The Exceptional First Amendment

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Although it was not always so, today virtually all liberal democracies protect, in formal legal documents as well as in actual practice, both freedom of speech and freedom of the press. The language used to enshrine the protection varies, with "freedom of expression" the most common contemporary canonical formulation, but in one way or another it is now routine for open societies to guarantee a moderately wide range of communicative freedoms.[2] Moreover, the protection is uniformly of a type that can be characterized as "constitutional," in that the principles of freedom of freedom of expression impose entrenched second order constraints not merely upon pernicious attempts to control communication, and not even merely upon well-intentioned but misguided attempts to control communication, but also, and most importantly, upon actually well-designed and genuinely efficacious attempts to control speech and the press in the service of important first order policy preferences. With few exceptions, it is today

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[2]For purposes of this Essay, I will treat "freedom of expression," as in Article 10 of the European Convention on Human Rights, "freedom of communication," as in the May 28, 2003, Declaration on Freedom of Communication on the Internet by the Committee of Ministers of the Council of Europe, and "freedom of speech" and "freedom of the press," as in the First Amendment to the Constitution of the United States, as synonymous, although there are instances in which variations in formulation reflect different substantive understandings and may even make a genuine difference in practice.

generally understood worldwide that freedom of expression must be respected even when sound policies would actually be substantially fostered by restricting that freedom.[3]

Yet although a constitutional or quasi-constitutional[4] right to freedom of expression is the international norm, the contours of that right vary widely even among the liberal democracies that understand the value of the right and the importance of enforcing it seriously. And among the most interesting manifestations of that variety among liberal democracies is the way in which the American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails. In numerous dimensions, the American approach is exceptional, and my goal in this Essay is first to describe some aspects of American free speech (and free press) exceptionalism, and then to offer as plausible but untested hypotheses various explanations for why the American protection of freedom of expression is generally stronger than that represented by an emerging multi-national consensus, but stronger in ways that may also reflect an exceptional but not necessarily correct

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[3]On the importance of understanding freedom of expression as just this kind of side-constraint, see Frederick Schauer, Free Speech: A Philosophical Enquiry (Cambridge: Cambridge University Press, 1982); Thomas Scanlon, "A Theory of Freedom of Expression," Philosophy and Public Affairs, vol. 1 (1971), pp. 203-221. On second-order constraints on first-order policy preferences as underlying constitutionalism in general, see Frederick Schauer, "Judicial Supremacy and the Modest Constitution," California Law Review, vol. 92 (2004), pp. 834-57.

[4]I refer to as "quasi-constitutional" those entrenched protections of rights that exist not as components of written constitutions, but instead within statutes whose modification or repeal is politically or formally more difficult than would be the modification or repeal of so-called "ordinary" legislation. The phenomenon is most common in countries without formal written constitutions, and thus we see, in the United Kingdom, the Human Rights Act 1998, in New Zealand, the Bill of Rights Act 1990, and, in Israel, the Basic Law: Human Dignity and Liberty (S.H. 1992, No. 1391). For commentary on the constitutional status of each, see Aharon Barak, "The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Law," Israel Law Review, vol. 3 (1997), pp. 3-21; Janet McLean, "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act," [2001] New Zealand Law Review, pp. 421-48; Douglas W. Vick, "The Human Rights Act and the British Constitution," Texas International Law Journal, vol. 37 (2002), pp. 329-72.

understanding of the relationship between freedom of expression and other goals, other interests, and other rights.

I. Two Types of Exceptionalism

It will be useful at the outset to distinguish between substantive and methodological exceptionalism. When I speak of the former, I refer to actual outcomes and actual doctrines, but when I speak of the latter I mean to focus on the methods and approaches, predominantly but not exclusively those of the courts, by which those outcomes and doctrines are produced. Thus, and as I will explain in detail, the American understanding of freedom of expression is substantively exceptional compared to international standards because a range of American outcomes and American resolutions of conflicts between freedom of expression and other rights and goals are starkly divergent from the outcomes and resolutions reached in most other liberal democracies. And this is not because the First Amendment, 213 years old at this writing and into its ninth decade of serious judicial enforcement,[5] is simply older, with other nations only now just recognizing and catching up to more entrenched American developments. Rather, much of the rest of the developed democratic world has by now carefully considered the American resolution of numerous freedom of expression issues as to which the United States is an outlier, and has after this consideration deliberately chosen a different course.

In contrast to such substantive exceptionalism, methodological exceptionalism reflects a divergence in approach, whether by the courts or by legislative bodies, to resolving freedom of expression controversies. As I shall explain, it is widely believed, in Canada and South Africa

[5]The modern First Amendment begins in 1919, with Schenck v. United States, 249 U.S. 47 (1919); United States v. Debs, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S 204 (1919); and Abrams v. United States, 250 U.S. 616 (1919), although free speech ideas had haltingly emerged earlier. See David M. Rabban, The First Amendment in Its Forgotten Years (Cambridge: Cambridge University Press, 1997); David M. Rabban, "The Emergence of Modern First Amendment Doctrine," University of Chicago Law Review, vol. 50 (1983), pp. 1205-64.

and Europe, that the American methodology is marked by a profoundly different understanding of the structure of freedom of expression adjudication, with the American approach characterized by an emphasis on rule-based categorization, in contrast to the more flexible and open-ended balancing approach that generally rides under the banner of "proportionality."[6] Apart from substantive outcome, therefore, it is widely believed in most liberal democracies that the United States is an outlier not only with respect to freedom of expression doctrines and policies, but with respect to freedom of expression methodology as well. Yet although, as I shall argue, the phenomenon of substantive exceptionalism is significant and in need of deeper explanation, methodological exceptionalism, by contrast, may be more ephemeral, explainable largely in terms of a natural course of rights complexification -- the way in which simply articulated rights evolve into more complex ones more as decision-makers confront a larger array of problems, perceive patterns within that array, and develop rules, principles, and presumptions necessary for them to manage that larger array. Insofar as American freedom of expression methodology reflects this process, what look like methodological differences may be little more than the reflection of longer and more extensive American experience with freedom of communication issues. Consequently, as I shall argue, the development over time of a larger experiential base in other regimes might be predicted to produce methods more similar to the American ones. As a result, we are likely to see in the future a degree of methodological convergence even in the face of little change in the current state of substantive divergence.

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[6]See Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy," Harvard Law Review, vol. 116 (2002), pp. 16-105. See also Richard Moon, The Constitutional Protection of Freedom of Expression (Toronto: University of Toronto Press, 2000), pp. 32-75.

Substantive Exceptionalism I – the Case of Hate Speech

With the distinction between substantive and methodological exceptionalism having been drawn, it is time to examine each, turning first to the substantive. We will look first, therefore, at the ways in which American freedom of expression policies -- in the courts and elsewhere -- diverge from those in most other liberal democracies, thus reflecting American substantive choices among competing values that are different from the choices made in much of the balance of the democratic and developed world.

Consider initially the widely debated topic of "hate speech." Although the label "hate speech" tends to be applied capaciously, the phrase can be understood as encompassing four distinct but interrelated freedom of speech issues. First, there is the question of the legitimacy of prohibiting various racial, ethnic, and religious epithets – nigger, wog, kike, paki, kaffir, and the like[7] – words whose use, except as ironic self-reference by members of those groups, is invariably intended to harm, to offend, and to marginalize.[8] Second, the question of hate speech sometimes involves the issue of restrictions on circulating certain demonstrably false factual propositions about various racial or religious groups, with prohibitions on Holocaust denial being the most common example.[9] A third hate speech issue arises with respect to laws prohibiting the

[7]Similar issues arise in the context of epithets about sexual orientation – fag, dyke, etc. – but attempted legal prohibitions are less common.

