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Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture

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FREEDOM OF EXPRESSION ADJUDICATION IN EUROPE AND AMERICA:
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Constitutional and human rights doctrines and rights differ across cultures not only in their substance, but also in their architecture. Some rights are worded broadly and vaguely while others are written in narrow and precise terms; for some rights the determination of the scope of the right is merged with the determination of its strength, while for others questions of scope and strength are sharply delineated; some rights are seemingly absolute, yet others allow for overrides; some rights are universally applicable within their jurisdictional scope, while others apply only to some people, or at some times, or in some places; and some rights are non-derogable, while others are subject to suspension in cases of catastrophe, or in circumstances of emergency or crisis..

Although such differences in the architecture of rights pervade the topic of constitutional and human rights,² the architectural issues have been especially visible and especially contested

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²For my own thought on the structure of rights generally, see Frederick Schauer, "A Comment on the Structure of Rights," Georgia Law Review, vol. 27 (1993), pp. 415-34; Frederick Schauer, "Exceptions," University of Chicago Law Review, vol. 58 (1991), pp. 871-99; Frederick Schauer, "Can Rights Be Abused,?" Philosophical Quarterly, vol. 31 (1981), pp. 225-30.

with respect to the rights variously described as freedom of speech, freedom of communication, and freedom of expression, and including the freedom of the press, the right of assembly, the freedom of association, and various other rights (academic freedom and artistic freedom, for example) commonly associated with or part of the cluster of communicative rights. In part because the concepts of speech, communication, and expression are themselves so capacious, and in part because the countervailing interests often both appear and are especially weighty, there has been an explicit concern with the design of freedom of communication rights in virtually all countries with sophisticated constitutional or human rights cultures and legal protection. This concern with the structure and design of rights of communication has emerged out of a seeming need to delimit the scope of rights that if taken literally would have unlimited breadth, and there has thus been careful attention to the need to design the rights so as simultaneously to ensure their effective protection and also to provide appropriate breathing room for a multiplicity of important countervailing interests.

Yet although issues relating to the architecture of rights have arisen with particular frequency in the context of freedom of communication, there exists an important divide in terms of just what that architecture should be. More particularly, 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.³ Under this

³A sampling of the comparative literature on this point includes Nadia Ahmad, "The Canadian Charter of Rights and Freedoms: An Example of Canadian Dependence on the United States or Commitment to International Law," Detroit College of Law Journal of International Law and Practice, vol. 7 (1998), pp. 89ff.; Donald L. Beschle, "Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada," Hastings Constitutional Law Quarterly, vol. 28 (2001), pp. 187 ff.; Paul Horwitz, "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law," Osgoode Hall Law Journal, vol. 38 (2000), pp. 101ff.; Vicki C. Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse," International Journal of Constitutional Law, vol. 1 (2004), pp. 91ff.; Vicki C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality', Rights and Federalism," University of Pennsylvania Journal of Constitutional Law, vol. 1 (1999), pp. 583ff.; Simon Mount, "R v Shaheed: The Prima Facie Exclusion Rule Reexamined," New Zealand Law Review, vol. [2003], pp. 45ff.; Aaron J. Polak,

view, American free speech adjudication disingenuously decides that certain forms of communication are beyond the scope of the First Amendment's protection of freedom of speech and freedom of the press, and in the process of such categorial exclusion masks the difficult weighing process that the Canadian, European, and South African structure both facilitates and makes more transparent. The American approach, say its critics abroad, produces results that are both substantively undesirable and procedurally inappropriate, both being the consequence of a preoccupation with categories and an unwillingness to recognize the importance of numerous values that often conflict with the values of freedom of communication.

My goal in this paper is to address this contrast and this controversy, relating some of the controversy to more abstract questions about the theory of rights, some to larger questions of constitutional method, and some of to genuine disagreements about the substance and strength of the right rather than about its structure. It is not my aim here to take an especially strong position on the desirability of one approach or structure rather than another, although I will suggest that the critics of the American approach, scarcely less than the Americans, ignore the extent to which they rely on categorization and the extent to which they disguise or neglect the choices

"Free Legal Trade: American First Amendment Theory Fails to Persuade Canadian Courts," Emory International Law Review, vol. 8 (1994), pp. 579 ff.; Cedric Merlin Powell, "The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond," Harvard Blackletter Law Journal, vol. 12 (1995), pp. 1ff.; Adrienne Stone, "The Limits of Constitutional Text and Structure: Standards of Review and Freedom of Political Communication," Melbourne University Law Review, vol. 23 (1999), pp. 668ff.; Nadine Strossen, "Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis," Hastings Law Journal, vol. 41 (1990), pp. 805 ff.; Clive Walker and Russell L. Weaver, "The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World," University of Michigan Journal of Law Reform, vol. 33 (2000), pp. 497 ff.; Lorraine C. Weinrib, "Hate Promotion in a Free and Democratiuc Society: R. v. Keegstra," McGill Law Journal, vol. 36 (1991), pp. 1416 ff.; Lorraine C. Weinrib, "The Supreme Court of Canada and Section One of the Charter," Supreme Court Law Review, vol. 10 (1988), pp. 469 ff. See also Eric Barendt, Freedom of Speech (Oxford: Oxford University Press, 1985); Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech ((Princeton: Princeton University Press, 1995), especially Chapter 2.

that such categorization reflects. My goal is thus primarily descriptive and explanatory, although I suspect that both the description and the explanation will have some of the flavor of a defense of the American approach against the charges of its critics. Insofar as this is true, however, the defense should not be understood as a prescription that other jurisdictions follow the American lead, but is best taken as an explanation of why the American approach follows more naturally than is often understood from deeper choices in the American constitutional culture.

