LIMITING CONSTITUTIONAL RIGHTS

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The structure of constitutional rights in the United States and most other countries grants to legislatures a limited power to override rights when they conflict with certain public policy objectives. This limited override power contrasts with an absolute one, as enshrined in section 33 of the Canadian Charter of Rights and Freedoms, and is also both general and noninterpretive in nature, unlike the "substantive" congressional power claimed by some under Section 5 of the Fourteenth Amendment. This override power tends to be somewhat obscured in the United States by the absence of express limits on rights and, thus, a textually mandated two-stage process of rights adjudication.

In this Article, I first highlight the existence and nature of this limited override power and then present a normative justification of it and the general structure of rights that underlies it. In moving beyond description to defense, I also aim to respond to the highly influential, but largely unanswered, antibalancing critique in constitutional law. Specifically, I offer a democratic justification for the modern structure of rights as presumptive shields rather than peremptory trumps against conflicting public policy objectives—that, at least when certain substantive constitutional criteria are satisfied, rights should be overridable by legislatures for democratic reasons. My justification in turn has important consequences for how courts should go about their task of reviewing exercises of this legislative power.

My specification and defense of the limited legislative override power also provide fresh perspective on two other vigorous debates in constitutional theory. First, both opponents and proponents of judicial review have overlooked the role that the near-universal override power plays in rendering systems of judicial review less vulnerable to democratic critiques. Second, this power represents a form of popular constitutionalism that does not challenge—indeed is entirely consistent with—the interpretive supremacy of the U.S. Supreme Court and other constitutional courts.

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INTRODUCTION

A major issue in contemporary constitutional law is whether Section 5 of the Fourteenth Amendment grants Congress, in effect, the power to override U.S. Supreme Court decisions by enforcing its own independent interpretations of the Due Process and Equal Protection Clauses.[1] Of course, in *City of Boerne v. Flores*,[2] the case that reopened this debate, a bare majority of the Court held that Congress has no such "substantive" power.[3] In 1996, a year before *Boerne* was decided, Robert Bork proposed a constitutional amendment formally empowering Congress to override Supreme Court decisions by majority vote in order to counter what he viewed as illegitimate judicial expansion of individual rights.[4] As Bork himself half anticipated, however, his proposal was

1. Section 5 of the Fourteenth Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

2. 521 U.S. 507 (1997).

3. *Id.* (holding that a substantive interpretation of the Section 5 power would permit Congress to "alter the meaning" of the Fourteenth Amendment, a function inconsistent with both constitutional and judicial supremacy).

4. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 96–119 (1996). In fact, Bork's proposed override power was not limited to the U.S. Supreme Court, but could be used against the decision of any court, state or federal.

viewed across the legal-political spectrum as alien and extreme from a U.S. perspective, and he subsequently dropped it.[5]

Seemingly lost in both the ongoing Section 5 debate and the Bork episode is the fact that Congress and the states have long had a general power to limit or override constitutional rights as defined by the Supreme Court. This general power is a central but largely unexpressed feature of American constitutional law. Unlike the power claimed under Section 5, the existing general override power is not interpretive in nature. It permits Congress and the states to override constitutional rights without conferring authority to determine their meaning. Unlike the power proposed by Bork and enshrined in section 33 of the Canadian Charter of Rights and Freedoms (Canadian Charter),[6] the existing general override power is a limited, rather than an absolute, one: Certain substantive constitutional criteria must be met before Congress or a state may validly exercise it.

More familiar than this legislative override power per se is the general structure of constitutional rights of which it is an essential part. Rights are protective "shields," rather than peremptory "trumps,"[7] against conflicting, nonenumerated

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5. *See* BORK, *supra* note 4, at 117 ("The mere suggestion of such a remedy is certain to bring down cries that this would endanger our freedoms.").

6. The Canadian Charter states:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [the substantive rights provisions] of this Charter.

Part I of the Constitution Act, 1982, § 33(1), being Schedule B to the Canada Act 1982, ch. 11 (U.K.). The Section 5 power has recently been suggested as perhaps the nearest U.S. equivalent to a legislative override power. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 437–451 (2d ed. 2006). *See also infra* note 17.

7. Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 443 (1993) (describing constitutional rights in the United States as "shields" rather than "trumps"). In making reference here to the slogan of constitutional rights as trumps, I mean only to refer in a shorthand way to the proposition that constitutional rights cannot be overridden by conflicting public policy objectives. In particular, I do not mean to be attributing such a view to Ronald Dworkin, who is closely associated with this slogan. In fact, Dworkin does not seem to support such a conception. He has argued that, conceptually, a right cannot be overridden merely because this would produce an overall benefit to the community. Such normal political justification is insufficient and a "special protection" or "sort of justification" is needed. Rights are thus "trumps" against this sort of ordinary majoritarian or utilitarian claim, but not necessarily against any type of public interest claim whatsoever. This negative part of the claim is, to be sure, clearer than what the required "special protection" or justification must be. Can rights be overridden (1) only by other rights; (2) only for nonutilitarian reasons; or (3) only for strong or compelling reasons, which may include utilitarian ones? RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977). Within contemporary scholarship on rights, there is some disagreement as to which of two alternative theories of rights Dworkin actually espouses. *See* Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000) (arguing that Dworkin holds this "immunity" or "personal" view of rights in which rights are conceptualized as individual claims against majoritarian or

governmental interests, with courts balancing the two by applying one of several different presumptions and standards of review, such as strict scrutiny, intermediate scrutiny, and the rational basis test.[8] Indeed, far from being unique to the United States, the practice of limiting rights by balancing them against conflicting public policy objectives is in fact a near-universal feature of the structure of constitutional rights throughout the contemporary world.[9] Despite its doctrinal and comparative hegemony, such constitutional balancing[10] has long been subject to a highly influential scholarly critique, which has a number of complementary strands: conceptual, textual, historical,

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utilitarian goals). *But cf.* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000) (arguing that Dworkin holds a "reason-constraining" conception of rights in which rights generally exclude reasons of "external preferences"—views that people may have about the value of others or the worthiness of others' decisions—as a legitimate basis of collective action). Most likely, versions of both theories can be found in Dworkin's extensive work on rights.

8. This type of balancing analysis permitting an implicated right to be limited or overridden by a conflicting governmental interest, while not universal, *see infra* notes 63–65 and accompanying text, applies across the spectrum of constitutional rights. Thus, the Supreme Court applies such balancing tests to the rights contained in the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV.

9. *See infra* Part I.A and Part III.A. In focusing in this Article on the deep *structural* commonality of balancing rights against conflicting public policy objectives, I do not mean to deny that there are significant differences between the United States and many other countries in the particular *contents* of the balancing tests employed. For example, both the Canadian Supreme Court and the German constitutional court are generally understood to take a more liberal approach to whether a right is implicated and to focus most of their analysis on the second stage: whether limiting or overriding the right is justified. Moreover, in Canada, the content of this second stage differs from that used in the United States; rather than a fixed, multitiered level of scrutiny that depends on the right in question, the Canadian Supreme Court applies a single, sliding-scale standard in which the "proportionality" of the limit on the right is the central issue. Indeed, outside the United States, this proportionality test, which originated in Germany, increasingly provides both the common terminology and content of the second stage of rights analysis in constitutional systems around the world. *See infra* Part III.A.

10. There is some ambiguity in the literature about the term "balancing," which is sometimes given either a broader or a narrower meaning. *See* RICHARD FALLON, IMPLEMENTING THE CONSTITUTION 82–85 (2001). The broader meaning refers to any doctrinal test that "requires courts to assess whether a statute [or other state action] ought to be upheld, in light of the governmental interest that it serves, despite its impact on" a constitutional right. *Id.* at 83–84. Such tests may contain stronger or weaker presumptions of constitutionality or unconstitutionality, or involve either "weighted" or "evenhanded balancing." The narrower meaning refers only to the latter: a doctrinal test that requires courts to engage in a more evenhanded weighing of multiple factors on a case-by-case basis. The difficulty of drawing this line, however, is arguably suggested by Professor Fallon's inclusion of intermediate scrutiny in the narrower category. *See id.* at 83. Although Fallon thinks that "more illumination is lost than gained" by employing the broader meaning, he acknowledges that those making the antibalancing critique rely—indeed, must rely, as far as their descriptive claim about the pervasive role of balancing tests is concerned—on this broader meaning ("That claim depends on a broader characterization of balancing—one that encompasses suspect-content and non-suspect-content tests."). *Id.* at 83 (citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (asserting that compelling state interest tests "exemplify" a "form" of balancing)). In aiming to respond to the antibalancing critique in this Article, I employ the same broader meaning of the term as the critics.

expressive, and institutional.[11] Yet, surprisingly, this critique of balancing remains mostly unanswered in the literature. Although there have been sophisticated descriptions of the modern structure of rights analysis,[12] there has been little attempt to provide a normative justification for it: an account seeking to explain not merely that or when constitutional rights are overridable by conflicting public interests, but also *why they should be.*

This Article seeks to fill these two important and connected gaps. First, I highlight the existence and nature of the limited legislative power to override rights that lurks in the shadows of American constitutional law. Second, I provide a normative justification of this power and the structure of rights of which it is part. In so doing, my aim is to respond to the antibalancing critique by presenting the case for the general structure of modern constitutional rights both in the United States and throughout the contemporary Western world in which the political institutions have a certain power to promote public policy objectives that conflict with rights. This case needs to be made because there is nothing obvious or self-evident, to say the least, about the proposition that legislatures should be empowered to act inconsistently with entrenched rights. Accordingly, my account is neither descriptive nor interpretive.[13] Rather, it operates—like the general arguments for constitutionalized rights—at the level

11. Major works presenting the antibalancing critique include: Aleinikoff, *supra* note 10 (historical and institutional critique); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994) (conceptual and expressive critique); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (textual and historical critique). I discuss and respond to various aspects of the antibalancing critique throughout this Article.

12. Notable among the sophisticated analytical descriptions of the modern structure of constitutional rights are: Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 2–3 (1998) (stating that constitutional rights are rights against specific governmental rules and are not general immunities to act); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) (describing constitutional rights and governmental interests as conceptually interrelated to each other rather than, as usually understood, independent); Schauer, *supra* note 7, at 429 (describing the structure of U.S. constitutional rights as "shields" rather than "trumps"). In addition, a few other scholars have presented doctrinal or interpretive justifications, as distinct from normative defenses, of the modern structure of rights. *See* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994) (proposing a structural interpretation of the U.S. Constitution, which he calls the "Madisonian model," in which keeping the definition of constitutional rights separate from the analysis of state interests preserves the boundary between majority and minority tyranny); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988) (presenting a *constitutional* defense of balancing; namely, that compelling state interests have the same constitutional source as implied fundamental rights and so, as a matter of constitutional interpretation, are equally justified, no more nor less).

13. As mentioned, *see supra* note 12, Stephen Gottlieb has, for example, presented such an interpretive argument for the United States: that despite any obvious textual reference to it, the Constitution, properly interpreted, contains the principle of strict scrutiny, just as it contains implied fundamental rights.

of constitutional or political theory. More specifically, I offer a *democratic* justification of this structure: that rights should be overridable, at least in part, for democratic reasons.[14]

My specification and defense of the limited override power also provide fresh perspectives on two other important and vigorous debates in contemporary constitutional theory. The first is between proponents and opponents of judicial review.[15] Both sides in this debate have overlooked the existence of a legislative power to limit rights and its critical justificatory role within the system of judicial review that we actually have. For, as I argue, a system of judicial review with this power (that is, essentially all modern systems) is far less vulnerable to democratic critiques than one without. The second debate is between those who support the Supreme Court's recent assertions of judicial supremacy and those who reject it in the name of popular constitutionalism.[16] The issue dividing the two sides is whether the Supreme Court is, or should be, the ultimate/exclusive interpreter of the Constitution. By contrast, my democratic defense of the power of the majoritarian institutions to limit or override rights as judicially defined represents an *alternative form* of popular constitutionalism that does not challenge—indeed, is entirely consistent with—the interpretive supremacy of the Supreme Court. For my defense does not involve popular input into the meaning of the Constitution, but rather into

14. By "constitutionalized rights" here and elsewhere in this Article, I am referring to a particular legal form that rights may be given, which contrasts primarily with statutory and common law rights. This legal form typically involves (1) granting rights constitutional status as supreme law; (2) entrenching them against ordinary legislative amendment or repeal; and (3) enforcing them through judicial review; that is, granting one or more courts the power to decline to apply a statute (and often other laws or government action) on the ground that it violates a constitutional right.

In this Article, I am presenting the democratic case for balancing and limiting rights within a system of constitutionalized rights. I am not directly addressing the normative issue of whether to constitutionalize rights in the first place, including whether to give courts the power of judicial review, although I do think that my democratic defense closes the "democracy deficit" between systems with and without judicial review. *See infra* Part II.B.

15. Recent judicial review skeptics include Mark Tushnet and Jeremy Waldron. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT 282–312 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Proponents include Bruce Ackerman and Rebecca Brown. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998).

16. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). Academic supporters of judicial supremacy include Larry Alexander and Fred Schauer. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). There is a huge and growing literature on popular constitutionalism. For a leading rejection of judicial supremacy, see LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). For helpful citation to this literature, in addition to its own contribution to it, see Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

the noninterpretive task of resolving conflicts that result from what the Court has held the Constitution to mean.[17]

In order to bring the legislative override power into sharper focus and to prepare the way for my justification of it, it is necessary to correct two misconceptions about the structure of rights that both stem from the court-focused nature of American constitutional law. First, limiting constitutional rights tends to be understood as a purely interpretive, and hence a judicial, function concerning the scope or definition of a given right. As I argue, this ignores a second and distinct type of limit on constitutional rights. While "internal limits" are indeed about scope and definition, "external limits" are about the power of a legislature to limit or override the right as defined. Second, contrary to the usual understanding given firm expression in the antibalancing critique, balancing rights against conflicting public policy objectives is not a self-contained judicial methodology of constitutional adjudication, to be contrasted with more formal or categorical modes. Rather, balancing is part of the broader structure of constitutional rights and primarily a *legislative* exercise. It is legislatures that are granted a limited power to balance rights against certain public policy objectives, and to pursue these objectives even when the two conflict. The task of the courts in reviewing exercises of this power, as any other, is to ensure that its scope has not been exceeded.

Having first specified and clarified the limited override power, I then present a normative case for granting this power to the legislature.[18] This case turns on the proper division of authority within a democracy that

17. This is one reason the override power I identify and defend in this Article is quite different from, and has no connection with, arguments for and against Congress's independent power to interpret the Constitution under Section 5 of the Fourteenth Amendment. *See supra* note 6 and accompanying text.

My defense of the limited override power is, accordingly, in the same spirit as Mitchell Berman's suggestion that "the usual arguments for judicial deference to the interpretive judgments of Congress may find greater success if translated into arguments that courts should give greater deference to Congress's judgments about whether given policies conform to judge-interpreted constitutional meanings." Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 104 (2004) (proposing a taxonomy of constitutional doctrine that distinguishes between "constitutional operative propositions" (rules about what the Constitution means) and "constitutional decision rules" (rules directing how courts should adjudicate claimed violations of such meaning)).

As a noninterpretive form of popular constitutionalism, my thesis is thus also different from "departmentalist" theories of constitutional interpretation, which generally hold either that each department of government should be the final interpreter of its constitutional powers or that there should be informal dialogue among the branches with no final arbiter. For various theories of departmentalism, see Adler, *supra* note 16, at 753.

18. As I discuss in Part III.B, although the limited override power that emerges from my analysis is effectively granted in the United States and in some other countries to both the legislature and the executive, the justification I present in Part II applies far more strongly to legislative overrides than to executive overrides. Accordingly, my argument in Part III for a relatively deferential standard of judicial review of the limited override power applies only to legislative overrides.

constitutionalizes rights. That is, the power may be seen as part of a democratic response to the inherent features of entrenched rights and judicial review that disable popular self-government. My argument first suggests that the limits constitutional rights undoubtedly place on majoritarian decisionmaking need not be absolute. In addition, especially (though not only) in a context of indeterminate textual provisions and reasonable disagreement about what rights to recognize, permitting an electorally accountable collective institution to limit or override rights when it satisfies the applicable burden of justification offers a plausible and appealing alternative to judicial monopoly in constitutional law.

Finally, my democratic justification of the limited legislative override power has important implications for how courts should go about their task of reviewing its exercise. To be sure, the fact that this power is limited and not absolute means that its exercise is subject to some form of judicial review. But this issue of the appropriate form of judicial review is secondary and must be answered in light of the purpose of granting the power in the first place. If, for democratic reasons, we want legislatures to have a limited power to pursue certain policy objectives even though doing so conflicts with constitutional rights, it would be counterproductive if the form and standard of subsequent judicial review effectively transferred this power of decision to the judiciary. Moreover, because judicial balancing of constitutional rights and government interests creates special problems of legitimacy and integrity over and above the standard ones associated with judicial review,[19] it increases rather than diminishes democratic tensions.

The form and standard of judicial review I propose and defend in this Article is a combination of strong procedural, and relatively weak substantive, review. The former aims to ensure that the relevant political institution actually makes a judgment that acting inconsistently with a right in a particular context is justified by the relevant constitutional criteria, because this is an essential and nondelegable part of the limitation placed on the power. The latter involves a reasonableness or clear error rule regarding the various substantive components of that required judgment. More than this is effectively to transfer the power to decide the issue from the political institution to the courts, which is inconsistent with both the underlying nature of the power itself and its primary justification as a means of enhancing self-government within a system of constitutionalized rights.

19. I discuss these problems in Part III. On this limited point, I agree with the critics of balancing, *see supra* note 11, although they make it in the context of misidentifying balancing as exclusively a judicial methodology rather than primarily a legislative power.

The Article proceeds as follows. Part I offers a partial reconceptualization of the structure of constitutional rights in order to identify the United States as having a system of judicial review in which the political institutions are granted a certain power to limit or override rights by promoting conflicting policy objectives. It begins by drawing an important distinction between internal and external limits on constitutional rights in order to explain respective judicial and legislative functions. Here, I employ comparative constitutional materials to clarify and illustrate the point. I then seek to establish that, contrary to the usual understanding, balancing is far less a judicial methodology of constitutional adjudication than an intrinsic part of the structure of rights and the limited override power. Part II presents a normative case for this structure and power. This case is not essentially one of constitutional interpretation but of constitutional democracy. Part III proposes how, informed by a proper understanding of its nature and justification, judicial review of this majoritarian power should be conducted. After analyzing how courts in Canada, Germany, South Africa, and under the European Convention on Human Rights have applied their respective constitutional criteria for use of this same power, I suggest which of these examples, if any, provides the best model for courts in the United States.

