA

Ernest A. Young[*]

Constitutional law suffers from a disconnect between what the Constitution does and how the Constitution is defined. It is commonplace to think of a "constitution" as serving a number of different functions: it "constitutes" the government by establishing governing institutions, conferring powers upon them, and setting the boundaries of their jurisdiction; it confers rights on individuals against government action; and it entrenches these institutions and rights against legal change. When we ask what the Constitution *is*, however, Americans tend to focus exclusively on entrenchment. "The Constitution" is the document ratified in 1789 and subsequently amended through a difficult supermajoritarian procedure set forth in Article V. It is obvious, however, that our institutions are "constituted" by a vast range of additional legal materials—consider, for example, the statutes creating the national administrative bureaucracies, the Judicial Code defining federal jurisdiction and procedure, or the rules that govern party and committee organization and voting requirements in the Senate and House of Representatives. Likewise, many of our most important individual rights—the right to be free from discrimination on the basis of age or disability, the right to income security and healthcare in old age, or to the enjoyment and security of our property—are conferred by statutes. What makes the 1789 document and its amendments unique is that they can only be changed in a particular way, that is, by running the gauntlet of Article V. What defines "the Constitution" is its formal process of enactment and the concomitant difficulty of changing the canonical text.

It does not have to be this way. The British have a constitution, but it is not generally entrenched.[1] Lacking a distinctive formal pro-

* Professor of Law, Duke Law School. This brief Essay develops some of the ideas suggested in Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

1 Certain complications have recently arisen due to Britain's acquiescence to the supremacy of European Union law, but Parliament remains sovereign—that is, able to change any law by ordinary legislative processes—in theory and, most of the time, in practice.

cedure for entrenching constitutional norms, the British define their constitution by reference to the constitutive and rights-conferring functions: the statutes and practices constituting institutions and conferring rights on individuals are considered to be part of "the Constitution" despite the absence of any formal distinction between such norms and "ordinary" law. Americans might learn something about our own constitutional order by rethinking the boundaries of constitutional law in a similar fashion. In particular, this perspective might both break down some of the barriers between traditional and positive scholarship relating to the Constitution and also suggest some areas in which positive work may enhance our understanding of constitutional dynamics.

This brief Essay traces the outline of a functional view of American constitutionalism, emphasizing the distinction between a constitution's government-constituting functions and its entrenchment against subsequent legal change. The final section identifies some questions revealed by this perspective that positive scholars may wish to take up.

I. THE EXTRA-CANONICAL CONSTITUTION

Although the British Constitution is frequently described as "unwritten," that is a misnomer. Most of the legal materials that make up the British Constitution are written down somewhere—in Magna Carta, in the Parliament Acts, in the Human Rights and Devolution Acts, et cetera. What the British lack is a codified or canonical constitution—a single document that purports to collect their constitutive commitments in one place and, perhaps, entrench that set of commitments against easy change.[2]

Consider two basic functions that constitutions perform in most constitutional systems. They create the institutions of government—ordain their structure, confer their powers, limit their jurisdiction, and determine methods for selection, supervision, and discharge of their officers. And they confer rights on individuals to resist action by these governmental institutions.[3] While it will occasionally be helpful

---

See, e.g., Paul Craig, *Constitutional and Non-Constitutional Review*, 54 CURRENT LEGAL PROBS. 147, 162 (2001).

2 ADAM TOMKINS, PUBLIC LAW 7 (2003).

3 *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 1 (2000) ("Constitutions allocate basic powers to officials and recognize fundamental rights of citizens . . . ."); Frank I. Michelman, *Constitutional Authorship, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 65 (Larry Alexander ed., 1998) (defining "constitutional essentials" as "(a) the

to distinguish between the institution-creating and rights-conferring functions, I will also group these two constitutional tasks—which are to at least some extent flip-sides of one another[4]—together as the "constitutive" function.

Our Constitution also performs a third function: it entrenches certain institutions and rights against easy change.[5] Not all constitutions do this; as I have already noted, the British Constitution is not entrenched. (It might be more precise to say that all constitutions perform an entrenchment function in the sense that they all contain, explicitly or implicitly, a rule setting the requirements for changing their own content. In systems like the British, however, that rule is identical to the requirements for ordinary legislation.) In America, however, the idea that the Constitution is specially insulated from change by a set of formal and quite difficult amendment requirements has come to be foundational to our sense of constitutional definition.

