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## The Constitution Outside the Constitution

**ABSTRACT.** Countries lacking a single canonical text define the “constitution” to include all laws that perform the constitutive functions of creating governmental institutions and conferring rights on individuals. The British Constitution, for example, includes a variety of constitutive statutes, such as the Magna Carta and the Parliament Acts. This Article proposes a thought experiment: what if we defined the U.S. Constitution by function, rather than by form? Viewed from this perspective, “the Constitution” would include not only the canonical document but also a variety of statutes, executive materials, and practices that structure our government. What these constitutive materials lack is a third characteristic shared by some (but not all) constitutions: formal entrenchment against legal change. Decoupling the entrenching function from the constitutive functions offer a relatively simple answer to one of the most important problems in constitutional theory: how do we explain the evident fact that the structure of our government and the rights of the people have changed pervasively since the Founding, in ways that are simply not reflected in Article V amendments to the canonical text? The answer is that the constitutional order can change in this way because most of it was never entrenched in the canonical text to begin with. Most of the salient changes—the growth of the administrative state, the proliferation of individual entitlements—are changes to our “constitution outside the constitution” that are neither mandated nor forbidden by the canonical document. This functional account of constitutionalism also has implications for constitutional doctrine and scholarship. It tends to undermine doctrinal prescriptions grounded in a sharp dichotomy between constitutional and statutory claims, and it suggests that basic constitutional values—such as federalism or concern for individual rights—are relevant to statutory construction. Finally, the functional account suggests a broader set of concerns for constitutional law teaching and scholarship.

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## INTRODUCTION

*There is the notion that the primary source of information as to what our Constitution comes to, is the language of a certain Document of 1789, together with a severely select coterie of additional paragraphs called Amendments. Is this not extraordinary?*<sup>1</sup>

My central claim in this Article is that the American “constitution” consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments. To clarify what I mean, it will help to begin with a thought experiment derived from comparative constitutional experience. It has long been said that the English have an “unwritten” constitution. This, however, is clearly untrue. As Adam Tomkins has pointed out, “notwithstanding its allegedly unwritten nature, much (indeed, nearly all) of the [English] constitution is written, somewhere.”<sup>2</sup> The Magna Carta, the Bill of Rights of 1689, the Parliament Acts of 1911 and 1949, the European Communities Act of 1972, the Human Rights Act of 1998<sup>3</sup>—these all form parts of the English constitution, and they are all written down. As Professor Tomkins explains, “[t]he unhappily misleading phrase, ‘written constitution’ really means ‘codified constitution.’ Thus, a written, or codified, constitution is one in which all the principal constitutional rules are written down in a single document named ‘The Constitution.’”<sup>4</sup> That single codified document is what the English lack.

In a polity without a codified constitution, the content of “The Constitution” must be derived functionally, not formally. Matthew Palmer has described this perspective as “constitutional realism” that “seeks to identify the nature of a constitution through observing its operation in reality.”<sup>5</sup> The

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1. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).
  2. ADAM TOMKINS, PUBLIC LAW 7 (2003). I place to one side the role of “conventions” in the English tradition. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, at xxii-xxxii (8th ed. 1915) (discussing the distinction between “constitutional law” and “conventions of the constitution”). These are important, but they are not the primary reason people say that the English constitution is unwritten.
  3. See Human Rights Act, 1998, c. 42 (Eng.); European Communities Act, 1972, c. 68 (Eng.); Parliament Act, 1949, 12, 13 & 14 Geo. 6, c. 103 (Eng.); Parliament Act, 1911, 1 & 2 Geo. 5, c. 35 (Eng.); Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), reprinted in 10 HALSBURY’S STATUTES OF ENGLAND AND WALES 42 (4th ed. 2007); Magna Carta, reprinted in 10 HALSBURY’S STATUTES OF ENGLAND AND WALES, *supra*, at 18.
  4. TOMKINS, *supra* note 2, at 7.
  5. Matthew S.R. Palmer, *Using Constitutional Realism To Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 592-93 (2006).

functional perspective predates the realist movement, however. As early as 1908, A.V. Dicey defined English constitutional law to include “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”<sup>6</sup> Hence, we know that the Parliament Acts of 1911 and 1949—defining the role of the House of Lords in the legislative process—are part of the English Constitution because of what they *do*, not because they have any formal markers that set them off from ordinary legislation.<sup>7</sup>

The thought experiment that I wish to propose involves thinking of the American constitutional order in the same way, despite the fact that we purport to have a codified constitution. It is possible to identify, in the abstract, certain functions that constitutions perform. In England, whatever laws actually perform those functions are considered part of “the constitution.”<sup>8</sup> What if we thought of the United States’ legal system in the same way? What would our “constitution” look like then?<sup>9</sup>

My descriptive claim is that much—perhaps even *most*—of the “constitutional” work in our legal system is in fact done by legal norms existing outside what we traditionally think of as “the Constitution.”<sup>10</sup> A constitution

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6. DICEY, *supra* note 2, at 22.

7. See, e.g., *id.* at 6 (observing that an English scholar “may search the statute-book from beginning to end, but he will find no enactment which purports to contain the articles of the constitution; he will not possess any test by which to discriminate laws which are constitutional or fundamental from ordinary enactments”); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 153 (Larry Alexander ed., 1998) (“In the thin sense it is tautological that every legal system includes a constitution. For in that sense the constitution is simply the law that establishes and regulates the main organs of government, their constitution and powers, and ipso facto it includes law that establishes the general principles under which the country is governed . . .”). Both Parliament Acts significantly limited the power of the House of Lords to veto or delay legislation enacted by the Commons.

8. That, at least, is the traditional conception of English public law. Recent developments, such as the integration of Britain into the European Union, have pressed in the direction of a distinction between “higher” and “ordinary” law. Cf. MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 4 (2000) (suggesting that Britain is shifting away from a “political constitution” that is not set above ordinary legislation); Paul Craig, *Constitutional and Non-Constitutional Review*, 54 CURRENT LEGAL PROBS. 147 (2001) (discussing emerging forms of English judicial review of domestic legislation that may conflict with European law).

9. Matthew Palmer has proposed a similar inquiry, grounded in a comparison with the “unwritten” constitution of his native New Zealand. See Palmer, *supra* note 5; see also 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).

10. Cf. Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 431,

generally does three primary things: It constitutes the government, that is, it establishes the various institutions of the government and sets out their powers and obligations. It identifies certain rights of individuals against that government. And (sometimes) it entrenches these structures against change, absent compliance with a difficult amendment procedure. A moment's reflection, however, reveals that under our modern institutional arrangements, the first two of these functions are no longer exclusively, or even primarily, performed by constitutional norms. (I shall have more to say about the third function—entrenchment—later on.) For virtually all practical purposes, the boundary between federal and state power is set by the terms of federal statutes; likewise, statutes and regulations play a far more significant role in regulating the separation of powers at the national level than do constitutional rules. Many of our most important individual rights—rights against discrimination based on age or disability, rights to welfare, medical care, and social security—stem from statutes rather than the Constitution. Even the basic electoral structure of our democracy is created and regulated by an assortment of nonconstitutional federal and state law rules.

Consider, for example, the Federal Communications Act.<sup>11</sup> That Act divides authority between the Congress and the Executive by delegating certain functions to an agency;<sup>12</sup> it further delegates some tasks to state governments while reserving others to federal authority.<sup>13</sup> The Act also confers both substantive and procedural rights on regulated entities and individuals.<sup>14</sup> From a functional point of view, the Communications Act might truly be described

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431 (Richard W. Bauman & Tsvi Kahana eds., 2006) (suggesting that fundamental U.S. structural legislation would be considered “constitutional” in England).

11. 47 U.S.C. §§ 151-614 (2000).

12. *E.g.*, *id.* § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”).

13. *E.g.*, *id.* § 152(b) (assigning regulatory authority over interstate and intrastate telephone service to the Federal Communications Commission and the state utility commissions, respectively).

14. For substantive rights, see, for example, *id.* § 202 (conferring a right against common carriers to be free from “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services”); *id.* § 222 (conferring a right on customers to ensure the privacy of their consumer information); *id.* § 251 (conferring on companies seeking to enter local telephone markets the right to interconnect with the incumbent local exchange carrier); *id.* § 254(b) (creating at least an aspirational right to universal telecommunications services, as well as institutional mechanisms to pursue that goal); and *id.* § 255 (conferring a right of access to telecommunications services on persons with disabilities). For procedural rights, see, for example, *id.* § 208 (creating procedures for complaints to the Commission).

as a “constitution” in its own right. To be sure, the Act is not “entrenched” in the sense that it can only be modified by constitutional amendment. On the other hand, the broad range of important interests, both individual and commercial, that the Act balances and protects ensures that it is, as a practical matter, quite difficult to alter in any sort of fundamental way.<sup>15</sup>

It is time we recognized and thought systematically about the fact that much of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself. When lawyers talk about the Constitution being “open ended,” they generally mean that constitutional norms themselves can be extended to cover unforeseen changes in technology or mores: the Fourth Amendment now covers wiretapping;<sup>16</sup> the Due Process Clause now covers abortion.<sup>17</sup> The more important sense of open endedness, however, lies in the extent to which the Constitution permits basic constitutive questions to be answered by subconstitutional norms. My point is emphatically *not* that the Constitution is irrelevant to most of today’s legal problems. However, its relevance typically takes the form of a set of outside limits and a source of general constitutional values. The particular rules enshrined in the Constitution will themselves rarely have significant bite on our most important constitutional controversies.<sup>18</sup>

We can thus better understand our legal order if we decouple the constitutive function of a constitution from the entrenchment function. Other scholars, from Karl Llewellyn in the 1930s to Bruce Ackerman, William Eskridge, John Ferejohn, and many others today, have recognized that our political order is constituted by norms existing outside the canonical document.<sup>19</sup> But they have insisted on treating these extracanonical norms as

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15. For example, the landmark amendments to the Act in 1996, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.), came only after years of extraordinarily complex bargaining among affected governmental and industry constituencies. For a short overview of the changes, see Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996).

16. *Katz v. United States*, 389 U.S. 347 (1967) (extending the Fourth Amendment to govern wiretapping).

17. See *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a constitutional right to an abortion).

18. This is partly because the core operations of many of the most important clauses in the Constitution—such as those setting forth the general structure of the branches of government—are uncontroversial and rarely litigated. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). But I want to press the further point that even these clauses leave many or even most questions of both broad structure and institutional detail to be worked out through subconstitutional rules.

19. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001); Llewellyn, *supra* note 1.

“higher law,” which puts their theories on a collision course with Article V and creates a great deal of pressure to develop an alternative rule of recognition to identify those norms that have achieved this higher status. If one is going to confer entrenched constitutional *status* on a norm that has not gone through Article V ratification—on the institutional innovations of the New Deal, for example—then one needs a highly determinate way to identify both which norms have achieved this status and what their precise content is. This rule of recognition problem has loomed large in critiques of alternative theories of constitutional change, as well as more general approaches to interpretation predicated on a “living constitution.”<sup>20</sup>

My aim is more modest. I want to suggest that the set of norms that “constitutes” our government is in fact much broader than the set of norms that is constitutionally entrenched. A statute like the 1934 Act creating the Federal Communications Commission (FCC) may be constitutive of an institution without having any “higher law” status making it more difficult to change.<sup>21</sup> Decoupling constitutive function from entrenched status decreases the pressure to confine the class of constitutive enactments to a narrow and precisely defined category of norms. In fact, it would be fair to say that *most* laws have some constitutive aspects, to the extent that they create a government post, empower an institution, or confer a right. The fact that ordinary laws perform these functions is important, but it does not make them any less ordinary.

Decoupling the constitutive and entrenchment functions has important implications for constitutional law. The first is to offer a relatively simple account of constitutional change outside the Article V amendment process. The second, more doctrinal implication is to undermine sharp distinctions between constitutional claims and claims under statutes and regulations, as those distinctions are currently applied or proposed in areas like statutory construction, federal jurisdiction, and civil rights remedies. Finally, broadening the definition of “constitutive” norms beyond those that are formally entrenched ought to expand the jurisdiction of constitutional scholars, both as to what we teach and what we study.

Part I of this Article discusses three primary functions of constitutions—establishing the institutions of government, conferring rights on individuals,

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20. See *infra* notes 218–232 and accompanying text.

21. Some constitutive statutes and practices *are* entrenched, as a practical matter, because the functions they perform render them terribly difficult to dislodge: the Social Security Act comes to mind. See *infra* Subsection I.A.3. But I do not argue that this *should* be the case, and the set of rules and practices performing constitutive functions is broader than the set that has achieved some level of quasiconstitutional durability.

and entrenching these structures against easy change—and demonstrates that ordinary law frequently performs each of these roles. Part II argues for decoupling the constitutive and entrenching functions and explores the implications of that move for theories of constitutional change. Part III then traces the implications of this approach for constitutional doctrine and scholarship.

## I. OUR EXTRACANONICAL CONSTITUTION

Exposition of my argument requires ready terms differentiating between the document generally designated as “the Constitution”—the one ratified in 1789, formally amended several times since, and passed out in handy pocket-size booklets by the Federalist Society—and those legal norms existing outside that document that nonetheless perform constitutional functions. It will not do to distinguish between “written” and “unwritten,” because (as in England) the overwhelming bulk of the “constitution outside the Constitution” is, in fact, written down in statutes and regulations. Functionally speaking, one might distinguish the “entrenched” Constitution that can only be amended through the rigorous Article V procedure from various unentrenched norms that may be changed by other processes, including ordinary legislation. I want to suggest, however, that entrenchment is more multifarious than binary and that ordinary legislation performs important entrenching functions. For lack of a better term, I will refer to a “canonical” Constitution and an “extracanonical” constitution that exists alongside the canonical text.

I begin with an overview of the ways in which extracanonical materials perform crucial constitutional functions in our system. I then develop some case studies in greater detail, focusing on three decisions from the Supreme Court’s 2005 Term. Finally, I conclude this Part with a brief typology of extracanonical functions.

### *A. Extracanonical Materials and Constitutional Functions*

To make the case that much of the “constitutional” work in our legal system is done by extracanonical norms, one first needs a catalog of constitutional functions. I want to focus on three such functions here: First, constitutions “constitute” the government by creating governmental institutions, prescribing procedures by which those institutions operate, and allocating powers and responsibilities among the various institutions thus



created.<sup>22</sup> Second, constitutions typically confer certain rights on individuals as against government action.<sup>23</sup> Finally, many constitutions entrench certain institutional structures and individual rights by making those arrangements relatively difficult to change.<sup>24</sup>

I do not insist on this particular typology of constitutional functions. Others have described them somewhat differently.<sup>25</sup> I expect my argument could be replicated for just about any other function one might attribute to a constitution. If constitutions are meant to embody the basic aspirations and values of a society, for example, then it is easy to cite examples where those basic commitments are more readily found in statute. Our national commitments to environmental stewardship, intergenerational responsibility, and a free market economy are easier to discern in the Clean Water Act,<sup>26</sup> the Social Security and Medicare regimes,<sup>27</sup> and the Sherman Act<sup>28</sup> than in the Constitution itself. In any event, my point is not to develop an exhaustive definition of constitutional functions, but simply to identify enough key functions to test the hypothesis that these functions are often performed by ordinary law.

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22. See, e.g., Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM, *supra* note 7, at 64, 65 (defining as “constitutional essentials” the “plan of political government—offices, branches, levels, procedures, power distributions, and competency ranges”); cf. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999) (“The Constitution is a governing document. It defines and constrains the way government operates and politics is conducted in the United States.”).
  23. See Michelman, *supra* note 22, at 65 (also listing as a “constitutional essential[]” the “list of personal rights and liberties, if any, that the constituted government is ‘bound to respect’”).
  24. See, e.g., Michael J. Perry, *What Is “the Constitution”?* (and Other Fundamental Questions), in CONSTITUTIONALISM, *supra* note 7, at 99, 103; Raz, *supra* note 7, at 153. Some might identify a separate “trumping” function to signify the invalidation of legal rules inconsistent with the constitution itself, but I take this to be simply a manifestation of the constitution’s entrenchment against change through subconstitutional means.
  25. Adam Tomkins’s helpful discussion, for instance, divides the constitutive function into “creation of the institutions of the State,” “regulat[ing] the relations between those institutions and one another,” and “regulat[ing] the relations between those institutions and the people (citizens) they govern.” TOMKINS, *supra* note 2, at 3. Because Professor Tomkins focuses on the British system, he understandably omits entrenchment from his list of key constitutional tasks.
  26. 33 U.S.C. §§ 1251-1387 (2000).
  27. 42 U.S.C. §§ 301-1397jj (2000).
  28. 15 U.S.C. §§ 1-7 (2000).

1. *Constituting the Government*

The first function of a constitution is to “constitute” the government. This includes creating governmental institutions, specifying their composition and methods for selecting officers, conferring powers upon them, establishing operational procedures, and drawing the boundaries of their jurisdictions. Article I of the U.S. Constitution, to take the most obvious example, vests “[a]ll legislative Powers herein granted . . . in a Congress,”<sup>29</sup> divides that Congress into two houses, specifies the composition of each house and the apportionment of representatives among the states, confers enumerated powers on the institution thus created, and prescribes procedures by which legislation may be enacted. Articles II and III perform similar functions for the executive and judicial branches, albeit in considerably less detail.