I. The Difference Described

The basic difference between the American and non-American approaches can best be described in the formal and literal structure of the relevant guarantees, although differences in formal structure are the beginning and not the end of the analysis. Still, the formal differences are a good entry into the issue. And in terms of those differences, the most notable part of the guarantee of freedom of speech (and freedom of the press) in the First Amendment to the Constitution of the United States is that it appears on its face to speak in absolute terms:

“Congress shall make no law . . . abridging the freedom of speech or of the Press . . .”⁴

Although the text of the First Amendment refers to “Congress,” it is now accepted that, by virtue of the “incorporation” of the First Amendment by the Fourteenth Amendment, the First Amendment now delimits the powers of the states as well as those of the federal government. *Stromberg v. California*, 283 U.S. 359 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925). As written, this guarantee makes no reference to the strength of potentially competing interests, no reference to the possibility of the right being outweighed or overridden, and no reference to any circumstances in which an exercise of the right might nevertheless be restricted. According to

⁴The full text is as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

its literal terms, the First Amendment is absolute.

By contrast to the seeming absoluteness of the First Amendment, the typical modern non-American protection of roughly the same right differs from its American counterpart in two important respects. First, most obvious in Article 10 of the European Convention on Human Rights, is the presence of an explicit listing of various qualifications or exceptions to the right. So although Article 10(1) of the Convention protects the freedom of expression in seemingly absolute terms (except for the explicit authorization in that section of broadcast and motion picture licensing), Article 10(2) proceeds to allow restrictions in the name of “national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Just as Article 1 grants the right, therefore, Article 2 appears significantly to circumscribe it.

Second, and more significantly, the typical non-American protection of freedom of communication⁵ explicitly authorizes a process of balancing the interest in freedom of communication against other countervailing interests. In the European Convention on Human Rights, the balancing methodology is contained directly in Article 10(2), which precedes the foregoing list of approved countervailing interests with the statement that the freedom of expression, “since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . .” More commonly, such qualifications are contained in a limitations clause applicable

⁵For purposes of this analysis, I will draw no distinction among freedom of speech, freedom of expression, and freedom of communication. The different forms may at times make a genuine difference, but for my purposes here little turns on variations in the way in which the right is formally articulated.

to all rights, as for example in the Canadian Charter of Rights and Freedoms, which protects freedom of expression (as well as the related freedoms of thought, belief, opinion, press, assembly, and association) in Section 2, but in which Section 1, the limitations clause, allows the rights in section 2, as well as all other rights, to be “subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Similarly, South Africa designates some rights as non-derogable, but for all the others, including the right to freedom of expression, the rights may be “limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.”⁶

The Canadian model of a general limitations clause, embellished by the South African proportionality inquiry, has become the dominant model among advanced constitutional democracies. Israel’s quasi-constitutional Basic Laws allow rights to be limited when the limitation is one “fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required . . .”⁷ The Federal Republic of Germany’s Basic Law explicitly allows restrictions of basic rights as long as done explicitly, by a law of general application, and in a way that preserves the “essence” of the right affected.⁸ New Zealand’s Bill of Rights Act

⁶Constitution of the Republic of South Africa, Section 36. The right to freedom of expression is contained in Section 16, and associated rights to assembly, demonstration, picketing, petition, and association are contained in Sections 17 and 18. And although Section 16 is subject to the general limitations clause, Section 16 itself makes clear that its protections do not extend to “propaganda for war,” “incitement of imminent violence,” or “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

⁷State of Israel, Basic Law – Human Dignity and Liberty, §8.

⁸Basic Law for the Federal Republic of Germany, Article 19.

1990 expressly authorizes limitations in language virtually identical to that in the Canadian Charter of Rights and Freedoms,⁹ and the limitations provisions of the European Convention on Human Rights are now the law, whether directly or by incorporation,¹⁰ throughout Europe.

As the contrast has been developed, the issue is not just the one of whether the limitations should be omitted, as in the United States, or attached to specific rights, as in the European Convention, or applied to all or almost all rights, as in Canada, Germany, South Africa, and New Zealand.¹¹ Rather, the importance of the issue stems from the way in which, textually, the different formulations might be thought to produce different processes of adjudication. Under the American approach, 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.

⁹New Zealand Bill of Rights Act 1990, §5.

¹⁰See, for example, the United Kingdom Human Rights Act of 1998.

¹¹On this distinction, see David Kretzmer, “Basic Laws as a Surrogate Bill of Rights: The Case of Israel,” in Philip Alston, ed., Promoting Human Rights Through Bills of Rights: Comparative Perspectives (Oxford: Oxford University Press, 1999), pp. 75-92.