It is not my purpose here to develop a definitive list of constitutional functions. We might identify others beyond those I have listed, but these three are sufficient to test my central descriptive claim, which is that the functions we generally attribute to the Constitution are not, in fact, performed exclusively—or even primarily—by the canonical document.

This is plainly true of institution creation: Think of all the crucial institutions in modern government—the Federal Reserve, the alphabet-soup agencies, the lower federal courts—that are not even mentioned, or that are only authorized, not created, in the canonical document. Or consider how Congress would function if it only had the structures and rules provided by Article I—that is, if it had no defined electorate (provided by state law), no political parties, no committee system, and no voting rules for legislative action.

The canonical constitution is also far from our exclusive source of individual rights. Some canonical rights are parasitic on extra-

---

plan of political government—offices, branches, levels, procedures, power distributions, and competency ranges—and (b) the list of personal rights and liberties, if any, that the constituted government is bound to respect." (internal quotation marks omitted)).

4 *See* Richard S. Kay, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 3, at 16, 22 ("Constitutions restrict the reach of the state by a proper specification of what it may and may not do. They may do this by defining an exclusive grant of public power and/or by removing from its control certain favored private activities.").

5 *See* COOTER, *supra* note 3, at 1; Michael J. Perry, *What Is "the Constitution"? (and Other Fundamental Questions)*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 3, at 99, 103.

canonical entitlements (the Takings Clause protects property rights created by state law); others have been eclipsed by statutory analogs (Title VII provides broader and deeper protection against race and sex discrimination in employment than does the Equal Protection Clause); and some crucial rights (the electoral franchise, public education, healthcare and income security in old age) have no grounding in the canonical text at all.

Even the entrenchment function is not exclusively reserved to the canonical constitution. Some norms are practically entrenched even though they may be amended or repealed by ordinary legislation. Which is more likely in the next five years: amendment of the Constitution to prohibit flag-burning, or repeal of the Social Security Act? Moreover, there are more than two degrees of entrenchment. As the Supreme Court's decisions in the military commissions and Oregon right-to-die cases illustrate, it makes a great deal of difference whether an existing set of rights and/or institutional arrangements can be changed by executive fiat, or whether a new statute is necessary to effect the change.[6] Whether legislative amendments are required to change the law is typically a question of statutory, not constitutional, construction, and this relative entrenchment question is particularly important when the political branches are closely divided politically and the Supreme Court is reluctant to recognize new categories of fundamental rights.

In our legal order, no less than in Britain, constitutional functions are pervasively performed by a "constitution outside the constitution"—that is, a set of extra-canonical norms and institutions that structure our government, confer our rights, and specify the requirements for legal change. If we define our "Constitution" functionally, rather than formally, then all these extra-canonical norms are part of "the Constitution" of the United States. I do not mean to discount the importance of the traditional formal definition for certain purposes. Nonetheless, I submit that a broader, functional perspective can yield important insights for constitutional law and theory.

---

6 *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (holding that the President could not try suspected terrorists before military commissions using procedures that depart from traditional courts martial without specific authorization from Congress); Gonzales v. Oregon, 546 U.S. 243 (2006) (invalidating a regulation promulgated by the Attorney General that defined the use of drugs for physician-assisted suicide as an illegitimate use under the Controlled Substances Act).

Although I have developed this functional definition of our "Constitution" by way of comparative constitutional experience, similar accounts emerge from the Legal Realist tradition and from positive theory.[7] (The latter fact may explain my otherwise-puzzling invitation to this Symposium.) The Realist account emerges from Karl Llewellyn's largely forgotten foray into public law, which identified a "working Constitution" with only a tenuous relationship to the canonical text.[8] As examples, Llewellyn invoked "the privilege of Senatorial filibuster; the powers of the Conference Committee; the President's power of removal; the Supreme Court's power of review; the party system; the campaign fund."[9] The scope of this extra-canonical constitution was defined simply by those norms and institutions that the relevant political actors considered to be largely beyond alteration.[10]

