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AMBIVALENT RESISTANCE AND COMPARATIVE
CONSTITUTIONALISM: OPENING UP THE CONVERSATION ON
"PROPORTIONALITY," RIGHTS AND FEDERALISM

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This article concerns what I will call the ambivalent resistance of U.S. constitutional law to explicit learning and borrowing from other nations' constitutional decisions and traditions. It begins in Part I by identifying this resistance and explaining in what respects it is ambivalent, and goes on in Part II to suggest reasons for the resistance and for why it may diminish in the future. To explore the attractions and dilemmas of comparative constitutional law, Part III examines how a particular doctrine found in Canadian constitutional law, the so-called "proportionality" test of *R. v. Oakes*,¹ might bear on recent constitutional issues of federalism and individual rights in the United States. This section argues for the value of studying foreign constitutional law, while at the same time urging caution about the possibility of direct "transplants." Finally, the article explores the relationship between the U.S. Supreme Court's resistance to considering foreign constitutional law and its resistance to input from other domestic institutions, notably Congress, on the meaning of the U.S. Constitution. It argues for a broader understanding of what is relevant to U.S. constitutional interpretation, embracing both congressional judgments and judgments reached by the constitutional courts of other nations considering similar problems.

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¹ See [1986] 1 S.C.R. 103, 108 (holding that a statutory presumption that possession of narcotics implied trafficking violated the presumption of innocence guaranteed by the Canadian Charter of Rights and Freedoms and was unconstitutional because it was not "demonstrably justified in a free and democratic society").

I. AMBIVALENT RESISTANCE

Members of the current U.S. Supreme Court have on more than one occasion rejected the utility of considering constitutional practice in other countries. In 1997, Justice Scalia, writing for the Court in *Printz v. United States*,² explained why, in his view, “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”³ Justice Scalia also made a narrower argument, that “our federalism is not Europe’s,”⁴ suggesting that European practice in federal systems was not relevant to the question before the Court – whether Congress had the power to compel local government officials to perform background checks under a federal gun law.

Justice Scalia was writing in response to an argument made in dissent by Justice Breyer. Writing for himself and for Justice Stevens, Justice Breyer argued that the experiences of the federal systems of Switzerland, Germany and the European Union indicate that a system in which local governments carry out directives of the central government may “interfere[] less, not more, with the independent authority of the . . . subsidiary government”⁵ Breyer suggested that this comparative experience shows that “there is no need to interpret the Constitution as containing an absolute principle forbidding the assignment of virtually any federal duty to a state official” in order to reconcile “central authority with the need to preserve the liberty-enhancing autonomy of smaller constituent governmental entit[ies].”⁶ (Justices Breyer, Stevens, Souter and Ginsberg would have upheld the relatively small burden imposed on local sheriffs to implement the background checks.)⁷

² 521 U.S. 898 (1997) (holding unconstitutional “Brady Act” interim provisions requiring local law enforcement officers to conduct background checks on prospective gun purchasers, based on ground that it is inconsistent with the implicit rule of U.S. federalism that the federal government cannot “commandeer” state officers into executing federal law).

³ *Id.* at 921 n.11.

⁴ *Id.* In contrast, consider Justice Frankfurter’s attempts earlier in this century to invoke similarities between the constitutional federalism of the United States, of Canada and of Australia on issues of intergovernmental tax immunity. See e.g., *United States v. Allegheny County*, 322 U.S. 174, 198 (1944) (Frankfurter, J. dissenting) (“In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces is the same as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver v. Attorney-General of Canada* [1944] S.C.R. 23, that Court denied the Dominion’s claim to immunity in a situation precisely like this, as I believe we should deny the claim of the Government.”); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (intergovernmental tax immunity case raises the “same legal issues” as in Australia and Canada under cited provisions of their constitutional acts). For a critique of Frankfurter’s assumption that the constitutional relationships were the same, see *infra* note 46.

⁵ *Printz*, 521 U.S. at 976.

⁶ *Id.* at 977.

⁷ The burden was not only relatively small (particularly in light of the U.S. government interpretation of the “reasonable efforts” language of the statute, see Respondent’s Brief at 6,

Resistance and ambivalence: Justice Breyer argued for the relevance of comparative experience in resolving an open question of constitutional interpretation, one to be informed by understanding the empirical consequences of different interpretations.⁸ Justice Scalia, in contrast, acknowledged the contributions of comparative study to the formation of the Constitution but resisted its appropriateness to the task of interpretation.⁹ But did he resist comparative study in *Printz* because it can never be appropriate? Or, did he resist such study because the issues of federal structure somehow were unique to the United States? And does Justice Scalia really speak for even the five-justice majority of the *Printz* Court?¹⁰

Chief Justice Rehnquist, who joined Scalia's opinion in *Printz*, has taken a more receptive view of the benefits of comparative constitutional law to courts in the United States, both in his opinions¹¹ and in his other writings. In a speech given in 1989 at a symposium in connection with the 40th anniversary of the German Basic Law, Chief Justice Rehnquist stated:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict

Printz (No. 95-1478) citing ATF Guidances) but was also time-limited. The requirement that local law enforcement officers perform background checks lasted for five years, at which time, in November 1998, the obligation became that of the federal government, using a computerized national data base developed during the interim period.

⁸ See *Printz*, 521 U.S. at 977.

⁹ See *id.* at 921 n.11.

¹⁰ Note that in *Washington v. Glucksberg*, 521 U.S. 702 (1997), Chief Justice Rehnquist, writing for a Court that included Justice Scalia, cited and described decisions from other nations' constitutional courts in identifying the relevant "background" to evaluate the claim that the State of Washington's prohibition on assisted suicide violates the Due Process Clause. See *id.* at 718 n.16 (citing, *inter alia*, a 1993 Canadian Supreme Court decision, *Rodriguez v. British Columbia (Attorney-General)*, 107 D.L.R. (4th) 342 (1993), which construed the 1982 Canadian Charter of Rights and Freedoms not to include a right to assisted suicide).

¹¹ See *Glucksberg*, 521 U.S. at 718 n.16; *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing abortion decisions by the West German Constitutional Court and the Canadian Supreme Court).

that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future.¹²

But the same year as Rehnquist's 1989 speech, Justice Scalia, writing for the Court, rejected the relevance of the practice in other nations, while the dissent argued to the contrary, in *Stanford v. Kentucky*,¹³ a case addressing the constitutionality of the death penalty for juveniles convicted of murder. No question of government structure was presented, to which the claim of a uniquely American federalism might apply; rather, the question was one of pure individual right. In *Stanford*, the Court rejected a claim that the imposition of capital punishment for crimes committed when the defendant was age 16 or 17 was cruel and unusual punishment under the Eighth Amendment. In the first footnote in the opinion, the Court wrote:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contentions of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather 'so implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," *Thompson v. Oklahoma*, 487 U.S. 815, 868-869 n.4 (1988) (Scalia, J., dissenting) . . . they cannot serve to establish the first Eighth Amendment prerequisite that the practice is accepted among our people.¹⁴

Other voices on the Court, however, argued that foreign constitutional practices were relevant. In his *Stanford* dissent, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, wrote that "choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."¹⁵ He went on to note specifically that over fifty countries, including nearly all of Western Europe, had formally abolished the death penalty, twenty-seven other countries did not in practice impose the death penalty, and of those countries that retained it, a majority did not permit the execution of juveniles.¹⁶ Justice Brennan

¹² William Rehnquist, *Constitutional Courts-Comparative Remarks (1989)*, reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

¹³ 492 U.S. 361 (1989).

¹⁴ *Id.* at 369 n.1 (emphasis in original).

¹⁵ *Id.* at 384 (Brennan, J., dissenting).

¹⁶ *See id.* at 389 (referring to amicus brief submitted by Amnesty International).

and the other dissenters believed that the legal practice of other countries was relevant, though not dispositive, on the constitutional question of "cruel and unusual punishment."¹⁷

As cases cited by both Justice Scalia and Justice Brennan illustrate, at least for purposes of Eighth Amendment doctrine, standards of punishment in other countries have on occasion been viewed as relevant to the constitutional question whether a particular punishment is "cruel and unusual."¹⁸ Earlier, in *Trop v. Dulles*,¹⁹ the plurality opinion of the Chief Justice relied on the practice of other nations to conclude that loss of citizenship for desertion was unconstitutional, noting that "banishment [is] a fate universally decried by civilized people."²⁰ The Court noted further that the "international community of democracies" deplores statelessness and that a United Nations survey "reveal[ed] only two countries . . . [that] impose denationalization as a penalty for desertion."²¹

Opposing stances towards the relevance of practice and experience in other countries in resolving constitutional questions occur even earlier in our constitutional history as well. In *Fong Yue Ting v. United States*,²² for example, the Court upheld a statute authorizing the deportation of Chinese laborers who did not possess a required residency certificate unless, on the testimony of at least one "white witness," they met the conditions to excuse them from the certificate requirement. In so ruling, the majority began by noting the universal practice of sovereigns to retain the right to expel aliens, a right it found unconstrained by the Constitution.²³ While the majority invoked foreign practices, it was the dissenting justices who invoked American exceptionalism. According to Justice Brewer:

¹⁷ See *id.* ("Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis.")

¹⁸ See *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., for the plurality) (looking to "other nations that share our Anglo-American heritage," and "leading members of the Western European community" to confirm that it would "offend civilized standards of decency" to execute juvenile for crimes committed before age 16); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (noting developments in European and Commonwealth countries for support in holding the death penalty unconstitutional for robber who did not kill or intend to kill); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (White, J., plurality opinion) ("It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.") (White, J., for the plurality).

¹⁹ 356 U.S. 86 (1958).

²⁰ *Id.* at 102 (Warren, C.J., announcing judgment of Court and opinion joined by Black, Douglas, and Whitaker, JJ.).

²¹ *Id.* at 102-03.

²² 149 U.S. 698, 728 (1893) (upholding federal statute providing for exclusion and removal of Chinese persons and for punishment at hard labor prior to removal, and further providing registration system for Chinese laborers requiring either special certificate of residence or proof on testimony of "one credible white witness" of their entitlement to reside).

²³ See *id.* at 711 (referring to "an inherent and inalienable right of every sovereign and independent nation").

The governments of other nations have elastic powers - ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.²⁴

Justice Field also dissented. After disagreeing that English practice had been correctly described, he wrote:

[E]ven if that power [of deportation of resident aliens] were exercised by every government of Europe, it would have no bearing in these cases. . . . Spain expelled the Moors; England, in the reign of Edward I, banished fifteen thousand Jews; and Louis XIV, in 1685, by revoking the Edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots Within [the last] three years Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race - an act of barbarity which has aroused the indignation of all Christendom. . . . [A]ll the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution. The government of the United States is one of limited and delegated powers. *It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty.*²⁵

Perhaps just as noteworthy as the cases in which justices of the U.S. Supreme Court discuss the relevance of foreign constitutional practice or reasoning are the cases in which they do not, but easily could have. For example, in 1992 the Court held, in *R.A.V. v. St.*

²⁴ *Id.* at 737 (Brewer, J. dissenting).

²⁵ *Id.* at 757 (Field, J. dissenting) (citations omitted) (emphasis added). Brewer's and Field's claims here might be compared with the debate, in *Loving v. United States*, 517 U.S. 748 (1996), over the relevance of English constitutional history to the relative scope of congressional and presidential power in determining the punishment for courts martials. The *Loving* majority relied on one (somewhat contested) view of what was permitted under English law at the time of the framing. Justice Scalia argued that this view was "irrelevant" since the framers deliberately adopted a model of governance quite distinct from the Westminster model. *See Loving*, 517 U.S. at 775-76 (Scalia, J. concurring in part). In either event, both the majority and Justice Scalia treated the foreign practice as relevant, if at all, only as it bore on the original understanding of the clauses in question, a significant but not exclusive mode of constitutional decision-making in the United States.

Paul,²⁶ that a local ordinance prescribing “fighting words” based on racial bias violated the First Amendment because it amounted to a content-based regulation. Neither the majority nor the dissent in this closely-divided case alluded to how other constitutional governments have addressed this problem, notwithstanding Justice Scalia’s acknowledgment in the opinion for the Court that “[f]rom 1791 to the present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas”²⁷ Readily available were the opinions of the Canadian Supreme Court in *R. v. Keegstra*,²⁸ in which that Court addressed at length its reasons for upholding the constitutionality of a statute prohibiting the “wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin.”²⁹ While the several lengthy opinions in the *Keegstra* case extensively discussed U.S. First Amendment cases,³⁰ the U.S. Supreme Court two years later was silent on this potentially valuable comparative resource.³¹

As these examples illustrate, the U.S. Supreme Court is resistant to considering foreign constitutional law, even in areas where there are materials close at hand that address similar problems within the context of a western, liberal democratic republic (and that discuss the U.S. Court’s prior precedents). But the resistance is often seen in silence. And it is ambivalent – sometimes silently, sometimes expressly.

In what respects is U.S. constitutional law ambivalent about borrowing from or considering foreign constitutional decisions? First, it is evident that the different justices are receptive in differing degrees to the possible bearing of comparative constitutional law, with several

²⁶ 505 U.S. 377 (1992).

²⁷ *Id.* at 382-83.

²⁸ [1990] 3 S.C.R. 697. Although Canadian Supreme Court decisions are available, in English, in major law libraries (and were accessible on-line through QUICKLAW beginning in 1989), *Keegstra* was apparently mentioned in only one of the many briefs filed in *R.A.V.* (based on an examination of the Table of Authorities of those briefs available on LEXIS). See Brief Amicus of the National Black Women’s Health Project in Support of Respondent, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (No. 90-7675); see also Brief Amicus Curiae of the Asian-American Legal Defense and Education Fund et. al., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (No. 90-7675) (listing a 1989 law review article comparing U.S. and Canadian approaches to hate speech). If lawyers are not aware of and do not refer to constitutional decisions of other courts, it is less likely that the Court will do so.

²⁹ *Keegstra* [1990] 3 S.C.R. at 713.

³⁰ See *id.* at 739-42 (Dickson, C.J.); *id.* at 812-22 (McLachlin, J., dissenting).

³¹ Similarly, with the exception of Justice Frankfurter’s reliance on Australian and Canadian decisions on intergovernmental tax issues, U.S. Supreme Court decisions earlier in this century on federalism issues tended not to refer to cases from Canadian or Australian courts on analogous issues. Compare *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating federal tax designed, through exemptions, to require limits on child labor) with *Rex v. Barger*, (1908) 6 C.L.R. 41 (High Court of Australia) (holding that “implied prohibitions” of the constitution – to protect state authority and to regulate labor conditions – invalidated federal tax on manufactured goods designed, through exemptions, to impose minimal working condition requirements).

current members of the Court open at least to thinking about foreign decisions.³² Justice Scalia's rejection of the relevance of foreign constitutional practices in *Printz* may be an outlier, notwithstanding its appearance in his opinion for the *Printz* Court.³³ Further, his view is that comparative experience is relevant to *making* a constitution but not to *interpreting* one.³⁴ On this view, to the extent that the process of interpretation resembles the making of a constitution, comparative experience could still be relevant.³⁵ Finally, the view that comparative experience is irrelevant (or less relevant) on structural issues such as federalism, even if accepted,³⁶ would not necessarily rule out its rele-

³² Some justices, present and past, resort to comparative experience in constitutional decision-making with relative degrees of comfort, sometimes to support claims of the distinctiveness of the U.S. experience, while at other times as if they were relevant and helpful to the resolution of domestic constitutional questions. *Compare* *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (asserting irrelevance of other nations, experience to U.S. constitutional interpretation), *Loving v. United States*, 517 U.S. 748, 775-76 (1996) (Scalia, J., concurring in part) (asserting that the framers of the U.S. Constitution put it in writing to make clear that it was different from the English government it replaced) and *Fong Yue Ting v. United States*, 149 U.S. 698, 737, 757 (1893) (Brewer & Field, J.J., dissenting) (rejecting the applicability of the foreign doctrine of inherent sovereignty and emphasizing the irrelevance of foreign government practices to U.S. constitutional law), *with* *United States v. Allegheny County*, 322 U.S. 174, 198 (1944) (Frankfurter, J. dissenting) (relying on a decision of the Supreme Court of Canada on the ground that the relation of Canada to its Provinces resembles that of the United States to its States) and *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (observing that despite structural differences between legal systems, foreign legal experience "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

³³ And even Justice Scalia has on occasion acknowledged a (quite) limited role for foreign practice. *See* *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting) (stating that the practices of other democracies may be relevant to determining whether a practice uniformly adopted by the American people is merely a historical accident or is instead "implicit in the concept of ordered liberty").

³⁴ *See* *Printz*, 521 U.S. at 921 n.11.

³⁵ In a strict jurisprudence of original intent, foreign experience may be irrelevant (except insofar as it relates to the understandings of the *original* group whose intentions count). Justice Scalia, for instance, implies that judges can only *interpret*, and never *make*, the constitution and has worked to develop a jurisprudence that appropriately constrains judicial choices by rooting them, wherever possible, in original decisions reflected in authoritative texts. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Few justices, however, are rigidly committed to originalism as the sole method of interpretation, particularly on structural issues of federalism and separation of powers, and it is a method whose drawbacks are legion. For illustrative discussions, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786-804 (1983); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 472-500 (1981).

³⁶ That interpretation of federalism-related provisions in other constitutions may be of less relevance than comparative decisions in other areas has some plausibility because of the deeply and necessarily pragmatic, contextual and dynamic nature of successful constitutional federalism. *See generally* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2228-29 (1998) [hereinafter Jackson, *Federalism*]. By contrast, the individual rights claims of the Declaration of Independence, which served as the basis for provisions in the U.S. Bill of Rights, were designed to be appealing to an international audience and drew on traditions of what today might be called international human rights; the international appeal of human rights to be free from torture, discrimination, religious oppression are embodied in several international conventions today. *See, e.g.*, International Covenant on Civil and

vance on issues of individual right.³⁷

Moreover, courts can use comparative experience for different reasons and in different ways. A constitution might be read to *require* consideration of foreign practice or decisions, for example, as evidence of a practice that bears on a criterion like “usualness” in the Eighth Amendment arena.³⁸ Alternatively, constitutional adjudication might be informed by knowledge of what institutional experiences under different regimes suggest, negatively or positively, about how the U.S. regime ought to be construed in order to work at a structural level.³⁹ Further, constitutional adjudication might consider the weight or force of the reasoning of constitutional courts or jurists elsewhere, as Justice Rehnquist’s 1989 comments seem to suggest.⁴⁰ It is the latter point in particular that I think meets the most resistance in the U.S. cases.

Political Rights, art. 18, 999 U.N.T.S. 171; The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2, at 1 (1978), 660 U.N.T.S. 195; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 23 I.L.M. 1027, *as modified*, 24 I.L.M. 535; *see also* Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 18, at 71, 74, U.N. Doc. A/810 (1948); *cf.* Robin West, *Is the Rule of Law Cosmopolitan*, – QUINNIPIAC L. REV. – (forthcoming 1999) (arguing that commitment to the rule of law should encourage egalitarian understandings of justice embodied in law that are universal and that extend to people regardless of their nationalities or locations).

³⁷ *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997), (where Court, in an opinion written by Rehnquist and joined by Scalia, relied in part on foreign constitutional decisions denying that their constitutional bill of rights provisions protected a right to assisted suicide).

³⁸ *Compare* *Stanford v. Kentucky*, 492 U.S. 361, 364 n.1 (1989) (rejecting contention that sentencing guidelines of other countries are relevant to determination of “evolving standards of decency”) with *Trop v. Dulles*, 356 U.S. 86, 126 (1958) (Frankfurter, J., dissenting) (arguing that loss of citizenship is not cruel and unusual punishment because civilized nations use this punishment). Constitutions can explicitly require resort to foreign constitutional law. *See* S. AFR. CONST. § 39(1)(b), (c) (1996) (*requiring* courts, when interpreting the Bill of Rights, to consider international law, and *authorizing* courts to consider *foreign law*).

³⁹ Thus, Justice Breyer argued unsuccessfully in *Printz v. United States*, the successful experience in other constitutional, democratic federations suggested that it was not necessary to construe our Constitution to include a non-commandeering principle. *See* 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting); *see also* *Adkins v. Children’s Hosp.*, 261 U.S. 525, 570-71 (1923) (Holmes, J., dissenting) (arguing that experience in other nations, including Great Britain and Australia, supported the reasonableness, and hence the constitutionality, of a minimum wage law for women that the Court held unconstitutional). In contrast, other Justices have referred to experience in other countries as bearing, negatively, on how the Constitution should be construed. *See, e.g.*, *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (referring implicitly to fascist dictatorships in Europe as a reason to constrain presidential power even though it “is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley”); *id.* at 641 (Jackson, J., concurring) (noting negative example of George III and “instruction from our own times” of executive powers in “totalitarian” governments).

⁴⁰ Comparative constitutional experience may also bear on issues of constitutional design or amendment that occur outside of adjudicatory process, but the balance of this article will focus on adjudication.

