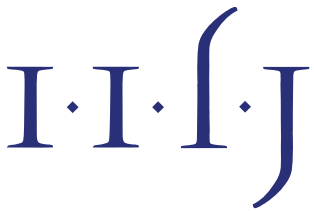

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THE MYTH AND THE REALITY OF AMERICAN CONSTITUTIONAL EXCEPTIONALISM

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By Stephen Gardbaum*

Abstract

This Article evaluates the widely held view that American constitutional rights jurisprudence is exceptional. Its thesis is that while the conventional wisdom is largely correct about the content of a few specific constitutional rights, it is largely wrong about the more general structure of constitutional rights. The perceived exceptionalism of this structure is threefold. First, the United States has a more categorical conception of constitutional rights than other countries. Second, the reach of constitutional rights into the sphere of private conduct is less than elsewhere. Third, the United States rejects the types of positive constitutional rights—including social and economic rights—recognized by many other modern constitutions. Once labels and assumptions are set aside, I aim to show that on each of these structural issues, far from occupying a comparatively extreme and lone position as is generally thought, the U.S. approach is actually well within the contemporary constitutional mainstream. Finally, I explain why debunking the myth of American structural exceptionalism matters.

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THE MYTH AND THE REALITY OF AMERICAN CONSTITUTIONAL EXCEPTIONALISM

INTRODUCTION

The familiar notion of American exceptionalism[1]—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.

The standard list of differences includes, depending on one's perspective, economic systems (free market capitalism versus a mixed economy), political traditions (antigovernmentalism, absence of both a strong socialist movement[3] and a professional, high level civil service, and top elective offices open to those with little or no political experience), work ethics and culture, moral and personal values, the contemporary role of religion and extent of religious belief, attachment to firearms, unique team sports, sense of humor, and self-presentation. The explanations of these differences are, of course, legion and much disputed, but they include the newness of the United States, the country's existence and status as the product of the first successful colonial revolution, geography, political isolation and isolationism, a long

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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).

3. The classic work is WERNER SOMBART, WHY NO SOCIALISM IN AMERICA? (1906). *See also* SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES (2000).

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 now. It was then one of the very few countries with a written constitution that (1) included a bill of rights at all, and also (2) gave it 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 Australia[6]—are now truly exceptional.

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 pre-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 is, 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

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

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 UK still lacks a written 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). *See, 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 UK, 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.

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 be focusing 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 and differences between U.S. federalism and separation of powers and those of 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. Since this goal has defined—indeed, created—constitutional law in the modern world, it is here too that claims of exceptionalism must be

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7. Steven Calabresi's article, *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 in an article of eighty pages. *Id.* at 1405–10. Even here, he focuses primarily on substantive differences rather than on the structural ones that occupy more than half of this Article. For these reasons, I believe my Article is the more systematic study of the exceptionalism of American constitutional law. Moreover, the two articles generally come to opposite conclusions about the extent of such 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 *id*., at 57; and Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *id.*, at 90. The book in which these articles are collected focuses primarily on another individual aspect of exceptionalism: the U.S.'s uniquely ambivalent attitude towards international human rights law. *Id*. 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.

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, MICHEL ROSENFELD, ANDRAS SAJO, SUZANNE BAER, 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).

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* of constitutional rights, what particular rights exist at any given time, and the second is the *structure* of constitutional rights. This structure is the underlying framework—set of concepts, principles, doctrines, and institutions—that applies to, frames, 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 it 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 and omissions (state militias, quartering of soldiers, 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]

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 is such that there is a virtually unique combination of a high level of separation of church and state

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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 U.S. 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.")(emphasis in original).

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.

(notwithstanding some recent lowering[13]) 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 a non-secular, unofficial 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 distinction[18] 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 and particularly 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 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

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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 66–72.
16. District of Columbia v. Heller, 554 U.S. _ (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.

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 with 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, recognized by many other modern constitutions. 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 U.S. 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 U.S. is standardly viewed as occupying a relatively extreme and lone

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.

position, I aim to demonstrate that its approach to each is in fact well within the contemporary constitutional mainstream.

This partial debunking of the myth of American constitutional exceptionalism has several significant implications worth noting at the outset.[24] For one, it may generally 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 U.S. 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

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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).

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 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. 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 U.S. 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 will only briefly survey 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 brevity. It is the oldest currently in effect[28] and, if not *the* shortest (as is often erroneously

27. The only other general list of which I am aware is that of Steven Calabresi, and our lists are a little 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.

claimed), is among the shortest at 7,591 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 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 late eighteenth century warfare seemingly dealt with in the second and third amendments.[32] Post-Bill of Rights, the thirteenth amendment ends the inhuman treatment of one group of Americans by another[33] and four of the remaining amendments deal with the right to vote.[34]

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:

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29. The constitution of Libya (1969) contains 1,600 words and the constitution of the Central African Republic (1995) approximately 2,000 words. Among western constitutions, Luxembourg's is the shortest at 5,744 words, followed by Denmark (6,260 words), the U.S. (7,591 words), France (7,764 words), and Norway (8,057 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, 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 exceptionalism beyond the common law/civil law divide.

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. Of course, these concerns have been partially revived with the recent decision finding an individual right to possess firearms in the Second Amendment for the first time. *See supra* note 16.

33. 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.").

34. *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.").

> 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*."[35]

Almost all other constitutions contain longer lists of more particular liberties[36] and an equality provision setting out prohibited bases of discrimination.[37] The age, terseness, and vagueness of enumerated rights have, controversially, resulted in significant implication of rights by the U.S. Supreme Court in modern times.[38]

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.[39] 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

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

36. 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 172–174.

37. *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.) ("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.").

38. 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.

39. For example, the Canadian Constitution contains a general limitations clause. Canadian Charter of Rights and Freedoms, *supra* note 37 § 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, concerning 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.).

differences between the United States and other countries on the structural issue 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 law[40]—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),[41] but its jurisprudence 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.[42] Whereas most Western countries permit some significant form of "hate speech" regulation, including laws making it a criminal offence to deny the Holocaust and to incite racial or religious hatred,[43] almost all such laws fall foul of the First Amendment as impermissible

40. *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).

41. *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 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.) ("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 U.S., 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).