III The Current Debate

The current debate between these two approaches in fact involves two different debates. One is a debate about the formal structure of rights, and flows from the description provided above. On one side of the debate is the view that rights should be designed and delineated so that they are absolute, with the best structure of rights being a list of specifically and (probably) narrowly defined but infinitely stringent rights.¹² Under this approach, crisp articulations of specific rights are set forth with the understanding that the rights so described will be absolute. No weighing, balancing or proportionality testing is involved or permitted, and the rights, as a matter of structure, are designed so that they may not be overridden or declared inapplicable with respect to any conduct falling within their linguistic scope.

According to its proponents, the advantages of this form of rights architecture reside largely in the domain of worries about slippage in application.¹³ If overrides are permitted, so the argument goes, then overrides will be found, especially because the right-holders of certain rights – especially rights to freedom of speech and fair procedure in criminal law – will disproportionately be unpopular (or guilty) individuals espousing unpopular ideas or engaging in antisocial behavior.¹⁴ Given this phenomenon, so the argument goes, allowing for rights overrides is effectively to encourage such overrides, and to encourage them in a milieu in which it is highly likely that the exercise of the right will seem unfortunate and the reasons for override

¹²Such an approach is developed in Charles Fried, Right and Wrong (Cambridge, Massachusetts: Harvard University Press, 1978).

¹³See John Hart Ely, “Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,” Harvard Law Review, vol. 88 (1975), pp. 1482 ff.; Mark Tushnet, “‘Of Church and State and the Supreme Court’: Kurland Revisited,” The Supreme Court Review, vol. 1989, pp. 373 ff., at pp. 382, 400.

¹⁴See Frederick Schauer, “Slippery Slopes,” Harvard Law Review, vol. 99 (1985), pp. 361ff.; Frederick Schauer, “Codifying the First Amendment: New York v. Ferber,” The Supreme Court Review, vol. 1982, pp. 285 ff.; Frederick Schauer, “Categories and the First Amendment: A Play in Three Acts,” Vanderbilt Law Review, vol. 34 (1981), pp. 265 ff.

compelling. With such a psychological, sociological, and political environment, so the argument goes, rights will be overridden, outweighed, or outbalanced with great frequency. The only remedy, it is said, is to devote considerable effort early on to defining the rights carefully, but having done so then to set up a system such that the non-overridability of the rights makes them as durable in the caldron of practical application as was imagined when the right was first designed.¹⁵

On the other side of this argument is the argument from unpredictability. Carefully designed but non-overridable rights resemble the precisely written, publicly accessible, and non-interpretable codes so celebrated by Jeremy Bentham,¹⁶ and they suffer from similar flaws. Just as no code of laws can anticipate all eventualities in advance, so too can no listing of rights anticipate ex ante all possible reasons for overriding such rights, or even anticipate all of the possible types of exercises of those rights. And just as no code, whether in Bentham's writings or in actual civil law codified legal systems, has been able to survive without incorporating mechanisms for continuous internal modification, so too with rights. Unless rights contain the flexibility to allow for their own modification, and unless they allow for the possibility that unpredicted and unpredictable events will necessitate their override, it is argued, the rights will be widely ignored, destined to be replaced by something far more flexible, or, even worse, doomed to ineffectiveness in guaranteeing the very rights whose protection is their rationale.

This debate about rigidity, flexibility, slippage, and the structure of rights, however, is, as noted above, only one of two related debates. The other debate, also a debate based on structure

¹⁵See Kathleen M. Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing," University of Colorado Law Review, vol. 63 (1992), pp. 293 ff.; Kathleen M. Sullivan, "Foreword: The Justices of Rules and Standards," Harvard Law Review, vol. 106 (1992), pp. 22ff.

¹⁶See Gerald M. Postema, Bentham and the Common Law Tradition (Oxford: Clarendon Press, 1986).

but with a different focus, is largely a debate about honesty. The American approach is flawed, say large numbers of Canadians, Europeans, and South Africans, among others, not (or not only) because it represents a mistaken resolution of the debate about rigidity, flexibility, and slippage. It is also flawed because Americans have wound up doing surreptitiously and disingenuously what the rest of the advanced constitutional world does honestly and transparently. Sometimes, so the charge goes, this is merely a matter of appending exceptions and qualifications and elaborate tests to seemingly absolute rights. So when American courts allow free speech rights to be overridden by compelling interests,¹⁷ or in the service of intricate three and four-part tests,¹⁸ they are engaging in a similar proportionality or balancing inquiry, but less honestly, and in a far less disciplined manner. Even worse, say the critics, is what happens in the first stage of the inquiry. Recognizing that free speech rights will be extraordinarily strong, Americans, say the critics, do their balancing and proportionality testing when they define the rights,¹⁹ disingenuously claiming that certain activities are beyond the scope of the right when it would be wiser, more transparent, and more honest to do this balancing more openly. By insisting that outweighed rights were not really rights in the first place, say the critics, Americans do under the table what most others do far more openly.

IV In Search of Explanation

Like far too many other debates, there is a risk that this debate about free expression

¹⁷See *New York v. Ferber*, 458 U.S. 747 (1993).

¹⁸See *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (commercial advertising).

