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# DISCIPLINING JUDICIAL INTERPRETATION OF FUNDAMENTAL RIGHTS: FIRST AMENDMENT DECADENCE IN SOUTHWORTH AND BOY SCOUTS OF AMERICA AND EUROPEAN ALTERNATIVES

Larry Catá Backer\*

*American constitutional jurisprudence has entered a period of decadence. The characteristics of this decadence is much in evidence in the constitutional jurisprudence of the American Supreme Court: judicial arbitrariness, the use of interpretive doctrine as an end rather than a means, disregard of existing interpretive doctrine and hyper-distinction of fact, doctrine as a smokescreen for personal preference, and an inclination to permit the juridification of everyday life. Indeed, these characteristics of decadence are made worse by a bloated and ill-defined catalogue of interpretive doctrine that veils all distortion of constitutional principle in the service of personal politics. Here is a jurisprudence in decline, increasingly noted more for arbitrariness than principle. In this context, it is worth inquiring whether there might be a suggestion for improvement in the juristic traditions of European or supra-national constitutional systems. This article examines the latest example of the modern phenomenon of jurisprudential decline through an analysis of two First Amendment cases decided during the American Supreme Court's 1999-2000 Term. It then looks to the French and German systems of constitutional review, and the jurisprudence of the European Court of Human Rights, to determine whether other systems provide translatable lessons for a more effective and democratically based supervision of the interpretive function of the American Supreme Court. It suggests that while European traditions of hierarchies of fundamental constitutional values provide at least a basis for the policing of judicial interpretation. In the absence of regularization and restraint the American system constitutional jurisprudence (like any other system relying on judicial interpretation) will collapse of its own weight. Equally likely, is the*

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*possibility that such a system will be abandoned because, having become so engorged in detail, point and counterpoint, thrust and counter-thrust, rule and exception, it will prove useless to all but the theoretician and the pedant.*

Students of comparative law are sometimes warned that it is dangerous to make comparisons of the approach taken by different legal systems with respect to the identification and protection of fundamental rights.<sup>1</sup> This is especially the case where human rights are concerned. People from Western democratic states are sometimes lectured that such an enterprise is basically impossible, given the differences in the systems that give rise to such rights.<sup>2</sup> At the same time, however, nations that are struggling to overcome histories of violent and systematic abuses of even the most rudimentary understandings of concomitants of basic human dignity,<sup>3</sup> have taken steps to institutionalize a comparative basis for

1. See ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 150 (1993):

Our aim is to explain why the case law from the other side of the Atlantic should not be seen as offering solutions to the interpretation of the convention's [European Convention for the Protection of Human Rights and Fundamental Freedoms] application to the private sphere. The appropriateness and reasons for the evolution of this case law in its home ground is only covered superficially. Paradoxically, the comparative exercise has been embarked on in order to counsel against making such comparisons.

Yet, it should be understood that warnings of these types are not meant to steer us away from the project of comparison so much as from easy transpositions based on facile conclusions to be drawn by looking at different systems. Comparison can as easily highlight seemingly unbridgeable difference as it can highlight a model worthy of emulation. For a defense of the comparative method in rights discourse, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

2. For a well known example, see, e.g., Adamantia Pollis and Peter Schwab, *Human Rights: A Western Construct With Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis & Peter Schwab, eds. 1979). Lately, this line of argument has been adopted by certain organs of modern institutional political Islam, the Chinese state, and their apologists. For discussion, see, e.g., M.H.A. Reisman, *Some Reflections on Human Rights and Clerical Claims to Political Power*, 19 YALE J. INT'L L. 509 (1994); Ann Elizabeth Mayer, *Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. INT'L L. J. 307 (1994); James Paul, *Islam and the State: The Problem of Establishing Legitimacy and Human Rights*, 12 CARDOZO L. REV. 1057 (1991); Abdullah Ahmed An-Naim, *Qu'ran, Shar'ia and Human Rights: Foundations, Deficiencies, Prospects*, in THE ETHICS OF WORLD RELIGIONS AND HUMAN RIGHTS 61 (Koung Moltmann, ed., 1990); MAHATHIR MOHAMMAD & SHINTARO ISHIHARA, THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY 80 (Frank Baldwin, trans. 1995).; Mab Huang, *Human Rights in a Revolutionary Society: The Case of the People's Republic of China*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 60 (Adamantia Pollis & Peter Schwab, eds. 1979). One has to wonder, however, about such attacks from systems notorious for racism (the revival of African slavery and genocide), see, e.g., Bernard K. Freamon, *Slavery Freedom and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. L.J. 1, 5-6 (1998). and religious bigotry. See, e.g., GILLES KEPEL, THE PROPHET AND PHAROAH: MUSLIM EXTREMISM IN EGYPT (1985); Natan Lerner, *Proselytism, Change of Religion, and International Human Rights*, 12 EMORY INT'L L. REV. 477 (1998).

3. Human dignity itself, has been an object of constitutional pronouncement and protection. Human dignity plays a considerable grounding role, for example, in the German Federal Constitution, the *Grundgesetz*.

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law.

*Grundgesetz* [Constitution] [GG] art. 1 (F.R.G.), translated in Donald P. Kommers, THE

the recognition and interpretation of human rights in their domestic law.<sup>4</sup> Moreover, American scholars have begun to accept "comparative constitutionalism" as a legitimate basis of study.<sup>5</sup> Its purpose is no longer merely to serve isolationism and affirm uniqueness and superiority. Rather, the comparative method now serves also as a means to foster an active or passive convergence.<sup>6</sup> "Borrowing from another system is the most common form of legal

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CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 507 (2d ed. 1997). For a discussion of the German Basic Law, see, Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477 (2000).

4. The Republic of South Africa and the Argentine Republic are two cases in point. For a discussion of the constitutionalization of a comparative/supra-national approach to basic rights within domestic law in Argentina, see, e.g., Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 Colum. J. Transnat'l L. 281 (1999); Jonathon M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith* 46 Am. U. L. Rev. 1483 (1997). For South Africa, see, e.g., S. Afr. Const. ch. 2 § 36(1) (1996); *Du Plessis v. De Klerk*, 1996 (5) BUTTERWORTH'S CONST. L. R. 658 (CC); *Ferreira v. Levin*, 1995 (4) BCLR 437 (W). For commentary, see, e.g., Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions* 1 U. PA. J. CONST. L. 176 (1998); Hoyt Webb, *the Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998); Johan D. Van der Vyver, *Comparative Constitutionalism: Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 823 (1991).

5. For recent examples of publications in this area, which includes casebooks suitable for American law students, see, e.g., G. HARUTYUNYAN & A. MAVCIC, *CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD: A COMPARATIVE CONSTITUTIONAL ANALYSIS* (1999); VICKI C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); and Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Johan D. Van der Vyver, *The Randolph W. Thorer Symposium: Comparative Constitutionalism: Constitutional Options for Post-Apartheid South Africa* 40 EMORY L.J. 745 (1991).