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

43. *See* R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (upholding 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 created the crime of criminal insult).

content-based regulation.[44] Under existing doctrine, only speech that is directed to inciting or producing imminent lawlessness may be regulated.[45] In itself, avoiding the individual, social, psychological, and cultural harms that hate speech undeniably causes is either not deemed a compelling public interest that can in principle justify speech restrictions or such restrictions are deemed an unnecessary means of promoting this goal.[46]

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 public figures are constitutionally permissible only when made with "actual malice"; that is, actual knowledge that the statement is false or reckless disregard of its truth or falsity.[47] This rule has expressly been considered and rejected under both the Canadian Charter[48] and Australian Constitution[49] as insufficiently protecting the conflicting values of reputation and dignity, and this is also the general situation in most other countries, including Germany.[50]

Somewhat ironically, given *New York Times*'s rationale of ensuring "that debate on public issues should be uninhibited, robust, and wide-open,"[51] 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 companies[52] means that the common ban elsewhere on paid political

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44. *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 as a signal of impending violence).
45. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Dennis v. United States, 341 U.S. 494, 501-09 (1951).
46. The latter was the rationale in *R.A.V.*, 505 U.S. at 392.
47. 376 U.S. 254, 279-80 (1964).
48. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 122-26 (Can.).
49. Theophanous v. Herald & Weekly Times Ltd. (1994) 182 CLR 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.").
50. *See* Mephisto Case, 30 BverfGE 173 (1971) (F.R.G.); Böll, 54 BverfGE 208 (1980)(F.R.G.).
51. 376 U.S. at 270.
52. *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 widest editorial and journalistic freedom consistent with its public obligations).

advertisements in favor of free, mandated airtime for electoral candidates[53] 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 Amendment[54] 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 as requiring access by the citizenry to the full range of political views so that both broadcasting regulation and limits on campaign expenditures are either constitutionally permissible or mandatory.[55]

The final free speech exceptionalism I will mention, although there are numerous 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, the United States stands alone in the degree to which it favors the former.[56] Indeed, this exemplifies the more general difference that the constitutional presumption against prior restraint on publication is exceptionally strong in the United States.[57]

C. *Religion*

To many, the United States is "a riddle wrapped in a mystery inside an enigma" on the whole topic of religion and public life. It has by far the largest percentage of believers and active worshippers of any developed country.[58] Despite the constitutional ban on religious tests for

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53. *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].").

54. 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 53, 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.").

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

56. 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.

57. 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).

public office,[59] it undoubtedly has one *de facto* in 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 clause[60] as interpreted means that state support for, or connection to, religion in general or particular religions is close to the secular pole on a spectrum of actual or possible positions, perhaps only second to the well-known, aggressively secularist regimes of France and Turkey. And on the other hand, after the changed position or clarification in *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").

On the establishment clause, several constitutional rights regimes, including the Canadian and the ECHR, have no equivalent provision at all, and 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.[61] Many other Western countries do have constitutional bans on established religions but nonetheless 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.[62] Apart from the United

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58. 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, was the highest. *Id.*

59. 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.").

60. *Id.* amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

61. 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.

62. Grundgesetz [GG] art. 137(6)(F.R.G.) ("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.").

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.[63] 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. Rather, 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.[64] 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 U.S. as elsewhere, this is not true of many other types of general regulations burdening religion—including those at issue in *Smith* (a general drug law) and *City of Boerne v. Flores*[65] (a zoning ordinance).

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63. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

64. *See* KOMMERS, *supra* note 41, 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 Blood Transfusion Case in Germany, 32 BverfGE 98 (1971) (F.R.G.), 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 that, "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 __. Similarly, the Supreme Court of Canada, 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 s.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 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).

65. 521 U.S. 507 (1997).

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.[66]

Several of the canonic American cases in this area involved what would typically in other Western constitutional systems be thought of 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,[67] and *Ferguson v. Skrupa* upheld a state law prohibiting all but lawyers from engaging in the business of debt adjusting.[68] 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.[69] Although far from absolute, this right is nonetheless protected more rigorously

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66. 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 so 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).

67. 83 U.S. (16 Well.) 36 (1873).

68. 372 U.S. 726 (1963).

69. *See, e.g.*, Grundgesetz [GG] art. 12(1) (F.R.G.) ("All Germans shall have the right freely to choose their 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.").

under the standard test of proportionality than in the United States and has, on occasion, resulted in a finding of unconstitutionality.[70] 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.[71] Even this lesser economic right is, however, arguably still more protected elsewhere than in the United States under the "minimal impairment" prong of the proportionality test.[72]

The U.S. Supreme Court has finally ruled for the first time on what had been the open question of whether there is an individual constitutional right to possess firearms under the Second Amendment, an issue that arouses great passion and controversy.[73] 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 chose not to address the important issue of what standard of scrutiny applies to government limitations of the right.[74]

Finally, is the well-known exceptionalism surrounding the death penalty.[75] 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

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70. 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).

71. *See, e.g.*, Pharmacy Case, 7 BVerfGE 377 (1958) (F.R.G.).

72. Thus, in The Chocolate Candy Case, 53 BverfGE 135 (1980) (F.R.G.), 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 __. This sort of law would easily pass muster under the U.S. rational basis test.

73. District of Columbia v. Heller, 554 U.S. _ (2008). *See supra* note 16.

74. *See* Adam Winkler, *Scrutizining the Second Amendment*, 105 MICH. L. REV. 683 (2007) (demonstrating that under state constitutional rights to bear arms, state courts have generally upheld reasonable regulations of guns).

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

inhumane and degrading punishment, which have been interpreted to include the death penalty in all circumstances.[76]

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 arisen[77] following the first citation by the Supreme Court in a majority opinion of foreign/international constitutional cases,[78] as well as the slightly less unprecedented practice of referring to foreign and international laws.[79] Regardless of its merits or outcome, this controversy is obviously testament to the fact that such use of foreign constitutional materials is hardly normal or routine in the United States, as it is increasingly 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

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76. *See, e.g.*, Grundgesetz [GG] art. 102 (F.R.G.) ("Capital punishment is abolished."); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, __ Europ. T.S. __. (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.).

77. 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).