¹⁹In the American literature, such a process has occasionally been referred to as “definitional balancing.” See Melville Nimmer, “The Meaning of Symbolic Speech Under the First Amendment,” *UCLA Law Review*, vol. 21 (1973), pp. 29 ff.; Melville Nimmer, “The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy,” *California Law Review*, vol. 56 (1968), pp. 935 ff.

architecture will degenerate into a simple normative debate between advocates trumpeting the virtues of their own country's position. And although there may be value in such normative debates, there is also value in trying to search simply for explanation, and that is what I propose to do in this section. As a result, I will offer here some explanations for why American and other approaches might differ so markedly, yet without arguing that one is better or worse than the other. Indeed, my point is largely that is not a matter of better or worse, but rather a function of the way in which different architectures emerge from different substantive commitments, different experiences, and different views about the locus of decision-making authority.

A. The Question of Age

The American approach to freedom of speech is not only characterized by the use of complex tests, as noted above, and not only by determinations of what is inside or outside of the coverage of the First Amendment,²⁰ but also by a wide range of qualifications, exceptions, principles, rules, and presumptions. At first glance the temptation is to see this as baroque, formal, and faintly ridiculous. Yet however tempting this characterization is, the temptation should be resisted. After all, three- and four-part (or more) analyses are a common part of numerous statutes and regulations throughout the world, and principles, rules, presumptions, qualifications, and exceptions pervade virtually all mature legal topics. Once we see this, and once we see freedom of communication as an area of law and not just an abstract and content-less manifesto to be trumpeted on national holidays, the question shifts, and we confront the possibility that the law of freedom of speech, no less than the law of contract, tort, real property, unfair competition, or securities regulation, is simply a mature legal topic -- a well-developed area of legal doctrine -- with all of the characteristics that such maturity can be expected to bring.

²⁰On the issue of "coverage," the American equivalent of the first stage inquiry in Canadian, European, and South African adjudication, see Frederick Schauer, "The Boundaries of the First Amendment," Harvard Law Review, vol. 117 (2004), pp. ____ ff.

To put the same issue in a different way, one possibility is that the American approach, as compared to that which prevails elsewhere, is largely a function of experience, and of the increasing array of cases and challenges that come from time. At this writing, the First Amendment is 213 years old. And although serious First Amendment application has hardly occurred for that entire period, it does date back to no later than 1919,²¹ thus producing in the United States no less than 85 years of intensive judicial (as well as public and political) engagement with free speech adjudication. By contrast, the experience under the European Convention on Human Rights is, with respect to freedom of expression issues, closer to twenty-five years, under the Canadian Charter of Rights and Freedoms slightly over twenty, and in most of the other countries mentioned above somewhat closer to ten.

There is no reason to believe that this experience has made the United States any better or wiser at free speech adjudication than are its architectural competitors. The claim here is not that older is necessarily sounder. Yet the enormous differential in the simple quantity of free speech experience has made the United States more experienced, in the non-evaluative sense of that term, and it has thus allowed American courts to confront a much larger quantity and diversity of free speech issues. And as large numbers of different free speech issues have arisen, these issues and cases have, not surprisingly, arranged themselves into patterns, patterns that may be less apparent and more fluid than in countries with a substantially smaller experiential base. Just as the common law has become substantially less fluid as dispute patterns have repeated themselves over hundreds of years, and just as codes in civil law countries have become more refined with more experience in the transactions that those codes must govern, so too does freedom of

²¹On earlier discussions and applications of the First Amendment, primarily in the lower courts, see David M. Rabban, Free Speech in Its Forgotten Years (Cambridge: Cambridge University Press, 1997). The modern era of free speech adjudication in the Supreme Court is commonly taken to begin with a series of important 1919 cases, including *Scheck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); and *Abrams v. United States*, 250 U.S. 616 (1919).

expression decision-making codify itself over time and with experience. What appears to Canadians and Europeans as an American obsessions with categories, boundaries, definitions, tests, and rules may well be an obsession, but it is likely an obsession borne of experience, and little different from the obsession with all of the impedimenta of legal doctrine that characterizes a vast number of other equally old and equally dense legal topics. When the European Court of Human Rights first dealt in the Sunday Times (Thalidomide) case²² with the issue of pre-trial publicity, it dealt with an issue entirely new to that Court, albeit against a background of considerable national experience with the issue in the various member countries. Still, the issue was novel for the European Court of Human Rights itself, and it should come as no surprise that the matter was decided in a substantially open-ended fashion, albeit with due regard for the margin of appreciation that the Convention and the Court allows for national practices, national histories, and national variation. But it would come as a great surprise to discover that in the year, say, 2029, half a century after the Thalidomide case, the same court were to be treating every contempt case as if it were a case of first impression. Far more likely is that the Court in 2029 would itself have had increasingly more experience with the issue, that national courts would have had increasingly more experience in working out various details within the interstices of the law under Article 10 of the Convention, and that this experience would have produced not only precedents, but also rules, principles, canons, maxims, presumptions, and all of the other devices of the increased complexification of legal doctrine. In theory, it remains possible that freedom of expression adjudication in Canada, in Europe, and in other countries other than the United States will remain, in Q’adi-like fashion, continuously open-ended and continuously case- and context-specific. But this possibility is highly remote, and were it to occur it would constitute a challenge not only to American free speech development, but to all we know about the growth and rigidification of the common law generally.²³ Far more likely is

²²(1979) 2 EHRR 245.