[8]See Randall Kennedy, Nigger: The Strange Career of a Troublesome Word (New York: Pantheon Books, 2002); Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," Harvard Civil Rights – Civil Liberties Law Review, vol. 17 (1982), pp. 133-72; Michel Rosenfeld, "Hate Speech in Comparative Perspective: A Comparative Analysis," Cardozo Law Review, vol. 24 (2003), pp. 1523-67.

[9]The most important judicial discussion of Holocaust denial and freedom of expression is in the Supreme Court of Canada's decision in R. v. Keegstra [1990] 3 S.C.R. 697. Noteworthy discussions of Keegstra include, inter alia, Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech (Princeton: Princeton University Press, 1995), pp. 64-70; Roy Leeper, "Keegstra and R.A.V.: A Comparative Analysis of the Canadian and U.S. Approaches to Hate Speech Legislation," Communication Law and Policy, vol. 5 (2000), pp. 295-322; L.W. Sumner, "Hate Propaganda and Charter Rights," in W.J. Waluchow, ed., Free

advocacy of or incitement to racial or religious intolerance, hatred, or violence, as with explicit calls to race-based violence, explicit appeals for racial exclusion, and explicit calls for repatriation of members of racial or religious minorities to the countries of their ancestry.[10] Finally, hate speech questions are presented, especially in the context of gender, when it is argued that epithets, and occasionally pictures, create a hostile, and therefore marginalizing or excluding, workplace or educational or cultural environment.[11]

On this cluster of interrelated topics, there appears to be a strong international consensus that the principles of freedom of expression are either overridden or irrelevant when what is being expressed is racial, ethnic, or religious hatred. Going back at least as far as the 1965 Race

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Expression: Essays in Law and Philosophy (Oxford: Clarendon Press, 1994), pp. 153-74.

[10]See Eric Barendt, Freedom of Speech (Oxford: Clarendon Press, 1985), pp. 163-65; Joseph Magnet, "Hate Propaganda in Canada," in Waluchow, op. cit., pp. 223-50; Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story," Michigan Law Review, vol. 87 (1989), pp. 2320-2404. For an analysis of the difference between hate speech intended to inflict psychic pain on a listener and hate speech intended to incite another hater, see Frederick Schauer, "The Phenomenology of Speech and Harm," Ethics, vol. 103 (1993), pp. 635-53.

[11]I will say little more about gender in this Essay, in large part because the issue introduces complexities that go well beyond the question of American freedom of expression exceptionalism. On the relationship between hate speech in the gender context and hate speech in the context of race, see Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography," Law and Contemporary Problems, vol. 55 (1992), pp. 77-114, and also the various essays in Laura Lederer and Richard Delgado, eds., The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography (New York: Hill and Wang, 1995). I will say little more about gender in this Essay, in large part because gender issues introduce complexities going well beyond the question of American freedom of expression exceptionalism, and implicating what might be thought to be quite a different form of American exceptionalism. So although it is likely that the emergence of a free speech reaction to speech restrictions generated by concerns about gender discrimination are virtually unique to the United States, the absence in the first instance of such restrictions in most other countries make the issue more difficult to disentangle. We know that France believes that American hostile environment restrictions are a manifestation of politically correct hypersensitivity, see Abigail C. Saguy, "Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law," Law and Society Review, vol. 34 (2000), pp. 1091-1128, but we cannot know for sure what form the opposition would take if, counterfactually, France were to enact such restrictions.

Relations Act in the United Kingdom, Section 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and Article 20 of the 1966 International Covenant on Civil and Political Rights,[12] and continuing through numerous other national and international laws, treaties, conventions, covenants, and understandings, the incitement to racial hatred and other verbal manifestations of race-based animosity are widely accepted as lying outside the boundaries of what a properly conceived freedom of expression encompasses. Consistent with this worldwide consensus and international mandate,[13] the typical non-American domestic regime prohibits various forms of racially hostile speech, with "hate speech" being the common umbrella term for much of the speech that is commonly prohibited for reasons of its contribution to intolerance on the grounds of race, religion, ethnicity, national origin, and, less commonly, gender and sexual orientation.

The precise form of attempting to control hate speech by law varies considerably among the nations of the world. Germany and Israel, among other countries, ban the Nazi party and its descendants, as well as prohibiting other political parties whose programs include racial hatred, racial separation, and racial superiority.[14] Germany, Israel, and France are among the nations that prohibit the sale and distribution of various Nazi items, including swastikas, Nazi flags, and, on occasion, images of Adolph Hitler and copies of Mein Kampf.[15] Canada, Germany, and

[12]These two conventions are noteworthy, along with Article 13(5) of the 1969 American Convention on Human Rights, in either prohibiting the incitement to racial hatred and other forms of hate speech or requiring their prohibition by signatories. Other conventions expressly or implied permit such restrictions by signatory nations, and none appear to prohibit them.

[13]See Wojciech Sadurski, Freedom of Speech and Its Limits (Dordrecht, Netherlands: Kluwer Academic Publishers, 1999), chapter 6; David Kretzmer, "Freedom of Speech and Racism," Cardozo Law Review, vol. 8 (1987), pp., 445-62.

[14]See Friedrich Kübler, "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights," Hofstra Law Review, vol. 27 (1998), pp. 335-64; Eric Stein, "History Against Free Speech: The New German Law Against the "Auschwitz" – and Other – Lies," Michigan Law Review, vol. 85 (1986), pp. 277-312.

[15]See Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitism, 169 F. Supp. 2d 1181 (N.D.

France, along with others, permit sanctions against those who would deny the existence of the Holocaust.[16] France imposes fines with some frequency on public utterances espousing the racial or religious inferiority of various groups, or advocating the exclusion of people from France on the basis of their race, their religion, their ethnicity, or their national origin. The Netherlands outlaws public insults based on race, religion, or sexual preference.[17] And South Africa, New Zealand, Australia, Canada, the United Kingdom, and all of the Scandinavian countries, among many others, follow the mandates of Article 20(2) of the International Covenant on Civil and Political Rights and Articles 4(a) and 4(b) of the Convention on the Elimination of all Forms of Racial Discrimination by making it a crime to engage in the incitement to racial, religious, or ethnic hatred or hostility.

In contrast to this international consensus that various forms of hate speech need to be prohibited by law and that such prohibition creates no or few free speech issues, the United States remains steadfastly committed to the opposite view.[18] Indeed, the American commitment

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Cal. 2001), denying American enforcement of a French judgment against the Internet service provider Yahoo! for selling Nazi items in an on-line auction. For discussion, see Mark D. Rosen, "Exporting the Constitution," Emory Law Journal, vol. 53 (2004), pp. 171-232.

[16]Holocaust Denial Case, 90 BverfGE 241 (1994); R. Keegstra [1990] 3 S.C.R. 697.

[17]See Ineke Boerefijn, "Incitement to National, Racial and Religious Hatred: Legislation and Practice in the Netherlands," in Sandra Coliver, ed., Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination (London: Article 19, 1992), pp. 202-45.

