ENGLISH CONSTITUTIONALISM *CIRCA* 2005, OR, SOME FUNNY THINGS HAPPENED AFTER THE REVOLUTION

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Ernest A. Young[2]

American constitutional lawyers have always been curious about British public law. Blackstone, of course, was the most widely-read legal work in the early republic. More recently, the United States Supreme Court has construed Congress's power to control its membership in light of the 18th century British controversy over John Wilkes's election to Parliament;[3] the power of juries to hear patent claims by reference to the 18th century practice of the courts at Westminster;[4] and the proper treatment of citizens accused of levying war against their country with regard to English practice dating back to the 14th century Statute of Treasons.[5] As these examples indicate, however, our comparative interest in British arrangements has typically been confined to *old* British arrangements—presumably because it is the British institutions and practices antecedent to the American founding that can tell us most about our own. We have been comparatively less interested in what British public law has become in the centuries since the unpleasantness at Lexington, Saratoga, and Yorktown.

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1. John Millar Professor of Public Law, University of Glasgow.

2. Judge Benjamin Harrison Powell Professor of Law, the University of Texas at Austin. B.A. Dartmouth College 1990; J.D. Harvard Law School 1993. I am grateful to my friend Adam Tomkins for many interesting and enlightening conversations, to Brian Bix, Sandy Levinson, Frank Michelman, and Scot Powe for helpful comments and suggestions on the manuscript, to Carina Cuellar for research assistance, and to Allegra Young for putting up with me while I wrote this.

3. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 789 (1995); Powell v. McCormack, 395 U.S. 486, 527–31 (1969).

4. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376–84 (1996).

5. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 559 (2004) (Scalia, J., dissenting).

This American focus on the 18th century makes reading about *current* British public law a bit like hearing about what your relatives have been up to after having been out of touch for a long time: Parts of it are more interesting than others, some of it just sounds crazy, and occasionally you hear something that yields unexpected insight into your own life. It's for the latter sort of insight that most readers of this journal will read Adam Tomkins's *Public Law*, an insightful and accessible new addition to the same Clarendon Law Series that gave us H.L.A. Hart's *The Concept of Law* years ago. Your humble reviewer is in no position to evaluate *Public Law* in terms of what seems to be its primary aim—that is, as a descriptive account of British constitutionalism at the opening of the new century, with some normative prescriptions for the betterment of the British legal system. Instead, I want to focus on Professor Tomkins's work as an example of transatlantic constitutional discourse. In that context, *Public Law* has some valuable contributions for American constitutionalists, and it also provides the occasion for some suggestions as to how American experience may inform current British debates.

I. EAST TO WEST

Despite its rather encompassing title, *Public Law* is focused quite firmly on the public law of England.[6] Although ambitious within its sphere—How many books purport to offer a general analysis of American constitutional law within the confines of a mere 211 pages?—its excursions into general principles of constitutionalism are offered for purposes of introduction rather than as prescriptions for other legal systems. Nonetheless, Professor Tomkins's discussion of general principles *is* illuminating for participants in other systems. I want to focus on two aspects of that discussion: the distinctions between written and unwritten constitutions, and between legal and political constitutions. Careful consideration of the way those distinctions play out in the English system can help shed light on important debates on this side of the Atlantic.

6. Very early on, Professor Tomkins disavows any aim to encompass the public law of the United Kingdom outside England and Wales. The Scottish and Northern Irish legal systems are distinct for public law purposes (pp. 2–3). One might find strange Tomkins' dismissal of the United Kingdom as a whole as "a young entity," having come "into existence only in 1800" (p. 2), until later in the book when one encounters his conviction that almost everything really important in British constitutionalism happened in the 17th century (p. 45).

A. WRITTEN AND UNWRITTEN CONSTITUTIONS

Professor Tomkins uses his introductory first chapter, "On Constitutions," to clear some conceptual underbrush. He begins by stating that "Constitutions perform three main tasks: they provide for the creation of the institutions of the State; they regulate the relations between those institutions and one another; and they regulate the relations between those institutions and the people (citizens) they govern" (p. 3). That should be a relatively unexceptionable catalog for most readers, but Tomkins proceeds quickly to debunk some conventional wisdoms about the English Constitution. "The first thing anyone learns about English public law is that in England the constitution is unwritten," he says. In truth, however, "the importance of the distinction between written and unwritten constitutions is greatly exaggerated" (p. 7).

The first problem is that the English Constitution isn't really "unwritten" at all. As Professor Tomkins points out, "much (indeed, nearly all) of the constitution *is* written, somewhere" (p.7)—whether in Magna Carta or the Bill of Rights of 1689, or more modern statutes like the Devolution Acts of 1998, or more prosaic sources like the Ministerial Code given by Prime Ministers to their deputies. As others have also recognized,[7] what people really mean when they say that the English Constitution is "unwritten" and that the American is "written" is that only the latter is *codified* or written down all in one place. Codifed written constitutions, Tomkins explains, are creatures of Enlightenment rationalism. England lacks a codified constitution because "England experienced its moments of greatest political turmoil well before Enlightenment thinking took hold" (pp. 7-8).

Professor Tomkins wants to deny, however, that the distinction between written and unwritten constitutions matters very much in practice. "[W]ritten constitutions are not complete codes capable of answering all constitutional questions. Indeed no written constitution could ever be." Codified written constitutions like America's thus end up looking much like England's through practice over time, because they "need to supplement those codes with unwritten, or more likely uncodified, rules. In this sense all constitutions are (at least in part) unwritten" (p. 9).

7. *See, e.g.*, Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855 (1962).

Over-emphasis on the distinction between written and unwritten constitutions leads, in Professor Tomkins's view, to a second mistake, which is "to say that the unwritten nature of the constitution means that the constitution is flexible" (p. 9). This way of thinking about the English Constitution relies heavily on the extent to which English public law is governed by *convention*—that is, "non-legal . . . rule[s] of constitutional behaviour" that are "not enforceable by a court" (p. 10). As Tomkins points out, the fact that conventions are enforced politically rather than legally does not make them flexible; indeed, English public law generally defines a convention as "a practice which enjoys a long history of unbroken observance, in respect of which there is a strong sense of obligation, and which forms an integral part of the constitutional order" (p. 13). Hence, "reliance on convention makes the constitution more rigid and more fixed, not more flexible" (p. 14).[8]

The more important aspect of flexibility, however, stems from the sovereignty of Parliament: "Parliament may make or un-make any law whatsoever, and nobody has the power to override or to set aside Parliament's legislation." As Professor Tomkins explains, "[t]he consequence of this doctrine is that nothing is entrenched: there is nothing which cannot be undone; no law which cannot be unmade" (p. 17).[9] But Tomkins insists that "[t]here is no necessary connection between the constitution being unwritten and it being unentrenched" (p. 18). A written constitution, for example, might contain a provision allowing amendment by the same legislative procedure needed to pass ordinary legislation, and an unwritten constitution might nonetheless include a principle of basic human rights not susceptible to legislative override.

This may be a surprising line of argument for American readers, who tend to equate the United States Constitution's supremacy over ordinary lawmaking with its written-ness. John Marshall's opinion in *Marbury*, for instance, asked "[t]o what purpose are [Congress's] powers limited, and to what purpose is that limitation *committed to writing*, if these limits may, at any

8. Nor is there any necessary connection between reliance on convention and an unwritten constitution. As Professor Tomkins notes, one might well include such principles as ministerial responsibility in a codified written constitution, then use convention to flesh them out (p. 12).

9. *Cf.* United States v. Winstar, 518 U.S. 839, 872–73 (1996) (plurality opinion) (observing that America's adoption of an entrenched constitution also makes it possible, in some circumstances, for one Congress to bind its successors).

time, be passed by those intended to be restrained?"[10] And yet it is plain that, even within our own political culture, many states have written constitutions without committing to anywhere near the same degree of entrenchment; the Texas constitution, for example, has been amended over 300 times.[11] The utility of Professor Tomkins's discussion is to identify the constitutive function of a constitution—the establishment of governmental institutions and the regulation of their relations one with another and with their citizens—as central, with the obduracy of those arrangements in the face of efforts to change them being a separate and optional feature. The Reform Acts of 1832 and 1869 and the Devolution Acts of 1998 "constitute" the legislative franchise and rudimentary elements of a federal structure in much the same way that Article I and the Tenth Amendment to the U.S. Constitution do; the English measures are thus "constitutional" in their import despite the fact that they can be changed tomorrow.