Positive theorists have likewise tended to view "the Constitution" as the set of basic rules and practices that structure our government, often without paying a great deal of attention to whether particular rules or practices are included within the canonical document. Dennis Mueller's work on "Constitutional Democracy," for example, defines a constitution as "the set of rules that define a community's political institutions."[11] The constitutional features that he discusses include the structure of political parties and different voting rules in the legislature—issues that, in the American legal order, are determined by rules existing outside the canonical document and amendable by ordinary legislation or, in many instances, by changes in the practices of particular political actors.[12] It may be considerably easier for scholars with a positive orientation to recognize the constitutive

---

7 The comparative and realist traditions meet in Matthew Palmer's insightful work on the Constitution of New Zealand. Matthew S. R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 593 (2006); Matthew S.R. Palmer, *What Is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders*, 17 PUB. L. REV. 133 (2006).

8 Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934) ("A recanvass of the nature of any working constitution, and especially of ours, as being in essence not a document, but a living institution built (historically, genetically) in first instance *around* a particular Document . . . would lay the foundation for an intelligent reconstruction of our constitutional law theory.").

9 *Id.* at 15.

10 *Id.* at 28–30 ("To be unambiguously a part of the working Constitution . . . [t]he actors, and any non-actors in a position to block or modify action, must *feel* that the way or institution, is not subject to abrogation or material alteration . . . .").

11 DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 43 (1996).

12 *See also* COOTER, *supra* note 3 (discussing a similar mix of canonical and extra-canonical features as part of the American Constitution).

functions of ordinary legislation and practices than it is for traditional practitioners of constitutional law.

II. DECOUPLING THE CONSTITUTIVE AND ENTRENCHMENT FUNCTIONS

As I noted at the outset, the formal entrenchment of the canonical text against subsequent legal change has come to define the boundaries of constitutional law in America. The situation is altogether different in Britain; because Britain's constitutive statutes and practices are not specially entrenched, "there is no special significance attached to the adjective 'constitutional,'" and "constitutional law is not sharply demarcated from other areas of law."[13] Even in the United States, political scientists seem to think in terms of "public law," rather than distinguishing sharply between "constitutional" law and everything else, the way that lawyers do.[14] Among American lawyers, however, entrenchment of the Constitution against legal change seems essential to what "the Constitution" is.[15]

This is true even of scholars who argue for the existence of constitutional norms outside the canonical text. Bruce Ackerman, for example, is famous for arguing that the Constitution has been amended outside the Article V process and now includes any number of principles that do not show up in the text.[16] Yet Professor Ackerman's theory is built around a sharp distinction between "higher lawmaking" and "ordinary politics," and he urges that subsequent interpreters should treat the products of the former—e.g., the administrative state produced by the New Deal—as entrenched against amendment by way of the latter.[17] Similarly, William Eskridge and John Ferejohn argue that certain "super-statutes" have attained the status of "quasi-constitutional law," and a crucial component of super status is a degree of special durability against legal change and of special influence on the interpretation of subsequent legislation.[18] And of course the whole debate about unenumerated constitutional rights amounts to an effort to entrench certain extra-canonical norms—e.g., privacy—against legislative departures. This pervasive focus on en-

---

13 TOMKINS, *supra* note 2, at 16.

14 The University of Texas Government Department, for example, has a "public law" division rather than a "constitutional law" division.

15 This was even true of Karl Llewellyn's "realist" view. *See supra* note 10.

16 *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

17 *See id.* at 6.

18 William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1265–66 (2001).

trenchment makes being part of "the Constitution" a function of a norm's status, rather than its function.

Thinking of the Constitution in terms of status makes it important to develop a rule of recognition to determine which norms and institutions have this status and which do not. Much turns, after all, on inclusion or exclusion from the category: a right of privacy cannot be overturned by subsequent legislation if it is part of the Constitution in this sense. Once we abandon the canonical rule of recognition in Article V, however, these boundaries become quite difficult to draw. Criticism of Professor Ackerman's "constitutional dualism," for example, has often focused on the difficulty of identifying transformative "constitutional moments" and specifying the precise changes that they make to the Constitution.[19] Similar criticisms can be made of "super-statutes" and unenumerated individual rights.