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

79. *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 (1968) at n.14 (discussing the changed approach). As the majority 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.

comprehensively.[80] Similarly, the UK'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.[81] The German Federal Constitutional Court ("FCC") has also required courts to take into account decisions of the ECtHR in interpreting the Basic Law.[82] 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.[83] So too, only slightly less frequently, does the Indian Supreme Court.[84] 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.

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 and original intent methods

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80. 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.).

81. 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.).

82. Görgülü v. Germany, 111 BverfGE 307 (2004) (F.R.G.), at para. 62 ("The Convention provision as interpreted by the ECtHR must be taken into account in making a decision; the court must at least duly consider it."). The case is discussed in Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, supra note 5, at 256, 280.

83. *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 US debate over substantive versus procedural due process for purposes of interpreting scope of "fundamental justice" under section 7 of the Charter).

84. *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)); Nandini Satpathy v. P.L. Dani, A.I.R. 1978

S.C. 1025 (1978) (India) (discussing Miranda warnings);) State of Uttar Pradesh v. Pradip Tandon, A.I.R. 1975 S.C. 563(1975)(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 (India) (discussing Fifth Amendment Takings Clause).

of reasoning, summed up in *Brown*'s famous verdict that "at best, they are inconclusive,"[85] was more in line with other countries.[86] Since then, however, the rise of originalism in the U.S. 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.[87] 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 two hundred and nineteen year old document.[88]

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 actualize. Although a version is certainly endorsed by some U.S. judges and commentators in the 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

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85. Brown v. Board of Education, 387 U.S. 483, 489 (1954).

86. *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).

87. *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).

88. Thus, for example, the German Constitutional Court and Supreme Court of Canada have generally afforded minimal and non-conclusive 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 41, at 307. *See also* KOMMERS, *supra* note 41, 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 a 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 Supreme Court of Canada 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."

In re B.C. Motor Vehicle Act, [1985] 2. S.C.R. 486, 509 (Can.).

Israel, it is not only an orthodox but probably the dominant approach to constitutional interpretation.[89]

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 U.S. 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 in the United States. Instead, it 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.[90] 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 judicial review. By contrast, the rejected American model seemed exceptional.

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89. Karl Friauf has described the role of teleological interpretation in Germany as follows:
"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 Supreme Court of Canada 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).

90. 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.

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. 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 the 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.[91] 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.[92] Second, in the American system, courts engage only in concrete or incidental 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.[93] Third, under the American model, courts engage in *a posteriori* judicial

91. 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); Louis Favoreu, *American and European Models of Constitutional Justice*, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW 105, 105-19 (David S. Clark ed., 1990).

92. The European Court of Justice has, however, effectively mandated decentralized judicial review for the purpose of determining whether provisions of national law violate (supreme) European Union 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.

93. The Supreme Court of Canada, 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. In conversation, 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). In the U.S., Mark Tushnet has argued that more generous developments in standing law plus the availability of temporary and permanent injunctive relief

review and without a time limit; that is, 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 even under abstract *a posteriori* review, there is often a short deadline for seeking review.[94] 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 model[95] and results, according to some, in both greater political accountability of the constitutional judiciary and a less polarized, partisan nomination process.[96]

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 among countries with civil law rather than common law orientations.[97] The reasons why the European model of judicial review tends to fit far better within the civil law tradition (and the American

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have 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).

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

95. Of course, in the U.S. itself, the requirement is a simple majority in the Senate only and this applies only to federal, not state, judges.

96. *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.

97. 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.

within the common law) are well known and need not be rehearsed here.[98] 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 public law, and certain Scandinavian countries whose courts almost never exercised the power.[99] 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.[100] 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.[101] 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.[102]

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. Thus, the role of concrete judicial review (versus abstract) has grown in quantity

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98. *See* the classic works cited *supra* note 91. As Brewer-Carías points out, however, the overlap is not perfect. *See generally* Brewer-Carías, *supra* note 91.

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

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

101. *See id.* at 470-73.

102. *See id*. at 477-78, 482-84; *see also supra* note 92.

and importance in more recent times. Approximately ninety-five percent of cases now come to the Federal Constitutional Court through the individual constitutional complaint procedure,[103] 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 1976.104 Similarly, *a priori* review has shrunk in scope and is now practiced only by the French *Conseil constitutionnel*, having been abolished in Spain and Portugal.[105] 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 concurring and 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.[106]

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

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103. KOMMERS, *supra* note 41, at 11.

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

105. *See, e.g.*, PAUL HEYWOOD, ED., POLITICS AND POLICY IN DEMOCRATIC SPAIN 151 (Routledge 1999).

106. 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 93; 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); Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 23 SUP. CT. L. REV. 2d 213 (2004).

and not to the judiciary, as with 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.[107] 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.[108] In effect, this means that the legislature is empowered to act inconsistently with a right only where its intent to do so is express. Under the UK'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.[109] 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.[110] 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, have become largely details of the acceptance or rejection of the full force of the four principles of constitutional supremacy.

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107. "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." Canadian Charter of Rights and Freedoms, *supra* note 37, § 33(1). The renewable override power operates for a period of five years.

108. "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." New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 6.

109. The Human Rights 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.).

110. *But see* Schor, *supra* note 96 (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).

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 standardly 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 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. Constitution[112] 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 U.S. constitutional rights has been held to be absolute. To the extent these go beyond

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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 US]."); 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 Sajo & 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 categorization 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).

112. *See supra* text accompanying note 39.

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 than is the case elsewhere.[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 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 action 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

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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. *See* Kumm & Ferreres Comella, *supra* note 111, at 276-77:

> "[In the US,] [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 means a great deal in Canada or Germany. . . . Within proportionality analysis the dice are not loaded substantively in favor of the rights-holder." (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).

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).

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 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

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118. *See* Kumm and 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.). The South African Constitutional Court has also stated that:

> "[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 (emphasis added). For the ECtHR, the "margin of appreciation"—the degree of deference accorded to the original national decision-making authority—varies with both the importance of the right interfered with and the legitimate aimed 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").

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

121. Recent U.S. 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 Southeastern Pennsylvania 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 a new "undue burden" test for restrictions on the right).