II. AMBIVALENT RESISTANCE: WHY AND WHY NOT

In this section, I describe some possible reasons for the Court's ambivalence, including the shape and demands of legal education. I go on to argue that U.S. law schools, lawyers and jurists must abandon their ambivalence about learning from comparative constitutional law, even if they conclude that "borrowings" are not helpful. Comparison, I suggest, has become almost inevitable in the increasingly globalized world of law and information, and only deliberate study can yield the knowledge on which to base informed analysis of the implicit comparisons that are entailed in assertions about the uniqueness of the U.S. Constitution.

A. *Why such ambivalence?*

First, the broader history and culture of "American exceptionalism," with its twin manifestations of idealism and naivete, of expansionism and isolationism, may affect those who serve on the Supreme Court and in the federal courts no less than those in other government service.⁴¹ The belief that the U.S. experience is unique can be deployed to serve both "liberal" and "conservative" views of constitutional issues, as a comparison of Justice Scalia's stance in *Printz v. United States* with that of the dissenting justices in *Fong Yue Ting v. United States* suggests.⁴²

Second, for some period of time until fairly recently, many U.S. law school curriculums have had a decidedly parochial emphasis.⁴³

⁴¹ See Michael Kammen, *The United States Constitution, Public Opinion, and the Problem of American Exceptionalism*, in *THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS AND RESPONSIBILITIES* (A.E. Dick Howard, et. al. 1992) (noting the continued importance of exceptionalism in American history generally and describing the longstanding role of public opinion in constitutional adjudication). On whether "exceptionalism" in national histories is really "exceptional," see Carl Degler, *In Pursuit of an American History*, 92 AM. HIST. REV. 1 (1987) (suggesting importance of understanding "national character," and arguing benefits of comparative historical study so as to better understand what is "exceptional" about a particular nation's history). For an example of what might be regarded as nineteenth century British constitutional exceptionalism, see *Bank of Toronto v. Lambe* [1887] 12 A.C. 575, 587 (Privy Council, reviewing Canadian Supreme Court decision, and asserting that U.S. constitutional cases on federalism are irrelevant to the interpretation of the British North America Act). For what may be implicit responses of Canadian judges, see *In re Prohibiting Liquor Laws* [1894] 24 S.C.R. 170, 205, 231 (emphasizing intent of the Canadian framers to "devise a scheme by which the best features of the Constitution of the United States of America, rejecting the bad, should be engrafted upon the British constitution . . ." and asserting the fundamentally Canadian character of the British North America Act).

⁴² See *supra* note 32 (noting their denial of the applicability of foreign practices to interpretation of U.S. constitutional law).

⁴³ Legal training, to the extent it existed in law schools in the late eighteenth and early nineteenth centuries, may have been more "comparative" than those of the mid-twentieth century. Both Harvard and the University of Virginia, for example, included arguably "comparative" offerings as required courses in early days; at Virginia, international law (the "law of nations") was required and at Harvard there appear to have been required lectures or courses in the civil law,

the history of the common law, natural law and ecclesiastical law. See JOHN RITCHIE, *THE FIRST HUNDRED YEARS: A SHORT HISTORY OF THE SCHOOL OF LAW OF THE UNIVERSITY OF VIRGINIA FOR THE PERIOD 1826-1926*, at 11, 27-28, 64, 76-78, 104 (1978) (also noting that first-year curriculum included international law as recently as 1925-26); 1 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 303, 339, 355, 436-37 (1970). When the first U.S. law schools were founded, many of the available legal materials were from the British courts and treatise writers, and inertia may have been responsible for their presence in the curriculum for some time. See 2 Warren *supra* at 344 (reporting that in 1846-47 the Harvard "Catalogue stated: "The course of instruction for the bar embraces the various branches of Public and Constitutional Law, Admiralty, Maritime, Equity and Common Law which are common to all the United States, with occasional illustrations of Foreign Jurisprudence"). By the middle of the nineteenth century, however, U.S. materials were increasingly available. See 1 WARREN, *supra*, at 410 (noting advances in the creation of American legal literature, including Chancellor Kent's Commentaries by 1830); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 59-60, 111 (1994) (noting publication in 1870's of texts relying less on English precedents and more on cases from American jurisdictions and works exposing fallacies born of reliance on Roman legal concepts).

Compared to other parts of the curriculum, international and comparative offerings and requirements appeared to be in relative decline in the late nineteenth and early twentieth century at Harvard Law School. See 2 WARREN, *supra*, at 411-12, 448 (displaying tables, indicating that the curriculum in 1879-80 did not include comparative or foreign law nor did first year classes in 1891-92 include civil law). By 1900, Harvard's curriculum was "essentially professionally oriented," and was widely emulated, with only a few "national schools [that] tried to be less professional than Harvard by offering courses in such areas as international law, comparative law and jurisprudence" ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 39 (1983); see *id.* at 48 n.39, n.41 (reporting also that after 1899, international law was offered at Harvard only "sporadically"); see also LAPIANA, *supra*, at 129-30 (describing Harvard Law faculty's unwillingness to support University of Chicago's desire to offer such "nonlegal" subjects as comparative politics, European political theory and administrative law); cf. Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 363-67, 374-83 (1951) (describing Harvard's influence in professionalizing study of law despite efforts at, for instance, Columbia and Yale to revitalize connections between law and other disciplines). According to Stevens, Harvard had the greatest influence on other university-affiliated law school curricula during this time, see *id.* at 35-72, and the standard "core curriculum" of the 1920s, developed under Harvard's influence, included neither comparative nor international law. See STEVENS, *supra*, at 41 n.49; but cf. *id.* at 49 n.43 (noting that Yale offered second-year lectures on international law, comparative jurisprudence, Roman law, ecclesiastical law and political economy). Intellectual changes in the law also may have played a role in the decline of comparative and international course requirements and offerings relative to other parts of the legal curriculum. With the decline of natural law and its more universal approach to law's content and the rise of positivism as a basic jurisprudential outlook, it would not be surprising for legal educators who view law as the command of a legitimate sovereign to believe that law students should concentrate on the decisions and laws of their own jurisdiction. Cf. LAPIANA, *supra*, at 77 (linking Austin's positivism to Langdell's development of the case method).

As one moves on in the twentieth century, the tremendous developments in public law and the rise of "functionalism" and of legal realism, bore a complex relationship to law school curricula in international and comparative public law. Stevens quotes a description of law school curricula in the late 1940s as being "fairly well standardized . . . [with] curricula . . . fashioned largely around the subjects in which the graduates of the school must be examined for admission to practice . . ." *Id.* at 210 (quoting ABA Survey of the Legal Profession in late 1940s). In 1948 only 35 percent of AALS member schools offered courses in international law, see JOHN KING GAMBLE, *TEACHING INTERNATIONAL LAW IN THE 1990S* 121 (1992), and a smaller number appear to have offered comparative law, see Joseph Dainow, *Teaching Methods for Comparative Law*, 3 J. LEGAL EDUC. 388, 395 (1951) (stating that "as many as 26" law schools were then offering comparative law out of the then 107 AALS members reported by Warren Seavey, *The Ass'n of American Law School in Retrospect*, 3 J. LEGAL EDUC. 153, 168 (1950)). Yet, in the immediate post-World War II era, many law schools showed renewed interest in courses on global issues, and in

Even today, few if any require study of international or comparative law, and while rates of enrollment in such courses appear to be on the rise, they remain at some law schools a marginalized area of study.⁴⁴

In his speech discussed earlier, Chief Justice Rehnquist suggested that until after World War II, the only materials available to consult in judicial constitutional decision-making were domestic;⁴⁵ thus in the area of constitutional law, there were no other games in town. Perhaps it is more accurate to say, however, that of foreign decisions that might have been viewed as constitutional, few were seen as relevant to topics addressed by U.S. courts.⁴⁶ Indeed what judges viewed as avail-

comparative law. See STEVENS, *supra*, at 222 n.42 (noting postwar pressure at the larger schools for emphasis on international and comparative law); see also GAMBLE, *supra*, at 123 (noting that by the 1950s about 60 percent of law schools had some provision for international offerings); LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 154 (1986) (noting increased offerings in late 1940s in public and international law at Yale as reflecting the interest of Yale legal realists in social policy). As early as the 1920s, some legal realists at Columbia had urged a "broad conception of jurisprudence as encompassing legal philosophy, ancient law, legal history and comparative law," and expanded electives in comparative law. See KALMAN, *supra*, at 72. In 1949-50, Columbia University adopted a plan that required students to take minimum numbers of hours in five subject groups, requirements that included at least two hours from a group including international and comparative law and the legal profession. See STEVENS, *supra*, at 224 n.52. Harvard, in the 1950s, expanded its offerings in international law and comparative law. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 332-36 (1967). In the postwar period, McDougal and Lasswell offered a course at Yale on "The World Community and Law," investigating "the conditions under which the peoples of the world can be brought to a fuller consciousness and understanding of their interdependence so that they would reshape their institutions accordingly." KALMAN, *supra*, at 181. Yet, the McDougal-Lasswell approach to law as policy science had less influence elsewhere than might have been expected. See *id.* at 184-85; STEVENS, *supra*, at 265-66.

⁴⁴ For a survey of international law teaching in the United States and Canada in the early 1990s, and a description of other surveys of international law offerings, see GAMBLE, *supra* note 43, at 1-37, 118-25, 134-39 (demonstrating long concern by internationalist scholars about offerings and enrollments in international law courses, and showing that by early 1990s, more than 95% of law schools had such offerings but that there had been much less growth in the percentage of students enrolling in such courses, from 25% in 1912 to 45% in 1991). I am aware of no U.S. law school that currently requires students to complete a course in comparative or international law to earn a J.D. degree. According to the on-line course catalogues of the University of California at Berkeley, University of Chicago, Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, New York University, the University of Pennsylvania, Stanford, Virginia, and Yale, for instance, the schools offer many courses in international and comparative law, but do not require study in those fields. (A list of citations to these on-line catalogues as of March 9, 1999 is on file with U. PA. J. CONST. L.). See also GAMBLE, *supra* note 43, at 4, 22, 123 (stating that the "survey course in public international law . . . is never required," in contrast to the year 1912, when 25 percent of U.S. law schools required a course in international law).

⁴⁵ See Rehnquist, *supra* note 12, at 411-12.

⁴⁶ In evaluating Rehnquist's analysis, bear in mind that by the 1880's the Canadian Supreme Court and the Privy Council in London were issuing decisions interpreting the power-allocating clauses of the British North America Act [BNA], the first Canadian constitution, adopted in 1867. By 1949, Canada's Supreme Court was exercising final jurisdiction over questions arising under the BNA, an Act that largely addressed allocations of power between the national and provincial governments, but which also addressed some minority religious and linguistic issues. See DALE GIBSON, *THE LAW OF THE CHARTER: GENERAL PRINCIPLES 6-8* (1986); RICHARD E. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA*,

able and relevant may itself reflect "exceptionalist" understandings of the U.S. Constitution.

Since World War II, a number of constitutional courts, perhaps most prominently the German Federal Constitutional Court, have developed important bodies of jurisprudence addressing constitutional issues similar to those presented in the United States; of these, only a small number are routinely available in English. Furthermore, in those countries that have developed constitutions and constitutional court decisions, the constitutions themselves are typically the product of the latter part of the century. These constitutions are often longer than, and include provisions different from those of U. S. Constitution. Understanding the constitutional context of foreign decision-making is a daunting task, made no less so by the length and, in some respects, unfamiliarity of the basic constitutional texts. Finally, important differences exist between the U.S. constitutional system and those of other leading producers of English-accessible

CANADA AND THE UNITED STATES (1969). Moreover, Australia began generating constitutional decisions on federalism issues in the early years of this century. For evidence of academic attention to Australia's early constitutional developments, see Charles Grone Haines, *Judicial Interpretation of the Constitution Act of Australia*, 30 HARV. L. REV. 597 (1917). In the 1930s and 1940s, Justice Frankfurter referred to Canadian and Australian decisions in cases involving intergovernmental immunities. See *supra* note 4 (discussing Frankfurter's dissenting and concurring opinions in *U.S. v. Allegheny* and *Graves v. New York* ex rel. *O'Keefe*, respectively). It thus seems overly simple to suggest that it has not been until recently that there was a sufficient body of constitutional decisions from other courts that could have been helpful to U.S. courts.

However, whether the federal systems of these three countries are so analogous that decisions in one system bear directly on the *correct result* in another, as Frankfurter suggested, see *supra* note 4, is somewhat doubtful. While all three nations were designed to have federal systems, Canada's federation was designed, in the heat of the U.S. Civil War, to establish a stronger national government than that of the United States, an intention clearly frustrated by decisions, led by the Privy Council, substantially restricting the scope of national power. See generally, PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 97-112 (3d ed. 1992) [hereinafter HOGG, CONSTITUTIONAL LAW OF CANADA]. Although Australia's federalist arrangements were more closely modeled on those of the United States, the specific constitutional allocations of power to the federal and provincial governments in both Canada and Australia differ from those of the U.S. Constitution in some significant ways. Canada, for example, allocates criminal law entirely to its national legislative competence. See CAN. CONST. (Constitution Act 1867) pt. VI § 91(27). In Australia, the national government has power to make laws for marriage, divorce and custody. See AUSTL. CONST. ACT § 51 (xxi), (xxii). Yet, in Canada, Australia, and the United States there are more general issues of federalism in constitutional adjudication, on which wisdom is not likely to be localized exclusively in one country's jurisprudence. For instance, on whether enumerated federal powers should be construed broadly in favor of strong central power, or more narrowly in order to preserve realms of provincial or state power, compare *Attorney Gen. for Ont. v. Attorney Gen. for Can.* [1896] A.C. 348 (Privy Council reverses Canadian Supreme Court to hold that federal power to "regulate" trade did not include power to "prohibit" trade) and *Rex v. Barger* (1908) 6 C.L.R. 41, 78 (implied prohibition doctrine in Australia) with *United States v. Darby*, 312 U.S. 100 (1941) (holding that power to regulate commerce includes power to prohibit) and *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920) (dismissing "invisible radiations" from powers reserved to states as constraints on federal treaty power). Having said all this, Chief Justice Rehnquist's point about the rapid development of constitutional law since World War II in other nations is widely shared. See MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW 13-16 (1979) (noting the explosive growth of constitutions and judicial review since World War II).

opinions (for example, the rules against "abstract" review under the "case or controversy" regime), as well as in the style and accessibility of opinions written in other constitutional systems.⁴⁷

Some of the reasons for resistance to comparative constitutional learning, however, are in the process of changing. Interest in international and comparative courses is on the rise, as law practice becomes more globalized. Availability of foreign decisions is increasing. Likewise, the rate of U.S. research in and publication on issues of comparative constitutionalism is increasing, as this symposium illustrates.⁴⁸ And U.S. judges are participating in a variety of international organizations and educational programs which promote exposure to other constitutional systems.⁴⁹

⁴⁷ Thus, for example, decisions of the French Conseil Constitutionnel, even when translated, are sometimes difficult for those accustomed to U.S. opinions to understand, with terse paragraphs succeeding each other in a not always easy to follow narrative. For discussion of French judicial discourse, see Mitchel de S.-O.-l'E. Lasser, *'Lit Theory' Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689 (1998); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 1325 (1995). Reliance on treatises by legal scholars is far more common in European systems and thus the materials of comparison and discussion themselves appear unfamiliar. For a recent example of the attitude of some U.S. judges to treatises and law review articles, see *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (noting in a tone of implicit criticism that "Justice Stevens' dissent relies upon a law review article for" a certain proposition).

⁴⁸ A LEXIS search for law review articles referring to the key language in Section 1 of the Canadian Charter ("demonstrably justified in a free and democratic society") from 1990 through 1997 yielded 69 articles in U.S. law journals. A LEXIS search of U.S. Supreme Court opinions for references to the Canadian Supreme Court yielded 21 cases (not counting one disbarment petition), of which seven were decided after 1980; only one of these, *Washington v. Glucksberg*, 521 U.S. 702 (1997), involved reference to the Canadian Supreme Court's decisions in a majority opinion on a constitutional issue.

⁴⁹ My sense is that in the last ten years, there has been an increase in U.S. judges' travel abroad to meet with their counterparts, and likewise a substantial influx in the other direction, fueled in some measure by the emergence of new regimes in Eastern and Central Europe and the constitutional revolution in South Africa. Review by the author of financial disclosure statements of the U.S. Supreme Court justices between 1992-97 (available on request through the Administrative Office of the U.S. courts) reveals that most of the justices reported reimbursement for some international travel for educational purposes during this time period, and several justices report regular international trips for educational purposes in the summer. As further evidence of increasing opportunities for judicial interchange, consider the following examples. In October, 1994, the U.S. Judicial Conference established a permanent Committee on International Judicial Relations, designed to review and assist exchange programs offered to representative foreign legal systems and their counterparts in the United States. See Reports of the Proceedings of the Judicial Conference of the United States, Judicial Conference Comm. on Int'l Judicial Relations 36, 60 (Sept. 20, 1993); see also Report of the Ad Hoc Comm. on Int'l Judicial Relations 4-5 (Sept. 1993) (in recommending that committee become permanent, notes interest in international judicial relations and judicial interest in "education on civil law systems of justice and on the interaction between federal jurisprudence and international treaties and conventions"). In June, 1995, the First Worldwide Common Law Judiciary Conference was held in Williamsburg, Virginia and Washington D.C. See *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, INT'L JUDICIAL OBSERVER, September, 1995, at 1. The second such conference was held in May, 1997, in Washington, D.C., and included U.S. federal judges and representatives from ten common law nations. See *Judges from Ten Common Law Countries Meet in Washington for Five Day Conference*, INT'L JUDICIAL OBSERVER, June, 1997, at 1. In October, 1995, the Organization of Supreme Courts of the Americas was created as a

Yet, accessibility and interest alone do not fully explain the ambivalence about looking to other constitutional systems for illumination of shared constitutional problems. Other divides, and reasons for caution in borrowing constitutional ideas from one system to another, are likely to remain. The differences between the U.S. Constitution and the constitutions of other western democracies are substantial, not only in the organization of the court systems that resolve constitutional questions, but also in the relatively unusual nature of the U.S. "presidential" system of allocating executive and legislative power. The interplay between these allocations of power and the system of federalism in the United States makes analogies to any of the other major constitutional systems complex and difficult. And differences in history, culture, population composition and distribution, political parties and voting systems, further and substantially complicate the process even of understanding the operation of other constitutional systems, let alone "borrowing" from them.

One difficulty in using comparative constitutional study to identify areas for potential "borrowing" is in determining when foreign constitutional law reflects alternative ways of understanding familiar concepts and problems, such as due process of law, or enumerated and limited powers, that give rise to interpretive questions. Comparative study can yield insights into the sense of "false necessity" internal to one legal system. As Justice Breyer argued in *Printz v. United States*,⁵⁰ given that some countries find it important to safeguard the right of sub-national units to administer national law, it is hard to conclude that, in order to have a successful and continuing federal division of powers, a national government must be prohibited from requiring sub-national units to do so. At these moments of possible insight, however, one is faced with the harder problem of distinguishing *false necessities* for a given constitutional system from aspects of the system that may be *true necessities* in light of the (some would say inevitable) interdependencies of the parts of the whole.⁵¹ For example, had Justice Scalia responded on the merits to Justice Breyer's reference to the structure of other federal systems, he might have argued that other differences between German and U.S. federalisms preclude reliance on Germany's emphasis on the *länder* administration of federal law in determining what the U.S. rule should be. The symbolic meaning of sub-national administration of federal law in Germany

permanent institutional link between the judiciaries of the Americas, with a focus on judicial education. See *Justices, Judges from Across Western Hemisphere Assemble, Create Charter for New Organization of Supreme Courts*, INT'L JUDICIAL OBSERVER, January, 1997, at 1. And the Fourth International Judicial Conferences for Justices of Supreme Courts and Constitutional Courts was held in 1996 at the Federal Judicial Center in Washington, D.C. See *Major Int'l Jud. Conf. to Meet in Washinton*, INT'L JUD. OBSERVER, Sept. 1996, at 1.

⁵⁰ See 521 U.S. 898, 976-78 (1997) (Breyer, J. dissenting).

⁵¹ For a thoughtful theoretical elaboration, see Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998).

differs substantially from that in the United States.⁵² So, too, do the mechanisms for *länder* influence in the national legislative process: members of the *länder* governments sit in the Bundesrat to exercise constitutionally-secured and judicially-enforceable political powers over legislation that the *länder* will then have to administer;⁵³ this power differs substantially from the less direct influences state governments have upon the U.S. Congress and may be a structural protection against undue burdens of administration in Germany that is lacking in the U.S constitutional system.⁵⁴

A final obstacle to constitutional borrowing may be worth noting, one that is reflected in the self-consciously normative mode of analysis found in many Canadian and German decisions. Perhaps because they are far more recently adopted, decisions about these constitutions are often less concerned with original intentions than some of the current decisions of the U.S. Supreme Court.⁵⁵ German constitutional court decisions often begin their reasoning with a basic, fundamental norm, not particularly tied to a specific constitutional text, and proceed in their reasoning from the abstract principle to the de-

⁵² In Germany subnational administration of federal laws is understood as one of the rights of the *Länder* and as part of a relationship of trust among the federal and subnational governments; in the United States, it is perceived as a federal imposition on the states. See sources cited *infra* note 53.