I. THE EXISTENCE OF THE LIMITED OVERRIDE POWER

Most constitutional rights can be limited or overridden by the government when they conflict with sufficiently important, nonenumerated public policy objectives. *Grutter v. Bollinger*[20] is a paradigmatic recent example of this structural characteristic of constitutional rights. In *Grutter*, the Supreme Court held that Michigan's public policy objective of promoting educational diversity at its flagship law school justified the state in overriding the plaintiff's equal protection right not to be treated unequally on the basis of race.[21]

This structure of rights, in other words, effectively grants to the political institutions a certain power to limit or override constitutional rights in the promotion of conflicting public policy objectives. Yet we do not tend to call

20. 539 U.S. 306 (2003).

21. *Id.* Although it might be thought that *Grutter v. Bollinger* is an outlier as one of the relatively few cases in which the Supreme Court has upheld a challenged measure under strict scrutiny, my colleague, Adam Winkler, has recently shown that between 1990 and 2003, there was a 30 percent survival rate in the federal courts as a whole for all measures subjected to strict scrutiny. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812 (2006). Of course, the federal courts, including the Supreme Court, also subject some other infringements of constitutional rights to lesser standards of scrutiny, meaning that the total survival rate for all overrides is likely far higher.

what was validated in *Grutter* the exercise of such a power or think of the structure of constitutional rights in quite this way. The argument of this Part is that should we should do both and for two reasons. First, because this most accurately and candidly describes what takes place; second, because this understanding makes more obvious the need to justify the structure that we have. There are, I believe, three hurdles to conceiving of the structure of rights as containing a limited override power, which I explore and seek to overcome in what follows. These are: (1) that the whole topic of limits on rights is undertheorized in the United States due to the fact that almost all limits are implied; (2) that limiting constitutional rights tends to be viewed as a purely interpretive—and hence, judicial—function concerning the meaning and scope of a right; and (3) that balancing rights and government interests is understood exclusively as a particular judicial methodology of constitutional adjudication.

A. Judicial and Legislative Limits on Rights

Although it is generally understood and widely repeated that "constitutional rights have limits," the whole topic of limits on rights is strangely undertheorized in the United States. This is especially surprising given the time that courts spend on, and (as *Grutter* illustrates) the controversies surrounding, the part of rights adjudication in which many of the limits come into play.

An important part of the explanation for this neglect stems from the well-known fact that, with only very few exceptions, all limits on constitutional rights are implied in the United States. As a result, the topic is denied the status of an independent and distinct subject in constitutional law and is, at best, subsumed within the general field of constitutional interpretation, of which limits are one product among many. This contrasts with most modern constitutions around the world, which contain express limits on certain of the rights that they bestow. They typically do so via general or specific limitations clauses: either a single express statement of the limits that apply to all constitutional rights, or different customized express limits that attach to specific rights.

For example, section 1 of the Canadian Charter contains a general limitations clause, which states: "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."[22] The South African constitution also contains a general limitations clause, in section 36(1), which states that:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.[23]

Like the Canadian Supreme Court, the Constitutional Court of South Africa has made clear that the general limitations clause results in a two-stage analysis when constitutional rights are at issue: A court must determine (1) whether a right in the Bill of Rights has been infringed; and (2) if so, whether the infringement is justified as a permissible limitation under section 36(1).[24]

By contrast, several of the rights recognized under the European Convention on Human Rights (ECHR)[25] contain specific limitations clauses, such as the following in article 9(2): "Freedom to manifest one's religion or beliefs

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22. Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) (italics omitted).

23. S. AFR. CONST. 1996 § 36(1). A third example of a general limitations clause is contained in the European Union's (EU) Charter of Fundamental Freedoms. It states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Charter of Fundamental Rights of the European Union, art. 52, para. 1, Dec. 18, 2000, 2000 O.J. (C 364) 1, 21. The Charter has not yet, however, been incorporated into the EU's existing constitutive treaties or otherwise given legal effect. It is now held up in the stalemate following rejection of the EU Constitution by referendums in France and Holland.

24. *S v. Makwanyane*, 1995 (3) SA 391 (CC) at para. 100. Although *Makwanyane* interpreted the general limitations clause contained in section 33 of the interim constitution of 1993, and the wording of section 36(1) in the 1996 final constitution differs from it in a few respects, the Constitutional Court of South African subsequently held that the limitations inquiry remains essentially the same and that it should follow the formulation in *Makwanyane*. *See Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice*, 1999 (1) SA 6 (CC) at para. 33.

25. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. The Convention is an international treaty sponsored by the Council of Europe, an intergovernmental organization now comprising all European states. Ratification of the Convention, which initially came into force in 1950, is a requirement of membership in the Council of Europe. The rights contained in the Convention bind member states in their dealings with their own citizens, and are enforced by the European Court of Human Rights sitting in Strasbourg, France.

shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[26] The Basic Law of the Federal Republic of Germany (Basic Law) similarly contains several specific limitations clauses. For example, article 11(2) states that:

> [Freedom of movement] may be restricted only by or pursuant to statute, and only in cases in which an adequate basis for personal existence is lacking and special burdens would result therefrom for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a State, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect, or to prevent crime.[27]

The U.S. Constitution contains almost no express limits on the rights that it bestows, so that virtually all limits are implied.[28] Contrary to Justice Black's well-known admonition that "Congress shall make no law abridging the freedom of speech" should be understood to mean what it says—"no law means no law"[29]—the Supreme Court has long read what is effectively an "unless clause" into this and most other important rights that on their face appear absolute. So, for example, for current purposes, modern First Amendment law states that Congress shall not abridge freedom of speech *unless* doing so is necessary for a compelling government interest.[30]

Apart from general neglect of the topic, another important consequence of the absence of express limits in the United States is that the practice of

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26. *Id.* Similar, but not identical, specific limitations clauses apply to the rights to respect for private and family life, *id.* art. 8, and freedom of expression, *id.* art. 10.

27. GRUNDGESETZ [GG] [Constitution] art. 11(2).

28. Among the very few express limits on rights are (1) the power of Congress to suspend the writ of habeas corpus in times of rebellion and invasion; and (2) the Thirteenth Amendment right against slavery and involuntary servitude permitting the latter as a punishment for crime. *See* U.S. CONST. art. 1, § 9; *id.* amend. XIII.

29. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) (Black, J., dissenting); *see also* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

30. This is, of course, a highly abbreviated statement of current First Amendment doctrine intended only to illustrate the role of implied limits. A slightly fuller version would be that Congress and the states shall not abridge freedom of speech by content-based restrictions unless necessary for a compelling interest, or by content-neutral restrictions unless substantially related to an important interest. The Supreme Court has read similar unless clauses into fundamental rights under the Due Process Clause and the right not to be discriminated against on the grounds of race, ethnicity, or national origin under the Equal Protection Clause. The latter has also been interpreted to mean, inter alia, that neither the states nor the federal government can discriminate (1) on the basis of gender unless substantially related to an important government interest; or (2) on any other ground unless rationally related to a legitimate government objective. *See* Craig v. Boren, 429 U.S. 190 (1976); *see, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

limiting rights tends to be understood as a purely interpretive—and hence, judicial—function, concerning the meaning and scope of a right. Limiting rights is something that courts do as part of their broader task of giving meaning to the Constitution, and not something that governments do. Since it is undoubtedly part of the Court's legitimate function to interpret constitutional rights provisions, it is easier to justify the judicial implication of limits on rights if all such limits are understood to be part of this function, part of the task of defining a right. Yet, this overlooks a second and distinct type of limit on constitutional rights, one that concerns the power of the political institutions to act inconsistently with the right as defined. Failure to acknowledge or distinguish this second type of limit accordingly results in failure to acknowledge the legislative role in limiting rights and the override power. I refer to these two types of limits as "internal" and "external" respectively.

Internal limits on rights address the issue of whether a constitutional right is implicated in a given situation in the first place. That is, they concern the meaning and scope—the definition—of a constitutional right. Thus, for example, does the constitutional right to free speech include car bombing the president as an expressive act of political dissent? The answer is no, which amounts to an internal limit on the right to free speech: There is no such constitutional right in the first place, and hence, never the need to justify infringing it. Does the constitutional right to liberty under the Fourteenth Amendment's Due Process Clause include the right of a woman to choose an abortion? Under the Court's existing interpretation of this constitutional right, the answer is yes: The scope of the right includes abortion.[31] Does the same clause include the right to engage in homosexual sodomy? In seemingly overruling the existing answer to this question given in *Bowers v. Hardwick*,[32] the majority in *Lawrence v. Texas*[33] answered yes and so lifted a preexisting internal limit on the right.[34]

External limits, by contrast, are constitutionally permissible restrictions on rights that *are* implicated and do apply in a given situation. That is, they specify the circumstances in which the government can pursue a public policy objective even though doing so conflicts with a constitutional

31. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

32. 478 U.S. 186 (1986).

33. 539 U.S. 558 (2003).

34. *Id.* at 578. The Supreme Court in *Lawrence* overruled *Bowers* without clearly stating either whether the liberty involved was "fundamental" (*Bowers* had said it was not, 478 U.S. at 192–95) or what standard of protection applies to it: strict scrutiny, undue burden, or rational basis. *See Lawrence*, 539 U.S. at 578.

right as interpreted.[35] In short, external limits state the parameters of the government's override power. Thus, to take the sole U.S. example of an express external limit, Congress is empowered under Article I, Section 9 to suspend the right to petition for habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[36] A more typical (that is, implied) external limit issue is, given that the constitutional right to liberty under the Due Process Clause has now been interpreted to include the right to engage in homosexual sodomy, under what circumstances, if any, may government limit this right to promote conflicting public policy objectives?[37] Or, given that the same clause includes a woman's right to have an abortion (*Roe v. Wade*[38] ended the previous internal limit on this right), when, if ever, may conflicting public interest objectives asserted by a state "override" [39] that right? To take a First Amendment example, given that the right to free speech paradigmatically includes the right to express political opinions (at least nonviolently), an external limit issue is whether government may override the constitutional right of the American Nazi Party to march through Skokie, Illinois in order to promote its conflicting public policy objective of protecting Holocaust survivors from pain and suffering.[40]

Similarly, in *Grutter*, both the majority and three of the four dissenters treated the constitutional issue raised as one involving external limits.

35. As Fred Schauer argues, the distinction between the applicability or scope of a right and the overriding of a right "simply reflects the deep structure of all rules and all principles." Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND U.S. CONSTITUTIONALISM 49, 68 (Georg Nolte ed., 2005).

36. U.S. CONST. art I, § 9. I am grateful to Sandy Levinson for reminding me of this express external limit.

37. In *Lawrence*, the majority held that morality was not a sufficient justification for criminalizing homosexual sodomy, but discussed neither what particular objectives might be capable of overriding the right nor what general criteria for an override attach to the right. *Lawrence*, 539 U.S. at 571.

38. 410 U.S. 113 (1973).

39. The term "override" was used in Justice Blackmun's majority opinion in *Roe* in denying that Texas had a compelling interest in protecting life from conception: "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Id.* at 162. Presumably, where the state does have a compelling interest (as in protecting life after viability), such an override of rights occurs. Indeed, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 866 (1992), the joint opinion confirmed this point by again using the term "override": "The second reason is that the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can . . . be the object of state protection that now *overrides* the rights of the woman." *Id.* at 870 (emphasis added).

40. I am referring here to the circumstances surrounding the case of *Smith v. Collin*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978), in which the Supreme Court declined to review the Seventh Circuit decision invalidating, under the First Amendment, ordinances of Skokie, Illinois prohibiting the American Nazi party from marching through the town. *Id.*

Given the prior interpretation of the constitutional right to equal protection as mandating governmental colorblindness (which no Justice challenged),[41] can the plaintiff's right not to be treated unequally on the basis of race be overridden by Michigan's public policy objective of promoting educational diversity? Alternative analyses that do not involve external limits would be (1) that the right as interpreted is in principle non-overridable by conflicting public interest objectives, however compelling (that is, the right is absolute);[42] or (2) that the right should be interpreted differently, as having greater internal limits. An example of this second alternative would be adopting the anticaste view that equal protection creates a right only against governmental acts premised on the lesser citizenship of one or more groups. Under this latter interpretation, an override would not arise as the right is not in conflict with Michigan's public interest objective.

Internal limits on rights are automatic and inherent. Once specified, they always apply so that, where triggered, there simply is no constitutional right to be infringed. For example, obscenity is never part of the right of free speech.[43] Moreover, as inherent parts of the right, internal limits apply independently of political will; political institutions have no power to elect that internal limits do or do not apply in a particular case.

By contrast, external limits on rights are both contingent and conditional. They are contingent because whether they are even relevant in a given case depends, first, on a state choosing to assert a conflicting public objective that is capable of overriding the right in question. Thus, Michigan, but not California,[44] purported to limit the Equal Protection Clause as defined by the Supreme Court in the pursuit of educational diversity. They are conditional because even if a state so elects, successful and valid imposition of the external limit

41. This interpretation was established in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which the Supreme Court held, for the first time, that strict scrutiny applies to all facial racial classifications, whether they disadvantage or benefit minorities. *Id.* at 493.

42. This was arguably the analysis of Justice Scalia's dissent in *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (Scalia, J., dissenting).

43. *See* Roth v. United States, 354 U.S. 476, 485 (1957); *cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that "fighting words," although casually stated to be outside First Amendment protection (like obscenity), were nonetheless protected against viewpoint-based discrimination—banning only certain fighting words).

44. California affirmatively chose not to assert educational diversity as a compelling interest by enacting Proposition 209, which bans affirmative action in admission and in hiring in public universities in the state, as an amendment to the state constitution. *See* Prohibitions Against Discrimination or Preferential Treatment by State and Other Public Entities, Initiative Constitutional Amendment Proposition 209 (codified at CAL. CONST. art. I, § 31).

depends on satisfying the substantive constitutional criteria. Mere assertion of the objective is insufficient to override the relevant right.[45]

45. As noted above, Fred Schauer has described the conceptual distinction between the coverage or delineation of a right and the reasons for overriding it as reflecting "the deep structure of all rules and all principles." *See supra* note 35. How does the distinction between internal and external limits on rights compare with three other distinctions that have been drawn in the literature?

The first distinction is between the scope and the weight of a right. Clearly, the two distinctions overlap considerably and address the same general issues of definition versus justified infringement. Nonetheless, I think the internal-external limits distinction is preferable for the following reasons: (1) by focusing attention not only on the right but on the governmental power, it helpfully distinguishes between judicial and legislative roles in limiting rights; (2) by highlighting the legislative role, it also points to the need for justifying it; and (3) it more directly addresses the neglected but important topic of limits on rights.

Second, in an admirably dense and thoughtful article, Richard Fallon distinguishes between (1) constitutional rights as conceptually independent constraints on governmental powers; and (2) constitutional rights and governmental powers as conceptually interdependent. *See* Fallon, *supra* note 12. He argues that the latter more accurately reflects the fact, as he sees it, that "within our constitutional practice," constitutional rights are pervasively defined by balancing "the interests underlying the rights against the interests supporting the recognition of governmental powers." *See id.* at 361–62. I am genuinely uncertain whether Fallon's analysis challenges or undermines the distinction between internal and external limits. For this distinction does not turn on *how* courts go about the task of defining the scope (the internal limits) of constitutional rights—whether they employ text, original intent, or interest balancing—but only specifies that defining rights is distinct from assessing their external limits. So, even if, for example, courts balance to define whether freedom of speech includes commercial speech, the separate issue of external limits still arises to determine if the government can justify overriding the defined right in a particular case. Moreover, as I suggest, in the United States all limits on rights tend to be understood as interpretive in nature. *See infra* text accompanying note 54. But to the extent Fallon's account does challenge the distinction, I tend to agree with Fred Schauer that the analytical structure of rights as shields rather than trumps does not generally presume the conceptual interdependence of rights and interests. *See* Schauer, *supra* note 7, at 520. I also tend to agree with Schauer that this interdependence conflates "two inquiries whose separation lies at the heart of the structure of all rules." *See* Schauer, *supra* note 35, at 69. Of course, my task in this Article is to provide a normative justification for this analytical structure of rights and interests that I believe Schauer (and perhaps also Fallon), among others, correctly describes.

Finally, in a characteristically lucid and insightful discussion of limiting rights under the New Zealand Bill of Rights Act, Andrew Butler employs Melville Nimmer's classic distinction between definitional balancing (a higher court balances to create a rule that will bind lower courts) and ad hoc balancing (courts engage in case-by-case balancing on the facts) to express two different methods for limiting rights. *See* Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968). According to Butler, "definitional balancing would involve reading limitations into the definition of the right . . . while *ad hoc* balancing would require the court to define the rights broadly 'without reference to competing values or other considerations,' with questions as to the reasonableness of limitations on those broad rights being determined separately." *See* Andrew S. Butler, *Limiting Rights*, *in* ROLES AND PERSPECTIVES IN THE LAW: ESSAYS IN HONOUR OF SIR IVOR RICHARDSON 113, 117 (David Carter & Matthew Palmer eds., 2002). Butler, however, seems to suggest that these two methods of limiting rights are mutually exclusive: that New Zealand, at least, can have only one type of limit on rights and so must choose one or the other of these alternatives (definitional or ad hoc balancing). Given this choice, he proposes that the New Zealand courts should interpret the Bill of Rights as incorporating only ad hoc balancing, thereby granting rights a broad interpretation and considering limits only at the separate, second stage. By contrast, my discussion suggests that these two types of limits are more independent of each other so that a system can choose to incorporate both. Thus, the right to free speech does not

Both internal and external limits may be either express or implied, as again illustrated by examples from comparative constitutional law. In the United States, of course, with only a couple of exceptions, both types of limits are implied. So, for example, neither what types of speech or conduct lie outside the right to "freedom of speech" in the first place, nor the circumstances in which government may promote public policy objectives that conflict with what is inside the right, are expressed in the text of the Constitution. The same is true of the rights to due process and equal protection.