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 doctrine 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 rulelike 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 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]

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122. *See, e.g.*, The Chocolate Candy Case, 53 BverfGE, *supra* note 72.
123. *See e.g.*, Grundgesetz [GG] art. 19(2)(F.R.G.) ("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) (2002) (arguing that the "essential core" approach is not independent of proportionality review).
125. *See* Schauer, *supra* note 8, at 31, 53-54.

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

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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).

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*[133] alongside Germany's *First Abortion Case*.[134] 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*.[135] 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*) *Abortion Case*[136] is far more common and internally less controversial; indeed, it may be inherent in the function of abstract review.[137]

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*.[138]

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."[139] It also inferred this duty from the general concept of constitutional rights as an "objective ordering of values,"[140] concluded that aspects of the conflict between the fetus's right to life and the mother's freedom of personality were resolved "*a priori*"[141] in favor of the former, and frequently stated that issues were to be decided as

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133. 410 U.S. 113 (1973).
134. 39 BVerfGE 1 (1975) (F.R.G.)(trans. By Robert Jonas and John D. Gorby, 9 JOHN MARSHALL J. OF PRACTICE AND PROCEDURE 605 (1976)).
135. Planned Parenthood of Southeastern Pennsylvania 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*.").
136. Second Abortion Case, 88 BVerfGE 83 (1993).
137. *See, e.g.*, ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 141–44 (2000).
138. 347 U.S. 483 (1954).
139. 39 BVerfGE 1 (1975), translated by Jonas and Gorby, *supra* note 134, at 641
140. *Id.*, at 642 On the German concept of constitutional rights as an "objective order of values," *see infra* text accompanying notes 199-200.
141. *Id.*, at 643 (emphasis added).

"matters of "principle."[142] 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 that: "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."[143] 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."[144] 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.[145]

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: by employing such categories as manufacture versus commerce, direct versus indirect effect, or by looking at the empirical effects on commerce.[146]

What this observation suggests, however, is that the First Amendment is not only methodologically exceptional in a comparative sense, as Schauer argues,[147] but it is also exceptional from the perspective of the rest of U.S. constitutional rights jurisprudence.

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142. *E.g.*, *id*. at 642.
143. *Id.* at 638.
144. Roe v. Wade, 410 U.S. 113, 159 (1973).
145. The FCC stated:

> "In all other cases [than where the life, health, or social necessity of the mother require an abortion] the termination of pregnancy remains a wrong deserving of punishment . . . . If the legislature had wanted to dispense with criminal sanctions, this [decision] would have been compatible with the protective command of Article 2 (2) [1] of the Basic Law only under the condition that another, equally effective, legal sanction was at its command which would permit the clear recognition of this act as a wrong (disapprobation by the legal order) and which would prevent abortions as effectively as a penal provision."

First Abortion Case, *supra* note 134 (trans. By Jonas and Gorby), at 649.
146. *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).
147. Schauer, *supra* note 8.

Elsewhere, and particularly in Fourteenth Amendment jurisprudence, such categories are far less prominent. Under substantive due process, there are no obvious equivalents although, 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 source: elsewhere, which types of discrimination violate the right to equality is typically in the text[148] whereas in the U.S. 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.[149]

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"[150] 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 expressive activity regulated promotes one of the principles underlying the guarantee.[151] 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.[152] 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.[153]

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

148. *See supra* note 37.
149. *See infra* text accompanying notes 237–238.
150. 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).
151. Irwin Toy Ltd. V. Quebec (Attorney General), [1989] 1 S.C.R. 927, 971-77 (Can.).
152. *See infra* Part IV.
153. Thus, the FCC had held that demonstrably untrue representations of fact are not protected at all under Article 5. See Boll, 54 BverfGE 208 (1980) (F.R.G.); Holocaust Denial, 90 BverfGE 241 (1994). By contrast, in The Historical Fabrication Case, 90 BverfGE 1 (1994), 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 was not protected.

adjudication employed throughout the modern constitutional world. The first step consists in determining whether a constitutional right has been infringed; the second step in whether the government can justify infringing the constitutional right.[154] 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."[155]

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.[156] 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 open-ended, context-specific, case-by-case assessment under the various prongs of the near-universal proportionality test.[157] 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.[158] Thus, U.S. courts are said to employ a narrow conception of both rights and their permissible limits, whereas other courts employ a broad conception of both.[159]

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

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

156. 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 and 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.

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

158. *See* Kumm and Ferreres Comella, *supra* note 111, at 278 (footnote omitted):

> "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

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,[160] it should not be automatically inferred that this approach applies to other constitutional rights.[161] 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*,[162] 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.[163] 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 abortion[164] 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.[165] Similarly, in the more recent landmark affirmative action case of *Grutter v. Bollinger*, decided under the

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> 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."

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).

159. *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 . . .").

160. Schauer, *supra* note 111, at 47-63.

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

162. 198 U.S. 45 (1905).

163. 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.

164. 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.

165. *Id.* at 153–64.

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 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. [166]

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 Supreme Court of Canada 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.[167] 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.[168]

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 pubic 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

166. 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.
167. [1988] 1 S.C.R. 30, 51-73 (Can.).
168. 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 __.

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 U.S. Supreme Court properly recognizes the reality that what lies on either side of the "unless clause" reflects the distinction between "internal" and "external" limits on rights and the standard two steps of modern constitutional rights adjudication.[169]

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; twice, when it does not, by using a different second step test. But on closer analysis, this second rejection 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,[170] the differences between the two second-step tests are far less, and far less significant, than generally claimed, for two reasons.

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.[171] In Germany, under the proportionality test, what justifies an infringement, say, of the general constitutional right to

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169. 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).

170. 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 Five 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.").

171. *See supra* text accompanying note 118.

liberty that has been held to include, among many other things, the right to feed pigeons in public squares,[172] would not necessarily justify an infringement of the constitutional right to human dignity, the most important constitutional right and value in the Basic Law.[173] 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.[174]

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.[175] And equally well-known is Justice John Paul Stevens' 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.[176] 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.