⁵³ See generally DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 69-75, 82-83, 96-102 (2d ed. 1997); DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 61-66 (1994). Note that unlike members of the U.S. Senate, who are popularly elected to that position, the members of the Bundesrat are representatives of the *länder* governments. The German Basic Law also contemplates "financial equalization" laws (with the consent of the Bundesrat), designed to "ensure a reasonable equalization of the financial disparity of the *länder*, due account being taken of the financial capacity and requirements of the municipalities . . ." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, Art. 107 (d) (Official translation revised March 1995). The Basic Law specifies that eligible *Länder* are those "whose per capita revenue from Land taxes and from income and corporation tax is below the average of all the *Länder* combined." *Id.* at Art. 107(1). These features, as well, may affect evaluation of the significance of the role of *länder* administration of federal law in Germany.

⁵⁴ In light of distinctive features of each system, similar questions could be raised about the relevance of Canadian or Australian federalism decisions. For example, in neither Australia nor Canada did the states or provinces (at least through mid century) preserve as much autonomy and power to raise their own taxes as did those of the United States, but rather relied on negotiated payments from the federal government to provide the subnational units with real budgets. See generally JOHNSTON, *supra* note 46, at 119-57. There may be reciprocal relationships between greater national power over taxes and more restrictive interpretations of regulatory powers that ought to caution against ready borrowing of doctrine concerning the latter in a system that has preserved more fiscal autonomy to its subnational units.

⁵⁵ The obvious connection between chronology and originalist interpretation is that the farther away from original drafting one is, the less consensus, the less in the way of shared understandings will exist about what was and was not meant, and the more there will be to argue about. For elaboration of this, and other less obvious connections, see Eivind Smith, *Introduction to CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* (Eivind Smith, ed. 1995) and other essays in this collection, especially those by Francis Delpérée, Frank Michelman, and Michel Troper.

cision at hand.⁵⁶ U.S. constitutional decisions are more likely to begin with a precedent, or a statement of facts.⁵⁷

We in the United States are in a long-continuing period of unease over the Court's authority as an institution to assert bold principles or normative values. Those constitutional courts that speak and interpret on behalf of younger constitutional orders, however, may feel themselves to be speaking to a different generation of constitutional problems than the U.S. Court faces. For one thing, the judicial review functions of newer constitutional courts are often expressly provided for in their constitutional documents. The interpretive difficulties for a court faced with an old and seldom-amended document differ from those of constitutional courts populated by persons for whom the drafting of the basic law is within their personal memories, or those of their immediate teachers.⁵⁸ In societies with newer constitutions, there may be broader areas of consensus, born of knowledge of the process of constitution-making, that function to constrain, or to legitimize decisions in ways not available to the U.S. Court. Nonetheless, as the Canadian experience demonstrates, issues of the legitimacy and the scope of judicial activism and of deference to legislative judgments can emerge early even in new constitutional systems.⁵⁹ These controversies illuminate, if nothing else, the tensions between democratic self-government, on the one hand, and judicially-enforced adherence to constitutional norms, on the other, that have concerned U.S. constitutionalists.⁶⁰

⁵⁶ See, e.g., 1975 German Abortion Decision, translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 349 (1989) (analyzing abortion issue in light of fundamental value of protection of human life). Cf. *Roe v. Wade*, 410 U.S. 113 (1973) (analyzing abortion in light of history, practice and precedent).

⁵⁷ In part this may be due to the common law feature of constitutional adjudication so aptly described in David Strauss, *Common Law Constitutional Adjudication*, 63 U. CHI. L. REV. 877 (1996).

⁵⁸ See JOHNSTON, *supra* note 46, at 239 (arguing that earlier interpretations of the BNA by the Canadian Supreme Court were more receptive to national power than those of the Privy Council because "members of the early Court were judges for whom federation had been a personal experience, and they knew well the purposes for which the union had been consummated"). See also Patrick J. Monahan, *The Charter Then and Now*, in *PROTECTING RIGHTS AND FREEDOMS* 105 (Philip Bryden, et. al., eds., 1994) (arguing that public debate and lobbying over the Canadian Charter in the period 1980-82 had effect of sending message to judges to take the document seriously as a constraint on legislative action).

⁵⁹ Compare DON STUART, *CHARTER JUSTICE IN CANADIAN CRIMINAL LAW* 18-19 (2d ed. 1996) (criticizing inconsistency and laxness of the Canadian Court's recent decisions applying the proportionality test as a cause for concern) and Jamie Cameron, *The Past, Present, and Future of Expressive Freedom Under the Charter*, 35 *OSGOODE HALL L.J.* 1, 55, 67 (1997) (criticizing subjectivity of Canadian Court's section 1 analysis in free expression cases and arguing for a return to fundamental assumption of *Oakes* that any infringement of Charter rights must be taken seriously under Section 1) with Monahan, *supra* note 58, at 117 (praising the Court's approach as deferential and "resist[ing] the temptation to install itself as a kind of 'super legislature'") and Pierre Blache, *The Criteria of Justification under Oakes: Too Much Severity Generated Through Formalism*, 20 *MANITOBA L.J.* 437, 438, 450 (1991) (arguing that the Court has engaged in "prudent revisionism" of the *Oakes* test and is better in moving towards more open balancing).

⁶⁰ See David Beatty, *Law and Politics*, 44 *AM. J. COMP. L.* 131 (1996) (arguing that constitu-

B. *Why we should abandon ambivalence
as to the study of comparative constitutional materials*

Having said all this, let me suggest one reason, among many others,⁶¹ that we should not be ambivalent about learning more about constitutional decisions and practices outside the United States – whatever use we may or may not make of this knowledge.⁶²

Comparison is inevitable. We cannot help but draw on comparisons with other systems in understanding and giving meaning to our own. At least in the late twentieth century, news and communication media, as well as professional journals, bombard those who hold power or authority in the United States legal community with information about what is happening not only in the United States, but in many countries around the world and in international legal regimes. When Justice Scalia asserts that U.S. federalism is uniquely American, he is making an implicit comparison to other systems and asserting that there is no other system like that of the United States. When the majority in *Fong Yue Ting v. United States* invoked the universal practice of sovereigns, as well as when the dissenters invoked the irrelevance of foreign practice to U.S. constitutional law, each was making an implicit comparison.⁶³ We cannot wholly prevent ourselves from being influenced by what we think we know about other countries – in thinking about how rigorous are the standards for impeachment, whether racial distinctions by the government are ever permitted, or whether hate speech should be criminally punished or judicially protected⁶⁴ – what we think we know about the world forms part of the

tional scholars in many countries perceive a tension between popular sovereignty and judicial enforcement of entrenched rights). Some qualified praise emerges in the Canadian literature for the Court's steering a middle course between these two (at times) contradictory values. See, e.g., Andrée LaJoie and Henry Quillinan, *The Supreme Court Judges' Views of the Role of the Courts in the Application of the Charter*, in *PROTECTING RIGHTS AND FREEDOMS*, *supra* note 58, at 101 (suggesting that the role of the Chief Judge in applying proportionality review under section 1 of Charter is to maintain formal appearance of unified, objective approach to Charter interpretation even in the face of different interpretations of facts).

⁶¹ See Mark Tushnet, *The Possibility of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999) for a discussion of a number of other possible benefits of comparative constitutional study.

⁶² The "we" here refers to those who purport to speak with authority or power on the character and content of U.S. constitutional law (whether judges, legislators, lawyers, teachers, students or citizens).

⁶³ Compare *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (implicitly comparing the powers of other nations by holding that it is an "inherent and inalienable right of every sovereign and independent nation" to exclude or expel aliens) *with id.* at 737 (Brewer, J. dissenting) ("governments of other nations have elastic powers – ours is fixed and bounded by a written constitution") and *id.* at 757-58 (Field, J. dissenting) (arguing that the United States "takes nothing" from the cruel and barbaric practices of Europe).

⁶⁴ To elaborate one of these examples: In the recent controversy concerning the possible impeachment of President Clinton, some have advanced arguments that part of the reason why the standard for impeachment needs to be very high is because the U.S. system is not one of

lattice work of assumptions and beliefs that constitute, "our traditions," "common sense," or "contemporary understandings".⁶⁵

My point in referring to "what we think we know" is that we implicitly think we know many things about what is "necessary" to make the U.S. Constitution work the way we think it "should" or "was supposed to" and some of the assumptions on which this knowledge rests have to do with what we are and are not supposed to be. A basic and still valuable lesson from Freud is that becoming aware of our own experiences, assumptions and beliefs – making what is obscure visible and what is latent manifest – enables us to use our rational, analytical skills to make better sense out of what we should do in the future.⁶⁶ Whether or not we conclude on reasoned reflection that practices elsewhere suggest answers for U.S. constitutional questions, we are more likely to be able to monitor and control how much our assumptions about foreign views and practices influence our thinking if we become aware of those assumptions – and this is a benefit of actually studying comparative constitutional law.

In sum, comparison is inevitable. In formulating answers to U.S. constitutional questions, an implicit part of our arguing about and deciding these questions has to do with assumptions of what U.S. constitutionalism is about and what it requires; and this analysis involves an implicit comparison with other forms of constitutionalism. If comparison is (or is becoming) inevitable, then comparison should be conscious, knowing, well-informed, and reasoned.⁶⁷

parliamentary governance. The comparison may be illuminating, but it is also more complex than may at first appear. The first level of analysis would note that in a parliamentary system, if the Prime Minister does not survive a confidence vote, new elections are required and the people then have the chance to express their will at the polls. Under the U.S. presidential system, by contrast, elections are held at the end of fixed 4 year terms, which the elected President serves out unless he is found to have committed an impeachable offense. If the President is removed from office by impeachment, there are no new elections held but the office is taken over by someone elected or appointed to a different position. The anti-democratic possibilities of impeachment, therefore, argue for a high standard for defining impeachable offenses. Second, note that in a parliamentary system with two or three strong political parties, the Prime Minister will have the support of a majority party in the elected assembly, and thus may be less likely to develop the kind of conflict with that body that is more common in a presidential system, where a President may be from one party and the Congress dominated by another. If a President has lost the confidence of a majority of the Congress and the people, without some means to remove him from office, the country could be hobbled in its governance. Some might argue, then, that the standard of impeachment should not be set at so high a level as to make impossible effective governance. Third, note the importance of understanding the consequences of different structures of executive-legislative relations and the number and nature of political parties active on the national scene. Within the limits of a footnote the point is only that comparisons can be illuminating but are very complex.

⁶⁵ For an introduction to the literature on constitutional interpretation, see GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 37-46, 785-95 (3d ed., 1996).

⁶⁶ See ERNEST WALLWORK, *PSYCHOANALYSIS AND ETHICS* 64-65 (1991) ("Freud's therapeutic goal was to make . . . unconscious hidden meanings 'articulate'" to increase patient's freedom).

⁶⁷ Thus, as noted earlier, when Justice Frankfurter invoked the similarity in federal structure of Canada and Australia to the United States, he may well have been in error. See *supra* notes 4 and 46 (discussing Justice Frankfurter's reliance on Australian and Canadian decisions on in-

III. PROPORTIONALITY AND COMPARATIVE CONSTITUTIONAL LAW

A brief look at the concept of “proportionality” in constitutional law, both outside the United States and in recent U.S. Supreme Court opinions, will illuminate some of the benefits (and limitations) of comparative constitutional learning. Since 1994, the U.S. Supreme Court has articulated a “proportionality” test in two different constitutional fields.⁶⁸ Most recently, in *Flores*, the Court invoked proportionality to measure the constitutionality of exercises of Congress’s Section 5 powers under the Fourteenth Amendment.⁶⁹ Specifically, the Court there held that Congress’s use of its remedial powers under Section 5 must be proportional to or congruent with the constitutional harm sought to be remedied, and held that a recently-enacted federal statute was unconstitutional because it failed the test of proportionality. While no reference is made to support the Court’s invocation of considerations of proportionality, no Justice explicitly dissented from the majority’s use of the concept.⁷⁰ Yet, the most immediate scholarly responses to the *Flores* proportionality test were negative, treating *Flores*’ invocation of “proportionality” as a novel, indeterminate and unwise innovation.⁷¹ This response, from a perspec-

tergovernmental tax issues and the possible inaccuracy of his assumption of similarity). Moreover, as I discuss below, the Breyer-Scalia interchange in *Printz v. United States*, 521 U.S. 898 (1997) suggests the importance of broad knowledge of other systems, as well as of their particular structures, for evaluating the “transplantability” of practices from elsewhere; it also suggests the importance of understanding the context of which such practices are always only a part. See *supra* notes 52-54 and accompanying text.

⁶⁸ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that exercises of Congress’s power under Section 5 of the Fourteenth Amendment must be proportional to constitutional violations sought to be prevented or remedied); *Dolan v. City of Tigard*, 512 U.S. 374, 388-91 (1994) (holding that, where the nature and costs of a condition for permission to make changes to real property are not roughly proportional to the nature and impact of the change proposed, an unconstitutional “taking” of property may be found).

⁶⁹ See *Flores*, 521 U.S. at 518. Section 5 authorizes Congress by all appropriate measures to enforce the provisions of Section 1 of the Fourteenth Amendment, including its guarantee of equal protection and due process. Acting under Section 5, Congress has, for example, enacted the Voting Rights Act of 1965, upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). For discussion of the statute at issue in *Flores*, see *infra* text accompanying notes 184-188.

⁷⁰ See *Flores*, 521 U.S. at 544 (O’Connor, J., dissenting) (agreeing with the majority that scope of Congress’s Section 5 powers turn on congruence and proportionality between injury to be prevented or remedied and means adopted to that end, but arguing that *Smith v. Employment Division*, 494 U.S. 872 (1990), was wrongly decided); see *id.* at 565 (Souter, J., dissenting) (arguing that, in light of doubts about the *Smith*, the case should be reargued). The closest any member of the Court came to questioning the proportionality test, albeit implicitly, was a short, cryptic dissenting opinion by Justice Breyer. See *id.* at 566 (Breyer, J., dissenting) (noting that he joined all but one paragraph of Justice O’Connor’s dissent — the paragraph summarized in the parenthetical above — and reserving his own views on the proper method of Section 5 analysis).

⁷¹ See David Cole, *The Value of Seeing Things Differently*, 1997 SUP. CT. REV. 31, 47 (noting that proportionality standards “provide little if any principled guidance”); John T. Noonan, Jr., *Religious Liberty at Stake*, 84 VA. L. REV. 459, 470-71 (1998) (criticizing proportionality test as “extraordinary,” unsupported by precedent and inconsistent with *McCulloch v. Maryland*, 17 U.S. (4

tive internal to U.S. constitutional decisions, is perhaps not surprising.⁷² U.S. constitutional law does not ordinarily and explicitly resort to the idea of proportionality as a measure of constitutionality – even in the Eighth Amendment area,⁷³ where the constitutional text seems to call for application of the idea of proportionality,⁷⁴ an idea that was developed in early legal writings about criminal punishments.⁷⁵ Professor Stuntz has recently suggested that the failure to develop proportionality analysis in constitutional review of criminal law issues is due to the fact that such review involves decisions of inherently political, rather than legal issues:

There is no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis. Whether propor-

Wheat) 316, 421 (1819), which should serve as a guide to Congress's general powers). For other critiques of *Flores*' proportionality standard, see Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM & MARY L. REV. 743, 770-71 (1998); Michael W. McConnell, *Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 166-67 (1997) [hereinafter McConnell, *Institutions and Interpretation*]. For more favorable treatment of *Flores*' proportionality analysis, see, e.g., David P. Currie, *RFRA*, 39 WM & MARY L. REV. 637, 640 (1998) ("In demanding a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end, the Court in *Flores* sets forth an attractive test that it would no longer blindly accept untenable congressional pretenses that a particular measure was 'appropriate' to enforce the Civil War amendments or 'necessary and proper' to protect interstate and foreign commerce") (internal citation omitted); Marci Hamilton, *City of Boerne v. Flores*, *A Landmark for Structural Analysis*, 39 WM & MARY L. REV. 699, 712-14 (1998).

⁷² Nor is it surprising that scholars have noted the apparently increased rigor of proportionality review of congressional action as compared with earlier test of mere "rationality," and disagreed whether this is a good thing. See, e.g., McConnell, *Institutions and Interpretation*, *supra* note 71, at 166-67 (describing proportionality and congruence as more stringent than approach epitomized in *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966)); Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM & MARY L. REV. 665, 677 n.52 (1998) ("The *Flores* majority . . . presumed . . . that Congress enacted RFRA with the legitimate aim of enforcing the Free Exercise clause as interpreted in *Smith* and employed the proportionality test to determine whether the means – imposing the compelling interest standard on the states – were properly related to it."); Hamilton, *supra* note 71, at 712-14 (approving proportionality test as one designed to make Congress perform its duties reasonably well); Laycock, *supra* note 71, at 770-71 (criticizing proportionality test for allowing judicial "second-guessing of [questions of] degree in the interpretation of its delegated powers").

⁷³ See *Harmelin v. Michigan*, 501 U.S. 957 (1991) ("We conclude [that] the Eighth Amendment contains no proportionality guarantee.").

⁷⁴ See William Stuntz, *Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 72-73 (1997) ("The prohibition of cruel and unusual punishments could plausibly be read to imply a proportionality principle for sentencing . . .").

⁷⁵ See, e.g., BECCARIA, OF CRIMES AND PUNISHMENTS SECTION 23 (1764), translated by Jane Grugson (1996) (asserting that punishments should be graded to correspond with the gravity of the crime); see also H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 14-15 (1968) (arguing a utilitarian view that punishment should be distributed, in part, in proportion to the severity of the offense). Early U.S. state constitutions included provisions requiring that penalties be "proportioned to the nature of the offense." See, e.g., N.H. CONST. of 1783 (cited in ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 67 (1976)).

tionality review [of criminal sentences] is lodged in appellate or trial courts, the only way to do it is to do it, to decide that this sentence is too great but not that one. There is no metric for determining right answers, no set of analytical tools that defines what a given sentence ought to be Similarly, [with respect to the definition of substantive crimes] heightened mens rea requirements for overbroad crimes beg the question of which crimes are overbroad. Special culpability rules for, say, mail fraud would inevitably rest on a judicial judgment that mail fraud is badly defined, that Congress criminalized more than it should have.⁷⁶

Thus, Professor Stuntz suggests, review for proportionality would “amount[] not just to open-ended judicial regulation . . . but also to *arbitrary* judicial regulation, regulation that produces outcomes untethered to any definable legal principle.”⁷⁷

What is striking here is the degree to which, in the United States, proportionality itself is not seen as a “definable legal principle.”⁷⁸ Yet, in Canada, whose court decisions are readily available in English,⁷⁹ proportionality is a basic tool for analyzing the constitutionality of measures claimed to violate individual rights.⁸⁰ Likewise, proportionality is a widespread concept in European law.⁸¹ The idea of proportionality is one that inheres in many conceptions of justice and just lawmaking,⁸² and is embodied in some of the articulated “means-

⁷⁶ See Stuntz, *supra* note 74, at 73.

⁷⁷ *Id.*; see also Noonan, *supra* note 71, at 470-71 (“Proportion is not a criterion. It is hard to see how proportion would work as a criterion for civil legislation. It is difficult to see how proportion worked in *Boerne*.”). *But cf.* Stone v. Powell, 428 U.S. 465, 490 (1976) (arguing that disparity between Fourth Amendment errors of police and windfall to guilty defendant of excluding evidence “is contrary to the idea of proportionality that is essential to the concept of justice”). Note that *Flores* is not the first use of “proportionality” as a measure of legislative power in the 1990s. See, Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that standard of “rough proportionality” between the costs of the activity for which a permit is sought, and the benefits conferred by the permit should be used to determine whether a regulatory condition constitutes a governmental “taking” requiring just compensation).

⁷⁸ For a very different evaluation of proportionality principles in the public law of Germany, France and the European Union, see NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY I (1996) (“Proportionality embodies a basic concept of fairness which has strengthened the protection of individual rights at both the national and supranational level.”); see also DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE (1995) (arguing that all constitutional principles, transnationally, can be understood as elaboration of the core principles of rationality and proportionality).

⁷⁹ Canadian cases can be accessed through LEXIS under the library name “Canada.”

⁸⁰ See *infra* text accompanying notes 88-105.

⁸¹ See EMILIOU, *supra* note 78, at 134 (stating that between 1955 and late 1994, “proportionality” had been argued by litigants or invoked by the European Court of Justice in over 500 hundred cases).

⁸² See *supra* note 75. For state constitutions that continue to require that penalties be proportional to the nature of the offense, see IND. CONST. art. I, § 16 (Bill of Rights) (1998); ME. CONST. art. I, § 9 (1998); NEB. CONST. art. I, § 15 (1997); N.H. CONST. pt I, art. 18 (1997); OREGON CONST. art. I, § 16 (1997).

ends" tests deployed in U.S. constitutional law.⁸³

Proportionality tests offer both advantages and risks that can be analyzed, in part, on the basis of comparative experience, which has largely been in the arena of individual rights. In Section A below, I briefly describe Canada's development of the concept of proportionality in its constitutional law and compare a Canadian and a U.S. case on "hate speech" to illuminate salient differences between the Canadian "proportionality" test and the more categorical form of constitutional analysis employed here. Although there is much that is attractive about the Canadian analyses, thoughtful reflection suggests that the prospect of a successful "transplant" of the Canadian approach to the United States is uncertain at best.