To my mind, Professor Tomkins exaggerates somewhat when he suggests there is little relation between written-ness and entrenchment. The scattered writings of the English Constitution reflect its commitment to Parliamentary sovereignty; to find the constitutive elements of the governmental structure, one must consult recent legislation like the Devolution Acts as well as ancient texts like Magna Carta, precisely because the later acts have the capacity to override the prior ones. But the fact that the United States Constitution purports to perform these constitutive tasks in one document—that it is a *codified* written constitution, in Tomkins's terms—may itself foster at least a weak form of entrenchment. Republican majorities in Congress cannot clear the way for Arnold Schwarzenegger to seek the Presidency simply by passing a statute that will supersede Article II's requirement that a president must have been born in the U.S.; they must *amend* the original document so that the Constitution will continue to reflect our basic governmental arrangements. Certainly one can imagine a version of Article V that would permit amendment by the same process as is used for ordinary legislation. But given the strong political, even cultural aversion to tampering with basic governing arrangements,[12] I suspect that

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added).

11. *See* John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659, 669–70 (2002) (collecting numbers on amendments to various state constitutions).

12. *See, e.g.*, Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments*,

requiring that a change be presented and voted upon as *an alteration of the Constitution* rather than simply ordinary legislation would raise the bar substantially.[13]

This seems to be the theory of provisions like Article 33 of the Canadian Constitution, which provides that the Parliament or provincial legislatures may legislate notwithstanding constitutional prohibitions, but only if they expressly declare that they are doing so.[14] The experience under Article 33 is mixed, with an initial period of relatively frequent resort to the process, especially by Quebec, followed by a more recent trend of increased reluctance. But the overall record seems consistent with the intuition that measures derogating from a written constitution will not be undertaken with the same frequency or political ease as ordinary legislation.[15] That suggests that some degree of entrenchment follows from collecting constitutive principles in one place and calling them a constitution. John Marshall's admonition that "we must never forget that it is *a constitution* we are expounding"[16] is typically cited as an argument for flexibility, but it also carries something of the opposing connotation—that is, that even the growth of an evolving constitution entails something weightier, and likely slower and more difficult, than ordinary legal change.

To say that entrenchment and codification are not completely unrelated, however, is not to deny the usefulness of Professor Tomkins's insistence that they be considered separately. The distinction may suggest fruitful lines for future inquiry: For instance, should all parts of a constitution be entrenched (or not

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in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39 (1999). For a critique of this aversion to amendment, see Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tzvi Kahana, eds., forthcoming 2006).

13. *Cf.* Frank I. Michelman, *What Do Constitutions Do that Statutes Don't (Legally Speaking)?* *in* THE LEAST EXAMINED BRANCH, *supra* note 12 (discussing the relation of supremacy and entrenchment). There is, of course, a chicken and egg problem here: It is not obvious that this cultural aversion would exist if Article V did not strongly suggest, by setting the bar so high, that amendments are not to be undertaken lightly.

14. *See* Constitution Act of 1982, Art. 33(1) ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter.").

15. *See* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and-Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 832–33 (2003) ("The quite limited use of section 33 itself suggests that there is little difference between the Canadian system and one in which the Constitutional Court's decisions are final.").

16. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

entrenched) to the same degree? One could argue that the U.S. Constitution, for example, reflects varying degrees of entrenchment in practice, from the equal Senate representation clause, which arguably would require at least *two* amendments to change,[17] to textually-determinate provisions like the presidential age requirement that are relatively resistant to evolution through judicial interpretation,[18] to more open-ended provisions like "due process" that have evolved in a common-law fashion,[19] to provisions like "cruel and *unusual*" which seem to *invite* such evolution by (at least arguably) referring explicitly to a present state of affairs.[20] This may or may not be a good thing, but to think about it intelligently we need to separate the notion of "constituting" a government from a particular degree of entrenchment.

More important, separating out the notion of entrenchment allows us to focus on what constitutions *do* in a political society—that is, it permits a functional definition of "the constitution" that is distinct from a more conventional one that might amount to "the part of our arrangements that we can't change without going through the Article V process." The absence not only of entrenchment but also codification in Britain makes this issue a particularly stark one: As Professor Tomkins points out, "constitutional law is not sharply demarcated from other areas of law" in Britain (p. 16). What counts as "constitutional" is a matter of function: any statute, regulation, or convention that "creat[es] the institutions of the State," "regulate[s] the relations between those institutions," or "regulate[s] the relations between those institutions and the people" (p. 3) is a part of the Constitution.

This notion of entrenchment has an important analytical payoff in the American system, where the presence of a central

17. *See* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

18. *But see* Sanford Levinson, *"Perpetual Union," "Free Love," and Secession: On the Limits to the "Consent of the Governed,"* 39 TULSA L. REV. 457, 463 (2004) (suggesting that the age provision is not as determinate as we might think, because "we are not told within the text whether the thirty-five year age requirement for presidential eligibility should be computed by reference to a solar or a lunar calendar").

19. *See* Washington v. Glucksberg, 521 U.S. 702, 755–73 (1997) (Souter, J., concurring in the judgment).

20. *Cf.* Hudson v. McMillian, 503 U.S. 1, 8 (1992) (noting that the "objective component of an Eighth Amendment claim is . . . contextual and responsive to 'contemporary standards of decency'"); Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting) (linking the "evolving standards of decency" doctrine to the Eighth Amendment's text).

document that purports to codify our constitutional arrangements has often obscured the constitutional functions of other laws and practices. Consider, for instance, the two pillars of American judicial federalism: the rule of *Erie Railroad v. Tompkins*, stating that federal courts generally lack power to fashion federal common law rules of decision,[21] and the rule of *Murdock v. Memphis*, providing that state courts have the final say over the substantive content of state law.[22] Justice Brandeis's opinion in *Erie* explicitly rested on the Constitution, while Justice Miller's opinion in *Murdock* purported only to construe the Judiciary Act of 1867.[23] But how much does this difference matter? It certainly matters for purposes of *entrenchment*: Congress could presumably override *Murdock* by statute, but not *Erie*.[24] But if we set entrenchment to one side, does it make sense to say that *Murdock* does not announce a "constitutional" rule? It certainly *constitutes* the relationship between state and federal courts, and indeed between state and federal law, in every bit as fundamental a way as *Erie* does.[25]

Many other statutes, executive orders and regulations, and practices perform "constitutional" functions in the sense that they constitute the government and govern its internal and external relations. Harold Koh has argued that our "National Se-

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21. 304 U.S. 64 (1938).

22. 87 U.S. 590 (1874).

23. *Compare Erie*, 304 U.S. at 77–78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.") *with Murdock*, 87 U.S. at 633 ("[W]e are of opinion that the act of 1867 does not confer such a jurisdiction [to "examine and decide other questions not of a Federal character"]. This renders unnecessary a decision of the question whether, if Congress had conferred such authority, the act would have been constitutional."). There are still people who want to say that *Erie* was a statutory case, but it is hard to imagine a more explicit statement specifying the constitutional ground of decision. *See Erie*, 304 U.S. at 77–78. *See also, e.g.*, EDWARD PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 172–77 (2000); Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common law*, 39 N.Y.U. L. REV. 383, 385–86 (1964).

24. Congress could surely delegate broad substantive lawmaking authority to the federal courts in particular areas, so long as it set forth an "intelligible principle" to guide the exercise of that authority. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001). But that would *satisfy* the holding of *Erie*, not reverse it. It would be quite another thing to pass a statute providing simply that the federal courts may formulate substantive rules of decision in all cases otherwise within their jurisdiction.

25. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 921–22 (1986) ("It is . . . because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one. . . . *Erie* and *Murdock* together . . . give states control over their own law in a way we unquestionably presuppose them having today.").

curity Constitution" is composed primarily of "framework statutes" like the National Security Act of 1947 or the International Emergency Economic Powers Act.[26] The Administrative Procedure Act is surely part of the "constitution" of our modern regulatory state, providing both judicial checks on agency power as a substitute for the more traditionally constitutional (but defunct) delegation doctrine and protection of individual rights against agencies in many circumstances.[27] Elena Kagan has shown that more recent executive practices associated with "presidential administration"—chiefly the involvement of White House officials in agency policy making and the President's efforts to take credit for the resulting policies—likewise perform important constitutional functions by facilitating accountability in the administrative process.[28] An even more obvious example would be the executive orders providing for regulatory review by the Office of Management and Budget,[29] which altered the shape of the administrative state without any statutory enactment, much less a constitutional amendment.

Or consider the allocation of power between the nation and the states. Cases like *Lopez* and *Morrison* notwithstanding,[30] we live in a world of largely concurrent state and national regulatory powers. As a result, the boundary between state and national power will generally be set by the choices of federal legislators and officials—sometimes negotiated with state officials, sometimes simply imposed on them—to prescribe federal regulations in some areas, to refrain from interfering with state autonomy in others, and to share authority in still others. The Communications Act of 1934, for example, not only created the Federal Communications Commission but also drew a national/state boundary between long-distance and local telephony that was different than the line that would likely have been drawn under

26. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69–70 (1990).

27. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1679 (1975).

28. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

29. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (Feb. 17, 1981); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 4, 1985). *See generally* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

30. *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act as outside the scope of Congress's power under the Commerce Clause); United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the federal Violence Against Women Act for similar reasons).

the Commerce Clause.[31] And cooperative federalism arrangements like those existing under national environmental statutes like the Clean Air and Water Acts—arrangements that are entirely creatures of statute and regulation—define aspects of our federal structure that dwarf in practical importance those aspects governed by the Constitution itself.[32]

One could give many other examples. The point, though, should already be clear: A functional definition of "the constitution" of the United States would have to take in a great many things besides the provisions of the Philadelphia document, as formally amended. This has at least two important implications for American debates. The first is a challenge to textualism. Emphasizing the incompleteness of even those constitutions that aspire to codification, Professor Tomkins argues that "[c]onstitutional questions, which change over time, are too varied and too unpredictable for any single legal instrument to be capable of answering them all" (p. 9). A textualist might not quarrel with the proposition that many statutes, regulations, and practices outside the central text "constitute" our government, but still insist that matters governed by that central text itself be interpreted according to textualist methodologies. But if all these constitutional principles—that is, the ones in the central text and the ones found in constitutive measures and practices elsewhere—are serving the same ends, and indeed dealing in an interrelated way with the same concerns, then how can it make sense to focus only on the central text in virtually *any* case? And this criticism seems particularly true if the *reason* for the luxuriant grown of uncodified constitutional provisions is the inevitable limit of human foresight in the drafting of the central constitutional text.[33]

Consider, for example, the question of in what circumstances the Constitution requires congressional authorization for the use of military force. Some commentators have attempted to answer this question wholly by reference to the original under-

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31. *See* 47 U.S.C. § 152(b).

32. *See, e.g.*, John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, L. & CONTEMP. PROBS., Summer 1997, at 203, 216–18. I discuss these matters in somewhat more detail in Ernest A. Young, *What British Devolutionaries Should Know About American Federalism*, *in* PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE U.K. (Basil Markesinis & Jorg Fedtke eds., 2005).

33. For a similar critique of reliance on the original understanding of a single text conceived at an isolated point in time, see Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

standing of the text in Articles I and II of the Constitution.[34] And yet there are any number of statutes and practices that are "constitutive" of American war powers, in the sense that they structure and regulate the use of those powers. These might include such things as the War Powers Resolution, the Congress's internal arrangements for oversight of the military and intelligence forces, and the chains of command and deliberation procedures established within the military and the civilian executive branch. If these arrangements serve the constitutive function of implementing the war powers, then there is a strong argument for considering them as part of the relevant legal background for answering unresolved questions about those powers.[35]

The second and more important implication is to expand the horizons of our current debates about constitutional law. In my own specialty of constitutional federalism, for example, debate has focused on the implications of a relatively small set of cases construing the Commerce Clause, the Tenth and Eleventh Amendments, and Section Five of the Fourteenth Amendment for the balance between state and national authority. As I have argued at great length elsewhere,[36] however, the most important cases for the survival of meaningful state autonomy have generally concerned the extent to which particular federal *statutes* preempt state regulation. Likewise, some of the most important cases for individual rights in this country have concerned matters like the reach of the federal *habeas corpus* statute,[37] the Voting Rights Act,[38] and the immigration laws.[39]

If, for example, the Clean Air Act's allocation of authority over air pollution policy between the national and state governments is "constitutive" of the federal relationship in that area, then we should forthrightly recognize that constitutional values

34. *See, e.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

35. These supplemental sources need not all be presentist in their orientation. It is common for originalists to consider institutional arrangements in the Founding period as a guide to the original understanding of the constitutional text. But how different is that from saying that these institutional arrangements—say, the early statutory provisions regulating the military or the practices of early presidents—are likewise part of the constitutional backdrop that an originalist must interpret?

36. *See generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

37. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Brown v. Allen, 344 U.S. 443 (1952).

38. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986).

39. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289 (2001); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

are at stake in statutory cases interpreting the Act's provisions. This is what Justice Breyer was getting at when he pointed out, in an ERISA preemption case, that "the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[40] Recognizing the constitutional values at stake in these sorts of statutory cases can, in turn, bolster the argument for rules of construction grounded in those values rather than in Congress's imputed (and often fictional) intent.[41] In any event, Professor Tomkins's study of English public law, in which statutory matters are readily recognized as having constitutional implications, can help us see the profound constitutional issues lurking in these statutory disputes.

B. LEGAL AND POLITICAL CONSTITUTIONS

For Professor Tomkins, the distinction between written and unwritten constitutions is far less important than that between *legal* and *political* constitutions:

> A political constitution is one in which those who exercise political power . . . are held to constitutional account through political means, and through political institutions. . . . A legal constitution, on the other hand, is one which imagines that the principle means, and the principal institution, through which the government is held to account is the law and the courtroom (pp. 18-19).

For most of its history, English public law has emphasized the political aspects of the constitution. As Tomkins explains, the tradition exemplified by A.V. Dicey's treatise in the 19th century[42] relied heavily on the common law and resisted the development of a separate administrative or constitutional law that would apply only to government. The result was that "the legal constitution struggled to take hold as the animating idea of English public law" (p. 23).

This aspect of English constitutionalism has recently come under pressure, however, from three sources: the introduction into the British legal system of European law, emanating both from the European Community and the European Convention

40. Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting).

41. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550–51 (2000).

42. *See* A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885) (10th ed. 1959).

on Human Rights (p. 23); a changeover in the English judiciary from judges steeped in the Diceyan tradition to those influenced by more legalistic notions now prevalent in the law schools (p. 24); and the fact that, in recent years, "the political constitution has come to be widely seen as having broken down" (p. 24). These trends have resulted in a greater emphasis on courts and judicial review in contemporary public law. Professor Tomkins cites, as a central example, the House of Lords' decision in the *Fire Brigades* case, in which the Law Lords held that the Home Secretary had acted illegally by deciding not to implement a statute duly enacted by Parliament and, instead, replacing it with a reviewed measure adopted by the government as secondary legislation.[43] Traditionally, accountability for such an action would have been left to Parliament. Tomkins views the Law Lords' decision to intervene instead as "giv[ing] up on [the political constitution] and hand[ing] over to the courts the job of keeping the executive in line" (p. 30).