An International Association of Constitutional Law has now gained some prominence for itself in the United States.

The IACL is the principal organization that promotes constitutionalism worldwide through scholarly exchanges and contacts. At its fifth quadrennial World Congress, held in Rotterdam in 1999, 450 participants from more than 50 countries discussed a broad range of issues of common concern. Until 1996, the United States, unlike almost all other countries active in the IACL, lacked a national association that would serve as a focal point of activity.

Norman Dorsen, *Symposium: a Roundtable on Constitutionalism, Constitutional Rights & Changing Civil Society: Foreword*, 21 CARDOZO L. REV. 1041, 1042 (2000).

6. "From at least the time of Cicero, differences between legal systems have been regarded as inconveniences which have to be overcome." PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 481 (2d ed. 1999). Convergence theory posits that as systems achieve greater awareness of each other, they will tend to converge through active and passive processes of borrowing, harmonization, unification, and resemblance based on a convergence of social and economic systems. See *id.* at 490-92. De Cruz identifies four philosophies of convergence: (i) a *jus commune* theory suggesting a reversion to a common law of (at least) the western world, based perhaps on the reception of a dominant legal culture (possibly that of the U.S.); (ii) a legal evolution theory based on the idea that legal change is a natural process that will lead to unity at some point with the less developed systems catching up with the more mature ones; (iii) a natural law theory based on the idea that because all human beings are basically alike, humans as groups will tend eventually to create a singular form of the "best" system available for human organization and regulation; and (iv) a Marxist thesis that law, as a mere superstructure of economic control, will tend to converge within similar systems of economic regulation. See *id.* at 485-88.

As a practical matter, German comparativists remind us that:

[t]he scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration, that no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries. For a long time lawyers were content to be insular in this sense, and to some extent they are so still. But such a position is untenable, and comparative law offers the only way by which law can become international

change.”<sup>7</sup> For my purposes in this paper, comparison denotes “both the process or method of comparing laws and legal systems and the body of insights and knowledge acquired through that process.”<sup>8</sup>

The comparative method is especially useful at times when an insular system loses touch with its normative foundation and seems incapable of drawing on its own capital to renew itself. The American system of constitutionalism - byzantine and baroque<sup>9</sup> - is falling into a senescent decadence that increasingly renders irrelevant its interpretations of our fundamental rights in the United States.<sup>10</sup> The interpretive dialogue generated in this fashion by the Supreme Court is self-referentially powerful; it builds on itself in tighter and tighter circles, generating greater and greater force on smaller and smaller events.<sup>11</sup> And in this way it also binds its audience into its interpretive world: however much we try, we can't extricate ourselves from this dialogue, at once powerful in its implications ('we create meaning') and useless ('we cannot make sense of the meanings we create; they do not fit').<sup>12</sup> We stand before the constitutional jurisprudence of the Supreme Court as Jesus is said to have stood before the Pharisees.<sup>13</sup> Many within the academy and bar stand with the Supreme Court; lawyers are Pharisees by

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and consequently a science.

KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (3d. Rev. ed., Tony Weir, trans. 1998) (For a discussion of the comparative method generally, see *id.* at 32-47).

7. ALAN WATSON, LEGAL ORIGINS AND LEGAL CHANGE 73 (1991).

8. RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG, EDWARD M. WISE, COMPARATIVE LAW 2, 2 n.2 (6th ed. 1998).

9. It is difficult to dismiss modern observations of the excessively tangled and labyrinthine nature of modern constitutional adjudication. Indeed, the First Amendment has provided fodder for this view. See, e.g., Larry Catá Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996).

10. This is indeed a growing area of legal scholarship. This scholarship is grounded on the notion that courts, and primarily federal courts, do not have exclusive authority to interpret the Constitution. See, e.g., Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENTARY 63 (1999). For a sampling of the recent literature questioning the judicial role in constitutional interpretation and advocating a greater role for the political process, see, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES* (1998); Charles Epp, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1999).

11. Perhaps this is the consequence of the court fulfilling its role as the supreme common law court of the land. Yet, this result is both sad and ironic, for it is hardly the inevitable result of the system we have created. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). A growing literature exists on law as a self-referential system. See, e.g., *AUTOPOIETIC LAW* (Gunther Teubner, ed., 1988) (collected essays); *AUTOPOIESIS, COMMUNICATION AND SOCIETY* (Benseler et al., eds. 1980); *L'AUTO-ORGANISATION. DE LA PHYSIQUE AU POLITIQUE* (Dumouchel and Dupuy, eds. 1983).

12. See Larry Catá Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447, 449 (1996).

13. See, e.g., Matthew 15:1-9 (New International) ("Thus you nullify the word of God for your tradition"); *Id.* at 23:1-36 ("The teachers of the law and the Pharisees sit in Moses' seat. So you must obey them and do everything they tell you. But do not do what they do, for they do not practice what they preach"). *Id.* at 23:2-3.

nature. I find it troubling to stand in that august company, a company whose routinized predilections are ultimately destructive of our system. Taking the teachings of the culturally archetypal encounters between Jesus and the Pharisees to heart, I prefer to believe that there ought to be a way out from under the oppressive weight of interpretive Pharisaic folly before the system is swept out from under us.

Two decisions of the Supreme Court, issued at the close of the last term - *Boy Scouts of America v. Dale*,<sup>14</sup> and *Board of Regents of the University of Wisconsin System v. Southworth*<sup>15</sup> - provide a stunning illustration of the decadent and baroque qualities of constitutional adjudication that is slowly sapping the vigor of juridical authority to interpret our "Basic Law." Each is an expression of the overripe over-conceptualization of the interstices of constitutional law. Protections of the right of "expression" and of "association" lie buried under multiple layers of doctrine now critical to the core expression of the "right," but only related to that core expression by six degrees of separation.<sup>16</sup> Expression and association become lost in "expressive association," "public accommodation," "public forum" and other subsidiary standards, tests and doctrines. Doctrine and its twists and turns - the periphery - becomes the core about which the central right is focused.

Perhaps decadence of this type is inevitable.<sup>17</sup> A method of testing this conclusion requires us to look at the way different, if related, systems approach the interpretation of similarly expressed notions of basic law. For that purpose I will briefly examine the interpretive framework within which the German Federal Constitutional Court,<sup>18</sup> the French system of limited political constitutional review,<sup>19</sup> and the European Court of Human Rights<sup>20</sup> approach the protection of

14. 120 S. Ct. 2446 (2000).

15. 120 S. Ct. 1346 (2000).