Section B then sets forth in more detail *Flores*' use of proportionality, and suggests that proportionality as a tool for resolving federalism-based challenges to federal power should be understood somewhat differently than "proportionality" analysis where individual constitutional rights are at stake. In the federalism arena, "proportionality" tests may have the more limited role of being a surrogate for identifying the validity of congressional purpose and containing an otherwise uncontrollable federal power to obliterate state governments' abilities to function as independent sources of power. Comparative experience also suggest, however, that in the United States such federalism-based forms of review of national action should be conducted only with a high degree of deference to legislative findings and power. Whether readers agree with this conclusion or not, I hope also to show that the U.S. Supreme Court's constitutional decisions, and analyses of them, would be improved if judges, lawyers and scholars were more widely aware of the tools and techniques of other constitutional courts.

⁸³ Rigorous versions of proportionality tests bear some resemblance to the requirement of "compelling state interest" tests in equal protection analysis, *see, e.g.*, *United States v. Paradise*, 480 U.S. 149 (1987) (upholding race-conscious remedial order that fifty percent of promotions go to black officers, on grounds that the remedy was "narrowly tailored" to serve a "compelling government purpose" in light of the ineffectiveness of alternatives, flexibility and limited duration of the relief, and its limited adverse impact on third parties), and the standard for upholding discriminatory state regulation of commerce, *see Maine v. Taylor*, 477 U.S. 131 (1986) (upholding facially discriminatory ban on imported live baitfish because danger to native fish populations was genuine and there was no less discriminatory alternative for screening potentially diseased baitfish). *See also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (invalidating as unduly burdensome on First Amendment rights a state law requiring independent candidates to file for November ballot in March and stating that court must determine "legitimacy and strength" of state's asserted justifications and "must also consider the extent to which those [state] interests make it necessary to burden" plaintiffs' rights). The "narrow tailoring" requirement is at times articulated as part of the Canadian proportionality test, embodying the idea that when a fundamentally important right is at issue, intrusions on the exercise of that right must be proportioned both to the end being served and the harm being caused. *See, e.g.*, *Thomson Newspapers v. Canada*, 1998 DLR Lexis 399 (Supreme Court May 19, 1998) (finding unconstitutional a law requiring a news blackout of reporting on *any* opinion polls within three days of election as not narrowly tailored to achieve purpose of preventing reporting of *new* polls without time for reflection and response).

A. *Canada's Constitution and the Oakes Test:
Proportionality as a Principle In Protecting Individual Rights*

Canada adopted a rights-protecting constitution in 1982, The Canadian Charter of Rights and Freedoms.⁸⁴ The Charter begins with a section that is both declaratory and limiting of the enforceability of its subsequent provisions: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁸⁵ The Canadian Supreme Court has construed this provision to mean that *even if* a law is found to violate some particular right set forth in the Charter, the law can nonetheless be upheld if it is "demonstrably justified in a free and democratic society."⁸⁶ Thus Charter claims typically are analyzed with a generous interpretation of what the rights-protecting provisions cover;⁸⁷ if an infringement of one of those provisions is found, then the more important analysis often occurs under the rubric of this Section 1 standard.

In analyzing this standard, the Canadian Supreme Court ("Canadian Court") has held that two inquiries must be made: first, whether the purpose of the governmental intrusion on the freedom or right is legitimate and of sufficient importance to justifying limiting a right;⁸⁸ second, whether the means chosen are proportional to the purpose – (i) are they rationally connected to the objective, (ii) do they impair the protected rights as little as possible,⁸⁹ and (iii) are the effects of

⁸⁴ See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

⁸⁵ *Id.* at § 1.

⁸⁶ See *R. v. Oakes* [1986] 1 S.C.R. 103, 114.

⁸⁷ See, e.g., *Prostitution Reference Case* [1990] 1 S.C.R. 1123 (holding that solicitation of prostitution is a form of freedom of expression under Charter Section 2(b) infringed upon by a criminal prohibition of soliciting, yet upholding the prohibition as reasonable and justified under Section 1); *R. v. Skinner* [1990] 1 S.C.R. 1235 (same). For a critique of this kind of approach, see Peter W. Hogg, *Interpreting the Charter of Rights: Generosity and Justification*, 28 OSGOODE HALL L. J. 817 (1990) (arguing that a broad interpretation of rights cannot coexist with stringent standards of justification and favoring narrow rights interpretation) [hereinafter Hogg, *Interpreting the Charter of Rights*].

⁸⁸ As Justice Dickson explained in *Oakes*, 1 S.C.R. at 138, this "standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are *pressing and substantial* in a free and democratic society before it can be characterized as sufficiently important." (emphasis added).

⁸⁹ In *Oakes*, the Court used language that seemed to invite a "least restrictive alternative" standard of great severity. Critics noted how difficult it can be to meet that standard, given the creativity of courts and lawyers in finding such alternatives. Within the year, however, the apparent rigidity of the initial articulation was modulated in an opinion joined by the author of *Oakes*. See *R. v. Edward Books and Art, Ltd.* [1986] 2 S.C.R. 713, 772 (characterizing the inquiry as whether it impairs freedoms as little as reasonably possible); Pamela A. Chapman, *The Politics of Judging: Section 1 of the Charter of Rights and Freedoms*, 24 OSGOODE HALL L. J. 867, 886, 889-90 (1987) (describing *Edwards Books* as a substantial softening of the *Oakes* standard).

the measure generally proportional to the objective.⁹⁰ These are the inquiries of the so-called *Oakes* test.

This test of proportionality is used in a wide range of Canadian constitutional adjudications that take place under a constitutional delegation to the courts essentially to strike a balance between the protection of Charter-identified rights and freedoms, on the one hand, and the “demonstrably justified” claims of the government consistent with a “free” and “democratic” society, on the other.⁹¹ Section 1’s provisions were fairly widely understood to invite the Court to make “moral and political” inquiries and judgments in resolving constitutional questions.⁹²

A significant number of cases in Canada apply the *Oakes* test of proportionality to determine whether to uphold a law even though it trenches in some way on basic rights and freedoms. The test does not seem to be particularly associated with outcomes in favor of or against the government position, unlike the “compelling interest” test of U.S. equal protection jurisprudence. Some famous cases, like *Oakes* itself (dealing with the presumption of innocence), the Canadian abortion decision,⁹³ and a recent decision concerning a national ban on tobacco advertising,⁹⁴ have struck down laws that the government argued were sustainable under the proportionality test. In other areas, the Canadian Court has sustained challenged statutes under the *Oakes* test, including the hate speech statute challenged in *Keegstra*,⁹⁵ a mandatory retirement age,⁹⁶ a ban on advertising directed at children,⁹⁷ and a “secular” one-day-a-week closing law.⁹⁸

The *Oakes* test has been both praised and deplored by Canadian constitutional scholars.⁹⁹ Most scholars agree that the test has not

⁹⁰ See *Oakes* [1986] 1 S.C.R. at 139. The test was foreshadowed in a brief paragraph in Justice Dickson’s opinion in *R. v. Big M. Drug Mart* [1985] 1 S.C.R. 295, but was fully articulated in *Oakes*. Justice Dickson also noted that applying the proportionality test “will vary depending on the circumstances,” and that “in each case courts will be required to balance the interests of society with those of individuals and groups.” *Oakes*, 1 S.C.R. at 138-39.

⁹¹ See *Oakes*, 1 S.C.R. at 138-39.

⁹² See William E. Conklin, *Interpreting and Applying the Limitations Clause: An Analysis of Section 1*, 1982, 4 SUP. CT. L. REV. 75, 75, 87 (1982).

⁹³ See *R. v. Morgentaler* [1988] 1 S.C.R. 30.

⁹⁴ See *RJR MacDonald, Inc. v. Canada* [1995] 3 S.C.R. 199.

⁹⁵ See *R. v. Keegstra* [1990] 3 S.C.R. 697. See also *R. v. Butler* [1992] 1 S.C.R. 452, 482, 494, 509 (sustaining pornography ban on publication whose “dominant characteristic . . . is the undue exploitation of sex”).

⁹⁶ See *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 (finding that mandatory retirement ages were discriminatory under Section 15 but justified under Section 1).

⁹⁷ See *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927 (upholding, under Section 1, a ban on advertising directed at children under 13, despite its infringement upon Section 2 rights).

⁹⁸ See *R. v. Edwards Books and Art* [1986] 2 S.C.R. 573, 713 (upholding Sunday-closing law under Section 1, despite fact that it limited freedom of religion).

⁹⁹ Compare STUART, *supra* note 59, at 18 (criticizing Court’s inconsistency); Cameron, *supra* note 59, at 5 (criticizing Court’s subjectivity); and Christopher M. Dassios & Clifton P. Prophet, *Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada*, 15 ADVOCS’ Q. 289, 306 (1993) (arguing that review of proportionality of ef-

been deployed with the stringency suggested by its earliest emergence in *Oakes*.¹⁰⁰ Notably, the “minimal impairment” test has not been applied as a “least restrictive means” standard, but rather, as a more flexible analysis of whether the degree of impairment of protected rights is justifiable, considering the importance of the right, the degree of intrusion, and the nature of the asserted government interest.¹⁰¹ Yet, Canadian scholars are divided on whether to view this development as the court’s “fundamentally sound . . . moderation,”¹⁰² “prudential revisionism,”¹⁰³ or “stunning inconsistency”¹⁰⁴ – in short, whether it is a good or a bad thing.¹⁰⁵

Under *Oakes*’ proportionality test, inquiry begins with the Court’s deciding what the purpose of challenged legislation is and whether that purpose is legitimate and sufficiently important.¹⁰⁶ This is not a *non-legal* decision; indeed, it is similar to ones that U.S. constitutional cases frequently address.¹⁰⁷ Some of the greatest arenas of controversy

facts and objectives “pushes at the margins of the judiciary’s institutional role” and calls into question legitimacy of constitutional review) with Martha Jackman, *Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter*, 34 OSGOODE HALL L. J. 661, 674 (1996) (praising majority and dissenting opinions in *RJR-MacDonald* commercial speech case for addressing democratic legitimacy of rights-infringing legislation); Monahan, *supra* note 58, at 107, 114 (praising moderation of court and its deference to legislative decisions); Andrew Lokan, *The Rise and Fall of Doctrine Under Section 1 of the Charter*, 24 OTTAWA L. REV. 163, 190-92 (1992) (praising the Canadian Court’s abandonment of formal doctrine in favor of a more categorical U.S.-style approach producing a more coherent approach that exposes the role of normative judgments in judicial decision making) and Blache, *supra* note 59, at 450 (praising court for move toward more open balancing).

¹⁰⁰ See, e.g., STUART, *supra* note 59, at 18; Monahan, *supra* note 58, at 107-114.

¹⁰¹ See, e.g., R. v. Keegstra [1990] 3 S.C.R. 697 discussed *infra* text accompanying notes 118-151.

¹⁰² Monahan, *supra* note 58, at 107, 118.

¹⁰³ Blache, *supra* note 59, at 438.

¹⁰⁴ STUART, *supra* note 59, at 18.

¹⁰⁵ Some argue that the third criteria (proportionality of effects) itself never matters under the *Oakes* test, because prior criteria (sufficiently important purpose, rational connection and minimal impairments) preclude it from having independent force. See, e.g., HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 882-83; Lokan, *supra* note 99, at 172. The Canadian cases suggest, however, that the overarching concept of proportionality between the means used to achieve a legislative purpose, and both their positive effects in achieving that purpose and their negative effects on protected rights, has become an important part of the overall application of the *Oakes* test. This is well-illustrated in Dickson’s opinion in *Keegstra*, discussed *infra* text accompanying notes 127-151.

¹⁰⁶ See *Oakes*, at 138 (objective must be “pressing and substantial in a free and democratic society”).

¹⁰⁷ Compare, for instance, *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (holding that a state has a legitimate interest in safety served by differential scheme for taxing natural gas products) with *Romer v. Evans*, 517 U.S. 620 (1996) (noting that the “desire to harm a politically unpopular group” cannot constitute a legitimate governmental interest). This is not to say that the Court finds these judgments easy, or always agrees on the methodology for identifying the purpose of a challenged law. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240-41 (1976) (in holding that the Equal Protection Clause does not condemn neutrally-motivated action that has a disproportionate impact on racial minorities, Court notes that such disproportionate impact may be evidence of invidious purpose). Compare Justice Powell’s opinion in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-74 (1981), concluding that a purported safety regula-

concern the definition and evaluation of legislative objectives.¹⁰⁸ U.S. constitutional law requires, in some areas, definition of a statute's purpose, its legitimacy, and importance.¹⁰⁹ In this respect, both the U.S. and Canadian constitutional systems already address similar questions.

Moreover, both the U.S. and Canadian legal systems sometimes require their constitutional courts to examine the nature of the connection between the government purpose and the means chosen; likewise, both systems are open to the charge that the definition of purpose can be used to assure greater or lesser fit with the means chosen.¹¹⁰ While the language of "proportionality" is not generally used in the United States, the underlying questions – involving the degree of fit between the claimed objective and the means chosen, and a concern for whether the intrusion on rights or interests is excessive in relation to the purpose – are already an important part of some fields of U.S. constitutional law, especially equal protection,¹¹¹ and free speech.¹¹² The simplicity of the underlying idea of propor-

tion was unconstitutionally burdensome on interstate commerce, with Justice Brennan's concurring opinion, rejecting the purported safety justification as an after the fact rationalization. *See id.* at 679-87.

¹⁰⁸ Compare, for instance, Justice LaForest's view of the purpose of the law in *RJR MacDonald v. Canada* [1995] 3 S.C.R. 199, 272-73 (diminish tobacco consumption) with the prevailing justices' view (discourage new smokers from starting to smoke by "reducing advertising-related consumption"). *See id.* at 335-36 (McLachlin, J.). The narrower definition of the purpose led to a finding that a ban on all advertising was disproportional, since a ban on the type of advertising targeted at new smokers would suffice, and advertising directed at existing smokers and encouraging them to change brands would not rationally and proportionally relate to that more narrowly-defined goal. *See id.*

¹⁰⁹ *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 415, 447-53 (1996) (characterizing First Amendment cases disfavoring content-based regulation as concerned with improper government purpose). *See also* United States v. O'Brien, 391 U.S. 367, 376 (1968) (when speech and nonspeech elements combine in single course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (discussing evidence of state's impermissibly protectionist motive in dormant Commerce Clause constitutional challenge to apple-labeling law).

¹¹⁰ *See generally*, Note, *Invidious Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123, 137-38 (1972) (arguing that "it is always possible for a court to define the evil or the good at which legislation is aimed so as to make the statutory classification too broad or too narrow for achieving the purpose thus defined").

¹¹¹ *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 202 (1976) (finding that the minor statistical difference between drunk driving by young men and young women was too "tenuous [a] fit" to justify a different drinking age). *See generally* STONE ET. AL., *supra* note 65, at 567-68 (discussing means/ends nexus in equal protection analysis). On procedural due process, consider *Mathews v. Eldridge*, 424 U.S. 319, 332-50 (1976), which offered a balancing test to determine what procedures are required in administrative contexts, including the nature of the private interest to be affected, the risks of error and benefit of added procedures in reducing error, and the government interests in proceeding as it has been. One could conceive of *Mathews* as involving a decision that the procedures required by the Constitution are no more than are proportional to the interests at stake in light of the risks of error.

¹¹² *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989) (upholding requirement that performers use city-owned equipment in light of city's interest in noise control and

tionality in U.S. constitutional law may be obscured by the several doctrinal forms of multi-factored tests in which it is embodied.¹¹³

These basic similarities between U.S. and Canadian approaches suggest that differences in how analyses are conducted might usefully be examined – for what lawyers and judges may be able to “borrow” or “transplant”¹¹⁴ or for a better understanding of how the systems differ and of their possible *need* to differ. The Canadian proportionality cases differ interestingly from some current U.S. constitutional approaches in several respects. First, the Canadian Supreme Court provides more contextualized attention to the circumstances of the challenged enactment.¹¹⁵ Second, the Canadian Court’s analyses acknowledge a broader range of relevant, competing constitutional values. Third, the Canadian justices explicitly consider comparative sources.¹¹⁶ Finally, Canadian cases seem to reflect a greater connection between the articulated test and the decision-making process of

availability of other means of communication; regulation of time, place and manner of protected speech must be narrowly tailored but need not be least intrusive means; protected speech may not be burdened more than necessary to further legitimate government interest); *Central Hudson Gas and Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 565 (1980) (requiring that restrictions on commercial speech be no broader than necessary to accomplish state’s interest); *O’Brien*, 391 U.S. at 377 (upholding ban on draft card burning because government interest in maintaining effective draft was sufficiently important to justify incidental restrictions on First Amendment freedom of expressive conduct). See also 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 529-30 (1996) (O’Connor, J. concurring) (arguing that ban on advertising beer prices failed the “final prong” of *Central Hudson* because the ban “is more extensive than necessary to serve the State’s interest” and the “fit between Rhode Island’s method and [its] goal is not reasonable”). For one Canadian writer’s suggestion that the *Oakes* test is similar to *O’Brien*, see Lokan, *supra* note 99, at 174.

¹¹³ See also BEATTY, *supra* note 78, at 107 (arguing that all important doctrines of U.S. constitutional law concerning individual rights rely on standards of rationality and proportionality to conduct means-end and equaling analyses). Unlike Beatty, I do not claim that proportionality is a basic source of all constitutional doctrine, only that, even if the word itself is unfamiliar, the concept as it is used in the Canadian cases is not. For a critique of Beatty’s universalistic and approving approach to judicial enforcement of constitutional rights, see Richard F. Devlin, *Some Recent Developments in Canadian Constitutional Theory With Particular Reference to Beatty and Hutchinson*, 22 *QUEEN’S L. J.* 81 (1996); see also ALLAN HUTCHINSON, *WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS* 66-75 (1995) (criticizing Beatty’s faith in his own account of the Charter).

¹¹⁴ See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. PA. L. REV.* 1121, 1124 (1983) (describing the extent of “legal transplants” and arguing that “[b]orrowing from another system is the most common form of legal change”).

¹¹⁵ The so-called “contextual approach” is anticipated in *R. v. Oakes* [1986] 1 S.C.R. 103, 139 (Dickson, C.J.) (“the nature of the proportionality test will vary depending on the circumstances”) and was more fully developed by Justice Wilson in her concurrence *Edmonton Journal v. Alberta* [A.G.] [1989] 2 S.C.R. 1326, 1353, 1355-56 and by Justice McLachlin in *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232, 246-47. It was adopted by the Canadian Court in *R. v. Keegstra* [1990] 3 S.C.R. 697, 737, 760-61 (concluding, *inter alia*, that the Section 1 analysis of a limit on Section 2(b) protected freedom of expression “cannot ignore the nature of the expressive activity which the state seeks to restrict” and noting the “importance of context in evaluating expressive activity under” Section 1).

¹¹⁶ See, e.g., *R. v. Keegstra* [1990] 3 S.C.R. 377, 738-44 (Dickson, C.J.) (discussing U.S. First Amendment case law); *id.* at 811-23 (McLachlin, J., dissenting) (reviewing U.S. case law and international experience).

the judges, possibly with a corresponding increase in the accessibility of the decision to outside observers.¹¹⁷ These differences are briefly elaborated below.

1. Hate Speech Cases: *Keegstra* and *RAV*.

As an example of these differences between Canadian proportionality analysis and the more "categorical" approach of some U.S. cases, consider *R.A.V. v. St. Paul*¹¹⁸ and *R. v. Keegstra*.¹¹⁹ In *R.A.V.*, the U.S. Supreme Court struck down a St. Paul ordinance on the grounds that the law – which punished hate speech amounting to "fighting words" based on race, color, creed, religion, or gender – was an impermissible content-based and viewpoint-based regulation because it excluded hateful "fighting words" not based on race, color, creed, religion, or gender.¹²⁰ In *Keegstra*, a closely divided Canadian Court upheld the conviction of a high school teacher who used vividly anti-Semitic language in his classes, under a criminal statute prohibiting the "willful" promotion (other than in private conversation) of "hatred against any identifiable group . . . distinguished by colour, race, religion or ethnic origin."¹²¹

In *Keegstra*, all of the justices agreed that, while the prohibition infringed free expression guarantees of Charter Section 2(b),¹²² the purpose of the statute was to prevent the promotion of group hatred and that this was a sufficiently legitimate and important interest, in theory, to justify the infringement of rights under the first prong of the *Oakes*' Section 1 test.¹²³ Where the justices disagreed was in whether the statute was proportional to this objective. The majority found that the statute was rational, and that, in light of the peripheral nature of the free expression interests implicated by hate speech, it minimally impaired those interests.¹²⁴ In contrast, the dissent questioned the rationality of using criminal prosecutions to prevent hate speech, arguing that such prosecutions may increase the appeal of the purveyors of prejudice by "martyring" them.¹²⁵ Moreover, the dis-

¹¹⁷ For further discussion see *infra* text accompanying notes 144-145, 173-175.