By contrast, other constitutional texts contain both express internal and external limits on rights. An example of an express internal limit is provided by article 2(2) of the ECHR, which defines the contours of the right to life contained in article 2(1) as follows:

> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[46]

Several other rights in the ECHR are expressly stated to be subject to certain external limits, specifying both the conflicting public policy objectives that, in principle, may "interfere" with the right and the constitutional standard that must be met for such interference. Thus, article 8(1) states: "Everyone has the right to respect for his private and family life, his home and his correspondence."[47] Article 8(2) contains the external limits on that right:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[48]

Similarly, a few provisions of Germany's Basic Law contain internal limits on rights. For example, article 3(3), part of the right to equality before the law, states that: "No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his

include car bombing the president; but what it does cover may still be overridden by conflicting public policy objectives asserted by the legislature.

46. European Convention on Human Rights, *supra* note 25, 213 U.N.T.S. at 224.
47. *Id.* at 230.
48. *Id.* at 230.

religious or political opinions."[49] As a matter of text, this obviously limits the scope of the equality right to the enumerated classifications. Article 9(2) states internal limits on the right to freedom of association: "Associations whose purposes or activities conflict with criminal statutes or that are directed against the constitutional order or the concept of international understanding are prohibited."[50] By contrast, several other provisions of the Basic Law expressly provide for external limits on basic rights; that is, they permit rights to be contingently limited by the government. In addition to the examples cited above concerning the right to freedom of expression and freedom of movement, article 13(3) specifies the circumstances in which the right to "inviolability of the home" may be restricted.[51]

Although only internal limits are purely or inherently interpretive in nature—they are exclusively about the meaning and scope of a right—external limits, like any other constitutional provision, may sometimes involve or require interpretation. Thus, where external limits are almost entirely implied (as in the United States), the task of interpreting and defining the limit precedes that of determining whether it has been complied with or exceeded in a given case. But what courts are interpreting, however, is not the meaning or scope of the right but the scope of the governmental power to act inconsistently with it.

As exemplified by the Canadian Supreme Court and the Constitutional Court of South Africa, many high courts around the world have acknowledged the distinction between internal and external limits by interpreting their general or special limitations clauses to institutionalize it in the form of an explicit and self-conscious two-stage process of rights adjudication. These two stages are: (1) whether, as defined, a constitutional right has been infringed (internal limits); and (2) whether the government can justify the infringement by showing that it has validly exercised its power to act inconsistently with the right (external limits).[52] Indeed, the near universality

49. GRUNDGESETZ [GG] [Constitution] art. 3(3).

50. *Id.* art. 9(2).

51. "Intrusions and restrictions [on the right to inviolability of the home] may otherwise [than specified in article 13(2)] be made only to avert a public danger or a mortal danger to individuals, or, pursuant to statute, to prevent substantial danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of epidemics, or to protect juveniles who are exposed to a moral danger." *Id.* art. 13(3).

52. The Canadian and South African courts have both taken the view that, given the two-stage process, rights should be interpreted broadly under the first stage. This does not mean, however, that there are no internal limits on rights. It is also not a necessary approach to the two-stage process, although it is fairly common, as further exemplified by both the European Court of Human Rights and the German constitutional court. *See* Butler, *supra* note 45, at 120; *see also* Schauer, *supra* note 35 (also noting that these courts have institutionalized the distinction by creating a two-stage process,

of this general structure of rights adjudication has recently led one scholar to refer to it as "the Postwar Paradigm."[53]

In the United States, by contrast, external limits are often not distinguished from, but rather conflated with, internal limits. That is, there is a tendency for all limits to be conceptualized as part of the definition or scope of the relevant right.[54] As stated above, this is primarily to be explained by the absence of express limits. It is easier to justify the judicial implication of limits on rights if all such limits are understood to be part of the undoubtedly legitimate task of defining constitutional rights provisions. As a result, legislative functions respecting the practice of limiting rights have not been adequately distinguished from judicial ones. Under this conceptualization, the implied unless clause read into most constitutional rights provisions by the Supreme Court is part of the definition of the right. So, for example, the First Amendment right to free speech is roughly defined as follows: The right is to be free from intentional, content-based regulation of noncommercial speech or expressive conduct that does not constitute fraud, obscenity, fighting words, or a clear and present danger *unless* the regulation is necessary to promote a compelling governmental interest.[55] Similarly, the right to abortion in *Roe* may perhaps be defined as a right to have an abortion at all times where the health or life of the mother is at risk and otherwise unless, after the point of viability, a state elects to prohibit abortions as necessary to promote a compelling interest in protecting potential life.

One manifestation of this conceptualization of all implied limits as internal is the seeming awkwardness or disinclination in American constitutional discourse, when the government does justify acting inconsistently with the right, of referring to the right as having being "infringed," "overridden," or even "limited." If you have a right to X unless government action is necessary to promote a compelling interest, and the government satisfies this test, it seems strange to say that your right to X has been limited, infringed, or overridden—even if justifiably. As the condition qualifying your right has been fulfilled, you

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but arguing that the Canadian court's liberal approach to the interpretation of rights has effectively created a one-stage process, with justification the only real issue).

53. Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 93 (Sujit Choudry ed., 2006) ("In the postwar juridical paradigm, the determination of whether a right has been infringed requires a two-stage analysis.").

54. This is, arguably, the phenomenon that Richard Fallon describes as central to U.S. constitutional practice; namely, that rights are defined by "a balancing of the interests underlying the rights against the interests supporting the recognition of governmental powers" (the conceptual interdependence of rights and powers). *See* Fallon, *supra* note 12; *see also* discussion *supra* note 45.

55. Again, a fuller statement would also include the unless clause that applies to content-neutral speech restrictions. *See supra* note 30.

have no right in the circumstances. Again, this contrasts with countries such as Canada and South Africa which, by institutionalizing the distinction under the formal two-stage process, openly and unproblematically employ terms such as "infringement" and "violation" to describe the outcome of the first stage.

Whatever its internal cultural importance or explanation, however, any such differences in self-understandings between the United States and other constitutional systems on this score is primarily a matter of form and not substance. This substance is the existence of circumstances in which the government may permissibly promote public policy objectives that conflict with a constitutional right. Whatever the domestic label employed to describe this situation, the reality is the permissibility of infringing, limiting, restricting, or overriding that right.[56] Indeed, in this context, it should be noted that the Supreme Court does in fact sometimes explicitly use the language of "override" or "infringement" to describe justified external limits on rights.[57] In other words, its practice properly recognizes that what lies on either side of the unless clause still reflects the distinction between internal and external limits. For the reality is that all modern constitutional systems, including the United States, engage de jure or de facto in the same two-stage structure of rights analysis.[58] This latter point is overt and explicit in Canada, Germany, South Africa, and under the ECHR; but it has long been the very clear practice in the United States, as cases from *Lochner v. New York*[59] to *Grutter* testify.

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56. With respect to rights generally (and moral rights in particular), permissibly overriding a right does *not* mean that no moral wrong has been done to the rightholder. On the contrary, moral conflicts between rights and other claims inherently involve some moral loss or wrong. It simply means that the existence of a right does not prevent it being overridden by other pressing and conflicting moral claims that are not rights based. Applying this to constitutional law, one may recognize that a constitutional harm is done when a constitutional right is overridden, but this does not necessarily prevent it from being overridden in appropriate circumstances. In some cases, this constitutional harm should even be compensated. So, for example, even if one assumes for the sake of argument that *Korematsu v. United States*, 321 U.S. 760 (1944), was correctly decided, this does not mean that the constitutional harm suffered by the internees should not have been compensated.

57. See the examples of the use of the term "override" in *Roe* and *Casey*, *supra* note 39. In *Lochner v. New York*, 198 U.S. 45 (1905), the Court discussed whether the trade of baker was sufficiently unhealthy as to "authorize the legislature to *interfere* with the right to labor and with the right of free contract." *Id.* at 59 (emphasis added).

58. For example, without referring to comparative practice, Erwin Chemerinsky begins the section on individual rights in his constitutional law textbook with a description of how courts in the United States engage in a two-stage process of rights adjudication that involves asking precisely the same questions as in Canada and South Africa. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (2d ed. 2002).

59. 198 U.S. 45 (1905). In *Lochner*, Justice Peckham's majority opinion first determined that New York's minimum wage law "necessarily interfere[d]" with the constitutional right to liberty of contract protected by the Fourteenth Amendment, *id.* at 53, and then asked whether the law was nonetheless a justified interference with the right, *id.* at 56. The majority's answer to this second step of the analysis was, of course, that both the labor law and health rationales for the interference were

Accordingly, notwithstanding the presence or absence of express limits, contrasting self-understandings about internal and external limits, and differences in substantive criteria for overrides, the same deep structure of rights analysis is common to most modern constitutional systems including the United States.[60] This common structure is that most constitutional rights have both internal and external limits, and the two types of limits are separately and consecutively addressed in the two stages of rights adjudication. First, what is the definition and scope of the relevant right and has it been infringed in the concrete context? Second, if so, is the infringement nonetheless lawful because the government is acting within its power to limit rights by promoting certain conflicting public policy objectives?[61] It is this second issue—the issue of external limits—that under the constitutional criteria applicable in most systems, including the United States, requires balancing the right against the government's justification for acting inconsistently with it.[62] And having once found the relevant right to cover the case at hand, it is this issue that the U.S. Supreme Court then turned to in *Roe* and *Grutter*, just as the Canadian Supreme Court does in section 1 cases, the South African constitutional court in section 36 cases, and the European Court of Human Rights and the German constitutional court in cases involving their respective specific limitations clauses.

Finally, constitutional rights need not have external limits. In the United States, as under the ECHR, most do but a few do not. Examples of rights with no

unjustified. Accordingly, I believe that Alexander Aleinikoff's claim, made as part of his antibalancing critique, is mistaken; he argued that *Lochner* illustrates a categorical mode of reasoning employed by the Court in constitutional rights cases before this was replaced by balancing as the reigning judicial methodology during and after the New Deal. *See* Aleinikoff, *supra* note 10, at 1003–04.

60. As noted above, *see supra* note 9, in focusing on the deep common structure of rights, I am abstracting here not only from differing substantive criteria for use of the override under the second stage of analysis (a single, flexible standard of proportionality versus the various fixed tiers of scrutiny in the United States), but also from different methodologies for and emphases on the first stage. Thus, courts in the United States generally spend more time and place greater emphasis on whether a right has been infringed than courts in Germany and Canada.

61. As my own usage suggests, whether we use the term "override" or "justified infringement" to describe the second stage ultimately is a matter of labels, at least once it is recognized that a justified infringement of a right *is* an override of that right. The two important matters of substance do not change. These are (1) that the second stage concerns the power to act inconsistently with a constitutional right in pursuit of a conflicting public policy objective; and (2) that this power is in need of justification. I generally prefer the term "override" for three reasons. First is candor. I believe it more accurately names or describes the phenomenon. Second, it avoids the somewhat strained and awkward distinction between (lawfully) infringing and violating a right. Third, it more directly points to a legislative power and hence the need to justify it.

62. This second issue itself breaks down into two subissues: (1) What are the constitutional rules or criteria for justifiably infringing a right; and (2) have they been satisfied in the given case? As I argue in Part III, the resolution of this second subissue may depend on the standard of judicial review to be applied; that is, in Mitchell Berman's helpful taxonomy of constitutional doctrine, which "constitutional decision rule" the court employs. *See supra* note 17.

external limits are the right to jury trial (determinate in meaning, although there are internal limits on the right, such as the $20 minimum in civil cases),[63] the right against cruel and unusual punishments (indeterminate in meaning),[64] and the right (if any) contained in the Establishment Clause (indeterminate in meaning).[65] Accordingly, there are four separate issues with respect to any right: (1) its meaning or scope, including internal limits; (2) whether the right has external limits; (3) if so, what they are (what justification for overriding it in a particular case must be made?); and (4) whether that required justification has been made in a particular case and context.

In sum, in the United States as elsewhere, not only do constitutional rights have limits but *the political institutions are empowered to limit them*, to override rights in pursuit of certain conflicting public objectives. In this important sense, then, external limits impose legislative rather than constitutional limits on rights.

B. The Nature of Constitutional Balancing

A second, related misconception hindering full recognition of the legislative override power is that existing commentary on balancing, both for and against the practice, understands it exclusively as a particular judicial methodology of constitutional adjudication.[66] This is, however, an excessively narrow and myopically court-centered view that overlooks the broader and more essential features of balancing.

Balancing rights against conflicting public policy objectives is not primarily or essentially a judicial methodology of constitutional adjudication, to be contrasted and compared with other past or possible, more formal or categorical, methodologies. Rather, balancing is part of the structure of constitutional rights in which the political institutions have a limited override power. Specifically, it is that part of the structure specifying the constitutional standard or test for valid exercise of this power. As we have seen, it is a near-universal feature of modern constitutional systems throughout the Western world not merely that most constitutional rights have limits but that the political institutions have the power to limit them, to infringe or override rights when

63. *See* U.S. CONST. amends. VI, VII.

64. *See* U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

65. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . . .").

66. *See* works on balancing cited *supra* notes 10–11.

they conflict with certain pressing public objectives. Whether specified in the constitutional text or not, it is the political institutions that are granted a limited power to balance rights against important public policy objectives and to pursue these objectives even when the two conflict. The task of the courts in reviewing exercises of this power, as any other, is to ensure that its scope has not been exceeded. In other words, balancing must be understood, and ultimately evaluated, in its proper context as part of a broader conception of the structure of rights and not simply as a self-contained mode of adjudication.

Viewed in this broader context, then, balancing is about constitutionally permissible limits on rights. More specifically after the previous Subpart, balancing distinctively concerns external limits on constitutional rights: the limits that the political institutions are empowered to impose under the second stage of rights adjudication.[67] Indeed, only external limits require balancing.[68] Internal limits (whether express or implied) involve the essentially interpretive function of declaring what a right means and applying that meaning to determine whether it is infringed in a given situation. External limits (whether express or implied), by contrast, do not involve an essentially interpretive function, but rather a contextually specific assessment of the strength, importance, and fit of the conflicting public objectives offered in justification of restricting the implicated right.[69]

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67. Accordingly, an influential critique of balancing by Alexander Aleinikoff—that it "is undermining our usual understanding of constitutional law as an interpretive enterprise"—is based on a misunderstanding of the primary role of balancing. *See* Aleinikoff, *supra* note 10, at 987. Balancing is not primarily or essentially about interpreting constitutional rights; it is about assessing whether and when the government may override the rights as interpreted. It is the next stage of the process, beginning where the interpretive task ends. Now it may be, as Aleinikoff believes, that this next step should not take place (although this Article, of course, presents the case for why it should). However, if that is so, it cannot be because it takes the integrity out of the previous, interpretive step.

68. As notes 39 and 40 suggest, it is possible that, where relevant interpretive norms permit, courts sometimes engage in a form of balancing when defining a right. The point is that, given the universal constitutional criteria for external limits (assessing the importance and fit of conflicting public policy objectives), balancing is not simply possible but necessary and unavoidable.

69. What exactly the requirements of strength, importance, and fit are is a matter of the particular external limits in question; that is, the constitutional criteria for limiting or overriding the rights. We have seen that in most modern constitutions, these are typically stated in the constitutional text as either specific or general limitations clauses, whereas in the United States, these are implied. In Part II, I discuss the extent to which the normative justification of the legislative power turns on what the particular constitutional criteria are. For present purposes, though, it should be noted that the common portrayal of balancing as involving a simple cost-benefit analysis, in which rights can be overridden for any general benefit, mischaracterizes the type of external limits that typically apply. With a few exceptions (such as in the United States when rational basis applies), only certain public objectives—those that satisfy the particular criterion of importance—can in principle override rights. *See infra* text accompanying notes 112–121.

Balancing is part of the substantive test for resolving conflicts that arise because of the existence of such external limits;[70] it determines whether or not, in the specific context raised, the government may pursue a nonenumerated public policy objective that conflicts with a constitutional right. Balancing differs from the other typical constitutional conflict-resolution mechanism of a supremacy clause in that it does not supply a rule-like automatic answer (such as federal law always trumps state law where they conflict), but instead provides a standard requiring the exercise of judgment in an individual case.

Having explained the connection between balancing and external limits, it is now possible to clarify the role of balancing in constitutional indeterminacy. As *Grutter* illustrates, balancing is a major source of indeterminacy in constitutional law. That is, the difficult constitutional issue is sometimes not so much the meaning or the application of a relevant constitutional norm, but whether the justification for overriding it is sufficient. This is precisely because, as a conflict-resolution procedure, it does not have an automatic outcome (as a supremacy clause does), but rather, it depends on judgment. Reasonable disagreement as to whether a political institution has satisfied the burden of justification for acting inconsistently with a protected right is an important reason why outcomes of some constitutional cases are often highly uncertain. This, of course, is not to deny that in other cases, the antecedent issue of what the relevant constitutional right means is often a quite separate source of uncertainty, given the vagueness of many of the most important rights. For example, in the early abortion cases, there were two quite separate sources of constitutional uncertainty: the interpretive question of whether the Due Process Clause or any other constitutional provision contains a right to have an abortion (scope or internal limits), and the balancing question of whether, when, and for what objectives a state may justify acting inconsistently with that right (external limits). Similarly, in *Lawrence*, the interpretive issue of whether the Due Process Clause includes a right to engage in homosexual sodomy and the balancing issue of whether Texas had justified overriding the right were separate sources of uncertainty and controversy.

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70. In principle, there is another type of conflict which balancing may be used to solve: conflicts between two constitutional rights. As this type of conflict is relatively rare in the United States, my discussion of balancing does not take it into account. Such a conflict occurs, for example, where the media's free speech rights (arguably) conflict with a criminal defendant's constitutional right to a fair trial. In other countries, this type of conflict is more common. For example, in Germany, a woman's right to abortion was held to conflict with the fetus's right to life (whereas in *Roe*, the Supreme Court held the fetus is not a "person" under the Fourteenth Amendment, Roe v. Wade, 410 U.S. 113, 158 (1973)); in addition, the German constitutional court imposed a positive duty on the state to protect the fetus's right to life against such private parties as its mother. In this way, the German court effectively *required* the state to assert a compelling interest in protecting the fetus. *See* Abortion I Case, 39 BVerfGE 1 (1975).