16. Cf. JOHN GUARE, SIX DEGREES OF SEPARATION (1990) (A play based on the real life experience of several prominent New York families who took in a person pretending to be the son of Sidney Poitier and the friend of their children, and who used the entree to take money and other things from them - each family in part based their decision to allow the man into their house because of the prominence of the person's feigned connection, and because he had already been let into someone else's house; he relied on a web of trust and silence). For the litigation surrounding the play see *Hampton v. Guare*, 20 MEDIA L. REP. 1160 (NY Sup. Ct. 1992). Thus, separation becomes at once meaningful (we are all related), meaningless (we are all related), and menacing (we are all related). Ultimately the focus is on the web rather than the source. Cf. Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291 (1999) (on the meaning and effect of conceptual distance, *id.* at 310-13; and the menace of legal evolution, *id.*, at 313-15).

17. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

18. The German Federal Constitutional Court has been given jurisdiction to decide disputes relating to the Basic Law of the Federal Republic of Germany. See GG, art. 93, translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* app. A at 516 (2d ed. 1997). For a discussion of the German Constitutional Court, see, e.g., SABINE MICHALOWSKI and LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* 7-50 (1999).

19. For a discussion, see, e.g., Laurent Habib, *Le Conseil Constitutionnel*, in *SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES* 215 (Igor I. Kavass, ed. 1992).

20. The European Human Rights Convention is a treaty-based, divided power system created for the specific purpose of assuring the protection of basic human rights within its signatory

fundamental rights such as "expression" and "association." The French system provides for little judicial interference in matters of constitutional interpretation.<sup>21</sup> The German system has created a specialized court for the interpretation of the German Basic Law, and the European Convention for the Protection of Human Rights and Fundamental Freedoms [the "European Convention"] creates a regional human rights association in which a judicial organ is vested with supreme interpretive authority.<sup>22</sup>

Even a brief comparative review of the interpretive practices of the American Supreme Court, and some of its European analogues, suggests that the American Court exercises a freedom without restraint to an extent unknown in Europe. This freedom to devise and abandon interpretive doctrines sets the stage for a byzantine and ultimately decadent jurisprudence, increasingly unintelligible to, and remote from, the individuals who are the objects of this jurisprudence. At the same time, the European approach suggests that even a stricter control of interpretive principles within the black letter of the fundamental law will only reduce, and not eliminate, the power of the judiciary to reshape the law to suit it or the times. Avoidance comes only with abandonment of the judiciary as the focus of constitutional interpretation. The French have been teaching us this lesson; the British to a certain extent as well. But with abandonment must come an absolute faith in the power of the people speaking through their legislative organs. Such faith is hard to come by after the events of the twentieth century in "freedom-loving" Europe and the United States.<sup>23</sup>

#### I. DECADENCE AND THE AMERICAN CASES.

*Boy Scouts of America* and *Southworth* are landmarks of First Amendment decline. In this section I will examine each for the purpose of highlighting the

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states, members of the council of Europe. Under its terms, authoritative supervision is imposed by an international Commission and Court (the European Commission and the European Court of Human Rights) upon the legislative, executive, administrative and judicial authorities of the States Parties.

HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 1, 1-2 (1996).

21. The idea of Parliamentary Supremacy is not unknown in the English-speaking world. The British courts, in particular, had for many years applied the principle of Parliamentary supremacy as a limiting principle on their power to overturn acts of Parliament. The British courts, however, were free to interpret such acts. Since Britain joined the European Union, however, even that limitation on the power of courts has been removed and now, at least with respect to Parliamentary acts which contravene Britain's obligations under the Treaties defining Britain's membership in the European Union. For a discussion of Parliamentary supremacy and the British courts' new obligations within the context of the European Union, see, e.g., Michael H. Lee, *Revolution, Evolution, Devolution: Confusion*, 23 SUFFOLK U. L. REV. 465 (2000); Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Politics*, 36 STAN. J. INT'L L. 73 (2000); Michael Principe, *The Demise of Parliamentary Supremacy? Canadian and American Influences Upon the New Zealand Judiciary's Interpretations of the Bill of Rights Act of 1993*, 16 LOYOLA L.A. INT'L & COMP. L.J. 167 (1993).

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Europe, 213 U.N.T.S. (Entered into force September 3, 1953).

23. Cf. Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998) (On the use of instruments of the democratic order to subvert the democratic system, using the example of Vichy France).

peculiar character of the cases. I do not mean to provide another analysis of the “meaning” of the cases, their placement within the constellation of First Amendment “expression,” “state subsidy” or “association” cases.<sup>24</sup> I will not explore the usefulness of the cases for application in like contexts by clever lawyers seeking to advance the political objectives of their paying clients through a principled manipulation of law. That project, while unavoidable, provides more grist for the decadence mill.<sup>25</sup> Nor will I lament or celebrate the practices, policies, or extra-governmental social behaviors made more or less difficult by the cases. Those consequences, no doubt, will be discussed at length, especially by those who believe that a direct relationship exists between judicial pronouncement (deemed active) and its object - passive social action.<sup>26</sup> Instead, my analysis concentrates on the “weight” of these cases, a weight that squashes doctrine into something socially useless, and politically dangerous.

In *Southworth*, the Supreme Court unanimously agreed that a state university can compel its students, through the imposition of a mandatory student activity fee, to indirectly fund speech with which they do not agree, but that permitting students to select specific organizations for funding might violate the fundamental rights of the complaining students.<sup>27</sup> In *Boy Scouts of America*, a more divided Court held “that the First Amendment prohibits the State from imposing such a requirement [that the Boy Scouts of America retain an “avowed homosexual” as an assistant scoutmaster] through the application of its public accommodations law.”<sup>28</sup>

To get to these results, the Court, in each instance, was obliged first to wallow through the swamp of its First Amendment jurisprudence and then to contort the facts presented to fit the “law.”<sup>29</sup> In *Southworth*, the Supreme Court

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24. A number of such works appeared in anticipation of the result in these cases. Many more are sure to come. For a critique of this enterprise, see, e.g., Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493 (1989).

25. As such, these are both *necessary* and *worthwhile* projects – in terms of the political economy of law, and its practice in the United States. Extended hyper-discussion of the value of the cases are also critical within the interior communication of self-contained systems, the outward expressions of which are the cases themselves.

26. As such, these are both *necessary* and *worthwhile* projects – in terms of the political economy of law, and its practice in the United States. Extended hyper-discussion of the value of the cases are also critical within the interior communication of self-contained systems, the outward expressions of which are the cases themselves.

27. *Southworth*, 120 S. Ct. at 1349. Five members of the Court joined in a majority opinion written by Justice Kennedy. Justices Stevens and Breyer joined Justice Souter’s concurrence in the judgment. See *id.* at 1357 (Souter, J., concurring).

28. *Boy Scouts of America*, 120 S. Ct. at 2457. The majority opinion, authored by Chief Justice Rehnquist, was joined by Justices O’Connor, Scalia, Kennedy and Thomas. Justice Stevens filed a dissent in which Justices Souter, Ginsburg, and Breyer joined. See *id.* at 2459. Justice Souter filed a dissent in which Justices Ginsburg and Breyer joined. See *id.* at 2478 (Souter, J., dissenting).