¹¹⁸ 505 U.S. 377 (1992).

¹¹⁹ [1990] 3 S.C.R. 697.

¹²⁰ See *R.A.V.*, 505 U.S. at 391.

¹²¹ *Keegstra* [1990] 3 S.C.R. at 715-16, 795 (Dickson, C.J.).

¹²² See *id.* at 725-34 (Dickson, C.J.); *id.* at 826-42 (McLachlin, J., dissenting).

¹²³ See *id.* at 744-58 (Dickson, C.J.) (characterizing statute's objective as preventing harm caused by hate propaganda and as pressing and substantial in a free and democratic society); *id.* at 846-48 (McLachlin, J., dissenting) (agreeing that the law's objective is to prevent promotion of hatred toward identifiable groups, thereby advancing social harmony and individual dignity, and that these objectives are "clearly . . . substantial" and, given world history of racial and religious conflict, "pressing").

¹²⁴ See *id.* at 759-86 (Dickson, C.J.) (applying the three-part proportionality analysis of *Oakes* to the challenged statute).

¹²⁵ See *id.* at 852-53 (McLachlin, J., dissenting) (asserting that the statute was not rationally

senters argued, the statute did not minimally impair free expression, in light of the breadth of the statute and the track record of enforcement threats under it.¹²⁶

Both the majority and the dissent in *Keegstra*, as in other Canadian cases applying the *Oakes* proportionality test, demonstrate the influence of a context-specific approach. For example, the majority describes the work of an extrajudicial commission established in the 1960's to investigate hate crime in Canada in order to establish the importance of the government's interest and the nature of the harms caused by hate speech.¹²⁷ Both the majority and the dissent reviewed factual material to conclude that the problem of hate speech in Canada was substantial, although not of emergency dimensions.¹²⁸ In explaining its disagreement with the majority on proportionality, the dissent did not hesitate to elaborate on the experience in pre-Nazi Germany, which, it argued, suggests that the result of the prosecution for hate crimes may be to increase, rather than decrease, such crimes.¹²⁹ The majority responded by explaining why, as an empirical matter, it did not agree with the dissent's assessment of the evidence.¹³⁰ In *R.A.V. v. St. Paul*, by contrast, both majority and dissenting opinions rely almost entirely on past U.S. case precedents in resolving the difficult constitutional questions presented.¹³¹

Another interesting feature of Canadian cases is the degree to which the justices explicitly identify competing constitutional values and make comparative normative assessments about those values, and in so doing consider the relevance of comparative materials. In *R. v. Keegstra*, another area of disagreement concerned the relative weight of the constitutional values that, all of the Justices agreed, were important under the Canadian constitution. For the majority, the constitutional value of promoting Charter commitments to equality and to a multicultural society by giving equal respect to different linguistic, racial and religious groups provided strong reason to uphold the hate statute.¹³² For the dissent, however, it was doubtful whether the constitutional commitment to multiculturalism could ever outweigh the constitutional value of free expression, given the role of free ex-

connected to the goal of preventing promotion of group hate because prosecutions provide publicity to racists and generate sympathy for them).

¹²⁶ See *id.* at 859-62 (McLachlin, J., dissenting) (noting *inter alia* that Salman Rushdie's book *SATANIC VERSES* was stopped at the border for violating the standard).

¹²⁷ See *R. v. Keegstra* [1990] 3 S.C.R. at 745-46 (Dickson, C.J.).

¹²⁸ See *id.* at 744-58 (Dickson, J.); *id.* at 846-48 (McLachlin, J., dissenting).

¹²⁹ See *id.* at 854 (McLachlin, J., dissenting) (discussing hate propaganda regulation in pre-Hitler Germany).

¹³⁰ See *id.* at 768-71 (rejecting the assertion that barring hate speech would increase its occurrence).

¹³¹ See 505 U.S. at 382-390; *id.* at 397-408 (White, J., concurring in the judgment); *id.* at 417-25 (Stevens, J., concurring in the judgment).

¹³² See *R. v. Keegstra* [1990] 3 S.C.R. 697, 755-58 (Dickson, C.J.) (emphasizing Canada's constitutional commitment in Charter § 15 to equality and in Charter § 27 to multi-culturalism).

pression in protecting the democratic order.¹⁵³ In discussing these issues, both the majority and the dissent seemed to acknowledge the importance of the values held by their fellow Justices in opposition to their own expressed opinion.¹⁵⁴ By contrast, in *R.A.V.*, the majority opinion says little about the possible value of governmental opposition to hate speech and what it does say comes late in its opinion.¹⁵⁵ And in *Keegstra*, both the majority and the dissent discuss international and comparative materials,¹⁵⁶ while the opinions in *R.A.V.* mention neither.¹⁵⁷

Finally, the Canadian Section 1 opinions seem to lend themselves to a candid discussion of constitutional conflict. In the *Keegstra* opinions discussed above, one has the sense that the Canadian Justices identified the baseline constitutional values and empirical judgments that divide them, providing differing assessments of the weight to be

¹⁵³ See *id.* at 833-37, 849-50, 865 (McLachlin, J., dissenting) (rejecting claims that Charter §§ 15 and 27 should limit protection afforded to free speech under § 2).

¹⁵⁴ For example, Justice McLachlin's dissent includes a lengthy discussion of the harms caused by hate speech. See *Keegstra*, 3 S.C.R. at 847-48 (stating, *inter alia*, that the "continued existence of hateful communication [undermines] a tolerant and welcoming society, [creating harm] both to the individuals and groups who are the targets of prejudice, and to society as a whole" including loss of talent of all its people).

¹⁵⁵ The Court's strongest statement is in the last paragraph of the opinion before the "reversed, and . . . remanded" sentence. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible."); see also *id.* at 392 (agreeing with the Minnesota state court that it is the responsibility of communities to confront messages of hate); *id.* at 395 (agreeing that interests in ensuring basic human rights are compelling, but suggesting adequate content neutral alternatives casts doubt on whether the asserted justification is in fact the statute's purpose). The disagreeing justices devoted more attention to the values that might support such an ordinance. See *id.* at 402 (White J., concurring in judgment) (characterizing cross burning as an expression of violence, intimidation and racial hatred); *id.* at 407 (arguing that the contested ordinance reflects city's judgment that harms based on race, color, creed, religion or gender are more pressing public concerns than harms caused by other fighting words, which, in light of the Nation's long and painful experience with discrimination, is plainly reasonable).

¹⁵⁶ See *Keegstra* [1990] 3 S.C.R. 697, 738-44 (Dickson, C.J.) (addressing "the relationship between Canadian and American approaches to the constitutional protection of free speech," summarizing U.S. cases, noting importance of being "explicit as to the reasons why or why not American experience maybe useful in the § 1 analysis," and concluding, *inter alia*, that the First Amendment's "strong aversion to content-based regulation of expression" is incompatible with laws prohibiting hate speech but that "even in the United States" expression, e.g. child pornography, can be regulated based on its content, and that the "special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view . . . that the suppression of hate propaganda is incompatible with guarantees of free expression"); *id.* at 811-23 (McLachlin, J. dissenting) (arguing that problem of hate literature and free expression "is not peculiarly Canadian; it is universal;" further arguing that U.S. experience is most relevant to Canada's since both constitutions place high value on speech; reviewing U.S. cases and emphasizing concerns to avoid chilling effects on legitimate speech, and noting that U.S. approach requires "clear and present danger" before free speech can be overridden, in contrast to international approach which finds the objective of suppressing hatred sufficient to override free expression).

¹⁵⁷ For one very oblique reference see *R.A.V. v. City of St. Paul*, 505 U.S. at 382 (noting that "our society, like other free but civilized societies has permitted" restrictions on speech in few, limited areas).

given to competing values and of the likely effects of enforcing the particular law. By contrast, in *R.A.V.*, one wonders whether the majority really is worried about the law's failure to make it a crime to say "Racists are misbegotten"¹³⁸ – that is, whether the failure of the hate crimes statute to meet the "viewpoint neutrality" standard extended to "fighting words" is sufficiently plausible to shed light on what the justices were most in disagreement about.¹³⁹ In *R.A.V.*, identifying the legitimacy and importance of the statute's goals, and then analyzing whether the law was a rational way to achieve the legitimate goals, whether the law's adverse effects on important First Amendment interests were sufficiently limited, and whether the law's effects were, on the whole, proportional to the legitimate government interests, might have yielded more convincing opinions in *R.A.V.* – although, as Justice McLachlin's powerful *Keegstra* dissent suggests, not necessarily a different result.

The Canadian course of decisions may also suggest, however, that the effort to doctrinalize the idea of "proportionality"¹⁴⁰ extends law beyond the limits of what it can realistically achieve, and may obscure the coherence that could otherwise emerge from an inquiry into legitimacy of purpose and proportionality or reasonableness of means.¹⁴¹ The test more recently applied is not the one implied in *Oakes* – that the measure must always be the method of achieving the objective that minimally impairs protected rights¹⁴² – but rather, is a

¹³⁸ *Id.* at 391-92 (characterizing the ordinance's practical operation as viewpoint discrimination because it does not prohibit sign that "all 'anti-Catholic bigots' are misbegotten," but does prohibit a sign that all "papists" are misbegotten). *Cf. id.* at 434-35 (Stevens, J., concurring in judgement) (disagreeing with the Court's analysis of viewpoint discrimination because response to sign that all anti-Catholic bigots are misbegotten is one that all advocates of tolerance are, and both are treated the same by the ordinance).

¹³⁹ See Morton Horowitz, *Foreword, The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 113-15 (1993) (criticizing *R.A.V.* for combining "content neutrality" and "obliviousness to social consequences," and as a "flight into abstraction and anti-consequentialism," which ignored reality and resulted in shielding concrete terrorist acts of cross-burning); see also Akhil Reed Amar, *The Case of The Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 161 (1992) (noting absence of the "power and passion" of storytelling in *R.A.V.*). *R.A.V.*'s suggestion that the presence of non-content-based alternatives – presumably, a broader prohibition on fighting words – somehow casts doubt on whether the city really did have an interest in protecting the rights of members of groups historically discriminated against to live peacefully where they wish, see *R.A.V.*, 505 U.S. at 395, leaves me mystified at what nefarious purposes the majority suspects.

¹⁴⁰ By "doctrinalize," I mean to distinguish sharply, as *Oakes* does, between the (i) rationality of the law, (ii) the extent to which the law goes beyond the most limited intrusion on affected rights, and (iii) the proportionality of the law's effects on protected rights.

¹⁴¹ Some Canadian scholars conclude that the final element of the *Oakes* test has played no independent role, and that most of the water of the *Oakes* test is carried by the criteria of legitimate and sufficiently important purpose, rational connection and minimal impairment. See, e.g., HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 882-83 (arguing that the final step has "never had any influence on the outcome of any case" . . . because it is "redundant" with requirements of a sufficiently important purpose to warrant limiting rights, and of minimal impairment).

¹⁴² See *R. v. Oakes* [1986] 1 S.C.R. 103, 139 (asserting that speech restrictions must be mini-

more fluid, sliding-scale standard measuring the nature of the intrusion on the protected right against the importance of the objective.¹⁴³ In *Keegstra*, Justice Dickson, author of *Oakes*, explicitly disavows a strong “least restrictive alternative reading” of this part of the test, explaining:

In assessing the proportionality of a legislative enactment to a valid government objective, [section] 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction on a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger program of action, if that measure is not redundant, furthering the objectives in ways an alternative response could not, and is in all other respects proportionate to a valid [section] 1 aim.¹⁴⁴

In summarizing his conclusion on “minimal impairment” and in addressing the third “proportionality” criteria, Dickson explicitly links the finding of “proportionality” to the importance under the Charter of the interest in combating racial hatred, as well as the low (albeit still protected by Section 2) value of the expression being prohibited.¹⁴⁵ Likewise, the dissent in *Keegstra*, while reaching a different conclusion on minimal impairment, did not insist on a strict

mally intrusive to survive constitutional muster); Lokan, *supra* note 99, at 172.

¹⁴³ See Dassios & Prophet, *supra* note 99, at 302-03 (construing *Irwin Toy Ltd. v. Quebec*, and other post-*Oakes* cases to use a more deferential test than “least restrictive alternative” focusing on the basis for the government’s choice); *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927, 999 (“This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.”); Chapman, *supra* note 89, at 889-90 (noting Canadian Court’s retreat from *Oakes*’ least restrictive means test in *Edwards Books and Art*).

¹⁴⁴ *R. v. Keegstra* [1990] 3 S.C.R. 697, 784-85.

¹⁴⁵ See *id.* at 782, 785, 787 (stressing the value of combating racial hatred over the low value, “only tenuously connected with the values underlying the guarantee of freedom of speech,” of the hate speech being banned). This aspect of Justice Dickson’s opinion in *Keegstra* has been criticized by some who argue that once expression is found to be protected by Section 2 of Charter, its value should not be considered in analyzing the proportionality of the means used to prohibit it. One benefit of the transparency of Dickson’s opinion, however, is that it directly addresses the closeness of the relationship of hate speech to free expression values, arguing that it does not lie at the core of what free expression protects. In treating this issue at length in connection with proportionality, I take Judge Dickson to be suggesting that less is required to justify intrusions on protected expression that is less close to core expressive values – an elaboration of the principle of proportionality that corresponds to the normative constitutional values that seem to be motivating his analysis, and that, in its transparency, permits clear disagreement.

“least restrictive alternative” reading of the proportionality test.¹⁴⁶

One Canadian judge has argued that the biting edge of the *Oakes* test has, over time, turned on the Court’s assessment of how significantly the challenged law impacts the rights protected by the Charter,¹⁴⁷ with minor intrusions more likely to be upheld than more substantial ones. The test also seems to turn on assessment of the relative value of the aspect of the right being infringed. One could, for example, read *Keegstra* and *RJR MacDonald*¹⁴⁸ to suggest that advertising about lawful, although injurious, products is more important to protect than hate speech. Thus, the *Oakes* proportionality standard, with its frankly normative¹⁴⁹ and contextualized approaches,¹⁵⁰ may have endured in part because of its flexibility in accommodating both more, and less, deferential approaches to judicial review.¹⁵¹

2. Transplanting Proportionality?

Returning to the question of what, if anything, the United States could learn, or borrow, from Canada, on the one hand the “rough

¹⁴⁶ See *id.* at 854-62 (McLachlin, J., dissenting). Interestingly, McLachlin suggests that use of a criminal sanction (rather than a civil remedy) may itself be a constitutionally-disproportionate response to intentionally hateful speech, given competing values of freedom of expression, and alternative means of discouraging hate speech. Recent controversies in the United States concerning prosecutorial discretion raise questions whether U.S. free speech law might benefit from distinguishing between conduct that can be made the basis of a criminal prosecution or investigation, on the one hand, and civil remedies on the other.

¹⁴⁷ See Roger P. Kerans, *The Future of Section One of the Charter*, 23 U.B.C. L. REV. 567, 576 (1989).

¹⁴⁸ *RJR MacDonald v. Canada* [1995] 3 S.C.R. 199.

¹⁴⁹ See *RJR MacDonald*, at 268-78 (LaForest, J., dissenting) (stating that Section 1 inquiry is frankly normative, requiring courts to take into account both the nature of the infringed right and the specific values and principles on which the state seeks to justify the infringement).

¹⁵⁰ For example, in *RJR MacDonald* a substantial factor in the majority’s decision to find that the ban on tobacco advertising could not be sustained under Section 1 was a weakness in the presentation of a form of legislative history. The government refused to reveal a confidential report on which it purportedly relied in deciding that the total ban on advertising of a lawful product was warranted. See *id.* at 345 (McLachlin, J.). See generally, Kerans, *supra* note 147, at 573 (noting the importance of legislative history, and the degree to which the legislative history plausibly supports the government’s claim of legitimate purpose).

¹⁵¹ In *RJR MacDonald*, the Canadian Court held unconstitutional a federal ban on tobacco advertising. See [1995] 3 S.C.R. 199. This case illustrates the degree to which the definition of the purpose of a law can determine whether the law will be found to meet the “minimal impairment” test. See *id.* at 335-49 (McLachlin, J.). For the majority, the purpose of the law was only to prevent new smokers from starting; with so narrowly defined a purpose, the complete ban (which included “brand switching” advertising purportedly designed to appeal only to existing smokers to change their brands) could not be seen as “minimally impairing” speech rights. See *supra* note 108. The mutability of the precise definition of purpose to accord with the doctrinal “minimal impairment” requirement suggests, in a sense, why the concept of proportionality as more broadly understood may lead to more candid formulations. Cf. Note, *supra* note 110, at 154 (urging outright weighing of competing public policies without “diversionary discussion” of rationality of means-end nexus).

justice” of the idea of proportionality has much to commend it.¹⁵² “Proportionality” to “sufficiently important” purposes is no less definable a legal principle than some of the more elaborated tests of U.S. law on, for example, free speech¹⁵³ (although I do not suggest it is equivalent to some of the more stringent categorical rules in the United States, such as the rule against prior restraints of speech). Moreover, as developed in the Canadian case law, the proportionality test does appear to have certain advantages in its transparency of reasoning¹⁵⁴ and in its openness to the actual context of decision. These qualities offer hope that, under a proportionality regime, the Canadian court will distinguish between the “camel’s nose” in the tent – the dreaded slippery slope of the U.S. law school classroom leading to judicial second-guessing of legislative policy judgments¹⁵⁵ – and a benign cat’s paw, providing a useful tool for making hard judgments in distinguishing those restrictions that are “demonstrably justified in a free and democratic society” and those that threaten the continuance of that “free and democratic society.”¹⁵⁶

¹⁵² Canadian scholar Peter Hogg has argued that, rather than having a generous interpretation of rights and a relaxed standard of justification under section 1, it would be better to read the scope of the protected rights in the Charter quite narrowly and then to have a very rigorous standard of review under section 1, entailing a very strong presumption against the validity of infringements. See HOGG, *CONSTITUTIONAL LAW OF CANADA*, *supra* note 46, at 859-60; Hogg, *Interpreting the Charter of Rights*, *supra* note 87, *passim*. Given the expansive rights orientation of the movement behind the Charter, however, this alternative approach might not fairly capture the values of both rights-development and of inclusion and pluralism, so evident in the Charter and in Canada’s evolving self-conception.

¹⁵³ See, e.g., *United States v. Grace*, 461 U.S. 171 (1983) (striking down law prohibiting displays of banners on public sidewalks around the Supreme Court building, because government may enforce reasonable time, place and manner restrictions in public forums only if the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication; particular types of expression may be prohibited only if the prohibition is narrowly drawn to accomplish a compelling governmental interest); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding ordinance that prohibited residential picketing on a public street that targeted a particular residence because “privacy of the home is certainly of the highest order in a free and civilized society” and thus warranted the complete prohibition of targeted residential picketing).

¹⁵⁴ See Jeremy Kirk, *Constitutional Guarantees, Characterisation and Proportionality*, 21 MELB. U. L. REV. 1, 55-56, 64 (1997) (commenting that “proportionality” tests require more candor in identifying competing values and interests).

¹⁵⁵ See Kerans, *supra* note 147, at 577. In emphasizing the importance of a law’s impact in evaluating its constitutionality, Judge Roger Kerans distinguishes the Canadian approach from what he describes as the American tendency to “worry a lot about the camel’s nose.” *Id.* Canada, being more practical, can distinguish “between innocuous publication bans today and major censorship tomorrow.” *Id.*

¹⁵⁶ See *Can. Charter* (1982), § 1. Interestingly, in *RJR MacDonald v. Canada* [1995] 3 S.C.R. 199 and *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), the Canadian and U.S. Supreme Courts reached fairly similar results in striking down the constitutionality of complete bans on advertising for legal products. In Canada, the ban applied to tobacco advertising; in Rhode Island, the ban applied to advertising of liquor prices. In both cases, the respective governments sought to justify their laws on grounds the courts either accepted without comment or found “legitimate” – in Canada, to reduce tobacco-associated health risks by reducing consumption motivated by advertising, see *RJR MacDonald* [1995] 3 S.C.R. at 336 (McLachlin, J.); in the United States, to increase beer prices to promote temperance, see *44 Liquormart*, 517 U.S. at 504-

On the other hand, there are a number of reasons for caution in embracing use by U.S. courts of the Canadian proportionality test. First, the contextual, accessible form of reasoning in the Canadian opinions enhances the risk that the decisions will be viewed as less the product of "law" than of particularized judgments. It is plausible that the framers of the Charter intended the courts to engage in normative balancing of constitutional values.¹⁵⁷ Thus, in Canada perhaps a greater concern than countermajoritarianism (that is, the legitimacy of the Court's displacement of legislative decisions) is with the predictability of contextualized judgments and the substantive weighting of constitutional values. The United States, by contrast, has not so recently been through a process of self-conscious constitution formation, and participants in its legal system may accordingly be more uneasy about justifying the exercise of judicial judgment in the face of legislative will.¹⁵⁸

Moreover, the problem of distinguishing false and true necessities

08. Yet, in both cases, the courts found that the purported purpose did not justify the means. In addition, the question was raised whether withholding accurate information from consumers is ever valid, either as a means or an end. The proportionality test in *RJR MacDonald* may have been used to simultaneously approach and evade the issue whether it is ever legitimate to withhold from consumers information about lawful products on paternalistic grounds. See [1995] 3 S.C.R. at 343-45 (McLachlin, J.) (observing that the law deprives consumers of a legal product of "important means of learning about product availability to suit their preference, [and that] it will be more difficult to justify a complete ban on a form of expression than a partial ban," and concluding that the ban was more intrusive on free expression than necessary to accomplish its goals). The majorities of both courts applied stringent evidentiary standards in addressing the effect of the means on the government purpose, relied on an absence of evidence directly showing that the ban would materially decrease consumption, and discounted evidence that the product manufacturers or retailers thought there was a connection between advertising and sales. See *RJR MacDonald* [1995] 3 S.C.R. at 341-42 (McLachlin, J.); 44 *Liquormart*, 517 U.S. at 501, 505-06. Neither Court was willing wholeheartedly to adopt the idea expressed by Justice Thomas in *Liquormart* that the suppression of information about a lawful product is per se invalid. See 44 *Liquormart*, 517 U.S. at 518-528 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 504-14 (Stevens, J.); *RJR MacDonald* [1995] 3 S.C.R. at 343-44. Yet, both results tend to support the view of a Canadian commentator that application of free speech norms here suggest a "consumer/consumption" oriented view of a "free and democratic society," in which a defining freedom is consumption choices (rather than or in addition to political ones). See David Schneiderman, *A Comment on RJR-MacDonald v. Canada*, 30 U.B.C. L. REV. 165, 175-80 (1996).