Professor Tomkins is a big fan of the political constitution. Elsewhere, he has announced that "[t]he political constitution, and indeed politics generally, are in need of both defending and praising."[44] He thus views the trend in English public law toward more legalistic models of constitutionalism with considerable skepticism and concern. Tomkins emphasizes three "fault lines" in the legal constitution, one of which is the familiar (to American readers) concern about the undemocratic nature of judicial review: "Why should it be to the unrepresentative and—still—overwhelmingly old, white, male, upper-middle class judges that we turn when we desire to hold the democratically elected government to account?" (p. 209). At least in *Public Law*,[45] however, he seems equally concerned about the *efficacy* of judicial review in facilitating government accountability. His other two "fault lines"—the "capacity" and "potency" of the courts—center on the continuing exclusion of judicial review from many

43. Regina v. Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 A.C. 513. Other prominent examples include M. v. Home Office [1994] 1 A.C. 377 (holding an officer of the Crown in contempt of court); Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374 (refining and summarizing the "heads" of judicial review); and Regina (Daly) v. Secretary of State for the Home Department [2001] 2 A.C. 532 (applying a doctrine of proportionality to invalidate a prison policy on searches of inmates' cells).

44. Adam Tomkins, *In Defence of the Political Constitution*, 22 OXFORD J.L. STUD. 157, 157 (2002) (reviewing MARTIN LOUGHLIN, SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS (2000)).

45. Professor Tomkins' other writings stress the civic republican value of politics. *See id.* at 172–75; ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

areas of government action and the limited remedies available against government actors (pp. 206-09). Tomkins thus rejects the assumption of legal constitutionalists "that no constitutional problem is solved unless or until it is judicially solved, and that there is no constitutional problem that cannot be successfully solved by the judiciary." These assumptions, he warns, both "dangerously underplay the significant role that political accountability . . . can and should continue to play" and "exaggerate the contribution that it is reasonable to expect the law to be able to make" (p. 210).

The "political" constitution seems to have a somewhat different meaning for Professor Tomkins than it generally does in American discourse. For most American readers, I suspect the term "political constitution" will bring one of two notions to mind. One is the claim that political actors have their own independent *interpretive* authority. Larry Kramer has argued, for example, that for most of our history, "[f]inal interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."[46] This view resists the privileging of judicial interpretations of the Constitution; it thus tends to reject the holdings of cases like *City of Boerne v. Flores*,[47] in which the Supreme Court struck down the Religious Freedom Restoration Act (RFRA), enacted under Congress's power to enforce the Fourteenth Amendment, on the ground that *Congress*'s view of what the Amendment required, as embodied in the statute, went further than the Court's.

The second notion is that many constitutional values are protected by political dynamics more broadly than they are by hard constitutional rules. Herbert Wechsler's "political safeguards of federalism,"[48] for example, postulated that the structural composition of the Congress would create political incentives to preserve state autonomy even in areas that fall within the potential authority granted to Congress by the Constitution. We see a clear case of this, I think, in Section 152(b) of the Communications Act of 1934, which foreclosed FCC jurisdiction over local telephone service even if such service fell within the

46. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004).

47. 521 U.S. 507 (1997). *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 142–44 (2001) (criticizing *Boerne*).

48. *See* 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).

constitutional definition of interstate commerce.[49] One can think of this dynamic as "interpretation" in some broad sense: The Congress that enacted the Communications Act was "interpreting" the proper balance of federalism in the area of telephone service. But what is being interpreted is not the bounds of constitutional compulsion. It might fit better to say that constitutional understandings are sometimes "implemented"[50] by political decisions rather than by rules derived from the central constitutional text.

Professor Tomkins, on the other hand, seems to take a narrower view of the "political constitution" that focuses wholly on *enforcement*. American debates about supremacy in interpreting a higher law that binds both court and legislature alike—the first notion discussed above—make little sense in a regime of parliamentary sovereignty, although we might someday see parallel English disputes about authority to interpret the elements of higher law that are slowly being assimilated into the system, such as the European Convention on Human Rights. And Tomkins seems to reject the second notion—that the political constitution includes implementation of constitutional values through statutes, regulations, or other practices that are products of the ordinary political process—as well. On this view, many aspects of English public law—such as the enactment of the Human Rights Act or Parliament's decision to devolve some legislative authority to Scotland—would be manifestations of the "political constitution." But for Tomkins the crucial question seems to be whether the ultimate enforcement of constitutional principle comes from a court. The American Communications Act and the British Devolution Acts, after all, both contain provisions enforceable by the judiciary.[51] Tomkins's paradigm case of political constitutionalism, by contrast, is the doctrine of ministerial responsibility, which holds that "Ministers are personally liable to Parliament for the quality and success of their policies"—that is, subject to political demands for "explanation, apology, and, in the most serious cases, resignation" (p. 140).

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49. *See* 47 U.S.C. § 152(b).

50. *Cf.* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001).

51. *See* Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (holding that § 152(b) foreclosed the FCC from issuing rules concerning the introduction of competition into local telephone markets), *rev'd*, 525 U.S. 366 (1999). On the provisions for at least partial judicial enforcement of the Devolution Acts, see Young, *British Devolutionaries*, *supra* note 32.

This English emphasis on purely political *enforcement* of constitutional principles can serve, I think, as a helpful corrective to two unfortunate tendencies in American debates about constitutional interpretation "outside the courts." One is the occasional statement by the judiciary suggesting that the Constitution means whatever the judiciary says it does.[52] There are numerous sites of constitutional interpretation, however, in which the courts play no role, and in these situations some other actors will be, in Justice Jackson's memorable phrase, "infallible because [they] are final."[53] Where the President enforces his interpretation of the Constitution politically by vetoing a statute he thinks unconstitutional, or by pardoning someone convicted under that statute, it is he who has the last word on what the Constitution means in that circumstance. Professor Tomkins's focus on instances of purely political enforcement of the constitution may help remind American readers that similar instances exist throughout our own system. It may also remind us to question the converse idea that where no court can rule, there is therefore no constitutional constraint.[54]

The second tendency shows up in critics of judicial supremacy who suggest that the courts should defer to Congress's interpretation of the Constitution, even when the *courts* are called upon to enforce that interpretation. Congress enacted the RFRA, for example, to enforce its interpretation of the Free Exercise Clause of the First Amendment, as incorporated in the Fourteenth. But Congress's power to enact the RFRA depended upon its being a measure to "enforce" the Fourteenth Amendment, and it was no surprise that the local governmental defendant in *Boerne*—a suit to enforce the RFRA in court—argued that the law exceeded that power because Congress had overread the Free Exercise Clause.[55] In my view, even a hard-core departmentalist—that is, someone who believes that each branch of government must interpret the Constitution for itself when called upon to do so in the course of its ordinary duties—should say that a *court* confronted with such an argument must resolve

52. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958). Professor Tomkins himself falls into this trap when he says that "[t]he constitutional order of the United States of America is such that it is the US Supreme Court which has the last word" (p. 4).

53. Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., concurring in the result).

54. For instance, one might insist that there are constitutional limits on the war power even though it is unlikely that a court will ever be persuaded to confront the President by ruling on the question.

55. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

it without deferring to Congress's reading of Free Exercise.[56] The important thing—which Professor Tomkins's distinction between legal and political *enforcement* helps illuminate—is that in this case a *court* is acting.

Professor Tomkins's broader point, though, is the *superiority* of political mechanisms for resolving constitutional disputes. The increased salience of such mechanisms in English public law is, in his view, one of the English model's chief attractions vis a vis the American. This point comes through most clearly in a separate essay in which Tomkins discusses the disputed American presidential election of 2000. The "sorrowful episode" of *Bush v. Gore*, he says, showed the "ugliness" of "the legal system and its judicial enforcers."[57] Tomkins suggests that, had a similarly close election in Britain resulted in a hung Parliament, "the constitutional expectation would normally be . . . that the leaders of the principal political parties would negotiate a settlement which was likely to attract the support of a majority of MPs."[58] Although recalcitrance on the part of those leaders might require unusual measures, it is clear that "the courts would be kept well out of it, and the decision-makers . . . would be both democratically elected and politically accountable actors."[59]

Put aside the question whether a "political" resolution of the 2000 election by Tom Delay's House of Representatives would have been any less "ugly" or "sorrowful." The question is

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56. I have elaborated this argument elsewhere. *See* Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (book review). On departmentalism, *see, e.g.*, Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POLITICS 401, 411–12 (1986).