29. We understand that this two stage process is common to constitutional lawmaking in the courts. See Larry Catá Backer, *Tweaking Facts, Speaking Judgement: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISCIPLINARY L.J. 611 (1998); Larry Catá Backer, *Inventing a “Homosexual” for Constitutional Theory: Sodomy Narrative and Antipathy in U.S. and British Courts*, 71 TUL. L. REV. 529 (1996).



determined that the fee program created a public forum “by close analogy,”<sup>30</sup> that the public forum cases imposed a standard of viewpoint neutrality,<sup>31</sup> that extraction of fees for coerced speech cases did not apply because the coerced speech was viewpoint neutral,<sup>32</sup> the “germane speech” coerced speech cases were unworkable in the school student fee cases,<sup>33</sup> an opt-out or optional refund system was not necessary (but available as an alternative)<sup>34</sup> and that viewpoint neutrality was a sufficient protection against First Amendment abuses by the university.<sup>35</sup> Justice Souter argued, concurring in the judgement, “that the First Amendment interest claimed by the student respondents . . . here is simply insufficient to merit protection by anything more than the viewpoint neutrality already accorded by the university, and . . . would go no further.”<sup>36</sup>

In *Boy Scouts of America*, the majority first determined that the Boy Scouts of America (“BSA”) was an “expressive association,”<sup>37</sup> and second that the BSA was a public accommodation for purposes of the First Amendment,<sup>38</sup> but one to which the First Amendment applied to protect the expressive rights of the association<sup>39</sup> against those of the “avowed homosexual and gay rights activist.”<sup>40</sup> Justice Stevens, in dissent, first extolled the progressive values of New Jersey in ending all manner of social discrimination, and agreed that the BSA was characterizable as a public accommodation, but that the requirement to hire a gay man as an assistant scoutmaster would neither impose a serious burden on BSA’s “collective effort on behalf of [its] shared goals . . . nor does it force BSA to communicate any message that it does not wish to endorse.”<sup>41</sup> Justice Souter added only an emphasis of his disagreement with the majority that the BSA was somehow an association with an avowed anti-homosexual mission.<sup>42</sup>

On its simplest level, these cases decide merely that a student may not avoid payment of mandatory student activity fees, even if a portion of the fees fund expression with which the student disagrees, and that the BSA may discriminate against gay males and forbid their membership in BSA. These are safe, traditional conclusions. Our society clings to the belief that universities are places where

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30. *Southworth*, 120 S. Ct at 1354.

31. *Id.* It still is not clear whether this viewpoint neutrality standard applies in a special way in the case of religious speech. See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) discussed by Justice Souter in his concurring opinion in *Southworth*, 120 S. Ct at 1360 & n.6 (Souter, J., concurring).

32. *Southworth*, 120 S. Ct. at 1354-56.

33. *Id.* at 1355.

34. *Id.* at 1355-56.

35. *Id.* at 1356-57. The majority opinion was careful to exclude certain groups from its decision, including university faculty, on whom imposition of the holding would result in severe restrictions on their power to speak in class. See *id.* at 1357 & 1361 (Souter, J., concurring).

36. *Id.* at 1357-58 (Souter, J., concurring).

37. *Boy Scouts of America*, 120 S. Ct. at 2454-55.

38. *Id.* at 2455-56.

39. *Id.* at 2457.

40. *Id.* at 2455.

41. *Id.* at 2460 (Stevens, J., dissenting) (citing, in part, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

42. See *id.* at 2478-79 (Souter, J., dissenting).

"almost-adults" can play with all sorts of ideas before they assume positions of authority in society.<sup>43</sup> It also clings to the belief that homosexual is something that parents prefer their children not to be.<sup>44</sup> But our society has also developed, and deeply invested, in myths about the general level of social tolerance for personal expression and acceptance of others which contribute to cultural notions of national superiority - a "beacon unto the world" for the emulation of others.<sup>45</sup> The trick is to affirm our traditional social practices without harming our myths. This task was once an easy one for the courts.<sup>46</sup> But the twentieth century saw a marked deterioration of the consensus within the American elites with respect to basic issues of social organization.<sup>47</sup> In many countries this deterioration has led to

43. Justice Souter is particularly eloquent in this regard. *See id.*

44. This self-perpetuating myth is self-referentially reinforced in the courts:

Judges quickly learn from the narratives of their courts that the sodomite loves children. Unwilling to breed any for himself, he recruits them from among otherwise innocent children. We commonly believe that sexual non-conformists try to get sexually involved with children. Sodomites target both the willing and the unwilling. Sodomites target boy and girl children. Further, the belief feeds the commonly held fears that young people become life-long 'homosexuals' after being "recruited" by adults.

Larry Catá Backer, Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence and Antipathy in United States and British Courts, 71 TUL. L. REV. 529, B572 (1996). *See, e.g.,* ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S. 171-173, 179-83 (1989) (reporting belief of many that gay men are dangerous, wanting to seduce children and colleagues); M.J. Eliason & C.E. Randall, Lesbian Phobia in Nursing Students, 13(3) WESTERN J. OF NURSING RES. 363-374 (1991); J.W. Plasek & J. Allard, Misconceptions of Homophobia, 10 J. OF HOMOSEXUALITY 23-37 (1984).

45. *See, e.g.,* MARTIN E. MARTY, PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE (2d ed. 1986); *but see* ISAAC KRAMNICK AND LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996).

46. *See* Reynolds v. U.S., 98 U.S. 145 (1879) (polygamy); Davis v. Beason, 133 U.S. 333 (1890) (same); Plessey v. Ferguson, 163 U.S. 537 (1896) (constitutionality of racial separation). This social confirmatory function was one for which the courts were naturally suited within our system of governance. "[The] Court is institutionally incapable of doing anything other than reflecting the very majoritarian preference that the traditional model requires the Court to resist." GIRARDEAU SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1995).