¹⁵⁷ See e.g., PATRICK MONAHAN, *THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* 30, 53-60, 78-79 (1987) (arguing that under the Charter courts are required to balance interests and exercise judicial "originality" in interpretation).

¹⁵⁸ Although there are Canadian scholars who condemn the flexibility of the evolving *Oakes* test of proportionality, there are others who are more enthusiastic, for reasons that arguably correspond to Canadian legal culture more than that of the United States. In contrast to Professor Tribe's description of the universalistic, individual rights-based U.S. legal culture, see LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 73-84 (1992), compare the evident pride of some Canadian constitutionalists in what they describe as Canada's claim to "the middle ground" in "the world of ideas." See DALE GIBSON, *THE LAW OF THE CHARTER: GENERAL PRINCIPLES* iv-v (1996) (describing Canadian Supreme Court decisions as evincing approach to legal decision-making called "the Principled Middle"); see also MONAHAN, *supra* note 157, at 12 (arguing that "Canadian politics has always placed particular emphasis on the value of community, in contrast to the overriding individualism of the American experiment").

is an enduring and difficult one: Is U.S. legal culture likely to do with a proportionality test what Canadian legal culture does? Is the use of more formal rules and tests more important in the United States, given the size of the country, heterogeneity of population, and the diversity of lower court systems that are controlled by Supreme Court decisions?¹⁵⁹ Is U.S. legal culture likely to view a less formal, more open-ended approach examining the "proportionality" of legislative means to legitimate legislative goals as an illegitimate expression of judicial preferences as an opportunity for invidious biases to affect decision-making?¹⁶⁰ Or will the courts be able to explain with enough consistency what makes a scheme proportionate, and why the measure of proportionality will vary depending on the importance of the right infringed by the law, the degree of intrusion on the protected right, and the government interests being served? Do other features of Canadian constitutional law mitigate the difficulties of its Court having authority under Section 1 to decide whether or not particular statutes that infringe on rights are nonetheless valid under the *Oakes* test?¹⁶¹

A "comparativist" challenge to consideration of "proportionality" analyses might invoke earlier periods in U.S. constitutional history, when, for example, First Amendment cases employed "balancing" analyses, to demonstrate the jurisprudential evils of an approach like "proportionality" analysis that relies in part on balancing.¹⁶² In *Dennis v. United States*,¹⁶³ convictions for violations of the conspiracy provisions of the Smith Act were upheld based on evidence that the defendants "organize[d] people to teach and themselves [taught] Marxist-Leninist doctrine contained chiefly in four books . . ."¹⁶⁴ Both the plurality opinion and the Frankfurter concurrence relied on balancing tests that sought to measure the gravity of the evil the government

¹⁵⁹ On the constraining effects of formal rules, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

¹⁶⁰ See, e.g., TRIBE, *supra* note 158, at 74-75.

¹⁶¹ Canada's Charter, for example, also includes the "notwithstanding clause" of Section 33, which authorizes both federal and provincial parliaments to enact laws, for a five-year period, "notwithstanding" many provisions of the Charter. One could argue that when the legislature chooses not to invoke Section 33, it has by implication consented to the Canadian courts' review under the criteria of Section 1. Cf. MONAHAN, *supra* note 157, at 81, 115-20 (arguing that inclusion of the override provision was a recognition by framers of Charter that courts might interpret Charter in unforeseeable ways); Conklin, *supra* note 92, at 84 (arguing that in the absence of an override, courts must exercise stringent review of infringements of rights). One might also argue that, in the United States, the absence of an analogous legislative power to either short circuit or overcome the results of judicial review makes it more important for judicial review to be conducted under more formalistic and restrained approaches.

¹⁶² For a classic argument against balancing as a form of constitutional reasoning, see generally, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

¹⁶³ 341 U.S. 494 (1951).

¹⁶⁴ *Id.* at 582 (Douglas, J., dissenting) (identifying the four books as JOSEPH STALIN, FOUNDATIONS OF LENINISM (1824); KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848); V.I. LENIN, THE STATE AND REVOLUTION (1917); and HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (1939)).

sought to contain by its passage of the Smith Act against the accompanying intrusion on free speech.¹⁶⁵ Many First Amendment scholars now view the Court's decision in *Dennis*, and perhaps especially the Frankfurter concurrence, as wrongly reasoned and decided.¹⁶⁶ The approach of the Court in *Dennis* was essentially abandoned in *Brandenburg v. Ohio*,¹⁶⁷ currently the leading case on speech advocating unlawful conduct.¹⁶⁸

But it is not at all clear that it was the use of a balancing test used in *Dennis* that led to what is now seen as an erroneous decision, underprotective of free speech. Rather, the plurality – applying the more definitional “clear and present danger” test, – and Frankfurter – applying a more overt balancing analysis – gave greater weight to the danger of violent overthrow of the government and less weight to the value of free expression of communist teachings than would be the case under contemporary approaches. Frankfurter's concurrence addressed head on those values and interests that both the majority, and the dissent, agreed were relevant.¹⁶⁹ Frankfurter's key analytical move in conducting his balancing was to announce a principle of strong deference to the legislature,¹⁷⁰ a principle at odds with counter-majoritarian purposes of protecting freedom of speech and far more problematic than his candid expression of both free speech values and his interest in what was then viewed as government survival.¹⁷¹ *Dennis* might be taken to indicate that the stance of deference

¹⁶⁵ See *id.* at 503 (plurality opinion) (“societal value of speech must, on occasion, be subordinated to other values and considerations”); *id.* at 509 (“Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech”); *id.* at 510 (adopting Learned Hand's formulation of a balancing test measuring discounted value and weight of the harm against the invasion on free speech); *id.* at 519-25 (Frankfurter, J., concurring) (arguing that government's inherent right to maintain its existence justifies some restrictions on speech, and that courts should defer to legislative “balance” of the relevant factors).

¹⁶⁶ See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1372 (1984) (calling Frankfurter's *Dennis* concurrence “one of the great scandals of balancing”); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (criticizing *Dennis* and arguing against “balancing” rules in free speech cases). For a contrary view, see, e.g., Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

¹⁶⁷ 395 U.S. 444 (1969).

¹⁶⁸ *Brandenburg* holds that “mere advocacy” of unlawful conduct is protected by the First Amendment and that only if the advocacy becomes “incitement” of “imminent unlawful conduct” can the speech be punished. *Id.* at 449.

¹⁶⁹ Compare Frankfurter's concurrence in *Dennis*, 341 U.S. at 519-25 (recognizing individuals' First Amendment rights to think, read, and teach what they please, as well as the right of the government to preserve itself) with Douglas's *Dennis* dissent, *id.* at 588-89 (stating that “[t]he nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States,” but there was no record evidence of communist power within the United States and the Court could take judicial notice that as a political party it was politically impotent).

¹⁷⁰ See *id.* at 525-26 (Frankfurter, J., concurring).

¹⁷¹ On the purposes of protecting freedom of speech, even theories that emphasize political speech and the needs of representative democracies (as compared to broader theories more protective of speech that emphasize human autonomy or identity expression, artistic expression

that a judge or court takes towards a problem matters at least as much as whether the doctrinal test is formulated as one of balancing or one of definition.¹⁷²

One might also challenge the claim that analysis under a proportionality or other "balancing" test will be more transparent than analysis relying on more formal categories as rules for decision. Both logical and empirical reasons exist, however, to think this might be so. Logically, as Schauer and Tushnet demonstrate, the characteristic of a formal rule, and of formalism in applying a rule, is to ignore features of the case, or context, that might argue for a different result.¹⁷³ The salient characteristic of formalist analysis is the constraining force of the rule against the felt necessities of particular cases. And if the rule of decision does not permit some factors to be of relevance, it would not be illogical to ignore or discount those factors; doing so might avoid or minimize professional discomfort.¹⁷⁴ Apart from logic, I rely on widely held (but not quantitatively verified) impressions that "standards" as opposed to "rules," or multi-factored balancing tests as opposed to categorical rules, are likely to provide a larger range of arguably relevant constitutional factors than application of a more formal rule (e.g. "no content based" regulation or "no prior restraint" of speech).¹⁷⁵

Note, however, that either formalist or "balancing" reasoning might produce a formal rule.¹⁷⁶ Compare, for instance, the opinion of the U.S. Supreme Court in *R.A.V.*, which relies on reasoning that is formalist in character to insist on a formal rule that invalidates the

or the search for truth) recognize the need to protect expression by those in the minority as well as in the majority. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15-16, 24-27, 39 (1948) (arguing that the First Amendment requires that "no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than the other"). Deference to legislative majorities is thus in some respects particularly inappropriate in reviewing statutes aimed at minority political viewpoints. See Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1198 (1982).

¹⁷² See Vicki C. Jackson, *Printz and Testa: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 138-40 (1998) [hereinafter Jackson, *Printz and Testa*].

¹⁷³ See Schauer, *supra* note 159, at 510; Mark Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 13-18 (1996).

¹⁷⁴ On what some regard as the inevitability of "role discomfort" in being a "good judge," see Guido Calabresi, *Foreword: Anti-Discrimination and Constitutional Accountability: What the Bork-Brennan Debate Ignores*, 105 HARV. L. REV. 80, 132 n.169 (1991) ("A judge who does not decide some cases, from time to time, differently from the way he would wish, because the philosophy he has adopted requires it, is not a judge," although a judge who never strays from his judicial philosophy "no matter how important the issue involved, is a fool").

¹⁷⁵ See, e.g., Kathleen Sullivan, *The Justice of Rules and Standards*, 106 HARV. L. REV. 22 (1992); see also Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5 (1992) (discussing and contrasting "balancing" and "conceptual" approaches to freedom of speech).

¹⁷⁶ See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 80-81 (1997) (distinguishing between balancing of multiple factors in formulating a rule and balancing as part of the required test formulated by the Court).

hate speech ordinance at issue,¹⁷⁷ with Justice McLachlin's concern, in her *R. v. Keegstra* dissent, over the potential misuse of hate speech statutes against oppressed groups themselves, and her further concern that prosecutions under hate speech statutes may be counterproductive towards equality and anti-discrimination goals because they tend to make martyrs of the defendants.¹⁷⁸ Arguments in favor of a categorical rule, then, can be formally analytical, as in *R.A.V. v. St. Paul*, or may reflect contextual judgments about a range of factors, as in the McLachlin dissent in *R. v. Keegstra*. Even under a "proportionality" analysis, moreover, rules could emerge that would prohibit content-based restrictions on an analysis similar to MacLachlin's. Transparency values in defining the legal rule can thus be served, at least in part, by the reasoning that produces a formal rule, although as lower courts apply the rule some of this value may be lost.

Finally, advocates of more categorical, formal rules argue that such rules will yield greater predictability in results than more open-ended judgments under multi-factored standards. Much of the answer to the question whether "proportionality" analyses will be too unpredictable will lie in the "doing." Balancing standards bear some risk of too much fluidity, permitting constitutional values to yield too readily to the perceived expediences and conveniences of the given time; Alex Aleinikoff has rightly pointed to the risk of reducing "rights" to simply an item of cost and benefit that balancing metaphors may entail.¹⁷⁹ Yet proportionality analysis, in its emphasis on *judgment*, may be less likely to have this effect than "balancing" tests articulated in the language of a scientific scale. Categorical rules, moreover, may obscure more than prevent the exercise of judgment about matters of context and degree.¹⁸⁰ Free speech values under proportionality analysis should be given great weight in a free and

¹⁷⁷ The formalism of its reasoning is manifest, for example, in the Court's analytical concern with a hypothetical example of anti-bigotry "hate" speech being outside the reach of the statute, in order to demonstrate that the statute is not content or viewpoint neutral, as if the logic of the "no content based" rule would be convincingly self-evident in such a decontextualized (some might say, counterfactual) setting.

¹⁷⁸ See [1990] 3 S.C.R. 697, 701.

¹⁷⁹ Aleinikoff, *supra* note 162, at 987.

¹⁸⁰ For example, the rule against prior restraints on speech can fairly be understood as a categorical rule. However, defining what counts as speech and as a prior restraint, and whether there are exceptions to the rule (as in where there is a clear and present danger that the speech sought to be restrained will lead to imminent violence), all involve questions of judgment and context. Compare, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*) (upholding enforcement of former CIA employee's agreement not to publish information without prepublication clearance and rejecting argument that the agreement was an unenforceable prior restraint on speech) with *New York Times Co. v. United States*, 403 U.S. 713 (1971) (reversing an injunction against newspaper publication of a secret Defense Department study of Vietnam war, leaked by a former Pentagon official, because the government had not met its heavy burden of overcoming the presumptive rule against prior restraints); *id.* at 731 n.1 (White, J., concurring) (noting that National Labor Relations Board and Federal Trade Commission cease-and-desist orders often restrain what employers or businesses can say, and that copyright laws also authorize injunctive relief).

democratic society, and proportionality analysis could yield presumptive protection for speech falling into categories that a court views as highly protected.¹⁸¹ Finally, how important predictability is as a value may vary with the constitutional context, and the hardest cases at any point in time may be least likely to be constrained by preexisting "formal" rules and the most difficult to predict under "balancing" analyses.

Whether in the lower courts some constitutional values may be better protected through categorical rules rather than multi-factored analyses, seems open to debate. (As noted earlier, the size and diversity of lower courts that will be called on to enforce and apply the rule may be relevant to this inquiry.¹⁸²) What *Keegstra* illustrates is that constitutional reasoning in difficult cases can be illuminatingly carried out under the "proportionality" test and that this approach has some advantages over alternative styles of reasoning.

Keegstra raises, but cannot answer the question whether U.S. constitutional reasoning and law would be improved by use of such alternative approaches, or, more generally, by considering how other constitutional systems have responded to similar problems. As discussed below, awareness of the uses of "proportionality" analyses in the constitutional law of other nations may help in understanding the implications and possibilities of the U.S. Supreme Court's recent embrace of the idea of proportionality in *City of Boerne v. Flores*.¹⁸³

B. City of Boerne v. Flores: Proportionality and Federalism

In *Flores*, the Court held unconstitutional the Religious Freedom Restoration Act [RFRA]. RFRA was enacted in direct response to the Court's 1990 decision in *Smith v. Employment Division*,¹⁸⁴ which changed prior law to hold that neutral generally-applicable laws may constitutionally be applied even to those who claim that the law imposes a burden on a religious practice. Under *Smith*, generally-applicable laws, such as those prohibiting the use of peyote,¹⁸⁵ prescribing the diet for state prisoners,¹⁸⁶ or requiring autopsies in cases of sudden death,¹⁸⁷ are immune from attack on the grounds that for

¹⁸¹ See Lokan, *supra* note 99, at 163 (predicting development of categorical rules through applications of Section 1 proportionality analysis). Some Canadian scholars have argued that the *Oakes* proportionality test ought to be applied with different levels of scrutiny for different categories of conduct in the free expression area; for example, political speech would be more highly protected than commercial speech. See Cameron, *supra* note 59, at 68-72.

¹⁸² See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV 125, 172-73 (1995).

¹⁸³ 521 U.S. 507 (1997).

¹⁸⁴ 494 U.S. 872 (1990).

¹⁸⁵ See *id.*

¹⁸⁶ For pre-*Smith* cases involving such claims, see, for example, *McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

¹⁸⁷ See, e.g., *Yang v. Sturner*, 750 F. Supp. 558, 559 (D.R.I. 1990) (upholding constitutionality,

some persons (typically members of minority religious groups) the practice proscribed by law is required by their religion or that the practice required by law is prohibited by their religion.

Under RFRA, by contrast, neutral, generally-applicable laws could be challenged as burdening religious practice. Under RFRA, a state, local, or federal government may not impose a substantial burden on a religious practice unless the government can establish that the burden it is imposing is the least restrictive means of serving a compelling government interest.¹⁸⁸

Flores held that this statute exceeded Congress's power under Section 5 of the Fourteenth Amendment.¹⁸⁹ The Section 5 power, the Court concluded, was limited to *remedying* or *preventing* violations of Section 1 and did not permit Congress to change or to alter the substantive meaning of the rights secured by Section 1 of the Fourteenth Amendment.¹⁹⁰ While recognizing that the distinction between remedial and substantive laws was a fine one, the Court nonetheless found that RFRA was an impermissible attempt to alter the meaning of the Free Exercise Clause as it had been interpreted by the Court in *Smith*.¹⁹¹ In light of the *Smith* decision concerning what constitutes a free exercise violation, the *Flores* Court held RFRA to be an impermissible exercise of the Section 5 power because RFRA could not be re-

under *Smith*, of requiring autopsy notwithstanding Hmong religious beliefs). According to *Flores*, much of the legislative discussion preceding RFRA focused on concern over autopsies performed "on Jewish individuals and Hmong immigrants in violation of their religious beliefs." 521 U.S. at 531 (citing Religious Freedom Restoration Act of 1991, Hearing on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess. 81 (1993) [hereinafter "House Hearings"] (statement of Nadine Strossen)); *id.* at 107-10 (statement of William Yang); *id.* at 118 (statement of Rep. Stephen J. Solarz); *id.* at 336 (statement of Douglas Laycock); Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess. 5-6, 14-26 (1993) [hereinafter "Senate Hearings"] (statement of William Yang); *id.* at 27-28 (statement of Hmong Lao Unity Ass'n., Inc.); *id.* at 50 (statement of Baptist Joint Committee).

¹⁸⁸ See 42 U.S.C.A. § 2000bb-1 (1993). *Flores*'s holding that RFRA exceeds Congress's power under the Fourteenth Amendment does not necessarily invalidate RFRA as applied to the federal government.

¹⁸⁹ See 521 U.S. at 529-36. Interestingly, the Court held that Congress's Section 5 enforcement powers did extend to enforcing the First Amendment protection of the free exercise of religion as extended to the states by Section 1 of the Fourteenth Amendment. See *id.* at 519.

¹⁹⁰ See *id.* at 519-24. In so ruling, the Court relied on the drafting history of the Fourteenth Amendment and reached a conclusion that differs from those of some scholars. See, e.g., John P. Frank and Robert F. Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 WASH. U. L. Q. 421, 430 (arguing that framers of the Fourteenth Amendment intended that Congress could extend the Bill of Rights under Section 5, not that Section 1 would have self-executing effect, enforced by the courts, of doing so); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y. U. L. REV. 863, 867, 884-86, 912-14 (1986) (arguing that the drafters of Fourteenth Amendment were more concerned with ensuring a constitutional basis for Congress's authority to protect fundamental rights of national citizenship than with protecting individual rights, and that the concern leading to the change in the wording of the Amendment relied on by the *Flores* Court was that, without some self-executing provisions, Congress might infringe or fail to protect the rights of national citizenship).

¹⁹¹ See *Flores*, 521 U.S. at 532-35.

garded as *proportional* to its assertedly remedial or preventive objective.¹⁹²

Viewing the statute as a claimed remedial or preventative measure, the Court held that RFRA could not be regarded as “as a reasonable means of protecting the free exercise of religion as defined by *Smith*,” instead, the statute lacked “congruence between the means used and the ends to be achieved.”¹⁹³ *Flores* thus invoked the norm of proportionality as an important test of whether a measure enacted pursuant to Section 5 of the Fourteenth Amendment would be regarded as a valid measure to remedy or to prevent a violation of Section 1 of the Fourteenth Amendment, or as an invalid attempt by Congress to define the substantive meaning of Section 1.