57. Tomkins, *Political Constitution*, *supra* note 44, at 170. Professor Tomkins relies heavily on Justice Stevens's dissent, which lamented that the "perfectly clear" "loser" of the election was "the Nation's confidence in the judge as an impartial guardian of the rule of law." 531 U.S. 98, 129 (2000) (Stevens, J., dissenting). But public opinion polls after the Court's decision showed either narrow decreases or even increases in public confidence in the Court, and continuing high absolute levels of such confidence overall. *See, e.g.*, Richard Benedetto, *It's Time to Move On, People Say Americans Relieved Fight is Finally Over*, USA TODAY, Dec. 18, 2000, at 8A; Richard Morin & Claudia Deane, *Public Backs Uniform U.S. Voting Rules*, WASH. POST, Dec. 18, 2000, at A1; Janet Elder, *Poll Shows Americans Divided Over Election, Indicating that Bush Must Build Public Support*, N.Y. TIMES, Dec. 18, 2000, at A22. There thus seems to be some truth to Judge Posner's observation that "*Bush v Gore* may have done less harm to the nation by reducing the Supreme Court's prestige than it did good for the nation by averting a significant probability of a presidential selection process that would have undermined the presidency and embittered American politics more than the decision itself did or is likely to do." Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 54.

58. Tomkins, *Political Constitution*, *supra* note 44, at 170–71.

59. *Id.* at 171.

whether the British comparison really proves that political enforcement can resolve even these most intractable disputes. One problem with the analogy is that Professor Tomkins has a safety valve for his political dispute that was unavailable to the participants in the U.S. election of 2000: the Queen. If the leaders of the British political parties could not agree on who should assume the office of Prime Minister, the question would be resolved by a neutral and authoritative decisionmaker.[60] In the American case, the parties could have played out the Twelfth Amendment procedure for resolving election disputes in the House of Representatives.[61] As Judge Posner has pointed out, however, there is substantial likelihood that further political disputes about the appropriate process would have arisen at that point, raising once again the need for an authoritative and neutral decisionmaker.[62] The British disputants in Tomkins's hypothetical have not avoided the need to look outside of ordinary politics to solve their problem; rather, they can simply appeal to a different actor.

Still, I think Professor Tomkins has a point about the relative willingness of American and British actors to resort to legalistic solutions. Stated broadly, the English notion of convention is that some things are "not done" even though the legal constitution permits them. But one of the most striking things about American politics today is the extent to which these "conventional" notions of restraint seem to have broken down. Consider the shenanigans of the last decade: a government shutdown (1996), imposition of limits on federal court jurisdiction (1996), a presidential impeachment (1997), a litigated presidential election (2000), filibusters of lower court judges (2003–04), and numerous wartime measures that stretch independent presidential authority to (and perhaps past) its limit (2001–04). I do not contend that the present period is unique in our history; the Federalists and the Jeffersonians were not exactly cordial, either. I do think that the level of conventional restraint at the current time is unusually low.

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60. *See id.* at 171. As Professor Tomkins points out, *id.* at 172, British party leaders would be extremely reluctant to allow the Queen to make this choice, and this reluctance would increase the pressure for political compromise. But at least in prior disputed American elections, the principal actors have likewise been reluctant to involve the courts for similar reasons.

61. *See generally* Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001).

62. Posner, *supra* note 57, at 43–44.

To be sure, many of my examples are themselves "political" actions rather than legal ones. But even such measures as the Clinton impeachment and the Senate's more recent judicial filibusters suggest a preference for legalistic remedies. Impeachment itself casts Representatives as lawyers and Senators as judges, and the process went forward only because President Clinton resisted political pressure to resign and the House Republicans rejected the option of simply seeking to punish the President's party at the polls. Likewise, the importance of judicial nominations—and hence the willingness to "go to the mattresses"[63] over them—is highest when we expect that basic social controversies will be settled in the courts. And the current President's multiple decisions to do things like detain citizens indefinitely and try suspected terrorists before military commissions without seeking Congressional authorization have the effect of shifting debate over those decisions from legislative to judicial fora.[64] Not every "political" act strengthens the political constitution.

All of these acts suggest that government actors are pushing their constitutional options as far as they can go, rather than feeling constrained by politics to do something short of what they *might* do, legally speaking. It is primarily in this sense that recent events suggest that the American political constitution has relatively little force. What we may be experiencing is a variation on James Bradley Thayer's concern that aggressive judicial review would encourage legislators to ignore the constitution in their own deliberations.[65] Every lawyer knows that the posture of a judge toward a disputed legal question is quite different from that of a litigant. A view which stresses the political constitution, or "the constitution outside the courts," may encourage political actors to think of themselves not necessarily as

63. *See* THE GODFATHER (Paramount Pictures 1972). We have, in fact, been at the mattresses for a long time, since the present filibusters are part of a cycle of Republican delays of Democratic nominees, the earlier "Borking" of Republican nominees, etc.

64. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (detentions); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) (military commissions). One would not want to overstate the judicialization of these controversies, however. There is good reason to believe that intensive constitutional debate in the media, in Congress, and even in academia has had a moderating effect on the Administration's policies, particularly as manifested in the regulations promulgated by the Department of Defense prescribing relatively generous procedural protections for defendants before military commissions. *See* Dep't of Def., Military Comm'n Order No. 1 (March 21, 2002), *available at* http://*www.defenselink.mil/news/Aug2004/commissions_orders.html*.

65. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

judges but at least as interpreters tasked with finding the "right answer" to a constitutional question. The judicialization of constitutional disputes, on the other hand, encourages political actors to think like litigants—that is, to press the arguments advantageous to them as far as they will go, and leave the discovery of right answers to the court.[66] This is not to say that constitutionalism outside the courts will ever be perfectly disinterested or even particularly moderate in tone. But I do think that if parties to a political dispute over constitutional meaning expect ultimately to end up in court, the emphasis may shift from "What is our best interpretation of what the Constitution means?" to "What's the most advantageous reading that we can plausibly defend in court?" That can't be healthy.

At the end of the day, Professor Tomkins's enthusiasm for political solutions will most likely seem a little excessive to American readers—particularly those who believe that legal enforcement of constitutional principle played an essential role in overturning such evils as racial segregation.[67] As I suggest in Part II—and as Tomkins recognizes—there are reasons to doubt whether the political constitution can adequately hold the government to account even in England, much less in an America where the expectation that the courts will resolve many important controversies is considerably more entrenched. Nonetheless, the basic thrust of Tomkins's account should remind us of Learned Hand's admonition that "a society so riven that the spirit of moderation is gone, no court *can* save . . . a society where that spirit flourishes, no court *need* save . . . [and] in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."[68]

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66. I do not mean to say that this is a *good* strategy, even for litigants. My mentors at Covington & Burling constantly stressed the need for the lawyers themselves to offer to courts a balanced interpretation of the law, both as part of their responsibilities as officers of the court and also as a self-interested way of maximizing the persuasiveness of their arguments to the judge.

67. One need not believe that the courts had the efficacy to overturn segregation on their own, *see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (demonstrating that they did not), to think that they played an important role in prompting the necessary political and social changes. *See, e.g.*, Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (reviewing Rosenberg). Professor Tomkins has written that "[t]he freedom which politics invests in us . . . [is] a freedom from domination," Tomkins, *Political Constitution*, *supra* note 44, at 172, but much of the critique of the civic republican position that Tomkins defends has been rooted in concerns about domination of one social group by others. *See, e.g.*, Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L. J. 1663 (1988).

68. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY 172, 181 (Irving Dilliard ed., 1952).

Much has been written about the polarization of American politics, but the somewhat narrower task for constitutional lawyers may be to think hard about how to revive the sense of political restraint that can make our political constitution more viable.