47. I have observed in the context of the American social understanding of the meaning of the Religion Clauses of the First Amendment that:

We in the West, and the United States in particular, have sought to have our cake and eat it too. We chose the nominal, the fictive, framework of law. Yet this foundation of law we permeated with and made beholden to an even deeper foundational choice. We held as beyond dispute the primacy of the Christian religious foundation of that legal foundation. Secular law was to be the official basis of the ordering of our world; religion its object and handmaid, living in her own chamber and presiding over her own adherents in the space made available to her. JOHN LOCKE, A Letter Concerning *Toleration*, in 35 GREAT BOOKS OF THE WESTERN WORLD 1 (Charles L. Sherman, ed. 1937) (1689). The understanding, however, was that only schismatic theology was to be relegated to the world of the subordinate. Practice of the Christian religions were to be subordinate to the generality of law. But Christian teaching was to be supreme; law was to remain subordinate to the fundamental belief structures of the Christian religions. We were to remain a nation constructed on the rock of Christian Biblical foundationalism on which there was unquestioned agreement of its naturalness. "The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality." THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 219 (1986). We said one thing and meant another at a time when the meaning and limits of our foundational nation building subterfuge was clear

internal war.<sup>48</sup> In the United States it has fostered a period of unparalleled litigation—warfare by other means.<sup>49</sup>

The *Southworth* and *Boy Scouts of America* cases demonstrate the difficulty of this exercise in the early twenty-first century. To affirm what would have passed as pedestrian fifty years ago, to get to the simple holding in each case, the majorities were required to build from the facts presented “factual vessals” suitable for navigating through the shoals of several complex doctrines to arrive at a determination made “inevitable” by its construction of the facts. The most important of these doctrines - the public forum, viewpoint neutrality, compelled speech, expressive association, public accommodation, and germane associative purpose doctrines - occupy pride of place in the opinions. Our rights of speech and association have been hurled into the maze of these doctrines; vindication of the doctrines is paramount, and the speech and association rights protected incidental to the vindication of particular results based on descriptions of navigation through this maze. Nuance has been elevated to constitutional value *par excellence*. And therein lies the degeneration of constitutional jurisprudence.

But one might be inclined to react to my assertions here as crazy talk! Indeed, American scholars are applauded for repeating the common wisdom that the richness of the nuance and complexity with which American jurists approach the interpretation of the American “*Grundgesetz*” is evidence of vigor rather than of decay.<sup>50</sup> The American juridical system of constitutional interpretation is

and well understood.

But we have truly reaped the whirlwind. For the rock of Biblical foundationalism has been shattered by the staff of its servant, the law. We now have inherited our structural choice in full measure. The nominal structure created, the pseudo-foundation of law overlaying the true foundation of (the Christian) Religions, has become our foundation *in fact*. Like so much dross within the crucible of our socio-cultural migration has Religion fallen away as the undercoating of our fictive legal foundationalism. It is victim not only to the antipode B law B but to the theological struggles over the true source of belief as non-Christian Religions vie with the old monopoly religious group for the right to serve as the “true source” of religious socio-cultural foundation in the United States.

Larry Catá Backer, *There Can be Only One: Law, Religion, Grammar and The Organization of Society in the United States* in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 425, 426 (Stephen M. Feldman, ed., 2000).

48. On the repercussions of these divisions, see, e.g., Chaim Kaufmann, *Intervention in Ethnic and Ideological Civil Wars: Why One Can be Done and the Other Can't*, 6(1) *SECURITY STUDIES* 62 (1996).

49. Cf. CARL VON CLAUSEWITZ, *ON WAR* 402 (Anatol Rapoport and Col. J.J. Graham, eds., Penguin Books 1968) (“Der Krieg ist nichts anderes als die Fortsetzung der politik mit anderer Mittelen” (War is nothing but a continuation of political intercourse)).

50. See, e.g., MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 35-66 (1987). Indeed, some academics who criticize the Court’s First Amendment jurisprudence would have more rather than less, of this interpretive mode, just modified to better take into account the author finds more important.

[The] problem with First Amendment decision-making is for the most part not with the method employed but with the values held by the decision makers. The path to first amendment safety lies not in the imposition of a particular method, but in a genuine cultural commitment to substantive first amendment values. If that commitment is not present, no ‘binding’ method will hold. If that commitment exists, method will take care of itself.

STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 110 (1990). It is the business of the legal academy to think in these terms. A wonderful example is provided in Jeffrey Rosen’s introduction to a symposium issue of a law review on textualism in the federal constitution.

attempting, with the tools of common law logic, to overcome the problem of constitutional specificity.<sup>51</sup> Yet, this enterprise has forced the judiciary into a perhaps inescapable pattern of interpretation with an infinitely elastic tolerance of complexity, nuance, rule, and exception that will never satisfactorily resolve all conceivable issues that may arise.<sup>52</sup> The byproducts of this system, difficult to flush, may eventually cause the collapse of this system of its own weight, or its abandonment because, having become so engorged with detail, point and counterpoint, thrust and counter-thrust, rule and exception, it will prove useless.

The *Southworth* and *Boy Scouts of America* cases offer a window into this process and its frustrations. The cases presented problems of fairly typical complexity for the Supreme Court. Their resolution was far less straightforward. Consider all of the contextual problems the Court had to overcome before an answer to the question posed in each case became "inevitable" - though in different directions - for the justices. The cases highlight the patchwork of overlapping doctrine which are fungible as applied, and in which each additional case reshapes the quantum of doctrine without increasing predictability or understandability. The juridification of the everyday is the ultimate decadence of the American approach to the interpretation of constitutional protections.<sup>53</sup> Its ultimate "reward" will be irrelevance - sunk by its gross juristic overweight and incomprehensibility.<sup>54</sup>

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See Jeffrey Rosen, *Introduction to Symposium: Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1081 (1998) (and for articles in the symposium, see *id. passim*). On state constitutionalism and its peculiar conundrum, see, e.g., Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

51. The problem of specificity is well known to students of business enterprises. It suggests the impossibility of achieving *complete specificity*, the anticipation and provision of solutions to all contingencies that may arise in the context of the particular context for which specificity is sought. For a contextual discussion of rights of expression, see, e.g., Steven J. Heyman, *Foundations and Limits of Freedom of Expression*, 78 B.U. L. Rev. 1275 (1998). He notes that:

Several points follow for the modern understanding of First Amendment problems. First, there is no inherent limit to the interest in free speech, other than the desire to engage in it. The same is true where free speech is reconceived as a right coextensive with that interest. By the same token, there are no inherent limits to the social interests that may come into competition with speech. It follows that there is an inescapable conflict between free speech and other interests. Finally, there is no objective standard by which to resolve such conflicts.

*Id.* at 1306.

52. This result is not limited to the First Amendment by any means. See, e.g., Norman J. Fry, Note: *Lamprecht v. FCC: A Looking Glass Into the Future of Affirmative Action?*, 61 GEO. WASH. U. L. REV. 1895 (1993). "Through some 35 decisions over the next 30 years, the Court found itself constantly reviewing case-by-case circumstances with slightly different factual twists because the "totality of the circumstances" test simply failed to give lower courts, executives, or legislatures clear guidance as to what would, and would not, pass constitutional muster." *Id.* n.33 (referring to use of Due Process Clause to determine whether confessions are involuntary and thus violate due process).

53. See, generally Larry Catá Backer, *The Incarnate Word, that Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L. J. 447 (1996).

54. Indeed, the irrelevance of judicial pronouncement in connection with the desegregation of the American educational system or the issue of abortion, suggests the increasing ineffectiveness of our judicial organs.