All this is elementary. My claim, however, is that massively complex legal systems like our own require a great deal of constituting, and relatively little of it is done by the canonical Constitution. Of the 2,677,999 civilian persons employed by the national government in 2006,<sup>30</sup> only 546 were Presidents, Vice Presidents, Supreme Court Justices, or members of Congress. The rest served in positions created not by the Constitution, but by federal statutes or regulations.<sup>31</sup> Most of these officers are selected and supervised according to legislation creating the modern civil service.<sup>32</sup> Many great institutions of national government—the vast administrative bureaucracies of the Environmental Protection Agency (EPA), the FCC, or the Social Security Administration, for example—are nowhere to be found in the canonical Constitution. These institutions produce a solid majority of federal law.<sup>33</sup> But these powerful agencies are created by their organic statutes, organized according to presidential directives, and regulated by the Administrative Procedure Act (APA) and a host of judge-made “common law” requirements.<sup>34</sup>

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29. U.S. CONST. art. I, § 1.

30. U.S. OFFICE OF PERS. MGMT., EMPLOYMENT AND TRENDS: JANUARY 2006 tbl.1 (2006), <http://www.opm.gov/feddata/html/2006/january/table1.asp>.

31. This is also true of eight of the nine Justices of the Supreme Court, since the Constitution merely says there must be such a Court and does not specify the number of Justices.

32. See Pendleton Act, ch. 27, 22 Stat. 403 (1883) (creating the federal civil service); Farber, *supra* note 10, at 446.

33. See *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

34. See, e.g., Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)

Consider, for example, the Federal Reserve, which sets U.S. monetary policy and consequently affects the lives of every American. As a former governor notes, “[t]he Federal Reserve . . . is often called the most powerful institution in America.”<sup>35</sup> One might expect to find such a powerful institution described in the Constitution. The proposed European Constitution, for example, devotes considerable space to the powers and structure of the European Central Bank.<sup>36</sup> But our Federal Reserve was created by statute in 1913, and many of the rules by which it operates are found in regulations promulgated by the Fed’s Board of Governors.<sup>37</sup> It is hard to imagine what American economic policy would look like without this critical institution, yet it is “constituted” by legal materials existing entirely outside the canonical Constitution.

Or consider what the canonical Constitution does *not* tell us about Congress, the institution the document discusses most extensively. The two most important questions concerning who can serve in Congress concern the content of the electorate: Who can vote in elections for Congress, and by what system? And how are the members of a state’s delegation to the House of Representatives to be apportioned geographically? Article I punts the first of these questions to the states,<sup>38</sup> although their freedom is now circumscribed by the Fourteenth and Fifteenth Amendments and, more pervasively, the Voting Rights Act.<sup>39</sup> As a result, voter qualifications are controlled primarily by a combination of state and federal statutory rules; most significant, the “first past the post” system for choosing House members is entirely a creature of statute and convention.<sup>40</sup> Apportionment is, of course, controlled by a

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(requiring, as a matter of administrative common law, that an agency action can only be upheld by a reviewing court on the same grounds that the record discloses the agency’s action was originally based).

35. LAURENCE H. MEYER, *A TERM AT THE FED: AN INSIDER’S VIEW*, at xi (2004); *see also* MARTIN MAYER, *THE FED: THE INSIDE STORY OF HOW THE WORLD’S MOST POWERFUL FINANCIAL INSTITUTION DRIVES THE MARKETS*, at xi (2001) (observing that “[t]he Federal Reserve System is the most forceful participant in American economic governance”).
36. *See* Treaty Establishing a Constitution for Europe art. I-30 & protocol 4, Oct. 29, 2004, 2004 O.J. (C 310) 1, 25, 225-246.
37. *See* Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.); 12 C.F.R. §§ 201-281.1 (2007).
38. *See* U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).
39. Voting Rights Act, 42 U.S.C. §§ 1971, 1973 to 1973aa-6 (2000) (amended 2006).
40. *See* Farber, *supra* note 10, at 447 (observing that this “basic feature[] of the American political system . . . exists only by congressional sufferance”).

constitutional rule—one man, one vote<sup>41</sup>—but it is a rule with fairly tenuous grounding in the canonical text and which might therefore be better described as a product of judge-driven constitutional evolution.<sup>42</sup> And the most important issue of current controversy concerning apportionment—the legality and legitimacy of political gerrymandering—remains largely ungoverned by constitutional constraints.<sup>43</sup> Many observers have noted that much of the character of our politics derives from the ability of state legislatures to create an overwhelming proportion of “safe” congressional seats,<sup>44</sup> yet this vital constitutive dynamic remains largely outside the constraints imposed by the canonical Constitution.

Once Congress is elected, its operations are likewise framed largely by extracanonical materials. True, the “finely wrought” process of bicameral consideration and presentment to the President is set forth in Article I, Section 7, and the Court has been quite unwilling to countenance legislative modifications to that procedure.<sup>45</sup> But there is a great deal more to the legislative process than bicameralism and presentment, and none of it is in the Constitution. Congress is pervasively structured along the lines of our two dominant political parties, which were largely unanticipated by the Framers and accordingly left entirely out of the canonical document.<sup>46</sup> The progress of legislation, moreover, is dominated by the committee system, which is a creature not even of statute but of internal House and Senate rules. Even the basic principle that a bare majority in each house is sufficient to approve

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41. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

42. See *infra* notes 248-250 and accompanying text (discussing judicial extrapolations from canonical text).

43. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006) (rejecting a gerrymandering challenge for failure to agree on a workable doctrinal framework); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (same).

44. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 627-28 (2002) (arguing that bipartisan gerrymandering tends to polarize congressional delegations).

45. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the presidential line-item veto); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto).

46. See, e.g., Farber, *supra* note 10, at 446 (“[T]he most important single feature of the modern political system [parties] gains legal recognition only through legislation.”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269-70 (2000) (“The Founders had not anticipated, or even imagined, the formation of political parties in the modern sense of the term, though they undoubtedly would have been appalled by the prospect had they thought of it. . . . No one envisaged extensive organizations with a general ideology that would act to coordinate political campaigns and organize the government to facilitate the implementation of a popular program; such a thing had never before existed.”).

legislation, not to mention some of the exceptions to that rule in the Senate, does not appear in the Constitution. It exists simply as a matter of legislative convention.<sup>47</sup> To see the point most starkly, imagine if Congress were forced to operate with *only* the rules actually set forth in the canonical text of the Constitution. It is hard to imagine how it could possibly proceed.

In noting these facts, I do not mean to argue that these extracanonical institutions and constitutive rules are “unconstitutional.” The Constitution clearly contemplates that additional officers will serve alongside those specifically identified in the text: it empowers Congress to create Article III courts other than the Supreme Court, provides rules for the appointment of principal and inferior officers, and authorizes the President to require the written opinions of the “heads of departments.”<sup>48</sup> And it is impossible to imagine that the Framers could have intended to deny Congress the power to organize itself or select an appropriate voting rule for the passage of legislation. The Constitution is not a suicide pact,<sup>49</sup> and it is also not a nonstarter. My point is simply that the canonical Constitution leaves a very great deal of this essential work to be done by other legal materials.

We might identify a narrower sense in which a constitution “constitutes” a government—that is, it provides a “rule of recognition” by which we can tell what norms count as “law” within our legal system. The rule of recognition, as developed by H.L.A. Hart, “provides validity criteria that, directly or indirectly, determine the legal status of all other rules.”<sup>50</sup> It is tempting to suppose that providing such a rule is, in fact, a key function of constitutions. Hence, the validity of a legal rule in the U.S. legal system depends on its having been promulgated pursuant to the lawmaking procedures laid out in Article I and on its consistency with the individual rights articulated elsewhere in the document. If the Constitution does not actually establish all the institutions of

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47. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486 (1995) (“The Constitution’s failure to specify a proportion necessary to pass a bill, combined with the delegation of authority to each house under the Rules of Proceedings Clause, suggests that the Constitution permits each house to decide how many members are necessary to pass a bill.”).

48. See U.S. CONST. art. I, § 8, cl. 9 (power to create courts other than the Supreme Court); *id.* art. II, § 2, cl. 2 (appointment of “inferior officers”); *id.* cl. 1 (opinions of heads of departments).

49. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

50. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 731 (2006). See generally H.L.A. HART, *THE CONCEPT OF LAW* 90–94 (1961).

our government, perhaps it at least sets forth the criteria by which the validity of those institutions (and their works) can be judged.

This recognition function has the virtue of being sufficiently fundamental to fit our intuition about the special dignity of constitutions. But it does not withstand scrutiny. Most scholars seem to agree that a rule of recognition is a social fact, in the sense that it identifies the criteria that will cause the relevant class of officials to accept a norm as a rule of law.<sup>51</sup> Obviously one cannot refer to the criteria of Article I or the Supremacy Clause's simple statement that "[t]his Constitution . . . shall be the supreme Law of the Land"<sup>52</sup> to determine that the Constitution is, in fact, supreme law; after all, any spurious document (even the one you are reading) might likewise affirm that *it* is the supreme law. If we have to resort to some prior criterion to determine that the document drafted in Philadelphia in 1787, and not some competitor document, is the supreme law, then *that* criterion would provide the ultimate rule of recognition – not the Constitution itself.<sup>53</sup>

One might concede this much and say that while a constitution may require a priori validation at the outset, once it is in place it provides the validity criteria for all subsequent legal norms within the legal system.<sup>54</sup> This is certainly true to some extent: we are well accustomed to saying that an otherwise valid legal rule will be invalid if it transgresses some principle in the Constitution. But compliance with the Constitution's criteria is sometimes not a necessary, and often not a sufficient, condition for legal validity in our system.<sup>55</sup> As Bruce Ackerman has demonstrated, it is very difficult to square the adoption of the Reconstruction Amendments with the formal requirements for

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51. See, e.g., Raz, *supra* note 7, at 161; Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 150 (Sanford Levinson ed., 1995).

52. U.S. CONST. art. VI, cl. 2.

53. For a similar rejection of the Constitution as a rule of recognition, see Raz, *supra* note 7, at 160-61. See also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1291 (1995) (observing that "[u]ltimately, one *must* step outside the Constitution—as with *any* legal text—to identify criteria for legitimating that body of law").

54. See, e.g., Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 78 (1996) ("A constitution is defined as a constitution in large part by the fact that it provides a nation with rules of recognition for all other laws."); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 781-82 (1995) (arguing that Article I's presentment and bicameralism requirements provide a "rule of recognition" for valid federal legislation).

55. See generally Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (discussing the complicated relationship between the Constitution and the rule of recognition).

ratification in Article V.<sup>56</sup> The authority of those amendments thus must stem from some combination of traditional acceptance and current agreement with the values they embody. Hence, our preconstitutional ultimate rule of recognition, predicated on social acceptance, seems to operate even after the initial act of constitutional founding. Satisfaction of the document's own terms, in other words, is not always a necessary condition for legal validity in our system.<sup>57</sup>

More frequently, satisfaction of the constitutional criteria is not a sufficient condition for legal validity. All state laws, for instance, must also satisfy whatever validity criteria are set out in the relevant *state* constitution.<sup>58</sup> Even if we confine the inquiry to federal legal rules, the majority of those rules are administrative in character rather than statutory. As such, they must satisfy various validity criteria set out in the Administrative Procedure Act and the organic statute of the relevant administrative agency. More fundamentally still, even federal statutes must satisfy validity criteria other than those set out in the Constitution. That document, after all, never sets out the voting rules that will govern statutory enactment. The basic criterion that approval requires a bare majority of each house is thus fixed by custom, not by the Constitution itself.

The inescapable conclusion is that, while satisfaction of constitutional criteria is an important component of a legal rule's validity, those criteria hardly capture the entire range of conditions that rules must satisfy in order to be valid within our legal system. The ultimate rule of recognition in our system—in *any* system, most likely—is something so basic that it transcends even the constitutional text. And to the extent that the Constitution *does* serve as a rule of legal validity, this constitutive function, like the others I have already discussed, is shared between the constitutional text and a variety of other rules and provisions in the system.

## 2. *Conferring Rights on Individuals*

Conferring rights fits somewhat uncomfortably with the other constitutional functions that I have discussed so far. The others involve “constitutive” rules—rules about rulemaking, if you will—that are relatively

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56. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-119 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

57. Likewise, as Louis Fisher has shown, legislative veto arrangements continue to be respected long after they were held inconsistent with Article I in *INS v. Chadha*, 462 U.S. 919 (1983). See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, *LAW & CONTEMP. PROBS.*, Autumn 1993, at 273, 288.

58. See Greenawalt, *supra* note 55, at 645-47.

distinct from “substantive” rules like prohibiting murder or setting the permissible amount of a chemical in the drinking water. Rights, by contrast, often seem more substantive in their orientation—the right to bear arms or to obtain an abortion, for instance. This difference from the constitutive functions of constitutions may be more apparent than real, however. Rights perform a key constitutive function by setting the bounds of government power and constraining the exercise of government discretion.<sup>59</sup> The great bulk of our rights guarantees are procedural in nature,<sup>60</sup> and provisions like the Speech, Press, and Establishment Clauses can all be thought of as “constituting” a transparent and open political process as well as a public space for political, social, and religious debate free of governmental distortion. Even the right to bear arms has a constitutive dimension, to the extent that it was originally intended to create a military counterweight to potentially oppressive governments.<sup>61</sup>

In any event, individual human rights loom so large in our modern constitutional consciousness that it would be impossible to leave them off of any reasonable list of constitutional functions. But one also does not have to look far to see that many of our most important human rights are not part of the canonical Constitution. To begin with, some of our canonical rights are dependent on rights created elsewhere. One of the most important rights in the early Republic was the right against state impairment of contracts.<sup>62</sup> That right, however, only kicks in once state law has recognized contractual rights in the first place.<sup>63</sup> The same thing is true of property rights: the Federal

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59. As Richard Kay has explained, “[c]onstitutions 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.” Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM, *supra* note 7, at 16, 22.

60. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 92 (1980); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 *TEX. INT’L L.J.* 527, 531 (2003).

61. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 651 (1989) (demonstrating that “one aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen”).

62. See, e.g., Richard A. Epstein, *Obligation of Contract*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 171, 172 (Edwin Meese III et al. eds., 2005) (noting that the Contract Clause was “the focal point of litigation for those who sought to protect economic liberties against state intervention” in the antebellum period).

63. See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (noting that the existence of a contract, as predicate to a Contract Clause claim, is a question of state law); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827).



Constitution says they cannot be “taken” without just compensation, but they are generally created in the first instance by state law.<sup>64</sup>

The more basic point, however, is that many rights that are fundamental for individuals in modern America are entirely creatures of statute. Notwithstanding the Court’s interpretation of the First Amendment in *Texas v. Johnson*,<sup>65</sup> I am unlikely—to put it mildly—to exercise my right to burn an American flag. I do worry that I or someone close to me might one day be discriminated against on the basis of race, gender, age, or disability, and in that event I would look first to the Civil Rights Act of 1964,<sup>66</sup> the Age Discrimination in Employment Act,<sup>67</sup> or the Americans with Disabilities Act<sup>68</sup> for protection and relief rather than the Equal Protection Clause, even if the perpetrator is a state actor.<sup>69</sup> Even more obviously, American constitutional culture has generally been reluctant to recognize positive rights to housing, food, health care, or economic security, but we have created elaborate statutory entitlements to such benefits under the Social Security, Medicare, Medicaid, Aid to Families with Dependent Children, and unemployment assistance regimes.<sup>70</sup> One suspects that millions of our citizens value these entitlements

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64. See, e.g., *Philips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’” (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

65. 491 U.S. 397 (1989).

66. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

67. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000).

68. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101-12,213 (2000).

69. I confine my discussion here to “vertical” rights of individuals against governments, not “horizontal” rights of one person against another. It would be interesting to explore the constitutive functions of private law, but that excursion must await another day.

70. For a variety of reasons, I want to resist in this discussion a sharp distinction between negative and positive rights or entitlements. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122-34 (1969). Positive entitlements constrain government discretion both in individual cases (by imposing duties on government actors) and on a structural level (by creating massive resource commitments that limit government freedom of action). Some canonical rights, moreover, are difficult to classify as negative or positive. Equal protection, for example, often confers a positive right to government benefits where those benefits are accorded to others, and remedies in this area often encounter all the difficulties ascribed to enforcement of positive rights. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (wrestling with the extent to which the Equal Protection Clause may require positive improvements in schools as a remedy for racial segregation). Many legal systems treat positive entitlements as equally central to their conception of human rights as negative freedoms. See, e.g., S. AFR. CONST. 1996 ch. 2, § 24 (right to healthy environment); *id.* § 26 (right to housing); *id.* § 27

considerably more highly than many or most of their canonical rights. The point, in any event, is not to establish that statutory rights are *more* important than canonical ones—just that many important individual rights derive from extracanonical sources.<sup>71</sup>

Finally, and more controversially, there are rights conferred by international law. Agreements like the North American Free Trade Agreement (NAFTA) and the Vienna Convention on Consular Relations confer on foreigners in our midst important rights against American governments.<sup>72</sup> With respect to our own citizens, the traditional assumption has been that international human rights are redundant with domestic constitutional protections, and the Senate has often attached reservations to human rights treaties designed to ensure that international rights sweep no more broadly than domestic constitutional rights within the domestic legal system. One wonders how long these assumptions will hold, however, as human rights discourse becomes increasingly global in character. International law and foreign practice already shape interpretation of the canonical Constitution in some areas,<sup>73</sup> and their strictures are sometimes incorporated into federal statutes.<sup>74</sup> Treaties and customary international law seem likely to be an

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(right to health care, food, and water); *id.* § 29 (right to education). Although I cannot pursue the point here, I expect it may make more sense to distinguish between negative and positive rights when choosing which rights to *entrench* than when describing the *constitutive* functions of legal norms.