C. AN ENGLISH VIEW OF AMERICAN CONSTITUTIONAL LAW

Public Law has so little to say about American constitutional law that it is hardly fair to evaluate it on its assessments of doings on this side of the Atlantic. Professor Tomkins's few comments on the subject, however, provide some interesting insight into how our constitutional debates look from the outside. In the course of demonstrating that even a written constitution like ours cannot, without supplementation or elaboration, answer all the questions put to it, Tomkins asserts that whether Bill Clinton's perjury amounted to a "high crime or misdemeanour" warranting impeachment was "the most pressing and important question[] that [was] asked of US constitutional law during the whole of the 1990s" (p. 8).[69] That can't be right. Think of the other questions contending for the title: Should the constitutional allocation of authority between the national government and the states be recalibrated (or restored)?[70] Do homosexuals have rights to sexual autonomy and equal treatment?[71] Should the Court's recognition of a woman's right to an abortion, and its substantive due process revolution more generally, be limited, expanded, or reconsidered?[72] These are basic questions about the structure of the government and the relation of the individual to the state, and their lasting significance for constitutional law is obvious.

It is hard to see the Clinton impeachment in the same light. The Johnson impeachment during Reconstruction served as a

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69. Professor Tomkins allows as how the Supreme Court's decision in *Bush v. Gore* might also be a strong contender for "the most important constitutional event in recent American history" (p. 8 n.5). But I would argue that this once again mistakes the sensational for the lastingly significant. The *sui generis* nature of the situation, the doctrinal narrowness of the Court's decision, and the Court's obvious reluctance to repeat its intervention make it hard to compare *Bush v. Gore* to, say, *Planned Parenthood v. Casey* in significance.

70. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

71. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

72. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000); Washington v. Glucksberg, 521 U.S. 702 (1997); Planned Parenthood of Southeastern. Pa v. Casey, 505 U.S. 833 (1992).

forum for venting basic constitutional issues about the president's power over his subordinates and the appropriate way to put the nation's pieces back together after a civil war,[73] but what principles of equivalent importance were at stake in the Clinton episode? The latter strikes me as more akin to the old adage about academic politics: It was so nasty because so little—in terms of constitutional principle—was at stake. The fact that it *came* to impeachment does indicate, as I have already suggested, an important structural breakdown in notions of political restraint. But it seems to me that dragging out the heavy constitutional artillery over some stains on a blue cocktail dress is a symptom of a period of intense partisan competition combined with disagreements of principle too minor to serve as adequate vehicles for that competition.

In the end, Professor Tomkins's view of the Clinton impeachment's salience may tell us more about English constitutional law than it does about our own. The impeachment raised no questions about the limits of presidential *authority*; no one, in other words, thought the President had the authority to lie under oath. It was instead a controversy about *accountability*; that is, the central issues concerned the circumstances under which the highest executive official might be removed from power. Perhaps it should be unsurprising that English constitutionalists focus on the latter sort of issue. The English model, after all, confers vast sovereign authority on the party in power, but checks that authority by permitting both the ouster of the government at the instant that it loses Parliament's confidence and the undoing of all the prior regime's works by its successors in office. English public law, in this sense, is about accountability of leaders rather than checks on their power to act.[74] From that perspective, an American controversy about removing the President might understandably loom larger than disputes about the scope of congressional power or individual rights against government. The next Part explores in greater detail the English notions of accountability developed in *Public Law*.

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73. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 113–57 (1999).

74. It is perhaps indicative of this tendency that *The Economist*'s reaction to the Abu Ghraib torture scandal was to call for Secretary of Defense Donald Rumsfeld to resign rather than for the strengthening of legal curbs on the interrogation of prisoners. *See Resign, Rumsfeld*, ECONOMIST, May 8, 2004, at 43. Obviously, one might have both limited authority *and* personal accountability at the same time, and perhaps Rumsfeld *should* have resigned. My point is simply that one would tend to lean more heavily on personal accountability where limits on authority are sparse.

II. WEST TO EAST

I hope to have already conveyed some of what American constitutional lawyers might learn from Professor Tomkins's elegant analysis of the English system. Can English public lawyers learn anything from America? As Ian Loveland observed a decade ago, "the United States has long been grappling with issues which are now being forced on to the British political agenda, and might thus be thought to offer valuable guidance . . . to British lawmakers."[75] In addressing this issue, I want to focus on two elements of Tomkins's argument: the dichotomy between political and legal constitutions, and his fascinating development of the English separation of powers, which is quite different from our own.

One might understand these two central components of *Public Law* as a forthright defense of the Westminster model of parliamentary democracy in the face of two tendencies. The first is an attempt, by emphasizing the legal constitution over the political, to move toward what Bruce Ackerman would call "constrained parliamentarianism"—that is, a parliament constrained by higher law enforceable by the courts.[76] The second is a revisionist interpretation of the English separation of powers that finds within it a commitment to a tripartite division of legislative executive, and judicial functions. By rejecting these tendencies in favor of a relatively unadulterated Westminster model, Tomkins registers an important dissent from the apparent conventional wisdom that Westminster is outdated or otherwise undesirable.[77]

Professor Tomkins's defense of the Westminster model encourages us to take seriously an altogether different way of thinking about the separation of powers. This stark reminder that our American understandings of the subject are hardly inevitable may well be more important for readers west of the Atlantic than any particular comparative insight to be gleaned from *Public Law*. There are, nonetheless, commonalities, and their

75. Ian Loveland, *Introduction*, *in* A SPECIAL RELATIONSHIP? AMERICAN INFLUENCE ON PUBLIC LAW IN THE UK 1, 10 (Ian Loveland, ed., 1995).

76. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 665 (2000). Professor Ackerman de-emphasizes the courts in the process of higher-law *formation*, *see id.* at 666–68, but it is clear that the courts play a primary role in the *enforcement* of higher law. *See id.* at 668 ("We will require a constitutional court to make the principles enacted by the people into operational realities."). He is thus a devotee of the "legal constitution" as Professor Tomkins defines it.

77. *See, e.g.*, Tushnet, *supra* note 15, at 813–14 (observing that "[t]wo models of constitutionalism were on offer in the last century," but that "[f]or all practical purposes, the Westminster model has been withdrawn from sale").

usefulness may run in both directions. The remainder of this essay thus asks whether American experience can inform English constitutional debates. Again, I want to confine the role of comparative constitutional analysis chiefly to raising questions that must then be resolved within the English system; I don't presume to provide any answers.

A. COLLABORATIVE ENFORCEMENT

Professor Tomkins paints the dichotomy between political and legal constitutions as "a stark choice": "[D]o we want to replace our political constitution with a legal one?" (p. 30). I want to suggest, however, that the choice may not be as stark as all that. For one thing, it seems more accurate to say that we are choosing between legal and political *mechanisms* for enforcing one constitution (albeit with scattered components), rather than between two distinct constitutions. Moreover, political and legal enforcement are not unrelated, and each may affect the efficacy of the other. Courts may develop legal doctrines that buttress the political constitution, and political actors may take steps to facilitate legal enforcement of constitutional principles. One way forward from Tomkins's portrait of an increasingly frail political constitution coupled with a still-nascent (and perhaps undesirable) legal constitution would be to ask how those two flip-sides of English constitutionalism might each be employed to buttress the other.

A great deal of the "legal" enforcement of the American Constitution is directed toward enhancing the operation of political checks. This is the main thrust, for example, of "process federalism."[78] That approach takes as given that "political safeguards" such as the representation of the states in Congress or the procedural difficulty of making federal law will remain the most important checks on central authority.[79] Process federalism acknowledges, however, that these political checks are imperfect, and it seeks to develop judicial doctrine to maintain or even improve their operation. The Court has thus employed "clear statement" rules of statutory construction, for example, to require that the states' defenders in Congress have clear notice of threatened impositions on state autonomy and to impose an ad-

78. *See, e.g.*, Young, *Two Federalisms*, *supra* note 36, at 15–16.

79. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Bradford R. Clark, *The Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

ditional drafting requirement on such legislation.[80] Similar rules have required that national decisions to narrow state regulatory authority be made by actors, like Congress itself, that are accountable to the states rather than by other actors, like administrative agencies, that are not.[81] These sorts of process-forcing rules have played similar roles in the protection of individual rights.[82] I have described these sorts of rules elsewhere as instances of "collaborative enforcement"—that is, enforcement strategies that encourage one set of institutions, like courts, to develop practices that enhance the abilities of other institutions, like Congress, to implement constitutional norms that both institutions are committed to enforcing.[83]

Collaborative enforcement also plays a role in Britain, notwithstanding the sharp dichotomy between legal and political enforcement posed by Professor Tomkins. The impact of the new Human Rights Act (HRA), for example, appears to be twofold: It encourages English courts to interpret ambiguous statutes and secondary legislation in accord with the protected rights, and it empowers courts effectively to "remand" acts of Parliament that a court finds violative of the HRA back to the legislature for another look (p. 122). The relationship between Parliamentary sovereignty and European Union law will, in most cases, be similar: Even for Acts of Parliament passed subsequent to the European Communities Act of 1972 (ECA), English courts construe those statutes—wherever possible—in conformity with European law (p. 111).[84] Both these arrangements strike this Ameri-

80. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991).

