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Journal

UCLA School of Law Public Law & Legal Theory Series, 08(33)

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Publication Date

2008-10-22

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UCLA School of Law
Public Law & Legal Theory Research Paper Series
Research Paper No. 08-33

THE MYTH AND THE REALITY OF AMERICAN
CONSTITUTIONAL EXCEPTIONALISM

by

STEPHEN GARDBAUM



THE MYTH AND THE REALITY OF AMERICAN CONSTITUTIONAL EXCEPTIONALISM

Stephen Gardbaum*

This Article critically evaluates the widely held view inside and outside the United States that American constitutional rights jurisprudence is exceptional. There are two dimensions to this perceived American exceptionalism: the content and the structure of constitutional rights. On content, the claim focuses mainly on the age, brevity, and terseness of the text and on the unusually high value attributed to free speech. On structure, the claim is primarily threefold. First, the United States has a more categorical conception of constitutional rights than other countries. Second, the United States has an exceptionally sharp public/private division in the scope of constitutional rights resulting in their lesser reach into private conduct. Third, the U.S. Constitution is exclusively a charter of negative rights and so rejects the types of positive constitutional rights, including social and economic rights, that many other modern constitutions recognize.

The thesis of the Article is that while the conventional wisdom is largely correct about American exceptionalism regarding the contemporary content of a few specific rights, it is largely wrong regarding the general structure of constitutional rights. Once labels and assumptions are set aside, I show that on each of the three identified structural issues, far from occupying a relatively extreme and lone position as is generally thought, the U.S. approach is actually well within the contemporary global constitutional mainstream. Debunking the myth of American structural exceptionalism matters for several important and timely reasons. These include undermining one prominent argument against the federal courts using foreign constitutional decisions and also the idea that there are distinctive threshold barriers in the United States against judicial implication of a few social and economic rights.

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* Professor of Law, UCLA School of Law. I am grateful to Bruce Ackerman, Rosalind Dixon, Richard Fallon, Barry Friedman, Vicki Jackson, Tsvi Kahana, Ken Karst, Mark Tushnet, Benedict Kingsbury, Frank Upham, Joseph Weiler, students in my comparative constitutional law seminar, and audience members at the NYU School of Law International Legal Theory Colloquium and the Queen's University Faculty of Law seminar for extremely helpful comments on previous drafts.

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INTRODUCTION

The familiar notion of American exceptionalism¹—that, in many spheres of activity, the United States does things in a qualitatively different way than other developed countries—is shared by Americans (“only in America”) and non-Americans alike.² Although there is, perhaps, broad consensus on the list of differences, there is less agreement between internal and external viewpoints on their explanations, and still less on the underlying normative assessment attached to the entire phenomenon. While Americans tend to see these differences as a badge of honor, reflecting the vigor and boldness of the new world versus the old, many non-Americans like to view them, if not quite as a badge of shame, as a badge of immaturity, cultural inferiority, or lack of sophistication.

Depending on one's perspective, the standard list of differences includes economic systems (free market capitalism versus a mixed economy), political traditions (U.S. antigovernmentalism, top elective offices open to

1. The idea of American exceptionalism is commonly traced to John Winthrop's "citty upon a hill" sermon of 1630, and from there to Thomas Paine's *Common Sense*. The term itself is usually attributed to Tocqueville: "Thus the Americans are in an exceptional situation, and it is unlikely that any other democratic people will be similarly placed." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 455–56 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

2. The historical and sociological literature on American exceptionalism, in its various guises, is vast. Among the best-known general works are JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* (1993); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996); DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* (1998); Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 AM. Q. 1 (1993); Dorothy Ross, *American Exceptionalism*, in *A COMPANION TO AMERICAN THOUGHT* 22 (Richard Wightman Fox & James T. Kloppenberg eds., 1995).

those with little or no political experience, and the absence of both a strong socialist movement³ and a professional, high-level civil service), work ethics and culture, moral and personal values, the contemporary roles of religion and extent of religious belief, attachment to firearms, unique team sports, senses of humor, and forms of self-presentation. The explanations of these differences are, of course, legion and much disputed, but they include the United States' newness, existence and status as the product of the first successful colonial revolution, geography, political isolation and isolationism, a long period of buoyant economic self-sufficiency, and demographics as a heterogeneous and non-organic immigrant society.⁴ To a greater or lesser degree, the United States seems to have evolved differently, like a giant Galapagos, or better yet, started out as a political-economic mutation of the species.

There is a parallel view, widespread among both American and comparative legal scholars, that the list of differences also includes constitutional law.⁵ Prior to 1945, the United States was unequivocally exceptional in this regard and, by any standard, far more exceptional than it is now. It was then one of the very few countries with a written constitution that (1) included a bill of rights, (2) gave the constitution, including the bill of rights, the status of the supreme law of the land, (3) entrenched it against amendment or repeal by ordinary legislative vote, and (4) enforced it by the power of judicial review. Since 1945, however, the developed world in particular has converged on these constitutional fundamentals to such an extent that countries which continue to reject one or all of them—such as the United Kingdom, the Netherlands, New Zealand, or Australia⁶—are now truly exceptional.

3. The classic work is WERNER SOMBART, *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?* (Patricia M. Hocking & C.T. Husbands trans., Macmillan 1976) (1906). See also SEYMOUR MARTIN LIPSET & GARY MARKS, *IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES* (2000).

4. See sources cited *supra* note 2 for these and other explanations.

5. See, e.g., Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006) (arguing that the Constitution is the focal point of the American creed of exceptionalism); Lorraine E. Weinrib, *The postwar paradigm and American exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84 (Sujit Choudhry ed., 2006). See also the work on particular areas of constitutional exceptionalism cited throughout the Article. Bruce Ackerman has been characterized by one reviewer as the "most prominent representative" of a contemporary academic movement to "attribute the vitality of the American constitutional order to 'American exceptionalism.'" James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT. 355, 355 (1994).

6. The United Kingdom still lacks a written—or, more accurately, a codified—constitution, the conception of constitutional law as a source of law hierarchically superior to statute, and the judicial power to disapply a domestic statute (outside the context of EU law). E.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001). The constitution of the Netherlands expressly denies the courts the power of judicial review. GRONDWET [GW.] [Constitution] art. 120 (Neth.), translated in *THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS* (2002) ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."). New Zealand, like the United Kingdom, has no written constitution and denies its courts the power of judicial review. Gardbaum, *supra*. Australia has a written constitution that does not contain a bill of rights.

Nonetheless, even within the common framework of these modern constitutional fundamentals, there is still a pervasive sense that the United States remains broadly exceptional or different, even if not as exceptional as before 1945. That is to say, such differences are in some meaningful sense general, systemic, or qualitative in nature and not merely limited to the type of particular, specific, or narrow differences that inevitably exist between the constitutional laws of any two or more countries. There are, if you will, one or more macro-differences that are more than the sum of ordinary, expected micro-differences among constitutional systems. In a word, American constitutional law is still perceived as different from all other constitutional laws. And yet, there is a surprising paucity of scholarship that actually focuses specifically on—sets itself the goal of—identifying, exploring, and evaluating this alleged fact of general American constitutional exceptionalism,⁷ as distinct from (1) largely assuming it in passing or as the premise of some other argument or (2) focusing on an individual part of it.⁸ So in this Article, I seek to take this more systemic or holistic view and explore whether this sense is an accurate one—whether or to what extent any such differences that exist justify the overall conception of American constitutional law as exceptional in some basic or fundamental sense.

Immediately, however, I must make explicit a limit on the comprehensive nature of my analysis. In what follows, I will focus on that part of constitutional law dealing with the protection of rights, as distinct from the allocation of powers between the various branches and levels of government: federalism and separation of powers. The reason for this limitation of scope is clearly not that these areas hold no interest or importance in themselves, nor that there are no significant similarities or differences between

7. Steven Calabresi's *A Shining City on a Hill* is one of the very few scholarly works to address the global issue of American constitutional exceptionalism, and he expressly notes this surprising paucity:

The only substantial book I was able to find that has already applied American exceptionalism to law is *American Exceptionalism and Human Rights*. . . . This book is a collection of short chapters on specific legal issues and American exceptionalism; it does not address the subject in the comprehensive way I seek to do here.

Calabresi, supra note 5, at 1340 n.27. Calabresi, however, actually deals with the subject of the exceptionalism of American constitutional law and doctrine (as distinct from the bulk of the article's focus on charting the history of the Constitution's social meaning in U.S. political culture) in only six pages of an eighty-page article. *Id.* at 1405–10. He also focuses primarily on substantive differences, rather than on the structural ones that occupy more than half of this Article. Moreover, the two articles generally come to opposite conclusions about the extent of American constitutional exceptionalism.

8. Good recent examples of work on specific issues of exceptionalism include Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., 2005); Carol Steiker, *Capital Punishment and American Exceptionalism*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, supra*, at 57; and Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, supra*, at 90. The book in which these articles are collected focuses primarily on another individual aspect of exceptionalism: the United States' uniquely ambivalent attitude towards international human rights law. *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, supra*. I discuss Sunstein's article and the extent to which I disagree with his diagnosis of American exceptionalism on social and economic rights. See *infra* Part V.

federalism and separation of powers in the United States and in other countries.⁹ Apart from space, there are two reasons. First, protection of fundamental or human rights has been the central driving force behind the convergence on constitutional fundamentals since 1945. Because this goal has defined—indeed, created—constitutional law in the modern world, it is here too that claims of exceptionalism must be anchored and explored. Second, this anchoring at least has happened, for it is very widely believed that what primarily distinguishes U.S. constitutional law from all others is its exceptional “rights tradition.”¹⁰

Within this general focus on its constitutional rights jurisprudence, there are two dimensions to the perceived exceptionalism of the United States. The first is the *substance* or content of constitutional rights: what particular rights exist. The second is the *structure* of constitutional rights. This structure is the underlying framework—set of concepts, principles, doctrines, and institutions—that applies to, organizes, and characterizes constitutional rights jurisprudence as a whole. I think it is fair to say that there is a substantial body of opinion inside and outside the United States that views its rights tradition as exceptional or highly distinctive in both respects.¹¹

As far as the substance of constitutional rights is concerned, the claim of exceptionalism focuses primarily on two well-known features of American constitutional law. First is the text. Its age and many correspondingly anachronistic concerns (state militias, quartering of soldiers) and omissions (gender equality), its brevity, its comparatively few enumerated rights, the vagueness of such central enumerated rights as due process and equal protection, and the absence of any express limits on rights, all stand in marked contrast to such paradigmatic post-1945, rights-protecting constitutions as the Basic Law of the Federal Republic of Germany (1949), Canada’s Charter of Fundamental Rights and Freedoms (1982), and South Africa’s Final Constitution (1996). Second is the unusually high value attributed to free speech and related rights, and the corresponding lower priority (or outright rejection) of competing rights or values, such as reputation, privacy, the individual and/or collective harm caused by certain types of speech, and access by the electorate to a full range of political views.¹²

9. Although I do think that these differences are ultimately more of the expected micro-rather than macro-variety. For good introductions, see NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 212–488 (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 778–1166 (2d ed. 2006). For an excellent non-introductory discussion of comparative separation of powers, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

10. See, e.g., Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 8, at 1, 10 (“[The United States has] a rights tradition that has always been different from those of other democratic states.”); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) (“America has a distinctive rights culture, growing out of its peculiar social, political, and economic history.”).

11. On substantive differences, see *infra* Part I. For scholarship claiming that the United States has an exceptional structure of constitutional rights, see works cited *infra* Parts II–V.

12. See *infra* Section I.B; see also Schauer, *supra* note 8, at 29.

Beyond these two major perceived differences concerning the substance of rights, there are a few additional ones. The current constitutional position of religion in the United States creates a virtually unique combination of a high level of separation between church and state (notwithstanding some recent lowering¹³) and a comparatively low level of protection of religious freedom (at least after *Employment Division, Department of Human Resources v. Smith*¹⁴). Yet this occurs in such an unofficially non-secular public and political culture that the United States is arguably the only Western country in which an avowed atheist could likely never gain the highest political office and candidates are required to expound on the role of faith in their personal development and lives. Another significant substantive difference is the depth of the anti-*Lochner* reaction, which has resulted in the near non-protection of most economic rights in the face of government regulation, such as the right to choose an occupation.¹⁵ Finally, there are the twin instruments of death: guns and capital punishment. The U.S. Supreme Court recently affirmed an individual constitutional right to possess firearms for the first time, although the precise scope and limitability of the right remain unclear.¹⁶ The death penalty violates the constitutional rights to life and to be free of cruel and unusual punishment in all other developed countries except Japan.¹⁷

Straddling the substantive/structural distinction¹⁸ is the increasingly well-known exceptionalism regarding the use of foreign and international materials in domestic constitutional interpretation. In fact, U.S. exceptionalism regarding constitutional interpretation has two other important dimensions: (1) the greater emphasis on historical understandings of the text, particularly on original intent; and (2) the relative rarity and questionable legitimacy of employing a “teleological” or purposive mode of interpretation that is common in many other countries.¹⁹

As far as the structure of constitutional rights is concerned, the list of claimed exceptionalisms is at least as long and even more fundamental. First

13. The lowering has occurred for two reasons. First, there has been increased reliance on the notion that government may not discriminate against the freedom of speech or association of religious groups. For example, in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), a public university's prohibition on the use of student activity fees to fund any religious activity was held to be viewpoint discrimination in violation of the First Amendment. Second, some Justices believe that the Establishment Clause only prohibits governmental coercion on behalf of religion, but not measures that non-coercively endorse or discriminate in favor of one religion or religion generally. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting).

14. 494 U.S. 872 (1990).

15. See *infra* text accompanying notes 65–71.

16. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (finally ruling on the debate between proponents of an individual and a collective right (only as part of a militia) to own a firearm under the Second Amendment).

17. See Steiker, *supra* note 8, at 59.

18. Of course, there is no watertight compartmentalization between the substance and structure of rights either, but I believe the distinction is still generally helpful.

19. See *infra* Section I.E.

is the U.S. adherence to the so-called “American model” of judicial review rather than the “European model.” Very briefly, the former is paradigmatically characterized by decentralized, incidental judicial review performed by generalist judges via personalized opinions; the latter by centralized, more abstract judicial review performed by specialist judges via anonymous opinions.²⁰ Second, the United States has a more categorical conception of constitutional rights as compared to the more flexible, open-ended, and pragmatic conception employed elsewhere. This difference is said to be manifested by the U.S. rejection of the near-universal proportionality test for determining if the government has justified its limitation of a right.²¹ Third, the state action doctrine of American constitutional law is said to result in the United States having a much sharper public/private split in the scope of constitutional rights than elsewhere, resulting in a higher wall protecting private autonomy. In the terminology of comparative constitutional law, the United States takes a more “vertical” approach to the reach of constitutional rights into the private sphere and, unlike most other contemporary systems, rejects all forms of “horizontal effect” on private actors.²² Fourth is the well-known axiom that the U.S. Constitution is exclusively a charter of negative rights, prohibiting the government from doing certain things to its citizens but rejecting the types of positive constitutional rights that require the government to do certain things, which many other modern constitutions recognize. Exhibit number one for this claim is the exceptional absence of social and economic constitutional rights in the United States; exhibit number two is the exceptional absence of a constitutional right to protection from the government.²³

In a nutshell, the thesis of this Article is that while the perceived wisdom is largely correct about American exceptionalism concerning the substance of constitutional rights, it is largely wrong concerning the structure. While there are currently several clear and sharp differences regarding the former, this is not so regarding the latter. More specifically, my argument is that once labels and assumptions are set aside, the structure of constitutional rights in the United States is far more similar to than different from that of other developed countries—and far more similar than generally understood. In particular, whereas on each of the four identified structural issues the United States is commonly viewed as occupying a relatively extreme and lone position, I aim to demonstrate that its approach to each is in fact well within the contemporary constitutional mainstream.

20. See *infra* Part II.

21. See *infra* Part III. “Proportionality” is the general concept employed in many countries around the world for determining whether a government’s limitation of a constitutional right is justified. The tests deriving from this concept vary a little from country to country, but the basic idea is that such limitations are permissible if, all things considered, they do not impose an irrational, unnecessary, or disproportionate burden on the right.

22. See *infra* Part IV.

23. See *infra* Part V.

This partial debunking of the myth of American constitutional exceptionalism has several significant implications worth noting at the outset.²⁴ For one, it may help to break down the mutual wall of separation arising from the perception of the U.S. system—by Americans and non-Americans alike—as so different in its basic principles and assumptions concerning rights that nothing tangible is to be gained from deeper engagement with the other. More particularly on this score, it undermines the particular argument against use of foreign constitutional materials by U.S. courts that is premised on exceptionalism. For another, recognizing that the United States is not exceptional in the structure of its constitutional rights could well have important substantive effects. As one example, it undercuts the notion that there are formidable and distinctive structural hurdles to adopting a few social and economic constitutional rights.

My project in this Article obviously invokes what Mitchel Lasser has referred to as “the most visible methodological cleavage in contemporary comparative law: the division between the proponents of similarity-oriented, and those of difference-oriented, comparison.”²⁵ As just described, my enterprise here appears to be a similarity-oriented one, but I do not undertake it as a “proponent” of such scholarship or indeed of the sameness/difference debate. My concerns in this Article are primarily first-order ones: misconceptions and inaccuracies about the comparative structure of rights have prevented commonalities from being identified and led to a skewed understanding of important aspects of American and comparative constitutionalism. In addition, because my task is to challenge a descriptive thesis (albeit one with important normative implications), I largely limit myself to descriptive and analytical modes of reasoning: what is the case plus some reconceptualization of structural issues. Accordingly, the methodological approach of this Article is, in Ran Hirschl’s terminology, “[c]oncept formation through multiple description.”²⁶ As such, its focus is not on providing causal explanations—or justifications—of either structural similarities or substantive differences, although I briefly discuss possible explanations in the Conclusion. There too, I present a fuller discussion of the practical, theoretical, and methodological implications of my analysis.

The Article proceeds as follows. Part I briefly surveys and confirms the reality of contemporary American exceptionalism concerning the substance of constitutional rights as well as certain methods of constitutional interpretation. Parts II to V challenge the conventional wisdom on each of the four structural claims and, taken together, seek to establish that American exceptionalism in this foundational aspect of its rights tradition is largely a myth.

24. I discuss them at greater length in the Conclusion.

25. MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 146 (2004). For interesting and helpful essays on the sameness/difference dichotomy in comparative law theory, see *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2003).

26. Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 5, at 39, 43 (emphasis removed).

Part II discusses models and forms of judicial review. The heart of the Article lies in Parts III to V. Part III considers conceptions of constitutional rights and their limits; Part IV the issue of state action and horizontal effect; and Part V negative and positive rights. The Conclusion explains why debunking the myth of American structural exceptionalism matters.

I. SUBSTANTIVE EXCEPTIONALISM

Since the thesis of this Article is that the conventional wisdom is largely correct on the substantive exceptionalism of certain contemporary constitutional rights in the United States but largely wrong on the deeper, more enduring matter of its structural exceptionalism, I will naturally be focusing primarily on the latter. Accordingly, in this Part, I present only a brief survey of the substantive and interpretive differences. Many, though not all, are fairly well known, but it will perhaps be a useful exercise to put these differences together in one place, as they are usually discussed piecemeal and individually.²⁷

A. *The Text*

Overall, the U.S. Constitution is exceptional among written constitutions both in its age and its brevity. It is the oldest currently in effect²⁸ and, if not *the* shortest (as is sometimes erroneously claimed), is among the shortest at 7591 words including amendments, especially if the frame is limited to Western constitutions.²⁹

Specifically in terms of constitutional rights, the U.S. Constitution is exceptional in how few enumerated rights it contains, especially of a substantive rather than a procedural nature.³⁰ In addition to the few scattered

27. The only other general list of which I am aware is that of Steven Calabresi, and our lists are somewhat different. See Calabresi, *supra* note 5, at 1405–10.

28. Among the next oldest constitutions are those of Norway (1814), Belgium (1831), Luxembourg (1868), and Mexico (1917). The British North America Act (now renamed The Constitution Act) has been in continuous effect in Canada as a “constitutional statute” since it was enacted by the Westminster Parliament in 1867 and was incorporated as part of the new, repatriated Canadian Constitution in 1982.

29. The constitution of Libya (1969) contains 1600 words, and the constitution of the Central African Republic (1995) approximately 2000 words. Among Western constitutions, Luxembourg’s is the shortest at 5744 words, followed by Denmark (6260 words), the United States (7591 words), France (7764 words), and Norway (8057 words). Robert D. Cooter & Tom Ginsburg, *Leximetrics: Why the Same Laws are Longer in Some Countries than Others* 9 (Ill. Law & Econ. Working Paper Series, Paper No. LE03-012, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=456520. By contrast, the Basic Law of Germany contains 24,549 words, the Italian Constitution 15,043 words, the Austrian 27,939 words, and the Portuguese 32,022 words. *Id.*

30. This point is, of course, the foundation of John Hart Ely’s highly influential theory that the Constitution overwhelmingly protects process rather than substantive outcomes. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). As most of the procedural rights have their origins in, and are distinctive to, the common law, they are not particularly helpful objects of study for the purpose of evaluating the extent of American constitutional exceptionalism beyond the common law/civil law divide.

rights in the main body of the original Constitution,³¹ the Bill of Rights enumerates only the substantive rights of free speech, free exercise of religion, and the right to be compensated for the taking of private property for public use—apart from the antiquated concerns of eighteenth century warfare seemingly dealt with in the Second and Third Amendments. Post-Bill of Rights, the Thirteenth Amendment ended the inhuman treatment of one group of Americans by another,³² and four of the remaining amendments deal with the right to vote.³³

These sparsely worded but relatively specific enumerated substantive rights are, of course, supplemented by several critical, but by comparative standards exceptionally vague, ones. In particular, the three Delphic phrases of the second sentence of Section 1 of the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction *the equal protection of the laws*.³⁴

Almost all other constitutions contain longer lists of more particular liberties³⁵ and an equality provision setting out prohibited bases of discrimination.³⁶ The age, terseness, and vagueness of enumerated rights

31. These are contained in Article I, Section 9 (prohibitions on Congress); Article I, Section 10 (prohibitions on the states); and the Privileges and Immunities Clause. See U.S. CONST. art. I, §§ 9, 10; art. IV, § 2.

32. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

33. *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax."); *id.* amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

34. *Id.* amend. XIV, § 1 (emphases added).

35. Although, in addition to specific liberties, some constitutions, such as the German Basic Law, have been interpreted to contain a general or default right to liberty. See *infra* text accompanying notes 173–175.

36. *E.g.*, Canadian Charter of Rights and Freedoms, § 15(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter of Rights and Freedoms] ("Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."); GRUNDGESETZ [GG] [Constitution] art. 3(3) (F.R.G.), translated in THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000) ("No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.").

have, controversially, resulted in significant implication of rights by the U.S. Supreme Court in modern times.³⁷

Finally, it is not only rights that have been implied in the United States, but also limits on rights. This is because, as another example of its textual exceptionalism, the U.S. Constitution lacks any express limits on the rights that it contains. Almost all other constitutions contain such express limits, either in the form of a general limitations clause applying to all rights or specific limitations clauses applying to particular rights.³⁸ This lack of express limits has not, contrary to well-known textualist arguments, resulted in rights being deemed absolute but rather in the judicial implication of limits. As I will argue in Part III, this perceived need to imply limits in the absence of express ones plays an important role in explaining certain relatively superficial differences between the United States and other countries on the structural issues of the conception of constitutional rights and the methodology of rights analysis.

B. *Freedom of Speech and Expression*

Although within the United States it is well known that Justice Hugo Black failed to establish an absolute understanding of the First Amendment right to free speech—that no law abridging the freedom of speech means no law³⁹—this knowledge is largely lost on outsiders, who find it hard to see the difference. For one of the paradigmatic contemporary exceptionalisms of American constitutional law is the higher value placed on free speech and the lower value placed on conflicting rights, values, and interests than anywhere else. The U.S. Supreme Court has never officially pronounced a hierarchy of rights and values, unlike the German and South African constitutional courts (which place human dignity at the top),⁴⁰ but its jurisprudence

37. This is especially true under the doctrine of substantive due process, in the fundamental rights strand of equal protection, in the categories of heightened scrutiny under equal protection, and with respect to the right to travel.