School desegregation, it is true, has been compelled by *Brown*. [347 U.S. 483 (1954)] *Brown* did articulate a social consensus of the highest aspirations of American

### A. *The Public Forum Doctrine.*

The public forum doctrine has been an important tool of constitutional expansion.<sup>55</sup> It has permitted the state to closely regulate the private conduct of its citizens using as a basis the conduct norms originally meant for the state and its instrumentalities.<sup>56</sup> The importance of the public forum doctrine lies in its effect - it is a gateway doctrine. Once found to be a public forum, the state may impose on those who maintain the forum the constitutional requirements imposed on the state.<sup>57</sup>

Still, merely understanding the parameters of the doctrine is not enough. The doctrine, or more accurately *its effects*, may also be imposed in contexts in which there does not exist a public forum. Thus, the *Southworth* majority conceded, the student fee assessment and the fund created thereby, "is not a public forum in the traditional sense of the term."<sup>58</sup> This proved no impediment. The majority applied the "lessons" from application of that doctrine "despite the

society. Yet, almost fifty years after that decision, American society continues to resist the coercive power of *Brown*. The decision has altered residential patterns, rates of private school attendance, and increased the allure of "states rights" politics. The decision has substantially failed to force integration of American public schools. The courts appear ready to abandon that effort. Likewise, *Roe v. Wade* [410 U.S. 113 (1973)] permitted women the right to an abortion. But twenty five years after the decision, changing patterns of social organization and norms have significantly increased the difficulty of obtaining even a "legal" abortion. Medical schools do not emphasize instruction in abortion procedures, hospitals do not permit the procedure, and fewer doctors perform the service for fear of retaliation.

Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291, 298-299 (2000). For a discussion of desegregation in this context, see, e.g., GIRARDEAU SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 19 (1995); Richard Delgado, Rodrigo's *Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993). Cf. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 96-98 (1988).

55. My purpose here is not to recite a history of the development, purpose, socio-cultural or legal politics of the doctrine. That I leave for others. For a history of the development and use of the public forum doctrine, see, e.g., David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 150-60 (1992); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1539-49 (1998); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718-58 (1987). For arguments supportive of the doctrine, see, e.g., Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (1992); Gary C. Leedes, *Pigeonholes in the Public Forum*, 20 U. RICH. L. REV. 499 (1986). For arguments on the unworkability of the doctrine, see, e.g., C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271 (1993).

56. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (Court held that it was constitutionally impermissible to deny religious groups after hours access to school facilities otherwise made available to a wide range of other groups); *Widmar v. Vincent*, 454 U.S. 263 (1981) (members of registered religious group at a state university entitled to access to university facilities under the university's open forum program); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (shopping center a public forum so that individuals may exercise state protected speech rights on that property); Susan Ehrmann, Note, *Lamb's Chapel v. Center Moriches Union Free School District: Creating Greater Protection for Religious Speech Through the Illusion of Public Forum Analysis*, 1994 WIS. L. REV. 965. Cf., *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

57. See, e.g., John W. Whitehead & Alexis I. Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L.J. 149 (1992).

58. *Southworth*, 120 S. Ct. at 1354.

circumstance that those cases [public forum cases] most often involve a demand for access, not a claim to be exempt from supporting speech.”<sup>59</sup>

However, the application by analogy of this doctrine might not have been either necessary or appropriate. Justice Souter makes a strong case that the majority was too quick to rush to an answer “by analogy.”<sup>60</sup> Sadly, Justice Souter can offer only another doctrine to aid the analysis - the government subsidy of speech doctrine - and that, only by analogy.<sup>61</sup>

### B. *The Viewpoint Neutrality Doctrine.*

The viewpoint neutrality doctrine is a *consequential rule*. A set of circumstances found to fall within the public forum doctrine is then subject to a standard of conduct with respect to the regulation of conduct within these “fora.” That standard imposes a requirement of “viewpoint neutrality” on the regulation of the conduct of those within the fora.<sup>62</sup>

But the constitution of viewpoint neutrality is not often easy to discern in the regulation of any given forum. The University of Virginia recently discovered this in the course of a review of the University’s policies for admitting, or denying admission to applicants to its forum.<sup>63</sup> Moreover, the viewpoint neutrality doctrine may directly clash with an equally strong constitutional limitation on government and its instrumentalities - the Religion clauses.<sup>64</sup> Sadly, a majority of the justices did not see the conflict that was so apparent to Justice Souter. Instead, the majority in *Rosenberger* adopted the position that state sponsorship of religious speech was not constitutionally suspect if it was only one of many forms of speech sponsored. A gaggle of speech, in other words, drowns Establishment Clause

59. *Id.*

60. *See id.* at 1360 (Souter, J., concurring). “Unlike the majority, I would not hold that the mere fact that the University disclaims speech as its own expression takes it out of the scope of our jurisprudence on government directed speech.” *Id.* at 1360 n.8.

61. Although the facts here may not fit neatly under our holdings on government speech, (and the university has expressly renounced any such claim), . . . our cases do suggest that under the First Amendment the government may properly use its tax revenue to promote general discourse. In *Buckley v. Valeo*, 424 U.S. 1 . . . (1976) (*per curiam*), we rejected a challenge to a congressional program providing viewpoint neutral subsidies to all Presidential candidates based in part on this reasoning: “[The program] is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the program] furthers, not abridges, pertinent First Amendment values.”

The same consideration goes against the fee payer’s speech objection to the scheme here.

*Id.* at 1360-61 (Souter, J., concurring).

62. It is not my purpose here to report extensively on the viewpoint neutrality doctrine. To the extent that the viewpoint neutrality doctrine is a *consequential* doctrine, it is dependent on the public forum analysis for its application. *See, e.g.,* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

63. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

64. “Of course, I believe that even a government program that promotes a broad range of expression is subject to the specific prohibition on government funding to promote religion, imposed by the Establishment Clause.” *Southworth*, 120 S. Ct. at 1360 n.9 (Souter, J., dissenting) (citing *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 882 (1995) (Souter, J., dissenting)).

objections to state sponsored religious speech.<sup>65</sup> Indeed, in *Southworth*, the majority took a moment to congratulate itself on the way its conception of the problem/solution in that case fit neatly with the equally ingenious approach of the majority in *Rosenberger*.<sup>66</sup> "The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support."<sup>67</sup> In so doing, the majority constructs "a new category of First Amendment interests and a new standard of viewpoint neutrality protection".<sup>68</sup>

### C. *The Compelled Speech Doctrine.*

The problem with the public forum and viewpoint neutrality doctrines is that neither applies cleanly to the complaining student's problem in *Southworth*. But another line of cases, providing the outlines of another interpretive doctrine, might provide the basis of a definitive constitutional interpretation - the compelled speech doctrine.<sup>69</sup> The compelled speech doctrine is used as a shorthand for the constitutional limitation of the power of a government or its instrumentalities - a public employees labor union<sup>70</sup> or a state bar association<sup>71</sup> - to force individuals to subsidize speech with which they do not agree.<sup>72</sup>

While it was clear that the students in *Southworth* stood in the same shoes as the non-union teachers in *Abood v. Detroit Board of Education* or the California attorneys in *Keller v. State Bar of California*, that connection was not enough for the majority in the *Southworth* case to apply the compelled speech doctrine. Instead, *Southworth* adds wrinkles to the compelled speech doctrine - it is not enough to show that an instrumentality of government is coercing speech from an

65. The majority reminds readers that in *Rosenberger* "we rejected the argument [that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause], holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspaper speaks for the University.'" *Southworth*, 120 S. Ct. at 1356 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 841 (1995)). For a discussion, see generally, Larry Catá Backer, *The Incarnate Word, that Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L. J. 447 (1996).