81. *See, e.g.*, Solid Waste Auth. of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

82. *See, e.g.*, Cass. R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

83. *See generally* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005).

84. *See also* Paul Craig, *Constitutional and Non-Constitutional Review*, 54 CURRENT LEGAL PROBS. 147, 162–64 (2001). The *Factortame* litigation raised the more difficult case of a clear conflict, and the English courts held that they could enjoin the enforcement of an Act of Parliament inconsistent with European law. *See* Regina v. Secretary of State for Transport, ex parte Factortame (No. 2) [1991] 1 AC 603. Professor Tomkins ties himself in knots trying to make this conclusion consistent with the doctrine of parliamentary sovereignty. He says that the English court did not say that it could enjoin an Act of Parliament *as a matter of English law*; instead, the court was simply enforcing *European* law, which it was authorized to do by the ECA. Hence, "it remains the case that under English law nobody has the power to override or to set aside a statute, but it is no longer the case that English law is the only law that is applicable in England" (p. 118).

I have to say that I find this completely unpersuasive. It is like saying that joining the United States did not compromise the sovereignty of the State of Texas, because it re-

can observer as similar to a process-forcing "clear statement" regime; they thus might fruitfully be viewed as ways in which the legal constitution operates in tandem with the political one.

Collaborative enforcement can also operate in the opposite direction, with the legislature making a political decision that helps to facilitate the judicial enforcement of legal constraints. One might, for instance, understand the War Powers Resolution in this way. Judges encounter serious difficulties in assessing whether a particular military action amounts to a "war" that must be declared by Congress; the resolution, on the other hand, may be triggered simply by introducing the armed forces into "hostilities" or into foreign territory "equipped for combat."[85] The resolution may thus render certain war powers questions more susceptible of judicial resolution—and therefore less likely to be held non-justiciable—by imposing a more determinate standard than the Constitution itself does.[86]

Likewise, various bills in Congress have proposed interpretive guidelines for courts construing the preemptive impact of national legislation on state regulatory autonomy.[87] Although the power of Congress to prescribe interpretive rules for courts is not free from controversy, such guidelines would, at a minimum, be relevant to the task of determining what Congress intended on the issue of preemption. That would assist the courts

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mains the case that the Texas legislature (or the people of Texas by state constitutional amendment) can still set aside any prior law of Texas. The only change is that, by virtue of the national Supremacy Clause, Texas law is not the only law applicable in Texas. But who in the world cares whether Texas law is set aside as a matter of Texas law or as a matter of federal law? The point is that it can be—and frequently is—set aside. The same is true in Britain after *Factortame*: Acts of Parliament can be—and, in all likelihood, frequently will be—set aside where they are in conflict with European law. It makes no more sense to deny that Parliament's sovereignty has been seriously narrowed than it does to insist that Texas remains just as sovereign as it was prior to its entry into the Union.

85. 50 U.S.C. § 1543.

86. *Compare, e.g.*, Campbell v. Clinton, 203 F.3d 19, 24–25, 28 (D.C. Cir. 2000) (Silberman, J., concurring) (concluding that neither the statutory nor the constitutional question was justiciable), *with id.* at 37, 39 (Tatel, J., concurring) (concluding that both were justiciable, but suggesting that the statutory question was easier to resolve). A judicial determination that the resolution had been violated, of course, would leave much to decide, including the constitutionality of the resolution itself and the appropriate remedy that might issue from a court. But a judicial declaration that the resolution had been triggered and/or violated might, in itself, then help frame the terms of a decisive political debate about what to do about the situation.

87. *See, e.g.*, Federalism Enforcement Act of 1998, S. 2445, 105th Cong. (1998); State Sovereignty Act of 1998, H.R. 4196, 105th Cong. (1998). Neither of these bills passed, but the Executive Branch has promulgated a similar requirement, binding on administrative agencies that must interpret statutes, by Executive Order. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

in enforcing the dictate of the Supremacy Clause—part of the legal constitution—by helping to specify the situations in which state laws should be considered in conflict with the supreme law of the land.

As a last example, consider the basic federal civil rights statute, 42 U.S.C. § 1983, which provides a private right of action to enforce federal constitutional rights against state and local officials. Although state officials would be *bound* by federal constitutional rights even in the absence of such a statute, the availability of a federal cause of action, a federal forum, and (under 42 U.S.C. § 1988) a right for successful plaintiffs to recover attorneys' fees makes a tremendous difference in facilitating the enforcement of these rights. In the case of similar suits against federal officials, the Supreme Court has itself created an implied right of action for damages against federal officials.[88] It seems fair to say, however, that the judicially-implied version of this cause of action has been far less helpful to persons whose rights have been violated than the statutory right of action against state and local officials.[89] Section 1983 thus demonstrates the importance of political action to give teeth to the principles of the legal constitution.

Again, English examples discussed by Professor Tomkins appear to fit this pattern. The Human Rights Act's relatively specific provisions, for example, operate in an area where the English courts had been groping toward judge-made, substantive due process-like restrictions on governmental action implicating individual rights. Parliament's decision to define those rights by statute thus may well enhance the role of the judiciary in enforcing human rights both by lending Parliamentary sanction to such enforcement and by providing the courts with more determinate guideposts.[90] My point is thus not to prescribe that English law

88. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

89. *See generally* RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 812–25 (5th ed. 2003) (noting the limited willingness of courts to expand the *Bivens* remedy, and the extremely infrequent success of individual plaintiffs).

90. The Human Rights Act's significance is more complex than this, however. It may, for instance, not only facilitate judicial review but also cabin its previously open-ended character. Moreover, its passage was surely an effort not only to rationalize judicial review within the British system but also to maximize compliance with the European Convention on Human Rights.

It is also worth noting that not all of the new rights-expanding reforms work through the courts. For example, the new Freedom of Information Act, which came into effect on January 1, 2005, operates by creating an independent commissioner of information to

follow American notions of collaborative enforcement, but rather to suggest that such notions may help provide a theory for what is already occurring in English public law and demonstrate that the choice between political and legal constitution is not as stark as Tomkins sometimes makes it sound.

B. THE (REALLY) OLD SEPARATION OF POWERS

The big problem with the mechanisms of collaborative enforcement that I have been discussing is that it is not at all clear how well they would work in a parliamentary system like Britain's. One cannot repeat often enough Vicki Jackson's caution that it is particularly difficult to derive positive prescriptions from comparative law when we are concerned with the structural components of a constitution; those components, after all, tend to be parts of "package deals," integrally connected to other institutional arrangements.[91] It is thus dangerous to assume that clear statement rules, for example, would operate the same way in the context of the English separation of powers as they operate in America.

The American model of collaborative enforcement, for example, depends on enhancing political and procedural constraints that operate within the legislative process. A federalism-protecting clear statement rule, for instance, may both mobilize defenders of state autonomy to oppose a legislative proposal and add to the burden of inertia that proponents must overcome by imposing additional drafting hurdles. One may wonder how effective these checks can be in a parliamentary system where party discipline minimizes the effect of both political opposition to the Government's legislative program and inertial barriers to legislative action. The point of the Westminster model, as Bruce Ackerman has explained, is to give "*plenary* authority" to the governing party.[92]

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enforce the act. Although there appears to be some eventual right of appeal to the courts, the process is primarily administrative in nature. *See Freedom of Information Act 2000; Out of the Darkness*, THE ECONOMIST, Jan. 1, 2005, at 11.

91. *See* Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 273–74 (2001); *see also* Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795 (1997) (urging caution before "exporting" American structures to foreign contexts).