38. For example, the Canadian Constitution contains a general limitations clause. Canadian Charter of Rights and Freedoms, *supra* note 36, § 1 (“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”). An example of a specific or special limitations clause is provided by Article 11(2) of the German Constitution, which concerns the right to freedom of movement:

This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.

GRUNDGESETZ [GG] art. 11(2) (F.R.G.), translated in THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000).

39. See *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring); see also Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

40. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 32 (2d ed. 1997) (“The principle of human dignity, as the Constitutional

leaves little doubt about the unofficial one. Across the broad range of substantive free speech issues, the United States takes an exceptional position in favor of unregulated and unregulable speech.

Rather than chart this entire range, I will briefly review some of its most prominent and visible peaks.⁴¹ Whereas most Western countries permit some significant form of "hate speech" regulation, including laws making it a criminal offence to deny the Holocaust or to incite racial or religious hatred,⁴² almost all such laws run afoul of the First Amendment as impermissible content-based regulation.⁴³ Under existing doctrine, only speech that is directed at inciting or producing imminent lawlessness may be regulated.⁴⁴ Avoiding the individual, social, psychological, and cultural harms that hate speech undeniably causes is either not seen as a compelling public interest that can in principle justify speech restrictions, or such restrictions are deemed an unnecessary means of promoting this goal.⁴⁵

Similarly, the United States is exceptional in the extent to which it protects defamatory speech. Under the rule of *New York Times v. Sullivan* and its subsequent extensions, laws imposing liability on those who defame government officials or other public figures are constitutionally permissible only when such speech is made with "actual malice"—that is, knowledge that the statement is false or reckless disregard of its truth or falsity.⁴⁶ This rule has expressly been considered and rejected under both the Canadian

Court has repeatedly emphasized, is the highest value of the Basic Law, the ultimate basis of the constitutional order . . ."); see also Christian Starck, *Menschenwürde als Verfassungsgarantie im modernen Staat*, 36 JURISTENZEITUNG 457 (1981); Microcensus Case, 27 BVerfGE 1 (1969) (F.R.G.), translated in KOMMERS, *supra*, at 299 ("Human dignity is at the very top of the value order of the basic law. This commitment to the dignity of man dominates the spirit of Article 2 (1), as it does all other provisions of the Basic Law."). The South African Constitutional Court has stated: "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap. 3 [i.e., the South African bill of rights]." *S. v. Makwanyane* 1995 (3) SA 391 (CC) at 451 (S. Afr.). In the United States, Justice Brennan was well known for making a similar argument, but it has never been accepted as the official position of the Supreme Court. See William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

41. For another recent review, see Schauer, *supra* note 8.

42. See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (upholding the constitutionality of § 319(2) of the Criminal Code, which prohibits the willful promotion of hatred towards any section of the public distinguished by colour, race, religion, or ethnic origin); Holocaust Denial Case, 90 BVerfGE 241 (1994) (F.R.G.) (upholding Section 130 of the Criminal Code, which creates the crime of criminal insult).

43. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that a bias-motivated crime ordinance was an unconstitutional content-based speech restriction); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (holding that a ban on the American Nazi Party marching through a town with a large population of Holocaust survivors violated the First Amendment). But see *Virginia v. Black*, 538 U.S. 343 (2003) (holding that the First Amendment permits the state to outlaw cross burnings done with the intent to intimidate because of the specific history of cross burning as a signal of impending violence).

44. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Dennis v. United States*, 341 U.S. 494, 501-09 (1951).

45. The latter was the rationale in *R.A.V.*

46. 376 U.S. 254, 279-80 (1964).

Charter⁴⁷ and Australian Constitution⁴⁸ as insufficiently protecting the conflicting values of reputation and dignity, a position mirrored in most other countries, including Germany.⁴⁹

Somewhat ironically, given *New York Times's* rationale of ensuring "that debate on public issues should be uninhibited, robust, and wide-open,"⁵⁰ the combined real-world effects of the First Amendment on the regulation of the mass media and of political campaign expenditures are to ensure that this debate is largely conducted about and among the various multi-millionaires or hugely successful fundraisers running for highest public office. Thus, on the one hand, the exceptional understanding of the right to free speech as permitting at most only very limited regulation of broadcasting companies⁵¹ means that the common ban elsewhere on paid political advertisements in favor of free, mandated airtime for electoral candidates⁵² would be unconstitutional in the United States. As a direct result, only those with the wherewithal to pay for such ads are plausible candidates. On the other hand, the exceptional inability to limit campaign expenditures because it violates the First Amendment⁵³ ensures that each election season sees ever-higher economic barriers to entry for public office. Elsewhere, this skewing of democratic elections by the exigencies and dangers of fundraising is commonly rejected in favor of a conception of free speech that requires access by the citizenry to the full range of political views. As a result, both broadcasting regulation and limits on campaign expenditures are either constitutionally permissible or mandatory.⁵⁴

The final free speech exceptionalism I will mention, although there are several others, is that in the conflict between the freedom of the press to report on criminal proceedings on the one hand, and both the right of the accused to a fair trial and the privacy interests of crime victims on the other,

47. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, para. 122–26 (Can.).

48. *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104 (holding that under the implied constitutional right to freedom of communication, false statements in the context of political reporting are constitutionally protected only if "reasonable in the circumstances").

49. See *Mephisto*, 30 BVerfGE 173 (1971) (F.R.G.); Böll, 54 BVerfGE 208 (1980) (F.R.G.).

50. 376 U.S. at 270.

51. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121–32 (1973) (rejecting a broad right of access to private broadcasting in favor of the widest editorial and journalistic freedom consistent with its public obligations).

52. See, e.g., FRITZ PLASSER WITH GUNDA PLASSER, *GLOBAL POLITICAL CAMPAIGNING: A WORLDWIDE ANALYSIS OF CAMPAIGN PROFESSIONALS AND THEIR PRACTICES* 225 (2002) ("[T]he majority of Western European democracies have placed a ban on paid political advertising on public, as well as private, commercial networks [in favor of mandated free airtime].").

53. For the United States, see *Buckley v. Valeo*, 424 U.S. 1, 39–59 (1976) (per curiam). For a list of countries which limit campaign expenditures, see PLASSER & PLASSER, *supra* note 52, at 163 ("Limitations on campaign expenditures can be found in Canada, New Zealand, Belgium, France, Ireland, Italy, Spain, Portugal, United Kingdom, Israel, Brazil, Japan, South Korea, Russia, Poland, Hungary, Turkey, Venezuela, Mexico, Chile, India, Botswana, Mozambique and Zimbabwe.").

54. On the constitutional duty to regulate broadcasting in Germany, see *Television I Case*, 12 BVerfGE 205 (1961) (F.R.G.).

the United States stands alone in the degree to which it favors the former.⁵⁵ Indeed, this exemplifies the more general difference that the constitutional presumption against prior restraint on publication is exceptionally strong in the United States.⁵⁶

C. Religion

To many, the United States is “a riddle wrapped in a mystery inside an enigma” on the topic of religion in public life. It has by far the largest percentage of believers and active worshippers of any developed country.⁵⁷ Despite the constitutional ban on religious tests for public office,⁵⁸ it undoubtedly has one *de facto* given that, among Western countries, only in the United States must political leaders go through the public ritual of confessing their religious faith and would a professed atheist be politically disqualified from office. And this in a country that, apart from funds raised or made, otherwise and exceptionally has no particular qualifications or experience as prerequisites for high political office. Yet despite, or perhaps because of, these political and cultural facts, the constitutional position of religion in the United States is exceptional for the low level of protection it is currently afforded.

Thus on the one hand, the Establishment Clause⁵⁹ has generally been interpreted to prohibit state support for (or connection to) either religion in general or particular religions, placing it close to the secular pole on a spectrum of actual or possible positions, perhaps third only to the well-known, affirmatively secularist regimes of France and Turkey. And on the other hand, after the changed position or clarification in *Employment Division v. Smith*, the freedom to act on one’s religious convictions is arguably less protected in the United States than in most other Western countries, including France and Turkey as member states of the European Convention on Human Rights (“ECHR”).

Several constitutional rights regimes, including the Canadian and the ECHR, have no equivalent provision to the Establishment Clause at all and

55. Fla. Star v. B.J.F., 491 U.S. 524, 530–41 (1989); Smith v. Daily Mail Publ’g. Co., 443 U.S. 97, 100–06 (1979). By contrast, in most of the rest of the world, various forms of “sub judice” rules backed by judicial “contempt orders” are constitutionally permissible. See, e.g. IAN CRAM, A VIRTUE LESS CLOISTERED: COURTS, SPEECH AND CONSTITUTIONS 77–122 (2002) (comparing sub judice rules in the United States with those of Commonwealth countries).

56. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 716–20 (1971) (per curiam) (holding that the ban on prior restraint even extends to classified government information leaked to the press); Near v. Minnesota, 283 U.S. 697 (1931).

57. A recent study of fifty countries from around the world identified the United States as having the lowest percentage (three percent) of people who identified themselves as atheists, agnostics, or non-believers in God. Phil Zuckerman, *Atheism: Contemporary Numbers and Patterns*, in THE CAMBRIDGE COMPANION TO ATHEISM 47, 56–57 (Michael Martin ed., 2007). Vietnam, at eighty-one percent, had the highest. *Id.*

58. U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

59. *Id.* amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

contain only a right to free exercise of religion. Indeed, twelve out of the forty-seven current member states of the ECHR, including the United Kingdom, Norway, and Greece, have officially established religions.⁶⁰ Many other Western countries do have constitutional bans on established religions, but still clearly permit even-handed support for religion as a whole, and in some cases special privileges. For example, Article 137(6) of the German Constitution grants certain religious bodies the right to levy taxes on their members that are collected by state governments.⁶¹ And apart from the United States, France, and Turkey, almost all Western countries permit or require some form of religious education in public schools.

On free exercise, the current U.S. constitutional position is that only state action targeting religious practice is subject to strict scrutiny, while the many more general laws that incidentally burden religious practice are subject to ordinary rational basis review.⁶² Accordingly, no accommodation of religious practice is constitutionally required, and the state's duty is essentially one of neutrality of intent. Few other countries draw such a distinction between purpose and effect in their constitutional treatment of religious freedom. In defining the scope of the freedom, they tend to focus on the motivations of the individual (is this religiously motivated conduct?) rather than on the motivations of the government in regulating. As a result, special protection is commonly afforded the freedom to act on one's religious convictions, and exceptions from general laws that burden such actions are often constitutionally mandated under the proportionality test, which is more stringent than the U.S. rational basis test used for incidental burdens.⁶³

60. In the United Kingdom, the established religions are: in England, the Church of England; in Scotland, the (Reformed) Church of Scotland. The Church of England was disestablished in Wales in 1920. In Greece, Article 3 of the Constitution states that: "the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ." 1975 Syntagma [SYN] [Constitution] § 2, art. 3, cl. 1 (Greece), *translated in* MINISTRY OF JUSTICE, *THE CONSTITUTION OF GREECE* (2003). In Norway (as well as Iceland and Denmark), the Lutheran Church is the official state religion.

61. GRUNDGESETZ [GG] art. 137(6) (F.R.G.), *translated in* THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000) ("Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with land law.").

62. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

63. See KOMMERS, *supra* note 40, at 584–85 n.8 ("The wide berth granted to the value of free exercise seems greater in Germany than in the United States. . . . German constitutional doctrine requires a higher measure of accommodation than does American doctrine."). Compare *Smith* to the (German) Blood Transfusion Case, 32 BVerfGE 98 (1971) (F.R.G.), *translated in* KOMMERS, *supra* note 40, at 449, in which the FCC invalidated the criminal conviction of a husband for failing to provide assistance when his wife died after they had both refused a blood transfusion for her based on their religious convictions. The FCC stated, "The duty of all public authority to respect serious religious convictions . . . must lead to a relaxation of criminal laws when an actual conflict between a generally accepted legal duty and a dictate of faith results in a spiritual crisis for the offender . . ." *Id.* at 451. Similarly, the Canadian Supreme Court, in a case involving parents' refusal to permit a blood transfusion for their child on religious grounds, found that the Children's Protection Act "seriously infringed on the appellants' freedom to choose medical treatment for their child in accordance with the tenets of their faith" under section 2(a) of the Charter, granting the "freedom of conscience and religion." Although the Court ultimately upheld the Act as justified under section 1 of the Charter, the burden of justification placed on the Canadian government was greater than under the rational basis test, which would apply to such a case in the United States. *B. v. Children's Aid Soc'y*, [1995] 1 S.C.R. 315, 322 (Can.). The European Court of Human Rights ("ECtHR") has

Thus, for example, while certain types of post-9/11 regulations around the world, which “target” either Muslim clothing or the wearing of religious symbols more generally, may still be subject to at least as high a presumption of unconstitutionality in the United States as elsewhere, this is not true of many other types of general regulations burdening religion—including those at issue in *Employment Division v. Smith* (a general drug law) and *City of Boerne v. Flores*⁶⁴ (a zoning ordinance).

D. Guns, Jobs, and Scaffolds

Three final areas of U.S. substantive exceptionalism are the rights to choose an occupation, to own a gun, and not to be subject to cruel and unusual punishment.

Ever since the demise of the *Lochner* era, the U.S. Supreme Court has lumped all forms of social and economic regulation together for the purpose of determining whether it interferes with the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments and uniformly applied its lowest standard of scrutiny. The result is that no such regulation has been held unconstitutional since 1936. Indeed, many have wondered whether it is even correct to say there are constitutional rights at stake in this area.⁶⁵

Several of the canonic American cases involved what would typically be thought of in other Western constitutional systems as the independent constitutional right to choose an occupation. Thus, *The Slaughter-House Cases* upheld a state law conferring a monopoly on one slaughterhouse and stockyard facility and requiring all competitors to cease doing business,⁶⁶ and *Ferguson v. Skrupa* upheld a state law prohibiting all but lawyers from engaging in the business of debt adjusting.⁶⁷ As epitomized by *Ferguson*, the modern approach is that the ousted loan makers have no substantial constitutional right claim and that the state’s economic regulation is entitled to the high level of deference embedded in the ordinary rational basis test.

By contrast, in many other Western countries, such a claim would fall under the independent constitutional right to choose an occupation, a more significant right than in the United States.⁶⁸ Although far from absolute, this

stated that, under Article 9 of the ECHR, “[w]hile religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to ‘manifest [one’s] religion.’ Bearing witness in words and deeds is bound up with the existence of religious convictions.” *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 6, 17 (1993) (alterations in original).

64. 521 U.S. 507 (1997).

65. These seemingly included Justice Black who, in his opinion for the Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), omitted any reference to even a minimal rational relation test for social and economic regulation, thus suggesting that there was no constitutional right the infringement of which needed to be justified. This omission was underscored by Justice Harlan’s brief concurrence stating only that this test had been satisfied. *Id.* at 733 (Harlan, J., concurring).

66. 83 U.S. (16 Well.) 36 (1873).

67. 372 U.S. 726 (1963).

68. See, e.g., GRUNDGESETZ [GG] art. 12(1) (F.R.G.), translated in THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000) (“All Germans shall have the right freely to choose their

right is nonetheless protected more rigorously under the standard test of proportionality than in the United States and has, on occasion, resulted in a finding of unconstitutionality.⁶⁹ This right to choose an occupation in the first place—concerning the ability of the government to restrict entry into a trade or profession—is to be distinguished from the generally lesser right to practice an ongoing occupation as one sees fit, free of regulation.⁷⁰ Even this lesser economic right is, however, arguably still more protected elsewhere under the “minimal impairment” prong of the proportionality test than it is in the United States.⁷¹

The U.S. Supreme Court finally ruled for the first time on what had been the open question of whether there is an individual constitutional right to bear arms,⁷² an issue that arouses great passion and controversy. This latter point is sufficient by itself to distinguish the United States from other Western countries, where gun ownership is comparatively rare and tends not to be a subject that triggers—excuse the pun—the emotions. In the end, although the Supreme Court has undoubtedly increased the difference by finding that there is an individual constitutional right to possess a firearm, much is still uncertain because it was vague on the scope of the right and

occupation or profession, their place of work, and their place of training.”); SUOMEN PERUSTUSLAKI [SP] [Constitution] § 18 (Fin.), *translated in* THE CONSTITUTION OF FINLAND (1999), *available at* <http://www.om.fi/21910.htm> (“Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice.”); BUNDESVERFASSUNG [BV], CONSTITUTION [Cst] [Constitution] Apr. 18, 1999, art. 27 (Switz.), *translated in* FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION (2002), *available at* <http://www.admin.ch/org/polit/00083/index.html?lang=en> (“Economic freedom is guaranteed. It contains particularly the freedom to choose one’s profession, and to enjoy free access to and free exercise of private economic activity.”).

69. As David Currie states: “[T]he [German] Constitutional Court has struck down as unwarranted infringements on occupational freedom an impressive array of restrictions that would pass muster without question in the United States today.” DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 302 (1994). Among the many examples he gives are the following:

The state may not limit the number of drugstores on the ground that there are already enough of them or license taxicabs only in cases of special need. It may not require vending machines to be shut down after stores are closed or require barbers who close on Saturday afternoon to shut down on Monday morning too.

Id. (footnotes omitted).

70. See, e.g., *Pharmacy Case*, 7 BVerfGE 377 (1958) (F.R.G.), *translated in* KOMMERS, *supra* note 40, at 274.

71. Thus, in the *Chocolate Candy Case*, 53 BVerfGE 135 (1980) (F.R.G.), *translated in* KOMMERS, *supra* note 40, at 279, the FCC invalidated a federal consumer protection statute that banned the sale of foodstuffs that might be confused with products made of pure chocolate. Although the court acknowledged that, under its lower level of scrutiny for laws restricting the practice of a trade (as distinct from those restricting the freedom to choose a trade), the legislature is granted wide discretion in setting economic policy, nonetheless it found that “the legislature has exceeded the proper bounds of its discretion, for less restrictive means [labeling] can easily achieve the purpose of the statute.” *Id.* at 280. This sort of law would easily pass muster under the U.S. rational basis test.

72. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

chose not to address the important issue of what standard of scrutiny applies to government limitations of the right.⁷³

Finally, there is the well-known exceptionalism surrounding the death penalty.⁷⁴ Among other Western industrialized countries today, only Japan permits and carries out the death penalty. Most constitutions either expressly prohibit the death penalty or contain provisions banning inhumane and degrading punishment, which have been interpreted to include the death penalty in all circumstances.⁷⁵

E. Constitutional Interpretation

The final area of undoubted and well-known contemporary American exceptionalism straddles the substance/structure dichotomy: namely, methods of constitutional interpretation. In particular, both a raging legal/political controversy and a cottage academic industry have recently arisen⁷⁶ following the first citation by the Supreme Court in a majority opinion of foreign/international constitutional cases,⁷⁷ as well as the slightly less unprecedented practice of referring to foreign and international laws.⁷⁸

73. Cf. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716–19 (2007) (demonstrating that under state constitutional rights to bear arms, state courts have generally upheld reasonable regulations of guns).

74. See generally Steiker, *supra* note 8, at 57.

75. See, e.g., GRUNDGESETZ [GG] art. 102 (F.R.G.), translated in THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000) (“Capital punishment is abolished.”); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> (prohibiting the death penalty under all circumstances). The Supreme Court of Canada has held that the death penalty inherently violates the prohibition in section 12 of the Charter against any cruel and unusual treatment or punishment. See *United States v. Burns*, [2001] 1 S.C.R. 283, 285, 2001 SCC 7 (Can.).

76. The initial round of the current judicial skirmish occurred in *Printz v. United States*, 521 U.S. 898 (1997), in which Justice Breyer’s dissent referred to comparative federal experience as casting “an empirical light on the consequences of different solutions to a common legal problem.” *Id.* at 977 (Breyer, J., dissenting). Justice Scalia, writing for the Court, responded that “such comparative analysis [is] inappropriate to the task of interpreting a constitution.” *Id.* at 921 n.11 (majority opinion). Subsequent rounds have been fought by these two Justices in both judicial and extra-judicial contexts, with certain other Justices, including Kennedy, O’Connor, and Ginsburg, also weighing in on behalf of the Breyer position in various fora, and Chief Justice Roberts, Justice Thomas, and Judge Richard Posner supporting Scalia. Following *Atkins v. Virginia*, 536 U.S. 304 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), several congressional proposals were launched to prohibit federal courts from citing foreign constitutional cases, though none has been enacted. For academic contributions to the debate, see, for example, David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353 (2004).

77. *Lawrence*, 539 U.S. at 573 (citing decisions of the ECtHR).

78. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 577–78 (2005) (invalidating juvenile death penalty and referring to UK law and international human rights treaties). Until the early 1960s, the Supreme Court referred to foreign criminal procedure and practices under its “fundamental fairness” standard for interpreting the Due Process Clause of the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (discussing the changed approach). As the majority

Regardless of its merits or outcome, this controversy is obviously a testament to the fact that such use of foreign constitutional materials is hardly normal or routine in the United States, as it increasingly is elsewhere.

As is well known, the Constitutional Court of South Africa is required by an express constitutional provision to consider the decisions of international courts in interpreting its own constitution and is permitted to consider those of foreign courts, which it typically does quite comprehensively.⁷⁹ Similarly, the United Kingdom's Human Rights Act of 1998 requires British courts to "take into account" the case law of the European Court of Human Rights ("ECtHR") in interpreting and applying its substantive provisions.⁸⁰ The German Federal Constitutional Court ("FCC") has also required courts to take into account decisions of the ECtHR in interpreting the Basic Law.⁸¹ The Supreme Court of Canada routinely canvasses the decisions of foreign constitutional courts, including a usually quite extensive discussion of relevant U.S. jurisprudence—if often only to reject it.⁸² So too, although slightly less frequently, does the Indian Supreme Court.⁸³ To immediately identify the red herring, in none of these countries is the domestic constitutional court bound by foreign decisions; the power—and sometimes the duty—is rather to consider and take them into account for whatever relevance and lessons they may hold.

opinion in *Roper* noted, the Court has referred to foreign laws under its Eighth Amendment jurisprudence since *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958). *Roper*, 543 U.S. at 575.

79. Article 39(1) states, "When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law; and (c) may consider foreign law." S. AFR. CONST. 1996 § 39(1). For a good example of the typically extensive discussion of foreign constitutional decisions, see *S. v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

80. The Act states:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights . . . whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

Human Rights Act, 1998, c. 42 § 2(1) (U.K.).

81. Görgülü v. Germany, 111 BVerfGE 307 (2004) (F.R.G.), *partially translated in* Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 5, at 281 ("[T]he Convention provision as interpreted by the ECtHR must be taken into account in making a decision; the court must at least duly consider it."). Kumm's article provides further discussion of the case. Kumm, *supra*, at 280–81.

82. See, e.g., *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, paras. 122–141 (Can.) (discussing and rejecting the rule in *New York Times*); *R. v. Keegstra*, [1990] 3 S.C.R. 697, 738, 743 (Can.) (concluding in a section of the judgment entitled, "The Use of American Constitutional Jurisprudence," that the "uniquely Canadian vision of a free and democratic society" requires the court to depart from the American view that the suppression of hate speech is incompatible with the guarantee of freedom of expression); *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 52–53 (Can.) (rejecting relevance of U.S. debate over substantive versus procedural due process for purposes of interpreting scope of "fundamental justice" under section 7 of the Charter).

83. See, e.g., *Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.R. 518 (India) (discussing *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)); *Satpathy v. Dani*, A.I.R. 1978 S.C. 1025, 1036–38 (India) (discussing *Miranda* warnings); *State of Uttar Pradesh v. Pradip Tandon*, A.I.R. 1975 S.C. 563 (India) (discussing, *inter alia*, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)); *Rustom Cavasjee Cooper v. Union of India*, (1970) 3 S.C.R. 530, 592 (India) (discussing Fifth Amendment Takings Clause).