71. See, e.g., CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 21-29 (1990) (describing President Franklin Roosevelt's "second Bill of Rights" and the "rights revolution" of the 1960s and 1970s as conferring a wide range of entitlements on individuals, predominantly through legislation and regulatory activity).
72. North American Free Trade Agreement ch. 11, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 (conferring right on investors to be free from various forms of discrimination and expropriation); Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (conferring a right on foreign nationals arrested within the territory of a signatory to consult with their home consulate). These treaties also serve constitutive functions to the extent that they integrate the United States into a system of supranational adjudication. See generally Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1163-70 (2005) (discussing the interaction of supranational and domestic courts under NAFTA and the Vienna Convention).
73. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (looking to foreign law to construe the meaning of "cruel and unusual punishment" under the Eighth Amendment).
74. See, e.g., Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14 (current version codified at 18 U.S.C. § 1651 (2000)) (punishing "the crime of piracy, as defined by the law of nations"); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that the Uniform Code of Military Justice incorporates the requirements of Common Article 3 of the Geneva Convention on the Treatment of Prisoners of War).

increasingly important source of individual rights against government action in the future.

If conferring rights on individuals against government action is a basic function of constitutions, then all of these sources of rights are “constitutional” in nature. One need not disparage canonical rights to say that they form a mere subset of those rights that individuals value and depend upon in our legal system. The obvious difference, of course, is that canonical rights are entrenched against legal change in a way that statutory rights are not. I quibble with that distinction, however, in the next section.

### 3. *Entrenching Structures and Rights Against Change*

A third function of many—but not all—constitutions is to entrench certain legal arrangements against change. Entrenched norms “trump” subsequent conflicting enactments and actions, unless those subsequent measures themselves satisfy certain demanding criteria. Entrenchment is central to our American understanding of “constitutional” law; as Adam Tomkins has observed, the lack of entrenchment in Britain means that “there is no special significance attached to the adjective ‘constitutional,’” and “constitutional law is not sharply demarcated from other areas of law.”<sup>75</sup> In America, by contrast, the difficulty of changing the canonical Constitution sets the legal arrangements created by that document sharply apart from all other arrangements, which may be changed by “ordinary” means. By conferring “higher law” status on certain norms, entrenchment facilitates the distinctive American practice of judicial review, by which courts invalidate government acts and laws contrary to the entrenched norm.<sup>76</sup> Entrenchment may also contribute to the almost mystical pull that the Constitution exerts on most Americans: because the Constitution may not be changed by ordinary political means, it seems to exist as a timeless inheritance from our ancestors, set above the fray of current controversy. Indeed, if I am right that the constitutive and rights-creating functions of the Constitution are shared pervasively by all manner of other legal materials, then entrenchment may be *all* that sets the canonical Constitution apart from the rest of our legal system.

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

76. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803). This is not to say that one could not have entrenchment *without* judicial review, see, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 18-25, only that one cannot have judicial review without some form of entrenchment.

The relationship between entrenchment and canonicity is considerably more complex than this, and I will have a good deal more to say about it later.<sup>77</sup> For now, I simply want to suggest that the relative entrenchment of an institution or legal principle is not solely a function of its inclusion in or exclusion from the canonical Constitution. Consider, for example, the relative likelihood that the following three norms will be fundamentally altered or abolished over the next ten years:

- (a) the right to burn the American flag under the First Amendment;
- (b) the right to an abortion under the Due Process Clause; or
- (c) the right to government support in old age under the Social Security Act.

Does anyone disagree that this is the correct ranking, in descending order, of the likelihood of fundamental change? This is true even though probable mechanisms would be, respectively, a full-dress Article V amendment on flag burning, a change in the composition of the Supreme Court on abortion, and a mere statutory repeal of Social Security. Social Security is an unusual example, but it suggests that entrenchment is a function of more variables than simply the formal lawmaking method required to effect a change. Even constitutional change through the Article V gauntlet may, in some circumstances, be politically easier than eliminating or revising a longstanding statutory scheme backed by powerful constituencies.

As another example, consider the recent controversy over Senate confirmation of judicial nominees. Although judicial nominees are ordinarily confirmed by majority vote, Senate rules provide that opponents of a nominee may block an up-or-down vote by filibuster, and that a resolution to cut off further debate and force a vote must have sixty or more votes to prevail.<sup>78</sup> When Senate Democrats, lacking a majority in the chamber, began filibustering a significant portion of President George W. Bush's judicial nominees, Republicans threatened to change the Senate rules, which can be done by a mere majority vote, so as to forbid filibusters of judicial nominees. This proposal was promptly dubbed the "nuclear option" because it was perceived to be so disruptive of the Senate's ordinary course of operations, and a significant number of Republicans who disapproved of the filibusters were

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77. See *infra* Part II.

78. See S. COMM. ON RULES AND ADMIN., *STANDING RULES OF THE SENATE*, S. DOC. NO. 107-1, at 20-22 (2002).

nonetheless unwilling to vote to change the Senate's rules.<sup>79</sup> This was true notwithstanding that such rules are not even statutory, much less constitutional, provisions. The convention permitting filibusters had become sufficiently entrenched that politicians of both parties shied away from changing it in a way that they would hardly shrink from amending ordinary legislation.<sup>80</sup>

Incorporating a principle into the canonical Constitution is thus not the only way to entrench it against future changes. That hardly means that canonization is not an effective means, although formal entrenchment did not save a number of once-important constitutional principles from effective desuetude.<sup>81</sup> The important point for present purposes is that the canonical Constitution does not have a practical monopoly of *any* of the functions traditionally associated with constitutions.

### B. Three Cases

The extracanonical constitution was on prominent display in the Supreme Court's 2005 Term. This Section considers three of that Term's cases: *Gonzales v. Oregon*,<sup>82</sup> which traced the boundary between national and state power concerning the controversial practice of physician-assisted suicide; *Rapanos v.*

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79. See, e.g., Richard Morin & Dan Balz, *Filibuster Rule Change Opposed*, WASH. POST, Apr. 26, 2005, at A1.

80. One might usefully compare the widespread aversion to changing the Senate's filibuster convention with the widespread yawn that greeted claims that Texas presidential electors in the 2000 election violated the clear command of the Twelfth Amendment by voting for a presidential and a vice-presidential candidate who were both inhabitants of their own state. See U.S. CONST. amend. XII, § 1 ("The Electors shall . . . vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves . . ."). The question whether Vice President Cheney was, in fact, a Texas inhabitant at the time was complicated; what was crystal clear, however, was that virtually no one cared about the answer. See generally Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001) (belaboring the issue and speculating about why no one else cared). The fact that the Twelfth Amendment's "Habitation Clause" is plainly part of the canonical Constitution cut no ice with the vast majority who (apparently) felt it no longer served any important purpose.

81. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (discussing the demise of several fundamental structural characteristics of the canonical Constitution—such as the doctrines of enumerated powers and nondelegation—in the absence of any relevant textual amendment).

82. 546 U.S. 243 (2006). In the interest of full disclosure, I note that I signed and participated in drafting an amicus brief in support of Oregon. See Brief for Professors of Law Briffault et al. as Amici Curiae Supporting Respondents, *Gonzales*, 546 U.S. 243 (No. 04-623), 2005 WL 1707466. Unusually, Oregon won anyway.

*United States*,<sup>83</sup> in which a property owner whose land had been designated as protected wetlands relied on rights created by the Clean Water Act<sup>84</sup> rather than the Takings Clause; and *Hamdan v. Rumsfeld*,<sup>85</sup> probably the most important separation-of-powers case in recent memory, and one that highlights the extent to which both executive authority and individual liberty in the war on terror have come to be defined by extracanonical materials.

1. *The Statutory Safeguards of Federalism: Gonzales v. Oregon*

In *Washington v. Glucksberg*,<sup>86</sup> the Supreme Court declined to recognize a fundamental right under the Due Process Clause to physician-assisted suicide. The majority observed that “Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”<sup>87</sup> As part of that debate, the State of Oregon legalized physician-assisted suicide in 1994 under the Oregon Death with Dignity Act (ODWDA).<sup>88</sup> The lethal drugs dispensed by physicians under the ODWDA, however, are also subject to federal regulation under the Controlled Substances Act (CSA).<sup>89</sup> In 1998 and 1999, opponents of physician-assisted suicide unsuccessfully sought to amend the CSA to explicitly foreclose state authorization of the practice.<sup>90</sup> In 2001, however, Attorney General John Ashcroft issued an interpretive rule construing the CSA to foreclose use of regulated drugs for physician-assisted suicide.<sup>91</sup> *Gonzales v. Oregon* evaluated the validity of this rule as an interpretation of the underlying statute.

The circumstances of *Gonzales*—a challenge by terminally ill patients and their doctors to a federal restriction on physician-assisted suicide<sup>92</sup>—focused attention initially on two boundaries. The first was the line between individual autonomy and state control; the second divided national and state legislative

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83. 126 S. Ct. 2208 (2006).

84. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

85. 126 S. Ct. 2749 (2006).

86. 521 U.S. 702 (1997).

87. *Id.* at 735.

88. OR. REV. STAT. §§ 127.800-.995 (2003).

89. 21 U.S.C. §§ 801-904 (2000).

90. See H.R. 2260, 106th Cong. (1999); H.R. 4006, 105th Cong. (1998). See generally *Gonzales v. Oregon*, 546 U.S. 243, 252-53 (2006) (describing these legislative initiatives).

91. 66 Fed. Reg. 56,608 (Nov. 9, 2001).

92. The State of Oregon itself also joined in the challenge to the federal rule. *Gonzales*, 546 U.S. at 254.

authority. Both of these boundaries are “constitutional” ones in the sense that they concern the structure of public institutions and the rights of individuals against those institutions. But neither could be litigated as a constitutional claim in *Gonzales*. *Glucksberg’s* refusal to recognize a fundamental due process right foreclosed the rights claim, and the federalism claim looked no more promising in light of *Gonzales v. Raich*, which upheld Congress’s Commerce Clause authority to stamp out California’s experiment with medical marijuana.<sup>93</sup> The Oregon case was thus litigated in terms of a third boundary, between Congress’s reservation to itself of authority to set national drug policy in the CSA and its delegation of enforcement discretion to the Attorney General under the same statute. Rather than a holding about the Due Process or Commerce Clause, *Gonzales* produced an opinion about the scope and limits of *Chevron* deference to executive interpretations of congressional enactments.

*Gonzales* illustrates the extent to which “ordinary” laws constitute the institutions and legal rights that bear on individuals’ most fundamental concerns. When Congress enacted the CSA in 1970, it did not simply impose a substantive prohibition on drug use; rather, it “creat[ed] a comprehensive framework for regulating the production, distribution, and possession of . . . ‘controlled substances.’”<sup>94</sup> Because many controlled drugs have legitimate medical uses, the Act regulates medical practice: doctors must register with federal authorities, and their ability to prescribe controlled drugs may be suspended or revoked if they fail to comply with federal rules.<sup>95</sup> Although the CSA specifies some requirements in the text, it also delegates considerable rulemaking authority to the Attorney General and imposes procedural requirements on the exercise of that authority.<sup>96</sup> Indeed, the dispute in *Gonzales* focused not only on the meaning of the relevant statutory provisions but also on the proper interpretation of a rule promulgated by an earlier Attorney General, which requires that all prescriptions be issued “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>97</sup> Finally, the CSA divides state and federal authority by disavowing any intent to preempt the field of drug regulation.<sup>98</sup>

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93. 545 U.S. 1 (2005). For an assessment of *Raich*, see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1.

94. *Raich*, 545 U.S. at 24.

95. 21 U.S.C. §§ 822(a)(2), 824(a)(4) (2000).

96. *Id.* § 811.

97. 21 C.F.R. § 1306.04 (2007).

98. 21 U.S.C. § 903 (2000) (“No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the

Oregon maintained that the individual right to physician-assisted suicide, which derived from *state* law in light of *Glucksberg's* refusal to federalize the matter, fell within this area of state autonomy carved out by federal law.

The primary dispute in *Gonzales* concerned whether the Attorney General's interpretive rule, pronouncing that using controlled substances to assist suicide is not a legitimate medical practice, was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>99</sup> That issue depended, in turn, on whether Congress had "delegated authority to the agency generally to make rules carrying the force of law," and the rule in question "was promulgated in the exercise of that authority."<sup>100</sup> The Court ultimately concluded that the CSA did *not* delegate such authority concerning physician-assisted suicide.<sup>101</sup> In the absence of deference, the Court rejected the Attorney General's "assertion of an expansive federal authority to regulate medicine" without needing "to consider the application of clear statement requirements . . . or presumptions against pre-emption."<sup>102</sup> Nonetheless, the Court's reading of the statute was plainly influenced by a baseline assumption that primary responsibility for regulating the medical profession remains with the states.<sup>103</sup>

Especially after *Raich*, the primary line between state and national authority concerns not what Congress *could* regulate, if it wished, but rather what Congress *has* regulated under the statutes it has actually enacted.<sup>104</sup> There is

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authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.").

99. 467 U.S. 837 (1984). That rule provides that a court should defer to an agency's interpretation of a statute if the statute is ambiguous and the agency's interpretation is reasonable. *See id.* at 842-45. *Chevron* deference is itself a constitutive principle defining the separation of interpretive authority between the executive and judicial branches. That principle, of course, does not appear in the canonical Constitution.
100. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).
101. *Gonzales v. Oregon*, 546 U.S. 243, 257-68 (2006).
102. *Id.* at 273-74 (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *United States v. Bass*, 404 U.S. 336, 349 (1971)).
103. *Id.* at 270 ("The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.").
104. *See id.* at 302 n.2 (Thomas, J., dissenting) (stating that any Commerce Clause challenge to the Attorney General's rule "must fail" under *Raich*). This was the case long before *Raich*. *See generally* MARTHA DERTHICK, *KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM* 6 (2001) (concluding that the Rehnquist Court's decisions enforcing some constitutional limits on national authority "have not changed the day-to-day conduct of intergovernmental relations, having no effect, for example, on the ability of Congress to preempt state laws or to attach onerous and far-reaching conditions to grants-in-aid to the states"); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 64-65 (1998) ("The meaning of the Commerce Clause has been developed far more by numerous congressional enactments than by a handful of Supreme Court decisions . . .").



sufficient vigor in the “political safeguards of federalism”<sup>105</sup> that Congress rarely pushes to the limits of its potential regulatory authority, and it typically leaves considerable swaths of policy autonomy to the states. Exactly how much is reserved, of course, depends on the construction of the relevant statutes and regulations.<sup>106</sup> What I want to insist on is that the line drawn in *Gonzales* is no less “constitutive” of our governmental structure than the one drawn in *Raich*. These sorts of statutory boundaries have come to dominate the structure of American federalism as the canonical Commerce Clause boundary has been interpreted into irrelevance.

What about the individual rights question in *Gonzales*? By refusing to recognize a fundamental right to physician-assisted suicide under the Due Process Clause, *Glucksberg* left persons wishing to assert such a right in the care of the extracanonical constitution. In the absence of federal legislation on the subject, the people of Oregon derived their “right to die” from state law.<sup>107</sup> The problem with state law rights, of course, is that they can be trumped by any valid federal law. The durability of such state law rights against federal intrusions thus depends on what sort of federal lawmaking is required in order to legislate on the subject at issue. Opponents of physician-assisted suicide tried, after all, to enact legislation preempting Oregon’s Death with Dignity Act, but they failed. They succeeded, however, in persuading Attorney General Ashcroft to promulgate an agency interpretive rule designed to achieve the same result. The durability of the *Gonzales* plaintiffs’ state law right to die thus turned on the allocation of lawmaking authority between Congress and the agency. In the absence of meaningful canonical constraints on legislative delegation,<sup>108</sup> that too was a statutory question.

The basic function of a constitution is to draw boundaries among the institutions of the government—between nation and state, between Congress and executive agencies, and between the government and individuals. In *Gonzales v. Oregon*, all of those boundaries were drawn by statutes and regulations rather than by constitutional text. Nor was *Gonzales* an unusual

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105. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that the autonomy of the states is primarily protected by their representation in Congress, not by judicial enforcement of constitutional limits on national authority).

106. For an extended argument about the primacy of statutory construction in modern federalism disputes, see Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1 (2004).

107. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-127.995 (2003).

108. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (declining to reinvigorate judicial enforcement of the nondelegation doctrine).

case in this regard. As the next Subsection demonstrates, the same thing is true in the area of environmental protection.

2. *The Clean Water Act as a Constitution: Rapanos v. United States*

Federal authorities sued John Rapanos, the owner and would-be developer of three parcels of land near Midland, Michigan, for backfilling fifty-four acres of designated wetlands without a permit from the Army Corps of Engineers.<sup>109</sup> Mr. Rapanos's activity ran afoul of section 301 of the Clean Water Act (CWA), which provides that "the discharge of any pollutant by any person shall be unlawful."<sup>110</sup> The Act defines "pollutant" broadly to include ordinary solids like Rapanos's dirt,<sup>111</sup> and "the discharge of a pollutant" covers "any addition of any pollutant to navigable waters from any point source."<sup>112</sup> Permits for such discharges may be issued by the Environmental Protection Agency (EPA) or the Army Corps of Engineers, and issuing such permits constitutes a large proportion of the Corps' work.<sup>113</sup> Because Rapanos lacked such a permit, the litigation focused on whether the wetlands on his property fell within the regulatory jurisdiction conferred by the CWA.