[18]The statement in the text should possibly be tempered slightly, but only slightly, by reference to Virginia v. Black, 123 S. Ct. 1536 (2003), in which the Supreme Court of the United States upheld a Virginia law prohibiting cross-burning, concluding that cross-burning intended to intimidate constituted the kind of threat unprotected by the First Amendment. What makes the case significant on the issue of hate speech is the Court's conclusion, arguably in some tension with its earlier statements in R.A.V. v. City of St.Paul, 505 U.S. 377 (1992), that singling out cross-burning for special legal attention did not constitute the kind of content discrimination that the First Amendment cannot countenance. See Frederick Schauer, "Intentions, Conventions, and the First Amendment: The Case of Cross-Burning," The Supreme Court Review 2003 (2004), pp. 197-230.

is so firm that the United States has on First Amendment grounds filed its reservation with respect to Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, and has, more recently, refused on constitutional grounds, after several years of negotiation, to agree to the "Protocol on the Criminalization of Acts of a Racist or Xenophobic Nature" which is appended to the 2001 Council of Europe Cybercrime Convention, a convention to which the United States, with the exception of the Protocol, is a signatory. These effects on American treaty practice are important in their own right, but also reflect a deeper division between the United States and the rest of the world on freedom of expression issues; for as a matter of formal legal doctrine and significantly as a matter of public opinion as well, the American understanding is that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the point of view espoused. Specifically, this prohibition on what is technically called "viewpoint discrimination"[19] extends to the point of view that certain races or religions are inferior, to the point of view that hatred of members of minority races and religions is desirable, and to the point of view that violent or otherwise illegal action is justified against people because of their race, their ethnicity, or their religious beliefs.[20] If government may not under the First Amendment distinguish between Republicans and Communists, or prohibit the speeches of the flat-earthers because of the patent falsity of their beliefs, then the government may not, so American First Amendment doctrine insists, distinguish between espousals of racial equality and espousals of racial hatred,[21] nor may the government

[19]See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Geoffrey R. Stone, "Content Regulation and the First Amendment," William and Mary Law Review, vol. 25 (1983), pp. 189-232; Susan Williams, "Content Discrimination and the First Amendment," University of Pennsylvania Law Review, vol. 139 (1991), pp. 201-258.

[20]R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," University of Chicago Law Review, vol. 59 (1992), pp. 225-73. See also American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), affirmed without opinion, 475 U.S. 1001 (1986).

[21]See Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

prohibit public denials of the existence of the Holocaust just because of the demonstrable falsity of that proposition and the harm that would ensue from its public articulation.

Some of the American aversion to discriminating against speech because of its point of view, including racist points of view, was spawned when the Supreme Court in 1969[22] established the still-prevailing test distinguishing permitted advocacy from regulable incitement. Advocacy even of illegal conduct, the Court held, was protected by the First Amendment, and only if that advocacy was explicitly directed to urging "imminent" lawless acts in a context in which such imminent lawless acts were "likely" – essentially standing in front of an angry mob and verbally leading them to immediate violence – could the constraints of the First Amendment be overridden. This doctrine applies to the full range of public political or ideological utterances, but for our purposes what is most important is that the doctrine was created in the context of a case in which Clarence Brandenburg, a local leader of the Ku Klux Klan in southern Ohio, had called for acts of "revengance" against Blacks and Jews. But because Brandenburg's advocacy fell short of explicitly urging "imminent" unlawful acts in a context in which those unlawful acts were "likely," his speech was held to be constitutionally immune from criminal (and, almost certainly, civil as well[23]) punishment. In the context of hate speech, therefore, Brandenburg stands for the proposition that in the United States restrictions on the incitement of racial hatred can only be countenanced under the First Amendment when they are incitements to violent racial hatred, and even then only under the rare circumstances in which the incitements unmistakenly call for immediate violent action, and even then only under the more rare still circumstances in which members of the listening audience are in fact likely immediately to act upon the speaker's suggestion. As should be apparent, therefore, the vast majority of non-American laws

[22]Brandenburg v. Ohio, 395 U.S. 444 (1969).

[23]See Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Olivia N. v. National Broadcasting System Co., 178 Cal. Rptr. 888 (Ct. App. 1981).

prohibiting the incitement to racial hatred would be unconstitutional in the United States, as would be the overwhelming proportion of actual legal actions brought under those laws.[24] Jean Le Pen could not be sanctioned in the United States, as he was in France, for accusing Jews of exaggerating the Holocaust,[25] nor could Brigitte Bardot be fined in the United States, as she was in France, for crusading against Islam and urging the deportation of those of Arab ethnicity.[26] Ernst Zundel and James Keegstra can be charged with crimes in Canada for denying the Holocaust, but not in the United States.[27]

The distinction American practice and that in other liberal democracies exists not only with respect to incitement, but also with respect to racial epithets and insults intended not to rally or motivate the speaker's allies but rather to cause psychic harm and mental distress to those to whom the words are directed. When Frank Collin, then the leader of the American Nazi Party, proposed in 1977 to march with his followers, in full Nazi regalia, in Skokie, Illinois, a community disproportionately populated by survivors of the Holocaust, both the state and federal courts made clear that under the First Amendment there was no plausible cause for prohibiting the march.[28] More recent cases involving racial intimidation,[29] membership in racist groups,[30]

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[24]See Nathan Courtney, "British and U.S. Hate Speech Legislation: A Comparison," Brooklyn Journal of International Law, vol. 19 (1993), pp. 727-51.

[25]See Debbieann Erickson, "Trampling on Equality – Hate Messages in Public Parades," Gonzaga Law Review, vol. 35 (2000), pp. 465-513, at p. 510.

[26]See Liza Klaussmann, "Buzz Over Bardot Book," Daily Variety, May 15, 2003, p. 14; Maite Seligman, "France's B.B. Gun: Still Shooting from the Lip," Washington Post, September 6, 2003, p. C1.

[27]R. v. Zundel, [1992] 2 S.C.R. 731; R. v. Keegstra, [1990] 3 S.C.R. 697. See Credence Fogo-Schensul, "More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms," Gonzaga Law Review, vol. 33 (1998), pp. 241-63.

[28]Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Village of Skokie v. National Socialist Party of America, 373 N.E.2d 21 (Ill. 1978). Aryeh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979); Lee C. Bollinger, The Tolerant Society: Freedom of Speech and extremist Speech in America (New York: Oxford University Press, 1986).; Michel

and restrictions on racist speech on university campuses[31] have all made clear that this form of "hate speech" will not be treated differently under the First Amendment (and, as in California, under state statutes and state constitutions that reach non-governmental entities not strictly subject to the First Amendment) than will any other viewpoint or any other form of public offensiveness. If Paul Cohen is protected by the First Amendment when he articulates his objection to conscription by publicly wearing a jacket emblazoned with the words "Fuck the Draft,"[32] if people who use words like "motherfucker" are protected when they talk back to police officers,[33] and if all forms of vituperation against one's opponents are permitted in political debate, then the American constitutional prohibition on viewpoint discrimination prevents treating people who call others "niggers" differently from those who call others "motherfuckers," and prevents treating people who carry Nazi flags differently from people who burn American ones.[34] That even in 1978 the United States Supreme Court treated the march of the Nazis in Skokie as so plainly protected as not even to warrant a full opinion[35] speaks volumes about the First Amendment's unwillingness to treat Nazis different from Socialists, to treat Klansmen different from Republicans, or to treat intimidation on grounds of race, religion, or

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Rosenfeld, "Extremist Speech and the Paradox of Tolerance," Harvard Law Review, vol. 100 (1987), pp. 1457-1488.

[29]R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). See Elena Kagan, "Regulation of Hate Speech and Pornography after R.A.V.," University of Chicago Law Review, vol. 60 (1993), pp. 873-914.

[30]Dawson v. Delaware, 503 U.S. 159 (1992).

[31]Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); Corry v. Stanford, No. 740309 (Cal. Super. Ct. Santa Clara County, February 27, 1995).

[32]Cohen v. California, 403 U.S. 15 (1971).

[33]Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

[34]United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

[35]See cases and commentary cited above, op. cit. note 29.

ethnicity differently from any other form of intimidation. In much of the developed world one uses racial epithets at one's legal peril, one displays Nazi regalia and the other trappings of ethnic hatred at significant legal risk, and one urges discrimination against religious minorities under threat of fine or imprisonment, but in the United States all such speech remains constitutionally protected.