In explaining its conclusion of nonproportionality, the Court first noted that the legislative record was virtually bereft of contemporaneous examples of generally-applicable laws passed as a result of religious bigotry – the type of laws that would violate the free exercise clause as defined in *Smith*. Instead, the focus of the legislative hearings was on “laws of general applicability which place incidental burdens on religion,” that, under *Smith*, were constitutionally valid.¹⁹⁴ Apart from the legislative record, however, and more important for the Court, was the fact that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹⁹⁵ In reaching this conclusion the Court relied on (1) the broad sweep of RFRA; (2) RFRA’s lack of temporal or geographic limits; and (3) the rigor of the test it imposed on any government practice alleged to burden religion and the ensuing burdens this placed on the defending governments,¹⁹⁶ a “considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens . . . imposing a heavy litigation burden . . . [and] curtailing their traditional general regulatory power”¹⁹⁷

However novel this proportionality test may sound to U.S. constitutional ears, as described above the idea of proportionality as a

¹⁹² See *id.* at 532.

¹⁹³ *Id.* at 529-30.

¹⁹⁴ *Id.* (citing the legislative record found in House Hearings, *supra* note 187, at 331-34 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H.R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong. 2d Sess. 49 (statement of John H. Buchanan, Jr.) Senate Hearings, *supra* note 187, at 30-31 (statement of Dallin H. Oaks); *id.* at 68-86 (statement of Douglas Laycock). The Court noted “[t]he absence of more recent episodes [of intentional religious discrimination] stems from the fact that, as one witness testified, ‘deliberate persecution is not the usual problem in this country.’” *Flores*, 521 U.S. at 530 (citing House Hearings at 334 (statement of Douglas Laycock)).

¹⁹⁵ *Flores*, 521 U.S. at 532.

¹⁹⁶ See *id.* at 532-36.

¹⁹⁷ *Id.* at 534.

measure of the constitutionality of laws is highly developed in Canadian constitutional law. It is also a marked feature of German constitutional law.¹⁹⁸ Yet in both Canada and Germany, courts appear to invoke the concept of proportionality primarily in decisions relating to individual rights and not in cases involving the distribution of federal powers.¹⁹⁹ Awareness of this feature of Canadian case law prompts the question whether a proportionality test serves (or should serve) the same function in addressing federalism issue, like that in *Flores*, as it does in a free speech case like *Keegstra*.

If one conceives of the division of powers between the federal and state governments as similar to the arena of individual freedom, that is, as according *rights* to each level of government to regulate within their sphere, then the concept of proportionality can be regarded as doing much the same work. A proportionality analysis of a government regulation claimed to violate an individual right asks whether the regulation itself is proportional to the government's asserted legitimate goal, and whether the harm caused to individual rights is proportional to the possible benefits of the regulation. Such a test can be applied in more or less deferential ways, and with greater or lesser degrees of *ex ante* categorization. Likewise, if one conceives of states as having "rights" to regulate some substantive areas (e.g., family law, inheritance laws, "local" commerce), then a proportionality

¹⁹⁸ See Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 PA. J. CONST. L. 284, 317-320 (1998) (discussing the German Federal Constitutional Court's clear mandate under its "New Formula" that a strict test of proportionality should be applied in specified cases); see also KOMMERS, *supra* note 53, at 46 (describing proportionality as "crucial to any understanding of German constitutional law," "play[ing] a role similar to the American doctrine of due process of law," an "approach . . . not so different from the methodology often employed by the United States Supreme Court in fundamental rights cases," involving three steps: "determining the legitimacy of a state purpose;" deciding under a flexible standard whether the means used "have the least restrictive effect . . . on a constitutional value," and deciding whether "the means used [are] proportionate to the end"); CURRIE, *supra* note 53, at 307-10 (explaining that the proportionality principle dates back to Magna Carta and was developed by German Enlightenment thinkers, including Svarez, who "plainly stated two distinct proportionality requirements. First, the state was justified in restricting the liberty of the individual 'only to the extent necessary for the liberty and security of others'; Second, the evil to be prevented must be substantially greater than the attendant harm to individual liberty. . . . [This] insiste[nce] on proportionality both between ends and means and between costs and benefits [is] reflected in the jurisprudence of the Constitutional Court.").

¹⁹⁹ See HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 805-06 (distinguishing "characterization" of a law's "pith and substance" on federalism-based challenge, from characterization of a law challenged under the Charter's individual rights provisions, with more focus on the law's effects in Charter review); CURRIE, *supra* note 53, at 307-10 (linking proportionality in German law to individual rights issues). *But see* BEATTY, *supra* note 78, at 36-39 (arguing that Canadian federalism cases have developed concept of proportionality, although without using that term itself, as a basic tool for measuring scope of federal government and provincial powers). In Australia and the European Union, proportionality has been invoked in cases dealing, respectively, with the *characterization* of the powers of the federal and state governments, and with whether regulatory action of the European Union organs is authorized by the relevant treaties.

analysis of federal regulation could ask whether the regulation is proportional to the federal government's asserted legitimate objective, and whether the harm caused to the states' right to regulate is proportional to the benefits of federal regulation.²⁰⁰

Critical to such an application of proportionality analysis to federalism issues is the premise that there exists a definable allocation of "rights" to regulate in certain areas assigned to the sub-national level(s) of government. But if states do not have "rights," analogous to individual rights, to regulate in particular areas,²⁰¹ then the constitutional judgment being sought should differ.²⁰² If one conceives of the arena of state government power to regulate private activities as an area that is defined in large part by the exercise of federal power, flexible, and changing over time, then proportionality analysis should have a smaller role to play in federalism-based challenges to the constitutionality of national action. If states have no "right" to retain exclusive legislative authority over particular areas, what is the baseline against which to measure the proportionality of harm to something analogous to a constitutional right?²⁰³ One could still inquire whether the measure is proportional to the asserted legitimate purpose of the federal governmental activity and to the harms caused to state interests.²⁰⁴ But this inquiry could be either very diffuse, very intrusive, or both. Without a baseline measure of a "right" to regulate, or a rule constraining the level of detail of federal enactments (which exists in some constitutional systems but not in the United States),²⁰⁵ applica-

²⁰⁰ For an argument that proportionality (and other) principles in Canada have been used to increase the concurrent powers of both federal and provincial governments, see BEATTY, *supra* note 78, at 25-29, and also see HOGG, *CONSTITUTIONAL LAW OF CANADA*, *supra* note 46, at 377-85 (describing the Court's techniques of characterisation and recognition of multiple purposes to uphold areas that are, in effect, of concurrent federal-provincial powers).

²⁰¹ For discussion, see Jackson, *Federalism*, *supra* note 36, at 2231-33, 2252-53 (arguing that states do not have constitutionally protected enclaves of power to regulate private activity free from federal intervention but that states' maintenance of their own executive, legislative, and judicial branches is constitutionally protected).

²⁰² Proportionality analysis could still, in theory, address the underlying policy question by comparing the costs and benefits of centralization (through national legislation) to those of decentralization. Yet, absent some legal directive or standard to guide this determination, it is difficult to see why on a pure cost benefit analysis one would prefer a court's judgment to that of the legislature.

²⁰³ In Australia, as in the United States, there are few, if any, explicit powers reserved to the States. At least one Australian jurist has criticized the use of proportionality to protect state jurisdiction as such, while offering guarded support for its use to test the validity of the "characterization" of federal laws as falling within federal powers (at least when those powers are limited by a requirement of a particular purpose). See Kirk, *supra* note 154, at 36-37, 41-42.

²⁰⁴ Greater levels of application and detail may be seen as more intrusive on states' regulatory authority, and thus as bearing on the degree of injury to the states' interests. Yet, if states do not have constitutionally protected rights to exercise regulatory authority free of federal intervention, on what constitutional basis could courts interfere with the national legislature's leeway to accomplish its goals provided there is a sufficient connection to a national enumerated power? See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²⁰⁵ In Germany, there are subjects on which the federal government may enact "framework statutes" that must leave substantial room for the subnational units (called *länder*) to enact laws

tion of proportionality review to federalism-based challenges to national power should be highly deferential to legislative judgments in order to minimize risks of judicial invalidation based on disagreement over "policy" issues concerning the scope of federal regulation.

One could still ask, though, whether the federal law is plausibly related to a subject over which the federal government has power to act – a basic requisite of constitutional government being that governments act only as they are authorized by law.²⁰⁶ Understood in this sense, the proportionality test of *Flores* could function as a more respectful version of a "purpose" or "legitimate ends" test²⁰⁷ (similar in some ways to the Canadian "pith and substance" test²⁰⁸ for evaluating whether the federal government, or the provinces, have authority to legislate on particular issues). A disproportional law may be a law not really designed for one asserted purpose but to sweep more broadly or in other directions.²⁰⁹ In this sense, *Flores's* proportionality test may be a reinvigoration of the "legitimate end" test of *McCulloch v. Maryland*,²¹⁰ through a mechanism perhaps less difficult to administer, in light of the challenges of identifying a collective legislative intent and the reluctance of courts to attribute improper motives to a coordinate branch of government.²¹¹ But, using "proportionality" as a surrogate for "purpose" in the federalism context requires a highly deferential

filling in the details. See BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, Art. 75 (Official translation, revised edition, March 1995) (providing that "the Federation has the right to enact framework legislation for legislation of the länder on" a number of subjects, including "general principles of higher education," "the general legal status of the press," and "land distribution," and further providing that "Framework legislation may only in exceptional cases contain detailed or directly applicable provisions," and imposing duty on länder to introduce implementing legislation in timely fashion).

²⁰⁶ See Jackson, *Federalism*, *supra* note 36, at 2224-25.

²⁰⁷ For a discussion of surrogates for purpose tests in U.S. constitutional law, see Fallon, *supra* note 176, at 94-95 (examining content-based and effects-based tests as substitutes for purpose test). Cf. *Washington v. Davis*, 426 U.S. 229, 241-42 (1976) (noting that a law's disproportionate impact may bear on whether the law will be found to have an impermissible purpose).

²⁰⁸ See, e.g., *Labatt Breweries v. Attorney Gen.* [1980] 1 S.C.R. 914; HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 377 *et seq.* (discussing "pith and substance" test to "characterize" the leading feature, or true nature and character, of the challenged law). Hogg further states that the "pith and substance" test is not used to evaluate claims that Charter rights have been infringed but rather to evaluate whether federal and provincial laws are within their respective heads of power. *Id.* at 377 n.21.

²⁰⁹ Cf. Note, *supra* note 110, at 124-25 (analyzing *Eisenstadt v. Baird*).

²¹⁰ See 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

²¹¹ See Fallon, *supra* note 176, at 131-32 (treating *Flores's* Section 5 analysis as resting on a "purpose" test). Recall suggestions in early constitutional cases in the U.S. that different "purposes" could authorize federal and state regulation of the same area, see, e.g., *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (upholding state law draining creek for health purposes though action might block federally-licensed interstate navigation) and Hogg's suggestion that the "pith and substance" test serves a similar purpose in Canada. See HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 378.

stance towards Congress's use of its powers, to be overcome only in the presence of a very clear disproportionality between legitimate end and chosen means.²¹²

Assume for the moment that one agreed with *Smith's* view on the scope of the Free Exercise Clause and further agreed with *Flores's* view that Congress's only role in Section 5 was to remedy or prevent Section 1 violations as the Court defined them.²¹³ On these large assumptions, the conclusion that followed – that this statute could not be upheld as an effort to prevent or remedy those kinds of violations – seems quite plausible. Notwithstanding early critique of the proportionality standard that it offers “little if any principled guidance as to where the line will be drawn in any particular case,”²¹⁴ the Court's conclusion that RFRA sweeps more broadly than a law designed to prevent what the *Court* would find to be invidiously motivated interferences with religious freedom seems reasonable, in light of the legislative record's suggestion that the principal problem to which RFRA was directed was the adverse effect on minority religious practices of neutral, generally-applicable statutes.²¹⁵ Application of a proportion-

²¹² See also Kirk, *supra* note 154, at 41 (suggesting that courts in Australia use proportionality “as indicative of purpose” by asking “whether the imbalance, or availability of alternative means, was of such a clear, gross or overwhelming nature as to prevent the measure reasonably being characterized as having been made with respect to the claimed legitimate purpose”) (emphasis in original); HOGG, CONSTITUTIONAL LAW OF CANADA, *supra* note 46, at 390 (arguing for judicial restraint in invalidating laws on federalism grounds where the choice between competing characterizations is not clear). Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 403 (1994) (Stevens, J., dissenting) (suggesting that the test of proportionality of land use condition to costs created by landowner's proposed change is appropriate “only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.”).

²¹³ But see *infra* part IV below (questioning these aspects of *Flores* especially in light of the Fourteenth Amendment's explicit reliance on Congress to enforce its substantive provisions).

²¹⁴ See Cole, *supra*, note 71, at 229; see also Noonan, *supra* note 71, at 470-71 (criticizing proportionality test as unprecedented and without meaning). Interestingly, Noonan has elsewhere described the role of proportionality in the principle of “double effect.” JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE AND RELIGIOUS FREEDOM* 205 (1993) (describing principle of “double effect” which “supposes one action, one good intention, and two simultaneous effects, one good and one bad; and to be moral the bad effect must be unintended and not be greater than the good effect. In other words, a judgment is required that the bad is not disproportionate to the good”). Noonan's dialogue considers whether this principle could guide public decisions about government accommodation of religion, but ultimately the principal interrogator concludes not. See *id.* at 205-06 (raising concerns about the workability and subjectivity of the approach).

²¹⁵ Note that there are at least three kinds of constitutional decisions involved in the *Flores* Court's federalism-based analysis of RFRA: first, whether “disproportionate impact” practices are prohibited by the Free Exercise Clause; second, whether one can draw an inference concerning what the Court would recognize as discriminatory intent from the enactment of statutes that are facially-neutral but have a disproportionate impact; and finally, assuming a plausible basis for finding a violation of the substantive provisions, what means can Congress design to combat it. On all three of these issues, the Congress and the Court may have had different views. For an effort to justify RFRA as preventing invidious treatment of minority religions, see Laycock, *supra* note 71 at 771-79 (arguing that *Smith*, together with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), should not be read to require proof of hostile

ality test might reasonably lead the Court to conclude that the purported remedial justification – that the statute was needed to prevent invidiously-intended, bad treatment of minority religious groups – was a fictive fig leaf or an after-the-fact justification designed to paper over the real contest – a disagreement between Congress and the Court on the meaning of religious liberty.²¹⁶

Having said this, one might still be troubled about whether the “proportionality and congruence” standard of *Flores* contemplates a more activist role for judicial review than has developed under *McCulloch*’s standard for reviewing whether federal legislation is within federal power.²¹⁷ One might be particularly concerned in light of the U.S. history of review of the “appropriateness” of civil rights legislation so rigorous as to undermine the egalitarian goals of the Reconstruction Amendments.²¹⁸ Canadian (and European) proportionality analyses in individual rights cases suggest that it might be rational, if not wise, to take an action that could not meet the more rigorous formulations of proportionality testing.²¹⁹ But a look at the constitutional jurisprudence of Australia offers a way of thinking about the proportionality standard that may be useful, cabining proportionality analysis to a highly deferential inquiry in which only gross disproportionality would be a basis for invalidation, essentially as a surrogate

motive if a statute provided less favorable treatment to religiously motivated than to secularly motivated conduct through statutory exemptions, and accordingly there exist a larger number of laws that should not be regarded as “generally applicable” and a more substantial number of constitutional violations than *Flores* assumed).

²¹⁶ In *Flores*, Respondent Archbishop Flores argued in favor of the constitutionality of the RFRA in part on the ground that the legislation was designed to prevent difficult-to-prove invidious religious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. See 521 U.S. 507, 529 (1997); Brief of Respondent Flores at 23-24, *Flores* (No. 95-2074). Petitioner’s Reply Brief argued that defending RFRA as a statute that enforces the Equal Protection Clause was “a pretext,” and argued that the Court could invalidate the statute as having an improper “purpose” without entailing a difficult inquiry into legislative “motive.” See Reply Brief of Petitioner at 4, *Flores* (No. 95-2074).

²¹⁷ For academic comment to the effect that the standard is more rigorous, see, for example, McConnell, *Institutions and Interpretation*, *supra* note 71, at 165; Laycock, *supra* note 71, at 770; but cf. Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right – Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 815 (1998) (arguing that while a “rigorous requirement of congruence” would be “revolutionary,” “narrower readings of *Flores* exist and involve less tension with” constitutional tradition).

²¹⁸ See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 10-15 (1883) (holding unconstitutional federal law prohibiting race discrimination by inns and other public places, and narrowly construing Fourteenth Amendment, in light of Tenth Amendment, to reach only “state action of a particular character”); *United States v. Cruikshank*, 92 U.S. 542, 557 (1875) (construing the Fourteenth Amendment narrowly and invalidating indictment for interference with the right to assemble).

²¹⁹ See, e.g., *RJR MacDonald, Inc. v. Canada* [1995] 3 S.C.R. 199, 342-48 (McLachlin, J.) (striking down prohibition on all tobacco advertisements; while legislation was rational means toward legitimate goal of reducing smoking, the complete bar could not be sustained under Charter section 1 because it did not minimally impair free expression rights, the government not having explained why a partial bar on “lifestyle” advertising designed to increase consumption, but not on “brand preference” advertising directed at existing smokers to increase market share, would not have been as effective).

for purpose analysis.

In Australia, the idea of proportionality has been applied to review challenges to federal action as outside the scope of federal power. Australian writers describe the concept as inspired by the European Court of Justice and European Court of Human Rights' jurisprudence.²²⁰ Jeremy Kirk, an Australian scholar, has suggested that the concept of proportionality has different roles to play in federalism as compared to individual rights cases. He argues that in assessing whether an act of the federal government "can be characterized as having a sufficient link" to a head of federal power "to be valid," proportionality can serve as "an objective test of purpose."²²¹ In assessing the validity of a "purposive" federal power, he suggests, elements of the proportionality test must be employed more narrowly: "[t]he court would have to ask whether availability of less restrictive means, or the imbalance [of benefits and harms], was of such an overwhelming nature as to make it clear that the law could not reasonably be characterized as having been made with respect to the claimed legitimate purpose."²²²

In other words, the argument is that courts should – in order to avoid inappropriate second-guessing of legislative decision-making – invalidate laws as outside federal power only where the law is so grossly disproportionate to the asserted goal as to cast doubt on the validity of the purported purpose. In order to avoid a quagmire of constitutional uncertainty in the U.S. constitutional setting, given both the lack of discrete areas reserved to the states as matters of regulatory jurisdiction and the constitutionally-protected participation of states in constituting the federal government,²²³ a judicial pol-

²²⁰ See *Minister for Resources v. Dover Fisheries Pty Ltd*, 116 A.L.R. 54 (1993); see also Kirk, *supra* note 154, at 2. For a detailed description of proportionality as a concept in the European Union, see EMILIOU, *supra* note 78, at 115-265.

²²¹ See Kirk *supra* note 154, at 2, 6. In Australia the process of determining whether a federal law is supported by one of its enumerated powers is referred to as "characterization." For implied or incidental powers, analogous to those contemplated by the U.S. Necessary and Proper Clause, purpose is always relevant. See *id.* at 22 (citations omitted). Other enumerated powers, although not all of them, are deemed to have a purposiveness requirement, including the power over external affairs and defense. Proportionality in Australia has been used to determine whether a law can be "characterisable as in fact adapted to achieve" a legitimate purpose. *Id.* at 22; see also H.P. Lee, *Proportionality in Australian Constitutional Adjudication*, in *FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR LESLIE ZINES* 126, 130-31 (Geoffrey Lindell, ed. 1994) (noting the similarity between established "proportionality" test to determine validity of regulations in administrative law, and its use to determine constitutionality of national legislation). While acknowledging concern that a proportionality test could invite judges impermissibly to intrude on legislative functions, Lee argues that some judicial review of the "degree" of connection between legislative action and legislative power is necessary to hold the legislature to rule of law standards. Lee, *supra*, at 148.

²²² Kirk, *supra* note 154, at 24-25.

²²³ For a classic statement, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559-60 (1954) (Court is on the weakest ground in opposing its view of Constitution to that of Congress in the interests of the states); see also, JESSE R. CHOPER, *JUDICIAL REVIEW AND THE*

icy of highly deferential review of exercises of federal power (not claimed to violate individual rights) makes sense. While Congress's institutional attention to the needs and interests of the different states is not a reason for refraining from judicial review altogether, it is a reason for highly deferential judicial review.²²⁴ With this important caveat – that the proportionality of congressional means to the claimed purpose is reviewed with considerable deference²²⁵ – the introduction of the concept of proportionality in *Flores* could be relatively benign.²²⁶ It certainly provides an occasion for further comparative reflection on the use of this concept elsewhere and its (some might say) strange absence from U.S. constitutional law.

I recognize the strength of David Cole's point that a proportionality test does not tell where the line will be drawn.²²⁷ But, such a test

NATIONAL POLITICAL PROCESS 171-259 (1980) (arguing that federalism-based challenges to national power should be nonjusticiable).