In the eyes of Justice Scalia's plurality opinion, "the U.S. Army Corps of Engineers . . . exercises the discretion of an enlightened despot" in deciding whether to grant or deny a permit to develop wetlands.<sup>114</sup> But in contrast to a despotic regime, the bureaucratic institutions that administer the CWA have virtually all the features of a constitutional government.<sup>115</sup> The EPA, for example, contains lawmaking institutions, prosecutorial authorities, and administrative law courts for hearing cases arising under the environmental laws. Detailed procedural rules govern the exercise of all of these functions, and judicial review of the agency's actions is available in federal courts under the

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109. The Court consolidated *Rapanos v. United States*, 126 S. Ct. 2208 (2006), with another Michigan case. See *Carabell v. U.S. Army Corps of Eng'rs*, 546 U.S. 932 (2005) (mem.). The facts of *Rapanos*, however, will suffice for purposes of illustration here.

110. Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (2000).

111. 33 U.S.C. § 1362(6) (2000).

112. *Id.* § 1362(12).

113. See *id.* § 1342(a) (permitting authority of the EPA); *id.* § 1344(a) (permitting authority of the Corps).

114. *Rapanos*, 126 S. Ct. at 2214 (plurality opinion).

115. Cf. ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 4 (2004) ("[L]ike the Constitution itself, the CWA structures relationships between the United States, the states, and private entities.").

Administrative Procedure Act.<sup>116</sup> The Corps of Engineers has similar characteristics and functions, although unlike the EPA, its role in developing and protecting the nation's natural resources goes back to the dawn of the Republic.<sup>117</sup> The important point, of course, is that none of this institutional framework is in the canonical Constitution. The entire edifice is a product of statutes, regulations, and executive orders.<sup>118</sup>

*Rapanos* was the third in a trilogy of cases addressing the reach of the Corps' regulatory jurisdiction, which the CWA defines as covering "the waters of the United States."<sup>119</sup> Exercising delegated rulemaking authority under the Act, the Corps promulgates regulations further specifying the reach of its authority, and those regulations have adopted increasingly expansive readings of the statute over the years. In *United States v. Riverside Bayview Homes, Inc.*, the Court upheld the Corps' interpretation of "waters of the United States" to include wetlands that "actually abut[]" traditional navigable waters.<sup>120</sup> The next case, *Solid Waste Agency v. U.S. Army Corps of Engineers*,<sup>121</sup> considered the validity of the Corps' "Migratory Bird Rule," which asserted jurisdiction over any intrastate waters used as habitat by migratory birds.<sup>122</sup> The Court rejected this rule, holding that the CWA could not support extension of the Corps' jurisdiction to "nonnavigable, isolated, intrastate waters"<sup>123</sup> that did not "actually abut[]" on a navigable waterway.<sup>124</sup> *Rapanos* involved a seemingly intermediate case: wetlands that intermittently drain into navigable waters located some distance away.<sup>125</sup> Justice Scalia's plurality opinion held that the phrase "waters of the United States" in the CWA authorizes federal jurisdiction only over "relatively permanent, standing or flowing bodies of water," and that only wetlands with a "continuous surface connection" to such water are "adjacent" in the sense required by the statute.<sup>126</sup> Justice Kennedy's opinion concurring in the result, on the other hand, required only that the agency show

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116. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

117. See U.S. Army Corps of Engineers, Brief History, <http://www.hq.usace.army.mil/history/brief.htm#1beg> (last visited Aug. 30, 2007).

118. For an overview of the CWA's development, see CRAIG, *supra* note 115, at 10-27.

119. 33 U.S.C. § 1362(7) (2000).

120. 474 U.S. 121, 135 (1985).

121. 531 U.S. 159 (2001).

122. Migratory Bird Rule, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

123. 531 U.S. at 171.

124. *Id.* at 167.

125. See *Rapanos v. United States*, 126 S. Ct. 2208, 2218 (2006) (plurality opinion).

126. *Id.* at 2225-26.

a “significant nexus” to navigable waters in order to assert jurisdiction over a wetland.<sup>127</sup>

Had it arisen in the nineteenth century, *Rapanos* would have almost surely been a constitutional case under the Commerce and Takings Clauses. Like *Gonzales v. Oregon*, *Rapanos* implicated boundaries between federal and state regulatory authority and between individual rights and the public interest. Neither a Commerce Clause challenge to the Corps’ jurisdiction nor a regulatory takings challenge to the reduction in Rapanos’s property values would have had much chance under current law, however.<sup>128</sup> The relevant boundaries are now defined by the CWA itself. The federal-state boundary resides in the statutory definition of “waters of the United States,” as interpreted by the EPA and the Corps. The individual right to develop one’s property is likewise defined primarily by the statutory criteria for granting permits.<sup>129</sup>

As in *Gonzales*, the actual debate in *Rapanos* focused on the separation-of-powers question of the Corps of Engineers’ authority to interpret the boundaries drawn by Congress in the CWA. The general burden of legislative inertia and the politically sensitive nature of environmental policy made the statutory boundaries in the CWA relatively hard to amend, lending those boundaries a degree of functional entrenchment—*unless* the Corps was accorded broad deference to reinterpret those boundaries in the exercise of its

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127. *Id.* at 2236 (Kennedy, J., concurring in the judgment). As the fifth vote and the narrower ground supporting the result, Justice Kennedy’s opinion is almost certainly controlling. On the “significant nexus” requirement, see, for example, *FINDING NEMO* (Pixar Animation Studios 2003), which depicts captive fish in an aquarium, plotting to escape, who observe that “[a]ll drains lead to the ocean.”

128. *Solid Waste Agency* did invoke the need to interpret the Corps’ authority narrowly in order to avoid constitutional difficulties under the Commerce Clause. 531 U.S. at 172-74. After *Raich*, however, it is hard to believe that the Court would strike down a measure like the Migratory Bird Rule. That does not mean *Solid Waste Agency* was wrong in either its result or its reasoning. As I have argued elsewhere, the avoidance canon is a means for enforcing otherwise underenforced constitutional norms, even if the relevant doctrine would not void the measure in question if the constitutional question were reached and decided. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

129. See, e.g., 33 U.S.C. § 1344 (2000). It is thus unsurprising that commentary on *Rapanos* has described its holding in constitutional terms. See, e.g., M. Reed Hopper & Damien M. Schiff, *Rapanos v. United States*, ENGAGE, Oct. 2006, at 64, 67 (“[T]he fundamental principle . . . in *Rapanos* [is] that there are limits to federal power and the means employed to achieve national aims.”).

delegated authority.<sup>130</sup> I do not contend that a statute is as entrenched as a constitutional provision. But I do want to insist that the question whether a constitutive boundary can be altered by agency action, or only by statutory amendment, is the same *sort* of entrenchment question as whether a boundary change requires a formal constitutional amendment. The former question, moreover, is far more likely to be a live one under the current constitutional law of the regulatory state.

Justice Scalia's plurality opinion in *Rapanos* resisted deference to the Corps and interpreted the CWA's statutory boundaries as having a relatively fixed and autonomous meaning. Justice Kennedy's controlling concurrence offered a considerably more dynamic reading. For him, the Corps could regulate any wetland that possesses "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."<sup>131</sup> The "significant nexus" phrase, as Justice Scalia pointed out, appears not in the statute but rather in the Court's opinion in *Solid Waste Agency*.<sup>132</sup> It thus seems fair to point out that the disagreement between Justices Scalia and Kennedy over the proper interpretive sources and methods under the CWA replicates the debate they have had for years over the legitimacy of "common law" or "evolving" approaches to constitutional meaning.<sup>133</sup> For Justice Kennedy (and for the four dissenters in *Rapanos*), the Clean Water Act is not simply a constitution—it is a *living* one.

### 3. *The Extracanonical Constitution of War Powers: Hamdan v. Rumsfeld*

*Hamdan v. Rumsfeld*<sup>134</sup> may be the most important separation-of-powers decision in a generation. But it did not interpret the Constitution—at least not the canonical one. The Court characterized the case as "raising important

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130. See, e.g., *Rapanos*, 126 S. Ct. at 2215 (plurality opinion) (noting "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations").

131. *Id.* at 2236 (Kennedy, J., concurring in the judgment).

132. *Id.* at 2233-34 (plurality opinion).

133. Compare Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997) (insisting that federal courts lack authority to interpret the Constitution in a common law fashion), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (opinion by O'Connor, Kennedy, & Souter, JJ.) (extolling an evolving, common law approach to constitutional interpretation).

134. 126 S. Ct. 2749 (2006).

questions about the balance of powers in our constitutional structure,<sup>135</sup> yet the issues actually in play concerned interpretation of the Uniform Code of Military Justice,<sup>136</sup> the Authorization for Use of Military Force approved by Congress after the September 11, 2001, attacks,<sup>137</sup> the Detainee Treatment Act of 2005,<sup>138</sup> and the Geneva Convention on prisoners of war.<sup>139</sup> As Justice Kennedy's concurrence pointed out, "a case that may be of extraordinary importance is resolved by ordinary rules . . . pertaining to the authority of Congress and the interpretation of its enactments."<sup>140</sup> There is no mistaking, however, the constitutive functions served by these materials.

Since the early Republic, we have had a military justice system operating in parallel with the civilian courts established under Article III. The "constitution" of that system, in its modern incarnation, is the Uniform Code of Military Justice (UCMJ). As Justice Kennedy explained,

The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms, . . . it regulates the organization and procedures of those courts, . . . it defines offenses . . . and rights for the accused . . . and it provides mechanisms for appellate review. . . . [T]he statute further recognizes that special military commissions may be convened to try war crimes. . . . While these laws provide authority for certain forms of military courts, they also impose limitations . . . .<sup>141</sup>

The UCMJ is not, however, the only source of relevant constitutive rules. As Justice Kennedy went on to note, "the statute allows the President to implement and build on the UCMJ's framework by adopting procedural regulations."<sup>142</sup> Moreover, by explicitly incorporating the "law of war,"

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135. *Id.* at 2759; *see also id.* at 2800 (Kennedy, J., concurring in part) ("Trial by military commission raises separation-of-powers concerns of the highest order.").

136. 10 U.S.C. §§ 801-946 (2000).

137. Pub. L. No. 107-40, 115 Stat. 224 (2001).

138. Pub. L. No. 109-148, 119 Stat. 2739.

139. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

140. 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

141. *Id.* at 2800-01.

142. *Id.* at 2801.

Congress introduced a third set of constitutive principles derived from both international treaties and customary international law.<sup>143</sup>

Salim Ahmed Hamdan challenged his impending military trial by resorting to another justice system also dominated by statutes. He filed a petition for habeas corpus in federal district court—a procedural right guaranteed by the Suspension Clause of the Constitution,<sup>144</sup> but one that is actually created and defined by the federal habeas statute.<sup>145</sup> Because the jurisdiction of the civilian courts is also circumscribed by statute, the Supreme Court had to determine whether Congress had foreclosed jurisdiction over Hamdan’s petition in the Detainee Treatment Act (DTA), which created limited and exclusive procedures for judicial review of detention of individuals and of commission proceedings.<sup>146</sup> The majority ultimately concluded that the DTA did not apply retroactively to bar Hamdan’s suit, which was filed before the statute’s effective date. This was a difficult question of statutory construction, but the point I want to focus on is a more basic one. Like virtually every decision that the Supreme Court has ever rendered concerning a legislative restriction on federal court jurisdiction, *Hamdan* avoided identifying the *constitutional* boundary for permissible jurisdiction stripping and instead focused on the boundaries of judicial power set by Congress in the statute itself.<sup>147</sup> Just as the Commerce Clause has relatively little relevance to current disputes about the scope of national power, so too the Court has labored to keep Article III largely out of debates over jurisdiction stripping.

On the merits, Justice Stevens’s opinion offered two reasons why Hamdan could not legally be tried before a military commission. The first, which garnered only four votes, was that Congress had authorized military

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143. See 10 U.S.C. § 821 (2000) (indicating that military commissions are limited to “offenders or offenses that by statute or by the law of war may be tried by military commissions”); *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring in part) (noting that “the law of war . . . derives from ‘rules and precepts of the law of nations’; it is the body of international law governing armed conflict” (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))).

144. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

145. 28 U.S.C. §§ 2241-2255 (2000). Mr. Hamdan could file a habeas petition despite being held at Guantanamo Bay, Cuba, because the Supreme Court had recently determined, *as a matter of statutory construction*, that the writ extended to persons held abroad so long as someone in the custodian’s chain of command was within the territorial jurisdiction of a federal district court. See *Rasul v. Bush*, 542 U.S. 466 (2004).

146. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739.

147. See, e.g., Young, *supra* note 128, at 1556-68 (chronicling the Court’s use of the avoidance canon to avoid deciding what limits, if any, Article III imposes on Congress’s power to restrict the jurisdiction of the federal courts).

commissions only “in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”<sup>148</sup> Hamdan’s prosecution did not meet this standard because the crime of conspiracy—the only offense charged against Hamdan—was not recognized under the common law of war.<sup>149</sup> The second argument, which *did* get a majority, concerned the procedures by which Hamdan was to be tried. According to the Court, “[t]he UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself . . . and with the ‘rules and precepts of the law of nations’ . . . .”<sup>150</sup> The Court read article 36 of the UCMJ to require parity between military commission and courts-martial procedures in the absence of special justification, which the President had not provided.<sup>151</sup> The majority also objected to particular aspects of commission procedure on the ground that they conflicted with Common Article 3 of the Geneva Convention, which the UCMJ incorporates as part of “the law of war.”<sup>152</sup>

Both of Justice Stevens’s arguments were, at bottom, statutory. Both the common law of war and the Geneva Convention bind the executive because Congress has incorporated them by reference in the UCMJ. As Justice Breyer made clear, “[t]he Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’”<sup>153</sup>

Equally striking, given *Hamdan*’s central concern with matters of criminal procedure, is the absence of any constitutional due process argument.<sup>154</sup> Two years earlier, in *Hamdi*, the Court held that due process limits executive

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148. *Hamdan*, 126 S. Ct. at 2775 (plurality opinion). See generally Uniform Code of Military Justice art. 15, 10 U.S.C. § 821 (2000) (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”).

149. See 126 S. Ct. at 2775–86 (plurality opinion). Justice Kennedy—the fifth vote—did not reach this ground of decision. See *id.* at 2809 (Kennedy, J., concurring in part).

150. *Id.* at 2786 (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

151. *Id.* at 2788–93; see Uniform Code of Military Justice art. 36, 10 U.S.C. § 836(b) (2000) (“All rules and regulations made under this article shall be uniform insofar as practicable.”).

152. 126 S. Ct. at 2797–98 (plurality opinion). Justice Kennedy did not join Part VI–D–iv of the Court’s Geneva Convention discussion, concerning the right to be present at trial. See *id.* at 2809 (Kennedy, J., concurring in part and in the judgment).

153. 126 S. Ct. at 2799 (Breyer, J., concurring); see also *id.* at 2800 (Kennedy, J., concurring in part) (“[D]omestic statutes control this case. If Congress . . . deems it appropriate to change the controlling statutes . . . it has the power and prerogative to do so.”).

154. To the extent that such claims may have been urged on the Court, they do not show up in the opinions.



detention of suspected enemy combatants.<sup>155</sup> In *Hamdan*, however, both the obligation of procedural fairness and its benchmark standard—the procedures used in ordinary courts-martial—come from the UCMJ and its incorporation of Common Article 3 of the Geneva Convention.<sup>156</sup> Going forward, one can reasonably predict that statutory benchmarks (now embodied in the relatively robust procedural provisions of the Military Commissions Act<sup>157</sup>) will have considerably greater bite than the constitutional one under the Due Process Clause. *Hamdi*, after all, framed the requirements of due process in this context in exceptionally deferential terms.<sup>158</sup>

To the extent that anyone relied on the canonical Constitution in *Hamdan*, it was the President. Proponents of broad executive authority have viewed Article II as a virtually “complete” grant of executive authority.<sup>159</sup> For Justice Scalia, Article II’s statement that “[t]he executive power shall be vested in a President of the United States’ . . . does not mean *some of* the executive power, but *all of* the executive power.”<sup>160</sup> Hence, the grant of “executive power,” without more, confers upon the President the authority to detain, to establish military commissions, and to take all manner of other actions pursuant to the war on terror. Executive power advocates have also frequently argued that the exercise of such power cannot be regulated by Congress.<sup>161</sup> On this view,

155. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

156. See *Hamdan*, 126 S. Ct. at 2759. It seems unlikely that this difference arises from the fact that *Hamdan*, unlike *Hamdi*, was not a citizen. The Due Process Clause confers rights on “any person,” not citizens only, and the *Hamdi* plurality seemed to assume that the rights it considered were applicable to noncitizens. See *Hamdi*, 542 U.S. at 525 (noting that the habeas corpus vehicle for reviewing due process claims “remains available to *every individual* detained within the United States” (emphasis added)).

157. Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948q-s, 949a-o, 950a-j, 2006 U.S.S.C.A.N. (120 Stat.) 2600.

158. See *Hamdi*, 542 U.S. at 533 (noting that while suspected enemy combatants must be afforded basic elements of due process, “exigencies of the circumstances may demand that . . . proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict”).

159. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). The “virtually” in the text arises from the unitary theorists’ concession that some aspects of traditionally “executive” authority, such as the power to declare war, are explicitly delegated to Congress in Article I. See *id.* at 253.

160. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (quoting U.S. CONST. art. II, § 1).

161. See Memorandum from U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President 2 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (arguing that Congress’s attempt to regulate treatment of enemy combatants “would represent an unconstitutional infringement of the President’s authority to conduct war”).

Article II completely constitutes the executive power in a variety of contexts, including war powers.

The *Hamdan* majority, to the contrary, insisted that the sorts of war powers at issue in cases like *Hamdan*—powers outside the operational control of the military forces such as the power to detain, interrogate, and try prisoners for war crimes—are creatures of the extracanonical constitution. They are, in other words, governed by the web of statutory provisions authorizing and limiting executive action in the area of military force. The point is not that the extracanonical constitution *trumps* the canonical one, but rather that the latter is incomplete. While Article II vests the President with executive power, it remains for Congress to “constitute” that power by devising the institutional structures and procedures through which it may be exercised. As Justice Breyer’s concurrence pointed out, the Constitution leaves open the “ability to determine—through democratic means—how best to [deal with danger].”<sup>162</sup>

This central role for legislation reflects the emphasis on congressional action in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>163</sup> the dominant precedent on presidential powers and foreign affairs law. Justice Black’s majority opinion in *Youngstown* focused on the canonical Constitution, construing the Commander-in-Chief and “Take Care” Clauses, which President Truman invoked to justify his seizure of the steel mills.<sup>164</sup> The concurring analyses of Justices Jackson and Frankfurter, however, have been far more influential in subsequent cases. Both of these opinions viewed the extent of executive authority as a function of Congress’s own action. Justice Jackson explained:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . [W]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .<sup>165</sup>

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162. *Hamdan v. Rumsfeld*, 126 S. Ct. 2649, 2799 (2006) (Breyer, J., concurring).

163. 343 U.S. 579 (1952).

164. *Id.* at 587–88.

165. *Id.* at 635–37 (Jackson, J., concurring). A majority of the Court adopted Justice Jackson’s approach in *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981). The Court recognized,

Justice Kennedy's critical concurrence in *Hamdan* invoked Justice Jackson at length.<sup>166</sup> And the majority cited Jackson for the proposition, which Justice Stevens took as settled, that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers."<sup>167</sup>

*Youngstown*'s methodological divide between Justice Black and Justices Jackson and Frankfurter is often described as a contrast between formalism and functionalism.<sup>168</sup> That is true, but the divergence is not *just* that. It is also a contrast between exclusive reliance on the canonical Constitution and broader attention to other constitutive sources.<sup>169</sup> Because Justices Jackson and Frankfurter have proven more influential than Justice Black in this area, *Youngstown* now stands for the proposition that Congress has broad authority to structure the exercise of executive authority. Especially in foreign affairs law, the boundary between presidential and congressional authority will almost always be drawn through legislation. As Justice Kennedy pointed out, *Hamdan* rests on "the constitutional principle that congressional statutes can be controlling."<sup>170</sup>

### C. *Extracanonical Functions*

By focusing on three cases from the 2005 Term, I do not mean to suggest that the extracanonical constitution is a new development. The original

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however, that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Id.* at 669.

166. See 126 S. Ct. at 2800 (Kennedy, J., concurring in part) ("The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in [*Youngstown*].").

167. *Id.* at 2774 n.23 (majority opinion). Justice Stevens also noted that "[t]he Government does not argue otherwise." *Id.*

168. See, e.g., Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522-31 & nn.55 & 59 (1991).

169. One can imagine, for example, a Jacksonian emphasis on the existence or absence of statutory authorization that was nonetheless highly formal in the way it construed the statutes. One can likewise imagine an opinion following Black by ignoring extrakonstitutional norms, but that framed the constitutional issue in functionalist terms of "balance" among the branches. These two ways of looking at *Youngstown* could be reconciled, I suppose, by observing that the whole notion of an extracanonical constitution rests on adopting a *functional* test, rather than a formal one, for what counts as "the Constitution" in the first place.

170. 126 S. Ct. at 2804 (Kennedy, J., concurring in part).

Constitution, for example, explicitly delegated to Congress the option and responsibility for establishing the lower federal courts, allocating their jurisdiction, and articulating their procedures.<sup>171</sup> Likewise, the Bill of Rights looked to external sources to draw the line between civil cases that must be tried to a jury and those triable by the court<sup>172</sup> and—arguably—to identify rights “retained by the people.”<sup>173</sup> While extracanonical institutions like the administrative state play a much greater role today than they did in the early nineteenth century, it also seems likely that some forms of extracanonical *rights*—for example, rights grounded in natural law—may have enjoyed a greater prominence early on than they do today.<sup>174</sup> The Constitution has always been an incomplete description of our constitutive legal commitments, although the role and salience of the extracanonical constitution has changed over the course of our history.

This Section briefly introduces some of the different roles that extracanonical norms play in the constitutional order. While I hesitate to proclaim the list exhaustive, I focus here on five distinct functions: implementation, specification, supplementation, supersession, and entrenchment. The boundaries between these categories are fuzzy and contestable. Whether you think *Griswold v. Connecticut*'s recognition of a right to privacy<sup>175</sup> is an example of specification (describing how textual principles under the Due Process Clause bear on certain situations) or supplementation (reading in an evolving norm of privacy in response to the intrusions of

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171. See U.S. CONST. art. III, § 1 (“The 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.”); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28 (5th ed. 2003) [hereinafter HART & WECHSLER] (“The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system and, within limits established by the Constitution, of defining its jurisdiction.”).

172. See U.S. CONST. amend. VII (“In suits at common law, . . . the right of trial by jury shall be preserved . . .”); *Tull v. United States*, 481 U.S. 412, 417 (1987) (observing that the right to a jury trial under the Seventh Amendment turns on whether a particular claim is more analogous to “suits brought in the English *law* courts” or to “18th-century cases tried in courts of equity or admiralty”).

173. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

174. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 139 (1810) (suggesting that a Georgia statute could be struck down under either the Contract Clause or “by general principles which are common to our free institutions”); ELY, *supra* note 60, at 48–50 (observing that while natural law played a role in the Constitution’s early period, the idea now “is a discredited one”).

175. 381 U.S. 479, 484–85 (1965).

modern society) will depend on how you read the Due Process Clause, and reasonable people will disagree. The important point, however, is to show that extracanonical norms play all of these roles—not to determine with precision which role is being played in any given case.

*Implementation:* The canonical Constitution is not self-sufficient. It sets out the skeleton of a government, but it does not describe institutions with the completeness necessary for them to actually function. In some areas, the canonical document explicitly recognizes the need for implementation and delegates authority for that purpose: Articles I and III delegate authority to establish a federal judicial system,<sup>176</sup> and Article IV delegates authority to create a government in the territories.<sup>177</sup> Textual delegations of substantive lawmaking authority likewise have been understood to include authority to create institutions, such as the Bank of the United States<sup>178</sup> or the federal bankruptcy courts.<sup>179</sup> Similarly, the Reconstruction Amendments empower Congress to “enforce” substantive entitlements to equal protection, due process, and equal voting rights through “appropriate legislation.”<sup>180</sup> Congress has used this authority not only to create federal institutional arrangements, such as the federal remedial structure that grew up under the Ku Klux Klan Act of 1871,<sup>181</sup> but also to regulate and reshape institutional structures at the state and local level through legislation like the Voting Rights Act.<sup>182</sup>

Other constitutive rules operate at a more basic level. The Constitution calls for a bicameral legislative body, but each house of Congress has had to develop a more detailed set of rules for its processes of deliberation and voting.<sup>183</sup> John Marshall derived the power of judicial review from the nature of the judicial function in a legal system with a written constitution,<sup>184</sup> but both Congress and the federal courts have had to develop an extraordinarily complex system of constitutional remedies in order to implement that

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176. See U.S. CONST. art. I, § 8, cl. 9; *id.* art. III.

177. *Id.* art. IV, § 3, cl. 2 (“The Congress shall have power to . . . make all needful rules and regulations respecting the territory . . . belonging to the United States.”).

178. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

179. See U.S. CONST. art. I, § 8, cl. 4; 28 U.S.C. §§ 151-158 (2000).

180. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

181. 42 U.S.C. § 1985 (2000).

182. 42 U.S.C. §§ 1971, 1973 to 1973aa-6 (2000) (amended 2006).

183. See, e.g., H.R. DOC. NO. 109-157 (2007); S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15 (2000).

184. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803).

mandate.<sup>185</sup> Our system of constitutional law would be unrecognizable without these constitutive, but extracanonical, rules.

*Specification:* Extracanonical materials often support canonical norms by particularizing them in order to aid their application in specific situations.<sup>186</sup> Judge-made doctrinal “tests” are necessary to implement canonical commands like the Equal Protection Clause,<sup>187</sup> and statutory and regulatory materials will sometimes serve a similar purpose.<sup>188</sup> Section 2 of the War Powers Resolution, for example, specifies Congress’s interpretation of constitutional war powers, and the remaining sections set out a process for how that interpretation should apply in particular circumstances.<sup>189</sup> Sometimes, different branches of the government will disagree about the specific meaning of a given canonical provision. While its attempts to specify canonical meaning sometimes fail, Congress will often be able to make its interpretation stick—particularly if its power to act is not dependent on the presence of a violation of constitutional norms.<sup>190</sup>

*Supplementation:* “Supplementation” occurs at a further remove from the commands of the canonical Constitution. The Constitution is arguably silent,

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185. See, e.g., 42 U.S.C. § 1983 (2000); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

186. See Perry, *supra* note 24, at 113 (“The process of ‘specifying,’ in a particular context, a norm implicated but also indeterminate in the context is the process of deciding what the norm, in conjunction with all the other relevant considerations, should be construed to require in that context.”).

187. See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001) (discussing the role of constitutional doctrine). I have not taken a firm position on whether constitutional doctrine should be viewed as extracanonical in nature. If we view all such doctrine as extracanonical, then there is precious little left of the canonical Constitution; very few of its provisions, after all, are self-applying. On the other hand, much doctrine exists at a significant remove from the text—for example, the right to privacy and the anticommandeering doctrine—and might be better viewed as extracanonical. For one thing, judicial doctrine is not entrenched in the same way as the canonical text itself, because the Supreme Court, at least, can overrule its doctrinal precedents without going through the Article V process.

188. See, e.g., Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) (discussing the use of statutes to specify the meaning of constitutional commitments).

189. See 50 U.S.C. § 1541 (2000).

190. Compare, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as applied to state and local governments, on the ground that Congress’s extension of free exercise rights exceeded its power under Section 5 of the Fourteenth Amendment to “enforce” the religion clauses), with *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (acknowledging RFRA’s validity as applied to federal entities, in light of Congress’s plenary power to regulate the operations of the federal government).

for example, on the issue of administrative government; it nowhere explicitly authorizes the creation of vast administrative bureaucracies to supplement the three branches—legislative, executive, judicial—described in the canonical document.<sup>191</sup> But neither does it forbid the creation of additional governmental institutions, and throughout our history the “constitutional” branches have spawned additional institutions to fulfill a wide variety of purposes. Likewise, rights-creating statutes give rise to additional entitlements—for example, protection from discrimination on the basis of disability or minimal financial security in old age<sup>192</sup>—not readily derived from the canonical document. It should be obvious that this sort of extracanonical supplementation is a primary means by which a Constitution that is very old and hard to amend manages to serve the needs of a modern and highly complex society. Any number of observers have pointed to the common law approach that the federal courts have taken to constitutional interpretation as a crucial means of constitutional adaptation,<sup>193</sup> but it would be a mistake to overemphasize the judicial role at the expense of the extracanonical constitution “outside the courts.”

*Supersession:* Supplementation operates where the Constitution is silent, but “supersession” may involve *breaking* constitutional rules. More precisely, “supersession” involves the replacement of “obsolete” structures or principles in the canonical document with analogous but different extracanonical rules. For example, Congress’s ability to shift lawmaking responsibility to the executive branch was once limited by the nondelegation doctrine, which permitted shifting implementation functions to agencies but insisted that Congress make the basic policy decisions by articulating an “intelligible principle” to guide agency discretion.<sup>194</sup> But the courts found the concept of excessive delegation very difficult to define and police, and they eventually gave up trying.<sup>195</sup> Still, the result has not been unlimited discretion for agencies.

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191. At best, these bureaucracies are a “necessary and proper” means to implement Congress’s enumerated authority to regulate interstate commerce and other subjects substantively. U.S. CONST. art. 1, § 8, cl. 18. But even if we treat the Constitution as not entirely silent on the validity of the administrative state, it should be obvious that statutes, not the canonical Constitution, do the constitutive heavy lifting in establishing it.

192. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101-12,213 (2000); Social Security Act, 42 U.S.C. §§ 301-1397 (2000).

193. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905-06 (1996).

194. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408-09 (1928).

195. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1697 (1975) (“Given such subjective standards, and the controversial character of decisions on whether to invalidate

Instead, the delegation boundary, derived from the canonical Vesting Clause of Article I, has been replaced with a variety of extracanonical limits on agency discretion. Chief among these has been judicial review of agency action, generally conducted pursuant to the APA, for conformity to whatever guidelines Congress *has* set forth in the statute.<sup>196</sup> The boundaries of agency discretion thus now reside in the delegating statutes themselves, rather than in doctrine derived from the canonical Constitution. In this sense, APA review has superseded the old constitutional limit.

The idea that entrenched canonical principles can be abandoned and replaced with something else raises troubling questions of legitimacy, and I have sought to explore some of those questions elsewhere.<sup>197</sup> Not all instances of supersession require transgression of canonical boundaries, however. In *Osborn v. Bank of the United States*,<sup>198</sup> Chief Justice Marshall interpreted federal question jurisdiction under Article III extremely broadly, so as to cover any suit with a federal ingredient, even if that ingredient is not contested.<sup>199</sup> *Osborn's* breadth means that Article III itself rarely constrains the scope of federal question jurisdiction. Such jurisdiction requires both a constitutional *and* a statutory basis, however, and parallel “arising under” language in 28 U.S.C. § 1331 has been interpreted more narrowly. Most importantly, it excludes cases in which the federal question appears as a defense, rather than on the face of a well-pleaded complaint.<sup>200</sup> Section 1331 has thus become the primary limiting factor on federal question jurisdiction, replacing Article III’s canonical boundary; most jurisdictional debates therefore focus on the relevant statutes and ignore the constitutional standard.<sup>201</sup> The effect of this arrangement is to

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legislative delegations, such decisions will almost inevitably appear partisan, and might often be so.”).

196. See, e.g., SUNSTEIN, *supra* note 71, at 143 (“Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”).

197. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005); see also Lawson, *supra* note 81.

198. 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the federal element was simply the corporate status of the Bank (a creature of federal law) and its concomitant right to sue and be sued.

199. See *id.* at 823. *But cf.* A.J. Bellia, *The Origins of Article III ‘Arising Under’ Jurisdiction*, 57 DUKE L.J. (forthcoming 2007) (offering a somewhat narrower view of *Osborn*).

200. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). See generally HART & WECHSLER, *supra* note 171, at 832 (“[I]t is well-established that the constitutional language reaches more broadly than does the language of § 1331.”).

201. See, e.g., *Merrell Dow Pharm. Inc. v. Thompson ex rel. Thompson*, 478 U.S. 804 (1986).



give Congress flexibility to expand the federal question beyond the basic § 1331 boundary in particular areas,<sup>202</sup> without committing to the universal extension that would be mandated were the statutory and constitutional boundaries to be interpreted as coextensive.

*Entrenchment:* Canonical norms are defined by a particular kind of entrenchment: they (generally) may be modified only by an Article V amendment. But as *Gonzales*, *Rapanos*, and *Hamdan* all illustrate, legal norms can enjoy several different degrees of relative entrenchment. One of the key functions of the extracanonical constitution is to differentiate among those various degrees of entrenchment that fall short of formal constitutional status. I focus on the complex relationship between the extracanonical constitution's constitutive and entrenchment functions in the next Part.

## II. ENTRENCHMENT AND CONSTITUTIONAL CHANGE

A functional look at the U.S. "Constitution" reveals a far broader range of "constitutive" legal materials than the Philadelphia document and its amendments. To the extent that this observation is surprising, it is because our definition of "constitutional law" remains tightly bound to just one of the many functions that constitutions perform. The point is not simply that most Americans outside legal academia view "the Constitution" as a formally entrenched document. What is more striking is that scholars who accept that the Constitution may change outside the formal Article V process nonetheless insist on entrenchment as the sine qua non of constitutionalism. My central objective here, by contrast, is to decouple constitutional definition from the entrenchment function. The remainder of this Article explores how recognizing the constitutive functions of ordinary law might matter for debates about constitutional theory, doctrine, pedagogy, and scholarship.

### A. *The Rule of Recognition Problem*

There is nothing new about identifying constitutional norms outside the canonical text. Karl Llewellyn observed in 1934 that "most of the going framework of our Leviathan is hardly adumbrated in the Document. As a criterion of what our working Constitution is, the language fails in both directions. It affords neither a positive nor a negative test."<sup>203</sup> Llewellyn's foray

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202. See, e.g., 28 U.S.C. § 1442 (2000) (allowing federal officers to remove a case to federal court based on a federal defense).

203. Llewellyn, *supra* note 1, at 15.

into public law is largely forgotten today, but our constitutional debates remain dominated by the issue of extratextual principles. The longstanding argument over “living constitution” theories of unenumerated individual rights,<sup>204</sup> the Yale school’s assertion that the Constitution may be amended outside the Article V process,<sup>205</sup> and John Ferejohn and William Eskridge’s theory of “super-statutes” that attain quasi-constitutional status<sup>206</sup>—all of these raise questions of extracanonical norms.