Decoupling the entrenchment and constitutive functions eliminates much of the pressure to develop a precise rule of recognition for extra-canonical norms. My argument here is that ordinary laws often perform constitutional functions, but I do not say that those laws are any less ordinary as a consequence. My definition of "the Constitution" derives from function, not status. Consequently, I can afford to acknowledge that an extremely wide range of laws and practices—any law that creates a governmental office or entitlement, for example, or specifies a procedure—have some constitutive elements, and that the outer boundaries of the category may be fuzzy indeed. This observation points toward a simpler and much more incremental understanding of constitutional change outside Article V: the constitutional order can change dramatically over time precisely because much of it has always been composed of ordinary laws and practices that are not constitutionally entrenched.

I have explored this last argument about constitutional change in more depth elsewhere.[20] For present purposes, the important point is the expanded jurisdiction that this account opens up for constitutional scholarship. Constitutional scholars ought to be concerned with constitutive arrangements, regardless of the degree to which they are constitutionally entrenched. Two of the most important growth areas in legal scholarship—foreign affairs and election law—

---

19 *See, e.g.*, Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 923 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)); L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547, 570 (1998) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)).

20 *See* Young, *The Constitution Outside the Constitution*, *supra* note *, Part II.B.

take this approach, being equally concerned with statutory enactments and canonical constitutional provisions that structure the field.[21] This is likewise true of the older discipline of Federal Courts scholarship, which tends to view enactments like the Rules of Decision Act or the statutory guarantee that state courts are the final word on state law as fundamentally constitutive of our constitutional order.[22] Much of the mainstream of constitutional scholarship and practice tends to ignore statutes, regulations, and practices, however. Both scholars and judges have frequently rejected, for example, the notion that constitutional federalism can be protected through rules of statutory construction; instead, they seem to see interpretation of the canonical provisions themselves as the sole legitimate vehicle for protecting structural values.[23]

Including constitutive statutes, regulations, and practices within the domain of constitutional law would also open up opportunities to consider matters of institutional design. Given "[t]he functional impossibility of amending the Constitution with regard to anything truly significant,"[24] most constitutional scholars seem to see their opportu-

---

21 *See, e.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (2d ed. 2006) (covering both constitutional provisions bearing on foreign affairs and subconstitutional law, such as the Foreign Sovereign Immunities Act and the Act of State doctrine); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (3d ed. 2007) (covering constitutional provisions as well as the Voting Rights Act and other statutory enactments).

22 In *Murdock v. City of Memphis*, 87 U.S. 590 (1874), for example, the Supreme Court interpreted the statutory provision for its review of state court decisions as limited to federal questions, leaving the final say on *state* questions to the state courts. As Martha Field has observed, "It is . . . because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one. . . . *Erie* and *Murdock* together . . . give states control over their own law in a way we unquestionably presuppose them having today." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 921–22 (1986).

23 *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 300–01 (2006) (Thomas, J., dissenting) (arguing that, once the Court had upheld the federal Controlled Substances Act (CSA) as within Congress's constitutional commerce power, federalism values became irrelevant to interpreting the CSA's meaning (citing Gonzales v. Raich, 545 U.S. 1 (2005)); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2117 (2000) ("Redefining the proper balance of legislative powers between Congress and the states is better accomplished directly, through an insistence on the limits of Congress's enumerated and limited powers under Article I, rather than circuitously and ineffectually through some vague and ill-conceived presumption against preemption under the Supremacy Clause."); Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After* Gonzales v. Raich, 2006 CATO SUP. CT. REV. 113, 114–15 ("Clear statement rules sometimes protect the interests of state governments, but that is very different from protecting constitutional federalism.").

24 SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 167 (2006).

nities to think about matters of design as confined to those heady occasions when they are invited to Eastern Europe or some island in the South Pacific to consult on the drafting of a new constitutional document. But our American legal order confronts any number of fundamental institutional questions upon which the canonical document is relatively silent. How, for example, is our domestic judicial system to be integrated with emerging global judicial networks and supranational courts?[25] Most scholars writing about this issue from a constitutional perspective have sought to apply certain canonical rules and doctrines, such as the Appointments Clause or the nondelegation doctrine.[26] To my mind, however, these canonical principles offer relatively little purchase. Given the relative infancy of the relevant international institutions and the dearth of entrenched constitutional rules, the energies of constitutional scholars would be better directed toward applying what we already know about constitutional structures to the design task of drafting framework legislation to govern the interface of domestic and international legal institutions.[27] We are generally not inclined to see such drafting exercises as part of "constitutional" scholarship, but we should.