It is also now possible to explain why opponents of balancing may accept internal limits on rights—they need not be absolutists on the issue of a right's interpretation and scope—but are committed to the rejection of external limits. An illuminating example of this position is provided by Justice Black who, as a well-known First Amendment absolutist, rejected external limits on the right to free speech but argued for internal limits.[71]

Within constitutional scholarship in general, and within the antibalancing critique in particular, the fact that balancing is primarily a legislative and not a judicial exercise—that it is far more about a majoritarian power to act inconsistently with rights than a judicial methodology of constitutional adjudication—tends to be overlooked for three reasons. First, the proposition that most constitutional rights are overridable is entirely a judicial creation. As discussed above, the constitutional text is famously lacking in express limits on the rights it proclaims. Similarly, there is little evidence of original intent to support the power. Those who pressed for the Bill of Rights against the federal government, or for the Civil War Amendments against the states, did not appear to contemplate permitting either government to override them. What has tended to happen is that the source of this constitutional proposition is mistaken for its content: Judicially created external limits requiring rights to be balanced against conflicting public interests are equated with a judicial power to do the balancing. But if textual provisions containing external limits—such as section 1 of the Canadian Charter[72] and section 36(1) of the South African constitution[73]—grant a limited override power to the government in other countries, the mere fact that such limits are judicially implied in the United States does not deny the government this same power.

Second, the court-centered nature of U.S. constitutional law and discourse means that the reason for and justification of the judicial creation of external limits is presumed to be the desire to replace one judicial methodology with another. Although balancing is not nearly as modern as its contemporary critics suggest, the standard view informing the mischaracterization of the power is that balancing represents a methodology of constitutional adjudication called into being during the

71. *See, e.g.*, Street v. New York, 394 U.S. 576, 609–10 (1969) (Black, J., dissenting) (dissenting from the judgment invalidating prosecution for flag desecration under New York Penal Law on the basis that the defendant's conduct is not "speech" and so is not within the scope of the right to free speech protected by the First Amendment).

72. Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

73. S. AFR. CONST. 1996 § 36(1).

New Deal to replace the perceived failure of the *Lochner* era's more categorical mode of reasoning.[74]

The final reason for the view that balancing is primarily a judicial exercise is a characteristic constitutional parochialism and a failure to view U.S. constitutional law in a comparative context. This insularity permits the conventional balancing story as a contingent (and reversible) battle over competing judicial methodologies of constitutional adjudication in the wake of the *Lochner* and New Deal eras to go unchallenged. For the comparative analysis above has already shown two relevant points. First, far from being unique to the United States, the fact that, in principle, many rights may be overridden by pressing public interests is a near-universal feature of modern constitutional systems.[75] Second, the textual limitations on rights in more modern constitutions directly or indirectly state that it is the political institutions, and sometimes only the legislature, that are empowered to impose such limits subject to the expressed criteria.[76] To be sure, the textual limits bind the courts in their review function, as they do the political institutions in their decisionmaking function, but they strongly belie the notion that such balancing is primarily a matter of judicial methodology or more generally about the courts.

In sum, where constitutional rights are overridable, it is the political institutions that have the power to override them. The judicial function is to

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74. *See* Aleinikoff, *supra* note 10, at 950–52 (claiming that balancing, as a judicial methodology of constitutional adjudication, is a modern invention of the Supreme Court and that, until the New Deal era, a more categorical mode of reasoning was in operation, a mode to which Aleinikoff implies the Court should return). In supporting this claim, however, Aleinikoff largely focuses on nineteenth-century cases dealing with the scope of enumerated federal powers, rather than on individual constitutional rights cases. But balancing overwhelmingly involves rights cases: rights in conflict with public interests. Moreover, even today, the Court tends to employ an absolute, categorical, nonbalancing approach to enumerated power cases. It has never suggested as a matter of doctrine, for example, that an act outside Congress's commerce power can nonetheless be justified by a pressing public interest—even if that might be a sub rosa interpretation of some New Deal cases. The one rights case that Aleinikoff discusses is *Lochner v. New York*, and I have already explained above, *supra* note 59, why I believe Aleinikoff is mistaken to argue that the Court applied a categorical, nonbalancing approach in that case.

75. *See supra* Part I.A.

76. Thus, in setting out the limits on the article 5 right to freedom of expression, the Basic Law of the Federal Republic of Germany (Basic Law) states with respect to the rights set out in the first paragraph of article 5 that "these rights find their limits in the *provisions of general statutes*, in *statutory provisions* for the protection of youth, and in the right to respect for personal honor." GRUNDGESETZ [GG] [Constitution] art. 5(2) (emphasis added).

The relevant texts in Canada, the ECHR, and South Africa all require that limits on rights be prescribed by law. *See* Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act1982, ch. 11 (U.K.); S. AFR. CONST. 1996 § 36 ("The rights in the Bill of Rights may be limited only in terms of law of general application . . . ."); *see, e.g.*, European Convention on Human Rights, *supra* note 25, 213 U.N.T.S. at 230 ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law . . . ."). This has been interpreted to include statutory, administrative, and common law, subject to requirements of general accessibility and applicability.

determine whether, when exercising this power, a political institution has acted within its constitutional limits. This perhaps appears to be a basic and obvious point, and yet it is both critical and overlooked in the debate over balancing. The power to balance and override constitutional rights, then, is essentially one that belongs to the political institutions. The role of the courts is to subject the balancing done by the political institutions to the appropriate type of judicial review when it results in the overriding of a constitutional right. In other words, balancing is no more primarily a task or function of the courts than is exercising the federal commerce power or any other limited constitutional power granted to the political branches. Moreover, although courts review the exercise of the override power for lawfulness, as with any other granted power, judicial review of governmental balancing does not necessarily require the courts themselves to engage in balancing. Indeed, I argue in Part III that they should not as this is inconsistent with the nature and purpose of the underlying power.

Balancing, then, is part and parcel of a near-universal structure of constitutional rights in which the political institutions are granted a limited power to pursue important public policy objectives even though they conflict with constitutional rights. Once the structure of constitutional rights is understood in this way, the critical task becomes the justification of this power. For there is nothing obvious or self-evident, to say the least, about the proposition that legislatures should have the power to trump or act inconsistently with constitutionalized rights. Of course, the fact that descriptively, almost all contemporary constitutional systems (including the United States) grant this limited power does not tell us whether they are individually or collectively justified in so doing. In the next Part, I turn to this task.

II. JUSTIFYING THE LIMITED OVERRIDE POWER

A. The Democratic Case for Limiting Rights

What, then, is the justification for this dominant, yet undertheorized, position? Why should constitutional rights be overridable by "mere [governmental] interests"?[77] Or, more precisely after the previous Subpart, why should the political institutions be empowered to limit and override constitutional rights when they conflict with certain (and in the United States, nonenumerated) public policy objectives? In the United States, I do not believe that any such normative justifications have been put forward, primarily because: (1) this power remains largely unexpressed; (2) limits on rights are thought of as interpretive

77. *See* Schauer, *supra* note 7, at 421.

in nature; and (3) balancing is understood exclusively as a judicial methodology. Only in Canada has there been significant and self-conscious debate about the merits of the limited legislative override power—under section 1 of the Charter[78]—and almost all of this was political in nature, reflecting the practical concerns of the provincial governments faced with the prospect of an entrenched set of federal constitutional rights.[79]

One possible answer, but not the one I will pursue, focuses on the substance of public policy outcomes. That is, at least with respect to some rights and in some contexts, an override power is justified because it results in either generally superior policy outcomes or superior outcomes in particular cases.[80] For example, genuine national security alarms and emergencies are conventionally understood as situations in which rights, in principle, may justifiably be overridden. On the one hand, entrenched constitutionalization of rights enforced by the power of judicial review may be necessary for their adequate protection in practice. On the other, at least some of these rights should be presumptive rather than conclusive of constitutional outcomes, because although there are certain things that governments should never, under any circumstances, lawfully be able to do to people under their jurisdiction, these do not exhaust the rights that should be constitutionalized.[81] Sometimes, there are good public policy reasons for rebutting the presumption of a prohibition. Although not limited to utilitarian or consequentialist conceptions of the public good,[82] certainly this general justification permits many different types of policy variables to be maximized: for example, aggregate utility and national security.

A second answer, the one I will pursue, focuses not on outcomes or substance but on process, and on the proper allocation of decisionmaking power within a democracy that constitutionalizes rights.[83] The limited override

78. Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

79. This story of the politics behind adoption of section 1 is masterfully told in JANET L. HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW 10 (1996). Hiebert also provides an insightful and sophisticated theoretical analysis of section 1. Note that Canada has both an unlimited (under section 33 of the charter) and a limited (under section 1) override power.

80. I do not mean to ignore the fact that there might be textual, originalist, or other interpretive reasons for denying (or affirming) that rights are overridable in a particular constitutional system. I am offering a more general, external argument about why a constitutional system might choose to have overridable rights in the first place, and not an interpretation of what a particular constitution has in fact chosen.

81. Arguably, such conclusive or peremptory rights should exhaust the rights that are the subject of international human rights law.

82. This is so because, for example, one person's constitutional right might be held to conflict with either someone else's moral right or a constitutional or moral duty, and one of the latter two possibilities deemed more important on intrinsic grounds.

83. For my definition of "constitutionalized rights," see *supra* note 14. Again, my normative case addresses the democratic argument for granting a limited legislative override power within a system of constitutionalized rights. It does not directly address whether to constitutionalize rights in the first place.

power renders a system of entrenched rights enforced by the power of judicial review more consistent with certain enduring democratic concerns. Moreover, as a response to these concerns, it transcends the traditional either/or nature of judicial review and the binary choice of judicial versus legislative supremacy by focusing instead on alternative and intermediate allocations of power between courts and political institutions.

The limited override power enhances citizen self-government within a system of constitutionalized rights in three ways. First, compared to a (hypothetical[84]) system of judicial review without this power, it reflects a better, more appropriate balance between the competing claims of (1) majoritarian decisionmaking and (2) the limits on such decisionmaking embodied in the legal form of constitutional rights.

It is undoubtedly inherent in the concept of constitutionalized rights that they place limits on ordinary majoritarian decisionmaking procedures, but what is not inherent is the *type* of limits involved. The conception of constitutional rights as trumps demands that such limits be peremptory or categorical; that in the face of a valid constitutional rights claim, the majoritarian institutions are totally disabled. But constitutional rights entail only that there are limits on ordinary majoritarian decisionmaking; they do not necessarily require that the particular limit take this form. Analytically, there is space for different types of limits, and the argument from democracy supports a conception of constitutional rights that is less disabling of popular self-government.

Constitutional rights as shields is this conception. The limited override power, as the distinctive feature of this conception, reflects such a less extreme limit on majoritarian decisionmaking. In the face of a valid constitutional rights claim, the political institutions are neither totally disabled nor totally empowered. Rather, they are put to a special burden of justification that typically constrains both the objectives pursued and the means of pursuing them and will never be satisfied by a mere majoritarian desire not to respect the right. This contrasts, of course, with the normal situation where no constitutional right is implicated, in which the political institutions are legally free to act for any reason or objective within their own grants of authority. Accordingly, the limited override power steers a middle course between the two polar positions of: (1) the absolute disabling of ordinary majoritarian procedures in the face of a constitutional right; and (2) the absolute empowering of ordinary majoritarian procedures when a constitutional right is not in play. By thus employing a special, nonordinary

84. Charles Fried has proposed a system of narrowly defined but absolute constitutional rights (lacking external limits and an override power). *See* CHARLES FRIED, RIGHT AND WRONG 162–63 (1978).

constraint on majoritarian decisionmaking, it satisfies the essential requirement of a constitutional right, but does not totally disable popular self-government.[85]

A slightly different way of expressing this argument is that by rejecting the peremptory status of constitutional rights, the concept of constitutional rights as shields acknowledges the democratic weight attaching to other competing claims asserted by the majoritarian institutions. This conception of constitutionalized rights, I suggest, better reflects democratic values than the absolute, disabling conception. To be sure, those specific things we believe governments should never lawfully be able to do regardless of the circumstances or conflicting objectives can be singled out for absolute protection without accepting that this necessarily inheres in all constitutional rights. It is unnecessarily and unjustifiably restrictive of democratic decisionmaking procedures for constitutional rights to have such a totally disabling effect. By distinguishing the interpretive from the noninterpretive functions in constitutional law, understanding limits on rights as a distinct, democratic override power permits the judiciary to maintain the final word on the meaning and scope of constitutional rights, including indeterminate ones, but still potentially permits the political institutions to pursue pressing public objectives that conflict with such rights.[86]

The second way in which the limited override power enhances democratic values is by reducing the intertemporal tension between the set of entrenched rights constitutionalized by a past majority and the consequent disabling of today's citizens from deciding how to resolve the fundamental moral-political issues that they face. The limited power gives the current citizenry a role, rather than excluding them entirely from such decisionmaking. The decision of the previous supermajority may be overridden if the constitutional criteria of justification are made out. Obviously, from the perspective of this specific tension, such a limited power is a superior procedure compared to the complete exclusion of the current citizenry, with the single exception of the amendment process.[87]

Finally, my argument thus far applies equally to fully determinate and indeterminate constitutional rights: (1) The limits that rights impose on democratic decisionmaking need and should not be absolute; and (2) acknowledging this reduces the democratic tension between past and current citizenry. That is, my argument for the limited power does not depend on the existence of different

85. My argument is quite consistent with "representation reinforcement" reasons for skepticism toward certain aspects of majoritarian decisionmaking; that is, limits on majoritarian decisionmaking that enhance democracy. Where they arise, such concerns may be one reason for putting the political institutions to a special burden of justification.

86. As I discuss in Part III.B, even with my proposed standard of judicial review for exercises of the override power, courts still maintain the final word on who wins the case.

87. Of course, the intertemporal problem is either less significant or nonexistent for more modern constitutions.

but reasonable specifications of the relevant right in a concrete context on the part of courts and legislators. Rather, it is about the power to override a right as specified in the face of conflicting nonrights claims.

In practice, however, there is an additional democratic problem posed by the fact that many constitutional rights are indeterminate in their meaning, scope, and application.[88] In the face of such indeterminacy, the traditional argument that, in exercising the power of judicial review, courts are simply subjecting the political institutions to the democratic will of the people as enshrined in the Constitution[89] is rendered additionally problematic. As Michael Perry puts it: "Democracy requires that the reasonable judgment of electorally accountable government officials, about what an indeterminate human right forbids, trump the competing reasonable judgment of politically independent judges."[90] This is particularly problematic when it results in the most fundamental, important, and divisive moral and political issues confronting a society being decided exclusively by the courts and, moreover, by courts often divided along the same lines as the citizenry about the existence and scope of certain rights.[91] Citizens and their representative institutions are essentially banished from the decisionmaking process. This naturally occurs where constitutional rights are the only relevant claim, and where the only determinative issues are the meaning, scope, and application of the right to the situation. Given a system of judicial review, Chief Justice Marshall's original argument that the courts must interpret and apply the law retains its bite.[92]

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88. This problem of legal or interpretive indeterminacy—of what rights have in fact been constitutionalized—is distinct from the problem of more general political, moral, or substantive disagreement among citizens about what rights there are and what they amount to. Both problems, but particularly the latter where it exists, may be reasons for rejecting the constitutionalization of rights and judicial review in the first place. *See* Waldron, *supra* note 15, at 1406. At the same time, however, the limited legislative override power is an alternative solution to both problems. Consistent with the normative aim of this Article, which is to present a democratic justification for the structure of rights that we actually have, I focus in what follows on the problem of legal indeterminacy; that is, the problem that assumes rights have already been constitutionalized. But everything I say about the limited override power as a solution and democratic response to this problem could also be said about the problem of general moral and political disagreement among the citizenry about rights.

The reasons for legal indeterminacy are, of course, quite varied and depend in part on one's adopted theory of constitutional interpretation. Thus, there may be textual indeterminacy, indeterminacy in original intent or precedent, value indeterminacy, and so on.

89. This argument goes back at least to THE FEDERALIST NO. 78 (Alexander Hamilton).

90. Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 661 (2003).

91. *See* Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 28 (1993).

92. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The legislative override provides an alternative solution to that of rejecting judicial review altogether.[93] It also provides an alternative to rejecting judicial supremacy, or ultimacy, in interpreting the Constitution.[94] It grants a role to the majoritarian institutions in the decisionmaking process, not by challenging judicial supremacy in interpreting constitutional rights, but by introducing a second relevant claim, a discretionary and noninterpretive claim concerning the importance of conflicting public objectives. The function of the limited override power is precisely to inject this essentially and inherently legislative role into the process of constitutional adjudication, even if the courts still ultimately decide who wins the case. Constitutional adjudication is thus split into the two separate stages of (1) rights interpretation and application; and (2) assessment of competing public policy objectives. In short, the limited power counters the judicial exclusivity in constitutional decisionmaking that typically occurs where rights conclusively determine constitutional outcomes within a system of judicial review; an exclusivity that is rendered highly problematic by the indeterminate nature of many of the relevant rights. Because their indeterminacy raises the democratic problem in perhaps its most acute form, constitutional rights should not be the only relevant claim in a case in which they are implicated.[95]

93. It also provides an alternative solution to the problem of general moral and political disagreement among citizens about rights. This is the problem that leads Jeremy Waldron to reject judicial review, at least where the following two other conditions apply: (1) democratic and judicial institutions in reasonably good working order; and (2) a commitment to the idea of individual and minority rights. *See* Waldron, *supra* note 15, at 1359–69.

94. This is Michael Perry's solution to the problem of constitutional indeterminacy. *See* Perry, *supra* note 90, at 673–78. Larry Kramer, among others, has also argued against judicial supremacy, although primarily on historical grounds, rather than as a solution to the problem of indeterminacy. *See* KRAMER, *supra* note 16.