All of these invocations of extracanonical norms share a further characteristic, however, that sets them apart from the position that I defend here. The extracanonical norms identified by Llewellyn, Ackerman, Eskridge, and Ferejohn all enjoy a constitutional *status* that sets them apart from ordinary legislation. Professor Ackerman’s “dualist” theory distinguishes sharply between norms that arise out of “normal politics” and those that are the product of “higher lawmaking.”<sup>207</sup> Professor Llewellyn insisted that “a constitution is not the governmental machine at large, but rather its *fundamental* framework,” thus accepting the necessity of “marking off how much and which portions are to be regarded as basic to the whole, and therefore, as the working Constitution.”<sup>208</sup> And while Professors Eskridge and Ferejohn recognize that “[t]he traditional distinction between ordinary law and higher lawmaking is not sufficiently fine-grained for the modern state,” they view “super-statutes” as occupying a distinct, “intermediate category of fundamental or quasi-constitutional law.”<sup>209</sup>

Each of these theorists identifies constitutional status with some form of entrenchment. One of the central criteria for inclusion in Professor Llewellyn’s “working Constitution” was that the relevant political actors “must *feel* that the

204. Compare, e.g., LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 76 (2004) (arguing that judges should serve as equal “partners” to the Framers of the Constitution and act creatively to “bring[] our political community better into conformity with fundamental requirements of political justice”), with William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (having no truck with such a notion).

205. See, e.g., ACKERMAN, *FOUNDATIONS*, *supra* note 19; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

206. See Eskridge & Ferejohn, *supra* note 19.

207. See *infra* text accompanying note 218.

208. Llewellyn, *supra* note 1, at 26 (citations omitted). Matthew Palmer, who closely follows Llewellyn, likewise seems to want to ascribe special status to his “complete constitution” defined by realist emphasis on the actual performance of constitutional functions. See Palmer, *supra* note 5, at 634–35.

209. Eskridge & Ferejohn, *supra* note 19, at 1275 (emphasis omitted); see also *id.* at 1266 (“[W]e urge that super-statutes be considered something more than ordinary lawmaking.”).

way or institution is not subject to abrogation or material alteration.”<sup>210</sup> Professor Ackerman is not as clear as he might be on the extent to which the products of “higher lawmaking” are entrenched against subsequent change. His examples concern the empowerment of government (at least at the federal level), so that the constitutional revolution is achieved when statutes that would once have been held to extend beyond the limits of governmental power under the old Constitution are now upheld by the courts.<sup>211</sup> Such decisions, for Ackerman, amount to “translating constitutional politics into constitutional law, supplying the cogent doctrinal principles that will guide normal politics for many years to come.”<sup>212</sup> When past law shapes future law in this way, rather than being reshaped by it, that is the essence of entrenchment. Professors Eskridge and Ferejohn’s super-statutes play a similar role. They thus assert that “the Civil Rights Act [of 1964] is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law.”<sup>213</sup>

Conferring constitutional status on norms that have not been formally adopted as part of the canonical document creates not only problems of legitimacy, but also difficult problems of definition. Much turns on a norm’s being “in” or “out” of an expanded constitution, and consequently pressure builds to define the boundaries of the extracanonical constitution with a high degree of precision. Each theory must, in other words, develop a rule of constitutional recognition to replace Article V’s test of canonical adoption.<sup>214</sup> Unfortunately, this is where extracanonical theories tend to fall down.

Karl Llewellyn’s rule of *constitutional* recognition mirrored the positivist account of rules of recognition generally: the “working Constitution” is those institutions and practices that the relevant class of officials tend to treat as “not subject to abrogation or material alteration.”<sup>215</sup> Professor Llewellyn was more

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210. Llewellyn, *supra* note 1, at 29.

211. ACKERMAN, FOUNDATIONS, *supra* note 19, at 268 (“[T]he Justices proceed to the codification stage by issuing a set of transformative opinions validating the second wave of statutes despite their inconsistency with bedrock legal principles that were foundational during the previous regime.”).

212. *Id.* at 267.

213. Eskridge & Ferejohn, *supra* note 19, at 1237 (citations omitted).

214. I use “rule of recognition” here in a narrower and less fundamental sense than the positivist criterion discussed earlier. See *supra* notes 50-53 and accompanying text.

215. Llewellyn, *supra* note 1, at 29.

concerned with debunking formal tests than providing abstract criteria for evaluation. “[I]t is not essential,” he insisted,

that the practice or institution shall be in any way related to the Document; nor that it be old, if it in any other manner acquire the look and sense of future permanence; nor that the *machinery* of change be complex or cumbersome, if the *likelihood* of change approaches zero.<sup>216</sup>

The edges of Llewellyn’s working Constitution are thus “not sharp, but penumbra-like. And the penumbra will of necessity be in constant flux.”<sup>217</sup> The only reason that Llewellyn’s self-styled “sane theory” of constitutionalism can tolerate such an amorphous boundary is, as I shall discuss, that less turns on the boundary than Llewellyn seems to think.

For Bruce Ackerman, by contrast, a great deal turns on the boundary problem. “Above all else,” he says, his theory “seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.”<sup>218</sup> The importance of this distinction is evident in the title he gives to his theory: “Dualist Democracy.” He explains:

Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movement’s political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for “higher lawmaking.”<sup>219</sup>

Professor Ackerman’s rule of recognition takes the form of a higher lawmaking “obstacle course”<sup>220</sup> which Ackerman’s later work elaborates as a five-step process:

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216. *Id.* at 30.

217. *Id.* at 26.

218. ACKERMAN, FOUNDATIONS, *supra* note 19, at 6.

219. *Id.*

220. *Id.*

Constitutional Impasse → Electoral Mandate → Challenge to  
Dissenting Institutions → Switch in Time → Consolidating Election<sup>221</sup>

Extracanonical norms that survive this gauntlet are entrenched against alteration by way of ordinary politics:

Even when this system of “normal lawmaking” is operating well, . . . the dualist Constitution prevents elected politicians from exaggerating their authority. They are not to assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People.<sup>222</sup>

The problem, of course, is that notwithstanding the elaborate mechanisms of Ackermanian “moments,” it is very difficult to identify with precision when one has actually occurred.<sup>223</sup> Likewise, Ackerman’s recognition criteria for a “constitutional moment” do relatively little to pin down the precise content of the now-entrenched norms. As my colleague Scot Powe has pointed out, “the New Deal left no text. How are courts or ‘We the people’ to interpret the New Deal ‘amendments’?”<sup>224</sup>

Similar problems bedevil William Eskridge and John Ferejohn’s theory of “super-statutes.” Although they share my own wish to “break down this dichotomy” between “the ‘higher lawmaking’ entailed in the Constitution and ‘ordinary lawmaking’ entailed in statutes,”<sup>225</sup> Professors Eskridge and Ferejohn nonetheless accord special status to “super” laws. Such statutes should be construed liberally and purposively;<sup>226</sup> courts may apply them more confidently without deferring to other actors, such as administrative agencies;<sup>227</sup> and super-statutes need not always (or even often) bow to

221. ACKERMAN, *TRANSFORMATIONS*, *supra* note 56, at 20.

222. ACKERMAN, *FOUNDATIONS*, *supra* note 19, at 6.

223. See, e.g., Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 918 (1992) (reviewing ACKERMAN, *FOUNDATIONS*, *supra* note 19) (concluding that “the book . . . provides inadequate criteria to identify the moments in the past that have special constitutional importance”). Although Professor Ackerman’s second book provided somewhat more specific criteria, the indeterminacy criticism has persisted. See *infra* note 224 and accompanying text.

224. L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547, 566 (1998) (reviewing ACKERMAN, *TRANSFORMATIONS*, *supra* note 56).

225. Eskridge & Ferejohn, *supra* note 19, at 1266.

226. See *id.* at 1247.

227. See *id.* at 1252. Professors Eskridge and Ferejohn do not rule out deference to agency interpretations altogether, but would impose important limits on such deference stemming from the underlying enactment’s “super” status.

substantive canons of statutory construction and “clear-statement” rules.<sup>228</sup> More broadly, Eskridge and Ferejohn suggest that courts should look to the norms embodied in super-statutes when construing *other* laws—and perhaps even when construing the Constitution itself.<sup>229</sup> It thus becomes critical to identify the “super” category with precision:

A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law . . . . Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem . . . . The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.<sup>230</sup>

Unfortunately, each of these criteria is likely to prove subjective and indeterminate. How important does the statute’s public purpose have to be? How much deliberation has to go into its enactment? How much subsequent testing and elaboration by courts, agencies, and amending Congresses? How much additional law has to be generated and shaped by a statute before it becomes “super”? Eskridge and Ferejohn consider, for example, the possibility that the Federal Cigarette Labeling and Advertising Act of 1965 is a super-statute.<sup>231</sup> But they conclude that it is not, based on the fact that no Supreme Court Justice has “characterized the FCLAA in such glowing terms,” and on the professors’ judgment that “its regulatory regime emerges in retrospect as a cowardly one.”<sup>232</sup> These criteria are so wildly subjective that there *must* be something more operating under the hood of the theory. But no more rigorous criteria are offered.

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228. *See id.* at 1253, 1267.

229. *See id.* at 1235-36.

230. *Id.* at 1216. As examples, Eskridge and Ferejohn focus on the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2000); the Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000 (2000); and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000). *See* Eskridge & Ferejohn, *supra* note 19, at 1231-46. They acknowledge that the Endangered Species Act’s “super” status remains somewhat in doubt. *See id.* at 1245-46.

231. *Id.* at 1259 (“It bears at least some of the indicia, for it embodies a robust principle, that consumers should know the health risks of tobacco products and the government ought to compel the producers . . . to inform them; its policy has been the basis for subsequent federal and some state laws.”).

232. *Id.* at 1260.

The boundary problems that I have just described cannot be fixed by coming up with a more creative or sophisticated theory. Whenever one confers constitutional status on a norm that does not meet the document's formal criteria, similar dilemmas are certain to arise. It may be that our constitutional system cannot entirely avoid conferring such status on extracanonical norms. I have argued elsewhere, for example, that evolving traditions should have force in constitutional interpretation,<sup>233</sup> and the identification and interpretation of those traditions pose "rule of recognition" problems that are no different in kind (although hopefully lesser in degree) than those I have attributed to Llewellyn, Ackerman, Eskridge, and Ferejohn. All the same, I do want to suggest that interpreters can minimize the need to draw these difficult boundaries by decoupling the constitutional *functions* of extracanonical norms from their entrenched *status*.

The category of "constitutive" legal norms, as I have described it in this Article, is broad and various, and its boundaries are admittedly fuzzy. Any statute or regulation that creates a governmental office—whether that office is the Chairman of the Federal Reserve or a security guard at a Senate Office Building—performs a constitutive function. So does any legal rule that confers a right on an individual or a group, and I have already acknowledged that the boundary between rights-creation and ordinary substantive regulation is ephemeral at best.<sup>234</sup> I can offer no precise rule of recognition to separate constitutive norms from nonconstitutive ones. But this is only a serious problem if something important turns on being able to mark that boundary with precision. When I say that constitutional functions are often performed by "ordinary" laws, I do not mean to suggest that such laws cease to be "ordinary" by virtue of those functions.<sup>235</sup> My point is simply to identify the constitutive roles that such laws play—and, indeed, to show that the role of ordinary law in constitutional ordering is pervasive. I hope to demonstrate in

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233. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 697-712 (1994).

234. For example, does a regulation prohibiting dumping dioxin in the water confer a right to be free of dioxin pollution?

235. Of the theorists I have discussed, my position here corresponds most closely to Professor Llewellyn's. Llewellyn demonstrated that a range of institutions and practices were entrenched in a functional sense—that is, that the relevant political actors accepted them as not subject to change under ordinary circumstances. He nonetheless seems to have assumed a need for *courts* to identify which institutions and practices had this status, presumably so that the courts could protect that status through judicial review. I never thought that I would be one to write that someone like Karl Llewellyn was not realist *enough*, but surely the point of his analysis is that the institutions and practices that make up our "working Constitution" do not depend on courts, or upon formal categorization, for their staying power.

the rest of this Article that this simple observation is fruitful for constitutional theory, doctrine, and teaching.

*B. Extracanonical Mechanisms of Constitutional Change*

Decoupling the constitutive and entrenching functions of constitutional law helps make sense of our observed processes of constitutional change. Critics of canonical written constitutions in the late eighteenth century insisted that such constitutions were too rigid to respond to changing circumstances,<sup>236</sup> and their present-day intellectual heirs lament “[t]he functional impossibility of amending the [U.S.] Constitution with regard to anything truly significant.”<sup>237</sup> Notwithstanding the relative stability of the text, however, the American constitutional order has displayed anything but stasis over the past two centuries. The great puzzle of American constitutionalism, then, is not “how can a great nation survive with a rigid, nonadaptive written constitution?” It is rather, “how can such dramatic institutional change be squared with a commitment to written constitutionalism?”

Bruce Ackerman’s theory of constitutional “dualism” is the most fully developed effort to account for changes in both constitutional structure and individual rights that occur through means other than Article V amendment. As I have already discussed, Professor Ackerman’s theory famously asserts that the Constitution may be amended by popular mobilization that occurs outside the Article V process, and it posits an intricate political process for proposing, deliberating on, and ratifying these extracanonical amendments.<sup>238</sup> Many scholars have criticized Ackerman’s view,<sup>239</sup> and for the most part I will not repeat their arguments here, even though I share their skepticism. Dualism does have a great virtue, however. Our constitutional order has plainly changed between 1789 and now, and those changes sweep much further than anything that shows up in the text adopted through Article V’s formal amendment

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236. See, e.g., EDMUND BURKE, THOUGHTS ON THE PRESENT DISCONTENTS (1770), reprinted in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 241, 277 (Paul Langford ed., Oxford Univ. Press 1981) (rejecting “scheme[s] upon paper” in favor of “a living, acting, effective constitution”); JOSEPH DE MAISTRE, ESSAY ON THE GENERATIVE PRINCIPLE OF POLITICAL CONSTITUTIONS (1810), reprinted in THE WORKS OF JOSEPH DE MAISTRE 147, 149, 151 (Jack Lively trans., Macmillan Co. 1965) (insisting that “the weakness and fragility of a constitution is in direct relationship to the number of written constitutional articles”).

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

238. See *supra* notes 218–224 and accompanying text.

239. See *supra* notes 223–224; see also Tribe, *supra* note 53.



process.<sup>240</sup> Dualism's vision of amendment outside Article V offers an account of how that change came about; Ackerman offers a theoretical explanation for phenomena that we all observe and for which constitutional formalism cannot account.

A more functional approach to constitutionalism, however, offers a promising alternative explanation. The Framers of our canonical document created a basic skeleton of our institutions, and they entrenched particular solutions to a relatively narrow set of questions. For most purposes, however, they sought to create a set of political institutions and to empower those institutions to deal creatively with ongoing developments. They left room, in other words, for most of our constitutive work to be done outside the Constitution itself. That, I submit, is why we remain able to work within the same set of basic entrenched commitments two hundred-odd years later.<sup>241</sup> Extracanonial change offers a much simpler explanation for observed institutional phenomena, without the elaborate (and unlikely) conceptual apparatus and chronic indeterminacy of Professor Ackerman's approach.

Aside from its simplicity, my account of extracanonial change has two primary advantages over dualism. The first is that it allows broader scope for incremental change. By reducing the story of constitutional development to a few "moments," Professor Ackerman neglects the extent to which our constitutive arrangements have changed through the enactment of ordinary legislation. Certainly some of the constitutive statutes I have mentioned can be assimilated to Ackermanian moments—the jurisdictional and remedial structure of Reconstruction civil rights legislation, for example, or the administrative bureaucracies that arose during the New Deal. But what about

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240. See, e.g., Friedman & Smith, *supra* note 104, at 45; Sanford Levinson, *Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended?)* (A) <26; (B) 26; (C) > 26; (D) *All of the Above*, 8 CONST. COMMENT. 409, 428 (1991) (demonstrating that "any answer [to the question in the title] is more sophisticated theoretically than '(b)'); Strauss, *supra* note 193, at 884 ("The Constitution has changed a great deal over time, but—to overstate the point only slightly—the written amendments have been a sidelight."). Scholars observed this phenomenon even before 1937. See Llewellyn, *supra* note 1, at 21 ("Surely there are few superstitions with less substance than the belief that the sole, or even the chief process of amending our Constitution consists of the machinery of Amendment.").