U.S. interpretive exceptionalism does not, however, begin and end with the use of foreign and international materials as one might infer from the current focus on this issue. It also encompasses both the greater use and importance of history—in particular, original intent and/or understanding—and the lesser use and legitimacy of the “purposive” or “teleological” method of reasoning that is common, and often dominant, elsewhere. Prior to the modern revival of originalism about twenty years ago, the U.S. approach to historical methods of reasoning, summed up in *Brown*’s famous verdict that “[a]t best, they are inconclusive,”⁸⁴ was more in line with other countries.⁸⁵ Since then, however, the rise of originalism in the United States has gone so far that even such an avowed anti-historicist in statutory interpretation as Justice Scalia has on occasion engaged in detailed exegeses of the Federalist Papers in constitutional cases.⁸⁶ Textualism and originalism have tended to merge in practice in recent years, with the original meaning of the text coming to predominate over the current. It is obviously a curious fact that constitutional courts elsewhere, when interpreting the provisions of relatively recent constitutions—including some written in the last decade—should generally eschew an interpretive method (i.e., originalism) so heavily relied upon by a court interpreting a 219-year-old document.⁸⁷

The purposive or teleological approach to constitutional interpretation is, roughly speaking, an approach that looks to the present goals, values, aims, and functions that the constitutional text is designed to achieve. Although a version is certainly endorsed by some U.S. judges and commentators in the

84. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

85. *But cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54 (1989) (claiming that originalism was always a major method of constitutional interpretation in the United States—a tradition from which the Warren Court departed).

86. Compare ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997), with *Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J., for the Court).

87. Thus, for example, the German Constitutional Court and the Supreme Court of Canada have generally afforded minimal and nonconclusive weight to “originalist” reasoning. The FCC has stated that “[n]either original history nor the ideas and intentions of the framers are of decisive importance in interpreting particular provisions of the Basic Law. Since the adoption of the Basic Law, our understanding of the content, function, and effect of basic rights has deepened.” *Life Imprisonment Case*, 45 BVerfGE 187 (1977) (F.R.G.), translated in KOMMERS, *supra* note 40, at 307; see also KOMMERS, *supra* note 40, at 42–43 (“Original history [in Germany] performs, at best, the auxiliary function of lending support to a result already arrived at by other interpretive methods. When there is conflict, however, arguments based on text, structure, or teleology will prevail over those based on history.”); Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View*, 42 AM. J. COMP. L. (1994) 395, 401 (“Historical analysis . . . generally serves only as a secondary, supplementary way of clarifying a rule’s meaning”). The Canadian Supreme Court has generally also given minimal weight to originalist reasoning in favor of a purposive approach. Thus it stated:

Another danger with casting the interpretation of s.7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. . . . If the newly planted “living tree” which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials . . . do not stunt its growth.

form of "living constitutionalism," it is neither as widely and overtly employed nor deemed of generally uncontested legitimacy as in many other (although not all) countries. Indeed, in some, including Germany, Canada, South Africa, and Israel, it is not only an orthodox but probably the dominant approach to constitutional interpretation.⁸⁸

Having completed my survey of the ways in which the substance of constitutional rights affirms the reality and extent of American exceptionalism, I now aim to lay bare its mythical elements by turning to the deeper, structural aspects of the U.S. rights tradition.

II. THE AMERICAN VERSUS THE EUROPEAN MODEL OF JUDICIAL REVIEW

As we have seen, the claim of American exceptionalism in constitutional law was self-evident and unanswerable prior to 1945 because, as the inventor of modern constitutional supremacy—a constitution containing a bill of rights that is entrenched, the supreme law of the land, and enforced by the power of judicial review—the United States was one of the very few countries that then practiced it. After 1945, however, when this general system began to be adopted for the first time in western Europe and elsewhere in order to protect fundamental rights, the institutional structure of judicial review put in place departed from that of the United States. Instead, these countries borrowed from the first pre-1945 European prototype: the Austrian Constitutional Court, which had functioned from 1920 until 1938, although it did not have a bill of rights to enforce.⁸⁹ By the mid-1980s, when almost all western European countries had made the switch from legislative to constitutional supremacy, including a bill of rights, this Austrian model was so widely copied or adapted that it became known as the "European model" of

88. Karl Friauf has described the role of teleological interpretation in Germany:

The *teleological method* is today probably the most important technique of interpretation in German constitutional law. . . . The teleological method might also be characterized as 'functional,' because it asks for the function which a certain rule has to accomplish within the context of the Constitution. . . .

....

... Today the teleological method asks for the *present* purpose and the present meaning of a rule.

Karl Heinrich Friauf, *Techniques for the Interpretation of Constitutions in German Law*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW 12 (1968). The Canadian Supreme Court has declared that "the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one." *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344 (Can.). The South African Constitutional Court has stated that the Court's interpretation, while paying regard to the language that is used, "is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution." *S. v. Makwanyane* 1995 (3) SA 391 (CC) at 403 (S. Afr.). The purposive approach is also particularly associated with the influential former Chief Justice of the Israeli Supreme Court, Aharon Barak. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005).

89. This is because the Austrian Constitution lacked one. The Austrian Court had also been copied prior to 1945 by Czechoslovakia, and very briefly, by the Spanish Republic before the onset of that country's civil war. Gardbaum, *supra* note 6, at 714–15.

judicial review. By contrast, the rejected American model seemed exceptional.

And, to a significant extent, so it was at this particular point in time. But three things have occurred since that heyday of the contrast to reduce, if not eliminate, both the relative exceptionalism of the American model and the primacy of the American/European distinction as the most useful or important one concerning the institutionalization of judicial review. First, starting in the early 1980s and continuing into the 1990s, several countries, including Canada, Ghana, and Malawi (the latter two under their new, post-authoritarian constitutions) converted from legislative to constitutional supremacy but, unlike European countries after 1945, adopted the decentralized, American model of judicial review. Second, the “pure” version of the European model came under various sorts of pressures resulting in systemic movements in the direction of the American model. Finally, even more recent developments in certain countries have created an alternative to the now traditional model of constitutional supremacy adopted after 1945, and this alternative model also suggests a new and interesting dichotomy concerning forms of judicial review—strong versus weak—that transcends the older American/European one.

Before briefly describing these three developments, let me pause to summarize the well-known differences between the American and European models of judicial review.⁹⁰ The most visible, important, and still sharpest difference is between the decentralization of the American system, in which all courts have the power to disapply legislation that conflicts with the constitution, and the centralization or concentration of the European system, in which only one court (typically called the constitutional court) has this power.⁹¹ Second, in the American system, courts engage only in concrete judicial review, (that is, decide constitutional issues that are part of a litigated case) whereas in the European model, courts also or only engage in abstract judicial review (that is, decide constitutional issues referred to them by a qualified political institution).⁹² Third, under the American model,

90. Three classic accounts of the differences between the American and European models of judicial review are ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989); MAURO Cappelletti, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* (1989); and Louis Favoreu, *American and European Models of Constitutional Justice*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 105, 105–19 (David S. Clark ed., 1990).

91. The European Court of Justice has, however, effectively mandated decentralized judicial review for the purpose of determining whether provisions of national law violate (supreme) EU law. In *Amministrazione delle Finanze dello Stato v. Simmenthal* [*Simmenthal II*], Case 106/77, 1978 E.C.R. 629, it held that every national court must set aside any provision of national law that conflicts with EU law, regardless of whether they generally have such a power within the domestic constitutional system.

92. The Canadian Supreme Court, however, is empowered to render advisory opinions in certain cases. Although courts engage only in concrete review, other institutions may engage in a form of abstract review. Bruce Ackerman has suggested that presidential signing statements and Office of Legal Counsel memos can and should be thought of in this way. Bruce Ackerman, Presentation at the Comparative Constitutional Law Roundtable, George Washington University Law School (Mar. 7, 2008). Mark Tushnet has argued that in the United States, more generous developments in standing law plus the availability of temporary and permanent injunctive relief have

courts engage in a posteriori judicial review, and they do so without a time limit; they consider the constitutionality of a law only after it has come into effect and, moreover, at any time thereafter. Under the European model, some courts engage (only or also) in a priori review, that is prior to the promulgation of the law, and under abstract a posteriori review, there is often a short deadline for seeking review.⁹³ Fourth, under the American model, with its primarily common law context, majority decision making is the official rule, the votes of individual judges are made known, opinions are personalized and individually signed, and separate concurrences and published dissents are extremely common. By contrast, under the European model, with its primarily civil law context, decisions are traditionally impersonal, officially unanimous, and without separate concurrences or dissents. Finally, members of the single constitutional court are often appointed by a supermajority vote of the legislature, a quite different and far less bureaucratic process than applies to the appointment and promotion of ordinary judges within the same countries. This contrasts with the simple majority vote of the legislature typical of the American model⁹⁴ and results, according to some, in both greater political accountability of the judiciary and a less polarized, less partisan nomination process.⁹⁵

With the main differences between the two models in mind, we can now return to the three developments that have largely eliminated whatever claim to exceptionalism the American model once had. First, the initial wave of conversions from systems of legislative supremacy to the four fundamentals of modern constitutional supremacy after 1945 occurred primarily in countries with civil law rather than common law orientations.⁹⁶ The reasons the European model of judicial review tends to fit far better within the civil law tradition (and the American within the common law) are well known and need not be rehearsed here.⁹⁷ The net result was a growing imbalance in the geographical scope of the two models, with the American limited essentially to the United States, those Latin American countries that had looked to it as the hero of colonial revolutions in the 1820s and adopted the form of its

made it relatively easy to construct a lawsuit that looks similar to a standard abstract review proceeding. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

93. Typically, though not exclusively, one month or thirty days.

94. Of course, in the United States itself, the requirement is a simple majority in the Senate only, and this applies only to federal, not state, judges.

95. See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1681–82, 1702–04 (2004); Miguel Schor, *Judicial Review and American Constitutional Exceptionalism* (Suffolk U. L. School Legal Studies Research Paper Series, Research Paper 08-02, 2008), available at <http://ssrn.com/abstract=1081385>. Note, however, the effect of the U.S. Senate's cloture rule requiring a supermajority of sixty votes to end a filibuster and so get to an up or down simple majority vote on judicial nominees.

96. One important exception to this statement is the Indian Constitution of 1950 (common law and decentralized judicial review). Although Japan is mostly a civil law country, having borrowed parts of the German Civil Code in the early twentieth century, its 1946 constitution, adopted under U.S. occupation, institutes decentralized judicial review.

97. See the classic works cited *supra* note 90. As Brewer-Carías points out, however, the overlap is not perfect. See generally BREWER-CARÍAS, *supra* note 90.

public law, and certain Scandinavian countries whose courts almost never exercised the power.⁹⁸ In this context, the claim of institutional exceptionalism was a plausible one. However, since the mid-1980s, the tremendous new burst of constitutionalism around the world has been a little more evenly divided between the two models in terms of how judicial review has been institutionalized. While most central and eastern European countries have adhered or reverted to their civil law roots in looking primarily to the German version of the European model for inspiration and imitation, Canada as well as several common law countries in Africa, including Ghana, Malawi, and Nigeria, have adhered to the decentralized American model.

Second, there have been pressures and tendencies within the European model causing it to converge somewhat towards the American. As Victor Ferreres Comella has argued, there have been both internal and external pressures pushing towards decentralization within centralized systems.⁹⁹ Internally, both the greater uncertainty of whether legislation applies to specific situations resulting from more abstract, open-ended contemporary statutes, and the delays inherent in the European model requiring constitutional cases to be referred to the constitutional court, have led ordinary courts to overstep the line between interpreting and setting aside legislation by engaging in forced readings of statutes to render them consistent with constitutional rights.¹⁰⁰ Externally, a decentralized system has essentially been mandated by the European Court of Justice for the task of reviewing whether domestic law conflicts with EU law; and, where under the national constitution international treaties prevail over domestic law, the same is true of the European Convention on Human Rights.¹⁰¹

Apart from these moves towards the decentralization of judicial review, the other characteristics of the European model have also undergone certain changes that bring it closer to the American. The role of concrete (versus abstract) judicial review has grown in quantity and importance in more recent times. Approximately ninety-five percent of cases now come to the FCC through the individual constitutional complaint procedure,¹⁰² which was constitutionalized in 1977; and ninety percent of cases decided by the Spanish Constitutional Court are brought under the broadly similar writ of *amparo*, which was reintroduced under the post-Franco constitution in 1978.¹⁰³ Similarly, a priori review has shrunk in scope and is now practiced

98. See Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 AM. J. COMP. L. 345 (2000).

99. Victor Ferreres Comella, *The European model of constitutional review of legislation: Toward decentralization?*, 2 INT'L. J. CONST. L. (1•CON) 461, 463 (2004).

100. See *id.* at 470–73.

101. See *id.* at 477–78, 482–84; see also *supra* note 91.

102. KOMMERS, *supra* note 40, at 11.

103. Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 54 (Louis Henkin & Albert J. Rosenthal eds., 1990); see also Javier Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 715 (2001).

only by the French *Conseil constitutionnel*, having been abolished in Spain and Portugal.¹⁰⁴ Finally, over time, there has been a shift away from the traditional impersonal, unanimous constitutional decision in centralized systems, as several courts have begun to permit dissenting opinions. Germany is one notable example, and the influence of the ECtHR in this respect has further acculturated European lawyers to the practice.

The third and perhaps most interesting recent development is that the importance of the American/European distinction has not only been reduced by the forces of convergence described above, but also potentially transcended by a completely new distinction: strong versus weak judicial review. For within this newer distinction, *both* the American and European models are instances of the same, now traditional and mainstream, strong version of judicial review. The more novel weak form of judicial review is reflected in what I have elsewhere termed "the new Commonwealth model" as a third alternative to the American and European models.¹⁰⁵

Staggered over the last twenty-five years, the three Commonwealth countries of Canada, New Zealand, and the United Kingdom have enacted variations on the theme of rejecting the standard version of constitutional supremacy in favor of one that they believe reflects a more appropriate compromise with their traditions of parliamentary sovereignty. The most visible and concrete element in this new Commonwealth model is that although each country gives its courts greater powers than previously to enforce and protect individual rights, it grants the power of the final word on whether a law that conflicts with a protected right stands or falls to the legislature, and not to the judiciary as in strong review. In Canada, this is the result of the section 33 override power, enacted as part of the Charter in 1982: a provincial or the federal legislature may by ordinary vote determine that a statute is the law of the land notwithstanding that it conflicts with one of the specified Charter rights.¹⁰⁶ The mechanism in New Zealand under the Bill of Rights Act of 1990 is that although courts do not have the power of judicial review, they have the duty to interpret statutes in line with the protected rights wherever possible.¹⁰⁷ In effect, this means that the legislature is empowered to

104. See, e.g., Belén Barreiro, *Judicial Review and Political Empowerment: Abortion in Spain*, in *POLITICS AND POLICY IN DEMOCRATIC SPAIN* 147, 151 (Paul Heywood ed., 1999).

105. Gardbaum, *supra* note 6. For very interesting and important work on the implications of the distinction between strong and weak (or "strong-form" and "weak-form," as he prefers to call it) judicial review, see TUSHNET, *supra* note 92; Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004); Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006); and Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 23 SUP. CT. L. REV. 2D 213 (2004).

106. Canadian Charter of Rights and Freedoms, *supra* note 36, § 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 sections 7 to 15 of this Charter."). The renewable override power operates for a period of five years.

107. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 6 ("Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.").

act inconsistently with a right only where its intent to do so is express. Under the United Kingdom's 1998 Human Rights Act, the higher courts are empowered to declare that a statute is incompatible with a protected right but not to set it aside.¹⁰⁸ Such a declaration, however, is intended to trigger a parliamentary decision whether to amend or repeal the statute—and has done so in every case thus far—but without there being a legal duty to do so.

In sum, to the extent that the American model of judicial review was ever exceptional, or thought of as such, that is no longer the case.¹⁰⁹ As a result of developments since the early 1980s, its geographical scope has expanded and its gravitational pull on the European model has increased in the face of various structural and pragmatic pressures. The institutional differences between the two models remain real and interesting but, from the broader perspective of strong versus weak judicial review, they have become largely details of the acceptance or rejection of the full force of the four fundamentals of modern constitutional supremacy.¹¹⁰

III. CONCEPTIONS OF CONSTITUTIONAL RIGHTS AND THEIR LIMITS

A second, and more fundamental, claim of U.S. structural exceptionalism concerns the general conception of a constitutional right. It is commonly understood that the United States has a more “categorical” structure of constitutional rights than other countries.¹¹¹ In what follows, I resist this general understanding. I argue that, to the contrary, the United States

108. The Act states:

(2) If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility. . . . (6) A declaration under this section (“a declaration of incompatibility”)—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.

Human Rights Act, 1998, c. 42 §§ 4(2), (6) (U.K.).

109. *But see* Schor, *supra* note 95 (arguing that the United States is exceptional because of the lack of political accountability built into *both* weak judicial review—legislatures have the final word—and the supermajority appointments process in the European model).

110. *See supra* notes 5–6 and accompanying text.

111. *See, e.g.,* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 605 (1999) (“I briefly describe Canada’s development . . . of proportionality . . . to illuminate salient differences between the Canadian ‘proportionality’ test and the more categorical form of constitutional analysis employed [in the U.S.]”); Mattias Kumm & Victor Ferreres Comella, *What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 241, 278, 286 (Andras Sajó & Renata Uitz eds., 2005) (“Due to the more categorical structure of constitutional rights in the American constitutional tradition . . . [t]he best understanding of the state action doctrine connects it to the more categorical structure of constitutional rights in the American constitutional tradition.”). Similarly, in the specific context of the First Amendment, Fred Schauer reports that “there is a view, widespread in Canada, in Europe, and in South Africa, and sometimes seen in other countries as well, that American free speech adjudication is obsessed with categorisation and definition.” Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in *EUROPEAN AND US CONSTITUTIONALISM* 47, 48 (G. Nolte ed., 2005).

shares the same deep structure, conception, and analysis of constitutional rights as other modern Western democracies.

A. *The Weight of Constitutional Rights Claims*

Stated baldly, the claim that the United States is exceptional in that it has a more categorical structure of constitutional rights is ambiguous; in order to understand and evaluate it, it is first necessary to distinguish two different senses of the claim. The first, and perhaps most obvious, sense in which constitutional rights may be said to be categorical concerns their *weight*: rights are absolute and cannot be limited or overridden by competing considerations. Although the near unique absence of express limits on rights in the U.S. Constitution¹¹² suggests a textual basis for categorical rights in this sense, this is, of course, not the case in practice. The U.S. Supreme Court has long implied limits on most textually unlimited rights, so that only a small subset of constitutional rights has been held to be absolute. To the extent these go beyond procedural rights specific to common law systems,¹¹³ this small subset tends to have equivalents in most other constitutions.¹¹⁴

This first sense of the categorical claim, involving the weight of constitutional rights, may, however, be restated in nonabsolute terms. Constitutional rights are more categorical in the United States than elsewhere not because they are absolute but because, if infringed, they carry a stronger presumption that the infringement cannot be justified by the government.¹¹⁵ But this claim, too, is far less easy to substantiate than those who make or assume it suggest, for four reasons.

First, it is of course not true, as the implication seems to be, that infringements of all constitutional rights in the United States are subject to the strongest presumption of unconstitutionality reflected in the strict scrutiny test. Many, if not most, constitutional rights are protected by the lesser presumptions of the undue burden and intermediate scrutiny tests, or by what is effectively the nonpresumption reflected in the two types of rational basis tests.¹¹⁶ In other words, there is no single or uniform weight that

112. See *supra* text accompanying note 38.

113. Examples of such rights are the rights to jury trial, to confront accusers, and not to be subjected to double jeopardy.

114. This small subset includes, for example, the rights against cruel and unusual punishment and against taking of private property without just compensation.

115. For example, Kumm and Ferreres Comella state:

[In the United States,] [i]f a constitutional interest that enjoys protection as a right is infringed by the government, there is a *strong presumption* that there has been a *violation* of that person's right. Only in *exceptional* cases where a court finds a *compelling state interest* can this presumption be overcome. . . . Saying that an act by public authorities has infringed an interest protected as a constitutional right does not yet mean a great deal in Canada or Germany. . . . Within proportionality analysis the dice are not loaded substantively in favor of the rights-holder.

Kumm & Ferreres Comella, *supra* note 111, at 276–77 (emphases in original).

116. For an account of how few constitutional rights are subject to strict scrutiny, see Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

attaches to all constitutional rights in the United States; in this sense of the term, some are far more categorical than others.

Second, even in the relatively few rights cases to which it applies, the general strength of the strict scrutiny presumption in the United States and the difficulty of rebutting it are typically overstated. A recent empirical study concludes that overall within the federal courts, there is a thirty percent survival rate for government actions infringing any constitutional right protected by strict scrutiny, and even higher survival rates for certain such rights.¹¹⁷

Third, it is inaccurate to suggest that the principle of proportionality standardly employed outside the United States to determine if infringements of constitutional rights are justified always or generally involves a single and lesser—or even no—presumption, rather than a sliding scale depending on, among other factors, the nature of the particular right infringed.¹¹⁸ The German and South African constitutional courts, together with the ECtHR, have made clear that infringements of certain (i.e., the most important) rights carry a more rigorous burden of justification under the proportionality test than others.¹¹⁹ Similarly, in applying its proportionality test for rights violations under The Human Rights Act, the United Kingdom's House of

117. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006).

118. See Kumm & Ferreres Comella, *supra* note 111, at 276–77 (“Saying that an act by public authorities has infringed an interest protected as a constitutional right does not yet mean a great deal in Canada or Germany. . . . Within proportionality analysis the dice are not loaded substantively in favor of the rights-holder. The proportionality test allows the court to openly consider the respective competing interests and make a judgment on which of them takes precedence under the circumstances.”).

119. For example, the FCC stated:

The choice of an occupation is an act of self-determination, of the free will of the individual; it must be protected as much as possible from state encroachment. In practicing an occupation, however, the individual immediately affects the life of society; this aspect of [vocational activity] is subject to regulation in the interest of others and of society [Accordingly,] the [right to] practice an occupation [under Article 12(2)] may be restricted by reasonable regulations predicted on considerations of the common good. The freedom to choose an occupation [under Article 12(1), which protects the citizen's freedom in an area of particular importance to a modern society based on the division of labor], however, may be restricted only for the sake of a compelling public interest . . . [and] only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice.

Pharmacy Case, 7 BVerfGE 377 (1958) (F.R.G.), *translated in* KOMMERS, *supra* note 40, at 275–76. A similar, more rigorous burden of justification also applies to governmental classifications by one of the enumerated “suspect” traits in Article 3(3): the specific equality provision. See KOMMERS, *supra* note 40, at 290. The South African Constitutional Court has also stated:

[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, *considering the nature and importance of the right* and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation

Christian Educ. S. Afr. v Minister of Educ. 2000 (4) SA 757 (CC) at 777 (S. Afr.) (emphasis added). For the ECtHR, the “margin of appreciation”—the degree of deference accorded to the original national decisionmaking authority—varies with both the importance of the right interfered with and the legitimate aim pursued. See *The Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981) (finding lesser margin in context of law criminalizing homosexual sodomy because case concerned “a most intimate aspect of private life”).

Lords has adopted a “variable intensity of review” approach that takes into account the importance of the particular right infringed.¹²⁰ While not as rigid as the United States’ fixed tier structure, although (as is well known) this itself is currently in a state of flux,¹²¹ it is nonetheless a variation on the theme of different presumptions for different rights. Moreover, even the least important rights are plausibly understood to be more protected under the minimal impairment prong of the proportionality test than under the ordinary U.S. rational basis test.¹²²

Finally, there is a principle in some continental European countries that limits on constitutional rights cannot violate the essential core of a right.¹²³ Although in these countries there is a good deal of scholarly debate about whether this imposes a limit to limits on rights that is independent of the proportionality requirement or is part of it,¹²⁴ even the latter interpretation suggests a more “intense” application of proportionality the greater the degree to which the right is infringed. This essential core doctrine has no real equivalent in the United States. Accordingly, for these four reasons, global pronouncements about the comparative weight of constitutional rights cannot be established *a priori* and are hard to support.