As my discussion of institutional design suggests, emphasizing the constitutive role of ordinary law will also tend to shift the institutional focus of constitutional lawyers away from courts. As William Fisch and Richard Kay have pointed out, "subconstitutional law in the American legal system is principally the product of legislation," while much constitutional lawmaking is done by courts.[28] This institutional disparity has important consequences for the impetus, decision structure, and transparency of lawmaking, as well as the accountability of the actors involved and the form of the rules that emerge.[29] In many

---

25 *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 84 (2004); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L. J. 1143 (2005).

26 *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

27 For an effort in this direction, see Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93 (2008).

28 William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437, 459 (Supp. 1998).

29 *See id.* at 461 ("[O]rdinary (subconstitutional) lawmaking, at least in its optimum form, is controlled by publicly accountable agencies acting on frankly political grounds through the promulgation of prospective, generally applicable and reasonably well-defined rules

areas of current controversy, we confront a choice as to whether to deal with manifestly constitutive issues through extension of canonical constitutional principles by courts or through the development of new subconstitutional structures by political actors. The debate about whether to address political gerrymandering of electoral districts through equal protection doctrine or new districting procedures, for example, raises a question of this kind.[30] Acknowledging that "ordinary" lawmaking by political actors frequently resolves constitutive questions may help overcome habits of thinking that bias us in favor of judicial resolution.

III. THE POWER OF POSITIVE THINKING

I have already noted the affinities between positive perspectives on law and the functional approach to constitutionalism suggested here. In this last Part, I want to identify a number of areas in which positive work might fruitfully develop and enhance that functional perspective. Such work is essential if we are both to understand the constitutive roles played by ordinary law in our present legal order and to design institutional solutions to realize or maintain important constitutional values.

The first set of research questions fit under what Professor Vermeule characterizes as "prescriptive theory": they ask how we can best design institutional means to vindicate values embodied in the canonical constitution.[31] The "political safeguards of federalism," for example, are now often conceded to reside not so much in canonical features like equal state representation in the Senate, but rather in extra-canonical structures like political parties and the intertwining of state and federal administrative bureaucracies.[32] The efficacy of those safeguards has been questioned,[33] and further extra-canonical meas-

---

of conduct. Constitutional lawmaking is, in contrast, the domain of politically independent judges acting, usually retrospectively, on the basis of large principles of public morality, shaping those principles to different problems in an evolving and, necessarily, somewhat unpredictable manner.").

30 LULAC v. Perry, 126 S. Ct. 2594 (2006) (considering whether to adopt constitutional restrictions on partisan gerrymandering).

31 Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387 (2008).

32 *See generally* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 284 (2000).

33 *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEXAS L. REV. 1459 (2001).

ures—such as mandatory consideration of federalism impacts in administrative rulemaking—have been proposed in order to shore them up. Such proposals could benefit from serious scrutiny by positive scholars. Similar benefits seem likely to flow from positive evaluations of proposals to protect separation of powers values through "presidential administration,"[34] and values of political competition through restrictions on gerrymandering of voting districts.[35]

My remaining suggestions all have to do with entrenchment and its relation to the constitutive functions of a constitution. As I observed earlier, entrenchment is not exclusively a function of a norm or institution's formal status in our legal system. The Social Security System remains the "third rail of American politics," deterring even modest attempts at amendment, despite its status as an "ordinary" statute. The First Amendment, on the other hand, has had a series of narrow escapes from proposed amendments to prohibit flag burning, and such an amendment remains a real political possibility. And there are canonical principles which seem to be violated with relatively little interest or fuss, such as the Twelfth Amendment's restriction of presidential tickets on which the presidential and vice-presidential nominee hail from the same state.[36] Entrenchment is obviously a function of public salience and social consensus, in addition to formal requirements for amendment, but there is likely a great deal more to know about how these variables operate in practice.

Another set of entrenchment questions focuses on formal entrenchment, but builds upon the observation that there are many more steps on the entrenchment ladder than simply "higher lawmaking" and "ordinary politics." Statutes are certainly harder to amend than administrative regulations, and within the latter category some forms (e.g., legislative rules) seem considerably more durable than others (e.g., interpretive rules, letter rulings, et cetera). We also

---

34 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

35 *See supra* note 30.