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172. Mattias Kumm mentions this case, 54 BVerfGE 143, 147 (1980), as an example of the "mundane things" that the FCC has held 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 159, at 141.
173. *See supra* note 41.
174. *See supra* text accompanying note 118.
175. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460 (1985) (Marshall, J., dissenting).
176. Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

> constitutional law may be obscured by the several doctrinal forms of multi-factored tests in which it is embodied.[177]

Similarly, David Beatty has argued that the decisions in *Lochner*, *Brown*, and *Roe* demonstrate that the proportionality test, what 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."[178]

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 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*).[179]

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 rights context. Indeed, it is perhaps not entirely coincidental that it is this final prong that gives rise to a second

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177. Jackson, *supra* note 111, at 609-10 (footnotes omitted).

178. 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).

179. *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).

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.[180] For the practice of several common law countries reflects a certain unease with it, sometimes 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.[181]

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 U.S., 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 action than the final one.[182] 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*,[183] 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

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

181. *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).

182. *See* Rivers, *supra* 120, at 177-82. Peter Hogg has argued that section 1 analysis in Canada almost always turns on the minimal impairment prong. Peter W. Hogg and 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).

183. 323 U.S. 214 (1944).

objectives,[184] 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.[185] Doing so involves tests of both ends and means—whether the objective is legitimate 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*[186] and *R.A.V. v. City of St. Paul*,[187] the outcomes of which are correctly taken to epitomize significant substantive differences between the right of free speech in Canada and the U.S. respectively, nonetheless share a common structure of rights analysis.[188] 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 court found that section 319(2) of the Criminal Code was rational and minimally impaired the right,[189] the U.S. Supreme

184. 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).

185. *See* Gardbaum, *supra* note 169 (identifying this common structure of constitutional rights and presenting the missing normative justification of 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; 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. LEG. STUD. 725 (1998). Even 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 plausible 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.

186. [1990] 3 S.C.R. 697 (Can.).

187. 505 U.S. 377 (1992).

188. 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.

189. Although the dissenters in Keegstra argued that the statute did not minimally impair free expression.

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.[190]

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 U.S., 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.

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 U.S. 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 by contrast with the more "horizontal" approach of countries such as Germany, Ireland, Canada, and South Africa.[191] 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,[192] the United States is still standardly deemed less horizontal than other countries—such as Germany and Canada—that formally share

190. *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.
191. *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.").
192. Examples include Ireland, South Africa, and Colombia.

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."[193] 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.[194]

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.[195] Accordingly, the United States is generally understood to be more vertical and less horizontal in its approach than both Germany and Canada.[196]

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

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193. 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 191. On Germany, *see*, for example, Edward J. Eberle notes:

> "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):

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

195. *See* Kumm & Ferreres Comella, *supra* note 111, at 245 (2005) ("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.").

196. *See id*. Although 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 *id*., at 1, 8 (arguing that Canadian courts have refused to follow the logic of New York Times).

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.[197]

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.[198] 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 so have indirect effect on 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."[199] It continued:

> This value system, which centers upon human dignity and the free unfolding of personality within the social community, must be looked upon as a fundamental constitutional decision affecting the entire 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.[200]

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 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.

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197. In presenting this case, I build on and develop arguments made in Gardbaum, *supra* note 194, and Stephen Gardbaum, *Where the (state) action is*, 4 INT'L J. CONST. L. (I•CON) 760 (2006) (reviewing THE CONSTITUTION IN PRIVATE RELATIONS, *supra* note 111).

198. *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 German Federal Constitutional Court ("FCC")).

199. Lüth, 7 BVerfGE 198 (1958) (F.R.G.).

200. *Id*. at __.

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*,[201] the Supreme Court of Canada took the "more cautious"[202] position of excluding the common law from full and direct constitutional rights scrutiny in cases in which no independent government action is involved.[203] 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."[204] 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," by contrast to the "strong" version in Germany.[205] 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.[206]

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 laws identical in content, but one in the form of a statute and the other a common law rule, were evaluated

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201. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).
202. *See* Saunders, *supra* note 196, at 183.
203. 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*.
204. *Id*. at 603.
205. *See* Gardbaum, *supra* note 194, 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 UK'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).
206. 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, 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 194, at 436-37.

under the two approaches. To the best of my knowledge, there has been no such laboratory experiment. What we do have are (a) subsequent general statements by the Court that may shed light on whether there are any practical differences and (b) extrapolation from nonidentical cases.

In *Hill v. Church of Scientology*[207] which, after *Dolphin Delivery*, is the second 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."[208]

And a little further on: "*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."[209] These general statements seem to belie the notion that the Supreme Court of Canada 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.[210] Second, courts must take a cautious approach to amending the common law; "[f]ar-reaching changes . . . must be left to the legislature."[211] 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

207. [1995], 2 S.C.R. 1130 (Can.).
208. *Id*. para. 93.
209. *Id*. para. 95 (emphasis added).
210. *Id*.
211. *Id*. para. 96.

> only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.[212]

By contrast, under a Charter rights claim the government bears the burden of justification under section 1, the second part of the analysis.[213]

Two non-identical cases that may shed some light on the comparison between Charter rights and values are *Hill* itself and *R. v. Zundel*.[214] Both cases involved the issue of Charter protection of false and injurious statements, the first under the common law and the second under 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?*.[215] 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.[216] 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."[217] 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."[218] 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.[219]

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:

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212. *Id*. para. 98.
213. *Id*. para 98.
214. [1992], 2 S.C.R. 731 (Can.).
215. *Id*. at 732–33.
216. *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 37, § 2.
217. Zundel, [1992] 2 S.C.R. at 752-53 (Can.).
218. *Id*. at 758.
219. *Id*., at 758-59.