²³On American constitutional adjudication as largely a common law process, see David A. Strauss, “Common Law Constitutional Interpretation,” University of Chicago Law Review, vol.

that as more and more cases are presented, there will be as many rules outside of the United States as there are within, and that seeming differences in 2004 are far more a function of differential experience than of anything deeper or more permanent.

This issue is especially apparent at the edges rather than at the center of free speech doctrine. In Canada, in Europe, and in South Africa, free speech cases have looked quite traditional, at least in the sense of presenting issues that free speech adjudicators and free speech theorists have been dealing with for generations, such as defamation, pornography, commercial advertising in the mass media, hate speech, and speech alleged to be threatening to national security. And although such cases still dominate the free speech docket of American courts, American courts have also been involved (perhaps “plagued” is the better word) with a large number of cases raising free speech claims that are somewhere between attenuated and preposterous. Claims that the First Amendment limits the securities laws, the antitrust laws, the fraud laws, and many others are a staple of the current American free speech environment,²⁴ and it is thus a matter of vital importance in the United States to distinguish the legitimate from the frivolous claims of abridgment of freedom of speech, even though the frivolous and the legitimate claims alike are ones involving the word “speech” in the ordinary language sense of that term.

This feature of American free speech adjudication takes place against a background in which most non-American free expression adjudication has rarely been presented with such problems. Although the Supreme Court of Canada, for example, has tended to find that almost

63 (1996), pp. 877ff. For application to freedom of speech, see David A. Strauss, “Freedom of Speech and the Common-Law Constitution,” in Lee C. Bollinger and Geoffrey R. Stone, eds., Eternally Vigilant: Free Speech in the Modern Era (Chicago: University of Chicago Press, 2002), pp. 33-59.

²⁴On this phenomenon, see Frederick Schauer, “The Boundaries of the First Amendment,” op. cit. note 20.

all claims presented to it are encompassed by Section 2,²⁵ it has yet to have occasion to decide whether “freedom of expression” includes the expression by which corporate officers fix prices, whether “freedom of the press” includes published offerings of securities and other investment instruments, and whether “freedom of association” includes non-political criminal conspiracies.²⁶ And if and when it does, as American courts have had to decide just these issues, two possibilities emerge. One is that all or most of such activities will be held encompassed by the right, in which case it will become apparent that the scope (or ambit, or coverage) of the right has no limits, and that what is textually designed as a two stage process is in fact a one stage process. More plausibly, the Supreme Court of Canada will look at the purposes of the constitutional guarantee, and determine that whatever the single purpose is or the multiple purposes are, activities like securities trading and price-fixing are so beyond any plausible purpose that the right is not triggered in the first instance, the presence of what is literally “expression,” “association,” or “press” notwithstanding. And if this is the case, the court will find itself doing exactly what American courts have done (controversially) with obscenity, and far less controversially with numerous other topics. It is too soon to tell exactly what Canada, South Africa, New Zealand, European national courts, and the European Court of Human Rights will do with such claims, but until these courts confront this wide a range of cases involving what is literally expression but is implausibly about freedom of expression it may be too soon to brand the American approach as mistaken. What now looks to non-Americans as a mistaken approach may simply be a function of greater experience and a much greater array of free expression challenges, and what at first sight looks to most non-Americans like a different or unique or exceptional American approach may be little more than the natural progression from simplicity to complexity that we have witnessed in almost all forms of common law development.

²⁵See Richard Moon, The Constitutional Protection of Freedom of Expression (Toronto: University of Toronto Press, 2000); W.J. Waluchow, ed., Free Expression: Essays in Law and Philosophy (Oxford: Clarendon Press, 1994).

²⁶See Roger A. Shiner, Freedom of Commercial Expression (Oxford: Oxford University Press, 2003).

A. On the Relationship Between Structure and Substance

As noted above, many of the arguments for a precisely delineated set of non-overridable rules are premised on the importance of preserving a strong free speech culture and protecting strong free speech rights. Yet it is obvious that this is not a goal shared by most non-American constitutional cultures, at least not in the form in which and to the extent that it is held in the United States. As is well-known, American First Amendment doctrine protects incitement to racial hatred,²⁷ Holocaust denial,²⁸ and other forms of hate speech widely criminalized in the rest of the world, and explicitly excluded from free expression principles in numerous human rights documents. American First Amendment doctrine also constrains the law of libel to a degree virtually unthinkable even to those numerous countries that have explicitly considered (and rejected) the American approach,²⁹ treats freedom of the press as far more important than the rights of defendants and victims in criminal trials,³⁰ applies the First Amendment almost as vigorously to illegally obtained information as to information obtained legitimately,³¹ and treats

²⁷See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also the so-called “Skokie” cases, protecting the communicative actions of the American Nazi Party, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), stay denied, 436 U.S. 953 (1978), cert. denied, 439 U.S. 916 (1978); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), as well as, on cross-burning, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

²⁸That there is no American counterpart to the Canadian case of *R. v. Keegstra*, 3 S.C.R. 697 (1990), is solely a function of the fact that it is entirely implausible under current American free speech doctrine that Holocaust denial could be subject to either criminal or civil sanctions.