95. As I have argued above, the override power adds to overall constitutional indeterminacy. Michael Perry also points out that limitations clauses, such as South Africa's, are one reason for the indeterminacy of constitutional norms. Perry, *supra* note 90, at 636. One might conclude from this that if indeterminacy is the source of the democratic problem, the problem can be reduced by abolishing the override power. That is, far from being an argument in favor of the power, indeterminacy could be construed as an argument against the power. However, Perry's argument for democracy revolves around indeterminacy in interpreting and applying constitutional rights, tasks that are primarily the court's function. *Id.* at 674–78. Even though it may add to overall indeterminacy by creating external limits, the democratic justification of the limited override power is to neutralize a judicial monopoly that is especially unjustified in the face of interpretive indeterminacy.

B. The Limited Override Power and the Judicial Review Debate

1. The Spectrum of Positions

A system of judicial review with the limited legislative override power that I have been attempting to justify is quite different from a system of judicial review without it. They are obviously different doctrinally and institutionally, and, as I have just argued, different in terms of their compatibility with democracy, implicitly incorporating the conceptions of rights as shields and trumps, respectively. The important role of the limiting power in understanding and justifying the system of judicial review that we have has, however, been overlooked by both sides in the current debate about the general merits of judicial review. In effect, the system we do *not* have has acted as both standard-bearer and target.

This debate has focused on the respective claims of three institutional options: two traditionally conceived polar alternatives and a newer third position that has recently attracted attention. The first polar alternative is to reject rights-based judicial review altogether.[96] Under this approach, as courts cannot decline to apply statutes, they have no say on whether the legislature has violated any rights. Typically within such systems, not only is the power of judicial review rejected, but rights are neither granted the legal status of supreme law (they have statutory or common law status instead) nor entrenched against ordinary legislative amendment and repeal, and so are not constitutionalized at all.[97] This package reflected the traditional position in most countries prior to 1945,[98] and is usually referred to as legislative supremacy or parliamentary sovereignty—because statutes are the highest form of law known to the legal system. In such a regime, statutory infringements or reductions of preexisting rights and liberties may, for purely political reasons, require a stronger burden of justification compared to other legislative actions, but this will not be a legal requirement.

The opposite polar position is that of a system in which rights are enforced by the power of judicial review: the power to decline to apply inconsistent statutes. Analytically, this position requires that such rights as are protected

96. Jeremy Waldron has repeatedly argued for this position in recent years. *See, e.g.*, Waldron, *supra* note 15, at 1348–59.

97. Although "typical," both analytically and in practice it is possible to combine the rejection of judicial review with the constitutionalization and entrenchment of rights. The Netherlands Constitution, for example, contains individual rights which, like the rest of the constitution, can only be amended by a special supermajority process, but it also expressly denies courts the power of judicial review. GRONDWET [GW] [Constitution] art. 120.

98. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 713 (2001).

by the power have the status of supreme law; entrenchment is perhaps not necessary but usual. Accordingly, this position typically involves full constitutionalization of rights. Compared to the previous model, a notable characteristic of this second option is judicial supremacy (or ultimacy) in the sense that courts not only have a say but the final word on the validity of a statute in the face of a constitutional rights claim, and thus, on what the law of the land is. Since 1945, many countries have switched from the first option to the second, and most of the new constitutions written in a great burst of activity around the world since 1989 have firmly adopted this model.[99]

The third position is an intermediate one that grants courts some power to enforce rights but gives the legislature the final word in the form of an *absolute* override power. In practice, this option is most clearly enshrined in section 33 of the Canadian Charter,[100] which is why it was referenced by Robert Bork,[101] although more recent variations on the theme have been enacted in the United Kingdom and New Zealand.[102] This partial move away from the traditional Westminster model of parliamentary sovereignty in these culturally related common law countries is why I initially referred to this option as "the new Commonwealth model of constitutionalism,"[103] although others have, with at least equal justification, referred to it as "weak" or "weak-form judicial review."[104] This position at least partially constitutionalizes rights,[105] and adds a potential or actual[106] round of judicial review to the first position; however, like it, no special majoritarian procedures are legally required for a subsequent legislative decision to override rights.[107] Moreover, such an override has no substantive constitutional limits; there is no legally required special burden of justification

99. *See id.* at 714–16.

100. "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [the substantive rights] of this Charter." Part I of the Constitution Act, 1982, § 33(1), being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

101. *See supra* note 4.

102. Albeit in the context of statutory rather than constitutionalized rights. For discussion of both section 33 of the Canadian Charter and the British and New Zealand variations on this theme, see Gardbaum, *supra* note 98, at 719–39.

103. *Id.* at 710.

104. *See* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003).

105. For the differing ways in which the United Kingdom and New Zealand have given rights more than ordinary statutory status, see Gardbaum, *supra* note 98, at 727–39.

106. It has been held by the Canadian Supreme Court that the unlimited override power may be used either preemptively or in response to a court decision. *See* Ford v. Quebec, [1988] 2 S.C.R. 712.

107. Although there could be. A supermajoritarian requirement would therefore constitute a type of limited override power with a different limit.

for pursuing public policy objectives that conflict with the recognized rights. It is in this precise way that such an absolute override power contrasts with the limited override power that I have been discussing in this Article.

Curiously, despite the fact that the vast majority of modern constitutional systems, including the United States, adhere in practice to a specific version of the second option—"strong" judicial review with a limited legislative override power—this version has not been identified or distinguished from the generic model in the recent scholarly debates about the merits of judicial review. That is, the debate has proceeded as if the issue is either judicial review or no judicial review, with the absolute override power as a novel new option, but with no reference within a system of judicial review to the distinctive role of external limits.[108]

I am not claiming in this Article that a system of judicial review with a limited legislative override power is ultimately better than either no judicial review at all or weak judicial review. Rather, I am attempting to identify, and present the missing normative case for, the version of strong judicial review that the United States and many other countries actually have. My goal in so doing is primarily to rebut an influential internal critique of this version—the antibalancing critique—which, in effect, argues for an even stronger version of judicial review: one with no override power at all.

At the same time, however, a secondary aim is to try to ensure that the debate concerning the respective merits of the three options focuses on the proper, accurate, and best version of strong judicial review. Unlike the antibalancing critics who, of course, focus on the nonrights side of the ledger and reject it, the critics of strong judicial review tend to overlook the role of limits and take constitutional rights as conclusive of outcomes. By incorporating the limited override power into the analysis, however, the normative case for the existing structure renders (at least this version of) judicial review less vulnerable to the democratic critiques at the heart of the first and third positions on the spectrum. For the purposes of this Article at least, it may still ultimately be the case that either no judicial review at all or weak judicial review is the better way to resolve the claims of democracy and rights protection to the extent they conflict with each other.[109] But by identifying and justifying the version of strong judicial review with which they should be compared, I may have reduced the "democratic deficit" between them.

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108. Michael Perry is a partial exception to this statement, although he discusses the role of general limitations clauses, such as South Africa's, in the context of their adding to overall constitutional indeterminacy. *See* Perry, *supra* note 90, at 648–49.

109. Jeremy Waldron, for one, argues that they do not necessarily conflict, and that majority decisionmaking is sometimes a more effective way to respect rights than judicial review. *See* Waldron, *supra* note 15, at 1395–1401.

2. How Limited Is the Limited Power?

Focusing on the difference between the existing system of strong judicial review and the new model of weak judicial review also helps to clarify what exactly the limits are on the limited override power that is an intrinsic part of the former. I have previously argued that the legislative final word distinctive of "the new Commonwealth model of constitutionalism" is an interesting and potentially superior alternative to the two more traditional models of constitutionalism: the American model of judicial supremacy and the parliamentary model of legislative supremacy. Michael Perry bolstered the case for the unlimited legislative override by arguing that it "splits the difference" between the best arguments for and against court enforcement of indeterminate rights.[110] Given my tendency to agree with Perry's conclusion that an absolute or unlimited override power, creating what he terms "judicial penultimacy" and "legislative ultimacy," is superior to the other two alternatives we both considered,[111] the issue remains of how this model compares to the one we did not (the limited override power). If, as I have argued in this Article, the dominant model of the limited override power provides another distinct alternative for resolving the tension between rights and other important public interests, between courts and legislatures, and between judicial review and democracy, then how do these two alternatives compare?

To underscore and repeat the general difference between them, the limited override power characteristic of modern systems of judicial review means that rights may only be trumped by conflicting public objectives when the political institutions have provided the constitutionally required justification for so doing. The unlimited override power characteristic of weak judicial review means that the political institutions may override constitutional rights for any reason; there are no substantive constitutional limits on what justifies such an override.[112] To further prepare the ground for an eventual evaluation of these two, it is important to try to clarify the nature of the limits on the former. How limited is the power? What are or should be the constitutional criteria for empowering the government to pursue important public policy objectives that conflict with a constitutional right? In terms of justification, it may be

110. *See* Perry, *supra* note 90, at 663.

111. *Id.* at 693–94, 675 n.106.

112. In a system with *both* types of override, such as Canada—the limited override power contained in section 1, Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), and the unlimited power contained in section 33, *id.* § 33—the absolute power means, for example, that the political institutions could, in principle, override a judicial determination that the limits on the power have been exceeded in a particular case (that the constitutional criteria of justification have not been satisfied).

one thing to argue for extremely liberal criteria and another to argue for more stringent ones. To answer this question, I must make explicit two things that I have previously left implicit.

In conceptualizing and justifying the limited override power throughout the Article, I have referred to (1) important or pressing public policy objectives that (2) conflict with a constitutional right. In so doing, I have also been referring implicitly to two limits on the override power. Let me explain, taking the second limit first.

A threshold constitutional criterion for valid use of the limited override power that we have been considering is the existence and unavoidability of a conflict between a constitutional right as defined and a qualifying public policy objective. Obviously, if the objective is in fact promoted in a way that does not conflict with the right, then the second stage of rights analysis—involving external limits—is not triggered. An example would be where educational diversity is pursued through colorblind means.

The issue that needs to be made explicit arises where promoting the public policy objective does conflict with the right (as defined by the first stage). Here there are two possible situations: (1) Such a conflict is unavoidable because there is no other way to promote the objective; or (2) although a conflict occurs, it could have been avoided. In this second situation, the right is infringed but it need not have been, because there were nonrestrictive ways of promoting the objective. Accordingly, a legislative override power limited to the first situation of unavoidable conflict is a significantly lesser power than one permitting an override in the second situation. The override power I am focusing on and seeking to justify is this more limited one, and by referring throughout this Article to the power to pursue public policy objectives that conflict with a constitutional right, I have been implicitly referring to unavoidable conflicts of this first sort. In other words, part of the burden of justification for use of the override power is that there are no nonrestrictive means of achieving the objective.

A second general condition on the exercise of the power is that the public policy objective responsible for the unavoidable conflict is an important one. In other words, it is not any public policy objective that is capable of overriding a right, but only certain, especially significant ones. Again, I have referred throughout the Article to pressing or important objectives, and here I am making explicit that this is an essential condition on the power to be justified.

These two conditions—on means and ends—are not a matter of authorial stipulation. Rather, they mostly define the limited power that exists in practice in most contemporary Western constitutional systems. As far as the ends are concerned, the textual limitations clauses discussed above contain—or have

been interpreted to contain—either a general criterion of qualifying public policy objectives ("sufficient importance" in Canada and South Africa) or a specific list of such objectives (ECHR, Germany).[113] With regard to means, the Canadian and ECHR texts, as well as the implied German proportionality test,[114] require them to be "necessary" to promote the end; meaning, of course, that there is an unavoidable conflict.[115]

Under U.S. doctrine also, these two conditions specify the limits on the override power where a form of heightened scrutiny is employed. As for ends, they must be compelling or important. Concerning means, if, for example, in *Grutter* there had been colorblind ways of achieving the compelling interest in educational diversity, then there would have been an avoidable conflict between the constitutional right and the state's objective, and an override of that right would not be justified.[116] Similarly, in *United States v. Virginia (VMI)*,[117] because the Virginia Military Institute had ways to promote its important educational objectives that did not require a categorical exclusion of women, there was no unavoidable conflict, and hence, no valid override.[118] The presumptive weight of a constitutional right requires that such an override be a last resort.

By contrast, neither of these conditions is part of the burden of justification for overriding those "rights"[119] subject only to a rational basis test. As the test for overriding such rights is simply that the government rationally promote any legitimate objective, it follows (1) that there is no criterion of importance; and (2) that this test would be satisfied even if the government could have promoted the objective by means that do not violate the right at all. So, for example, the right to nondiscrimination on the basis of age could presumably be overridden by

113. *See infra* Part III.A.

114. *See infra* note 180 and accompanying text.

115. On the tests for ends and means, see *infra* Part III.A.

116. *See* 539 U.S. 306 (2003).

117. 518 U.S. 515 (1996).

118. *Id.* at 535–40.

119. There is generally some doctrinal and scholarly uncertainty and ambiguity as to whether an individual's constitutional claim is properly or accurately termed a "right" where its infringement is justified under ordinary rational basis review. This no doubt reflects the sense that constitutional rights are more powerful shields than this; that is, that they carry some sort of presumptive weight. Thus, for example, in the post-*Lochner* world, is there a constitutional right to liberty of contract under the Due Process Clause, where at most the "right" puts the government to the burden of showing that it is rationally promoting some legitimate interest? Perhaps "liberty interest" (or "equality interest" for similar claims under the Equal Protection Clause) is a better term. Note that the German constitutional court has interpreted the "right to free development of personality" under article 2(1) of the Basic Law to contain a general constitutional right to liberty, with limits and overrides justifiable under the standard proportionality test. *See, e.g.*, 59 BVerfGE 158 (right to feed pigeons in public squares). Although this test is almost always satisfied, its final prong of proportionality in the strict sense does provide more "teeth" than ordinary rational basis review in the United States. *See infra* text accompanying note 186.

a road safety policy that imposes a blanket ban on driving for all people over the age of seventy, even though the same objective could be achieved by requiring all drivers to take a new road test every five years or so. Again, this would not be true of the right to nondiscrimination on the basis of race or gender, as *Grutter* and *VMI* make clear.[120]

What this implies is that, with respect to rights subject only to a rational basis test, the legislative override power is greater, or less limited, than the power discussed thus far. It is not only where important public policy objectives unavoidably conflict with constitutional rights that they may be overridden, but even where they do not—even where the means exist to reconcile rights and objectives. The only limits on this override power are (1) promoting a legitimate public policy objective;[121] and (2) that the means chosen do rationally promote the objective. This is obviously far closer to an unlimited override power than the one discussed thus far.

With the exception of the rational basis test, then, the modern constitutional structure of balancing is premised on a legislative override power that is circumscribed in terms of both means and ends as described. The focus of much of the antibalancing critique, however, has been either on judicial balancing under the rational basis test or on balancing in the narrow sense that involves evenhanded, nonweighted, case-by-case consideration of various specified factors without any starting presumption.[122] In other words, the focus of the critique has primarily been on the wrong target.

A good example of this is provided by Jed Rubenfeld in an article in which he argues against balancing in the free speech context.[123] In the course of interpreting the First Amendment as containing a categorical and absolute prohibition on government actions aimed at punishing protected speech, Rubenfeld expressly makes an antibalancing case by relying on a conception of balancing in effect (that is, in my terms—not his) premised upon the greater override power discussed. He uses Judge Posner as his foil to characterize

120. As just noted, such a road safety policy might not pass muster under the proportionality test common to most contemporary constitutional systems, insofar as the infringement of equality, although rationally related, is disproportionate to the benefits. *See supra* note 119.

121. Perhaps violated only by discrimination as an end in itself in the context of the Equal Protection Clause (see the line of cases from *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), to *Romer v. Evans*, 517 U.S. 620 (1996)), and by morality in the case of certain rights under the Due Process Clause, *see* Lawrence v. Texas, 539 U.S. 558 (2003).

122. *See* FALLON, *supra* note 10.

123. Rubenfeld, *supra* note 11, at 780–81.

balancing as involving quantitative cost-benefit analysis: A constitutional right is outweighed wherever the harms or costs exceed the benefit.[124]

This may indeed be Judge Posner's conception of constitutional balancing where rights are at stake, but it is far from the one employed here or in most systems around the world. Unlike general common law balancing or the type of economic balancing currently dominant in torts, constitutional balancing does not involve just any cost-benefit analysis but is centrally about the quality of the proffered justification. Only certain public policy objectives are worthy of overriding rights. Again, in many constitutions around the world, these objectives are specified in the text, whereas in the United States they are judicially created and on a case-by-case basis. But it has never been suggested, for example, that economic benefit or avoiding mere harm is a public interest objective capable in principle of overriding the right to free speech. The sort of objectives put forward are quite different and have an essential qualitative component: preventing psychological suffering by concentration camp survivors at the hands of those who decry their survival, or by African American families at the hands of the organization that was given free rein by the law to murder their ancestors. The qualitative component in balancing is that the objective must be important, pressing, or compelling, not any objective or net social benefit.[125]

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124. *Id.* at 782. Once again, the antibalancing critique cannot at the same time (1) employ and attack the narrow conception of balancing; and (2) maintain the descriptive thesis that balancing is prevalent in constitutional law. To have even prima facie plausibility, this latter claim depends on the broader conception of balancing that includes such qualitative standards of review as strict scrutiny. *See supra* note 10.

125. A similar characterization of balancing is made by Rick Pildes in his influential critique, *Avoiding Balancing*, *supra* note 11. Pildes argues that balancing presumes two things: (1) an individualistic conception of constitutional rights as personal immunities; and (2) that such rights are balanced in quantitative terms against state interests. In contrast, he argues that at least certain constitutional rights should be understood as "structural," not individualistic in nature, marking out separate spheres of public power rather than personal immunities. Thus, he argues, "the 'right' to free speech means that government may not attempt to politically indoctrinate public school students. The 'right' to freedom of religious conscience means that government may not act for the purpose of endorsing religion or religious sects." *Id.* at 722–25. With respect to these rights, he argues, the proper method of judicial reasoning is qualitative not quantitative, focusing on excluded reasons for government action. *Id.* Regarding (1), my account is agnostic between different substantive accounts of rights—whether immunities against the common good or structural and reason excluding. Rather, it conceives of rights procedurally as simply limits on majoritarian decisionmaking. Specifically, I have nowhere held that the rights subject to the limited override power are necessarily individualistic in nature. Regarding (2), Pildes effectively makes the same assertion as Rubenfeld, *see* Rubenfeld, *supra* note 11, and is mistaken for the same reason. Apart from rights protected by only a rational basis test, the required justification for a valid exercise of the override power typically involves qualitative reasoning, focusing on the importance of the conflicting public policy objective, and not, for example, on the number of dollars involved.