92. Ackerman, *supra* note 76, at 643; *but see* Tushnet, *supra* note 15, at 834 (arguing that the inertial checks on which "clear statement" and similar rules depend also exist in parliamentary systems).

One of the principal arguments of *Public Law*, however, is to insist on the viability and continued relevance of a separation of powers between Parliament and the Government. Professor Tomkins notes that a number of revisionist commentators have recently tried to argue that the English Constitution reflects a Montesquieuian separation of powers (pp. 38-39).[93] Tomkins likewise thinks that England has a meaningful separation of powers, but he rejects ahistorical yearnings for Montesquieu and Madison in favor of a much older vision forged in the crucible of the constitutional crises of the 17th century. Tomkins writes that "[t]he seventeenth century was the formative period of the English constitution—our foundational moment." Hence, "[t]he English constitution was forged in the blood of civil war and its aftermath" (p. 45). And the separation of powers that emerged from that strife "is a separation between the Crown on the one hand, and Parliament on the other" (p. 44).

This notion requires a good deal of explanation, especially for American readers used to thinking of the British monarch as a ceremonial figure whose primary function is to fuel the tourism and tabloid industries. Professor Tomkins insists that "[t]he monarch is no mere figureheard. As Queen, Elizabeth II has extraordinary power," even in her personal capacity (p. 62).[94] More important than the monarch's personal powers, however, is the power of "the Crown"—defined as the monarch *and her ministers*, who make up "the Government." Tomkins's central notion of separation of powers rests on this tension between the Crown and the Parliament. It is tempting to view the Crown/Parliament distinction as tracking American notions of the Executive and Legislative branches, but Tomkins insists that this parallel is illusory. Virtually all legislation, after all, is in fact proposed by the Government and then rubber-stamped by virtue of its command of a Parliamentary majority (p. 95). Parliament's more important roles are instead to "supply" the Government, both in the sense of raising revenue and by providing the members of the ministry from its own ranks, to "scrutinize" its activities through ques-

93. Tomkins cites COLIN MUNRO, STUDIES IN CONSTITUTIONAL LAW 328–32 (2d ed. 1999); T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (1993), and ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW (1998).

94. These powers include the power to choose the prime minister in the event of a hung parliament (in some circumstances), the power to "assent" to legislation, and certain powers in dealing with the Commonwealth countries. The exercise of these powers is, however, generally constrained tightly by convention (pp. 62–72).

tions and investigations, and to vote it out of office if Parliament's confidence in the ministry should fail (pp. 91-92).

Professor Tomkins's 17th century account of the separation of powers is fascinating, although it remains somewhat difficult to get a firm fix on what makes it a meaningful check on the power of the Prime Minister. One can concede that Parliament has many ways of checking the Government, and that the Government remains dependent on Parliament, and yet it is hard to get around the fact that the Parliament and the Executive are basically *the same people*, at least at the top. Tomkins's notion thus seems to depend on creating some political and institutional separation between the Parliament itself and its members who make up the Government. Despite Tomkins's rejection of revisionist appeals to Montesquieu and Madison, his own vision follows Federalist 51 in its dependence on the notion that different institutions of government will have strong competitive incentives to check one another.[95] But it is not clear that these incentives exist in all circumstances,[96] particularly where the participants in competing institutions are united by bonds of party. We would expect that problem to reach its apogee in systems like Britain's, where strong party discipline is the norm.

I am in no position, of course, to second-guess Professor Tomkins on the realities of British politics. And at least to a casual reader of the *Economist*, the notion of separation between Parliament and the Government does seem to have some purchase in the present political dynamic. On the two issues of most interest to American observers, the most interesting divisions seem to be taking place *within* the major political parties. On the war in Iraq, Prime Minister Tony Blair has come close to outright rebellion from elements within the Labour party.[97] Likewise, the extent to which Britain should seek to strengthen and further integrate itself into the European Union seems to divide both Labour and Conservative politicians.[98] Such intra-party di-

95. *See* THE FEDERALIST NO. 51, at 349 (Jacob E. Cooke ed., 1961) (James Madison).

96. *See generally* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that one cannot assume that government institutions will always act to maximize their own power).

97. *See, e.g.*, *Clare Loses It*, ECONOMIST, May 17, 2003, at 51.

98. *See, e.g.*, *The Ties that Do Bind*, ECONOMIST, May 24, 2003, at 61 (discussing the differences over Europe between Blair and Gordon Brown, the Labour Chancellor); *The Europhiles' Rebel Yell*, ECONOMIST, Nov. 1, 1997, at 56 (discussing splits in the Tory party over Europe).

visions would seem to have at least some potential to divide the party-in-Parliament from the party-in-Government.

One wonders, however, how well the British system can function if meaningful separation between Parliament and the Government becomes a fixture of British politics. The basic problem would seem to be that the citizenry has no separate mechanism for holding the Parliament and the Government to account. If, for example, one is against the war in Iraq and lives in a constituency whose Labour MP has been actively engaged in holding the Blair Ministry to account for its involvement there, does one vote to return that MP at the next poll? A vote for the Labour MP, after all, is a vote for Tony Blair—the last, best friend of George Bush in an otherwise hostile world. There is, in other words, no separate mechanism for approving the actions of one's MP while disapproving of the Government formed by the same party; one cannot, as an Arizona Republican might do, vote for John McCain for the Senate but against George Bush for the presidency.

The British system may also suffer from a more subtle handicap when it comes to fostering the sort of intra-party debate that might allow the party-in-Parliament to function as a meaningful check on the party-in-Government. In the U.S. system, the decentralization of the major parties is an important source of intra-party debate; in particular, the existence of *state* party organizations, some of which may be in power at the state level at any given time and therefore facing the need to actually govern, injects a much more diverse set of political perspectives than one might expect in a more unitary system. One of the primary forces for debate within the contemporary Republican party, for example, comes from the Republican governors of moderate to liberal states—people like Arnold Schwarzenegger in California, Mitt Romney in Massachusetts, and George Pataki in New York—who have argued that the party should move to the political center.[99] Likewise, in the early 1990s, Governor Bill Clinton and other Democratic governors of more moderate states were able to mount a challenge to the national Democratic party establishment and move their party to the middle. Part of that diversifying impulse may well come from the fact that these governors face substantially different political circumstances and

99. *See, e.g.*, Joe Mathews & Megan Garvey, *Stem Cell Research: Governor Breaks Ranks Toward Center*, L.A. TIMES, Oct. 19, 2004, at A1 (discussing Governor Schwarzenegger's support for a major stem cell research initiative in California despite opposition from the conservative wing of the Republican party).

policy challenges than those confronting the national party. And the mere existence of state governmental institutions gives different politicians a platform not controlled by the party leadership. Unless British devolution goes much further than it has thus far, it is hard to see how British parties would generate a similar dynamic.

Nonetheless, I cannot help but think that Professor Tomkins's instinct to build upon the separation of powers that England has inherited from its history—rather than to strain to shoehorn England's arrangements into a Madisonian tripartite model—is the right one. In any event, Tomkins's discussion of the institutional separation between Crown and Parliament returns us to the principal virtue of *Public Law* for American readers: It is immensely healthy and fruitful, I think, to recognize that other well-functioning democracies may set things up completely differently than we do. And as our own system diverges further and further from the Madisonian model—for instance, through the continuing development of the administrative state—the alternative possibilities for holding government to account in different separated-power systems may become increasingly relevant to our own.

CONCLUSION

If the dollar-sterling exchange rate stays where it is, then the most practical way for Americans operating on an academic's salary to learn about British constitutionalism will be to read about it in books. For this purpose, one can hardly do better than *Public Law* as an entrée into the English system. It is likewise hard to imagine a better time for Americans to take up the subject, as English public law deals with the dual constitutional conundrums of European integration and far-reaching internal constitutional reform through devolution, revision of the House of Lords, and the like. The fundamental task of English public law at the dawn of the 21st century is to adapt a venerable and largely successful constitutional order to the fundamental challenges of globalization and the modernization of domestic society. Notwithstanding the strangeness of the English system, *that* challenge may not be altogether unfamiliar to American readers.