²⁹See Leonard Leigh, “Of Free Speech and Individual Reputation: *New York Times Co. v. Sullivan* in Canada and Australia,” in Ian Loveland, ed., *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (Oxford: Hart Publishing, 2000), pp. 51-68.

³⁰*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

³¹*Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

claims of national security with a dose of skepticism far larger than that seen in much of the developed world.³² In all of these dimensions, and many more, the United States, as a matter of substance and not a matter of structure, is a free speech outlier, insisting that its “exceptional” approach to freedom of speech and freedom of the press is both wiser and more faithful to American political and legal traditions than would be the American analogue to Canadian and European views on these and related issues.³³

This is not the occasion for me to address the possible explanations for American substantive exceptionalism on free speech and free press issues, and certainly not the occasion to offer an opinion on whether the American approach is better or worse than that seen in most of the balance of the open, liberal, democratic, constitutional world. This is, however, the occasion on which to address the issue whether there is a relationship between the American approach on matters of substance and the American approach on matters of free speech architecture. And on this issue, it does appear that there is a significant relationship. This relationship is illustrated by an American debate that took place on the United States Supreme Court in the 1950s and 1960s, and in the academic literature of the same time, and extending somewhat beyond. As this debate was framed, it had on one side those who contended, more metaphorically than literally, that the First Amendment was an absolute. Prominent contestants on this side of the debate included Justices Hugo Black³⁴ and to a lesser extent William O. Douglas³⁵ on the Supreme Court, and

³²New York Times v. United States (Pentagon Papers Case), 403 U.S. 713 (1971).

³³On the differences between the United States and the rest of the modern developed liberal world on freedom of speech and freedom of press issues, see the various essays in Ian Loveland, ed., Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA (Oxford: Hart Publishing, 2000).

³⁴See *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961)(Black, J., dissenting); Hugo Black, “The Bill of Rights,” New York University Law Review, vol. 35 (1960), pp. 865 ff. See also Harry Kalven Jr., “Upon Rereading Mr. Justice Black on the First Amendment,” UCLA Law Review, vol. 14 (1967), pp. 428 ff.

³⁵*Brandenburg v. Ohio*, 395 U.S. 444 (1969)(Douglas, J., concurring); *Roth v. United States*, 354

Alexander Meiklejohn³⁶ and Laurent Frantz³⁷ among a large number of academic commentators. And on the other side were Supreme Court Justices such as Felix Frankfurter³⁸ and John Marshall Harlan,³⁹ and commentators like Wallace Mendelsohn,⁴⁰ all of whom advocated a “balancing” approach in which free speech values were weighed against potentially countervailing values on more or less a case-by-case basis.

Like most such debates, there was no clear winner. Yet even with the absence of a winner, it was widely understood then, and to a considerable extent is widely understood now, that those on the “absolutes” side of the debate tended to be the more enthusiastic free speech proponents, and those who advocated “balancing” were more likely to believe that free speech, whatever its importance, was hardly the only important interest, and hardly an interest that did or should be granted presumptive priority in cases in which free speech and other interests were in conflict.⁴¹ Moreover, the debate, not surprising against the background of a Supreme Court that was largely passive in the face of McCarthyism, and not surprising during a time when it was just beginning to be recognized that a Communist revolution in the United States was far less

U.S. 476 (1957)(Douglas, J., dissenting).

³⁶Alexander Meiklejohn, “The First Amendment is an Absolute,” The Supreme Court Review, vol. 1961, pp. 245 ff.

³⁷Laurent Frantz, “Is the First Amendment Law: A Reply to Professor Mendelsohn,” California Law Review, vol. 51 (1963), pp. 729ff.; Laurent Frantz, “The First Amendment in the Balance,” Yale Law Journal, vol. 71 (1962), pp. 1424 ff.

³⁸*Dennis v. United States*, 341 U.S. 494 (1951)(Frankfurter, J., concurring in the judgment).

³⁹*Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

⁴⁰Wallace Mendelsohn, “The First Amendment and the Judicial Process: A Reply to Mr. Frantz,” Vanderbilt Law Review, vol. 17 (1964), pp. 479 ff.

⁴¹For the view that a balancing process could in theory be strongly speech-protective, see Gerald Gunther, “In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,” Stanford Law Review, vol. 24 (1972), pp. 1972 ff.

likely than many previously had previously thought, was significantly about a distrust of discretion and significantly about a fear of the official ability to assess accurately the dangers that might come from speaking, writing, and printing. For the absolutists in this debate, what was wrong about balancing was not anything structurally problematic about the idea of balancing, but rather the worry that in the actual balance free speech interests would be balanced too lightly and countervailing interests would be balanced too heavily.