III. JUDICIAL REVIEW OF THE LIMITED OVERRIDE POWER

If, as I have argued, overriding rights when they conflict with certain important public interests is a limited power that we have good reason to grant to the political institutions, then how should subsequent judicial review of its exercise be conducted? What standard of review should be applied to determine whether the substantive criteria for valid exercises of the override power have been satisfied in a given case?[126] On the one hand, a major practical difference between a legally limited and unlimited override power is the existence of judicial review.[127] On the other, if the power is granted at least in part to temper the democratic tensions that judicial review creates, then those tensions should not be reproduced and even aggravated by the way in which courts review exercises of the power. A standard of judicial review that effectively transfers the power of decision to the courts by wholly displacing legislative judgment would clearly be counterproductive.

Moreover, review of the override power potentially increases the tensions because it adds a step to constitutional rights adjudication that raises special concerns about judicial legitimacy and integrity over and above the standard ones.[128] As exemplified by *Grutter*, the outcomes of many constitutional claims are rendered indeterminate by the issue of the justification for overriding rights, rather than by whether a right is implicated and infringed. And yet, this part of the judicial function is inherently noninterpretive. It is not about interpreting and applying a constitutional provision but assessing the importance and fit of (at least in the United States) nonenumerated state objectives and policies. As we have seen, balancing starts where the infringement and inconsistency begin. Under the second stage of rights adjudication, determining whether the constitutional criteria for exercise of the override power have been satisfied

126. In other words, there is an important distinction between (1) the substantive constitutional test or criteria for justifying an override and (2) the standard of judicial review for determining whether the relevant political institution has satisfied this test. In Mitchell Berman's terminology of constitutional doctrine, the former involves an "operative proposition" and the latter a "decision rule." *See* Berman, *supra* note 17, at 9. Analytically, these two are independent of each other in that the test may be strict and the standard of judicial review less so. My discussion in this Subpart focuses on the second issue: I take the relevant existing test as given and ask what standard of judicial review should be applied to determine if the legislature has satisfied it.

127. That is, judicial review for substantive compliance with the constitutional criteria. Even an unlimited power will likely have procedural limitations, which may be subject to judicial review. This is the case with Canada's section 33 override power, the procedural limitations on which were explored by the Canadian Supreme Court in *Ford v. Quebec*, [1988] 2 S.C.R. 712.

128. Here, once again, I agree with the critics that judicial balancing creates special problems of legitimacy and integrity over and above the standard problems associated with judicial review. Of course, unlike them, I take this point to be an argument in favor of greater judicial deference to legislative balancing.

involves such quintessential policy and factual questions as how important the particular legislative objective is in the precise circumstances, and whether there are any practical policy alternatives that would achieve the objective to the same extent.

So the form and standard of judicial review must respect these two facts: (1) What is being reviewed is the exercise of a power that has been given to political institutions at least in part to enhance the role of democratic decisionmaking where rights are involved; and (2) judicial review of governmental balancing raises special concerns about legitimacy and integrity. The proper role of the courts must be assessed in this light and determined in a way that coheres with the overall point of reducing democratic tensions rather than adding to them.

Unlike the two logically prior questions of which rights are overridable and what the constitutional criteria for overriding them are, this third question regarding the proper role of the courts in reviewing measures to determine if these constitutional criteria have been satisfied—the question of judicial review strictly speaking—is, as far as I am aware, nowhere specified in a constitutional text. I have argued above that, notwithstanding contrary labels and perhaps self-understandings, all modern constitutional systems (including the United States) employ the same deep structure of rights analysis and two-stage process of adjudication. Accordingly, as a prelude to discussing the standard of judicial review that should apply in the United States, I will survey comparative materials on how this third question is answered in practice: how courts have elected to enforce the textual or other limits on the political institutions' override power.[129]

A. Comparative Judicial Standards

1. Canada

The operation of the Canadian Charter's general limitations clause requires, according to the Canadian Supreme Court (CSC), an explicit two-stage inquiry: (1) whether a right been infringed; and (2) whether the infringement is justified under the constitutional standard contained in section 1.[130] This textual standard for use of the limited override power by the political institutions

129. To clarify, I focus in what follows on how courts have adjudicated the second stage of the two-stage process, not the first: the justification for infringing a right and not the interpretation of the right. It should be noted, however, that just as there are variations among countries on this second stage (as I document in what follows), there are also variations on the first.

130. R. v. Oakes, [1986] 1 S.C.R. 103, 135–36.

has been interpreted by the CSC to break down into the characteristic modern means and ends requirements. Regarding ends, it has stated:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". . . . 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.[131]

In addition to this ends requirement, the second criterion is that "the means chosen are reasonable and demonstrably justified."[132] This, according to the *Oakes* court, involves a "form of proportionality test."[133] Specifically:

> There are . . . three important components of a proportionality test. First, the measures adopted . . . must be rationally connected to the objective. Second, the means . . . should impair "as little as possible" the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[134]

The third and final prong of the proportionality analysis (proportionality in the strict sense) was subsequently refined by the CSC in two separate cases. In the first, the inquiry was stated to involve "whether the benefits which accrue from the limitation are proportional to its deleterious effects."[135] In the second, the CSC held that "there must be proportionality between the importance of the objective and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure."[136]

In applying these twin constitutional criteria of ends and means for a valid exercise of the limited override power, the overall level of judicial scrutiny engaged in by the CSC has been described by one leading commentator as "overwhelmingly deferential."[137] Another states that "[i]t is well known that, after an initial bout of enthusiasm, the Supreme Court has become more deferential in determining whether the government has justified restrictions on *Charter* rights . . . . [T]he Court will often uphold legislation if the government

131. *Id.* at 138–39 (citation omitted).
132. *Id.* at 139.
133. *Id.* (citation omitted).
134. *Id.* (citation omitted).
135. Thomson Newspapers Co. v. Canada (Att'y Gen.), [1998] 1 S.C.R. 877, 969.
136. U.F.C.W., Local 1518 v. KMart Can. Ltd., [1999] 2 S.C.R. 1083, 1108.
137. HIEBERT, *supra* note 79, at 79.

does a half-way decent job of mounting a section 1 defence."[138] The CSC itself has endorsed the following bifurcated approach to judicial review under section 1:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line . . . . If the legislature has made a reasonable assessment as to where the line is most properly drawn . . . it is not for the court to second guess.
>
> . . . .
>
> . . . *Democratic institutions are meant to let us all share in the responsibility for these difficult choices*. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. . . .
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed.[139]

Indeed, Kent Roach argues that since this initial 1989 statement, the CSC has largely abandoned the distinction between these two types of cases by backsliding on the second part and becoming far more deferential, even in criminal cases.[140] Moreover, the CSC has repeatedly stated that, under section 1, the government's burden is to "show on a balance of probabilities that . . . an infringement can be justified,"[141] a seemingly lenient standard.

With respect to ends, the CSC has essentially applied a reasonableness test to the legislature's judgment on the constitutional standard of "sufficient importance to warrant overriding a constitutionally protected right or freedom."[142] For a clear majority of the CSC at least, the government's burden of proving the importance of the policy objective does not require it to demonstrate that the feared social harm will in fact occur in the absence of legislation, nor even that a causal link exists between the objective and the harm the legislation is intended to address. So, for example, in *R. v. Keegstra*,[143] the majority upheld—against a free speech challenge—the Criminal Code provisions prohibiting the willful promotion of hatred against identifiable groups, even in the acknowledged absence of proof of a causal link between hate speech and hatred in listeners. In another case, the CSC held that the requirement is only that parliament had

138. KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 172 (2001).
139. Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 990–94 (emphasis added).
140. ROACH, *supra* note 138, at 160–66.
141. *KMart Can. Ltd.*, [1999] 2 S.C.R. at 1108.
142. R. v. Oakes, [1986] 1 S.C.R. 103, 138–39.
143. [1990] 3 S.C.R. 697.

a "reasonable basis" for fearing that harm would occur.[144] As a result, only once since the establishment of the *Oakes* criteria in 1986 has a majority of the CSC found that the legislative objective itself is not sufficiently important to justify imposing limits on protected rights.[145]

This willingness to accept the importance of legislative objectives has meant that judicial review under section 1 has, in practice, focused on the three prongs of the means or proportionality test. Here too, however, the CSC has exercised a generally deferential level of judicial scrutiny. The first prong by definition involves a reasonableness test, although in *Oakes* itself, the majority opinion, to near-universal approbation, uniquely held that the legislation failed it.[146]

The second prong, the minimal impairment test, appears on its face to pose the most stringent test. In application, however, the CSC has exhibited great reluctance to second-guess legislative choice of means on the basis that there was a less restrictive option available. This reluctance has been based on both democratic ("mindful of the legislature's representative function"[147]) and expertise grounds. The result has been a clear error rule: "[A] failure to satisfy the minimal impairment test will be found only if there are measures 'clearly superior to the measures currently in use.'"[148] The appropriate standard was also stated as follows: "It was argued after *Oakes* that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion .... It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary ...."[149]

The final prong, proportionality in the strict sense, was initially almost completely neglected, and therefore considered redundant by some.[150] However, the CSC has since revived and rephrased this prong[151] and, on at least two occasions, employed it to invalidate the legislative measure

144. R. v. Butler, [1992] 1 S.C.R. 452, 502.

145. R. v. Zundel, [1992] 2 S.C.R. 731, 776–77 (holding that section 181 of the Criminal Code, which made it a crime to knowingly publish or spread false news that causes injury to the public interest and under which the defendant was prosecuted for publishing DID SIX MILLION REALLY DIE?, infringed the right to freedom of expression and was not justified under section 1 as lacking any ostensible purpose altogether and, given its prior lack of use, a purpose of sufficient importance).

146. R. v. Oakes, 1 S.C.R. at 142 (holding that a statutory presumption that a person found in possession of a narcotic intends to traffic in that narcotic is irrational).

147. Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 933 (emphasis in original).

148. Libman v. Quebec (Att'y Gen.), [1997] 3 S.C.R. 569, 607 (quoting Lavigne v. Ont. Pub. Serv. Employees Union, [1991] 2 S.C.R. 211, 296).

149. R. v. Sharpe, [2001] 1 S.C.R. 45, 102 (emphasis in original).

150. Peter W. Hogg, *Section 1 Revisited*, NAT'L J. CONST. L. 1, 23 (1992).

151. HIEBERT, *supra* note 79, at 82.

in question.[152] Overall, however, this does not detract from the general record as one of a relatively deferential level of scrutiny, under which legislative judgments as to the justification of the override and as to whether the constitutional standard is met are more often than not subject to a reasonableness test. Moreover, this level of deference has been thought appropriate by the CSC to a significant extent on democratic grounds: that in very many types of cases, the underlying judgments are ones more appropriate for the elected branches of government.

2. The European Convention on Human Rights

As illustrated above, the European Convention on Human Rights contains both express internal and external limits on the rights that it recognizes. Similarly worded (though not identical) express external limits apply to the rights to privacy and family life under article 8, to freedom of thought, conscience, and religion under article 9, to freedom of expression under article 10, and to freedom of assembly and association under article 11.[153]

These special limitations clauses permit rights to be restricted by conflicting public policy objectives provided three conditions are satisfied: (1) The government measure is "prescribed by the law" or "in accordance with law"; (2) it pursues a "legitimate aim"; and (3) the measure is "necessary in a democratic society." The first two requirements are in practice essentially pro forma. Under the first, the European Court of Human Rights (ECtHR) asks whether the challenged measure is either itself a written or unwritten law or authorized by one, and whether it conforms to rule of law values, such as accessibility and foreseeability. Under the second, the ECtHR, unlike the Canadian Supreme Court, need not decide which public policy objectives are sufficiently important to be capable in principle of overriding a right, because these are listed in the various special limitations clauses, which have been interpreted as exhaustive.[154] The ECtHR has, however, always accepted the government's word that it is pursuing one of the specified objectives—usually stating that "the Court finds no reason to doubt" that the policy was designed to promote the

152. Dagenais v. Canadian Broad. Corp., [1994] 3 S.C.R. 835, 841–42; R. v. Laba, [1994] 3 S.C.R. 965, 970–71.

153. *See supra* note 26 and accompanying text.

154. *See* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 304 (2d ed. 1996).

legitimate aim.[155] In no case has the ECtHR found for a claimant on the basis that the government's claim to be pursuing a legitimate aim was pretextual.[156]

Consequently, the outcome of the case always turns on whether the measure is "necessary in a democratic society" for the pursuit of this legitimate objective. This condition requires, according to the ECtHR's standard restatement of principles, (1) that the measure in question meets a "pressing social need"; and (2) that it is "proportionate to the legitimate aim pursued."[157] Unlike the CSC, the ECtHR has not further broken down these two requirements.

This twin test is, in turn, applied through the lens of the famous "margin of appreciation." This is the ECtHR's term for the degree of deference that is due to the original decisionmaking authorities in the defendant member state—legislative, executive, or judicial. The margin of appreciation has been justified by the Court primarily on the grounds of federalism:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of the [article 10(2)] requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them . . . . Consequently, [article 10(2)] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force . . . .[158]

But it has also, to a lesser extent, been justified on the grounds of democracy. One former ECtHR judge described the margin of appreciation as "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy."[159] And one commentator has defended the doctrine in these terms: "The power of the Convention institutions to sit in final and binding judgment on national measures . . . must give due regard to the democratic processes of the [Contracting States] . . . . The

155. *See, e.g.*, Berend Hovius, *The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis*, 6 Y.B. EUR. L. 1, 24 (1986).

156. Arguably, article 18 would provide a textual basis for such a pretext review. Article 18 states: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." European Convention on Human Rights, *supra* note 25, 213 U.N.T.S. at 234.

157. The classic formulation of the necessity test was in *Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 38 (1983).

158. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (citation omitted).

159. Sir Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 9 (1980).

doctrine [of the margin of appreciation] reflects the division of responsibility effected by the Convention between the democratic institutions of the Contracting States and the Strasbourg enforcement bodies."[160]

The ECtHR has, however, made increasingly clear that the margin of appreciation is not fixed but varies with both the nature of the right interfered with and the legitimate aim pursued.[161] Application has been rather ad hoc and somewhat unpredictable, with the degree of deference sometimes varying from case to case—even where the same legitimate aim is relied on.[162] So, for example, governmental measures pursuing the legitimate aim of protecting morals were held to be entitled to a broad margin of appreciation in the context of the regulation of pornography and blasphemy,[163] but to a narrow margin in the context of the criminalization of homosexual conduct.[164] According to the ECtHR, this difference reflected both the nature of the activities regulated (the latter case concerned "a most intimate aspect of private life"), and the absence in the first case and presence in the second of moral consensus among member states as to whether regulation is a "pressing social need."[165]

Gradually, it appears that the ECtHR is developing a hierarchy of rights with those at the top—such as political expression, the right to private life (at least regarding "a most intimate part of an individual's private life"), and freedom of association to form political parties—provoking less deference and requiring "particularly serious" or "convincing and weighty reasons," while those lower down, such as property and freedom of commercial speech, provoke more deference. Effectively, this hierarchy is similar to the tiers of review in U.S. constitutional law, although it is far less rigid and formalized.

At the same time, however, there is some evidence that, as with the Canadian Supreme Court, the ECtHR's general level of deference is growing over time. One commentator complains that, "[f]or a long time, the Court applied a fairly strict proportionality test . . . . In some more recent judgments, however, a looser test is applied: was the interference 'justifiable in principle and

160. Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism*, 19 HUM. RTS. L.J. 1, 2, 6 (1998).

161. "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States." Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) at 15 (1985) (citation omitted).

162. *See, e.g.*, Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEGAL STUD. 405, 427 (2003).

163. *See, e.g.*, *Handyside*, 24 Eur. Ct. H.R. (ser. A); Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937.

164. *See* Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988); Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981).

165. *Norris*, 142 Eur. Ct. H.R. (ser. A) at 21.

proportionate'?; was there a 'reasonable relationship of proportionality' between the interference and the legitimate aim pursued?"[166]

As further evidence of its relative lack of rigidity and formalization, the ECtHR in applying the margin of appreciation sometimes fails to distinguish between the ends and the means parts of its necessity test, or at least to treat them sequentially. Thus, in both *Dudgeon v. United Kingdom* and *Norris v. Ireland*, which held that laws criminalizing adult consensual homosexual activity in Northern Ireland and the Republic of Ireland, respectively, violated article 8, the Court found on the basis of the same evidence both that there was no pressing social need for the laws and that a total criminal ban was a disproportionately severe regulation relative to the right involved.[167] Arguably, if the law failed the ends test, there was no need to consider the means.

Similarly, with respect to the means or proportionality part of the necessity test itself, the ECtHR sometimes fails to distinguish between the second and third prongs of the *Oakes* test: a least restrictive means analysis (whether the same legitimate aim could have been achieved with less interference of the right) and a pure proportionality test (even if they cannot be achieved in a less restrictive way, whether the benefits are disproportionate to the interference). Although the ECtHR has never unpacked the proportionality test in the way that the *Oakes* Court did in Canada, it sometimes uses one and sometimes the other in finding limits unjustified.

Overall, then, the ECtHR has perhaps been less deferential to government in applying the European Convention on Human Rights than the Canadian Supreme Court has been in applying section 1. Nonetheless, there have been continuous critiques of the ECtHR for too readily accepting government justifications under the margin of appreciation.[168] Those defending this doctrine tend not to dispute the degree of deference shown by the ECtHR, but rather reject the critics' view that it is not justified, arguing that the margin is entirely appropriate for reasons of federalism and, more occasionally, democracy.[169]

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166. P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 94 (3d ed. 1998).

167. "Applying the same tests [as in *Dudgeon*] to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a 'pressing social need' to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that 'such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant." *Norris*, 142 Eur. Ct. H.R. (ser. A) at 21.