B. *The Methodology of Constitutional Rights Claims*

The second, and analytically distinct, sense in which the structure of constitutional rights is claimed to be categorical, or more categorical, in the United States is a *methodological* one. Here, the focus is not directly on the outcome of rights adjudication (as with the previous sense) but on its process and style of reasoning. The basic claim is that constitutional rights adjudication is framed and analyzed through the use of rule-like categories in the United States, as compared with the more open-ended, contextualized, and case-by-case analysis practiced almost everywhere else under the test of

120. See Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174 (2006).

121. Recent Supreme Court decisions have called into question the previous two-strand analysis under the Due Process Clause: (1) fundamental right/strict scrutiny and (2) non-fundamental liberty/rational basis test. *Lawrence v. Texas*, 539 U.S. 558 (2003) (avoiding the questions whether the right to engage in homosexual sodomy is “fundamental” and what standard of review should be applied); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (not using the term “fundamental” to describe the right to choose an abortion and rejecting strict scrutiny in favor of a new “undue burden” test for restrictions on the right).

122. See, e.g., *Chocolate Candy Case*, 53 BVerfGE 135 (1980) (F.R.G.).

123. See e.g., GRUNDGESETZ [GG] art. 19(2) (F.R.G.), translated in *THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY* (2000) (“In no case may the essence of a basic right be affected.”); CONSTITUCIÓN [C.E.] § 53(1) (Spain), translated in *SPANISH CONSTITUTION* (1992) (“The rights and freedoms recognized . . . are binding on all public authorities. Only by an act which in any case must respect their essential content, could the exercise of such rights and freedoms be regulated . . .”). The ECtHR has also held that the “very essence” of a Convention right may not be impaired. Rivers, *supra* note 120, at 184–87.

124. See, e.g., ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 193–96 (Julian Rivers trans., Oxford Univ. Press 2002) (arguing that the “essential core” approach is not independent of proportionality review).

proportionality. Thus, American free speech jurisprudence is said to be uniquely framed and analyzed through such categories as content-based versus content-neutral speech, protected versus unprotected speech, commercial versus noncommercial speech, obscenity, "fighting words," and so on.¹²⁵

1. General Styles of Reasoning

Although commonly made, at first glance and as a global assessment this methodological claim seems somewhat counterintuitive for several reasons. First, it exactly reverses the standard characterizations of general common law and civil law styles of thinking and reasoning, what Pierre Legrand has referred to as their irreducibly different "*mentalités*."¹²⁶ Thus, whereas the civil law tradition employs more abstract, conceptual, and categorical modes of legal thought, the common law tradition muddles through with pragmatic, contextualized, fact-specific modes of legal argumentation.¹²⁷ Even though, as we have seen, the United States is now far from the only common law country practicing judicial review of entrenched rights, there seems to be something problematic and paradoxical in thinking of such reverse discontinuities between the analysis of constitutional rights on the one hand, and all other legal claims on the other, within the two traditions.

Second, this characterization of U.S. constitutional rights methodology flies in the face of standard internal understandings of the Supreme Court as tending to practice a form of "judicial minimalism"¹²⁸ by not prescribing general rules to guide future action but rather deciding individual cases on the narrowest grounds provided by the facts. Although defended by a few,¹²⁹ this practice is frequently criticized.¹³⁰ Recent examples include *Grutter v. Bollinger*¹³¹ (does its holding apply to high school affirmative action policies or are universities special?); *Bush v. Gore*¹³² (expressly limited to its facts);

125. See Schauer, *supra* note 8, at 31, 53–54.

126. Pierre Legrand, *European Legal Systems are not Converging*, 45 INT'L. & COMP. L.Q. 52, 60–62 (1996).

127. See Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363 (1968) (arguing that these differences are reflected in the very different styles of legal education within the two traditions).

128. The term is commonly associated with Cass Sunstein. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

129. See, e.g., *id.*

130. For a relatively early expression of such criticism, see Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634–35 (1952) ("A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . [C]ourt decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.").

131. 539 U.S. 306 (2003).

132. 531 U.S. 98 (2000).

and, at least in some respects, *Lawrence v. Texas*¹³³ (what standard of review applies to protected liberties, and is morality ever a legitimate or sufficient justifying objective?).

Third, and perhaps most on point, this characterization does not obviously seem to fit such a canonical exercise in comparative constitutional rights analysis as reading *Roe v. Wade*¹³⁴ alongside Germany's *First Abortion Case*.¹³⁵ Although it is true that, unlike *Grutter*, *Bush v. Gore*, and *Lawrence*, *Roe* unusually laid down general and detailed rules to guide future conduct, this "legislative" aspect of the trimester system was one of the opinion's most controversial features, and it was overruled in *Casey*.¹³⁶ As a result, we are back to the more usual case-by-case applications, now of the undue burden—rather than the strict scrutiny—standard. Such similar "legislation" by the FCC in the *First* (and *Second*)¹³⁷ *Abortion Case* is far more common and less controversial in Germany; indeed, it may be inherent in the function of abstract review.¹³⁸

Moreover, in *Roe*, far from relying on a categorical style of reasoning, the majority first engaged in consequentialist analysis of the concrete harms to women caused by forced childbirth, and then openly weighed the various interests at stake through the lens of current medical and scientific evidence to arrive at the trimester system. Such empirical analysis of harms was also, of course, the central feature of the Court's reasoning in *Brown v. Board of Education*.¹³⁹

By contrast, in the *First Abortion Case*, the FCC reached its "legislative" conclusions through more abstract, almost axiomatic, reasoning concerning the status of the fetus, the sanctity of life, and the state's duty to protect it. Thus, the FCC stated that "the duty of the state to protect every human life may therefore be directly deduced from Article 2, Paragraph 2, Sentence I, of the Basic Law."¹⁴⁰ It also inferred this duty from the general concept of constitutional rights as an "objective ordering of values,"¹⁴¹ concluded that aspects of the conflict between the fetus's right to life and the mother's freedom of personality were resolved "a priori"¹⁴² in favor of the former, and

133. 539 U.S. 558 (2003).

134. 410 U.S. 113 (1973).

135. 39 BVerfGE 1 (1975) (F.R.G.), translated in Robert Jonas & John D. Gorby, 9 J. MARSHALL J. OF PRAC. & PROC. 605 (1976).

136. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

137. *Second Abortion Case*, 88 BVerfGE 203 (1993) (F.R.G.).

138. See, e.g., ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 141–44 (2000).

139. 347 U.S. 483 (1954).

140. 39 BVerfGE 1 (1975) (F.R.G.), translated in Jonas & Gorby, *supra* note 135, at 641.

141. *Id.* at 642. On the German concept of constitutional rights as an "objective order of values," see *infra* text accompanying notes 200–201.

142. *Id.* at 643 (emphasis added).

frequently stated that issues were to be decided as "matters of principle."¹⁴³ In one of the few areas of the opinion in which it referred to empirical evidence, the FCC justified the holding that the right to life in Article 2 included the life of the fetus by declaring: "Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception."¹⁴⁴ Compare this to *Roe's* references to the inability of "those trained in the respective disciplines of medicine, philosophy, and theology . . . to arrive at any consensus" on "the difficult question of when life begins."¹⁴⁵ And in reaching its overall decision, the FCC did not engage in much obvious context-specific or empirical weighing of interests, but declared a general rule of principle that, with only a few exceptions, the legislature must legally condemn abortion, in most cases through the criminal law.¹⁴⁶

The strongest case for the methodological claim concerns U.S. free speech jurisprudence. In this area, courts do appear to frame and analyze rights claims through such categories as content-based versus content-neutral speech, protected versus unprotected speech, commercial versus noncommercial speech, obscenity, and "fighting words." Moreover, into which of these boxes particular speech falls heavily influences the outcome of the case, as it determines whether it is protected under the First Amendment at all and, if so, what standard of review applies. In a sense, the claim recalls earlier battles in the United States over how to interpret the scope of the Commerce Clause: between proponents of employing such categories as manufacture versus commerce and direct versus indirect effect on the one hand, and of looking at the empirical effects on commerce on the other.¹⁴⁷

What this observation suggests, however, is that the First Amendment is not only methodologically exceptional in a comparative sense, as Schauer argues,¹⁴⁸ but it is also exceptional from the perspective of the rest of U.S. constitutional rights jurisprudence. Elsewhere, and particularly in Fourteenth Amendment jurisprudence, such categories are far less prominent. Under substantive due process, there are no obvious equivalents, although—

143. *E.g., id.* at 642.

144. *Id.* at 638.

145. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

146. The FCC stated:

In all other cases [than where the life, health, or social necessity of the mother require an abortion] the interruption of pregnancy remains a wrong deserving of punishment If the legislature wants to dispense . . . with penal law punishment, this [decision] would be compatible with the requirement to protect of Article 2, Paragraph 2, Sentence 1, of the Basic Law, only on the condition that another equally effective legal sanction stands at its command which would clearly bring out the unjust character of the act (the condemnation by the legal order) and likewise prevent the interruptions of pregnancy as effectively as a penal provision.

First Abortion Case, 39 BVerfGE 1 (1975) (F.R.G.), *translated in* Jonas & Gorby, *supra* note 135, at 649.

147. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (rejecting a categorical approach in favor of determining the actual effect on interstate commerce).

148. Schauer, *supra* note 8.

to be sure—some liberty interests are protected more than others, such as intimate and personal autonomy interests versus economic. But that is true of most other constitutional systems too. Under equal protection, there might appear to be greater use of framing categories: whether there is discrimination on the basis of race and gender versus on other bases, such as age or wealth; or whether there is race-conscious versus race-neutral discrimination. But these categories are no less employed by other systems. On race, gender, etc., the only difference is their source: elsewhere, which types of discrimination violate the right to equality is typically in the text,¹⁴⁹ whereas in the United States they are judicially determined. On purpose and effect, many non-U.S. courts make use of the same distinction, even where what follows from it is somewhat different.¹⁵⁰

Moreover, some of these categories, or other ones, are used in free speech jurisprudence outside the United States. Thus, the Supreme Court of Canada also “draws on the U.S. First Amendment distinction”¹⁵¹ between regulation directed at content and content-neutral regulations, with the former “necessarily” infringing section 2(b) but the latter only if the claimant demonstrates that the regulated activity promotes one of the principles underlying the guarantee.¹⁵² It also employs the distinction between common law and statutory causes of action in free speech cases to determine whether or not the Charter right applies to them.¹⁵³ The FCC distinguishes between (1) expressions of opinion and representations of fact, and (2) demonstrably untrue representations of fact versus others for the purpose of determining whether certain speech is protected at all under Article 5’s guarantee of freedom of expression.¹⁵⁴

2. A One-Step or Two-Step Approach?

The methodological version of the claim of American categorical exceptionalism is sometimes given more specific shape by focusing on the standard two-step structure of rights adjudication employed throughout the modern constitutional world. The first step consists of determining whether a constitutional right has been infringed; the second step of whether the government

149. See *supra* note 36.

150. See *infra* text accompanying notes 238–239.

151. Kent Roach & David Schneiderman, *Freedom of Expression in Canada*, in *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 259, 266–67 (Gérald-A. Beaudoin & Errol Mendes eds., 4th ed. 2005).

152. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 971–77 (Can.).

153. See *infra* Part IV.

154. Thus, the FCC had held that demonstrably untrue representations of fact are not protected at all under Article 5. *Holocaust Denial Case*, 90 BVerfGE 241 (1994) (F.R.G.); Böll, 54 BVerfGE 208 (1980) (F.R.G.). By contrast, in *The Historical Fabrication Case*, it held that denying German responsibility for the outbreak of World War II was an expression of opinion (and so protected), unlike Holocaust denial (demonstrably untrue representation of fact), which is not protected. 90 BVerfGE 1 (1994) (F.R.G.).

can justify infringing the constitutional right.¹⁵⁵ As Fred Schauer has argued, this two-step analysis—distinguishing the definition or coverage of a right from the overriding of a right—“reflects the deep structure of all rules and principles.”¹⁵⁶

With respect to this two-step analysis, the claim of U.S. categorical exceptionalism has been made in two different ways. First, it is sometimes argued that U.S. courts focus all, or almost all, of their attention on the first step and ignore the second.¹⁵⁷ This reflects a categorical approach because it focuses on the definition of a constitutional right, rather than on the balancing or weighing of rights against competing values and interests that is the distinctive feature of the second step. By contrast, non-U.S. constitutional courts are said to quickly dispose of the first step by employing a liberal interpretation of rights and focusing almost all their attention and analysis on this second step, which involves an open-ended, context-specific, case-by-case assessment under the various prongs of the near-universal proportionality test.¹⁵⁸ Second, to the limited extent that U.S. courts engage in second-step analysis at all, they reject the near-universal proportionality test in favor of the more categorical, rule-like, fixed tiers or standards of review.¹⁵⁹ Thus, U.S. courts are said to employ a narrow conception of both

155. For a fuller descriptions of the two-step process, see Weinrib, *supra* note 5, at 93–98.

156. Schauer, *supra* note 111, at 62.

157. The South African Constitutional Court stated:

Our Constitution deals with the limitation of rights through a general limitation clause. . . . [T]his calls for a ‘two-stage’ approach. . . . In this it differs from the Constitution of the United States. . . . Although the ‘two-stage’ approach may often produce the same result as the [United States’] ‘one-stage’ approach, this will not always be the case.

S. v Makwanyane 1995 (3) SA 391 (CC) at 435 (S. Afr.) (footnotes omitted); see also Kumm & Ferreres Comella, *supra* note 111, at 276 (“It is a characteristic feature of American constitutional-rights discourse that in most areas of the law the focus is generally on the *first* part of the inquiry. The core question is whether a particular act violates an interest that is protected as a constitutional right.” (footnote omitted)). Schauer has also echoed these sentiments:

Under the American approach [to free speech], it appears as if the sole task is to delineate the contours of a right which is then to be treated as having infinite stringency, such that all of the “action,” as it were, is at the stage of definition. By contrast, the non-American approach appears explicitly to authorize a two-step process, in which the first step is to delineate the scope of the right, and then, if some activity or some governmental restriction falls within that scope, thereafter to determine whether the limitations are justified according to the designated burden of justification and the designated proportionality inquiry.

Schauer, *supra* note 111, at 51.

158. See Schauer, *supra* note 111, at 51.

159. See Kumm & Ferreres Comella, *supra* note 111, at 278 (“It would be false to claim that proportionality analysis and balancing have no role to play in American constitutional law. They obviously do. Yet it is also clear that, unlike the courts used as a point of comparison here, the Supreme Court is more hesitant in its embrace of proportionality analysis and frames inquiries in a way that appears more legalistic and categorical.” (footnote omitted)); see also Jackson, *supra* note 111, at 603 (“U.S. constitutional law does not ordinarily and explicitly resort to the idea of proportionality as a measure of constitutionality. . . .”); Weinrib, *supra* note 5, at 89–105 (suggesting that proportionality is a central part of postwar paradigm rejected by the post-Warren Supreme Court).

rights and their permissible limits, whereas other courts employ a broad conception of both.¹⁶⁰

This first claim—that, exceptionally, U.S. courts focus exclusively, or almost exclusively, on the definition/infringement step—once again moves a little too fast and fails to follow its own prescription of context-specific, case-by-case analysis in favor of over-generalization. For U.S. constitutional law is notoriously pluralistic, unsystematic, and clause-bound in its own doctrines. So while I think Fred Schauer is correct that U.S. free speech jurisprudence is more categorical in this sense, reflecting in part as he argues an exceptionally strong substantive commitment to free speech protection,¹⁶¹ it should not be automatically inferred that this approach applies to other constitutional rights.¹⁶² If we turn again from the First to the Fourteenth Amendment, from the right of free expression to the rights to liberty and equality, we frequently see something quite different.

As far back as 1905, in the notorious case of *Lochner v. New York*,¹⁶³ both the majority opinion and Justice Harlan's dissent spent the vast majority of their words on the second-step issue of whether the New York maximum-hours law was a justified infringement of the bakers' constitutional right to freedom of contract.¹⁶⁴ In as paradigmatic a case as *Roe v. Wade*, one of the notable features of the majority opinion (still the subject of ongoing criticism by both opponents and proponents of abortion) was how briefly and quickly it concluded that the right to privacy contained in the Fourteenth Amendment's liberty clause includes the right to choose an abortion¹⁶⁵ before focusing most of its attention on the second-step issue of whether, when, and for what purposes the government may justifiably limit and override the right.¹⁶⁶ Similarly, in the more recent landmark affirmative action case of *Grutter v. Bollinger*, decided under the Fourteenth Amendment's Equal Protection Clause, the entire majority opinion and the various dissenting ones addressed the second-step issue of whether the government objective of promoting educational diversity justified infringing the plaintiff's constitutional right under the colorblind norm not to be discriminated

160. See Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY* 131, 150 (George Pavlakos ed., 2007) ("Another approach is to define narrowly both the scope and the permissible limitations of the rights. This has been the approach of the U.S. Supreme Court . . .").

161. Schauer, *supra* note 111, at 47–63.

162. Schauer himself makes no such general inference, limiting his account to the First Amendment. See *id.*

163. 198 U.S. 45 (1905).

164. Lorraine Weinrib considers Harlan's dissent in *Lochner* as foundational to what she argues would eventually become the "postwar paradigm," a paradigm of rights-based constitutional jurisprudence that includes proportionality and was championed by the Warren Court but subsequently rejected by the isolationist and exceptionalist Supreme Court of the post-Warren era. Weinrib, *supra* note 5, at 105–10.

165. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Only a single paragraph of the fifty-four page majority opinion was devoted to this issue. *Id.*

166. *Id.* at 153–64.

against on the basis of race. In *United Building & Construction Trades Council v. Mayor of Camden*, Chief Justice Rehnquist referred to a "two-step inquiry" of first determining whether a right is implicated and infringed and, second, whether there is "substantial reason" for the infringement.¹⁶⁷

And on the other side of the ledger, is it always, or characteristically, true that non-U.S. constitutional courts simply rubber stamp the first step claim of rights infringement in their rush to assess the second stage, at least where more important rights are concerned? Well, in *R. v. Morgentaler*, the Canadian Supreme Court spent a great deal more time than the U.S. Supreme Court did in *Roe* on the first-step issue of whether criminalization of abortion implicated a constitutional right.¹⁶⁸ And in *Holocaust Denial*, the FCC addressed the issue of whether demonstrably false representations of fact are protected speech under Article 5 before concluding that they are not, thus negating any need for second-step analysis.¹⁶⁹

An important reason why U.S. courts sometimes appear to focus more on the first step is the (near unique) absence of express limits on constitutional rights. Where all limits are judicially implied, it is far easier to justify such implication if all limits are thought of as part of the first step, part of the undoubtedly legitimate judicial function of interpreting the meaning and scope of a constitutional right, rather than—as many are—part of the second step of specifying when the right as defined may be overridden by conflicting public policy objectives. This is especially true in the United States because judicial review and the power of the courts remain deeply contested, unlike in continental Europe. So, for example, although the U.S. Supreme Court implies both what types of speech or conduct lie outside the right to "freedom of speech" in the first place (first-step issue) and the circumstances in which government may promote public policy objectives that conflict with what is inside the right (second-step issue), there is a tendency for the latter to be conceptualized as part of the definition of the right. Thus, the right to free speech is, very roughly, defined as the right to be free from intentional, content-based regulation of noncommercial, expressive activity that does not amount to obscenity, fighting words, or a clear and present danger *unless* the regulation is necessary to promote a compelling governmental interest. Whatever the distortions in self-understanding resulting from the absence of express limits, however, the practice of the Supreme Court properly recognizes the reality that what lies on either side of the "unless clause" reflects the distinction between "internal" and "external" limits

167. 465 U.S. 208, 218 (1984). In this case, the right at issue was the right to non-discriminatory treatment by State A of a citizen of State B contained in the Privileges and Immunities Clause of Article IV. *Id.*

168. [1988] 1 S.C.R. 30, 51–73 (Can.).

169. 90 BVerfGE 241 (1994) (F.R.G.). The FCC engaged in a brief second-step analysis of the separate question of whether, if an utterance of Holocaust denial is considered not by itself but in connection with a broader argument about the "susceptibility to blackmail" of German politics, it might then be deemed constitutionally protected expression of opinion. *Id.* at 250.

on rights and the standard two steps of modern constitutional rights adjudication.¹⁷⁰

The second claim, it will be recalled, is that even to the limited extent U.S. courts focus on the second step, they still employ the more categorical, fixed tiers of review methodology and uniquely reject the open-ended, context-specific proportionality test of contemporary constitutionalism. Along these lines, the United States could be said to reject the principle of proportionality twice over: once by largely ignoring the second step altogether; and again, when it does not, by using a different second-step test. But on closer analysis, this second claim is only a little more accurate than the first. Although it is undoubtedly true that the United States employs neither the label nor the precise content of the proportionality test in constitutional rights cases,¹⁷¹ the differences between the two second-step tests are, for two reasons, both far less and far less significant than generally claimed.

The first reason is that, as mentioned during the discussion of weight above, the proportionality test as practiced does not involve a single presumption that applies to all constitutional rights equally. Even though the same verbal test—that is, the same various prongs—applies to all, it is applied in a way that takes into account, among other things, the relative importance of the particular constitutional right at issue.¹⁷² In Germany, under the proportionality test, what justifies an infringement, say, of the general constitutional right to liberty that has been held to include, among many other things, the right to feed pigeons in public squares,¹⁷³ would not necessarily justify an infringement of the constitutional right to human dignity, the most important constitutional right and value in the Basic Law.¹⁷⁴ Similarly, what would justify infringing the right to practice an occupation in the way one wants would not necessarily justify infringing the right to choose or enter a given occupation in the first place.¹⁷⁵

170. For more details of this argument, including further explication of the distinction between internal and external limits on constitutional rights, see Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007).

171. Outside the rights context, the concept of proportionality is used in the United States in both the dormant commerce clause “balancing test”—whether the burden on interstate commerce is disproportionate or clearly excessive relative to the local benefits—and Section 5 of the Fourteenth Amendment—is Congress’s measure so disproportionate to any state violations as to go beyond remedy or prevention into “substantive” regulation? Even in the rights context, proportionality is arguably an implicit part of the “undue burden” test for both First Amendment and abortion cases. In contrast, the Supreme Court has expressly rejected proportionality as part of the test for “cruel and unusual punishment” under the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (“We conclude . . . [that] the Eighth Amendment contains no proportionality guarantee.”).

172. See *supra* text accompanying note 118.

173. Mattias Kumm mentions this case, 54 BVerfGE 143, 147 (1980) (F.R.G.), as an example of the “mundane things” that the FCC has held are included within the general right to liberty derived from the right to the “free development of . . . personality” under Article 2(1)—understood as the right to do or not to do whatever you please. See Kumm, *supra* note 160, at 141.

174. See *supra* note 40.

175. See *supra* text accompanying note 118.

Accordingly, the difference between (1) this sliding scale, or “variable intensity of review,” approach to the criteria of justification for limiting rights depending on, among other things, the importance of the right in question; and (2) the U.S. approach of formally different standards of review, including different verbal tests, for different rights is far less than would be the case with a single justificatory weight applying to all rights. Indeed, Justice Thurgood Marshall was well known for arguing that the sliding scale metaphor provided a more accurate view of equal protection jurisprudence in the United States than that of fixed tiers of review.¹⁷⁶ And equally well known is Justice John Paul Stevens’s view that “[t]here is only one Equal Protection Clause” with a single standard that applies differently in different contexts, and not two or three.¹⁷⁷ The fact that these two Justices’ accounts are intended to be descriptive of the very same body of case law as the fixed tiers of review conception further suggests that the actual structure of the U.S. and non-U.S. tests are not so very different.

The second reason is that, labels aside, the *actual contents* of the U.S. tiers of review and proportionality tests are not so very far apart. As Vicki Jackson notes:

While the language of “proportionality” is not generally used in the United States, the underlying questions—involving the degree of fit between the claimed objective and the means chosen, and a concern for whether the intrusion on rights or interests is excessive in relation to purpose—are already an important part of some fields of U.S. constitutional law, especially equal protection, and free speech. The simplicity of the underlying idea of proportionality in U.S. constitutional law may be obscured by the several doctrinal forms of multi-factored tests in which it is embodied.¹⁷⁸

Similarly, David Beatty has argued that the decisions in *Lochner*, *Brown*, and *Roe* demonstrate that the proportionality test, which he refers to as the ultimate rule of law, is “as American as apple pie” and that the proportionality principle “is as much a part of the rule of law in America as anywhere else.”¹⁷⁹

The contents of the proportionality inquiry, as the basic tool for determining whether limitations on rights are justified, are fairly standard among the countries expressly employing it. One variation, however, is that certain countries and regimes employ a more formalized—dare one say, categorical—version, in which the various prongs of the test are considered

176. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., dissenting).