III. Substantive Exceptionalism II – The Case of Defamation

The divergence between American and international approaches to freedom of expression are hardly unique to the issue of hate speech. A similar divergence, for example, exists between American and non-American free speech and free press understandings with respect to defamation law -- the law of libel (written) and slander (spoken). Traditionally, the United States shared with the rest of the common law world an English law heritage in which defamation was treated as a strict liability tort. In order to win a lawsuit and recover money damages, a person suing for libel or slander needed only to prove by a bare preponderance of the evidence (the normal burden of proof in civil, as opposed to criminal, cases) that the defendant uttered (or, more commonly, published) words tending to injure the alleged victim's reputation. The plaintiff/victim was not required to prove that the defendant/publisher was negligent or in any other way at fault, and indeed the plaintiff did not even have to prove that the imputation was false. The defendant could, to be sure, prevent recovery by asserting an affirmative defense and showing that the words were true (although in some countries, it was necessary for the publisher to show not only that the words were true, but also that they had been published for good public purposes), but the fact that the burden of proof was on the publisher to demonstrate truth rather than on the target to demonstrate falsity underscores the way in which the common law of defamation traditionally embodied the view that one published at one's peril. Much of the common law thus reflected an attitude that many associate with the admonition that "if you can't say anything nice, don't say anything at all." Indeed, the fact that the common law required no proof of fault in only three classes of cases -- accidents ensuing from the possession

of explosives; injuries that were the consequence of keeping wild animals; and damage to reputation caused by the speaking of defamatory words -- offers a juxtaposition of examples that speaks volumes about the common law's preference not for speech but for civility and respect.

The United States departed dramatically from this tradition in 1964. In New York Times Co. v. Sullivan,[36] the Supreme Court, in the name of the First Amendment, constitutionalized what had previously been the constitutionally untouched[37] common law of defamation, concluding that actions for libel and slander brought by public officials could succeed only upon proof by clear and convincing evidence (and not merely by a preponderance of the evidence, as would be the case in other civil actions) of intentional falsity,[38] a burden of proof almost impossible to meet. To the Supreme Court, the traditional common law approach imposed all of the risk of falsity upon the publisher, making publishers wary of publishing even those charges that turned out to be true. This phenomenon, now widely labeled "the chilling effect,"[39] was to the Court inconsistent with a First Amendment part of whose goal was to encourage exposing and thus checking the abuses of those in power.[40] Although requiring intentional falsity to

[36]376 U.S. 264 (1964). For a full description of the factual background, see Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (New York: Vintage Books, 1991).

[37]See Beauharnais v. Illinois, 343 U.S. 250 (1952), holding that defamation remedies were not constrained by the First Amendment.

[38]The Supreme Court in Sullivan used the term "actual malice," but the Court's understanding of "actual malice" is one that focuses on publication with knowledge of falsity. "Malice" in the common law sense of hostility or ill will has nothing to do with the idea, and in retrospect it is clear that the word has fostered little other than confusion. The Supreme Court also said in Sullivan that the actual malice standard could be satisfied by publication with "reckless disregard" for the truth, but several years later emphasized that reckless disregard for the truth could be sufficient to sustain liability only if it were shown that the publisher published in the face of "actual suspicion" of possible falsity. St. Amant v. Thompson, 390 U.S. 727 (1968).

[39]See Frederick Schauer, "Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect,'" Boston University Law Review, vol. 58 (1978), pp. 685-723.

[40]See Vincent Blasi, "The Checking Value in First Amendment Theory," American Bar Foundation Research Journal, vol. 1977, pp. 521-97.

sustain liability would undoubtedly increase the amount of published falsehood, this error, the Court implicitly concluded, was far less grave than the opposite error of inhibiting the publication of political truth. And even if some of what would be published under the new rule turned out to be vituperative and uncivil, this was only to be expected, for the common law approach was inconsistent with a First Amendment centered around the importance of "uninhibited," "robust," and "wide-open" public debate.

In the ensuing years, the Supreme Court has refused to back away from the Sullivan approach, and has indeed substantially extended it. A few years after Sullivan it extended its basic holding to candidates for public office as well as to office holders,[41] and, more surprisingly and more significantly, to public figures as well as to public officials,[42] even to those public figures -- pop stars, television chefs, and professional athletes, for example -- who have little to no involvement in or effect on public policy or political debates.[43] The Court then required that even private individuals prove negligence in order to prevail,[44] and thus by 1975 the constitutionalization of American defamation law was complete. Although well-known libel actions brought in the 1980s by Ariel Sharon against Time magazine and General William Westmoreland against CBS Television raised American press concerns about the revitalization of American libel law, both cases were unsuccessful in light of the Sullivan rule, and there have not been since any serious efforts by major public officials or public figures to employ the law of libel, or any major moves to change the American approach. For all practical purposes the availability in the United States of defamation remedies for public officials and public figures, even in cases of provable falsity, has come to an end.

[41]Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

[42]Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967).

[43]See Frederick Schauer, "Public Figures," William and Mary Law Review, vol. 25 (1984), pp. 905-35.

[44]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Largely through the efforts of journalists, newspapers, and their lawyers, there has been an active effort to persuade other countries to adopt the American approach, and to conclude that the harm of unpublished truth about public officials and public figures is far greater than the harm of unsanctioned falsity. Yet although these efforts have been successful in moving most common law countries slightly away from the strictest version of the common law model, and in securing some modifications of analogous remedies even in civil law countries, the overwhelming reaction of the rest of the world to the American approach has been negative.[45] In Australia,[46] New Zealand,[47] Canada,[48] the United Kingdom,[49] and a number of other countries, the unalloyed American approach has been rejected.[50] Believing that the American model places far too much weight on the freedom of the press side of the balance, and far too little on the reputational side, the rest of even the developed democratic world has been satisfied to leave largely in place defamation remedies and standards that the United States continues to find unacceptable under the First Amendment. And the United States, in turn, and as exemplified by the several cases in which American courts have refused to enforce non-American libel judgments on the grounds of incompatibility with fundamental American free press principles,[51]

[45]See Ian D. Loveland, Political Libels: A Comparative Study (Oxford 2000).

[46]Lange v. Australian Broadcasting Corporation, (1997) 189 C.L.R. 520 (H.C.); Theophanous v. Herald & Weekly Times, Ltd., (1994) 182 C.L.R. 104 (H.C.). For a full discussion, see Michael Chesterman, Freedom of Speech in Australian Law (Aldershot, England: Ashgate Publishing Ltd., 2000), pp. 79-192.

[47]Lange v. Atkinson [1998] 3 NZLR 424 (Ct. App.).

[48]Hill v. C hurch of Scientology of Toronto, [1995] 2 S.C.R. 1130.

[49]Reynolds v. Times Newspapers Limited, 4 All E.R. 609 (1999)(H.L.).

[50]See Ian D.Loveland, ed., Importing the First Amendment (Oxford: Hart Publishing, 1998).

[51]Telnikoff v. Matesuvitch, 702 A.2d 230 (Md. 1997); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992). Addressing the same issue but remaining inconclusive at this stage of the litigation is Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002). On the general issue of American non-enforcement of such foreign judgments, see Mark

has been equally satisfied to hew to the Sullivan line, refusing to countenance a harmonization with non-American approaches that much of the American free speech and free press culture perceives to be substantially incompatible with a serious commitment to robust public debate.

* * *

Although hate speech and defamation provide the most vivid and well-discussed examples, American exceptionalism in fact exists throughout the domain of freedom of expression. In disputes over the persistent and inevitable conflict between freedom of the press to report on criminal prosecutions and the right of the accused to a fair trial uninfluenced by potentially inflammatory pre-trial and mid-trial publicity, the United States favors the former over the latter to a degree unmatched in the world.[52] In much of the rest of the world, press restrictions, often under the label of sanctions for "contempt," are acceptable in order to preserve the sanctity of the trial process, but in the United States considerable interference with that sanctity is tolerated in order that trials, no less than other governmental processes, are open for all that is best and worst about press coverage and public scrutiny. In the same vein, disputes between the interest in privacy of victims of crimes and the interest of the press in reporting on criminal proceedings are typically resolved in favor of the press and against the victim's privacy.[53]

American freedom of expression exceptionalism extends to still other topics. In protecting the publication of even unlawfully obtained information, First Amendment doctrine

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D. Rosen, "Should Un-American Foreign Judgments Be Enforced?," Minnesota Law Review, vol. 88 (2004), pp. 783-824.