241. Professor Levinson acknowledges the possibility of amendment by "informal methods," but notes the "lack of transparency" of such amendments and doubts that they are available on an adequate range of important issues. LEVINSON, *supra* note 237, at 164. These would be telling objections to a theory like Bruce Ackerman's, which allows such amendments only on great occasions and leaves their meaning to be gleaned by courts from vague materials. Extracanonial changes, however, have all the transparency built into the ordinary legislative process. And, as I showed in Part I, they have occurred on a vast range of critical issues.

the Administrative Procedure Act, surely one of our most important constitutive statutes, but enacted in 1946, six years after the second of two “consolidating elections” in Ackerman’s system.<sup>242</sup> Other plainly constitutive measures are even harder to fit into one of Ackerman’s moments. What do we make of the Federal Reserve, established in 1913? Or the creation of the Environmental Protection Agency in 1970? Or the long, slow evolution of the U.S. Army Corps of Engineers, over the course of two centuries, from military bridge builders to one of the world’s more powerful regulatory bureaucracies? As Barry Friedman and Scott Smith have noted, “history does not move exclusively in the earth-shaking jolts and volcanic eruptions of Ackerman’s constitutional moments.”<sup>243</sup>

The second advantage stems from the rule of recognition problem that I discussed in the preceding Section. Dualism has always been dogged by the difficulty of identifying the precise content of its informal amendments. One might try to include the APA as part of the New Deal “moment,” for example, by classifying it as a consequence of that moment’s basic constitutive changes, broadly defined. Professor Ackerman, after all, at one point defines the “plain meaning” of that moment as this: “We the People had endorsed the New Deal vision of activist government.”<sup>244</sup> That meaning is so general, however, that it can hardly be “plain.” Any action is now within the national government’s power as long as it is “activist”? By denying any imperative to treat all constitutive changes as entrenched, however, a functionalist account allows interpreters to take those changes at face value. That is, each constitutive enactment changes the legal order to precisely the extent of that enactment’s terms. We need not try to extrapolate a sense of the zeitgeist from the themes and proposals of political movements. Rather, changes to the Constitution grounded in ordinary law may be interpreted in the ordinary way.

To be sure, I have already acknowledged that sometimes the extracanonical constitution supersedes the canonical one—as, for example, when statutory boundaries on national power came to take precedence over narrower, traditional conceptions of the commerce power.<sup>245</sup> Professor Ackerman would have an answer for this: the canonical Constitution has been amended. My story has to be more complicated. To a greater extent than we often

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242. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 56, at 359 (identifying the elections of 1938 and 1940 as “consolidating elections” that ratified the constitutional changes of the New Deal).

243. Friedman & Smith, *supra* note 104, at 30.

244. ACKERMAN, *TRANSFORMATIONS*, *supra* note 56, at 359.

245. See *supra* notes 92-93, 128-129 and accompanying text; see also *supra* notes 194-196 and accompanying text (discussing supersession).

acknowledge, the canonical text is open to some of these dramatic changes. The problem with modern federalism jurisprudence, for example, is not that “commerce” will not bear the broad meaning attached to it but rather that we have failed to find other doctrinal avenues to preserve the Founders’ basic principle of balance between national and state power.<sup>246</sup> Other instances where constitutive enactments have carried us beyond boundaries set by the canonical text may have to be written off as mistakes, but then I suspect Ackerman likewise would not wish to characterize every successful government action contravening constitutional norms as a proper “amendment.”

More fundamentally, I do not claim my account here to be a complete refutation of Professor Ackerman’s dualism. The accounts are not mutually exclusive: to note that the extracanonical constitution is frequently amended is not to deny that amendments to the canonical text also occur, or even necessarily to reject the possibility that such amendments could occur, under extraordinary circumstances, outside Article V. Whether or not we consider the legal victories of certain social movements to become part of the formal Constitution, moreover, the difficult road traversed by such measures may well contribute to their *functional* or sociological entrenchment against subsequent change.<sup>247</sup> What I do deny is dualism’s premise that “ordinary” law cannot play a fundamental constitutive role. Moreover, much of the appeal of Ackerman’s framework stems from its ability to explain the phenomenon of constitutional change in the absence of formal amendment. If a simpler explanation is available, then much of his conceptual apparatus becomes a candidate for Occam’s Razor.

At the end of the day, an account of changes to our constitutive arrangements that occur through ordinary politics is more satisfactory than resort to Ackerman’s elaborate machinery of “higher lawmaking.” My argument here accepts that the constitution *has* changed, but not because the canonical Constitution has been amended in some mysterious non-Article V way. Rather, it has changed because most of the Constitution—that is, the

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246. See generally Young, *supra* note 197, at 1775-99 (arguing that judges should be willing to make new doctrine to enforce this principle).

247. This is surely true of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973aa-6. (2000) (amended 2006), for example. But it would be a mistake to think that this is the *only* way ordinary laws may become entrenched. The Anti-Injunction Act, 28 U.S.C. § 2283 (2000) (originally enacted 1793), may be hard to change simply because it is so old; the construction of the Supreme Court’s jurisdictional statute in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875), on the other hand, is shielded by the centrality of its role in setting state law apart from federal law. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 921 (1986). It is hard to characterize either law as the product of a social movement like the one that produced the Voting Rights Act.

constitutive rules that make up our polity—never required an Article V amendment to be altered in the first place. The overwhelming majority of changes in our constitutional structure since the Founding have resulted from changes and additions to the extracanonical norms by which we implement, specify, and supplement the canonical document.

### C. *Relative Entrenchment*

Moving beyond dualism allows us to recognize that entrenchment is a multifarious phenomenon in American law. This is true both formally and functionally. Formally speaking, our legal system recognizes multiple degrees of entrenchment: as the October Term 2005 cases discussed in Part I illustrate, much contemporary legal debate focuses on when a set of rules can be changed by unilateral executive action and when the change must be accomplished by statutory amendment. Within the sphere of executive action, legislative rules are more entrenched than interpretive rules, and more informal forms of agency action—such as letter rulings on issues proffered by individuals—are less entrenched still. Many critical rules and practices, moreover, are left to state law or quasi-governmental institutions, such as political parties.

Judicial decisions interpreting the Constitution offer another example of intermediate entrenchment. Technically, such decisions are just as entrenched vis-à-vis other political actors as the canonical Constitution itself. Practically, however, Congress can sometimes overcome an adverse judicial decision by exercising its factfinding powers,<sup>248</sup> and the President and Senate working together can appoint new Justices who may one day vote to overrule the adverse precedent.<sup>249</sup> From the perspective of the Supreme Court itself, moreover, prior interpretations are entrenched only to the extent mandated by

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248. See, e.g., Violent Crime Control and Law Enforcement Act of 1994 § 320,904, 18 U.S.C. § 922(q)(1) (2000) (adding factual findings concerning the impact of guns in schools on interstate commerce in an effort to overcome the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which held that banning guns in schools fell outside Congress's Commerce Clause authority); *Katzenbach v. Morgan*, 384 U.S. 641, 649–56 (1966) (accepting Congress's determination that literacy tests for voting may amount to purposeful discrimination in violation of the Equal Protection Clause, notwithstanding a prior contrary holding in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1969)). I do not, of course, take any position on whether the cited amendment to the Gun Free School Zones Act, 18 U.S.C. § 922(q) (2000), would be sufficient to change the result in *Lopez*, should the Court consider the issue in a subsequent case.

249. Cf. Abraham Lincoln, Speech During the Lincoln-Douglas Senatorial Campaign (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953) (“We propose so resisting [the *Dred Scott* decision] as to have it reversed if we can, and a new judicial rule established upon this subject.”).

stare decisis—an extracanonial principle that itself creates gradations of entrenchment depending on a variety of variables.<sup>250</sup>

Just as judicial invalidation of statutes stems from Article V's entrenchment of the canonical Constitution, so too relative entrenchment generates additional forms of judicial review. Courts thus review administrative agency rules for conformity to underlying statutes,<sup>251</sup> informal agency actions for conformity with legislative rules,<sup>252</sup> and state laws for conformity with federal law in all its forms.<sup>253</sup> Neither the "trumping" function of higher law nor its enforcement by courts is confined to the canonical document; rather, each propagates all the way down the legal food chain.

Relative entrenchment matters. A primary function of the extracanonial constitution is to define when the law can be changed by executive actors alone, and when change requires new legislation. In areas where the canonical Constitution itself imposes relatively little restraint on government action, these statutory entrenchment debates are likely to assume primary importance. In *Gonzales v. Oregon*, for instance, the lack of consensus at the national level on physician-assisted suicide means that Congress is quite unlikely to act on the matter. The Court's holding that the executive may not act unilaterally thus reserves the matter to the states for the foreseeable future. Likewise, while Congress *did* act to empower the President to use military commissions after *Hamdan*, the powers that Congress was willing to give in the Military

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250. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion) (articulating a multifactor test to evaluate the weight of stare decisis in constitutional cases); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (indicating that stare decisis carries more weight in statutory cases than in constitutional ones).
251. See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (holding portions of FCC rules implementing the local competition provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.), invalid on the ground that they were inconsistent with the underlying Act).
252. See, e.g., *Auer v. Robbins*, 519 U.S. 452 (1997) (reviewing the Secretary of Labor's informal interpretation of a legislative rule implementing the Fair Labor Standards Act for conformity with both the statute *and* the legislative rule).
253. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) (holding state law preempted by federal banking regulations issued by the Federal Home Loan Bank Board); *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (holding state law preempted by the federal common law of admiralty). This is not to concede that all forms of federal law should have the same preemptive effect. See generally Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004) (suggesting limits on the preemptive effects of agency actions); Ernest A. Young, *Executive Preemption of State Law*, 102 NW. U. L. REV. (forthcoming 2008) (arguing that federal agency action should preempt state law only where Congress delegates authority to act with the force of law).

Commissions Act<sup>254</sup> were considerably more circumscribed than those the President had sought to take unilaterally. Especially during periods when different political parties control the executive and legislative branches, or when power in Congress is closely divided, these relative entrenchment questions will exercise an enormous influence on the shape of our institutions and the direction of the law.

As I have already suggested,<sup>255</sup> moreover, formal entrenchment is not the only kind. The Social Security Act is *functionally* more entrenched, at least right now, than the First Amendment's prohibition on flag burning. The formal process for overturning a particular norm is simply one variable among many—an important one, to be sure—that bear on the difficulty of altering that norm. Karl Llewellyn, for instance, urged attention to the preferences and practices of legal specialists, interest groups, and the general public in determining which institutional arrangements should be considered constitutionally entrenched.<sup>256</sup> This is not the place for exploring the variety and force of those and other functional variables. The point is simply that decoupling the constitutive function of constitutional norms from their degree of formal entrenchment opens up a whole range of additional lines of inquiry into what legal “entrenchment” may mean.

### III. THE FUNCTIONAL BOUNDARIES OF CONSTITUTIONAL LAW

Recognizing the constitutive role of ordinary law sheds light not only on how the Constitution changes, but also on how we should implement and think about the Constitution at the present time. This last Part offers a few illustrative examples concerning both how certain doctrinal questions should be resolved and, more broadly, how the extracanonical constitution might change how we teach and write about constitutional law.

#### A. Doctrine

The law distinguishes sharply between constitutional and nonconstitutional norms in any number of areas. The distinction has been important in at least two areas of federal courts doctrine and scholarship: constitutional limitations on Congress's power to restrict the jurisdiction of the

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254. Military Commissions Act of 2006, Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600 (to be codified at 10 U.S.C. §§ 948a-950s).

255. See *supra* Subsection I.A.3.

256. See Llewellyn, *supra* note 1, at 19.

federal courts, and the availability of private remedies against state officers under 42 U.S.C. § 1983. Likewise, standard approaches to statutory construction tend to distinguish sharply between statutory and constitutional construction for purposes of consulting constitutional values and deferring to administrative agencies. In each of these contexts, recognizing the constitutive functions of ordinary legislation suggests that the dichotomy between canonical and noncanonical law should be less important than it is often argued to be.

### 1. *Two Federal Courts Puzzles*

The extent of Congress's power to restrict the jurisdiction of the federal courts is one of the imponderable mysteries of federal courts law. It is also an issue of enormous contemporary relevance, as the Antiterrorism and Effective Death Penalty Act of 1996,<sup>257</sup> the Detainee Treatment Act of 2005,<sup>258</sup> and the Military Commissions Act of 2006<sup>259</sup> are arguably the most significant instances of jurisdiction stripping enacted since Reconstruction. Discussion of the constitutional limits, if any, on such legislation often begins with Henry Hart's famous statement that restrictions on the Supreme Court's appellate jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."<sup>260</sup> Following Professor Hart, other scholars have sought to identify the "essential functions" of not only the Supreme Court but of the federal courts in general. One of the most influential miners of this vein, Larry Sager, has argued that the essential function of the federal courts is to ensure that both state and federal governmental actors comply with constitutional norms. The limit to Congress's jurisdiction-stripping authority is thus that it cannot divest the federal judicial system of constitutional claims.<sup>261</sup>

The extracanonical constitution undermines Dean Sager's argument by challenging its sharp dichotomy between constitutional claims and other rights claims predicated on federal law. Sager's argument largely seems to take the

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257. Pub. L. No. 104-132, 110 Stat. 1214 (codified principally in scattered sections of 28 U.S.C.).

258. Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739 (to be codified as amended in scattered sections of 10 U.S.C. § 801 note, 28 U.S.C. § 2241, and 42 U.S.C. §§ 2000odd, 2000odd-1).

259. 2006 U.S.C.C.A.N. (120 Stat.) 2600.

260. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

261. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 45, 66-67 (1981).

primacy of constitutional claims for granted.<sup>262</sup> Yet the reasons he gives for the enforcement of such claims as an “essential function” seem equally applicable to claims under the extracanonical constitution. With respect to judicial review of state conduct, he observes that “the Supreme Court’s superintendence of state compliance with national law emerged as the fulcrum of the national government.”<sup>263</sup> Maintaining the supremacy of national law, however, is as much a concern for federal statutory and regulatory law as it is for constitutional norms. Sager also argues that

[f]ederal judicial supervision of state conduct is particularly important because of the daily impact of state and local government on the lives of individuals, and because the actions of those governments are particularly rich with constitutional hazard. States or their municipal constituents register voters, run public schools, control access to speech opportunities, employ the police personnel with whom citizens regularly have contact, regulate the use of land, license professionals, and regulate families.<sup>264</sup>

I have already argued, however, that federal statutory rights will often play a more important role in the lives of individuals, practically speaking, than constitutional ones. Indeed, the examples Sager gives—registering voters, running public schools, etc.—are for the most part now heavily regulated under federal statutory schemes.

Turning to federal judicial review of *federal* conduct, Dean Sager argues from the value of judicial independence. His claim is that congressional ouster of federal constitutional claims against federal action would leave those claims in the state courts, and that this would “run roughshod over article III’s tenure and salary requirements.”<sup>265</sup> But Sager’s argument is primarily concerned with the unsuitability of the state courts as an alternative forum for federal claims. This could be even more true of federal statutory or regulatory claims, which

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262. At one point, Dean Sager cites Alexander Hamilton for the proposition that federal courts were “a necessary part of the [constitutional] plan” because of their importance in deciding “causes arising out of the national Constitution.” *Id.* at 67 (quoting THE FEDERALIST NO. 81, at 507-08 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)). In this instance, however, Sager’s usual hostility to originalism, *see* SAGER, *supra* note 204, at 42-69, would have been well-founded. Hamilton wrote, after all, before the proliferation of federal statutory rights and regulatory bureaucracies; his views on the relative importance of constitutional and statutory claims are considerably less relevant today.

263. Sager, *supra* note 261, at 51.

264. *Id.* at 55 n.112.

265. *Id.* at 66.



will often be more complex and unfamiliar to state judges, than it is of constitutional claims. In any event, if one concedes that statutes and regulations perform constitutive functions that are just as practically important as those performed by the canonical Constitution, then it is hard to see why judicial independence would be any more important for constitutional claims than for constitutive statutory ones.

To say this much is not to prescribe a particular solution to the problem of constitutional limits on jurisdiction stripping. My point is simply that wherever the boundary lies, it should not be predicated on a sharp distinction between constitutional and statutory claims—or, more precisely, between claims under the canonical Constitution and claims under the extracanonical one. I have argued elsewhere that the best way to enforce Article III limits in this area is through very strong clear-statement rules. That approach has the virtue of applying to efforts to restrict jurisdiction over the whole range of possible claims—not just canonical ones.<sup>266</sup>

Softening the distinction between constitutional and statutory claims also sheds light on an important controversy concerning the remedies for violations of federal rights. The primary federal statute providing individuals with a right of action for violations of their federal rights by state and local officials is 42 U.S.C. § 1983, which was originally enacted as part of the Ku Klux Klan Act in 1871.<sup>267</sup> The current version of the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>268</sup>

In *Maine v. Thiboutot*,<sup>269</sup> the Supreme Court interpreted § 1983's reference to "the Constitution *and laws*" broadly to cover violations of any federal statute. That holding, however, has been criticized by commentators<sup>270</sup> and narrowed

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266. See Young, *supra* note 128, at 1602-13.

267. Ch. 22, 17 Stat. 13 (1871).

268. 42 U.S.C. § 1983 (2000).

269. 448 U.S. 1 (1980).

270. See, e.g., David P. Currie, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 551 (1997) (commenting that overruling *Thiboutot* would be "no great tragedy" because the decision misinterpreted § 1983); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 104

significantly in recent decisions by the Rehnquist Court. Recognizing the broad constitutive functions played by statutory and regulatory materials, however, provides a strong functional argument for adhering to *Thiboutot*'s holding.