177. *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

178. Jackson, *supra* note 111, at 609–10 (footnotes omitted).

179. DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 187 (2004). Richard Fallon also notes that there are “important commonalities,” and a “similarity,” though not identity, between U.S. strict scrutiny and the proportionality tests used elsewhere. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1294–96, 1330–33 (2007). Speaking more generally about constitutions around the modern world, David Law argues that “variations in text and terminology do not appear to engender deep dissimilarities in the analytical structure of rights adjudication.” David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 694 (2005).

separately and in order, as in Germany and Canada; while others—South Africa and the ECHR, for example—employ a more gestalt version. Although the concept of proportionality primarily concerns the means used to limit a right, the tests employed also place restrictions on the ends that can justify such limitation. Sometimes, as in the ECHR with its special limitations clauses, these ends are specified in the text. Where they are not so specified—as under the general limitations clauses in Canada and South Africa, and sometimes in Germany—then only objectives of sufficient importance in the circumstances are permissible. In Germany, this applies to more important rights only; others, such as the general right to liberty, require only a legitimate objective. Turning to the proportionality test of means itself, there are typically three prongs: (1) that the means are rationally related to this objective; (2) that the means are necessary or minimally impair the right; and (3) that overall, looking at the costs and benefits involved, the means do not impose a disproportionate burden on the right (proportionality *stricto sensu*).¹⁸⁰

Comparing the prongs of this test to those used in the United States, it is clear that only the final one, proportionality in the strict sense, is generally unfamiliar in the American rights context. Indeed, it is perhaps not entirely coincidental that it is this final prong that gives rise to a second variation among countries overtly employing proportionality tests, what Julian Rivers refers to as “two conceptions of proportionality”: a “common law” and a “continental European” one.¹⁸¹ For the practice of several common law countries reflects a certain unease with the third prong, sometimes by treating the necessity/minimal impairment prong as the final stage of proportionality review, by formally omitting the proportionality *stricto sensu* prong from statements of the test, by conflating it with the necessity test, or by rarely relying on it in practice.¹⁸²

Regarding ends, in the absence of express limits, U.S. courts assess the importance or legitimacy of the government interest put forward to justify infringing or overriding the right in question, just as courts in Canada, South Africa, and Germany do. As far as the three prongs of the proportionality test for means are concerned, the rational relationship test is used for all rights in the United States, although it is insufficient for those rights subject to “heightened scrutiny.” For such rights, a version of the minimal impairment test is used in one formula or another (least restrictive means, necessity, narrow tailoring, substantially related) under both strict and intermediate scrutiny. Especially in common law countries, these first two prongs of the means test are far more common bases for invalidating state

180. See *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–40 (Can.) (for Canada); S. AFR. CONST. 1996 § 36(1) (for South Africa); see generally NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* (1996) (surveying the proportionality tests in different European countries).

181. Rivers, *supra* note 120, at 177–82. According to him, these common law countries include Canada, South Africa, and the United Kingdom. *Id.*

182. See *id.* For example, in Canada, Peter Hogg has argued that the minimal impairment and proportionality prongs are not conceptually distinct and should not be treated as such. Peter W. Hogg, *Section 1 Revisited*, 1 NAT'L J. CONST. L. 1, 23 (1991).

action than the final one.¹⁸³ But even here, although this third prong—proportionality in the strict sense—forms no official part of any U.S. test for constitutional rights, one can plausibly argue that it stands behind certain common intuitions about a few controversial U.S. cases. For example, in *Korematsu v. United States*,¹⁸⁴ one largely unstated reason for the near unanimous current view that the internment of all persons of Japanese ancestry was unconstitutional is that the burden imposed was disproportionate to the danger: that *even if* one grants a compelling interest and no less restrictive way of promoting it in the immediate circumstances, internment was still a disproportionate means.

The bottom line of my analysis is that far from being exceptional, the United States shares the deep common structure of modern constitutional rights analysis. This structure employs a conception of rights as “shields” rather than “trumps” against conflicting public policy objectives,¹⁸⁵ although shields of varying (rather than uniform) sizes and strength. Rights claims are adjudicated through a two-step analysis of asking first whether a right is implicated and infringed, and second whether the infringement is justified. This second step involves balancing the right against conflicting public policy objectives. Put another way, this structure means that legislatures are granted a limited power to override constitutional rights, which is validly exercised when the relevant burden of justification is satisfied.¹⁸⁶ Doing so involves tests of both ends and means—whether the objective is legitimate

183. See Rivers, *supra* note 120, at 177–82. Peter Hogg and Allison Bushell have argued that section 1 analysis in Canada almost always turns on the minimal impairment prong. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 85 (1997).

184. 323 U.S. 214 (1944).

185. I am employing the term used by Fred Shauer to describe the U.S. conception of constitutional rights. See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429–30 (1993).

186. See Gardbaum, *supra* note 170 (identifying this common structure of constitutional rights and presenting the missing normative justification for it; i.e., explaining why rights should be overridable by conflicting public policy objectives of sufficient importance).

Within the United States and as part of the “antibalancing critique,” there is a further sense in which the structure of certain constitutional rights is sometimes claimed to be categorical. This is the “excluded reasons” or “structural” conception of constitutional rights, which permits a right to be limited or overridden not where it is outweighed by a conflicting public policy objective but rather where the state has acted for a permissible (and not an excluded) reason. On this account, the adjudication of certain rights becomes a categorical exercise that does not require or permit balancing: if the state limits a right for a non-excluded reason, its action is automatically constitutional; if for an excluded reason, it is automatically unconstitutional. See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 735–36 (1998). Its adherents acknowledge, however, that this conception applies only to certain specific rights in the United States, including the right to vote, and does not provide a general account of U.S. constitutional rights practice. Moreover, “excluded reasons” will rarely, if ever, amount to compelling or important governmental objectives under conventional heightened scrutiny analysis in the United States. Finally, it has not been in this sense, or for this reason, that comparative constitutional law scholars have made the general claim that the United States has a more categorical conception of rights than elsewhere.

and sometimes sufficiently important in the circumstances, and whether the challenged measure is a close enough means to that end.

Accordingly, even the two “hate speech” cases of *R. v. Keegstra*¹⁸⁷ and *R.A.V. v. City of St. Paul*,¹⁸⁸ the outcomes of which are correctly taken to epitomize significant substantive differences between the right of free speech in Canada and the United States respectively, nonetheless share a common structure of rights analysis.¹⁸⁹ Both courts found that their respective rights to free speech had been infringed by the two criminal laws under the first step. Under the second step, both courts further found that the government’s objective in regulating the respective speech was sufficiently important to justify the restriction. What led to the different outcomes was the final part, the means test. Specifically, whereas the Canadian Supreme Court found that section 319(2) of the Criminal Code was rational and minimally impaired the right,¹⁹⁰ the U.S. Supreme Court found that singling out the particular forms of hate speech covered by the law was not necessary to achieve the city’s compelling interest; an “ordinance not limited to the favored topics” would have had the same effect.¹⁹¹

My claim is not that there are no differences at all within this overarching common structure of rights analysis, but rather that such differences are far less significant than often suggested, do not justify ascribing an exceptional conceptualization of rights to the United States, and do not detract from the commonality of the basic and deep structure of rights analysis. What remains are primarily micro-differences of form and label that are largely a function of (1) greater age and parochialism and (2) the absence of express limits on rights in the United States.

IV. THE STATE ACTION DOCTRINE AND HORIZONTAL EFFECT

A third fundamental structural issue is the scope of constitutional rights and their reach into the sphere of private action. Within comparative constitutional law, it is generally understood that the United States is exceptional on this issue. The existence and operation of the distinctive U.S. “state action doctrine” results in a greater public/private distinction in the scope of constitutional rights and places the United States at, or closer to, the “vertical” end of a spectrum of positions in contrast with the more “horizontal” approach of

187. [1990] 3 S.C.R. 697 (Can.).

188. 505 U.S. 377 (1992).

189. In focusing on the common structure of analysis, I do not mean to deny some of the differences in style and content identified by Jackson in her very perceptive discussion of the two cases. See Jackson, *supra* note 111, at 611–16.

190. On the other hand, the dissenters in *Keegstra* argued that the statute did not minimally impair free expression.

191. *R.A.V.*, 505 U.S. at 396. It is undoubtedly true, as Justice White’s concurring opinion pointed out, that requiring a more inclusive speech restriction is an odd example of less restrictive means analysis. *Id.* at 404.

countries such as Germany, Ireland, Canada, and South Africa.¹⁹² More intuitively, perhaps, American constitutional lawyers tend to believe that the state action doctrine protects private autonomy to a greater degree than elsewhere.

This contrast is not exclusively or primarily the straightforward one that, under the state action doctrine, constitutional rights only bind government and not private actors (the traditional definition of the vertical position), whereas elsewhere constitutional rights also bind private actors (the traditional definition of the horizontal position). Although there are a few countries that adopt this latter position to some significant extent,¹⁹³ the United States is still standardly deemed less horizontal than other countries—such as Germany and Canada—that formally share its basic position that constitutional rights only bind the government. The reason is that such other countries are said to occupy an intermediate position on the spectrum in between vertical and horizontal effect that is referred to as “indirect horizontal effect.”¹⁹⁴ Under this intermediate position, although constitutional rights do not *directly* regulate private actors, they do so *indirectly* by regulating the legal relationships of private actors among themselves. In this indirect way, constitutional rights regulate what private actors can be legally authorized to do with and to each other, what laws they can rely on in their everyday activities or in court, and which of their interests, choices, and actions may be protected by law.¹⁹⁵

The more subtle claim of American exceptionalism, then, is that the U.S. state action doctrine is distinctive in that it operates not simply to reject direct horizontal effect but also in ways that reject or lessen the indirect horizontal effect of constitutional rights. That is, it “functions as a far more effective shield” against constitutional rights coming into play in the context of private litigation than in other countries adopting the same formal position that rights only bind the government.¹⁹⁶ Accordingly, the United States

192. See, e.g., Murray Hunt, *The ‘Horizontal Effect’ of the Human Rights Act*, 1998 PUB. L. 423, 427 (“The jurisdiction which is closest to the position favoured by the verticalists is the United States.”).

193. Examples include Ireland, South Africa, and Colombia.

194. On Canada, Hunt, for example, places the United States in the “vertical” position and Canada in the more horizontal position of “indirect horizontal effect.” See Hunt, *supra* note 192. On Germany, see, for example, Edward J. Eberle:

The [German] Basic Law’s influence on civil law is a notable contrast to American law. . . . [I]n comparison to the Basic Law’s “objective” ordering of society, the American Constitution withdraws from the important private sector of society. . . . In this way, the reach of the German Basic Law is broader than its American counterpart.

EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 29 (2002).

195. See Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 415 (2003).

196. See Kumm & Ferreres Comella, *supra* note 111, at 245 (“In the US the state action doctrine generally functions as a far more effective shield against substantive constitutional-rights scrutiny in the context of civil litigation than the doctrines of indirect effect in Germany or Canada.”).

is generally understood to be more vertical and less horizontal in its approach than both Germany and Canada.¹⁹⁷

I believe this consensus is mistaken. Far from rejecting or limiting the indirect horizontal effect of constitutional rights, the United States adheres to this position in a form that is clearly stronger than Canada and as strong as Germany. In other words, as a structural matter, constitutional rights have no less a reach into the private sphere in the United States than in Germany and a greater reach than in Canada. In order to explain why this is so, I will discuss the position in each country, starting with Germany.¹⁹⁸

A. *The Comparative Position of the United States*

During the late 1950s, the German Constitutional Court resolved the preexisting uncertainty concerning the Basic Law's position on vertical and horizontal effect by developing the doctrine of *mittelbare Drittwirkung*—or indirect third party effect of constitutional rights—which has remained foundational ever since.¹⁹⁹ In essence, this doctrine holds that although constitutional rights bind only government organs, they apply directly to all private law (including the sacrosanct Civil Code) and therefore indirectly affect private actors whose legal relationships are regulated by that law. Constitutional rights, declared the FCC in the landmark *Lüth* decision of 1958, form “an objective order of values.”²⁰⁰ It continued:

This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system . . . It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.²⁰¹

Accordingly, all private law is directly subject to constitutional rights and is invalid if in conflict with them. What is indirect in the concept of indirect horizontal effect is *the effect of constitutional rights on private actors*. Unlike the direct effect of constitutional rights on private actors resulting

197. See *id.* A few have questioned whether this claim is true of Canada. See Cheryl Saunders, *Constitutional Rights and the Common Law*, in *THE CONSTITUTION IN PRIVATE RELATIONS*, *supra* note 111, at 183, 183–84, 184 n.5 (arguing that Canadian courts have taken a “more cautious” approach than the U.S. Supreme Court in *New York Times* on equating the actions of courts and states for purpose of triggering constitutional scrutiny); Renáta Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?*, in *THE CONSTITUTION IN PRIVATE RELATIONS*, *supra* note 111, at 1, 8 (arguing that Canadian courts have refused to follow the logic of *New York Times*).

198. In presenting this case, I build on and develop arguments made in Gardbaum, *supra* note 195, and Stephen Gardbaum, *Where the (state) action is*, 4 INT'L J. CONST. L. (1•CON) 760 (2006) (reviewing *THE CONSTITUTION IN PRIVATE RELATIONS*, *supra* note 111).

199. See, e.g., Greg Taylor, *The Horizontal Effect of Human Rights Provisions, the German Model and Its Applicability to Common-Law Jurisdictions*, 13 KING'S C. L.J. 187, 199 (2002) (arguing that there is “no sign” of the indirect effect doctrine being abandoned by the FCC).

200. *Lüth*, 7 BVerfGE 198 (1958), translated in KOMMERS, *supra* note 40, at 363.

201. *Lüth*, 7 BVerfGE 198, translated in GERMAN LAW ARCHIVE (P. Schlechtriem et al. eds., Tony Weir trans., 1999), available at <http://www.iuscomp.org/gla/judgments/tgcm/v580115.htm>.

from imposing constitutional duties on them in the fully horizontal position, indirect horizontal effect is achieved via the impact of constitutional rights on the private law that individuals invoke in civil disputes.

By contrast, Canada does not fully share this position. The reason is that one important type of private law—namely, the common law—is usually not directly subject to constitutional rights scrutiny. In the well-known leading case of *Dolphin Delivery*,²⁰² the Supreme Court of Canada took the “more cautious”²⁰³ position of excluding the common law from full and direct constitutional rights scrutiny in cases where no independent government action is involved.²⁰⁴ Instead, under their traditional and inherent power to bring the common law into line with contemporary social values, Canadian courts “ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.”²⁰⁵ At least formally, this difference in constitutional treatment of private law statutes on the one hand and the common law at issue in private litigation on the other—between Charter rights and Charter values—represents a less horizontal position on the spectrum. I have elsewhere suggested that this general position may usefully be termed “weak indirect horizontal effect,” in contrast with the “strong” version in Germany.²⁰⁶ It is “weak” in the sense that the impact of constitutional rights on (a certain type of) private law is not as great as where private law is fully and equally subject to the constitution.²⁰⁷

How different are these two tiers of constitutional scrutiny in Canada: the direct subjection of statutes to constitutional rights scrutiny and the more indirect, or weaker, subjection of common law rules to constitutional values analysis? Obviously, if in practice there is little or no difference, the formal distinction between the two is insufficient to place Canada in a less horizontal position. The most definitive test would presumably be to see how two

202. *Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (Can.).

203. *See* Saunders, *supra* note 197, at 183.

204. The primary reason was its interpretation of section 32(1) of the Canadian Charter of Rights and Freedoms, which applies the Charter to the federal Parliament, the legislatures of each province, and the “governments” of Canada and each province. *Dolphin Delivery*, [1986] 2 S.C.R. at 598–99. The court interpreted “government” according to standard usage to mean the executive branch only, with the consequence that the Charter applies neither to the courts nor to private actors. *See id.*

205. *Id.* at 603.

206. *See* Gardbaum, *supra* note 195, at 415. I borrowed this term from Gavin Phillipson, who used it to characterize what he argues is the best interpretation of the position on horizontal effect under the United Kingdom's Human Rights Act. *See* Gavin Phillipson, *The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whisper?*, 62 MOD. L. REV. 824, 833–43 (1999).

207. I have elsewhere proposed what I believe to be a more accurate and helpful spectrum of positions on the reach of constitutional rights into the private sphere than the standard one: (1) a vertical position, in which constitutional rights only govern public law and have no effect, either direct or indirect, on private actors; (2) weak, indirect horizontal effect, in which constitutional rights do not directly govern private law but have some lesser influence on it; (3) strong, indirect horizontal effect, in which constitutional rights directly, fully, and equally govern all private law; and (4) direct horizontal effect, in which constitutional rights directly govern private actors. *See* Gardbaum, *supra* note 195, at 436–37.

laws identical in content, but one in the form of a statute and the other a common law rule, were evaluated under the two approaches. To the best of my knowledge, there has been no such laboratory experiment. What we do have are (1) subsequent general statements by the Canadian Supreme Court that may shed light on whether there are any practical differences and (2) extrapolations from nonidentical cases.

In *Hill v. Church of Scientology*,²⁰⁸ which after *Dolphin Delivery* is the most important case on the topic, the Court was at pains to stress the importance of the distinction between the two tiers of scrutiny. It stated:

When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action."²⁰⁹

And a little further on, the Court wrote, "*it is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s.32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny.*"²¹⁰ These general statements seem to belie the notion that the Canadian Supreme Court thinks the distinction of no practical significance.

Moreover, the Court in *Hill* proceeded to explain what that practical significance consists of. First, as just noted, litigants must rely on existing causes of action and courts may not create new ones.²¹¹ Second, courts must take a cautious approach to amending the common law; "[f]ar-reaching changes . . . must be left to the legislature."²¹² Finally, and perhaps most importantly:

[The party suing on the basis of a prevailing common law rule] should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.²¹³

By contrast, under a *Charter* rights claim the government bears the burden of justification under section 1, the second part of the analysis.²¹⁴

Two nonidentical cases that may shed some light on the comparison between *Charter* rights and values are *Hill* itself and *R. v. Zundel*.²¹⁵ Both cases

208. [1995] 2 S.C.R. 1130 (Can.).

209. *Id.* para. 93.

210. *Id.* para. 95 (emphasis added).

211. *Id.*

212. *Id.* para. 96.

213. *Id.* para. 98.

214. *Id.* para 98.

215. [1992] 2 S.C.R. 731 (Can.).

involved the issue of Charter protection of false and injurious statements, the first under the common law and the second under a statute. In *Zundel*, the Court invalidated section 181 of the Criminal Code as applied to prosecute the defendant for publishing a pamphlet entitled *Did Six Million Really Die?*²¹⁶ Although three Justices dissented from the decision, all members of the court agreed that the speech in question was protected under section 2(b) of the Charter, despite its deliberate falsehood.²¹⁷ This reflected what the court described as the "broad, purposive interpretation" of section 2(b) under which it "ha[d] repeatedly affirmed that all communications which convey or attempt to convey meaning are protected . . . unless the physical form by which the communication is made (for example, by a violent act) excludes protection."²¹⁸ Accordingly, writing for the majority, Justice McLachlin concluded, "I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech."²¹⁹ The value of the speech was relevant only to the section 1 (proportionality) analysis, in which the burden of proof is on the government and the Court held section 181 failed because, unlike the more targeted provision of the Criminal Code upheld in *Keegstra*, it did not pursue a sufficiently important or pressing government purpose.²²⁰

In *Hill*, decided after both *Zundel* and *Keegstra*, the Court upheld the common law of defamation against a Charter value challenge after determining that it struck an appropriate balance between the twin values of reputation and free speech. But in considering the weight of the free speech value, the court stated:

Certainly, defamatory statements are very tenuously related to the core values which underlie s.2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.²²¹

Here the Court seems to suggest that false and injurious statements may not even be within Charter values protecting free speech at all, even though (as we have just seen) they are within Charter rights. Moreover, there can be little doubt after *Zundel* and *Keegstra* that a similar defamation law enacted by statute—such as Ontario's Libel and Slander Act of 1990 (which was not relied on by the plaintiff in *Hill*) or Quebec's civil code provisions on

216. *Id.* at 732–33.

217. *Id.* at 735. The Charter provision states: "Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . ." Canadian Charter of Rights and Freedoms, *supra* note 36, § 2.

218. *Zundel*, [1992] 2 S.C.R. at 752–53.

219. *Id.* at 758.

220. *Id.* at 758–59.

221. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, para. 106 (Can.).

defamation²²²—would conflict with the “broad, purposive” interpretation of the right contained in section 2(b), thereby putting the onus on the government to justify the statute under section 1. It is quite true that there were far clearer public values at stake on the other side of the balance in *Hill* than in *Zundel*, but the important point for present purposes is the quite different treatment of the speech claim standing by itself in the two cases.

How does the United States compare? Does it in fact take a less horizontal position than both Germany and Canada, as is generally thought? Simply put, the United States takes the same position as Germany: constitutional rights directly govern all private law and so indirectly govern private actors. All law in the United States—including private law statutes and court-made common law at issue in private litigation—is fully, equally, and directly subject to the Constitution.

This fundamental and quite general proposition does not derive from the particularities of the Fourteenth Amendment’s “no state shall” language or the labyrinthine intricacies of the Supreme Court’s state action doctrine. It is, rather, a simple and straightforward mandate of the Supremacy Clause of Article VI, which states, “This constitution . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding.”²²³ The Supremacy Clause means that all law—state and federal, public and private, statutory and common law—is governed by and subject to the Constitution and its set of rights.²²⁴ The clause itself makes clear that the Constitution binds state court judges, which strongly suggests it also binds the common law made by such judges and relied on in private litigation.²²⁵ This fundamental principle of U.S. constitutional law was simply applied or confirmed, and not created, in the two landmark cases of *Erie Railroad Co. v. Tompkins*,²²⁶ which held that state common law is state law for constitutional purposes, and *New York Times v. Sullivan*,²²⁷ which held that the state common law of libel at issue in private litigation is directly subject to the Constitution.²²⁸

222. On the potentially differential treatment of defamation law in common law and civil code jurisdictions within Canada, see Willmai Rivera-Perez, *Dolphin Delivery: The Constitutional Values Standard and its Implications for Private Law in Quebec* (2007) (unpublished manuscript, on file with author).

223. U.S. CONST. art. VI, cl. 2 (emphasis added).

224. Gardbaum, *supra* note 195, at 418–19.

225. It was precisely the absence of such a provision expressly binding the courts to the Charter in Canada, and the textual application to the legislative and executive branches only, that led the Canadian Supreme Court to hold the common law not directly subject to constitutional rights in *Dolphin Delivery*. See *id.* at 399–400, 419. By contrast, the inclusion of the courts among the “public authorities” bound to act compatibly with the Convention rights is the central argument in the United Kingdom for the indirect horizontal effect of the Human Rights Act. See *id.* at 408–09.

226. 304 U.S. 64 (1938).

227. 376 U.S. 254 (1964).

228. It should be noted that the Canadian Supreme Court explicitly rejected the U.S. position, affirmed in *New York Times* and other cases, that the Constitution applies to common law rules at

In explaining the influence of the Basic Law's value system on private law, the FCC stated, as noted earlier, that: "no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."²²⁹ Does this latter interpretive duty independently expand the scope of constitutional rights into private law over and above the former "no conflicts" rule? In what follows, I will explain why the answer is no.

The interpretive duty means that, so far as possible, a private law rule must be interpreted consistently with any relevant constitutional right; but if it cannot be so interpreted, then the private law rule is unconstitutional.²³⁰ In the United States, it is somewhat uncertain whether such an interpretive duty exists. If it does, then, of course, it will not be the basis for any significant difference between the two systems. But the more likely situation is that no equivalent interpretive duty is placed on the courts. First, although there is the well-known "canon of constitutional avoidance," by which courts construe statutes to avoid potential constitutional problems wherever possible, it is unclear whether this creates an obligation rather than a discretionary power. The U.S. Supreme Court sometimes refers to the canon as a "rule" and sometimes as a "prudential policy."²³¹ Second, even if a rule binding on lower courts, the canon is in a sense the opposite of the German duty for it requires avoidance rather than engagement with constitutional values in the interpretation of statutes.²³² This places it among the "passive virtues" that courts can employ to *reduce* the impact of the judicial review power²³³ and explains why certain judicial proponents of judicial minimalism, such as Felix Frankfurter, favored its use.²³⁴

Why doesn't the existence of such an interpretive duty independently expand the reach of constitutional rights into private law? Let us consider an often-cited German case that, at first glance, might appear to confirm this

issue in private litigation. See *Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 593–604 (Can.).