36 *See generally* Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001) (suggesting that the Amendment's "Habitation Clause" may well have been violated by the counting of Texas electors for both George W. Bush and Richard Cheney in 2000, and wondering why this possible constitutional violation was not taken as seriously as any number of less plausible constitutional claims arising out of the election). The Twelfth Amendment does not prohibit such a ticket, but it does seem to require that the favored state's votes be discounted for at least one of the candidates, presumably the vice-president. *See* U.S. CONST. amend. XII ("The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . . .").

know that certain judicial strategies for interpreting legislation, such as "clear statement" canons of statutory construction, can have entrenchment effects by raising the costs of legislating in a particular way.[37] But we could do with more systematic attention to the variable entrenchment effects of governmental acts that take these various forms, and investigation of the extent to which those effects may vary according to the subject matter upon which the government is acting.

Likewise, the modern legislative process includes any number of extra-canonical mechanisms that can affect the entrenchment of legal rules by making it easier or harder to enact certain kinds of legislation or promulgate certain sorts of administrative rules. These mechanisms include, for example, additional veto-gates in the legislative process created by House and Senate procedures,[38] framework laws creating special procedures for certain sorts of legislation,[39] and special executive branch review of administrative rules that preempt state law.[40] Positive scholarship obviously has an important role to play in helping constitutional lawyers integrate these extra-canonical mechanisms into their understanding of our constitutive arrangements.

Finally, it would be helpful to know more about the costs and benefits of formal constitutional entrenchment. There is a debate, for example, about the extent to which all the values associated with federalism—e.g., policy experimentation, citizen participation, and the like—can be captured by decentralizing political authority over certain questions without entrenching any commitment to such decentralization.[41] Defenders of entrenched federal structures have argued that governmental subdivisions that lack any entrenched authority, like the French *departments*, may lack the longevity and

---

37 *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 30, 69 (1994); Vermeule, *supra* note 31.

38 *See* William N. Eskridge, Jr., *Legislative Vetogates, Preemption, and* Chevron *Deference*, 83 NOTRE DAME L. REV. (forthcoming Spring 2008).

39 *See* Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187–93 (1985); Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. (forthcoming Spring 2008).

40 *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 782–86 (2004) (discussing executive practice under the federalism order).

41 *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994) ("Of the standard arguments for federalism, *four are really arguments that specific national policies are best implemented by decentralized decision-making*; these are public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation." (emphasis added)).

stability to actually acbieve the benefits associated with federalism.[42] After all, why invest in developing a viable, competent government if it may be shorn of its authority tomorrow? These contending views will likely continue to talk past one another in the absence of serious positive work on the extent to which constitutional entrenchment may help an institution to further its goals. Conversely, such work might valuably consider whether entrenchment is necessary, under modern conditions, to protect values and groups that were once thought seriously endangered. The political power of the modern media, for example, might suggest that a constitutional system designed today might require a less rigorous Press Clause than that contained in the First Amendment.

IV. CONCLUSION

If one asked a political scientist, "What are the key features of the American constitutional order?" I suspect the answer would include not only canonical features like a bicameral legislature and a life-tenured judiciary, but also features like the two-party system and a large administrative bureaucracy that have no grounding in the canonical document. I do not mean to suggest that these features are illegitimate, but rather that constitutional lawyers should pay more attention to them as *constitutional* features. Broadening our definition of the Constitution along functional lines, and decoupling that definition from the question of which norms and institutions are constitutionally entrenched, promises to yield important dividends in constitutional theory, doctrine, and pedagogy. And by expanding our definition of what counts as a constitutional question, this perspective should yield a wealth of opportunities for collaboration between traditional and positive approaches.

---

42 *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2218–19 (1998) ("Rubin and Feeley's analysis . . . underestimates the value of states as alternative locations of independently derived government power. Were the states not guaranteed existence within defined borders, for example, a national government unhappy with decisionmaking in its centrally defined administrative units could simply reorganize the political boundaries of those units to create more compliant decision-making, or to isolate 'troublemakers.'" (footnotes omitted)).