66. See *Southworth*, 120 S. Ct. at 1356. "There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fees in the first instance and for ensuring the integrity of the program's operation once the funds have been collected." See *id.*

67. *Id.* at 1356.

68. *Id.* at 1357 (Souter, J., concurring). Here, Justice Souter argues, the majority has crafted law for the university and provided it with a "cast-iron viewpoint neutrality requirement to uphold [the university's interests]." *Id.*

69. See *Abood v. Detroit Bd of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

70. See *Abood*, 431 U.S. 209 (1977).

71. See *Keller*, 496 U.S. 1 (1990).

72. *Abood* involved the assessment of a service fee, in lieu of union dues, payable by non-union teachers to the union that were used to fund union activities, including political activities. *Abood*, 431 U.S. at 211. *Keller* involved the payment by California attorneys of a mandatory union fee used by the bar association in part to fund political activity. *Keller*, 496 U.S. at 4-6.

individual, either directly<sup>73</sup> or indirectly.<sup>74</sup> An injured party will have to demonstrate that its interests are stronger than those of the instrumentality in using the funds for the speech of which the injured party complains. First, in cases of direct coercion, the party whose speech rights are allegedly impaired will have to demonstrate that the speech in question was not germane to the purposes of the instrumentality that receives the injured party's funds.<sup>75</sup> "The standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself."<sup>76</sup> Second, in the case of indirect speech coercion, the neutral forum doctrine will trump the compelled speech doctrine. Where the instrumentality does indeed coerce funds from a party and distributes those funds to others who use it for speech, the party may suffer no constitutional injury, no injury to the party's speech rights, if the instrumentality meets the requirements of a neutral forum.<sup>77</sup> Yet, as Justice Souter points out, this may be elevating academic freedom to unwarranted constitutional status.<sup>78</sup> These wrinkles thus make the compelled speech doctrine harder than ever to apply - and ensure

73. In both *Abood* and *Keller*, the coerced speech might be deemed direct because the instrumentality receiving the funds used it to fund its own speech.

74. In *Southworth*, the coerced speech might be deemed indirect because the recipient of the fees actually plays the role of middleman - no using the funds to speak, but rather directing the funds to others who will speak.

75. See *Southworth*, 120 S. Ct. at 1355. The germane speech prong of this doctrine was crystallized in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); see also *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (affirming *Lehnert's* germane speech test).

76. *Southworth*, 120 S. Ct. at 1355. The majority also suggested that the standard of germane speech might prove unworkable as the basis for distinguishing between impermissible compelled subsidies of another's speech, and permissible mandatory fees. "Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts after a long history of government regulation and judicial involvement, we have encountered difficulties in deciding what is germane and what is not." *Id.* at 1355. The majority cited *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) in which the justices could not agree on what expressive activities were germane to the mission of the association. It may well be that the majority is signaling an intent to abandon the germane speech rules or to limit *Abood* and *Keller* to their facts.

77. In the university context, the instrumentality requires more than this. The university must also determine, in good faith, that it will create this neutral forum as part of its educational mission.

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.

*Southworth*, 120 S. Ct. at 1356. It will be curious to see whether, for the majority at least, the compelled speech or the neutral forum doctrines apply in a case where no such pedagogical determination is farced made.

78. While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes . . . ), we have never held that universities lie entirely beyond the reach of students' First Amendment rights.

*Id.* at 1359 (Souter, J., concurring).



another generation of litigation to answer the questions opened by *Southworth*.

But Justice Souter would really go farther. Rather than use *Southworth* as a vehicle for questioning the utility of the coerced speech rules, he would distinguish the compelled speech cases and perhaps begin the process of limiting them to their facts. For Justice Souter, the coerced speech doctrine is strongest when applied to situations where the fee payer directly funds the organization promoting the objectionable speech.<sup>79</sup> It is weakest when the interests of the government are strongest.<sup>80</sup> But Justice Souter stops short of suggesting either a bright line test, or the general inapplicability of the doctrine in this context. The power of review is too strong to close the door to judicial reinterpretation in any doctrinal context.<sup>81</sup>

#### D. *The Expressive Association Doctrine.*

The Court in *Southworth* was concerned about the character of the expressive forum provided by the government instrumentality. In *Boy Scouts of America*, the Court went to some lengths to explain the rules for determining the meaning and effect of an expressive association.<sup>82</sup> The expressive association doctrine is shorthand for the rule that First Amendment protection for association speech can extend only to those ideas that the organization was formed to express. As such, it is a *gateway doctrine*. The application of the public accommodation and germane speech doctrines to limit an association's First Amendment rights depends on this critical assessment of the expressive purpose of associations. Prior to *Boy Scouts of America*, the expressive association had a burden of proving the range and purpose of its expressive association, and the courts were free to arrive at their own conclusions with respect to the expressive purposes of association. *Boy Scouts of America* adds a wrinkle that critically affects the applicability of the germane speech and public accommodation doctrines - it adopts a rule of discretion which appears to limit a court's ability to question assertions of associative purposes.

79. [In *Abood* and *Keller*] the connection between the forced contributor and the ultimate message was as direct as the unmediated contribution to the organization doing the speaking. The student contributor, however, has to fund only a distributing agency having itself no social, political or ideological character and itself engaging... in no expression of any distinct message. ... [T]hus, the clear connection between fee payer and offensive speech that loomed large in our decisions in the union and bar cases is simply not evident here.

*Id.* at 1360 (Souter, J., concurring).

80. [O]ur prior compelled speech and compelled funding cases are distinguishable on the basis of the legitimacy of the governmental interest. No one disputes the University's assertion that some educational value is derived from the activities supported by the fee, ... whereas there was no governmental interest in mandating union or bar association support beyond supporting the collective bargaining and professional regulatory functions of those organizations.

*Id.* at 1361 (Souter, J., concurring).

81. It is ironic that no one on the Court thought to argue the right not to listen. *Public Utilities Commission v. Pollock*, 343 U.S. 451 (1952). The student's position in this case might well be close to that of the street railway rider in *Pollock* forced to sit in the car and listen to broadcast radio programs. The student, as much as the rail car passengers is a captive audience. Justice Douglas's argument that people in such circumstances are entitled to be protected from listening, continues to be rejected. *See id.*

82. *Boy Scouts of America*, 120 S. Ct. at 2454-55.