168. *See, e.g.*, Greer, *supra* note 162, at 433 ("The case law on the relationship between convention rights and collective goods in Articles 8–11 is unprincipled and confused largely because the Strasbourg institutions have not fully appreciated the need to give priority to rights and have too often sought refuge in the margin of appreciation and balancing as a substitute.").

169. *See, e.g.*, *supra* notes 159–160.

3. Germany

With respect to limits on its "basic rights,"[170] the text of the German Basic Law contains three different types of provisions: (1) Some rights have no express limits at all; (2) others have express internal limits; and (3) still others have express external limits. As an example of the first type, article 4(1) states: "Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy, are inviolable."[171] There is no additional clause or sentence specifying any type of internal or external limit on this right.[172] The Federal Constitutional Court (FCC) has stated that, with respect to such rights, there is no legislative power to limit them, so the only possible limits come from other constitutional rights or values.[173]

I have given examples of both express internal and external rights above.[174] As the examples of express external limits illustrate, the Basic Law sometimes specifies which public policy objectives may, in principle, override a right and sometimes does not. Where it does specify, the FCC has interpreted the listed objectives to be exclusive and will not permit unenumerated ones to limit rights.[175] Where it does not specify but merely states that the right may be limited by statute,[176] the FCC does not (as the text alone might suggest) permit *any* legislative objective to prevail, but instead determines which objectives can override a right according to the hierarchical value the Basic Law places on the various basic rights. The more important rights can only be overridden by compelling interests and the less important by any legitimate public interest. So, for example, the FCC has affirmed that the freedom *to choose* an occupation under article 12 can only be overridden by a compelling state interest, such as public health. By contrast, the freedom *to practice* a trade under article 12 (that is, how an occupation is practiced) is a less significant right and governmental regulation is subject to the lesser ends review of a legitimate public interest.[177]

170. This is how the text of the Basic Law refers to the rights contained in its first substantive section after the preamble, from articles 1–19: "I. Basic Rights." GRUNDGESETZ [GG] [Constitution] arts. 1–19.

171. *Id.* art. 4(1).

172. Article 5(3) is similarly unqualified: "Art and science, research and teaching, shall be free. Freedom of teaching shall not release anyone from his allegiance to the constitution." *Id.* art. 5(3).

173. *See, e.g.*, Mephisto Case, 30 BVerfGE 173, *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 428 (2d ed. 1997).

174. *See supra* text accompanying notes 46–53.

175. "The fundamental right to freedom of movement may be limited only by the express provisions of Article 11(2)." Elfes Case, 6 BVerfGE 32 (1957), *translated in* KOMMERS, *supra* note 173, at 316.

176. For example, article 5(2) states that "[t]hese rights [of freedom of expression] find their limits in the provisions of general statutes, statutory provisions for the protection of youth, and in the right to respect for personal honor." GRUNDGESETZ [GG] [Constitution] art. 5(2).

177. Pharmacy Case, 7 BVerfGE 377, *translated in* KOMMERS, *supra* note 173, at 274–78. As noted above, *supra* note 119, the FCC has interpreted the "right to free development of personality" under

In applying this ends test, the FCC has not shown notable deference to legislative judgments. Thus, in the very case announcing this test, which challenged a Bavarian statute limiting the number of licensed pharmacies in any given community, the FCC did not accept the state's argument that there was a compelling public health interest at stake.[178] In interesting contrast to the Canadian Supreme Court on the causation issue of whether the feared harm will happen absent the challenged legislation, the FCC stated: "The decisive question before us is whether the absence of this restriction on the establishment of new pharmacies would . . . in all probability disrupt the orderly supply of drugs in such a way as to endanger public health. We are not convinced that this danger is impending."[179]

Turning to the means test, the FCC has famously imposed a proportionality test, which, although entirely unwritten, has become an integral and critical part of German constitutional law.[180] Indeed, it is standardly understood that Germany is the original source of the proportionality principle that we have seen adopted in several other regimes and that has been described by one author as "the ultimate rule of law" due in part to its near universality.[181] In fact, the three prongs of the *Oakes* test in Canada are essentially identical to the three prongs of the older German proportionality test; and although, as we have seen, the ECtHR does not explicitly break down its proportionality test into separate components, it arguably follows the German model in an implicit way as well. The three German prongs are that the challenged measure, as a means to the relevant government objective, must be (1) "suitable" or appropriate (rationally promote); (2) necessary (represent the least restrictive means); and (3) proportionate (the means must not impose disproportionate burdens relative to the objective).[182]

Although the constitutional test of means itself is thus essentially identical in its terms in Canada and Germany, the question remains of how has it been applied by the FCC: more or less deferentially? Not surprisingly, as in Canada, the rationality test of the first prong permits "wide discretion"[183] of choice of means.

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article 2(1) of the Basic Law to contain a general constitutional right to liberty, subject to the legitimate public interest and proportionality tests.

178. Pharmacy Case, 7 BVerfGE 377, *translated in* KOMMERS, *supra* note 173, at 277–78.

179. *Id.*

180. *See* NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 24 (1996); KOMMERS, *supra* note 173, at 46–48.

181. *See generally* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).

182. In German constitutional discourse, proportionality sometimes refers in the broadest sense to both ends and means tests and sometimes in the narrowest sense to only the third prong of the means test (proportionality *stricto sensu*); but most often, it refers to the three prongs of the *means* test.

183. EMILIOU, *supra* note 180, at 65.

The degree of deference under the second and third prongs—necessity and proportionality *stricto sensu*—depends on the general level of scrutiny that the FCC applies to the right in question, but overall it is somewhat less deferential than either the CSC or the ECtHR, particularly with respect to the necessity test. As we have seen,[184] the CSC generally asks only whether there was a clearly superior alternative means even under its strictest scrutiny, and the ECtHR applies its varying margin of appreciation. But even where it is explicitly applying greater deference to the legislature because the right in question is lower in the hierarchy, the FCC has, on occasion, employed the necessity test to invalidate the relevant law. For example, it invalidated a federal consumer protection statute that banned the sale of foodstuffs (such as puffed rice covered in a thin layer of chocolate) that might be confused with products made of pure chocolate.[185] The FCC acknowledged that, under its lower level of scrutiny, as a legitimate public interest the objective of consumer protection in principle justifies restrictions on the practice of a trade. Indeed, it stated, with respect to such restrictions (as distinct from restricting the freedom to choose a trade), "the Basic Law grants the legislature wide latitude in setting economic policy and devising the means necessary to implement it. In the instant case, however, the legislature has exceeded the proper bounds of its discretion, for less restrictive means can easily achieve the purpose of the statute."[186] Labeling, rather than a total ban on impure chocolate products, would have been equally effective but less restrictive of the right. Presumably, it was thus also disproportionate under the final prong. This sort of government action would easily pass constitutional muster in both the United States and Canada.

4. South Africa

As we have seen, section 36(1) of the South African constitution contains a general limitations clause.[187] As in Canada, Germany, and under the ECHR, the five factors listed in section 36(1) break down into two components: the end or purpose, and the proportionality between the means and end.

The Constitutional Court of South African (CCSA) described the process of applying section 36(1) as follows:

> [The five itemized factors] are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society.

184. *See supra* Parts I and II.
185. Chocolate Candy Case, 53 BVerfGE 135, *translated in* KOMMERS, *supra* note 173, at 279–80.
186. *Id.*
187. *See supra* text accompanying note 23.

> In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure in the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage . . . ."[188]

In rejecting the U.S. compelling state interest and strict scrutiny standard as too rigid a test, the CCSA stated that:

> Our Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing. . . .
>
> . . . [W]hat s 36 requires is an overall assessment that will vary from case to case . . . . [L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose . . . . [T]he standard to be applied is the nuanced and contextual one required by s 36 and not the rigid one of strict scrutiny.[189]

In terms of which purposes can, in principle, justify limiting a right, the general limitations clause does not specify. Although the CCSA has expressly acknowledged that some rights weigh more heavily than others, so that it is more difficult to justify limitations on these than on less weighty rights,[190] it has not supplemented the text by specifying *how* important the legislative purpose must be to override one of the weightier rights. Rather, it factors in the importance of the purpose as part of its "overall assessment." Among the legitimate purposes the CCSA has accepted in the context of section 36 analyses are: protecting the administration of justice; preventing, detecting, and investigating crime; preventing the "possession and publication of pernicious pornographic material exploiting women and children"; reduction of unemployment; and protecting the dignity of schoolchildren.[191]

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188. *S v. Manamela*, 2000 (3) SA 1 (CC) at 20.

189. *Christian Educ. S. Afr. v. Minister of Educ.*, 2000 (4) SA 757 (CC) at 776–77.

190. According to the Constitutional Court of South Africa (CCSA), "[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the Bill of Rights]." *S v. Makwanyane*, 1995 (3) SA 391 (CC) at para. 144.

191. *See* JOHAN DE WAAL, IAIN CURRIE & GERHARD ERASMUS, THE BILL OF RIGHTS HANDBOOK 144–6 (3d ed. 2000).

On the other hand, it rejected the retribution purpose for the death penalty (as distinct from the deterrent and prevention goals) as insufficiently important to justify limiting the rights to life and dignity.[192] And in striking down criminal laws against consensual homosexual conduct as violating the unique express right of nondiscrimination on grounds of sexual orientation,[193] the CCSA rejected "the enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice" as a "valid" or "legitimate purpose under" under section 36.[194] Having done so, it concluded that "[t]here is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays."[195] Certain academic commentators in South Africa have urged the position that a limiting measure must serve a purpose that all reasonable citizens would agree to be sufficiently important, and further argued that this both explains and justifies the decision in *National Coalition for Gay and Lesbian Equality*.[196] The CCSA, however, has never explicitly accepted this criterion.

Turning to the means or proportionality part of the test under section 36, the listed factors have been the exclusive ones used by the CCSA in its balancing function. Overall, in applying them, the Court has not been notably deferential to legislative judgments. This is so even though the CCSA has described its task as "to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature,"[197] and one commentator has said that the Court's role is "'not to second-guess the wisdom of policy choices made by legislators.'"[198] Although as part of its overall, nonmechanical assessment, the CCSA does not always disaggregate the various strands of the test, the least restrictive means part of the test has been perhaps the most important in practice and applied quite strictly by the Court. For example, in *Makwanyane*, the CCSA held that the government failed to demonstrate that life imprisonment (rather than the death penalty) would not be a less restrictive but equally effective method of promoting the goals of deterring

192. *Makwanyane*, 1995 (3) SA 391 (CC).

193. S. AFR. CONST. 1996 § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation . . . .").

194. Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1999 (1) SA 6 (CC) at 31.

195. *Id.*

196. This position has its source in DENISE MEYERSON, RIGHTS LIMITED: FREEDOM OF EXPRESSION, RELIGION AND THE SOUTH AFRICAN CONSTITUTION (1997).

197. *S v. Manamela*, 2000 (3) SA 1 (CC) at para. 95 (O'Regan, J. and Cameron, J.). "Although their judgment is a minority one, the majority of the Court explicitly approved of this approach at para 34." 1 IAIN CURRIE & JOHAN DE WAAL, THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW 342 n.94 (2001).

198. 1 CURRIE & DE WAAL, *supra* note 197, at 342.

and preventing murder. Similarly, in the three cases of *S v. Williams*,[199] *S v. Mbatha*,[200] and *Mistry v. Interim Medical and Dental Council of South Africa*,[201] the CCSA found that juvenile whipping, a presumption of guilt if in possession of certain arms, and a statutory power of search for inspectors of medicines were each more restrictive than necessary to achieve their respective objectives. In addition, in several cases the CCSA has rejected limitations arguments on the basis that the legislature has provided insufficient evidence in support of the factual claims underlying its justification.[202]

To summarize the comparative experience, the constitutional test for legislative overrides, or justified infringements, of rights is generally similar in all four regimes: First, only certain legislative objectives (either textually specified or those adjudged sufficiently important) are found to be valid. Second, a proportionality test is applied to ensure an appropriate fit between the measure in question and that objective. This proportionality test checks that the means promote the objective, and do so in a way that is not unnecessarily restrictive of the right or disproportionately burdensome relative to the benefit. If the test itself is similar, its application by the four courts is somewhat less so, with a marked variation in the degree of deference that is shown to the underlying legislative judgment. Thus, overall, the Canadian Supreme Court appears to be most deferential, the ECtHR a little less so, and the German and South African constitutional courts most likely to find that the legislature has exceeded the limits of its override power.

B. The Appropriate Standard in the United States

Turning to the United States, one obvious proposal would be to bring it in line with the comparative examples by amending the constitutional text to specify the existence and constitutional parameters of the override power, rather than leaving this to contestable and contested judicial interpretation. Such an amendment would, ideally, specify (1) which rights are overridable and which are not; (2) which political institutions are empowered to override them: legislature alone, or legislature and executive; (3) what the constitutional criteria are for overriding rights, including whether the same criteria apply to all overridable rights—that is, a general or specific limitations clause; (4) assuming that the criteria employ some form of a means-end test, either which objectives are in

199. 1995 (3) SA 632 (CC).
200. 1996 (2) SA 464 (CC).
201. 1998 (4) SA 1127 (CC).
202. *See, e.g.*, *Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Re-Integration of Offenders*, 2005 (3) SA 280 (CC); *S v. Steyn*, 2000 (1) SA 1146 (CC).

principle capable of overriding rights or the general standard that ends must satisfy (such as compelling, pressing, or important) to be capable of so doing; and (5) what degree of connection or proportionality between the selected means and such objectives is required.

In the absence of constitutional amendment, however, these are questions of constitutional interpretation, of saying what the law of the Constitution is—even though guidance from text, history, and structure is essentially nonexistent. Accordingly, they are within the legitimate and traditional judicial function in constitutional matters.[203] The existing answers given by the Supreme Court are, of course, well known and need not be rehearsed here.[204]

More problematic and complex than the constitutional test or criteria for the override power itself is the final issue of the standard of judicial review that should be used to determine whether particular exercises of this power satisfy the criteria.[205] The dilemma, once again, is that the existence of a limited rather than an absolute override power clearly implies that there must be judicial review of its exercise. Yet, it is obviously counterproductive to permit the standard of such judicial review to reproduce and even aggravate democratic tensions if the point of the override power is to reduce them. In short, the form of judicial review must steer a course between these two.

Before embarking on my discussion, there is one further preliminary point to be discussed. A threshold question is whether both the legislature and executive have the power to override constitutional rights. If they do, the question then arises whether the same standard of judicial review should apply to exercises of this power by each institution.

On the threshold question, the current practice in the United States is that both branches of government have the power. Thus, a case like *Korematsu v. United States*[206] suggests that the executive, and not only the legislature, may limit the Equal Protection Clause, as does the current discussion about the balance

203. This statement is not designed to be a controversial one and so, for example, would be perfectly consistent with the textualist interpretation associated most prominently with Justice Black that the absence of express external limits means that there are none: that rights are not overridable. It is also entirely agnostic with respect to (1) the supremacy or exclusivity of such judicial interpretation of the Constitution; and (2) the precedential status and binding nature of the Supreme Court's interpretations.

204. These, of course, include the three tiers of review under equal protection (strict scrutiny, intermediate scrutiny, and rational basis scrutiny), the two or three tiers under due process (strict scrutiny, undue burden, and rational basis), and the two or three tiers under the First Amendment. Once again, in what follows, I take these existing answers as given and focus on the distinct issue of what standard of judicial review should apply to determine if the political institutions have satisfied them.

205. In Mitchell Berman's terminology, what "decision rule" should the Court adopt? *See* Berman, *supra* note 17, at 9.

206. 323 U.S. 214 (1944).

between civil liberties and national security in the context of presidential power and the war on terror.[207] In Germany, as we have seen, express textual provisions sometimes limit the override power to the legislature, permitting rights to be restricted only by statute.[208] By contrast, Canada, South Africa, and the ECHR have provisions requiring limits on rights to be "prescribed by law,"[209] which have been interpreted to include not only statutes but delegated legislation (and the common law), although there are also requirements of general applicability and accessibility to be met.

In line with both the majority of these examples and with my general description of the power being granted to the political institutions, the same constitutional criteria for overrides do and probably should apply to both legislature and executive. Nonetheless, the democratic justification for this power and the constitutional balancing it requires is stronger in the case of the legislature than the executive. Very briefly, legislatures represent more collective and participatory modes of decisionmaking than executives, and the underlying democratic issue at stake—who decides what the law of the land is—seems to have only two plausible candidates: courts and legislatures. Accordingly, the standard of judicial review to determine whether these criteria have been satisfied need not, and should not, be the same. In what follows, I consider only the standard of review that should apply to legislative overrides.

In essence, the only standard of review that coheres with the basic reason for the override power is one that is relatively deferential to the underlying legislative judgment. The substitution of judicial for reasonable legislative judgment fails to accommodate the democratic basis for the override. This primary, democratic argument for a relatively deferential standard of review for exercises of the override power is thus deeply rooted in the justification for having a second stage of rights adjudication at all. By contrast, a subsidiary argument for relative judicial deference to legislative balancing assumes the existence of this second stage and focuses on the nature and reduced legal content of the relevant issues involved in its application. To be clear, this subsidiary argument

207. Although such discussions have thus far tended to focus on the separation of powers and inherent presidential power issues (for example, the president's wiretapping program), whichever branch of the federal government prevails will still have to face the next issue of whether constitutional rights have been violated and, if so, whether the security objectives justify an override.

208. *See supra* note 76.

209. *See supra* note 76. Thus, section 1 of the Canadian Charter permits "reasonable limits prescribed by law." Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act, 1982, ch. 11 (U.K.). Section 36(1) of the South African constitution permits rights to be limited "only in terms of law of general application." S. AFR. CONST. 1996 § 36(1). The ECHR requires limits to be "prescribed by law." European Convention on Human Rights, *supra* note 25, 213 U.N.T.S. at 226. And the German Basic Law typically permits basic rights to be restricted only by "statute." GRUNDGESETZ [GG] [Constitution] art. 2.

is not that nondeferential review is inappropriate because a court is applying rather than interpreting a constitutional rule (here the override criteria)—courts do this all the time in deciding constitutional cases; rather, it is inappropriate because of the particular type of questions involved in the second stage of right adjudication: Namely, how important is a given interest in the circumstances and would alternative policies promote it as well? These are quintessentially policy and factual questions rather than legal ones.