[52]Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Bridges v. California, 314 U.S. 252 (1941).

[53]Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

goes farther than even the most press-protective of liberal democracies.[54] And First Amendment protection of commercial advertising constrains restrictions on tobacco and alcohol advertising that are routine in most developed countries.[55] As a result, for example, American First Amendment objections led both to a significant qualification in the 2003 WHO Framework Convention on Tobacco Control, and also to substantial doubts as to whether even the modified convention, which has been signed by the President, will be ratified by the Senate or upheld by the courts.

In all of these areas, and numerous others as well, interests that are taken to represent legitimate counterweights to freedom of expression in other liberal democracies are understood in the United States to be decidedly subservient to the paramount constitutional concerns with freedom of speech and freedom of the press. Where in the rest of the world freedom of

[54]Bartnicki v. Vopper, 121 S. Ct. 1753 (2001); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); New York Times v. United States (Pentagon Papers Case), 403 U.S. 713 (1971).

[55]See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Colin Munro, "The Value of Commercial Speech," Cambridge Law Journal, vol. 62 (2003), pp. 134-59; (2003); G. Quinn, "Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective," in L. Heffernan, ed., Human Rights: A Comparative Perspective (Dublin: Trinity College Press, 1994); Kathleen M. Sullivan, "Cheap Spirits, Cheap Cigarettes, and Free Speech: The Implications of 44 Liquormart," Supreme Court Review, vol. 1996, pp. 123-61.

expression appears to be understood as an important value to be considered along with other important values of fairness, equality, dignity, health, privacy, safety, and respect, among others, in the United States the freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests.

IV From Description to Explanation

The facts are clear, but explanation remains. Why does the United States remain such a freedom of expression outlier? In particular areas of free expression law, it might be possible to explain national differences on the basis of historical aspects of certain issues, as for example with the view that the Nazi experience explains German hate speech law (especially with respect to unlawful political parties) in ways that are not replicated in other countries. Similarly, the American resultance to ban political parties[56] or accept government assertions about threats to national security[57] might be explained as a reaction to American anti-Communist and anti-socialist excesses during the Red Scare of 1919 and the McCarthy era of the late 1940s and early 1950s. But when we look not at particular topics but at the full range of freedom of expression issues, it is apparent that it is not just hate speech, and not just defamation, and not just anything else in which the United States stands alone. Rather, it is throughout virtually the entire range of freedom of speech and freedom of the press topics that the United States is an outlier, and thus if we are seeking to explain this broad-scale divergence, the historical and contextual dimensions of particular doctrines are unlikely to provide much assistance.

Thirty years ago it might have been plausible to explain the broad-scale disparity merely

[56]Healy v. James, 408 U.S. 169 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Noto v. United States, 367 U.S. 290 (1961).

[57]See, for example, New York Times v. United States, 403 U.S. 713 (1971), the case of the Pentagon Papers.

as a matter of differential experience, for thirty years ago the United States had a well-developed body of cases and doctrine on freedom of speech and press, while almost all other nations, even almost all other open democracies, were just beginning to explore the issue. Now, however, such an explanation is no longer plausible. The same issues that arise before the American courts have been presented to numerous national courts and supranational tribunals. Moreover, given the nature of litigation incentives, it is frequently the case that one party in a case involving freedom of expression issues will have an interest in urging the American approach. And with considerable interest in most developed countries (other than the United States[58]) in drawing on comparative approaches in making constitutional decisions, the American approach will not only often be promoted by one of the parties, but the virtues of the American model will also be argued to a court or other decision-making body likely to be open-minded about foreign law. Yet in the face of all of this, American doctrines and understandings about freedom of expression have typically been rejected as extreme, imbalanced, and hardly worthy of emulation. The American version of freedom of expression has undoubtedly been influential in the development of the law worldwide, but the limits of that influence are far more noteworthy than its effects. At the beginning of the twenty-first century, the exceptionalism of the First Amendment remains even more entrenched, and in need of explanation. And in searching for that explanation, a series of hypotheses present themselves for further and more systematic testing.

1. An Imbalanced Text

A noteworthy feature of the First Amendment is the seeming absoluteness of the text and the broad scope within which that absoluteness appears to apply. Although "Congress [and now the states[59]] shall make no law . . . abridging the freedom of speech, or of the press" is well

[58]This is a large topic in its own right, and is well-developed by Professor Michelman in this volume.

[59]Gitlow v. New York, 268 U.S. 652 (1925).

understood not to extend to every use of language,[60] to be subject to override in cases of compelling interest,[61] and to be surrounded by numerous caveats, qualifications, exceptions, tests, doctrines, principles, and maxims, it is potentially important that the language itself remains so stark. Unlike its counterpart provisions in the European Convention on Human Rights, in the Canadian Charter of Rights and Freedoms, and in the Constitution of South Africa, for example, the First Amendment itself makes no provision for overrides, whether "necessary in a democratic society" or otherwise. And in contrast again to Article 10 of the European Convention on Human Rights, for example, which explicitly lists a number of circumstances in which freedom of expression might permissibly be curtailed, the First Amendment lists none. Moreover, with the significant exceptions of the equality protected by the Fourteenth Amendment and the rights of the accused to a fair trial protected by the Sixth Amendment, most of the interests that are typically taken as justifying constraints on freedom of expression worldwide do not in the United States Constitution, unlike in many of its counterparts internationally, have explicit constitutional recognition. There may be a moral or political right to reputation, for example, but in the Constitution of the United States, unlike in the German Basic Law, it is not a right that the constitutional text explicitly recognizes. So too with human dignity, explicitly mentioned in many constitutions and even enshrined as preeminent against other rights in Article 1 of the German Basic Law. And the type of privacy interests that again often justify restrictions on freedom of expression are recognized in the United States by statute and by common law, but not in the Constitution. It would be an overstatement to say, as

[60]Frohwerk v. United States, 249 U.S. 204 (1919); Kent Greenawalt, Speech, Crime, and the Uses of Language (New York: Oxford University Press, 1989); Frederick Schauer, "The Boundaries of the First Amendment," Harvard Law Review, vol. 117 (2004), pp. 1765-1809.

[61]New York v. Ferber, 458 U.S. 747 (1982). The "compelling interest" concept takes numerous forms, of which the "clear and present danger" idea, Schenck v. United States, 249 U.S. 47 (1919), is the most famous, but the through all of the forms the basic principle is that within the scope of the First Amendment it takes an extremely strong governmental interest to permit restriction.

Supreme Court Justices Hugo Black and William O. Douglas were fond of saying, that all of the "balancing" was done prior to deciding what would be included in the Constitution and what would be omitted,[62] and it would be an overstatement to take the First Amendment as being as textually absolute as its most enthusiastic celebrants believe, but it is certainly plausible to suppose that the one-sided nature of the text of the First Amendment has played at least some role in the development of a constitutional environment in which the rights to freedom of speech and freedom of the press are taken as especially important.

1. A Preference for Liberty

Many of the controversies about freedom of speech present conflicts between liberty and equality, with the issues regarding hate speech and many forms of pornography among the most noteworthy. Moreover, these controversies between liberty and equality, as well as other conflicts between liberty and what might broadly be called "civility," also highlight a difference between, loosely and roughly, an individualist or libertarian view of the world, and, again loosely and roughly, a collective or communitarian view of the world. And to the extent that such contrasts reflect real differences, it would not be implausible to understand American free speech exceptionalism as a manifestation of the strong libertarian and individualistic aspects of American society itself.[63] Seen from this vantage point, it is not just with respect to freedom of expression that the United States stands apart from much of the rest of the democratic developed world, but so too, for example, with respect to its lower highest marginal tax rate, its willingness to entrust to individual decision and private enterprise matters of health care and retirement income that in more collective societies are taken as community and not individual

[62]See Laurent Frantz, "The First Amendment in the Balance," Yale Law Journal, vol. 71 (1962), pp. 1424-63.