> 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.[220]

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 defamation[221]—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 U.S. 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."[222] The Supremacy Clause means that all law—state and federal, public and private, statute and common law—is governed by and subject

220. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 106 (Can.).
221. 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).
222. U.S. Const. art. VI, cl. 2 (emphasis added).

to the Constitution and its set of rights.[223] The clause itself makes clear that state court judges are bound by the Constitution, which strongly suggests that the common law made by such judges and relied on in private litigation is also so bound.[224] 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*,[225] which held that state common law is state law for constitutional purposes, and *New York Times v. Sullivan*,[226] holding that the state common law of libel at issue in private litigation is directly subject to the Constitution.[227]

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."[228] Does this latter interpretive duty have an independent effect in expanding 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.[229] In the United States, it is somewhat uncertain whether such an interpretive duty exits. If it does, then, of course, it will not in any event 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, and for two reasons. 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 Supreme Court sometimes refers to the canon

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223. Gardbaum, *supra* note 194, at 418–19.
224. 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 Supreme Court of Canada 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
225. 304 U.S. 64 (1938).
226. 376 U.S. 254 (1964).
227. It should be noted that the Supreme Court of Canada explicitly rejected the U.S. position, affirmed in *New York Times* and other cases, that the Constitution applies to common law rules at 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.)
228. Lüth, 7 BVerfGE 198 (1958) (F.R.G.).
229. *See* Taylor, *supra* note 198, at 198–99.

as a "rule" and sometimes as a "prudential policy."[230] 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.[231] This places it among the "passive virtues" that courts can employ to *reduce* the impact of the judicial review power,[232] and explains why certain judicial proponents of judicial minimalism, such as Felix Frankfurter, favored its use.[233]

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 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, and that 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.[234] 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.[235]

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230. 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).

231. Thus, in *Catholic Bishop*, the issue of statutory interpretation was whether the NLRA applied to religious institutions. *Catholic Bishop*, 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*.

232. 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).

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

234. Bundesarbeitsgericht [BAGE] [Federal Labor Court], 47 BAGE 363 (1984)(F.R.G.).

235. *Id*. 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).

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.[236] 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.

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 (a) 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 (b) 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 (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

236. *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).

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 but has found violations only where there is facial discrimination on the basis of one of the express grounds contained in Article 3(3).[237] 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 both 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 "indirect" or "systemic discrimination."[238] 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 Part is not a normative one about what should be the case in the United States;[239] 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 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 U.S., 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

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237. Grundgesetz [GG] art. 3(3) (F.R.G.) ("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.").

238. *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."

239. As is, for example, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L .REV. 503 (1985).

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.[240] 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 constitutional position in the U.S. 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 employing 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 *Burton v. Wilmington Parking Authority*,[241] fall into this category. But note, this use of the state action doctrine does not "shield"[242] private litigation from indirect horizontal effect—this always exists—rather, it pushes it into direct horizontal effect. It subjects the private actor/conduct itself to constitutional scrutiny. This is, of

240. *See* Gardbaum, *supra* note 194, 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. (I•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.

241. 365 U.S. 715 (1961) (holding that racial discrimination practiced by a restaurant leasing its premises from a state parking authority was state action).

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

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*[243] because, as usual, the common law the court was enforcing by granting an injunction passed constitutional muster.[244] Note that the 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.[245] 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 because of an exceptional, more vertical structural position on the scope of rights nor because of how the

243. 334 U.S. 1 (1948).
244. I am assuming here that the common law being enforced is ordinary contract law. If, as some have argued (including myself), 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 for finding this common law itself unconstitutional as a form of racial discrimination by the state.
245. For more details, *see* Gardbaum, *supra* note 194, at 449–50.

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.[246] Thus, Sullivan, the losing plaintiff in *New York Times*, was more impacted 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 impacted by free speech rights in both the U.S. and Germany, in that they will likely be unable to obtain legal protection of their economic interests, following such cases as *Claiborne Hardware*[247] and *Lüth*. 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 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 greater impact on private actors in Canada than in either the United States or Germany because the Supreme Court of Canada has adopted a disparate impact interpretation of Section 15, the Charter's general equality provision.[248] 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*[249] 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 Supreme Court of Canada adopted, there would be many more actions that private actors could not be permitted to take, and interests that could not be protected, under color of state law.

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246. *See supra* Section I.B (discussing defamation law).
247. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (holding that state law awarding damages to shop owners for economic loss caused by NAACP boycott of segregated shops violated the First Amendment).
248. *See supra* text accompanying note 238.
249. 426 U.S. 229 (1976) (holding that racially disproportionate impact alone, absent proof of discriminatory intent, is insufficient to trigger strict scrutiny).

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 Amendment ban of slavery "anywhere in the United States"[250]—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.[251] 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.[252]

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,"[253] whereas constitutional rights

250. *See supra* text accompanying note 33. During the Prohibition era, there used to be 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.

251. *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 outlawing of slavery and involuntary servitude applicable to private actors. Ala. Const. art I, § 32.

252. 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 also 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).

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

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 as 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 two issues also results in the very practical difference of who is a proper defendant in a suit raising a constitutional rights claim: government or 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 impacted and subject to them.[254]

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 absence of positive constitutional rights into two more specific ones. 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 more specific claims involve 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 as 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

254. *See* Gardbaum, *supra* note 197, at 767–69.

negative and positive rights.[255] At the very least, this ought to result in an agreed subject matter of discussion and the avoidance of labeling disputes as to 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."[256] But Sunstein then immediately goes on to ask: "What makes the American Constitution so distinctive in this regard?"[257] It is this latter claim about the extent or degree of American exceptionalism ("so distinctive") 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.[258] Many states have

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

256. *Id*. at 92.

257. *Id.*

258. 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's constitutional right of privacy.

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 comparatively distinctive features of American federalism, in which the general subject matter of most social and economic rights—housing, poverty, 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,"[259] 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."[260] 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 positive claims against the government."[261] 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," [262] and seventeen other state constitutions have similar provisions.[263]

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.[264] Moreover, like the U.S. Supreme Court in the early 1970s, the Supreme Court of Canada has, after some earlier indications that it might do so, moved away from implying social and economic rights into certain of the express civil and political rights. Thus, despite arguments that the right to security of the person under section 7 of

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

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

261. Id. at 1135.

262. N.Y. Const. art. XVII, § 1.

263. 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, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–95 (1989).

264. 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).

the Charter should be interpreted to include constitutional rights to basic welfare services,[265] the Supreme Court of Canada has not done so and looks increasingly unlikely to.[266]

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 while not entirely ruling out the possibility that, in some future case, special circumstances might lead the Court to endorse it.[267] 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 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."[268] 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.[269] New Zealand and the United Kingdom do not have written constitutions but both have fairly recently enacted statutory (or super-statutory)

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265. *See id*. at 337.

266. *See* 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) (footnotes omitted):

> "At the other end of the spectrum are social welfare rights, very much 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 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."