229. Lüth, 7 BVerfGE 198 (1958); see *supra* note 197.

230. See Taylor, *supra* note 199, at 198–99.

231. Thus, in one leading case, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court referred to the "rule of statutory construction . . . where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 485 U.S. 568, 575 (1988) (emphases added). But in another, *NLRB v. Catholic Bishop*, the Court referred to this canon as a "prudential policy." 440 U.S. 490, 501 (1979).

232. Thus, in *Catholic Bishop*, the issue of statutory interpretation was whether the NLRA applied to religious institutions. 440 U.S. 490. If it did, the Court found this would raise a serious constitutional issue under the Free Exercise Clause; if not, no such issue would arise. Accordingly, applying the canon, the Court held that the statute did not apply to religious institutions, thereby avoiding engagement with the constitutional right. *Id.*

233. The concept and justification of the "passive virtues" as tempering the power of judicial review is most often associated with Alexander Bickel, although he did not explicitly list the canon of constitutional avoidance among the mechanisms available to courts in his most famous book. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press 1962).

234. See Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARK* 196, 210–12 (1967).

independent impact of the interpretive duty. An employee was fired for refusing to print material which, in his view, glorified war. The Federal Labor Court held that, under *Lüth*, the constitutional values of freedom of speech and conscience must influence the private law of employment and its general value of employer autonomy. Therefore, the governing unfair dismissal statute's criterion of a "socially justified" cause of dismissal must, if possible, be interpreted in a way that takes such an act of conscience into account.²³⁵ Accordingly, the court balanced the constitutional and private law values at stake and found the dismissal unjustified. Having found that the statute could be interpreted consistently with the influence of constitutional values, it was unnecessary to refer the case to the FCC to consider the constitutionality of the statute.²³⁶

In the United States, a similar hypothetical scenario with an employee suing under such an unfair dismissal statute would likely result in a decision for the employer. But the reason would be neither that the statute is not subject to the First Amendment nor that there is no equivalent interpretive duty on the courts. It would be because under current *substantive* interpretations of the constitutional right to free speech and conscience, general laws with incidental burdens on speech generally do not implicate the First Amendment in any significant way, but carry a strong presumption of constitutionality.²³⁷ The German case has a different result only because the employment statute *was* deemed to implicate the constitutional values of free speech and conscience and thereby triggered the latter's required influence. This is a purely substantive difference in the scope and interpretation of the underlying constitutional right. If, like the FCC, the U.S. Supreme Court were to adopt the incidental burdens rule for free speech (as it has, of course, been urged to do in the free exercise of religion context), then a U.S. court could do one of two things: (1) choose to interpret the statutory language of "socially justified" cause of dismissal as excluding such conscience-based actions, or (2) subject the statute to serious First Amendment scrutiny. Exactly the same can be said regarding the non-hypothetical employment-at-will laws that are more typical in the United States. Moreover, under existing substantive interpretations in the United States, a law that explicitly permitted an employer to fire an employee for expressing political views would almost certainly be unconstitutional as a content-based regulation targeting speech.

235. Bundesarbeitsgericht (Federal Labor Court), 47 BAGE 363 (1984) (F.R.G.). The case is discussed in Basil Markesinis, *Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47, 58 (1999), and Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 274-75 (1989).

236. Bundesarbeitsgericht, 47 BAGE 363. The reference procedure is the basic mechanism for getting cases to the centralized constitutional court under the European model. The case is discussed in Basil Markesinis, *Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47, 58 (1999), and Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 274-75 (1989).

237. See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 114 (1987) ("The general presumption is that incidental restrictions [on speech] do not raise a question of first amendment review."); see also Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200-10 (1996).

Accordingly, the practical difference between the presence and absence of an interpretive duty is that, with the duty, a law is perhaps a little more likely to be interpreted to include an exception for free speech than declared unconstitutional. This does not appear to be much of a structural difference. What is of far greater importance is (1) the substantive difference in the interpretation and scope of the constitutional right to free speech between being protected only from laws that target speech and those that impose incidental burdens on it, and (2) the structural similarity that in both countries all private law is subject to constitutional rights.

Finally on this point, perhaps the existence of the interpretive duty in Germany (and the "objective order of values" philosophy behind it) is itself responsible for the broader substantive scope of the free speech right to include incidental burdens—and presumably other constitutional rights as well. The fact, however, that the FCC gives a narrower substantive interpretation to certain other constitutional rights than a country without the interpretive duty seems to refute this possibility. So, for example, like the U.S. Supreme Court, the FCC has not adopted the "disparate impact test" as part of its "suspect category" equality jurisprudence; it has found violations only where there is facial discrimination on the basis of one of the express grounds contained in Article 3(3).²³⁸ By contrast, although there is no interpretive duty placed on the courts, the Supreme Court of Canada has interpreted Article 15, its equality provision, to presumptively prohibit laws that either facially discriminate on one of the express grounds or, despite being facially neutral, do so in their effects—what in Canada is referred to as "systemic discrimination."²³⁹ Accordingly, for countries such as Germany and the United States, which adopt the structural position that all private laws are fully and equally subject to constitutional rights scrutiny, the presence or absence of an interpretive duty has very little or no independent significance.

To be clear, my general argument in this Section is not a normative one about what should be the case in the United States;²⁴⁰ it is a description of the existing constitutional position properly understood. Moreover, it is also obviously true that although all laws are subject to the Constitution, it is not *only* laws that are so subject but also other forms of governmental conduct, such as executive acts and the conduct of courts in adjudicating and enforcing the

238. GRUNDGESETZ [GG] art. 3(3) (F.R.G.), *translated in* THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (2000) ("No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability."); *see* JOHAN RABE, *EQUALITY, AFFIRMATIVE ACTION, AND JUSTICE* 171–207 (2001).

239. *See* PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 1270–71 (4th ed. 1997) ("Systemic discrimination is caused by a law that does not expressly employ any of the categories prohibited by s.15, if the law nevertheless has a disproportionately adverse effect on persons defined by any of the prohibited categories. In other words, a law that is neutral (non-discriminatory) on its face may operate in a discriminatory fashion; if it does, the discrimination is systemic The mere fact that the law has the effect of discriminating against persons defined by a prohibited category is enough to establish the breach of s.15.").

240. For such an account, *see* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503 (1985).

laws. In sum, the United States takes a more horizontal approach to the scope of constitutional rights than Canada, because the common law at issue in private litigation is directly, fully, and equally subject to the Constitution, and shares the same general threshold position on the spectrum as Germany—strong indirect horizontal effect—in which all private law must conform to constitutional rights.

The problem, and much of the confusion, is caused by the fact that, as a matter of existing *substantive* constitutional norms in the United States, the vast majority of the common law is consistent with the Constitution. In this sense, *New York Times* is an outlier, not because the common law of libel was subjected to constitutional rights scrutiny—common law always is—but because it *failed* that scrutiny. Given, for example, the existing substantive interpretation of the Equal Protection Clause as presumptively prohibiting only facial racial or gender discrimination or disparate impact resulting from discriminatory intent, the common law of property, contract, and tort will (unlike the common law of libel) almost always pass constitutional rights scrutiny.²⁴¹ Accordingly, the fact that it is always subject to such scrutiny tends to drop out of the picture in favor of more promising constitutional arguments. But were the Court to adopt a more extensive substantive equality norm, such as unconscious racism or (like the Canadian Court) disparate impact alone, the existing structural position of strong indirect horizontal effect—under which, once again, all private law (including the common law) is fully and directly subject to the Constitution—would have a vastly greater impact in practice on private actors.

B. *The Surprising Role of the State Action Doctrine*

Thus far, I have managed to describe the general U.S. constitutional position on the reach of constitutional rights into the private sphere without relying at all on the notorious state action doctrine. But here is where it comes in to supplement the picture. In most cases involving the common law—again, *New York Times* is the outlier—in order to present a plausible claim of a constitutional rights violation, given existing substantive norms, it is necessary to come up with something more than simply subjecting the underlying law to constitutional scrutiny. That something more may take at least two forms.

The first is employment of the state action doctrine to create direct horizontal effect on a private actor, so that the particular conduct complained of, and not merely the background law relied on or authorizing it, is subject to constitutional scrutiny. The public function and entanglement cases, such as

241. See Gardbaum, *supra* note 195, at 446–55. On the connection between the state action/horizontal effect issue and various substantive norms, see, for example, Mark Tushnet, *The issue of state action/horizontal effect in comparative constitutional law*, 1 INT'L J. CONST. L. (1•CON) 79 (2003); and Mark Tushnet, *The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS, *supra* note 111, at 167.

Burton v. Wilmington Parking Authority,²⁴² fall into this category. But note, this use of the state action doctrine does not “shield”²⁴³ private litigation from indirect horizontal effect—this effect always exists—rather, it pushes private litigation into direct horizontal effect. It subjects the private actor/conduct itself to constitutional scrutiny. This is, of course, quite unusual by comparative standards, so it is perhaps not surprising that the Supreme Court should permit this employment somewhat sparingly.

The second form of “something more” is to treat a court order enforcing a law as a distinct, independent instance of state action, above and beyond the underlying law that it is enforcing, whether common law or statute. This again permits the more specific conduct involved—here of the state court—rather than only the background law, to be subject to constitutional scrutiny. In a sense, this route is the U.S. equivalent of the German constitutional complaint directed at a private law court and was, of course, the one employed in *Shelley v. Kraemer*²⁴⁴ because, as usual, the common law the court was enforcing by granting an injunction passed constitutional muster.²⁴⁵ Note that the state court injunction in *Shelley* was no less an enforcement of the underlying common law rule involved in the case than the state court damage award in *New York Times*. And yet no one in the latter case asked whether a damage award was state action, the Court simply subjected the common law that was being enforced to First Amendment scrutiny.

Now, I happen to think that the simpler and more coherent way of analyzing *Shelley* and some other common law cases is through the normal U.S. constitutional doctrine of “as applied” (as distinct from facial) challenges.²⁴⁶ That is, although the common law on its face may pass constitutional muster under existing substantive constitutional norms, it may fail these same norms as applied to certain situations or persons. Thus, applying the race-neutral common law of contracts or restrictive covenants to situations where exclusion is based on race compels race-conscious action by the state insofar as one of the facts the plaintiff must prove to establish a breach of the covenant is the race of the willing purchaser. Such unconstitutional application would be quite different from independent, racially discriminatory enforcement of the law by a court—for example, where it enforces restrictive covenants against some but not other racial groups.

In sum, if and to the extent that constitutional rights do have less impact on private actors in the United States than in other countries rejecting direct horizontality, it is neither due to an exceptional, more vertical structural

242. 365 U.S. 715 (1961) (holding that racial discrimination practiced by a restaurant leasing its premises from a state parking authority was state action).

243. See Kumm & Ferreres Comella, *supra* note 111, at 245.

244. 334 U.S. 1 (1948).

245. I am assuming here that the common law being enforced is ordinary contract law. If, as some (including myself) have argued, the common law the court was enforcing was rather the law of racially restrictive covenants as an exception to the normal common law principle of the free alienability of land, this would be a reason to find this common law itself unconstitutional as a form of racial discrimination by the state.

246. For more details, see Gardbaum, *supra* note 195, at 449–50.

position on the scope of rights nor to how the state action doctrine operates. It is exclusively because of substantive differences in the rights themselves and their interpretation; that is, not because fewer laws are subject to constitutional rights scrutiny but because fewer laws may fail it.

For example, in the United States the constitutional right to free speech has greater regulative impact on defamed private actors than it does in Germany, Canada, and South Africa because substantively, greater weight is given to this right in the balance with competing values, such as reputation, dignity, and privacy.²⁴⁷ Thus, Sullivan, the losing plaintiff in *New York Times*, was more affected and indirectly regulated by the First Amendment than a similar plaintiff would be in these other countries. Private shop owners or others subject to a political boycott will likely be significantly affected by free speech rights in both the United States and Germany, in that, following such cases as *NAACP v. Claiborne Hardware*²⁴⁸ and *Lüth*,²⁴⁹ they will likely be unable to obtain legal protection of their economic interests. In Canada, the extent of the impact may depend on whether they are able to rely on the (partially exempt) common law to protect their interests. In Germany, as we have seen, the constitutional right to free speech has a greater impact on private employers than in the United States because laws incidentally burdening speech, and not only ones that target it, are deemed to implicate the right.

On the other hand, the constitutional right to equal protection has a greater impact on private actors in Canada than in either the United States or Germany because the Canadian Supreme Court has adopted a disparate impact interpretation of Section 15, the Charter's general equality provision.²⁵⁰ Under this interpretation, more laws will infringe Section 15 and so cannot be relied upon by private actors. In the United States, given the application of the Constitution to all law relied on in private litigation, it is only because of the Supreme Court's substantive interpretation of the Equal Protection Clause in *Washington v. Davis*²⁵¹ that the clause does not have greater regulatory impact on private actors by rendering more of the laws they may seek to rely on unconstitutional. Were this interpretation to change, and that of the Canadian Supreme Court adopted, there would be many more actions that private actors could not be permitted to take, and many more interests that could not be protected, under color of state law.

Mention of state law leads me to a brief final point. Although, as is well known, there is currently only one textual exception to the general principle of a state action requirement under the U.S. Constitution—the Thirteenth

247. See *supra* Section I.B (discussing defamation law).

248. 458 U.S. 886 (1982) (holding that a state law awarding damages to shopowners for economic loss caused by NAACP boycott of segregated shops violated the First Amendment).

249. 7 BVerfGE 198 (1958).

250. See *supra* text accompanying note 239.

251. 426 U.S. 229 (1976) (holding that racially disproportionate impact alone, absent proof of discriminatory intent, is insufficient to trigger strict scrutiny).

Amendment ban of slavery "anywhere in the United States"²⁵²—there are several exceptions under state constitutional law. This fact is partly explained by the obvious irrelevance of the standard federalism rationale for the principle, and it cautions against an overly uniform, federally biased conception of constitutional rights and their scope in the United States. Thus, at least seven state constitutions contain express rights against private, as well as public, race and sex discrimination or rights to join labor unions that apply to private employers.²⁵³ In addition, even absent such express application to private actors, several state supreme courts have interpreted their free speech, due process, and equality provisions not to have a state action requirement.²⁵⁴

V. NEGATIVE AND POSITIVE CONSTITUTIONAL RIGHTS

A final American structural exceptionalism is said to be that the U.S. Constitution is exclusively a "charter of negative rather than positive liberties,"²⁵⁵ whereas constitutional rights elsewhere impose positive or affirmative duties on government and do not only require its forbearance.

Analytically, this issue of negative and positive rights is distinct from that of horizontal effect because it concerns the nature and content of the duties that constitutional rights impose on whomever they bind. Usually, of course, this is only government actors (even under indirect horizontal effect), but where they also bind private actors they may, at least in principle, also impose positive duties on them. This analytical difference between the

252. See *supra* text accompanying note 32. During the Prohibition era, there was a second exception under Section 1 of the Eighteenth Amendment: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1, *repealed* by U.S. CONST. amend. XXI.

253. See, e.g., MONT. CONST. art. 2, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."). Despite this explicit application to private persons, the Montana Supreme Court showed initial reluctance to depart from the federal Constitution, although it has been more willing to do so in recent years. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 28–29 (2004). The constitutions of Alaska, Louisiana, and New York contain similar provisions. The New Jersey constitution states, "Persons in private employment shall have the right to organize and bargain collectively." N.J. CONST. art. I, § 19. The constitutions of New York and South Dakota contain similar provisions. In addition, the constitution of Alabama contains a provision very similar to the Thirteenth Amendment, making the prohibitions of slavery and involuntary servitude applicable to private actors. ALA. CONST. art. I, § 32.

254. State supreme courts in California, Delaware, New Jersey, Pennsylvania, Massachusetts, and Oregon have applied their state constitutional free speech rights against certain private property owners, notably owners of shopping malls. The New Jersey and Pennsylvania supreme courts have also applied state constitutional equality provisions against private actors, and the New Jersey and Alabama supreme courts have done the same with respect to state constitutional due process provisions. The cases are discussed in John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1990).

255. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

two issues also results in the very practical difference of who is a proper defendant in a suit raising a constitutional rights claim: the government or a private individual. Despite this analytical separation, however, in practice positive rights are an important source of indirect horizontal effect. This is because to the extent that constitutional rights require government to regulate private actors, private actors are indirectly affected by and subject to them.²⁵⁶

In order to assess the existence or extent of American exceptionalism on this structural issue, it is helpful to break down the general claim about the exceptional absence of positive constitutional rights into its component parts. These are: (1) the absence of social and economic rights in the U.S. Constitution, as distinct from civil and political rights, and (2) the absence of a constitutional right to protection; that is, constitutional rights do not impose duties on the state to protect them against invasion by private actors. These components identify the two main *types* of positive rights that some modern constitutions contain.

This breaking down of the general claim may be helpful for three reasons. First, it renders the task of evaluating U.S. exceptionalism on this score easier and more accurate by refining the ways in which constitutions may differ—for example, more on social and economic rights but less on protective duties. Second, it serves as a reminder that not all positive rights are social and economic in nature (some involve protective duties respecting civil and political rights), and also that the converse is true: not all social and economic rights are positive rights. Thus, such significant social and economic rights as the right to strike, the right to join a trade union, the right to choose an occupation, and the right to educate one's child privately—where recognized in a constitution—may (but need not) be exclusively negative in scope, requiring only governmental forbearance from outlawing strikes and unions, from prohibiting business entry, and from banning private schools. Third, and connectedly, these two particular types of positive rights are conceptually uncontested—or at least less contested—unlike the general dichotomy of negative and positive rights.²⁵⁷ At the very least, this ought to

256. See Gardbaum, *supra* note 198, at 767–69.

257. Although not the first to do so, Cass Sunstein has recently cast doubt on the general distinction by arguing (1) that many seemingly negative constitutional rights—such as the right to private property, freedom of contract, and criminal procedure rights—“require government assistance, not governmental abstinence” and (2) that “[a]ll constitutional rights [and not only positive ones] have budgetary implications; all constitutional rights cost money.” Sunstein, *supra* note 8, at 94–95.

In making this first argument, Sunstein's implicit assumption about the scope of the constitutional rights to private property and freedom of contract in the United States begs an important question. If, post-*Lochner* and post-New Deal, there are such extensive constitutional rights as he implies—including the right to have the state protect your property and contracts against private infringements; i.e., the right to a system of private property—as distinct from the more limited (and seemingly negative) rights against government takings of property without just compensation or government deprivations of property without due process, and freedom of contract only against arbitrary government regulation, it is incumbent on him to make this case. In other words, there are, or may be, distinct negative and positive rights concerning property and contract. It is certainly possible for property and contract rights to mandate governmental assistance as a matter of constitutional law, but it is not inherent or necessary. Whether or not they do in the United States or

result in an agreed subject matter of discussion and the avoidance of labeling disputes about whether a right is properly deemed positive or negative.

A. Social and Economic Rights

Turning to the first more specific claim, it is true, as Cass Sunstein states, that "[t]he constitutions of most nations create social and economic rights . . . [b]ut the American Constitution does nothing of the kind."²⁵⁸ But Sunstein then immediately goes on to ask: "What makes the American Constitution so distinctive in this regard?"²⁵⁹ It is this latter claim about the extent or degree of American exceptionalism that, I think, is interesting to consider. Just how distinctive or exceptional is the United States with respect to social and economic rights?

There are four ways in which the United States is less exceptional than often thought in this area. First, while the "American Constitution" contains no social and economic rights, the state constitutions of many states in the United States do. It is well-understood that the Federal Constitution provides a "floor" or minimum of constitutional rights below which states cannot go, but states are free to grant their citizens greater constitutional rights—as long as in doing so they do not violate the minimum nationally guaranteed rights of others.²⁶⁰ Many states have taken advantage of this freedom to create state constitutional social and economic rights in the absence of federal ones. Moreover, this phenomenon is at least partly due to the relatively distinctive features of American federalism, in which the general subject matter of most social and economic rights—housing, poverty, and education—is still substantially governed by state rather than federal law. In this way, the United States "has not just a system of dual constitutionalism but dual constitutional traditions,"²⁶¹ a fact that challenges overly uniform (particularly laissez-faire) conceptions of its constitutional culture. Thus, while there is no federal constitutional right to education, "every state constitution mandates the establishment of free public schools and requires the state to educate children who live within its borders."²⁶² Similarly, "[u]nlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of

elsewhere, the basic conceptual distinction between negative and positive rights appears to survive this challenge.

258. *Id.* at 92.

259. *Id.*

260. The rallying cry for states to begin to take advantage of this freedom was William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Perhaps the best-known example, decided during the currency of *Bowers v. Hardwick*, 478 U.S. 186 (1986), was *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), which held that criminalizing homosexual sex violates the state constitutional right of privacy.

261. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 6 (1998).

262. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1138 (1999).

positive claims against the government.”²⁶³ For example, the New York Constitution has a Welfare Clause that explicitly requires the legislature to provide for “the aid, care and support of the needy,”²⁶⁴ and seventeen other state constitutions have similar provisions.²⁶⁵

Second, while “most” other countries grant social and economic rights in their constitutions, not all do. From the perspective of assessing how exceptional the United States is on this issue, another important country without any social and economic rights in its constitution is its neighbor, Canada. Like the U.S. Constitution, the text of the Canadian Charter of Rights and Freedoms, which came into effect as the supreme law of the land in 1982, contains no express social and economic rights.²⁶⁶ Moreover, like the U.S. Supreme Court since the early 1970s, the Supreme Court of Canada has moved away from implying social and economic rights into certain of the express civil and political rights, despite earlier indications that it might do so. Thus, notwithstanding arguments that the right to security of the person under section 7 of the Charter should be interpreted to include constitutional rights to basic welfare services,²⁶⁷ the Supreme Court of Canada has not done so and looks increasingly unlikely to.²⁶⁸

In the leading section 7 case of *Gosselin v. Quebec (Attorney General)*, decided in 2002, the Supreme Court of Canada rejected what it described as this “novel” interpretation of the right to security of the person, although it did not entirely rule out the possibility that, in some future case, special circumstances might lead the Court to endorse it.²⁶⁹ More recently, however, in 2004, the Court seemed to make this less likely when it stated that under section 7, “the legislature is under no obligation to create a particular benefit. It is free

263. *Id.* at 1135.

264. N.Y. CONST. art. XVII, § 1.

265. These are: Alabama, California, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Mississippi, Montana, Nevada, North Carolina, Oklahoma, Texas, Utah, and Wyoming. See Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1076 (1993); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–95 (1989).

266. Martha Jackman, *The Protection of Welfare Rights under the Charter*, 20 OTTAWA L. REV. 257, 338 (1988) (“The Charter was written, with little public consultation, by governments that had abandoned their commitment to the welfare state. It is thus hardly surprising that the Charter contains no explicit reference to social and economic rights; that, in fact, these rights were never even discussed.” (footnotes omitted)).

267. See *id.* at 337.

268. Robert J. Sharpe, *The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS 431, 441 (Philip Alston ed., 1999) (“At the other end of the spectrum are social welfare rights, very much a part of the Canadian political fabric, but not explicitly protected in the Charter. It has been argued that the right to a basic level of material wellbeing is implicit in the Section 7 guarantee of ‘life, liberty and security of the person’. The Supreme Court has deliberately avoided answering the question but it seems unlikely that the Court will give an affirmative answer. While the Court will not be able to avoid social welfare issues entirely . . . it seems unlikely that the Court would interpret the present language of the Charter to include social welfare entitlements.” (footnotes omitted)).

269. [2002] 4 S.C.R. 429, 434, 2002 SCC 84 (Can.).

to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.”²⁷⁰ Accordingly, rather than simply American exceptionalism, the phenomenon here is perhaps more accurately described as North American exceptionalism. And given the extensive Canadian welfare state that was in place as “a matter of public policy” well before the existence of the Charter, this raises the question of the relevance or importance of such constitutional exceptionalism.