This attitude of distrust of the balancing process still pervades American free speech culture, a culture of extreme distrust existing within what is itself a culture of distrust. And in such a culture, strong protection of free speech goes hand in hand with distrust of structures that allow, encourage, or even require a weighing of interests. If one takes as a given – for these purposes – the American commitment to an exceptionally strong protection of freedom of speech and freedom of the press, then the American preference for categorization at the first stage and limited balancing at the second is not an example of disingenuousness or dishonesty or ignorance of the extent to which some balancing takes place even at the first stage, but rather a deliberate commitment to the view that balancing categorially and not in individual cases is far less likely to result in erosion of strong free speech principles. As a result, it is plausible to argue that the debate ought to be joined at the level of substance, but that if we acknowledge non-evaluatively the differences between the cultures on questions of substance, then we should not be surprised that the American approach has grown out of a peculiarly American approach to the strength and breadth of free speech and free press protection, and that the Canadian and European approach has grown out of a non-American commitment to free speech being important but not necessarily more important than, say, equality, or the rights of those accused of crimes, or national security, or any of the other values listed as qualifications to freedom of expression in Article 10(2) of the European Convention on Human Rights.

C. The Role of the Courts

Once we appreciate the importance of the debate between absolutes and balancing, better understood as a debate between categorization and case-specific balancing,⁴² it turns out that much of the debate is a debate about judicial review, judicial authority, and the nature of constitutional adjudication. And here there are important differences that may explain part of the difference in approach between the United States, on the one hand, and Europe, Canada, and South Africa, among others, on the other hand.

Among the more important of those differences is the fact that judicial review in the United States remains a source of active debate, in part because of the absence of any explicit authorization in the constitutional text for the power itself. Although it is now more than 200 years since the Supreme Court first exercised the power in Marbury v. Madison,⁴³ and although there are no longer serious calls for the elimination of the power of judicial review in the United States, the very fact that it is implied rather than explicit has produced more of a continuing debate in the United States than elsewhere about the very legitimacy of the power, and about the implications for the breadth and strength of the power in light of its textually and historically fragile provenance.⁴⁴ Thus, although judicial review itself may be so well entrenched in the United States as to occasion few wholesale challenges, there is more of a concern in the United States than there is in most other countries with strong judicial review about a court that might be closely and continuously monitoring the details of government action, and about a court that might be intimately involved with the empirical and policy issues that such monitoring and evaluation necessarily entails.

⁴²See Frederick Schauer, op. cit. note 14; John Hart Ely, op. cit. note 14; Kathleen M. Sullivan, op. cit. note 15.

⁴³1 Cranch (5 U.S.) 137 (1803).

⁴⁴For a flavor of the issues and the debates, even today, see the various essays in John H. Garvey and T. Alexander Aleinikoff, Modern Constitutional Theory: A Reader (St. Paul, Minnesota: West Group, 1999).

Given this ongoing skepticism about the wisdom of allowing courts in general or the Supreme Court in particular to get too far down into the weeds of governmental policy decisions, it is not surprising that there is more preference for categorization and wholesale decision-making in the United States than there is in many of its counterparts in the developed liberal world. To make decisions about proportionality, and thus about what is “necessary” in a democratic society, is of course something that American courts do with great frequency, sometimes explicitly and even more implicitly. Yet this task is undertaken in the United States with reluctance more than enthusiasm, and it is done under the shadow of continuing criticism of its very exercise.⁴⁵ In light of this, it should come as little surprise that, at least at the margins, at least where there is some choice about the matter, American courts are far more reluctant explicitly to see themselves as weighing the full panoply of interests, facts, and factors that would support a careful proportionality analysis.

The phenomenon of some aversion to case-by-case proportionality or balancing analysis is exacerbated by the nature of the Supreme Court’s workload in the United States. In the 2002-2003 Term of the Court, the Court was asked to decide somewhat in excess of 8000 cases, but in fact decided only 74 on the merits and with full opinion. In almost all of the remainder of the cases, the Court let stand the result below on the basis of no briefs except those urging review in the first instance, on the basis of no oral arguments, with no written opinions being issued, and with no precedential effect for the Court’s decision to let the ruling below stand. But for a court

⁴⁵On the current Supreme Court, the most prominent critic of anything resembling “balancing” has been Justice Scalia. See Antonin Scalia, “The Rule of Law as a Law of Rules,” University of Chicago Law Review, vol. 56 (1989), pp. 1175ff. And although Justice Scalia may make the argument in a stronger and bolder form, and although in many respects he remains a minority voice on this issue, the prominence of his voice is useful evidence of the way in which American judges and commentators remain leery of too much explicit balancing and weighing in the process of constitutional adjudication.

that these days decides seventy to eighty cases a year, and which during even its most active period rarely decided more than one hundred and fifty, the guidance function looms larger, and the disadvantages of a case by case approach seem more apparent. When the Supreme Court decides a case, it is not only deciding that case, but is also giving instructions to literally thousands of lower courts, and literally hundreds of inferior appellate courts. In addition, it is giving instructions to Congress, to the President, to vast numbers of federal administrative agencies, and to the legislatures, governors, and executive and administrative apparatus of fifty states, the District of Columbia, and to various territories and protectorates. Although the Court may be less self-conscious about and attentive to this guidance function than some of us would prefer,⁴⁶ it still looms large in judicial self-understanding, and still exercises substantial force in making the Court reluctant to do too much in a case-specific manner.