267. [2002] 4 S.C.R. 429, 434, 2002 SCC 84 (Can.).

268. 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 37, § 15. But although the Supreme Court of Canada has, under the label of "substantive equality," adopted a somewhat more rigorous anti-discrimination 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).

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

bills of rights that contain only civil and political rights and no social and economic rights.[270] 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."[271] The Indian Constitution of a decade later exactly copied the Irish model in this regard,[272] although the Indian Supreme Court has implied a positive right to housing from the seemingly negative textual right to life.[273] 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.[274]

Moreover, even among continental west 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 and economic right in the German Basic Law is that "[e]very mother [is] entitled to the protection and care of the community."[275] The German Constitutional Court has, in addition, implied a positive right to public education from the provisions of Article 7(1),[276] and to a minimum level of subsistence exempt from

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270. *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 266, at 283, 289:

271. Ir. Const., 1937, art. 45.

272. 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.").

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

274. These include the right to have the environment protected (Article 24), the right to have access to adequate housing (Article 26), the right of access to health care, sufficient food and water, and social security (article 27), and the right to education (article 29).. *See* discussion of the right to housing, *infra* text accompanying notes 301-04.

275. Grundgesetz [GG] art. 6(4). 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.* art. 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 constitutional court has declared as not giving rise to an individual right and non-justiciable, although it has used it to help interpret statute and other constitutional provisions.

276. *See* Currie, *supra* note 70, at 285 n.90 (citing 52 BVerfGE 223 (1979) (F.R.G.)).

income tax from various constitutional provisions including the state's duty to protect human dignity contained in Article 1.[277] The only social and 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."[278] The Swedish constitution does not contain any social and economic rights in its list of enumerated "fundamental rights and freedoms" contained in chapter 2 but, in one of its preambular-like opening provisions expressing the general aims of public power, it 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."[279] Finally, the European Convention on Human Rights, which the ECtHR has referred to as "a constitutional instrument of European public order"[280] and which the forty-seven member-states of the Council of Europe are bound to observe, includes no express social and economic rights—positive or negative—apart from the negative rights to property and education contained in a separate subsequent protocol.[281] Moreover, in very marked contrast to its practice with respect to protective duties,[282] the ECtHR has repeatedly refused to imply social and economic rights from the civil and political ones listed in the text.[283] Accordingly, while the U.S. 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

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277. *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).

278. Kongeriget Norges Grundlov [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.

279. 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).

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

281. European 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 ("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." *Id*. art. 2 (emphasis added).

282. *See infra* text accompanying notes 312-14.

283. *See* Krieger, *supra* note 277, 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).

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.[284]

Third, in several countries with substantial numbers of social and economic constitutional rights, the practical impact of these rights is significantly reduced by either (a) express textual statements in the constitution that some or all such rights are not judicially enforceable or (b) judicial practice to that effect. Thus, apart from the right to education, the Spanish constitution, like the Irish and Indian previously mentioned, declares a set of "guiding principles of economic and social policy" that is expressly excluded from being enforced by the courts.[285] Similarly, apart from full rights to primary education[286] and the right to aid in distress,[287] the Swiss constitution contains a set of "social goals" that is expressly declared to be non-justiciable.[288] 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,"[289] "the health of the population,"[290] and "sufficient living accommodation";[291] while specifically granting *"rights"* only to "a free choice of work" and to "aid from the authorities" if unable to provide for themselves.[292] In addition, as previously mentioned, Article 120 expressly denies Dutch courts the power of judicial review at all,[293] which obviously prevents these two rights from being enforced against the legislature.

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284. *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).

285. 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 that: "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).

286. 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.

287. *Id.* art. 12.

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

289. Grondwet [Gw.] [Constitution] art. 19(1) (Neth.) *translated in* The Constitution of the Kingdom of the Netherlands (2002).

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

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

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

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

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.[294] 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,[295] contains few individual rights and no social and economic ones but does refer to the preamble of the 1946 constitution in its own preamble.[296] In 1970, the *Conseil* departed from the previous understanding and declared this preamble legally binding.[297] Nonetheless, of the social and economic principles in paragraph 11 of the preamble to the 1946 constitution,[298] only the protection of health has been treated as being of constitutional value by the *Conseil*. 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 it imposes positive obligations on the state.[299]

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.[300] 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,[301] and the constitutional court has as a result rejected the proposition that such rights entitle individuals to be provided with a

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294. "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." La Constitution, 1946 Const. Preamble ¶¶ 2, 11 (Fr.).

295. La Constitution, 1958 Const. arts. 56–63.

296. "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 294, at Preamble.

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

298. *See supra* note 294.

299. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW 148-49 (1992).

300. 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 result in their greater protection, given the characteristic legislative final word. *See* Tushnet sources cited *supra* note 106.

301. 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.

"minimum core."[302] As is well known, however, in the important cases of *Grootboom*[303] and *Treatment Action Campaign*,[304] 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.[305] 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.[306]

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.[307] 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.[308]

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302. Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC) (S. Afr.) at para. 34.
303. Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) (S. Afr.).
304. Treatment Action Campaign 2002 (5) SA 721 (CC).
305. 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., MONTH DAY, 1967) (Japan). and Standards for Protection of Livelihood Case, 9-1 KCCR 543, 94 HunMa 33, May 29, 1997 (S. Korea).
306. *E.g.*, Italian Constitutional Court, Case 252/1988 ("Only 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."). Cited at n.21 in Francisco Rubio Llorente, *Constitutionalism in the "Integrated" States of Europe*, NYU School of Law, Jean Monnet Center, Working Paper No 5/1998.
307. Examples include the constitutions of Egypt, Serbia, and Turkey.
308. *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).

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.[309] 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 former was famously interpreted by the FCC in 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.[310] The right to freedom of broadcasting was 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.[311]

The ECtHR has also been active in inferring affirmative 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.[312] It has also held that freedom of assembly requires positive action, including

309. *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.").

310. 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." 39 BverfGE 1 (1975). 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 the legislature had failed its duty. *See* 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).