In actual fact, the exceptionalism is not limited to North America. More generally, few other common law countries contain social and economic rights in their bills of rights or constitutions. The Australian Constitution does not include a bill of rights at all; the only individual right of any sort is the freedom of expression implied by High Court from the constitutional requirement of democratic elections.²⁷¹ New Zealand and the United Kingdom do not have written constitutions, but both have fairly recently enacted statutory (or super-statutory) bills of rights that contain only civil and political rights and no social or economic rights.²⁷² The Irish Constitution of 1937 grants no social and economic rights but rather, as is well known, contains a set of “directive principles of social policy” that are “intended for the general guidance of [Parliament] . . . and shall not be cognisable by any Court.”²⁷³ The Indian Constitution of a decade later exactly copied the Irish model in this regard,²⁷⁴ although the Indian Supreme Court has implied a

270. *Auton v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78, para. 46 (Can.). A second Charter provision from which it has been argued welfare rights can and should be implied is the general equality clause of section 15. Canadian Charter of Rights and Freedoms, *supra* note 36, § 15. But although the Canadian Supreme Court has, under the label of “substantive equality,” adopted a somewhat more rigorous antidiscrimination test than the U.S. Supreme Court in that it looks into discriminatory impact (on disadvantaged groups) as well as intent, this still results in the conditional rather than absolute duty or mandate inherent in any antidiscrimination norm. See generally Judy Fudge, *Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution*, 23 S. AFR. J. HUM. RTS. 235 (2007).

271. *Australian Capital Television Pty. Ltd. v. Commonwealth*, (1992) 177 C.L.R. 106 (Austl.).

272. See Human Rights Act, 1998, c. 42 (U.K.); New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109. On the “super-statutory” nature of the two, see generally Gardbaum, *supra* note 6. Philip Joseph has described the absence of social and economic rights in the New Zealand Bill of Rights:

Attempts were made within the Government caucus to embellish the [New Zealand Bill of Rights] Act with economic and social rights as guaranteed by some international instruments, notably the Universal Declaration on Human Rights. Advocated were the rights to work and an adequate standard of living, and the rights to housing, education and State health care. . . . However, the Government rejected this recommendation since it was felt that such ‘rights’ were, by nature, non-justiciable. Social or State welfare benefits fell to political rather than judicial process, and would have made the legislation ‘unmanageable.’

Philip A. Joseph, *The New Zealand Bill of Rights Experience*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS, *supra* note 268, at 283, 289.

273. IR. CONST., 1937, art. 45.

274. INDIAN CONST. art. 37 (“The provisions contained in this Part shall not be enforceable in any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these [directive] principles in making laws.”).

positive right to housing from the seemingly negative textual right to life.²⁷⁵ Among common law countries, the post-apartheid South African Constitution of 1996 is one of the few to include social and economic rights in its text.²⁷⁶

Moreover, even among continental western European countries, the extent to which constitutions contain social and economic rights can easily be exaggerated. The Austrian Constitution contains none. The constitutional texts of several other countries contain only one or very few such rights. Thus, the only express positive social or economic right in the German Basic Law is that “[e]very mother [is] entitled to the protection and care of the community.”²⁷⁷ The German Constitutional Court has, in addition, implied a positive right to public education from the provisions of Article 7(1)²⁷⁸ and to a minimum level of subsistence exempt from income tax from various constitutional provisions, including the state’s duty to protect human dignity contained in Article 1.²⁷⁹ The only social or economic right in the Norwegian Constitution is the aspirationally phrased provision declaring that “[i]t is the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by his work.”²⁸⁰ The Swedish Constitution does not contain any social or economic rights in its list of enumerated “fundamental rights and freedoms” contained in chapter 2, but, in one of its preamble-like opening provisions expressing the general aims of public power, states that “it shall be incumbent upon the public institutions to secure the right to health, employment, housing and education, and to promote social care and social security.”²⁸¹ Finally, the European Convention on Human Rights, which the ECtHR has referred to

275. Ahmedabad Mun. Corp. v. Nawab Khan (1996) Supp. 7 S.C.R. 548 (India).

276. These include the right to have the environment protected, art. 24; the right to have access to adequate housing, art. 26; the right of access to health care, sufficient food and water, and social security, art. 27; and the right to education, art. 29. See discussion of the right to housing, *infra* notes 305–309 and accompanying text.

277. Grundgesetz [GG] art. 6(4) (F.R.G.), translated in The Basic Law of the Federal Republic of Germany (2000). In addition, Articles 7(4) and 12(1) contain two more negatively phrased ones: “The right to establish private schools [is] guaranteed,” and “[a]ll Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training.” *Id.* arts. 7(4), 12(1). Finally, Article 20 proclaims that “[t]he Federal Republic of Germany is a . . . social federal state,” *id.* art. 20(1), a provision the FCC has declared as non-justiciable and not giving rise to an individual right, although it has used it to help interpret statutes and other constitutional provisions.

278. See CURRIE, *supra* note 69, at 285 n.90 (citing School Prayer Case, 52 BVerfGE 223, 236 (1979) (F.R.G.)).

279. See Heike Krieger, Comment, *The Protective Function of the State in the United States and Europe: A Right to State Protection?*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 111, at 153, 155 (citing 82 BVerfGE 60 (1990) (F.R.G.)).

280. KONGERIGET NORGES GRUNDLØV [Constitution] art. 110 (Nor.), translated in The Constitution of the Kingdom of Norway (2007), available at <http://www.stortinget.no/english/constitution.html>. In addition, Article 110(b) contains the “third generation” right that “[e]very person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.” *Id.* art. 110b.

281. REGERINGSFORMEN [RF] [Constitution] 1:2 (Swed.), translated in The Constitution, available at http://www.riksdagen.se/templates/R_Page_6307.aspx (last visited Sept. 3, 2008).

as "a constitutional instrument of European public order"²⁸² and which the forty-seven member states of the Council of Europe are bound to observe, includes no express social or economic rights—positive or negative—apart from the negative rights to property and education contained in a separate subsequent protocol.²⁸³ Moreover, in very marked contrast to its practice with respect to protective duties,²⁸⁴ the ECtHR has repeatedly refused to imply social and economic rights from the civil and political ones listed in the text.²⁸⁵

Accordingly, while the United States is indeed in the minority among all contemporary nations in not having any social and economic constitutional rights, its position is certainly not unique—and, especially when compared to its "peer" group of developed countries, not really that distinctive. For it is the constitutions of the newly liberated countries of central and eastern Europe and South Africa, as well as other developing nations, that more consistently include significant numbers of social and economic rights, which partly explains why it is from South Africa (and also from India on the implied right to housing) that the leading cases on adjudicating such rights have come.²⁸⁶

Third, in several countries with substantial numbers of social and economic constitutional rights, the practical impact of these rights is significantly reduced either by express textual statements in the constitution that some or all such rights are not judicially enforceable or by judicial practice to that effect. Thus, apart from the right to education, the Spanish Constitution, like the Irish and Indian constitutions previously mentioned, declares a set of "guiding principles of economic and social policy" that is expressly excluded from being enforced by the courts.²⁸⁷ Similarly, apart

282. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. ¶ 75, at 27 (1995).

283. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1 arts. 1–2, March 20, 1952, CETS No.: 009. The right to education provision appears to expressly rule out affirmative duties on the state. *Id.* art. 2 ("In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." (emphasis added)).

284. See *infra* text accompanying notes 314–316.

285. See Krieger, *supra* note 279, at 154; see also *Chapman v. United Kingdom*, 2001-I Eur. Ct. H.R. 41, para. 99 ("Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."); *Beard v. United Kingdom*, App. No. 24882/94, 33 Eur. H.R. Rep. 442, para. 110 (2001).

286. See, e.g., *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.); *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); *Ahmedabad Mun. Corp. v Nawab Khan* (1996) Supp. 7 S.C.R. 548 (India).

287. CONSTITUCIÓN [C.E.] Ch. III (Spain), translated in SPANISH CONSTITUTION (1992). The Principles Governing Economic and Social Policy are contained in a separate chapter of the Spanish Constitution, Chapter III, which follows Chapter II: "Rights and Freedoms." Section 53(1) declares that "[t]he rights and freedoms recognized in the Chapter 2 . . . are binding on all public authorities" and that any citizen may make a claim based on them before the regular courts. *Id.* § 53(1) (emphasis added). By contrast, Article 53 (3) states: "Recognition, respect, and protection of the principles recognized in Chapter 3 shall guide positive legislation, judicial practice and the actions by public authorities." *Id.* § 53(3) (emphasis added).

from full rights to primary education²⁸⁸ and the right to aid in distress,²⁸⁹ the Swiss Constitution contains a set of “social goals” that is expressly declared to be non-justiciable.²⁹⁰ The Netherlands Constitution declares that “[i]t shall be the concern of the authorities” to promote or secure certain social and economic goals, such as “sufficient employment,”²⁹¹ “the health of the population,”²⁹² and “sufficient living accommodation,”²⁹³ but it specifically grants “rights” only to “a free choice of work” and to “aid from the authorities” for those unable to provide for themselves.²⁹⁴ In addition, as previously mentioned, Article 120 expressly denies Dutch courts the power of judicial review at all,²⁹⁵ which obviously prevents these two rights from being enforced against the legislature.

Finally on this point, the situation in France takes a little longer to describe. The preamble to the previous constitution of 1946 contained a number of social and economic “principles” in addition to reaffirming the “rights and liberties” of the 1789 Declaration of the Rights of Man and of the Citizen.²⁹⁶ Under this constitution, however, no institution was granted the power to review legislation for constitutionality. The current, 1958 Constitution of the Fifth Republic, which created the *Conseil constitutionnel* with limited powers of judicial review,²⁹⁷ contains few individual rights and no social or economic ones but does refer to the preamble of the 1946 constitution in its own preamble.²⁹⁸ In 1970, the *Conseil* departed from the

288. BUNDESVERFASSUNG [BV], CONSTITUTION [Cst] [Constitution] Apr. 18, 1999, art. 27 (Switz.), translated in FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION (2002), available at <http://www.admin.ch/org/polit/00083/index.html?lang=en>.

289. *Id.* art. 12.

290. *Id.* art. 41, ¶ 4 (“No direct subjective right to prestations by the state may be derived from the social goals.”).

291. GRONDWET [GW.] [Constitution] art. 19(1) (Neth.), translated in THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS (2002).

292. *Id.* art. 22(1).

293. *Id.* art. 22(2).

294. *Id.* arts. 19(3), 20(3).

295. *Id.* art. 120 (“The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.”).

296. LA CONSTITUTION, 1946 CONST. Preamble ¶¶ 2, 11 (Fr.), translated in JOHN BELL, FRENCH CONSTITUTIONAL LAW 263–64 (1992) (“In addition, [the French people] proclaim[] the following political, economic, and social principles as particularly necessary for our times It guarantees to all, especially to the child, the mother, and aged workers, the protection of health, material security, rest, and leisure. Any human being who, by reason of his age, physical or mental health, or economic situation, is unable to work, has the right to obtain appropriate means of subsistence from the community.”).

297. LA CONSTITUTION, 1958 CONST. arts. 56–63 (Fr.), translated in THE FRENCH CONSTITUTION (1958).

298. “The French people solemnly proclaims its attachment to the rights of man and to the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.” LA CONSTITUTION, *supra* note 296, at Preamble.

previous understanding and declared this preamble legally binding.²⁹⁹ Nonetheless, of the social and economic principles in paragraph 11 of the preamble to the 1946 constitution,³⁰⁰ the *Conseil* has treated only the protection of health as being of constitutional value. As a result, the *Conseil* has held that individuals have a right to choose their own doctor and that health is a public interest justification capable of restricting the right to property, but not that this right imposes positive obligations on the state.³⁰¹

Even where judicially enforceable, constitutional courts have generally been cautious about the scope of their review of social and economic rights and have tended to grant legislatures wide discretion as to the means of fulfilling their positive duties.³⁰² Accordingly, a reasonableness test has been the norm. In South Africa, this reasonableness standard—relative to available resources—is actually contained in the text as defining the positive obligations of the state with respect to most social and economic rights,³⁰³ and the Constitutional Court has as a result rejected the proposition that such rights entitle individuals to be provided with a “minimum core.”³⁰⁴ As is well known, however, in the important cases of *Grootboom*³⁰⁵ and *Treatment Action Campaign*,³⁰⁶ the Constitutional Court held that government policies in the areas of housing for the desperately needy and combating mother-to-child transmission of HIV were unreasonable and thus unconstitutional. Both the Japanese and South Korean supreme courts have subjected textual rights to minimum living standards to highly deferential reasonableness tests under which government programs were upheld, although both acknowledged that government failure to act at all to promote the constitutional objective would amount to an unconstitutional abuse of discretion.³⁰⁷

299. CC decision no. 70-39DC, June 19, 1970, Rec. 15.

300. See *supra* note 296.

301. See BELL, *supra* note 296, at 148–49.

302. Mark Tushnet has linked the issues of the form of judicial review and the possibilities of constitutional social welfare rights by arguing that weak-form judicial review may be particularly appropriate for such rights and so, given the characteristic legislative final word, result in their greater protection. See Tushnet sources cited *supra* note 105.

303. For example, section 26 of the South African Constitution states: “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” S. AFR. CONST. 1996, § 26.

304. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) at para. 34.

305. *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

306. *Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

307. Article 25(1) of the Japanese Constitution provides that “[a]ll the people shall enjoy the right to maintain the minimum standards of wholesome and cultured living.” KENPŌ [constitution] art. 25, para. 1 (Japan), translated in *The Constitution of Japan* (1968). The South Korean Constitution guarantees people “to have a life worthy of human beings.” S. KOREA CONST. art. 34, translated in *The Constitution of the Republic of Korea, available at* <http://www.ccourt.go.kr/home/english/welcome/republic.jsp>. The two cases announcing the deferential reasonableness tests were *Asahi v. Japan*, 21 Minshū 5, 1043 (Sup. Ct., May 24, 1967), translated in *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70*, at 130, 135 (Hiroshi Itoh & Lawrence Ward Beer eds., 1978), and *Livelihood Protection Standard Case*, 9-1 KCCR 543, 94

The Italian Constitutional Court has also generally interpreted the many social and economic rights contained in the country's 1947 constitution as imposing a reasonableness test on governmental policy in the relevant areas.³⁰⁸

The final and perhaps most important point is that the existence and extent of modern welfare states do not appear to be correlated in any significant way to the presence, absence, or scope of constitutional social and economic rights, or to whether they are justiciable. Thus, Canada, the United Kingdom, New Zealand, Ireland, Austria, Germany, Norway, Sweden, and the Netherlands all have extensive and stable welfare states despite either nonexistent or limited constitutional mandates. Moreover, these countries do not have lesser welfare states than western European countries with more extensive constitutional mandates, such as Italy or Finland. By contrast, several countries elsewhere have less generous, stable, or successful welfare states despite greater constitutional requirements.³⁰⁹ Accordingly, as in the United States, welfare states are overwhelmingly the products of ordinary legislative processes rather than of constitutional courts stepping in to apply and enforce constitutional guarantees.³¹⁰

B. Constitutional Rights to Protection

Let's turn to the second type of positive right often found in modern Western constitutions but deemed absent from the American: a constitutional right to protection from the state against violation or undermining of certain civil and political rights by private actors. Unlike social and economic rights, which, where granted, are typically express, such protective duties are more evenly divided between text and judicial implication. So, for example, the constitutions of South Africa, Greece, Switzerland, and Ireland contain express rights to state protection.³¹¹ Elsewhere, protective duties have been implied by the judiciary from certain textual rights that otherwise seem negative. For example, the best-known and most important protective duties (*Schutzpflichten*) in Germany concern the right to life and freedom of expression. As we have seen, the FCC famously interpreted the former in

HunMa 33, May 29, 1997 (S. Korea), summarized in THE CONSTITUTIONAL COURT OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT, 1988–1998, at 239–42 (2001).

308. E.g., Italian Constitutional Court, Case 252/1988, cited in Francisco Rubio Llorente, *Constitutionalism in the "Integrated" States of Europe* n.21 (NYU School of Law, Jean Monnet Center, Working Paper No. 5/98, 1998), available at <http://www.jeanmonnetprogram.org/papers/98/985004.html> ("[O]nly the legislature, weighing up the available resources and the interests capable of being satisfied over time, can rationally adapt the means and the consequences of such [socio-economic] rights.").

309. Examples include the constitutions of Egypt, Serbia, and Turkey.

310. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 526–32 (1992); Wiktor Osiatynski, *Social and Economic Rights in a New Constitution for Poland*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 233, 241–49 (András Sajó ed., 1996).

311. See, e.g., S. AFR. CONST. 1996, § 12(1) ("Everyone has the right to freedom and security of the person, which includes the right . . . (c) to be free from all forms of violence from either public or private sources.").

the *First Abortion Case* to require the state to protect the lives of fetuses against such private actors as their mothers, presumptively through the criminal law.³¹² The right to freedom of broadcasting was also interpreted by the FCC to require state regulation to ensure that citizens have access to the full range of political opinions necessary for informed decision making at elections.³¹³

The ECtHR has also been active in inferring protective duties from the seemingly negatively phrased civil and political rights contained in the European Convention. In a series of cases, it has ruled that both the right not to be subjected to "inhuman or degrading treatment" under Article 3 and the "right to respect for . . . private and family life" under Article 8 require states to enact laws effectively protecting children from sexual and other physical abuse by private adults.³¹⁴ It has also held that freedom of assembly requires positive action, including effective police protection, to ensure the right may be exercised;³¹⁵ and Article 8 also requires effective action against industrial pollution.³¹⁶

Even here, however, I will argue that the United States is less exceptional than often thought, for two reasons. First, as with social and economic rights, if the U.S. Constitution lacks such protective duties, it is not the only constitution to do so. Thus, once again, Canada seems closer here to the United States than to South Africa, Germany, and the ECHR. Although to the best of my knowledge, the Canadian Supreme Court has not decided any cases equivalent to *DeShaney v. Winnebago County Department of Social Services*,³¹⁷ both the dominant general underlying philosophy of the Charter (including its limited application to the common law and the absence of social and economic rights discussed above) and at least one lower court decision suggest there may be no constitutional right to protection against private violence.³¹⁸ Second, even with respect to countries with protective

312. See *Second Abortion Case*, 88 BVerfGE 203 (1993) (F.R.G.). The positive protective duty was in part justified by the FCC on the basis of the express duty in Article 1(1) that to "respect and protect [human dignity] is the duty of all state authority." *Id.* As Gerald Neuman discusses, following the *First Abortion* case in 1975 establishing the state's duty to protect life and bodily integrity, the FCC responded to claims of a duty to protect life and health in a variety of other contexts by recognizing the claim in the abstract but never finding that the legislature had failed its duty. Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 297 (1995).

313. *Television I Case*, 12 BVerfGE 205 (1961) (F.R.G.).

314. *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 21 (1985); see also *Stubbings v. United Kingdom*, App. Nos. 22083/93 & 22095/93, 23 Eur. H.R. Rep. 213 (1996); Krieger, *supra* note 279, at 156 n.16 (collecting cases).

315. *Plattform "Ärzte für das Leben"*, 139 Eur. Ct. H.R. (ser. A) (1988).

316. *Guerra v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998); *Lopez Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994).

317. 489 U.S. 189 (1989); see also *infra* notes 323–325 and accompanying text.

318. In *Doe v. Board Of Commissioners* [1990], 74 O.R.2d 225, 236 (Can.), the Ontario Divisional Court stated that the Charter placed no obligation on the state to ensure that life, liberty, or property did not come to harm through means other than state action. It also stated, however, for the purpose of upholding a lower court's dismissal of the defendant's motion to strike, that failure by the police to perform a positive statutory duty for improper reasons may violate sections 7 and 15 of the

duties, the differences between them and the United States, while real, are less significant than they appear at first glance. This is because there is greater convergence at both ends than is often supposed: the United States is less negative and countries with implied protective rights are less positive. Let me begin with the United States.

The starting point here is the seemingly axiomatic status of the general principle that the U.S. Constitution is a “charter of negative rather than positive liberties,”³¹⁹ which was applied in two well-known cases denying a constitutional duty to protect the life of citizens from threats emanating from non-state actors. The first, in which this “slogan”³²⁰ was also announced, was the lower court case of *Jackson v. City of Joliet*, holding that a police officer was under no constitutional duty to help car accident victims who died while the officer was directing traffic away from the crash.³²¹ The second case was *DeShaney*, in which a bare majority held that Wisconsin had no constitutional duty under the Due Process Clause to protect a child from life-threatening violence at the hands of his father, even though the child had been under the state’s care.³²²

I believe the general principle is open to serious question. First, I find persuasive Steven Heyman’s argument that the *DeShaney* majority’s claim that neither the text nor the history of the Fourteenth Amendment supports a constitutional right to protection is wrong on originalist grounds.³²³ Second, the general principle is not in fact well established in the Court’s jurisprudence. Notwithstanding the outcomes of these two cases, the principle itself was and is dicta; cases really requiring a *holding* that states have no constitutional duty of protection at all have not been decided, and may well be decided differently.

In a well-researched and elegantly written article, Heyman argues that prior to the Fourteenth Amendment, the long-established Lockean and common law “first duty of government” to protect the life, liberty, and property of its citizens from each other was quintessentially and exclusively a task of state government, which is why such a positive right to protection

Charter. *Id.*, cited in Helène Combrinck, *Positive State Duties to Protect Women from Violence: Recent South African Developments*, 20 HUM. RTS. Q. 666, 686–87 (1998).

319. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

320. This is how John Goldberg has characterized the phrase. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 592 (2005).

321. *Jackson*, 715 F.2d 1200. Two previous abortion-funding cases had also suggested this general principle (and were cited in *Jackson*), although they raised the arguably distinct issue of a right to governmental funding. See *Harris v. McRae*, 448 U.S. 297, 318 (1980) (“It cannot be that because government may not prohibit the use of contraceptives . . . government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives . . .”); *Maier v. Roe*, 432 U.S. 464, 474 (1977) (“The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation [prohibiting state funding for abortions].”).

322. *DeShaney v. Winnebago County Dep’t Soc. Servs.*, 489 U.S. 189 (1989).

323. Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

appears in several of the earliest state constitutions but not in the federal one.³²⁴ Following the Civil War, however, state governments in the South proved they could no longer be trusted to fulfill this "first duty" absent national oversight, given their manifest and intentional failure to protect new black citizens. Accordingly, the right to protection by the state was purposefully incorporated into the federal Constitution by the Fourteenth Amendment, primarily as one of the traditional "privileges and immunities" of citizenship newly guaranteed against the states but also by implication in the Due Process and Equal Protection Clauses. In response to Chief Justice Rehnquist's argument to the contrary in *DeShaney*, Heyman convincingly shows why the framers of the Fourteenth Amendment could not plausibly have intended to leave the duty of protection purely to state "democratic political processes."³²⁵

Independent of the proper originalist understanding of the Due Process Clause, however, the general principle that the U.S. Constitution is exclusively a charter of negative rights against government is not well established in the Court's jurisprudence and so has not in fact achieved the axiomatic status that is sometimes claimed for it. Whether or not murder and theft laws, for example, are truly discretionary as a matter of federal constitutional law remains an open question because, being nonexistent, the permissibility of such gaps in the law has not been tested.³²⁶ Apart from the well-known exceptions to the general principle where government is responsible for an individual's predicament, such as the duty to provide adequate medical care, food, and clothing to those it has imprisoned or involuntarily

324. *Id.* The Pennsylvania Constitution of 1776 declared that "[e]very member of society hath a right to be protected in the enjoyment of life, liberty and property." PA. CONST. of 1776, art. VIII. Similar provisions soon appeared in the constitutions of Delaware, Massachusetts ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." MASS. CONST. of 1780, pt. I, art. X), and New Hampshire ("Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property." N.H. CONST. of 1784, art. 12). Heyman, *supra* note 323, at 512. The Massachusetts and New Hampshire provisions are still part of their respective state constitutions, thus creating state constitutional rights to protection against private violence.