Given the Court's role and resources, therefore, it is not implausible to see the Supreme Court as engaged in what is essentially a rule-making process as much as if not more than an adjudicatory one. And given that freedom of expression claims are disproportionately likely to be championed and litigated by what Justice Frankfurter, in a different context, referred to as "not very nice people,"⁴⁷ a rule-based approach to freedom of speech is hardly surprising. And although rule-based approaches will necessarily ignore particular features of particular cases that may in fact be important, that is simply what rules do and how rules operate.⁴⁸ There may be a difference between freedom of expression adjudication and a routine highway speed limit, but

⁴⁶See Frank H. Easterbrook, "Ways of Criticizing the Court," Harvard Law Review, vol. 95 (1982), pp. 802 ff.; Frederick Schauer, "Opinions as Rules," University of Chicago Law Review, vol. 62 (1995), pp. 1455 ff.

⁴⁷*United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). See Frederick Schauer, "The Heroes of the First Amendment," Michigan Law Review, vol. 101 (2003), pp. 2118-33.

⁴⁸See Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford: Clarendon Press, 1991).

the difference between American and non-American approaches to freedom of expression adjudication are not totally unrelated to the differences between “Speed Limit 100 Kilometers Per Hour” and “Drive Reasonably.” There are good arguments for both approaches at different times, different places, and under different circumstances, but the difference between the two may help us understand the differences between various national approaches to free expression decision-making.

IV A One Stage Process or Two?

As a conceptual matter, the rationale behind a rule or a principle is distinct from the reasons that may exist for overriding it or for refusing to apply it. To take the classic jurisprudential chestnut,⁴⁹ a rule prohibiting vehicles in the park may reflect and underlying rationale of safety or noise prevention, but these rationales are analytically distinct from the reason we may decide to override the rule when the Queen seeks to visit the park in the royal limousine. That there is a good reason to allow the Queen to do so, and that that good reason may be deemed more important than following the rule in this instance, does not change the fact that the rule itself reflects safety and noise-reduction rationales. More importantly, if we decide that the rule does not prohibit erecting a statue of a vehicle as a war memorial because such an enterprise fails to implicate the rationales behind the rule,⁵⁰ we have not decided that those rationales are overridden. To override an applicable rationale, as in the case of the Queen’s limousine, is different from concluding that the rationale is inapplicable, as in the case of the vehicle-based war memorial.

Once we understand this commonplace distinction between overriding a rule and holding

⁴⁹H.L.A. Hart, “Positivism and the Separation of Law and Morals,” Harvard Law Review, vol. 71 (1958), pp. 593-629.

⁵⁰Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” Harvard Law Review, vol. 71 (1958), pp. 630-72.

it inapplicable, we can see that American free speech adjudication, at its first stage, is far more often a matter of a rule's inapplicability than of an applicable rule's less than infinite stringency. So when the Supreme Court of the United States in Roth v. United States⁵¹ and subsequent cases held that obscenity was not encompassed by the freedom of speech that it is the function of the First Amendment to protect, it was doing little more than saying, prior to any process of evaluating the reasons for restriction, that, like the statute of a vehicle case, obscenity was not part of what the First Amendment encompassed and not part of the rationale lying behind it. Now it is quite possible that the Supreme Court was wrong in so concluding, as many commentators have urged,⁵² but there is nothing analytically flawed or necessarily disingenuous about the approach, and a process in which the scope of the right is decided at the first stage, without reference to the reasons for overriding it, and in which the arguments for override are considered at the second stage, simply reflects the deep structure of all rules and all principles.

Interestingly, therefore, the American approach to freedom of speech appears, in practice, to be more faithful to the non-American textual structure than is much of the non-American approach. As is well-known, Canadian adjudication at the first stage is virtually all-encompassing, holding that "freedom of expression" applies to any human act of communicating a message.⁵³ And because the first stage determination in Canada is so encompassing, in fact all of the difficult work is dealt with at the second stage, including, often more implicitly than explicitly, the determination of whether the values behind the right are even implicated at all. Under such an approach, what is textually designated as a two stage approach turns out to collapse into a one stage approach, and thus, ironically, turns out to be less faithful to the textual

⁵¹354 U.S. 476 (1957).

⁵²See Harry Kalven Jr., "The Metaphysics of the Law of Obscenity," The Supreme Court Review, vol. 1960, pp. 1 ff.

⁵³See Reference re §§ 193 and 195.1(1)(c) of the Criminal Code (Man.) (1990) 56 CCC (3d) 65.

demarcation of two stages under the Charter of Rights and Freedoms than is an American approach that reflects a two stage process even though the text, literally, makes no such rigid demarcation.

Because all rights necessarily involve just such a two stage process – no right has infinite coverage, and few have infinite stringency – it is far from fanciful to suggest that any process that actually divides the two steps is not only more faithful to what Canada, South Africa, New Zealand, and the European Convention on Human Rights have expressly incorporated into the relevant texts, but more accurately embodies something important about the deep structure of rights. At times the American approach has erred in incorporating a weighing process at the first stage, and at times other jurisdictions appear to have erred as well by largely ignoring the first stage of the process. But once we recognize that the process has two stages, and that the first stage, at its best, does not and should not be a process of weighing interests as much as engaging in the non-weighing process of determining the delineation of a right in light of the language of its formulation and the rationale behind its existence, we will find it easier to understand and evaluate different approaches, and perhaps be more reluctant as well to criticize as disingenuous and process that seeks to keep separate two inquiries whose separation lies at the heart of the structure of all rules, all principles, and therefore of all rights.