[63]See Roy Leeper, "Keegstra and R.A.V.: A Comparative Analysis of the Canadian and U.S. Approaches to Hate Speech Legislation," Communication Law and Policy, vol. 5 (2000), pp. 295-322.

responsibilities, its protection of private property against regulations common in the developed world, and its absence for more than thirty years of any form of national service. On a large number of other issues in which the preferences of individuals may be in tensuion with the needs of the collective, the United States, increasingly alone, stands as a symbol for a certain kind of preference for liberty even when it conflicts with values of equality and even when it conflicts with important community values. To some this preference stems from the almost complete absence in the United States of socialist or social democratic traditions, and to others the absence of these traditions themselves are symptoms of a deeper libertarian strain in the American political and cultural tradition. But whether the preference for liberty is a cause or an effect, it is nonetheless real, and the libertarian cast of American political and social thought may help in explaining why freedom of expression is thought pre-eminent in that host of instances in which limitations on expression might reasonably be thought to advance values of community, values of equality, and values of civility.

1. A Culture of Distrust

Relatedly, it is well-documented that for many years the degree of citizen distrust of government in the United States has been greater than that in a vast number of other developed and developing nations, including some number of countries whose citizens have considerably more reason to distrust their governments than Americans have to distrust theirs.[64] Again, it is unclear whether this culture of distrust contributes to American libertarianism, or whether American libertarianism is itself the deeper cause with distrust of government being merely one of the consequences. Yet regardless of the causes of that distrust in government, it seems apparent that American distrust of government is a contributing factor to a strongly libertarian

[64]See Ronald Inglehart, Modernization and Postmodernmization (Princeton: Princeton University Press, 1997); Pippa Norris, ed., Critical Citizens: Global Support for Democratic Governance (Oxford: Oxford University Press, 1999); Joseph S. Nye, Jr., Philip D. Zelikow, and David C. King, Why People Don't Trust Government (Cambridge, Massachusetts: Harvard University Press, 1997).

approach to constitutional rights. The Constitution of the United States is a strongly negative constitution, and viewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is, for better or for worse, highly disfavored. Moreover, although it is of course the case that drawing distinctions is an inevitable part of the legislative, regulatory, and judicial enterprises, there remains a pervasive American suspicion of official valuation of ideas and enterprises. And while the libertarian culture that such attitudes of distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment. It is for neither the government nor the courts, for example, to decide that Nazi ideas are dangerous or that the views of the Ku Klux Klan are as wrong as they are pernicious. So when the Supreme Court proclaimed in a prominent defamation case that "under the First Amendment there is no such thing as a false idea,"[65] it reflected the way in which a radically non-judgmental First Amendment is the natural repository for a culture in which libertarianism, laissez-faire, and distrust of government remain the hallmarks of a distinctive American ideology.

1. The Political Culture of the First Amendment

It is a familiar American political adage that one "should never argue with the fellow who buys ink by the barrel." And however true it is that the power of the press should not be taken lightly, this truth is especially vivid with respect to the power of the press when its own prerogatives are concerned. Politicians, bureaucrats, and even judges (who despite their life tenure in the federal system and in some states are not immune from the pressures of promotion and reputation[66]) who cross the press about press rights are especially likely to be excoriated

[65]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[66]I explore this topic at length in Frederick Schauer, "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior," University of Cincinnati Law Review, vol. 68 (2000), pp.

publicly,[67] and the interests of the press in press freedom particularly and freedom of communication generally are different in kind from the interests of the press in any other subject. Moreover, the self-interest of the institutional press in communicative freedoms intersect with the interests of an array of influential interest groups – the American Civil Liberties Union, People for the American Way, the American Booksellers Association, the American Library Association, PEN, and an assemblage of less institutionally organized interests representing the arts, higher education, and various other individuals and organizations together constituting a powerful pressure group for the preservation of the maximum amount of freedom of communication.

Yet although such interests together might explain part of why communicative freedoms have become more important than other individual rights (the obvious comparison is with the rights of those accused of crimes, most of whom have little political power and most of whom are guilty of the crimes for which they are charged), it is not clear why the United States should be different from other countries in this regard. After all, the institutional press outside of the United States presumably has as much interest in its own freedoms as does the press in the United States. Yet despite this, there appears to be a divergence between the United States and other countries in terms of press interest in press freedom issues, and part of the explanation for the difference might be that in the United States a tradition of private rather than state broadcasting gives private press interests a stronger and more pervasive voice than exists elsewhere.[68] Moreover, in the United States, unlike in many other countries, the interest in

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615-36. See also Richard A. Posner, "What Do Judges Maximize? (The Same Thing Everybody Else Does)," Supreme Court Economic Review, vol. 3 (1994), pp. 1-24.

[67]An especially famous example is William Safire, "Free Speech v. Scalia," New York Times, April 29, 1985, p. A17.

[68]Relatedly, it may not be irrelevant that most of the wealthiest, oldest, and most prestigious universities in the United States are non-governmental.

freedom of expression and the interest groups supporting it emerged prior to rather than simultaneously with much of the interest in equality, and prior to the strengthening of many of the most important equality-focused interest groups.[69] A particular manifestation of this history is the way in which an especially strong interest group presence with respect to freedom of expression issues arose in the 1950s, 1960s, and 1970s out of anti-McCarthyism, the civil rights movement, and the Vietnam anti-war movement,[70] social movements in which freedom of expression played a major role. As a result of this history, a history that explains almost all of the substance of American freedom of expression exceptionalism,[71] freedom of expression has long been treated in the United States as a central part of the political program of the political left in ways that are not replicated in other countries. Reasons of historical provenance and consequent path-dependence thus contribute to an environment in the United States in which freedom of expression interests have a degree of political power and social influence not replicated in countries in which the emergence of freedom of expression interests has a different history.

Finally, the political importance of the First Amendment has been reinforced by a recent

[69]Indeed, the most prominent interest groups with an equality focus – the National Association for the Advancement of Colored People, the National Organization for Women, the Human Rights Campaign, and the Anti-Defamation League, for example – tend to have a concern for a particular group, while most of the freedom of expression interest groups have a substantially broader focus.

[70]Indeed, almost all of the law that makes the American approach to freedom of speech and freedom of the press exceptional emerged in a series of Supreme Court cases commencing with New York Times v. Sullivan, 376 U.S. 254 (1964) and culminating perhaps as early as New York Times v. United States (The Pentagon Papers Case), 403 U.S. 713 (1971), and certainly no later than the commercial advertising breakthrough in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[71]Almost all of the judicial developments that make the United States unique in the world on freedom of expression issues owe their origins to Supreme Court cases starting in the mid-1960s and going through the mid-1970s, and almost all of those cases have something to do either with the civil rights movement, anti-McCarthyism, or protests against the war in Vietnam.

shift in, or possibly just an expansion of, the political valence of freedom of expression. On issues such as campaign finance reform, tobacco and other commercial advertising, the ability to exclude picketers from private business property, protests at abortion clinics, and so-called "political correctness," among others, the proponents of the strong free speech position have been, in large part, political conservatives. The salience of these issues has produced a shift in the politics of the First Amendment, such that strong protection of freedom of speech and freedom of the press are now seen as instruments of entrenched political and economic forces as much as they are seen as the instruments of those who would oppose them.[72] This has further reinforced the special political importance of the First Amendment in American political culture, and has produced an environment in which the American free speech culture has a power and resonance not equaled by anti-censorship forces – Article XIX and the Index on Censorship, for example – in other parts of the world.