1. Ends

Moving in stages from the abstract to the particular, the first issue regarding the standard of judicial review of ends is whether a particular end—such as, educational diversity, protecting potential life, or morality—is *in principle* capable of fulfilling the general constitutional criterion for ends laid down by the Supreme Court (assuming that there is no amendment containing either such a criterion or a list of such ends, as in the European Convention).

This issue is not clearly one that suggests nondeferential review, as it seems like a mixed question of law and policy or political judgment. On the one hand, whether educational diversity is in principle a compelling objective (if this is the relevant criterion) for purposes of the override power seems less the sort of question that, absent a textual list, legal analysis can resolve than one that reasonable citizens acting in good faith, and on the basis of broader moral and political considerations, can genuinely disagree about. In these circumstances, it seems appropriate that this question should be resolved by the normal process of self-governing decisionmaking. On the other hand, this is clearly not true of any end or objective that emerges from this process. Some ends are just not plausibly compelling ones for the purposes of satisfying the constitutional criterion.

Accordingly, I suggest that the standard of judicial review on this first issue should be a version of the reasonableness or clear error rule.[210] Specifically, the test should be whether a legislature's judgment that a particular objective is in principle compelling—so that it is worthy of potentially overriding a constitutional

210. In making reference here and later in this Subpart to a clear error rule, I am necessarily (and intentionally) invoking the famous and highly influential theory of judicial deference associated with James Bradley Thayer. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); JAMES BRADLEY THAYER, JOHN MARSHALL 106–10 (1901). The one twist I believe I am giving the Thayerian argument is in its application. Unlike Thayer and subsequent Thayerians, I am not arguing that judicial deference and the clear error rule apply across the board or to legislative versus judicial interpretations of the Constitution. I am proposing deference only to the distinct, second-stage issue of legislative judgment about whether the constitutional criteria for an override have been met. More generally in the Article, of course, I am also highlighting and justifying this override power—and rooting judicial deference primarily in this justification. For a recent defense of a general Thayerian approach to judicial review, see Michael Perry, *supra* note 90, at 679–88.

right—is a reasonable one.[211] Under this test, diversity, national and personal security, and protecting potential life and public health would presumably all pass; administrative convenience and economic benefit would not.[212] To hold that the latter ends are compelling would be to misconceive the presumptive weight of constitutional rights. Public morality is a trickier case, as its textual presence in some of the comparative lists but not in others attests.[213]

Continuing to descend the particularity-application scale, the second issue concerning ends is what standard of judicial review applies to the question of whether an asserted objective, acceptable in principle, is sufficiently pressing in the particular context to be deemed compelling. Indeed, in most cases, this will be the only judgment about ends that a legislature is likely to make. Here, the respective legal and policy components seem to pull even further in the direction of the latter. Is educational diversity, for example, not just capable of being a compelling objective but in fact compelling in the actual context of, say, (1) the sole public law school in a megalopolis with a majority minority population; or (2) a state with several public law schools and little ethnic or racial diversity among its population? Once again, and for the same reasons, the nature and reduced legal content of this question seems well suited to a reasonableness or clear error rule, with the role of judicial review being to bar decisions of the legislature that appear objectively unreasonable in terms of justifying an override of a constitutional right. While obviously not as stringent a test as one that effectively asks if the legislature made the same decision that the court itself would make, it is undoubtedly not equivalent to the proposition that a compelling interest is whatever the legislature says it is.

A final potential issue regarding judicial review of legislative ends concerns motives and pretext. If, as I have argued, the proper question for judicial review

211. This is consistent with Mitchell Berman's suggestion that one of the benefits of his distinction between operative and decision rules is that courts can select deferential decision rules in order to accommodate democratic concerns. *See* Berman *supra* note 17, at 104. In effect, I am presenting an affirmative argument here for why they should so choose.

212. This test is subtly different than the one proposed in the South African context by Denise Meyerson. *See* MEYERSON, *supra* note 196. She argues that only those ends that all reasonable people could accept as sufficiently important to override a right should be so deemed. Such a "positive rational consensus" is extremely hard to achieve and will likely result in very few such ends. MEYERSON, *supra* note 196, at 10–15. By contrast, the "negative consensus" test that I am proposing rules out those ends that no reasonable person could accept as sufficiently important to override a right, without the need for consensus on which particular ends can reasonably be accepted. As a matter of principle, I do not see a difference between the two versions and select the negative version only for pragmatic reasons about the size of the permitted class.

213. It is also attested by the obvious controversy surrounding the issue of whether morality is even a legitimate public interest for substantive due process purposes in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

should be the reasonableness of the legislature's judgment that a public policy objective is compelling (or important), then should a court evaluate the legislature's stated public policy objective in justification of limiting a right, or the actual motive or purpose where this is different? In the U.S. context, this issue goes all the way back to Chief Justice Marshall's opinion in *McCulloch v. Maryland*,[214] in which, despite a broad reading of Congress's power under the Necessary and Proper Clause, courts were empowered to review for whether use of this power was a pretext for illegitimate ends.[215] Of course, during the New Deal, the Court prohibited such pretext review in the specific context of the commerce clause power,[216] but that is obviously not our context here.

Given that the bare purpose to deny a right does not satisfy the constitutional standard for an override, it seems appropriate that attempting to conceal this purpose beneath a legitimate but pretextual justification should not succeed. Accordingly, as under the existing standard for heightened scrutiny, courts should evaluate actual purpose where this differs from the stated reason for acting. On the other hand, as the ECtHR has found in interpreting and applying article 18, which contains a similar rule,[217] there will rarely be justiciable "reason to doubt" that the actual purpose diverges from the proffered public policy justification.

Overall, then, the relatively deferential standard of judicial review of government objectives that we have already seen in the comparative context appears to make sense from the specific perspective of the nature and purposes of the override power and the appropriate judicial role that follows from them.

2. Means

Turning from judicial review of the objective to that of the means selected by the legislature, the existing constitutional criteria in the United States as determined by the Supreme Court are that the means be (1) necessary for the qualifying objective in the case of strict scrutiny; (2) substantially related to the objective in the case of intermediate scrutiny; and (3) merely rationally

214. 17 U.S. (4 Wheat.) 316 (1819).

215. *Id.* at 322 ("Should Congress . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.").

216. United States v. Darby, 312 U.S. 100 (1941).

217. "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." European Convention on Human Rights, *supra* note 25, 213 U.N.T.S. at 234. As we have seen, the European Court of Human Rights (ECtHR) has tended to merge this inquiry into the deferential ends inquiry under the relevant limitation clause.

related to the objective under rational basis scrutiny. What standard of judicial review should apply to these substantive constitutional criteria?

Starting with this last, where the constitutional test specifies that the means need only be rationally related to a legitimate government objective, the proper standard of judicial review is essentially self-defining: a reasonableness test. As I have discussed above,[218] however, because a rational basis test does not require an unavoidable conflict before a right can be restricted, it results in an override power significantly less limited than where a form of higher scrutiny applies. Accordingly, it is not part of the power I have sought to justify.[219]

Unlike a rational basis test, both the necessary and substantially related means tests require an unavoidable conflict between the right and the government objective so that there is no choice but to resolve it by opting for one or the other. In this sense, they both imply a nonrestrictive means test: If there are in practice ways of eliminating the conflict between the two, the right need not—and so cannot justifiably—be overridden.

In addition to this threshold nonrestrictive means test, the test of necessity involves a least restrictive means test. In other words, not only must there be no available means that would avoid the conflict altogether, but among the means that do conflict with the right, only the means that least conflict with—or restrict—the right may be employed. Other, more restrictive, means would clearly not be necessary. However, as generally understood in both U.S. and comparative practice, the government is not subject to a least restrictive *ends* approach. That is, it is permitted to promote the objective to the degree or extent it sees fit and can justify as independently compelling. So, for example, although the government must select the least restrictive means of achieving its chosen level of educational diversity, it is not required to select the level of educational diversity that least restricts the right. Accordingly, if a state could achieve 10 percent educational diversity by colorblind means, but can show that a 30 percent rate is compelling, it is not required to settle for the 10 percent.

Whether this necessity test is satisfied in a particular case must, of course, be assessed in practice, not in the abstract. What this implies is that the various available means must be considered to determine which would achieve the compelling objective to the same degree, and only among this limited set must the means that is least restrictive of the right be selected. In other words, the means test is most essentially about assessing policy alternatives and their impact

218. *See supra* text accompanying note 121.

219. It is also less limited than under the typical proportionality test in comparative constitutional law, because a rational basis test does not rule out rational but disproportionate means of promoting the objective.

and effectiveness on both rights and applicable objectives. And once again, this suggests that the relevant questions are far more factual and policy oriented than legal in nature. As a result, a reasonableness or clear error rule seems again to be the most appropriate standard for judicial review of whether the means part of the constitutional override test has been satisfied. And this, of course, also accords with the basic reason of democratic accommodation for the power itself.

Under such a test, a legislature's decision that overriding a right is necessary to promote the relevant compelling interest would not be reasonable if, for example, it had simply not considered, or considered with insufficient seriousness, alternative policies for promoting its objective. Similarly, it would not be reasonable if other states had achieved the same goal with a lesser restriction of the right—or, of course, without restricting the right at all. Once again, note that the same goal here means achieving the goal to the same degree. The achievement by State X of a level of educational diversity using only colorblind methods that State Y believes falls below what is a compelling interest would not thereby render State Y's affirmative action program unreasonable. In the same way, the fact that State A promotes its interest in protecting potential life after viability by mandatory counseling rather than prohibiting abortions does not thereby mean that State B's policy of prohibiting postviability abortions is unreasonable. A state's decision to override a right would also be unreasonable, and therefore unconstitutional, if, whether or not it has considered them or other states have implemented them, there are obviously less restrictive means of promoting the compelling interest to the same degree.

By contrast, judicial review of a legislature's balancing of rights and compelling interests should not require it to prove that every conceivable alternative policy would have been less effective, for this drags a court too far into the realm of policy analysis and evaluation. For a court, and particularly an appeals court, to substitute its judgment for that of the political institution on the question of whether the latter's measure was in fact necessary for promoting the relevant compelling objective, where the political institution's judgment is reasonable, is for that court (1) to decide an inherently political question; and (2) to act inconsistently with the democratic argument for the override power in the first place. Accordingly, the Canadian Supreme Court's approach to applying the least restrictive means test (the means "impairs the right no more than reasonably necessary"), informed as we saw by concerns about both democracy and expertise, appears to be the most appropriate.

This argument obviously holds for the more flexible substantial relation test under intermediate scrutiny. Unlike the necessity test under strict scrutiny, this

test does not require that only the least restrictive means of achieving the government's objective be employed. Rather, it presumably requires that the chosen means be among the less restrictive available. Once again, the Canadian approach to application of this standard, in the form of a reasonableness test of the underlying legislative judgment, seems highly appropriate.

Proportionality in the strict sense used in Canada, Germany, South Africa, and under the ECHR does not currently form part of the constitutional test for legislative overrides of rights under the second stage of analysis in the United States.[220] Doctrinally, it exists only in the different contexts of (1) determining whether a measure is within Congress's power under Section 5 of the Fourteenth Amendment ("proportionate and congruent"); (2) whether punishment is "cruel and unusual" under the Eighth Amendment, a constitutional right with no external limits; and (3) the so-called *Pike* balancing test under the Dormant Commerce Clause.[221] However, the Supreme Court's approach in this third context is illuminating, for it is essentially similar to the one proposed here. The Court does not declare a state law invalid simply because in its view the burden on interstate commerce outweighs the local benefits. The test is rather the more deferential one of whether the burden is "clearly excessive"[222] in relation to the benefits; that is, a clear error rule.

Finally, my argument—that the nature and purpose of the limited power require some significant degree of deference by courts toward the legislative judgment as to whether the constitutional criteria for the override have been satisfied—presumes, of course, that there is such a legislative judgment to defer to. If, as I have argued, the override empowers the legislature to balance rights and conflicting public objectives, it also requires them to do so. The argument for the power that I have made is one of democratic process and the process itself may not be overridden.

Accordingly, as part of their legitimate and appropriate review function, courts should ensure that the legislature has in fact made a judgment that pursuing objectives that conflict with constitutional rights is justified under the

220. As we have seen, in Canada, it is the third prong of the *Oakes* means test, *see supra* text accompanying notes 130–136; it is listed as one of the five factors in section 36(1) of the South African constitution, *see* Part III.A.4; and both the ECtHR and the FCC have interpreted specific limitations clauses to include this requirement, *see* Part III.A.2–III.A.3.

221. However, David Beatty seems to include the United States among the countries employing proportionality. *See* BEATTY, *supra* note 181. Note that the undue burden test now used in the abortion and also in the First Amendment context might at first glance appear to be a proportionality test. The Court, however, only looks at one half of the proportionality equation, the degree of interference with the right, and does not ask the essential proportionality question of whether this burden is disproportionate relative to the interests served by the limitation. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

222. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

constitutional criteria. They are not required—and should not—defer to a post hoc legal argument made in the context of litigation or to conclusory, boilerplate legislative statements. Evidence of such a judgment may be inferred by the courts from the presence or absence of legislative drafts, findings, and debate. Similarly, courts should not defer to an unintentional override; for example, where the evidence suggests that a legislature pursued a qualifying objective mistakenly believing it did not conflict with a right and would not have chosen to do so if it had realized the conflict.[223] As a form of "hard look" review, this helps to ensure that the democratic benefits of the override power, such as responding to the citizen debilitation problem, actually ensue.[224]

In sum, where heightened security applies, the limited override power requires a legislature to engage in a form of constitutional balancing: to determine whether a constitutional right unavoidably conflicts with an interest it reasonably deems compelling (or important under intermediate scrutiny) and, if so, whether it is necessary to override that right. Judicial review of this balancing should not require any further balancing on the part of the court. Determining whether the legislature's balancing satisfies the constitutional test for exercise of the limited override power is a matter of the reasonableness of its political judgment. For a court to do more than this is to cross two lines: first, into legislative rather than judicial territory (that is, policymaking), and second, into the field left for popular self-government rather than delegation to unaccountable elites.

CONCLUSION

It is sometimes suggested—and not only by courts acting without clear textual basis—that it is simply in the nature of constitutional rights that they have limits. At least as far as external limits are concerned, however, there is nothing natural about them. We may or may not choose to empower the political institutions to promote important nonenumerated public policy objectives when they conflict with constitutional rights. If we decide to empower, we do so for a reason and not from necessity.

I have attempted to respond to an unanswered critique of the existing structure of constitutional rights by identifying and presenting one important

223. I am grateful to Seana Shiffrin for this point.

224. There may be some constitutional issues surrounding the imposition on Congress of a "hard look doctrine," as Justice Breyer noted after citing with approval the suggestion made by me and others that this might be a useful approach to certain federalism issues. *See* United States v. Morrison, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting) ("Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach.").

reason for granting this power: it renders a system of entrenched constitutional rights enforced by judicial review more consistent with principles of citizen self-government and democratic decisionmaking than a system without this power. If you will, it balances the competing claims of majoritarianism and the limits on majoritarianism in a better way than does a system of court-enforced constitutional rights without limits. I have also sought to identify the implications of this reasoning for judicial review of the power. I have not, however, attempted to systematically address normative counterarguments.[225] Perhaps the most intuitive and powerful of these is that the limited power results in insufficient protection of constitutional rights. This strikes me as an entirely legitimate concern, but one that ultimately rests on contested empirical claims about the relative abilities of courts and legislatures to protect rights[226] and/or contested normative positions on the proper scope of constitutional rights in a democracy. In a sense, what I have tried to do in this Article is to identify and present what I believe is the overlooked side of the story, the democratic part of the argument that underlies balancing in constitutional law.

The choice, moreover, is not only between a system of constitutional rights with or without external limits, for there are at least three different ways in which legislatures may be empowered to override constitutional rights. The most expansive is an unlimited override power, such as that granted by section 33 of the Canadian Charter. Only slightly more limited is the second option, exemplified by those rights protected under a rational basis test in the United States (and elsewhere). Although here the override power does have substantive constitutional limits—rights may be overridden only where the government acts rationally to promote a legitimate governmental objective—they are minimal. Thus, the government may constitutionally infringe a right even where promoting its objective does not require it to do so. The third type of override power is the one employed both in the United States and elsewhere for rights protected by some form of heightened scrutiny, whether as a fixed tier or on a sliding scale. This override power is significantly more limited than the previous two. It is first subject to a threshold nonrestrictive means test: If there are ways of achieving the qualifying public policy objective without infringing the relevant constitutional right, the right may not be overridden. If satisfied, there are then additional limits involving the importance of the objective and the relative restrictiveness of the means.

225. I have attempted to address certain conceptual, linguistic, and interpretive counterarguments forming part of the antibalancing critique at various points in the Article.

226. In the context of making his case against judicial review, Jeremy Waldron, for example, argues that legislatures generally respect rights at least as well as courts. *See* Waldron, *supra* note 15, at 1406.

Under none of the versions of the override power, including the most limited one described and justified in this Article, is the role of the courts to displace or substitute the legislative judgment in favor of their own. The point of the power is to enhance the role of legislative judgment in rights analysis but without impinging on the judicial function of saying what the law is. Accordingly, the override power does not involve or require—indeed it prohibits—judicial balancing. If courts adhere to their proper role in assessing the validity of particular exercises of the override power, they do not themselves engage in balancing but rather in assessing the reasonableness of legislative balancing.

Indeed, even the political institutions engaging in balancing do so only in a specific sense and not in an all-things-considered weighing of costs and benefits typically employed in the antibalancing critique.[227] Rather, the steps in the required legislative judgment are: (1) determining if there is a sufficiently important public policy objective it collectively wishes to pursue that unavoidably conflicts with a constitutional right; and (2) determining whether the objective can be achieved to the same degree in a way that is less restrictive of the right. This first judgment involves a type of qualitative (not quantitative) balancing concerning the relative importance of the objective: Is it so important that we should override a right? The second judgment involves assessing alternative policy options in terms of their relative effectiveness and burdens on rights. Balancing is thus part of the constitutional standard for valid exercise of the override power. This is a power we do and should grant to the political institutions at least in part for democratic reasons.

227. *See supra* Part II.