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

312. 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 277, at 156 n.16 (collecting cases).

effective police protection, to ensure the right may be exercised[313]; and Article 8 also requires effective action against industrial pollution.[314]

Even here, however, I will argue that the United States is less exceptional than often thought, and 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 Supreme Court of Canada has not decided any cases equivalent to *DeShaney v. Winnebago County Department of Social Services*,[315] 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.[316] Second, even with respect to countries with protective 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,"[317] 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"[318] 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.[319] The second case was *DeShaney*, in which a bare majority held that

313. Plattform "Ärtze für das Leben," 139 Eur. Ct. H.R. (ser. A) (1988).
314. 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).
315. 489 U.S. 189 (1989). *See infra* notes 321-323 and accompanying text.
316. 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 section 7 and section 15 of the Charter. Id. cited in Heléne Combrinck, *Positive State Duties to Protect Women from Violence: Recent South African Developments*, 20 HUM. RTS. Q. 666, 686–87 (1998)).
317. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).
318. 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).
319. 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 distinctive issue of a right to governmental funding. See

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 its care.[320]

I believe the general principle is open to serious question for two reasons. 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.[321] 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 appears in several of the earliest state constitutions but not in the federal.[322] 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

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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 . . . ."); Maher 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].").

320. DeShaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189 (1989).

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

322. *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 321, 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.

framers of the Fourteenth Amendment could not plausibly have intended to leave the duty of protection purely to state "democratic political processes."[323]

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 non-existent, the permissibility of such gaps in the law has not been tested.[324] 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 committed,[325] there is, I believe, a case to be made for the existence of more "absolute" duties in addition to such "conditional" ones.[326]

In *DeShaney*, *Jackson*, and the more recent case of *Town of Castle Rock v. Gonzalez*,[327] 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.[328] Nor does the fact that an individual police officer is not under

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323. Heyman, *supra* note 321; *see also* DeShaney, 489 U.S. at 196.

324. 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.

325. *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).

326. *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).

327. 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).

328. This point is consistent with my critique of Sunstein's argument against the distinction between negative and positive rights, *see supra* note 255, 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

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.[329] 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.[330]

In rejecting the constitutional due process claim in *DeShaney*, the majority opinion noted that "Randy DeShaney was subsequently tried and convicted of child abuse."[331] 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 murders[332] 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;[333] 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

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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 then the perfectly coherent negative right, does not undermine the general distinction between the two.

329. 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 for the proposition that there is a constitutional right to a general protective law of torts to redress private wrongs. Goldberg, *supra* note 318. He also distinguishes this positive right from the rights to benefits, and argues that the right to law should form a third branch of due process, "structural due process." Id.

330. 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 325.

331. 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 325, at 56.

332. Castle Rock, 545 U.S. at 755, 768.

333. 39 BverfGE, *supra* note 142, at 342

protection is " 'valueless'—even if the prospect of those sanctions ultimately failed to prevent [the father] from committing three murders and a suicide."[334] 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 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."[335] 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.[336]

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 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, wealth, or cost—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.[337]

But it 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' right to

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334. Castle Rock, 545 U.S. at 760.
335. Currie, *supra* note 326, at 881.
336. *Id*. at 882.
337. 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.").

life against such private actors as the mother and doctor—a duty normally requiring criminalization of abortion.[338] 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.[339] 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.[340] 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 U.S. 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 U.S. are less 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.[341] 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.[342]

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

338. *Id*. at 869–70.

339. 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, at 197, n.3 (1989).

340. 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.

341. *See supra* text accompanying notes 310-11.

342. I acknowledge the arguments made for the proposition that all fundamental rights in Germany may have protective duties, but I do not believe this proposition has 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.

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 was 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.[343] That is, courts typically ask only whether the government (and it is usually the legislature) 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: institutional expertise and control of the purse where courts tell the elected branches of government what they must do. 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 abortion cases.[344]

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."[345] These include "broadcasting, higher education, and the use of force."[346] Even the abortion issue operates within the context 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 that 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

343. *See* Currie, *supra* note 326, at 888.
344. *See* Neuman, *supra* note 310, at 295–300.
345. Currie, *supra* note 326, at 888.
346. *Id*.

those it has imprisoned."[347] 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.[348]

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,[349] 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.

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

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347. *Id*.
348. There might also, of course, be an increase in the horizontal effect of constitutional rights. *See supra* Part IV.
349. *See, e.g.*, Calabresi, *supra* note 5.

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.[350] The first is that, unlike the structural principles, even the most exceptional of substantive rights are the products of relatively recent changes in constitutional interpretation and were not always so. For this reason, it is difficult to think of them as enduring or inherent parts of U.S. constitutionalism. 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.[351] In this regard, it is worth noting that the *Lüth* case in Germany was decided six years before *New York Times v. Sullivan*.[352] The first law, state or federal, struck down under the Establishment Clause did not occur until 1948.[353] 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.[354] As recently as 1976, the death penalty was unconstitutional.[355] For much of the twentieth century, evidence of the original understanding of constitutional provisions tended to be deemed "inconclusive" and 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 also apply against the states under the Fourteenth Amendment.[356]

By contrast, the fundamental structural principles are significantly older and have not tended to change much over time. Thus, as a matter of precedent, the source of the state action

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350. 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.

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

352. 7 BVerfGE 198 (1958) (F.R.G.).

353. McCollum v. Board of Education, 333 U.S. 203 (1948) (invalidating sectarian classes held in public schools by parochial school teachers).

354. 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).

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

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

doctrine is standardly given as the still-governing *Civil Rights Cases* of 1883,[357] 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,"[358] 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.[359] 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 to form 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 so makes 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" conception of constitutional rights 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,

357. 109 U.S. 3 (1883).
358. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).
359. *See supra* notes 322-325 and accompanying text.

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 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,[360] in Ran Hirschl's terminology, the methodological approach of this Article is primarily "concept formation through multiple description."[361] 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

360. *See supra* text accompanying note 26.
361. Hirschl, *supra* note 26, at 43.

embraces constitutionalized rights.[362] 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 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 it is normative. 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, if anything, the Article might contribute to general discussions about scholarship in comparative constitutional law, I want to conclude with a plea for pluralism and a

362. That is, within the overall category of liberal-democratic constititutionalism, 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 and 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.

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.[363] 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,[364] the Article serves as a reminder that both similarities between systems and internal changes are also the products of what might

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

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

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.[365] But special is not the same as exceptional.

365. 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.