V. The Substantive Consequences of Judicial Review

Each of the hypotheses set out in the previous section likely do some work in explaining American freedom of expression exceptionalism, but those hypotheses must be supplemented by another hypothesis that is partly substantive and partly methodological. And so we turn to the way in which a key to understanding freedom of expression lies in understanding that most contemporary democratic proposals for restricting freedom of expression are based on empirically plausible assessments that a particular restriction on communication will

[72]See J.M. Balkin, "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,"Duke Law Journal, vol. 1990, pp. 375-414; Frederick Schauer, "The Political Incidence of the Free Speech Principle," University of Colorado Law Review, vol. 64 (1993), pp. 935-56.

efficaciously serve a valuable social goal. Of course even the history of modern liberal democracies is replete with examples of ideas being suppressed simply because people disagree with them, but it is a mistake to believe that this phenomenon explains the central principles of freedom of speech and freedom of the press. If we are to understand those principles, we must appreciate that freedom of expression protects the expression of information and ideas not because such expression is typically inconsequential or harmless, but despite the harm and the consequences that expression may produce. For reasons that would take us to far afield in this context, restrictions on freedom of expression are best understood not as always bad first-order policies, but as often good first-order policies with frequently good short-term consequences.

To observe that suppression is often good short-term policy does not mean that suppression is desirable in the long term or all things considered. Whether the second-order constraints be rule-consequentialist or anti-consequentialist ones, it is still the case that explaining the idea of freedom of speech in any moderately strong way entails explaining the idea of important second-order constraints on well-meaning and often efficacious first-order policy preferences.

If this understanding of the "bite" of freedom of expression is sound, then it should come as no surprise to discover that freedom of communication was stronger, ceteris paribus, in those societies in which institutions existed to check even well-meaning and instrumentally efficacious policy choices. And although there are in theory a variety of such institutions, in practice the most common is strong judicial review coupled with considerable deference to judicial decisions by other political actors and institutions.[73] When free speech ideas, however sound they may be, are in the hands of institutions – legislatures, administrative officials, and the electorate, most

[73]See Frederick Schauer, "Judicial Supremacy and the Modest Constitution," op. cit. note 3. See also Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," Harvard Law Review, vol. 110 (1997), pp. 1359-87.

obviously – whose primary portfolio is the reflection of first order policy interests, the ability to subjugate those interests to second-order values will be smallest. So although a considerable degree of freedom of expression undoubtedly flourishes in Great Britain, New Zealand, Israel, Switzerland, the Netherlands, and other countries in which the protection of individual rights in general and freedom of expression in particular has historically been largely in the hands of a legislature or other politically accountable body, it should come as little surprise that the protection is likely to be stronger, controlling for all other variables, in those countries in which the traditions of judicial review and judicial supremacy are longer and stronger. Indeed, given that many strong free speech positions on issues such as defamation, child pornography, hate speech, and sedition are issues as to which popular support for the speaker is lacking and legislative support for the principle is fragile, the relationship between judicial review and the outer reaches of free speech protection is likely to be a close one. The American tradition of strong judicial review is thus not at all unrelated to American free speech exceptionalism, especially with respect to unpopular speakers and unpopular ideas. It is of course true that strong judicial review, although likely a necessary condition for free speech protection as strong as tjhat in the United States, is hardly a sufficient condition. The modern traditions of judicial authority in Canada and South Africa, for example, have not produced an American-style approach to freedom of expression. But if we are nevertheless trying to explain the American approach to freedom of expression, the American approach to judicial authority likely plays at least a significant role.

VI The International Politics of Transnational Legal Influence

I have until now treated American exceptionalism as if it were an entirely American domestic phenomenon, such that the divergence between American and non-American approaches to freedom of expression were entirely a function of American domestic law and the American domestic social, political, cultural, economic, and ideological environment. But treating American exceptionalism in this way is misleading in two ways, and it will be

worthwhile pausing to consider them.

First, American freed speech exceptionalism is, at least in part, a function of a Larger American exceptionalism in which American legal and constitutional doctrine remains somewhere between resistant and hostile to non-American models and guidance. Unlike the constitutionally enshrined obligation to consult foreign law that exists in South Africa, and unlike the less formal willingness to look abroad which is characteristic of an emerging multi-national constitutional culture, American courts, American lawyers, and the American constitutional culture have been stubbornly anti-international, far too often treating foreign influence as a one-way process, in which Americans influenced others but were little influenced in return.[74] On numerous questions surrounding freedom of expression, therefore, there is good reason to believe that arguments for adopting non-American models about hate speech, defamation, or numerous other topics would be greeted with great skepticism not only because of the free expression-specific factors discussed above, but also because freedom of expression exceptionalism is, at least in part, a component of and influenced by a larger and more encompassing constitutional and cultural exceptionalism.

But it also takes two to diverge, and American freedom of expression exceptionalism is a function not only of American unwillingness to consult and at times even attempt to harmonize with non-American approaches, but also of an increasing non-American unwillingness to be guided and influenced by American models. Especially with respect to issues of freedom of expression, the United States has historically been highly influential, as even the briefest examination of non-American judicial opinions and legal literature will quickly show. Yet partly because of the rise of Europe, partly because of Iraq and related issues generating hostility to

[74]The openness of American constitutional law to non-American ideas, models, and influences has recently become a subject of increasing judicial and non-judicial debate, as exemplified in, for example, the various opinions in Lawrence v. Texas, 539 U.S. 558 (2003).

American ideas and models, and partly because of the very phenomenon of American exceptionalism that this volume addresses, the willingness outside of the United States to look to American free speech ideas has appeared recently to decline. If American ideas about freedom of expression were as internationally influential now as they were fifty or even twenty years ago, the very phenomenon of Amercan free speech exceptionalism would be much less, not because of American harmonization with non-American approaches, but rather just the opposite.

It can be well-documented that patterns of cross-national constitutional and legal influence are often based on non-optimizing political, cultural, and economic forces.[75] Countries try to harmonize their legal traditions to those of countries whose influence and favor they desire, so it should come as no surprise, for example, that the Baltic countries adopted legal models far more with an eye to joining the European Union than to anything else. And countries often have complex relationships with the countries that formerly colonized and occupied them, with multi-national organizations such as the World Bank and the International Monetary Fund, with countries whose trade they wish to attract, and with countries whose associations they find uncomfortable. Sometimes these relationships are positive, as with the relationships between many Commonwealth countries and the United Kingdom, and sometimes they are negative, as with the relationship between Ireland and Great Britain and between Vietnam and France, but it would be hard to ignore the way in which patterns of legal influence follow the complex and often unexplainable patterns of international influence generally.

If all of this has more than a grain of truth, then understanding the spread and non-spread of American free speech ideas cannot be separated from the complex international politics of American influence. When American ideas are seen as valuable just because they are American,

[75]See Frederick Schauer, "The Politics and Incentives of Legal Transplantation," in Joseph S. Nye, Jr. and John Donahue, Governance in a Globalizing World (Washington, D.C.: Brookings, 2000), pp. 253-68.

the spread of those ideas is likely to be greatest, even controlling for the intrinsic merit of the ideas themselves. And when American ideas are seen as tainted just because they are American, hardly an unusual phenomenon these days, the opposite effect is likely to occur. If we are to explain the contemporary reception or non-reception of temporally prior American free speech and free press ideas, we need to understand the numerous political, social, economic, cultural, and historical forces that would lead countries or communities to look to or to look away from the United States in a larger sense. Indeed, although much of the flavor of discussions of American exceptionalism, including the discussions in this volume, attributes American exceptionalism to various forms of American recalcitrance and various other American attitudes, we ought not to ignore the political and cultural dynamics on the other side of the divide. In seeking to explain American exceptionalism, we need to look not only at why the United States often seems to resist the virtues of international cooperation and harmonization, but also at why, on occasion, even arguably sound American views are resisted just because they are American. International cooperation and harmonization are inextricably linked with larger questions of foreign policy and cross-national influence, and American free speech exceptionalism is likely, at least in part, a function both of American resistance to non-American ideas and non-American resistance to American ones, resistances that themselves that are often caused by concerns for larger and more pervasive than free speech issues themselves.