²²⁴ See generally Jackson, *Federalism*, *supra* note 36, at 2226-28 & n.206, 2230-55. A distinctive feature of current U.S. constitutional law may also identify a particular function for the *Flores* proportionality test: Federal regulation of state governments as such under Article I powers, (e.g. commerce clause) may be permitted (notwithstanding the anti-commandeering rule of *Printz*) if the federal statute even-handedly applies to private entities as well. See *New York v. United States*, 505 U.S. 144, 178 (1992). For purposes of the Commerce Clause, the distinction between federal commands to states as such, and federal regulations that fall even-handedly on states and private entities engaged in the same behavior, can be defended on a number of grounds as providing adequate protection to the states from federal regulation that interferes with their ability to function as independent governments. See Jackson, *Federalism*, *supra* note 36, at 2206-07. But federal regulation under the Fourteenth Amendment, unlike most Commerce Clause regulations, is necessarily directed at state power. See *The Civil Rights Cases*, 109 U.S. 3 (1883). Given the very purpose of the Fourteenth Amendment to constrain the exercise of governmental power, it would not make sense to extend the "regulate like private entities" rationale, by which the Court has, provisionally, maintained the possibility of congressional regulation of states when acting under Article I powers, to congressional enforcement of the Fourteenth Amendment. If Congress's Fourteenth Amendment power to define prohibited state action under Section 1 were unlimited, Congress would have unlimited power to eliminate state governments' independence. To the extent that, even after enactment of the Fourteenth Amendment, state governments retain a role as institutional counterbalances to Congress, it would be inconsistent to allow Congress to destroy the states. The *Flores* requirement of proportionality, properly administered, might thus be a substitute for constraints on Congress's regulation of the states in other areas, and justified by the need to assure that the national government cannot destroy the state governments, while at the same time allowing the federal government ample latitude to prohibit the states from engaging in practices that arguably violate the provisions of Section 1.

²²⁵ Cf. Lee, *supra* note 221, at 131, 148-49 (arguing for proportionality review of legislation "bolstered by a measure of judicial deference").

²²⁶ *Flores* also has the potential to be considerably less than benign; a broad reading of its rationale could threaten the constitutionality of, for example, applying to the states Title VII's "disparate impact" approach, or the Pregnancy Discrimination Act, both of which provide for relief on a showing that would not necessarily meet the Supreme Court's standards for establishing violations of the Equal Protection Clause. See generally Laycock, *supra* note 71, at 747-58. While both of these statutes may be sustainable as even-handed regulations of states as employers, see *supra* note 224 (discussing *New York v. United States*, 505 U.S. 144 (1992)) to the extent they are grounded in the Fourteenth Amendment *Flores* poses some risk (though perhaps more from the Court's holding that Congress cannot go beyond the Court's definition of what Section 1 prohibits than its holding on proportionality).

²²⁷ See Cole, *supra* note 71, at 47.

does permit one to say that some statutes are a closer fit, are more proportional, to a constitutional wrong, than are others. And ultimately, isn't what is enough of a fit a question of judgment under many of the tests? How rigorously proportionality will be applied may depend on the degree of deference given to Congress's determinations – whether Congress behaved rationally in concluding that the statute was proportional, or whether some more rigorous standard will be applied (which I would not favor).²²⁸ In *Flores*, however, Congress's main motivation in some sense was a disagreement with the *Smith* Court on what counts as a substantive violation.²²⁹ Thus, the standard of deference was arguably irrelevant: proportionality in *Flores* was being used as an alternative to screening for impermissible legislative purpose.

Does this discussion mean that the U.S. Supreme Court was either right or wrong in adopting a proportionality test in *Flores*? Perhaps neither. Ultimately, courts and commentators cannot avoid coming to grips with the historical reverberations of particular approaches

²²⁸ For a discussion of the basis for judicial deference to Congress in reviewing federalism-based challenges to congressional action, see Jackson, *Federalism*, *supra* note 36, at 2227. (arguing that Herbert Wechsler's argument that the structure of the national political process created by the Constitution tended to assure that states' interests were considered by Congress still has much merit, and that federal constitutional arrangements require a certain pragmatic give in the joints to function effectively over time).

²²⁹ While it may be somewhat more rigorous than the "mere rationality" standard, proportionality review in the Fourteenth Amendment context, if limited to instances of *gross disproportionality*, may do little seriously to impair Congress's power creatively to insist that states provide equal protection and due process of law to all. Note that the *Flores* Court refers with approval to its earlier decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (upholding the Voting Rights Act's suspension of literacy tests for five years in light of evidence that such tests had been used to exclude blacks from voting, and a concern that their use would freeze the effects of past intentional discrimination in the voter rolls). Moreover, the Court in *South Carolina v. Katzenbach* upheld a provision suspending any change in state voting rules or practices until federal authorities had reviewed them, a novel and intrusive step justified, the Court said, by the "extraordinary stratagem" states had in the past and might in the future adopt to exclude citizens from voting because of their race. 329 U.S. at 334, 329-31. While the Court did not explicitly refer to proportionality, its suggestion that extraordinary resistance justifies unusual responses, is consistent with the approach.

Other rationales that may sustain the requirement of proportionality go to whether efforts to promote the free exercise of religion by mandating accommodation would violate the prohibitions on federal establishment of religion. See *Flores*, 521 U.S. at 536-37 (Stevens, J. concurring); cf. Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997) (arguing that RFRA violates Establishment Clause). On whether the inquiry itself might be incompatible with the judicial role, see Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 947-48 (1993). See also *Flores*, 521 U.S. at 513 (discussing the Court's evaluation and rejection, in *Smith*, of the *Sherbert* standard which required courts to determine whether a particular practice was central to an individual's religion – a determination that, according to the Court, is "not within the judicial ken") (quoting *Smith*, 494 U.S. at 887). This article does not address these arguments other than to note that for those who believe that the two prongs of the religion clauses can come into conflict with each other at points of accommodation, this may provide an additional reason to identify some test for the validity of congressional power apart from the rational basis test into which *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), had developed.

within their own polities. In this light, the nineteenth century U.S. Court's hobbling of enforcement of the Reconstruction Amendments stands as an important caution in embracing "proportionality analysis" of federalism-based challenges to national laws, particularly outside the above-discussed inquiry into "gross disproportionality." Knowledge of the strikingly comparable developments of "proportionality" as a concept in other constitutional systems, however, and of their more intricate articulations of the proportionality test (in both individual rights and federalism issues) can inform decision of the range of consequences for adoption of this approach in the United States.

IV. FLORES, COMPARATIVE SOURCES AND THE CONSTITUTIONAL CONVERSATION

Flores is relevant to this article not only in its use of proportionality as a concept in constitutional law, but also in another way: it suggests that the Court may, at times, be unnecessarily close-minded in its appreciation of congressional input on constitutional interpretation in ways not unconnected to its resistance to comparative constitutional influences.

There is much room for disagreement with the *Flores* Court. Its reliance on the drafting history of the Fourteenth Amendment for the proposition that Congress was not intended to play a role in defining the substantive reach of the Section 1 rights is based on a highly contestable reading of that history.²⁵⁰ And the scope of the free exercise clause itself is a difficult question, the *Smith* decision, leaving many constitutional scholars, as well as politicians, deeply troubled.²⁵¹

But here I would like to consider arguments made by both David Cole and Michael McConnell,²⁵² that the Court's assertion of judicial

²⁵⁰ Compare *City of Boerne v. Flores*, 521 U.S. 507, 520-24 (arguing that redrafting of provisions of Section 1 was designed to allay fears that Congress would have too much power) with McConnell, *Institutions and Interpretation*, *supra* note 71, at 177-81 (arguing that the redrafted provision does not as a matter of language reduce Congress's power and was not understood by its drafters to do so). The Court's suggestion that its interpretation of Sections 1 and 5 of the Fourteenth Amendment, as limiting Congress to the design of remedial legislation, but not to a role in defining the substantive scope of Section 1, is "significant also in maintaining the traditional separation of powers between the Congress and the Judiciary," *Flores*, 521 U.S. at 523-24, is peculiarly circular. It could be argued that the Fourteenth Amendment changed those relations, just as it changed federal state-relations, to the extent contemplated by the Amendment. Indeed, since the Fourteenth Amendment was designed in part to overturn *Dred Scott v. Sandford*, 101 Howard 393 (1857) such a reading is hardly implausible.

²⁵¹ See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter, McConnell, *Free Exercise Revisionism*]; see also Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 442-45 (1994) (criticizing the Court's decision in *Employment Division v. Smith*, but also arguing against RFRA).

²⁵² See Cole, *supra* note 71, at 59-64 (arguing that Congress has particular institutional competence in interpreting the Constitution that should be given more deference than did the *Flores*

supremacy in interpretation need not have been accompanied by the implicit claim of judicial exclusivity in interpretation of constitutional provisions or by what appeared as a studied refusal to reconsider the constitutional question of *Smith* in light of Congress's findings and concerns.²³³ Given Congress's explicit constitutional role in enforcing the Fourteenth Amendment, the Court might have found congressional views relevant, particularly since the Court itself was closely divided in *Smith*. Instead, the Court suggested that Congress should have recognized the *stare decisis* principles that would mandate judicial adherence to *Smith* and implied that Congress should not have challenged the Court's decision in *Smith* through enactment of a statute premised, in part, on disagreement with *Smith*.²³⁴

But, was it inappropriate for Congress to test the limits of both the *Smith* principle, and of *stare decisis*, by enacting legislation that rested, in part, on a different constitutional theory?

This argument, while only implicit in *Flores*, is related to the arguments made by the plurality in *Planned Parenthood v. Casey*,²³⁵ that the Court should adhere to certain past decisions particularly when confronted with political pressure to change an existing interpretation.²³⁶ Critics counter that, particularly because it is a constitution being expounded, the Court should change its interpretation when persuaded that it is wrong (and can make the change without unset-

Court); McConnell, *Institutions and Interpretation*, *supra* note 71, at 155-56, 171-74 (arguing that the independent judgment of Congress on a constitutional question is relevant to judicial interpretation, especially in areas, such as the Free Exercise Clause, where there is plausible support for multiple interpretations).

²³³ See *Flores*, 521 U.S. at 515 (describing floor debates in which members of Congress discussed points of constitutional interpretation and criticized the Court's reasoning in *Smith*); *id.* at 536 (stating that once the Court has interpreted the Constitution, the political branches "act against the background of [that] interpretation" and that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance"). The Court indicated that once it had made a constitutional decision, it "will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *Id.* Thus, the Court rather clearly implies that the more expansive views of rights protected expressed by Congress in subsequent legislation are irrelevant.

²³⁴ Interestingly, Justice O'Connor's dissent, joined by Justice Breyer, seems to agree. She wrote that if she did not disagree with *Smith*, she would have joined the part of the Court's opinion in which this discussion is found because "when [Congress] enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment." *Flores*, 521 U.S. at 545-46. Justice O'Connor's position is surprising, since she also argues that the case should be used as a vehicle to reconsider *Smith*, and notes that *stare decisis* is not a barrier to reconsideration because *Smith* is "demonstrably wrong" and "is a recent decision [that] has not engendered the kind of reliance on its continued application that would militate against overruling it." *Id.* at 548. Why, if Justice O'Connor believes that the Court could appropriately overrule *Smith*, would it be inappropriate for Congress to provide such an opportunity to the Court through the enactment of RFRA?

²³⁵ 505 U.S. 833 (1992).

²³⁶ See *id.* at 867 ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

ting reliance interests on which law and political arrangements rest).²³⁷ If this critique of the *stare decisis* argument in *Casey* is correct, *a fortiori* it cannot be the case that the political branches are bound by separation of powers principles not to legislate on a plausible, competing constitutional theory.

It is not so much the assertion of judicial supremacy in interpretation with which I am concerned,²³⁸ but rather the suggestion that Congress violates the separation of powers in enacting a statute premised on a different constitutional theory and the implication that the Court should refuse to consider Congress's views on substantive questions. The latter, at least, raises echoes of the *Printz* Court's unwillingness to consider foreign constitutional practices in resolving U.S. constitutional questions. In the one case, foreign constitutional decisions might be worthy of consideration because they reflect reasoned judgments of other judges faced with similar problems.²³⁹ In the other, congressional views of the Constitution might be worthy of note because they come from a coordinate branch carrying out constitutional responsibilities of lawmaking and because they may reflect substantial general understandings of constitutional meanings. Constitutional adjudication probably cannot depart too far and too often from such understandings.

Should the practices and views of foreign constitutional systems, of the state courts, or of the Congress, be dispositive or controlling in constitutional adjudication? Surely not. Although compelling arguments exist for why Congress should have ample latitude to address

²³⁷ See *Casey*, 505 U.S. at 954-57 (Rehnquist, C.J., dissenting); see also Christopher J. Peters *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L. J. 2031, 2046 n.71 (1996) (stating that as a ground for not overruling, controversiality of prior decisions "becomes absurd if taken literally"). *But cf.* Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1539 (1997) (arguing that what the Supreme Court says must be treated as binding all other actors in order to serve the "coordination" functions of having a final decision-maker that constitutionalism requires). For a response see Tushnet, *supra* note 229, at 952-59 (challenging Alexander and Schauer's conclusion that courts rather than legislature should play "settlement" function).

²³⁸ One might believe that the Court's decision on constitutional matters must have priority over the views of other branches of government, and still believe that the system must be structured to allow opportunities for the views and positions of the other branches in disagreement with the Court to be considered by the Court through subsequent legal challenges.

²³⁹ *Cf.* *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994) (relying upon state court decisions about when a government regulation is a taking as an appropriate guide to development of a distinctive federal rule requiring "proportionality" between the conditions imposed and the benefits sought when a property owner requests a land use variance). The Court's occasional willingness to consider the views of the state courts on constitutional questions typically litigated there provides one model for considering the views of other constitutional courts. One might distinguish the Court's consideration of state cases from consideration of foreign decisions on the ground that state courts address identical issues under the identical constitution, whereas foreign decisions necessarily address different constitutions, even where the constitutional language is purportedly similar. *But see Dolan*, 512 U.S. at 398 (Stevens, J., dissenting) (pointing out that none of the state court cases announced anything akin to the Court's "rough proportionality" rule and noting that most of the state court cases cited by the majority relied on state law or other unspecified grounds, rather than on the federal Constitution).

what it sees as constitutional violations under Section 1 in the exercise of its Section 5 power, to construe the provision as affording Congress unfettered and unreviewable choice would probably yield too much power to maintain a constitutional balance. Moreover, well-reasoned and explained Court decisions can influence public and congressional understanding of the Constitution.

But are Congress's views on constitutional meaning irrelevant, and impermissible, on the question of scope? I would think not. Even the Court's view recognizes that the purported dividing line between substance and remedy is an uncertain one, and yields substantial deference to Congress on preventive and remedial issues. Being aware of Congress's considered views on the meaning of a substantive provision might well be relevant to sound constitutional adjudication, which, at least in reference to federalism issues, is an exercise of governance that must be both principled and pragmatic.²⁴⁰

Why, then, the Court's tone of rebuke to Congress in *Flores*, and of parochialism in *Printz*? Maybe just happenstance, but perhaps they are symptoms of current anxieties about the role of the Court, and of U.S. judicial review,²⁴¹ to which I alluded earlier. Congress has challenged the Court's interpretations, both statutory and constitutional, repeatedly in recent years.²⁴² The very titles of the statutes constitute

²⁴⁰ See Jackson, *Federalism*, *supra* note 36, at 2228-31, 2257-58.

²⁴¹ See also Horwitz, *supra* note 139, at 38-40 (suggesting that the "turn to history" and explicit preoccupation with legitimacy in the plurality opinion in *Casey* were symptoms of "a crisis of legitimacy in constitutional thought in which the generally accepted paradigms . . . are no longer felt capable of yielding convincing solutions to constitutional questions"); cf. Louis Michael Seidman, *This Essay Is Brilliant/This Essay Is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 U.C.L.A. L. REV. 501, 504-06 (1998) (finding pervasive foundational disagreement in modern constitutional law, discussing how this phenomena is reflected in Supreme Court opinions, and arguing that "loudly insisting on the truth of one's own statements can . . . suggest an insecurity as to their truth" reflecting this absence of fundamental agreement).

²⁴² Congress did so, for example, in enacting RFRA to provide greater protection for religious practices than provided by *Smith v. Employment Division*, 494 U.S. 872, 876-79 (1990), and by enacting a federal flag burning statute, albeit with different language, after the Court struck down a state flag burning statute, see *U.S. v. Eichman*, 496 U.S. 310 (1990) (holding that the Flag Protection Act of 1989, passed in response to the Court's striking of a state flag-burning statute in *Texas v. Johnson*, 491 U.S. 397 (1989), was also unconstitutional). Moreover, in reenacting the Gun Free School Zones Law, albeit with an element of "affecting commerce" added, see 18 U.S.C. § 922(q) (1998), Congress indirectly challenged the Court's decision holding unconstitutional a gun ban in *U.S. v. Lopez*, 514 U.S. 549 (1995). Apart from these constitutional confrontations, Congress has repeatedly overturned the Court's interpretations of federal statutes in several areas, including, for example, (1) federal civil rights statutes, see, e.g., *Grove City College v. Bell*, 465 U.S. 555 (1984) (leading to the Civil Rights Restoration Act of 1987); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (leading to the Civil Rights Act of 1991); see also *Landgraf v. USI Film Prod.*, 511 U.S. 244, 251 (1994) (describing the 1991 law as a response to several Court decisions); (2) federal laws relating to the sovereign immunity of the United States, for example, *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) (holding that even though the United States was a "person" subject to suit under certain environmental laws, it could not be sued for state-imposed punitive damages) (leading to the Federal Facility Compliance Act of 1992, 106 Stat. 1505, amending laws to provide specifically that federal agencies were not immune from such awards); and (3) the amenability of states to being sued for liability.

a visible confrontation with the Court – the Religious Freedom Restoration Act, the Civil Rights Restoration Act – implying that Congress is restoring what the Court took away. This is in contrast to other periods in the Court's history when its most contentious rulings were those imposing limitations on states and were supported (or at least not challenged) at the national level. The justices may also perceive themselves under greater scrutiny and attack by Congress at an administrative level.²⁴⁵ Finally, members of the Court cannot help but be aware of the increased interest in, and familiarity with, other systems of constitutional adjudication whose courts function well even though structured quite differently from those of the United States. All of these factors may contribute to the Court's defensiveness and assertiveness in excluding interpretive sources not more within the Court's control. Yet in the constitutional conversation of which adjudication is a major part, open-mindedness and a willingness to be humble about the correctness of one's views may actually go farther in preserving the rightful legitimacy of the Court.

I am guardedly optimistic that U.S. courts will be more open to foreign constitutional learning in the future. In 1996, for instance, Justice Sandra Day O'Connor, addressing the American College of Trial Lawyers, had this to say:

I think that I, and the other Justices of the U.S. Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. Some, like the

ties under federal statutes such as the Fair Labor Standards Act and the Federal Rehabilitation Act, discussed in Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 83 n.141, 89-90 nn.161-162 (1990). See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991).

²⁴⁵ Federal elected officials, including the President, the Congress, and its members have challenged federal judges across an array of the activities in recent years. For congressional challenges to federal courts' sponsorship of studies of gender and race equality in their courts, see Todd Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 175, 186-88 (1996) (describing how Senators Gramm, Grassley and Hatch denounced and tried to defund federal court-sponsored studies of gender and race equality). For an example of unusual congressional oversight of how federal judges spend their time, see U.S. Senate Judiciary Comm. on Adm. Oversight and the Courts, *Report on Judicial Survey (May 1996)* (describing survey of federal judges concerning how much time they spent on activities such as education and case management). For challenges to a federal judge's individual adjudicatory decision by elected officials (outside the ordinary course of U.S. Attorney's office litigation), see, for example, Linda Greenhouse, *Rehnquist Joins Fray in Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1 (describing attacks on Judge Harold Baer for exclusion of evidence in drug cases). In 1996, Congress and the President also passed the first major spate of jurisdiction-stripping legislation to be enacted in many decades. See generally Symposium, *Congress and the Courts*, 86 GEO. L. J. 2445 (1998) (discussing the potential impact of federal laws restricting the jurisdiction and remedial powers of the federal courts across a range of litigation brought by prisoners and immigrants); Exordium, *Suspension and Supremacy, Judicial Power and Jurisdiction: The Availability and Scope of Habeas Corpus After AEDPA and IIRIRA*, 98 COLUM. L. REV. 695 (1998) (discussing effect of AEDDPA and IIRIRA on federal courts' jurisdiction in habeas relief in the post-conviction and executive detention contexts).

German and Italian courts, have been working since the last world war. They have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies. Others, like the South African court, are relative newcomers on the scene but have already entrenched themselves as guarantors of civil rights. All these courts have something to teach us about the civilizing functions of constitutional law.²⁴⁴

In 1989, Chief Justice Rehnquist made a similar call for learning from other constitutional courts.²⁴⁵ Perhaps, then, the United States is beginning to be ready to open up the constitutional conversation, if not across institutional borders between the branches of government, then across national borders with other courts.

²⁴⁴ Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 1997 Spring meeting, American College of Trial Lawyers, reprinted in 4 INT'L JUDICIAL OBSERVER, June 1997 at 2 (publication jointly sponsored by the Federal Judicial Center and the American Society of International Law).

²⁴⁵ See discussion *supra* text accompanying notes 11-12.