The argument against *Thiboutot* stems from the early history of the statute. When it was originally enacted in 1871, § 1983 reached only the deprivation of constitutional rights. Congress added the “and laws” language in 1874, at the same time that it severed the 1871 Act’s jurisdictional provisions from its substantive provisions and placed them in separate sections of the code. The jurisdictional provision, which became 28 U.S.C. § 1343(a)(3), conferred federal jurisdiction only over constitutional rights and “by any Act of Congress providing for equal rights.”<sup>271</sup> *Thiboutot*’s critics have argued that the more terse “and laws” formulation of the substantive provision should be read as “coextensive” with the scope of § 1343(a)(3).<sup>272</sup> The *Thiboutot* majority rejected this argument, however, on the ground that the history of the statute was too ambiguous to support a departure from its plain language.<sup>273</sup>

*Thiboutot*’s holding has come under pressure in recent years as a result of the Rehnquist Court’s general skepticism of private rights of action and suits against state governments.<sup>274</sup> *Gonzaga University v. Doe*,<sup>275</sup> for example, rejected a § 1983 claim against state officials for violations of the Family Educational Rights and Privacy Act (FERPA) on the ground that the relevant FERPA provisions did not create individually enforceable rights. And *City of Rancho Palos Verdes v. Abrams*<sup>276</sup> held that when Congress creates a specific (and usually more narrow) statutory remedy for violations of statutory rights, those claims will generally not be cognizable under § 1983. Dissenting in *Gonzaga*, Justice Stevens protested that the Court had “eroded—if not eviscerated—the

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(1994) (“*Thiboutot*’s view of section 1983 remains vulnerable to attack.”); Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 Wis. L. REV. 1465, 1490 n.118 (“The product of a divided Court, *Thiboutot* was and remains a controversial decision.”).

271. 28 U.S.C. § 1343(a)(3) (2000).

272. See, e.g., *Thiboutot*, 448 U.S. at 20-21 (Powell, J., dissenting).

273. See *id.* at 7-8 (majority opinion).

274. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (sharply limiting *implied* private rights of action under federal statutes); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not generally override state sovereign immunity when it creates remedies for violations of federal statutes).

275. 536 U.S. 273 (2002).

276. 544 U.S. 113 (2005).

long-established principle of presumptive enforceability of rights under § 1983.<sup>277</sup>

If, unlike the *Thiboutot* majority, one finds the history of the statute and its relationship between § 1983 and § 1343(a)(3) conclusive, then my functional argument here would not necessarily be sufficient to support a broader interpretation. But the historical critique has generally been paired with a policy argument that *Thiboutot* supports unduly broad rights to litigate under a virtually infinite range of federal statutes, many of which have relatively little to do with the core purposes of the federal civil rights remedy.<sup>278</sup> My account of the extracanonial constitution, however, suggests that federal statutory rights will often play just as “fundamental” a role as constitutional ones from the perspective of the citizen. *Thiboutot* itself involved a denial of welfare benefits – positive rights that it may be difficult to include in an entrenched constitution but that may, practically speaking, be far more important to individuals than, say, the First Amendment right to burn the flag. Where statutory rights play this sort of constitutive role, it seems comparatively easy to fit their enforcement against state actors within the core purpose of § 1983.

The Rehnquist Court’s cases limiting *Thiboutot* are not necessarily wrong under my approach here. The recent cases finding that particular statutes do not create individually enforceable rights under § 1983 have involved the private enforcement of provisions in conditional spending arrangements between the national government and the states.<sup>279</sup> Such provisions are plausibly viewed as not performing the constitutive function of conferring rights on individuals, but rather as contractual terms of agreements between state and federal authorities. As such, it makes sense that they are enforceable only by the parties to the agreements. Likewise, the ability of Congress to supersede the general § 1983 remedy by providing a narrower remedial framework stems inevitably from the formally unentrenched nature of statutory rights. As a matter of doctrine, it is hard to argue with either principle.

The perspective offered here might matter, however, to the extent that it affects the disposition with which courts approach these statutory questions under § 1983. The principles that statutes must create individually enforceable rights and that a more specific remedial scheme may supersede § 1983 are sensible enough on their own terms. But they are principles that may be

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277. 536 U.S. at 302 (Stevens, J., dissenting).

278. See, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 22 (1980) (Powell, J., dissenting).

279. See, e.g., *Gonzaga Univ.*, 536 U.S. at 278 (noting that the FERPA requirements in question were enacted as a condition under the spending power, and that the sole remedy prescribed by the statute was the withholding of federal funds).

applied either more or less aggressively: one may, as a matter of doctrinal application, raise or lower the threshold for finding an individually enforceable right, or be more or less ready to find that Congress intended a specific statutory remedy to supersede the § 1983 framework. The comparatively aggressive recent application of these principles may reflect a more general sense that these federal statutory claims are not what § 1983 is really *for*.<sup>280</sup> It is that general claim that I want to dispute: where federal statutory rights play a similar functional role to canonical constitutional rights, the imperative to provide a federal statutory cause of action to enforce them is equally compelling.

## 2. *The Continuity of Interpretation*

My final suggestions concern two issues regarding the interpretation of constitutive statutes by courts. I argue first that, where a statutory scheme plays a constitutive role in the constitutional structure, courts should not hesitate to employ normative canons of statutory construction that reflect the constitutional values underlying the relevant aspect of the structure. Second, courts should be reluctant to accord *Chevron* deference to statutory interpretations by administrative agencies where the statute in question plays a constitutive role.

*Gonzales v. Oregon* readily illustrates the first point.<sup>281</sup> The majority's interpretation of the scope of authority delegated by Congress to the Attorney General under the Controlled Substances Act<sup>282</sup> was plainly influenced by federalism-based assumptions concerning the traditional and proper allocation of regulatory authority over the medical profession.<sup>283</sup> In dissent, Justice Thomas objected to the importation of this federalism-based judgment into a statutory case:

I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure. . . .

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**280.** It seems clear that the quite aggressive application of similar principles to limit the federal common law remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of constitutional rights by federal officials stems from a general discomfort with judge-made implied rights of action. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (strongly resisting any extension of the *Bivens* remedy to new contexts).

**281.** 546 U.S. 243 (2006).

**282.** 21 U.S.C. §§ 801-904 (2000).

**283.** See *supra* note 103 and accompanying text.

But that is now water over the dam. The relevance of such considerations was at its zenith in *Raich*, when we considered whether the CSA could be applied to the intrastate possession of a controlled substance [medical marijuana] consistent with the limited federal powers enumerated by the Constitution. Such considerations have little, if any, relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power.<sup>284</sup>

Justice Thomas thus concluded that “[t]he Court’s reliance upon the constitutional principles that it rejected in *Raich*—albeit under the guise of statutory interpretation—is perplexing to say the least.”<sup>285</sup>

It is easy to sympathize with Justice Thomas’s dissent. “Where were you people in *Raich*,” he asks of the majority, “when this Court interpreted the Constitution to authorize basically unlimited national legislation?” But with all respect to Thomas’s principled stand in *Raich*, I want to suggest that he overlooks the critical constitutive function of statutory construction in cases like *Gonzales* and *Rapanos*. The obsolescence of canonical boundaries for national power means that statutory boundaries like those in the CSA and the Clean Water Act will increasingly define the federal balance. The same thing is true of separation of powers in cases like *Hamdan*, and of individual rights values in cases like *Gonzales* and *Rapanos* where the courts are unwilling to recognize a fundamental rights claim. If this is correct, then it is not simply permissible for constitutional values to inform statutory construction in such cases through normative canons of construction—it is essential.<sup>286</sup>

The question of agency deference looms equally large in such cases, because statutory debate will often focus on the extent to which a given statutory boundary can be interpreted or modified by the enforcing agency. Here the deference rules reflect a sharp dichotomy between constitutional and statutory construction. There is no question of deference to agency interpretations of the canonical Constitution, yet the tradition of deference to agency *statutory* constructions is both broad and deep. My point is that when a statute is

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284. *Gonzales*, 546 U.S. at 301-02 (Thomas, J., dissenting) (citing *Gonzales v. Raich*, 125 S. Ct. 2195, 2229 (2005) (Thomas, J., dissenting)).

285. *Id.* at 302.

286. See, e.g., SUNSTEIN, *supra* note 71, at 164 (“[R]elatively aggressive statutory construction provides a way for courts to vindicate norms that do in fact have constitutional status, and to do so in a less intrusive way than constitutional adjudication.”); Young, *supra* note 128, at 1585-99.

playing a constitutive role, the usual reluctance to defer on constitutional questions should also extend to the statutory one.

That does not mean that every aspect of a vast, constitutive regulatory scheme like the Clean Water Act is off limits to *Chevron* deference. Much of the statutory law under such a scheme will consist simply of substantive rules, which play little constitutive role. Deference to agency interpretations of such provisions would remain appropriate. I do submit, however, that longstanding debates about whether *Chevron* should cover agency interpretations of the limits of the agency's own jurisdiction or agency judgments about the preemption of state law should generally be resolved against deference.<sup>287</sup>

One might object that suspending ordinary *Chevron* deference when constitutive statutes are at issue is tantamount to according special *status* to those statutes. This would raise the problem noted earlier, which is that any proposal to accord special status to constitutive laws would require relatively precise, determinate boundaries for the favored category.<sup>288</sup> But I am not proposing any new categories here. There is already a longstanding debate on the question of whether *Chevron* deference should apply to agency constructions of the limits of their own jurisdiction.<sup>289</sup> While it is true that "it may be difficult to distinguish issues of jurisdiction from other issues of agency authority,"<sup>290</sup> that is a far narrower (and hence more manageable) question than identifying "constitutive" norms generally. In any event, my argument here injects no new category into that debate, but rather proposes an argument for how a debate over preexisting categories should be resolved.

Likewise, we already have well-established canons of statutory construction designed to protect constitutional values concerning both structure<sup>291</sup> and

287. See, e.g., SUNSTEIN, *supra* note 71, at 143 (arguing that the abandonment of the constitutional delegation doctrine presupposes judicial enforcement of the statutory limits of agency action, and that "[i]f agencies are able to interpret ambiguities in these directives, the delegation problem increases dramatically").

288. See *supra* Section II.A.

289. Compare, e.g., *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) ("[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."), with *id.* at 386-87 (Brennan, J., dissenting) ("Our agency deference cases have always been limited to statutes the agency was 'entrusted to administer.' . . . Agencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies. Nor do the normal reasons for agency deference apply."). See generally JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 817-19 (2003) (surveying the debate).

290. MASHAW ET AL., *supra* note 289, at 818.

291. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that Congress must speak clearly if it wishes to regulate the traditional functions of state governments); Cass R. Sunstein,

individual rights.<sup>292</sup> The boundaries within which these canons should apply are not always perfectly determinate, but they are also not hopelessly vague. The debate about such canons is not so much when they are potentially applicable, but rather whether they should apply at all in cases where there is not an actual violation of the underlying canonical principle.<sup>293</sup> My answer has been to say that constitutional and statutory construction are functionally continuous—both are vehicles that protect important constitutional values. The import of the argument is thus not to pose yet another difficult doctrinal distinction, but rather to dispense with an unhelpful limit on the range of these canons' application.

### *B. Pedagogy and Scholarship*

Changing what counts as “the Constitution” should affect how we think about teaching and scholarship in the field of constitutional law. In this brief concluding Section, I want to note three points about pedagogy and scholarly inquiry. First, we need to question not only the American law school curriculum's continuing (albeit declining) neglect of regulatory law and statutory interpretation, but also the rigid divide between constitutional and nonconstitutional subjects that characterizes much of our traditional curriculum. The result might look something more like British courses in “public law,” with the relative entrenchment of various legal norms being simply one object of inquiry among many. Second, the extracanonical constitution is a creature of doctrinal detail, and the theoretical issues that it raises emerge only after one becomes familiar with the contours of intricate statutory schemes. That might cause us to question the divide between theoretical and doctrinal inquiry that characterizes some constitutional scholarship. Finally, the relative mutability of the extracanonical constitution suggests that institutional design questions are more relevant to American constitutional law than one might think if one views the content of our “constitution” as relatively fixed.

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*Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (collecting canons that limit delegated power).

292. See, e.g., *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (rule of lenity). On clear statement rules, see generally William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

293. See generally Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

Discussion of the “canon” in constitutional law often addresses whether we should teach this case or that, or whether we should spend more time addressing constitutional decision making by actors outside the courts. But it rarely confronts the more basic question asked here—that is, what should count as “the Constitution”? There are exceptions, of course, such as the encouraging trend to treat federal statutory preemption of state law as a constitutional issue to be taught as part of a more general discussion of constitutional federalism.<sup>294</sup> Casebooks on foreign affairs law likewise discuss constitutive statutory and common law rules like the Alien Tort Statute<sup>295</sup> and the act of state doctrine, respectively, alongside constitutional rules governing war and treaty powers.<sup>296</sup> And federal courts casebooks have generally put the constitutive interplay of statutes and constitutional provisions front and center—for example, in the treatment of federal question jurisdiction under Article III and 28 U.S.C. § 1331.<sup>297</sup>

Generally speaking, however, statutory and regulatory materials are rarely included in courses on constitutional law. At the University of Texas, we offer a course on equal protection doctrine and a course on the employment discrimination statutes, but there is not nearly as much overlap as one might think. We should at least consider an integrated course addressing the fundamental importance of rights against discrimination in the context of race, gender, age, disability, etc., without drawing sharp lines based on the derivation of those rights from statutes or constitutional provisions. Such an approach would afford not only the practical advantage of conveying a more complete picture of one’s legal options in a particular set of circumstances, but also opportunities to talk about the respective advantages and disadvantages of constitutional, statutory, and regulatory tools in addressing a common set of constitutive issues.

From the standpoint of scholarship, I have canvassed only a small fraction of the theoretical and doctrinal issues one might explore by defining the constitution in a functional way. I want to make two broader points, however.

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294. See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 324-33 (15th ed. 2004). At the same time, it is worth noting that the same casebook gives two-and-a-half times as much space to the anticommandeering doctrine and *National League of Cities v. Usery*, 426 U.S. 833 (1976), as it does to preemption, see SULLIVAN & GUNTHER, *supra*, at 179-204, notwithstanding their negligible importance relative to statutory preemption in ordering the relation between state and federal authority.

295. 28 U.S.C. § 1350 (2000).

296. See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 90-111 (2d ed. 2006) (discussing the act of state doctrine); *id.* at 502-22 (discussing the Alien Tort Statute).

297. See, e.g., HART & WECHSLER, *supra* note 171, at 832-905.



One has to do with the theory-versus-doctrine debate that presently divides the academy from the profession and members of many law faculties from one another.<sup>298</sup> There are certain fundamental theoretical perspectives that emerge only when one pays careful attention to doctrine. One does not need to know much doctrine to puzzle about the proper interpretive theory for approaching the Constitution's open-ended rights-bearing provisions. But to see how the Clean Water Act or the Communications Act operates as a "constitution" of sorts, one needs to know a bit about the nuts and bolts of the relevant statutes. Respect for doctrine is thus not just an imperative of faculty comity, but may in fact reveal a trove of theoretical insights.

The second point is that expanding our conception of "the Constitution" may encourage us to think of our institutional arrangements as less fixed than we often do. To a great extent, our constitutive arrangements are *not* entrenched to the point that they would require a formal amendment—or a constitutional "moment"—to alter. That means that our opportunities to think about constitutional *design* are not limited to those heady occasions when prominent scholars are invited to some exotic island in the South Pacific and asked to help design a new constitution. Many fairly basic issues of constitutional design arise in the creation of new statutory schemes or the alteration of old ones, and how we resolve those issues in turn will shape the overall structure of our constitution outside the Constitution.

There is an important current debate, for example, about delegations of legislative, executive, and judicial authority from domestic to supranational institutions. The legislative functions of the World Trade Organization, the investigative functions of inspectors under the Chemical Weapons Convention, and the adjudicative functions of arbitral tribunals under the North American Free Trade Agreement are just a few examples of this increasingly salient issue. Thus far, much of the academic debate about the validity of such supranational delegations has sought to fit them into categories defined by the canonical Constitution. Critics have thus invoked the classic nondelegation doctrine, the Appointments Clause, and constitutional limits on the assignment of federal judicial business to non-Article III tribunals as tools for evaluating supranational delegations.<sup>299</sup> The problem is that each of these canonical

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298. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

299. 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).

principles was developed to deal with quite different concerns than those that they are now called upon to address, and they tend to map poorly onto the issues raised by supranational delegations.

Recognizing the pervasive significance of extracanonical materials in structuring our governmental institutions might relieve the felt pressure to address every new problem in terms of preexisting canonical rules. Rather than strain the non-Article III courts doctrine to govern an international tribunal, why not simply write about how such a tribunal should be structured (by treaty) in the first place, or propose a statute to govern the effect of such a tribunal's pronouncements on domestic law?<sup>300</sup> Such a treaty or statute would perform a constitutional function, and insights gleaned from the study of canonical structures may pose helpful analogies for institutional reform and design. I suspect that part of the reason we do not see more scholarship in this vein is a sense that proposing legislative solutions is not "constitutional" scholarship, even when the problems to be solved are constitutive in nature. This perception, coupled with the virtual impossibility of formally amending the canonical document itself, has gone a long way toward stifling interest in institutional design among constitutional scholars. But statutes and treaties – even regulations and informal governmental practices – do constitutional work all the time, and it is time constitutional scholars paid more attention to them.

## CONCLUSION

If you seek the Constitution, look around you. It is much bigger than you think. If we look for it through functional eyes – that is, if we seek to identify the set of legal norms that actually *constitute* our public legal order – then the "Constitution" will include not only the canonical document but a host of statutes, regulatory materials, federal common law rules, and established practices. This Article has only scratched the surface of the theoretical, doctrinal, and pedagogical implications of viewing constitutionalism from this perspective. The basic point, however, should be clear: constitutional scholars need to quit drawing rigid lines around the legal materials that interest them – and hence around their scholarly discipline – and engage the constitution outside the Constitution.

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300. I have pursued this recommendation in other work. See Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. (forthcoming 2007).