VII The Open Question of Methodological Exceptionalism

As I noted earlier in this Essay, nations vary not only in the nature and extent of their substantive commitments to various rights, but also in their methodological approach to deciding rights controversies. Following this distinction, it is widely believed that the United States diverges from prevailing international democratic practice not only in the substance of its understandings about freedom of expression, but also in the manner in which it adjudicates freedom of expression claims, a divergence in approach that is thought to make the United States

just as methodologically exceptional as it is substantively exceptional.[76] More particularly, it is often said that American free speech adjudication is methodologically distinctive by employing a formal and sharply demarcated two step process, the first step being a category-based decision about whether some act is or is not encompassed by the First Amendment. Then, if the act is one that is within the First Amendment's purview, the question turns to which of numerous First Amendment rules should be applied. By contrast, it is said,[77] in other constitutional democracies virtually all acts of expression are understood as being encompassed by the scope of the right,[78] and the serious enquiry is devoted to the less formal and more open-ended question of whether a restriction is reasonable, necessary in a democratic society, or, most commonly, proportional in light of the importance of the restriction and the extent of the free expression interest that is restricted.[79] By maintaining a rigid and slightly disingenuous approach to freedom of expression issues, the claim goes, the United States is, and not to its credit, as exceptional about freedom of expression methodology as it is about freedom of expression substance.

The contrast between the two adjudicatory styles does reflect a genuine difference. There

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[76]See, for example, Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech (Princeton: Princeton University Press, 1995), chapter 2; 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. 101-27; 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. 583-612.

[77]See 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. 668-97; Lorraine C. Weinrib, "The Supreme Court of Canada and section One of the Charter," Supreme Court Law Review, vol. 10 (1988), pp. 469-502.

[78]The view is expressed crisply by the Supreme Court of Canada in Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927, at p. 969.

[79]See, for example, D.J. Harris, M. O'Boyle, and C. Warbrick, Law of the European Convention on Human Rights (London, 1995), p. 396.

is a distinction worth marking between a right that is defined narrowly and has enormous stringency within its narrow scope, on the one hand, and a right defined more broadly but with less stringency and more flexibility within that broad scope, on the other.[80] In this respect, it is indeed possible that current differences between the American categorial style and the non-American proportionality style embodied by Canadian,[81] South African, and European decision-making reflect genuine differences in judicial style, genuine differences in an understanding of the way in which rights operate, genuine differences about the role of the judiciary, and genuine differences in understanding the ideas of freedom of expression. Yet although such deeper and thus more permanent differences are possible, it may to too soon to tell whether these differences will be enduring, or instead whether what now appear to be real differences reflect little more than different stages in the development of freedom of expression decision-making structures.

In those legal cultures in which adjudication of freedom of communication ideas are comparatively new, and this would include important dimensions of all of the non-American regimes at issue here, there may not be very much of an accepted understanding of which subjects are encompassed by the right and which are not. So although Canada, for example, may nominally purport to be less concerned (or obsessed, say the critics) than the United States with whether an act of "expression" or "speech" is inside or outside the protection of the Charter[82] or the Constitution, the willingness to find virtually all freedom of expression claims plausible at the first stage, which has been the Canadian practice, may be contingent upon less of an

[80]For my reflections on these issues, see Frederick Schauer, "Codifying the First Amendment: New York v. Ferber," Supreme Court Review, vol. 1982, pp. 285-314; Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts," Vanderbilt Law Review, vol. 34 (1981), pp. 265-301; Frederick Schauer, "Can Rights Be Abused?," Philosophical Quarterly, vol. 29 (1981), pp. 225-31.

[81]See R.v. Oakes [1986] 1 S.C.R. 103.

[82]See Ford v. A.G. Quebec, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

opportunity to confront cases in which the claim of right is frivolous. In Canada, unlike in the United States, there have not been visible instances of claims that the regulation of securities sales, the regulation of ordinary commercial fraud, and the regulation of price fixing and other unfair trade practices, for example, present freedom of expression issues, although all of these and countless other examples involve expression (or speech, or communication, if you will). As more such cases arise, it may well turn out that what is now an unspoken demarcation in Canada between acts covered and acts not covered by Article 2 (and much the same structure exists in South Africa, Germany, and an increasing number of other jurisdictions) will need to be made more explicit. Will the Supreme Court of Canada spend as much time and care, and exercise as much judicial scrutiny, over such arguably inconsequential free speech as those mentioned above claims as it does with more serious ones involving, for example, hate speech, defamation, and pornography? If not, and that seems a highly plausible prediction, then it may well be that what looks at the moment like a large difference in style will grow smaller as courts outside the United States find it increasingly necessary to demarcate the claims that will be rejected summarily from the claims that require serious judicial scrutiny. Thus, one might speculate that the future will see non-American jurisdictions needing to find some way of sorting at the first step of the analysis, and sorting in light of underlying views about what freedom of expression is all about, which is what American courts have been doing for years under the rubric of defining the scope of the "freedom of speech" that neither the federal government nor the states is permitted to abridge.

In addition to the way in which an open-ended proportionality inquiry may turn out to be unsuited, at least without a fair amount of rule-based supplementation, for a larger number of questionable freedom of expression claims, it may also be ill-suited to simply a larger volume of freedom of expression cases in general. There are of course differences among countries in the degree of discretion that courts will have in adjudicating freedom of expression issues, but time and again, regardless of the subject, we have seen some convergence of rule-based and non-rule-

based approaches to legal questions.[83] Just as rule-based approaches often see the edges of the rules rounded off when difficult cases are presented, so too do more open-ended and discretionary approaches (which is what the "proportionality" inquiry amount to) evolve, for reasons of limits on the human or judicial capacity to deal simultaneously with too many unorganized options, into approaches more reliant on rules. Unless we can control for case quantity, case variety, and the length of the experience with dealing with these questions, and at the moment we cannot come close to doing that, it may be impossible to tell whether there is genuine methodological exceptionalism in the American approach to freedom of expression, or whether instead the current differences simply show the effect of the difference between a tradition of free speech adjudication that goes back almost a century, and traditions that are largely less than two decades old, and have yet to develop the encrustations of doctrines, rules, caveats, qualifications, maxims, principles, exceptions, and presumptions that any mature set of legal or constitutional rights will over time develop. In this respect, the contemporary differences between American and non-American methodological approaches are worth noting, and worth watching over time, but it may still befar too soon to reject with any confidence the hypothesis that what we are seeing is nothing deeper than differences reflected by different stages in the development of legal doctrine, and thus different stages in the development of the legal and constitutional right to freedom of communication.

VIII Conclusion

These last questions of methodological exceptionalism are important, but it is substantive exceptionalism that presents the largest and most difficult issues. And in terms of substantive exceptionalism, it is plain that American approaches to freedom of expression diverge dramatically from those accepted in most of the remainder of the open and democratic world.

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[83]Frederick Schauer, "The Convergence of Rules and Standards," New Zealand Law Review [2003], pp. 303-28.

Many commentators in the United States and in the rest of the world will be (and are) all too willing to offer their opinions on whether American exceptionalism is for good or for ill, and whether American substantive approaches to subjects like defamation, hate speech, and commercial advertising of dangerous products are better or worse than those found elsewhere. In this Essay, however, I deliberately avoid such evaluation. In the spirit of genuine comparitivism, I seek to identify and to try to begin to explain differences, leaving normative evaluation of those differences to other people or other times.