325. Heyman, *supra* note 323; see also *DeShaney*, 489 U.S. at 196.

326. Accordingly, my point here is different than Frank Michelman's argument that in practice there may not be much difference in actual protection between the United States and other countries, even though in the United States such duties are statutory rather than constitutional. See Frank I. Michelman, *The Protective Function of the State in the United States and Europe: the Constitutional Question*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 111, at 131, 149-51.

committed,³²⁷ there is, I believe, a case to be made for the existence of more “absolute” duties in addition to such “conditional” ones.³²⁸

In *DeShaney*, *Jackson*, and the more recent case of *Town of Castle Rock v. Gonzalez*,³²⁹ the fact that the social service officials and police officers—and thereby the state—may not have had a constitutional duty to protect individual citizens in the particular circumstances of the cases does not mean that more general legal protection against private violence is also discretionary. Even if an individual state official does not have a duty to help X enforce his contract against Y, it does not follow that the state is constitutionally free not to provide a general system for the legal enforcement of contracts.³³⁰ Nor does the fact that an individual police officer is not under a constitutional duty to help a property owner eject a trespasser from her land mean that having a legal system of property protection is discretionary. In other words, there is a distinction between a protective right to legislation or common law rules on the one hand and rights to action by individual government officials on the other.³³¹ Whether a general system of private property and contracts is constitutionally required in the United States, as distinct from specific prohibitions on governmental taking of private property without just compensation and arbitrary regulation, is, I believe, a difficult and open question; it is at least not obviously the case that they are not.³³²

In rejecting the constitutional due process claim in *DeShaney*, the majority opinion noted that “Randy DeShaney was subsequently tried and

327. See *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (holding that the state is obligated to provide involuntarily committed mental patients with adequate food, shelter, clothing, and medical care); *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (holding that the state is required to provide adequate medical care to incarcerated prisoners). But see David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 63–68 (arguing that the Court’s exception for custodial arrangements is not really an exception at all because the principle underlying the exception implies that the government has affirmative duties to every person in society).

328. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 881–82 (1986) (distinguishing between absolute positive duties and conditional ones triggered by voluntary state conduct).

329. 545 U.S. 748 (2005) (holding that plaintiff did not have a property interest in police enforcement of the restraining order against her husband for procedural due process purposes).

330. This point is consistent with my critique of Sunstein’s argument against the distinction between negative and positive rights, see *supra* note 257, because my critique was of the conceptual point that negative rights always require governmental assistance; i.e., that a purely negative constitutional right cannot and does not exist. I insisted above that different negative and positive rights to property are entirely possible and conceivable—and that Sunstein had assumed rather than argued for the proposition that the United States has a positive right to property. *Id.* So my argument here that the United States may in fact have positive rights to property or contract, rather than the perfectly coherent negative right, does not undermine the general distinction between the two.

331. I am grateful to Dick Fallon for encouraging me to make this distinction explicit. John Goldberg has explicated the general idea of a constitutional right to law (or a body of laws) in making a powerful case that there is a constitutional right to a general protective law of torts to redress private wrongs. Goldberg, *supra* note 320. He also distinguishes this positive right from the right to benefits and argues that the right to law should form a third branch of due process, “structural due process.” *Id.*

332. David Strauss has also argued for a constitutional right to a minimum level of protection against private wrongs in the areas of torts and property. See *supra* note 327.

convicted of child abuse.”³³³ Similarly, in *Castle Rock*, had the father who murdered his three daughters not been killed in a shoot-out at the police station, he would presumably have been convicted of homicide. The Court’s affirmation in this second case that, under *DeShaney*, the police had no constitutional duty to enforce the restraining order that might have prevented the murders³³⁴ does not answer the separate question of whether the existence of the homicide law is left to state political processes. The criminal law is, of course, a form of state protection of one individual from another, so in neither case was the majority faced with a situation of no legal redress—a situation in which the fathers’ actions were lawful. In other words, the existence of state criminal law may satisfy the protective constitutional duty imposed on states. After all, in the German *First Abortion Case*, the content that the FCC gave to the state’s protective duty was a presumptive requirement that the life of the fetus be protected by the criminal law, that abortion be generally criminalized;³³⁵ and in *DeShaney*, Joshua’s life was so protected by the state. Moreover, although in a slightly different context, the majority opinion in *Castle Rock* expressly rejected the notion that such protection is “‘valueless’—even if the prospect of those sanctions ultimately failed to prevent [the father] from committing three murders and a suicide.”³³⁶ Accordingly, and notwithstanding the more general dicta in all three cases, I take the larger question of the general constitutional requirement of protection as far from settled by them. The issue—and the difference between the United States and certain other countries—may well be not *whether* there are absolute duties to protect but rather their *scope*.

The second feature of U.S. jurisprudence that narrows the constitutional gap is the effect of the Equal Protection Clause. As David Currie has persuasively argued, this clause operates to create “conditional affirmative” duties in both protection against third parties and the provision of government services: “[I]f government undertakes to help A, it may have to help B as well.”³³⁷ Moreover, given the practical impossibility of abandoning either murder or theft laws (even if, contrary to what I have suggested, they are not obligatory) or government services such as welfare programs, the practical effect of the Equal Protection Clause will often be the same as if there were an absolute affirmative duty.³³⁸

The force, however, of Currie’s point about the gap-filling character of the Equal Protection Clause is, I think, both weaker and stronger than he states. It is weaker in the area of government services because only certain

333. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 193 (1989). Strauss notes this point in arguing that the actual holding in *DeShaney* was significantly narrower than the general charter of negative liberties principle because the state did not deny Joshua all protection against private violence. See Strauss, *supra* note 327, at 56.

334. *Castle Rock*, 545 U.S. at 755, 768.

335. See 39 BVerfGE 1 (1975) (F.R.G.).

336. *Castle Rock*, 545 U.S. at 760.

337. Currie, *supra* note 328, at 881.

338. *Id.* at 882.

bases for exclusion and differential treatment—namely race, ethnicity, national origin, gender, state citizenship status, and sometimes alien status—provide the level of judicial scrutiny likely to result in the conditional duty. Other bases—including age, health, or wealth—trigger the deferential rational basis test, which permits significant under- and over-inclusiveness as to who is deemed similarly situated. Accordingly, in the area of social and economic benefits, choosing to help A may not require the government to help B as well.³³⁹

But Currie's point is stronger in certain important areas relevant to protective duties, including abortion. Currie correctly points out the fact that in the *First Abortion Case* the FCC found the fetus to be a person protected by the right to life was not the only or conclusive difference from *Roe*. A second, and even more distinctive one, was the positive duty to protect the fetus's right to life against such private actors as the mother and doctor—a duty normally requiring criminalization of abortion.³⁴⁰ But even though a U.S. court would not ostensibly find such a positive duty—were the fetus deemed a person under the Fourteenth Amendment—the impact of the Equal Protection Clause might effectively create one. This is because it would arguably violate equal protection—in the most literal sense—for certain persons, namely fetuses, not to have their lives protected equally by a state's criminal laws.³⁴¹ If discrimination with respect to such a fundamental right as the right to life were held to trigger strict scrutiny, it is hard to see how any conflicting interest, except the life and health of the mother, could be compelling enough to satisfy it.³⁴² This would be true even if such criminal laws were not themselves constitutionally mandated, although, as I have argued above, they may well be. Accordingly, equal protection might well effectively create a positive duty to protect the life of a fetus if it were deemed a person, so that the actual U.S. and German positions would not be far apart.

In sum, in the United States, there may well be certain affirmative constitutional duties to protect rights against invasion by third parties and to provide government services—both absolute and conditional. Although the scope of any such absolute duties may be less than in some other countries, the practical effect of the conditional duties will often be the same. If this, then, is how and why constitutional rights in the United States are less

339. Of course, even if the Equal Protection Clause is found to be violated by the discrimination, absent social and economic rights the government is always constitutionally free to end the discrimination by ending the benefit to all; although this option was stipulated not to be open for political reasons. *Id.* (“[I]n the modern world it is almost as unthinkable for a state to abandon welfare payments as to stop punishing crime.”).

340. *Id.* at 869–70; see also *First Abortion Case*, 39 BVerfGE 1, 42–44 (1975) (F.R.G.).

341. As the majority opinion in *DeShaney* stated, “The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989).

342. The alternative analysis would be that state abortion laws are social and economic legislation subject only to a rational basis test, which they would presumably satisfy.

negative than is often thought, let's turn to the other side of the ledger and see how and why they are less positive in certain other countries.

First, although protective duties are typically inferred from negatively phrased rights, this inference is still made from only a limited number of rights. That is, courts inferring positive rights do not apply a general principle that all rights are inherently positive but rather read positive duties into certain particular rights.³⁴³ The result is that a majority of negatively phrased rights still carry only negative duties of forbearance even in those regimes, such as Germany and the ECHR, that largely created the phenomenon.³⁴⁴

Second, as with social and economic rights, the level of judicial scrutiny to which the positive, protective dimension of constitutional rights are subject is typically lower—more deferential—than that afforded to the negative dimension. Accordingly, protective rights generally grant to governments greater discretion in doing what they must do than negative ones grant in what they cannot, and in this sense have less practical effect. As we have seen above, constitutional rights are typically protected by a proportionality test under which the intensity of scrutiny varies, among other things, with the importance of the right in question. Even the relatively less important rights, however, are subject to the minimal impairment prong that provides additional protection above and beyond the rationality prong. It is in this sense that proportionality protects rights more than the U.S. rational basis test, which effectively applies only the latter. Protective rights, however, are generally subject to only a form of reasonableness test, rather than the usual proportionality test.³⁴⁵ That is, courts typically ask only whether the state has reasonably fulfilled its positive duty, a lenient and deferential test that rarely results in findings of failure. The reasons for this more lenient test are the standard reasons for wariness about including positive rights in constitutions: that in telling the elected branches of government what they must do, the judiciary lacks institutional expertise and assumes control of the public purse. In Germany, the FCC has not held that the government violated its protective duty with respect to the right to life and health in any case other than the two concerning abortion.³⁴⁶

Finally, although this point directly goes to explanation rather than description of the difference, it also suggests that future developments may further erode the difference itself. As Currie points out, most of the positive rights in Germany—and one might add elsewhere too—“involve areas in which there has been an effective government monopoly.”³⁴⁷ These include

343. See *supra* text accompanying notes 312–313.

344. I acknowledge the arguments made for the proposition that all fundamental rights in Germany may have protective duties, but it has not been affirmed by the FCC. See, e.g., Dieter Grimm, *The Protective Function of the State*, in *EUROPEAN AND US CONSTITUTIONALISM*, *supra* note 111, at 119, 125.

345. See Currie, *supra* note 328, at 888.

346. See Neuman, *supra* note 312, at 295–300.

347. Currie, *supra* note 328, at 888.

"broadcasting, higher education, and the use of force."³⁴⁸ Even the abortion issue operates within the framework of a comprehensive public health service unknown in the United States. In this context, it becomes virtually impossible to exercise a constitutional right without government assistance, so mere forbearance is insufficient. Where broadcasting stations, universities, and hospitals are all public, simply limiting the power of government to regulate these entities does not ensure a space in which individuals can exercise their rights, as it more arguably does when they are private. As Currie concludes, looked at in this way, the German cases are essentially equivalent to the U.S. position "that a state must provide medical care to those it has imprisoned."³⁴⁹ Accordingly, to the extent that privatization and the erosion of public services continue in western Europe and elsewhere, there may be a corresponding retraction in the sphere of positive duties.³⁵⁰

CONCLUSION: WHAT'S AT STAKE?

Why does a proper understanding of the myth and the reality of American constitutional exceptionalism matter? Even if my partial debunking of the myth is correct, what turns on it? Although I firmly believe that descriptive accuracy and correcting widely held misconceptions before they become too entrenched within the relatively new discipline of comparative constitutional law are of intrinsic scholarly importance, I also think there are several significant consequences that follow from getting the extent of American constitutional exceptionalism right. Roughly speaking, these implications can be divided into the more practical (or first order) and the more theoretical/methodological (or second order).

First, debunking the myth may enhance the perceived utility of comparative constitutional law and thereby promote further growth of the discipline. By breaking down the mutual wall of separation and practical irrelevance created by a false sense of "otherness," it will perhaps encourage greater comparative constitutional study *both* of the U.S. system by non-Americans and of foreign systems by Americans. No longer will the other system generally be viewed as so different in its foundational principles and assumptions about rights that nothing tangible is to be learned or gained from deeper engagement with it.

Second, as a particular manifestation of this first point, to those for whom the case against reference to foreign constitutional law and decisions by U.S. courts is premised on American constitutional exceptionalism,³⁵¹ then the thesis of this Article weakens that case. The similarities in the structure of constitutional rights mean that there may well be relevant things to learn from foreign sources.

348. *Id.*

349. *Id.*

350. There might also, of course, be an increase in the horizontal effect of constitutional rights. See *supra* Part IV.

351. See, e.g., Calabresi, *supra* note 5.

But, third, the similarities in structure suggest that what there is to be learned is not limited to the structure of rights but may also extend to substance. Let me begin to explain by making explicit a judgment that has perhaps remained only implicit thus far: the structural similarities that I have analyzed are, in at least two ways, more important than the substantive differences in an overall assessment of whether, and to what extent, the U.S. rights tradition is exceptional.³⁵² The first is that, in virtually every case, what is exceptional about the substance of rights is the product of relatively recent changes in their interpretation and was not always so. For this reason, it is difficult to think of substantive exceptionalism as an enduring or inherent part of the U.S. rights tradition. Thus, as is well known, the strong protection given to free speech was a work-in-progress on the part of the Supreme Court that began during the mid-1920s and was not completed until the mid-1960s.³⁵³ In this regard, it is worth noting that the *Lüth* case in Germany was decided six years before *New York Times v. Sullivan*. No law, state or federal, was struck down under the Establishment Clause until 1948.³⁵⁴ Prior to *Smith* in 1993, U.S. religious freedom jurisprudence was not exceptional. From approximately 1890 until 1936, the Supreme Court recognized a constitutional right to choose one's occupation.³⁵⁵ As recently as 1976, the death penalty was unconstitutional.³⁵⁶ For much of the twentieth century, evidence of the original understanding of constitutional provisions tended to be deemed "inconclusive" and was largely ignored. Until the 1940s, the Supreme Court relied on foreign constitutional practices to determine if federal criminal procedural protections contained in the Bill of Rights were so "implicit in the concept of ordered liberty" as to apply against the states under the Fourteenth Amendment.³⁵⁷

By contrast, the principles governing the structure of constitutional rights in the United States are significantly older and have not tended to change much over time. Thus, as a matter of precedent, the source of the state action doctrine is still considered to be the *Civil Rights Cases* of

352. I also think the structural similarities are more important to focus on because the substantive similarities are well known. Finally, I do not intend to be making any general judgment about the greater importance of "similarity" than "difference" in comparative law, but a far more limited one about the greater importance of the structure than the substance of rights in the specific context of gaining a proper sense of whether and to what extent the U.S. "rights tradition" is exceptional.

353. That is, roughly from *Whitney v. California*, 274 U.S. 357 (1927), to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

354. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210–11 (1948) (invalidating sectarian classes held in public schools by parochial school teachers).

355. During the *Lochner* era, the Court invalidated several laws restricting entry into businesses and occupations. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (striking down state law requiring certification for manufacturers of ice); *Adams v. Tanner*, 244 U.S. 590 (1917) (invalidating law prohibiting employment agencies from collecting fees from workers).

356. The constitutional permissibility of the death penalty was reinstated in *Gregg v. Georgia*, 428 U.S. 153 (1976).

357. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (rejecting the claim that double jeopardy violates the Due Process Clause of the Fourteenth Amendment).

1883,³⁵⁸ although the basic principle underlying it (that constitutional rights bind only government actors) was undoubtedly thought to apply to the Bill of Rights from the outset. Judge Posner may have coined the quotable phrase that the U.S. Constitution is “a charter of negative rather than positive liberties,”³⁵⁹ but he certainly did not claim to be inventing the principle, which both he and the Supreme Court in *DeShaney* expressly attributed to the Framers.³⁶⁰ And, as I have argued above, the rejection of a categorical conception of constitutional rights in favor of understanding rights as “shields,” as presumptive claims but which are in principle overridable by conflicting public policy objectives, goes back at least as far as 1905. Even if, as I have argued, misconceptions and inaccuracies surround the distinctiveness of these principles, their enduring quality qualifies them as the heart of the U.S. constitutional rights tradition and justifies the effort to gain a proper understanding.

This first way in which the structural similarities are more important than the substantive differences also points towards the second. The structural principles that I have discussed in this Article tend to function as axioms of constitutional rights jurisprudence within every system. That is, they are relatively fixed, overarching tenets that resolve threshold issues applicable to all substantive rights and help to shape, influence, and set the general parameters of their content. In this sense, the structure of rights is more fundamental or foundational than their substance. And if this structure were truly exceptional in the United States, one would expect it to result in substantive differences. Accordingly, to change our understandings—or perhaps assumptions—of how distinctive these unchanging axioms of U.S. constitutional law actually are, to see that far from being exceptional they are in the mainstream of contemporary constitutionalism, is to remove the foundation stone thought to underlie many of the differences in substantive outcomes and make it easier to change the interpretations of certain rights once again.

In this regard, the Article suggests that there are no great, distinctive structural barriers to a more “social state” approach to constitutional rights jurisprudence in the United States. Specifically, the United States does not stand apart from the modern conception of constitutional rights as important claims that may nonetheless be limited or overridden by certain conflicting public policy objectives. Bringing the two-stage process of adjudication out from the constitutional shadows makes it more likely that there will be greater focus on, and self-conscious attention to, the second stage. The state action doctrine notwithstanding, the U.S. Constitution already fully governs the legal relations of private individuals as it does in many other countries; there is no distinctive, threshold constitutional immunity or presumption protecting “private autonomy.” The actual extent to which constitutional

358. 109 U.S. 3 (1883).

359. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

360. See *supra* notes 324–327 and accompanying text.

rights restrict (or promote) such autonomy is purely a matter of their substantive scope and interpretation.

Neither is there a fundamental gulf between the United States and other countries on the issue of social and economic rights. The United States does not stand alone in currently rejecting them; several other countries without constitutional social and economic rights nonetheless have very extensive welfare states, so that their absence cannot be said to imply "constitutional hostility" to such policies; and even in countries with some social and economic rights, the extent of their actual welfare states goes well beyond what is constitutionally mandated. Judicial implication of a few social and economic rights from seemingly civil and political ones is fairly common in other countries and, especially given the general penchant of the U.S. Supreme Court for implying both rights and their limits, no great structural leap would be necessary for it to follow suit. Similarly, in the area of constitutional rights to protection, the overly general and absolutist "charter of negative liberties" slogan should no longer preempt, and serve as a distraction from, careful consideration of more particular and specific constitutional duties.

Finally, moving to the second-order level, I would like to back into a brief discussion of the Article's general methodological and theoretical implications in the following way. As previewed in the Introduction,³⁶¹ in Ran Hirschl's terminology, the methodological approach of this Article is primarily "concept formation through multiple description."³⁶² I would, of course, like to think that the Article does not merely fit this category of comparative constitutional scholarship but also in some small way helps to justify it. In any event, it is not focused on explanation but on understanding, and self-evidently not on providing empirically testable causal hypotheses. But to the extent it is possible, or permissible, to say anything at all about explanation without deploying data sets and regression analyses, what might explain the structural similarities and substantive differences that I have described and analyzed at length?

The structural similarities are, I believe, best explained as a form of practical near-necessity within the dominant sub-category of liberal-democratic constitutionalist culture that embraces constitutionalized rights.³⁶³ That is, at the deeper, or threshold, level at which the structural principles operate, there are powerful factors that pull in the direction of convergence given the overall constraints of liberal-democratic constitutionalism. So, once rights have been constitutionalized, the claims of conflicting

361. See *supra* text accompanying note 26.

362. Hirschl, *supra* note 26, at 43.

363. That is, within the overall category of liberal-democratic constitutionalism, there are two traditional sub-categories, commonly referred to as constitutional and legislative supremacy. Even during the heyday of this dichotomy, there were countries—such as Australia—that straddled the two by embracing constitutional supremacy but without a bill of rights. More recently, the legislative supremacy model has been in steep decline; several countries previously adhering to it have developed the new, third sub-category discussed in Part II ("the new Commonwealth model"), which aims to combine the two.

public policy objectives create strong pressures of various sorts to affirm a general conception of rights as shields rather than trumps with a two-stage process of adjudication. Once a constitution is granted the status of supreme law of the land—of providing law for the lawmaker—there is a certain force to the claim that it should govern all law, private as well as public, but not otherwise *directly* regulate individual citizens. And once a bill of rights is being framed or subsequently interpreted, there are pragmatic reasons for focusing on more traditional civil and political rights and leaving the existence or extent of positive social and economic rights to legislative decision. After all, unlike standard tyranny-of-the-majority reasons for endorsing the former—including negative property rights—those who benefit from positive social and economic entitlements typically form the electoral majority so that there is no obvious, *prima facie* reason to distrust the democratic process in this area. Although perhaps the same can be said for rights to basic protection (which, to the extent they are lacking in some countries, may be why), as a primary practical reason for constituting governments in the first place, one might still expect them to be included. Although this explanation employs a “universalist” approach to arrive at core principles, it is far more a form of empirical or practical universalism than a normative one. Nothing in this very brief account suggests that constitutions either could not or should not adopt variant structural principles of rights.

By contrast, I think substantive differences in constitutional rights within the general parameters set by these structural principles are best explained by a combination of contextual factors, including differences in political and legal culture, expressive values, and the age and content of constitutional texts. These factors of divergence tend to play out here rather than at the level of structure.

In terms of what the Article might contribute to general discussions about scholarship in comparative constitutional law, I want to conclude with a plea for pluralism and a warning against being hemmed in by false or unnecessary dichotomies. Methodologically, the Article suggests that there is no natural monopoly here to fight over but rather plenty of intellectual space for different approaches to make their own distinctive contributions to the field. Although, of course, both its goals and criteria for valuable scholarship are legitimate bones of contention, comparative constitutional law—more clearly than comparative law in general—is a subject and not a method (unlike, say, law and economics). It may well be that different methodological approaches are particularly appropriate for different areas or tasks: a form of division of intellectual labor. So, as just mentioned, contextualism and expressivism may be particularly helpful approaches to the study of substantive differences in constitutional rights and constitutional texts more generally, whereas analytical and conceptual methods may be more illuminating for understanding their underlying structures. Similarly, as the work of many scholars illustrates, the issues of constitution-making and judicial power/conduct are ones for which both empirical, causal methodologies and public choice theory have been especially fruitful. Functionalism may be particularly appropriate for separation of powers and federalism issues, and

normative constitutional and political theory for specifying the contours of liberal-democratic constitutionalism and its alternatives, and the choice among its various forms.

The Article also suggests that squeezing first-order scholarship in comparative constitutional law into the molds provided by certain influential second-order dichotomies and paradigms may not always be the best way to proceed. Thus, the refining of ideas about American constitutional exceptionalism that comes from distinguishing between the structure and substance of rights shows that there is not an either/or choice between convergence and divergence, or between similarity and difference.³⁶⁴ In reality, both are almost always present in any area of comparative study, and pre-commitment to one or the other sometimes obstructs rather than promotes valuable first-order scholarship. Whether, and in what sense, the similarities are more important than the differences, or vice versa, should be the result and not the premise of the analysis. Additionally, as comparative legal scholars continue to debate whether the metaphors of "transplant," "borrowing," or "migration" of ideas from one system to another best captures what is taken to be the major process of legal change,³⁶⁵ the Article serves as a reminder that both similarities between systems and internal changes are also the products of what might be thought of as parallel development in the law. Thus, in the United States, the structure of constitutional rights that I have argued it shares with most other Western constitutional systems developed largely in splendid isolation, which at least partly explains why the labels attached to the various principles mostly differ. Similarly, the relatively recent changes in the interpretation of many constitutional rights in the United States that have created most of the substantive differences were almost exclusively internally generated.

Every country is claimed to be special, and so they are to their citizens and many non-citizens as well.³⁶⁶ But special is not the same as exceptional.

364. For several helpful essays on the sameness/difference dichotomy in comparative law theory, see *COMPARATIVE LEGAL STUDIES*, *supra* note 25.

365. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1974); *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 5.

366. As a European living and working in this country, the United States is certainly special to me, as is the United Kingdom, of which I am a citizen.