There is irony here between the way the Court examined the purposes and missions of similar expressive organizations in different contexts. In determining the extent of the “message” of an expressive organization for first amendment purposes when the organization is seeking to prevent a homosexual from joining, the Court applies a deferential test to determining the expressive range of the association’s goals.<sup>83</sup> The dissenting opinion of Justice Stevens characterizes well this new standard:

[T]he majority insists that we must ‘give deference to an association’s assertions regarding the nature of its expression’ and ‘we must also give deference to an association’s view of what would impair its expression.’ So long as the record ‘contains written evidence’ to support a group’s bare assertion, ‘[we] need not inquire further.’ Once the organization ‘asserts’ that it engages in particular expression, ‘[w]e cannot doubt’ the truth of that assertion.’<sup>84</sup>

In these cases, then, “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the first Amendment.”<sup>85</sup> Moreover, “even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues . . . the First Amendment protects the Boy Scouts’ method of expression.”<sup>86</sup> Last, “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”<sup>87</sup> As such, the New Jersey Supreme Court committed error by carefully parsing through the BSA’s purposes and determining whether the retention of Dale would substantially impair its expressive associational purpose.<sup>88</sup>

This rule of deference is new. Deference of this sort represents a substantial departure from recent cases.<sup>89</sup> The sort of deference standard articulated stands as an irresistible temptation, on the part of the unscrupulous or the zealot, to “cheat.” Form will indeed be elevated over substance in a way found intolerable in the earlier opinions of the Court. The new standard thus has substantial ramifications. This new deferential standard vests burden shifting with a substantial constitutional effect. For the majority, it constitutes a sly use of procedure to undercut the thrust of prior court made interpretive doctrine without the bother of overturning the prior result - or even acknowledging the nature of the constitutional project attempted. It “pretermits [the] entire analysis” at the heart of the germane speech doctrine in public accommodation cases.<sup>90</sup> Ironically, the

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83. “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.” *Id.* at 2453.

84. *Id.* at 2470-71 (Stevens, J., dissenting)(citations omitted).

85. *Id.* at 2454. “An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.*

86. *Id.* at 2454-55.

87. *Id.* at 2455. “The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.” *Id.*

88. See *Boy Scouts of America*, 120 S. Ct. at 2454.

89. See *id.* at 2470.

90. See the discussion of the Germane Speech doctrine *infra* text at notes 102-115.

path chosen by the majority, this constitutional distortion in the service of the "anti-homosexual" crusade, may prove as useful to gay rights advocates as it proved to the Boy Scouts.<sup>91</sup>

#### *E. The Public Accommodation Doctrine.*

The public accommodation doctrine arose as the judicial gloss approving and regulating the state's power to interfere with private individual's power to freely associate with others.<sup>92</sup> The public accommodation doctrine permits a state, or the federal government, to reach to what might otherwise be considered the private conduct of individuals or groups when the activity is characterized as "public" enough to permit its regulation through laws designed to reach governmental (public) conduct. At its limit, of course, a state might be able to characterize all conduct of formally non-governmental individuals or groups as either public or private, according to its wont, and the tolerance of the electorate. Neither state legislatures nor courts have contemplated that extreme, but there is no principled, or at least logical, reason for avoiding either.<sup>93</sup>

Until *Boy Scouts of America*, one could generally presume that once a court determined that a place was one of public accommodation, the limitations of the statute would apply – that is the prohibitions against discrimination on account of the categories listed in the statute. *Boy Scouts of America* appears to change that equation, by weighing far more heavily the constitutional mass of the expressive purpose of the "public accommodation" to be regulated, than that of the "rights" protected. The application of the public accommodation doctrine is now heavily dependent on the characterization of the expressive purposes of the regulated association in relation to the distinguishing characteristics of the group protected by the public accommodation statutes. If the group to be protected is not one which is the object of federal constitutional protection, then the expressive right to exclude trumps the state's command to include, even when the expressive community can somehow be characterized as "public." The logic of the decision in

91. See Nan Hunter, *Expressive Identity: Recuperating Dissent For Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

92. For a discussion of the public accommodation laws and their regulation by the courts, see, e.g., Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate?*, 20 PEPP. L. REV. 643, 645 (1993); Lisa Gabrielle Lerman & Annette K. Sanderson, *Project, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978). For an "official" version of this history, see, e.g., *Romer v. Evans*, 517 U.S. 620, 627-29 (1996) (development of public accommodation laws); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571-72 (1995) (Massachusetts's public accommodation law). For a list of states with public accommodation statutes, see, Michelle L. Carusone, *Dale v. Boy Scouts of America and Monmouth Council: New Jersey's Attempt to Define Places of Public Accommodation and Remedy the "Cancer of Discrimination"*, 49 CATHOLIC L. REV. 823, & n.22 (2000).

93. And, indeed, there is no reason for uniformity in this regard either. Thus, one of the hallmarks of public accommodation law is the variety, at least at the margin, of the coverage of the law, both in terms of the groups covered and the sorts of accommodations deemed "public." See Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27, 40-44 (1994).

*Boy Scouts of America* makes its holding almost inevitable once the majority determined that a significant expressive purpose of the BSA was antipathy to an individual belonging to a group antipathy against which was now prohibited by the public accommodations statute of New Jersey.<sup>94</sup>

Conversely the substantial inquiry directed at expressive associations applies only in those cases in which the excluded individual belongs to a protected group and alleges exclusion based on group status.<sup>95</sup> If so, then perhaps the majority is suggesting that in cases where the state's interest in protecting against discrimination based on constitutionally protected status - sex, religion, race, ethnicity - the Court must apply a "no-deference" standard to the determination of the purposes of an expressive organization's mission.<sup>96</sup> However, where the exclusion involves a group which is not constitutionally protected under the federal constitution, then the Court is required to take the expressive association at its word with respect to its expressive mission, and on that basis short circuit the public accommodation and germane speech doctrines.<sup>97</sup> But the majority does this, if it does this at all, on the sly.

Perhaps the deference depends on the situation. In the coerced speech situation, the complainant is an individual whose speech is coerced by the association.<sup>98</sup> In the expressive association context, the roles are reversed and it is the association itself that argues coercion at the hands of the individual.<sup>99</sup> But even if this model of distinction works, it must also contain an exception for women who challenge their exclusion from all male clubs.<sup>100</sup> The logic of that exception lead to the need for further exceptions for other protected groups, and then we are back to wondering whether the rule of deference is really a shorthand for creating two standards, one which substantially limits the reach of the public accommodation doctrine where the excluded individual does not belong to a

94. *Boy Scouts of America*, 120 S. Ct. at 2452-54.

95. The majority in *Boy Scouts of America* noted that the Court had "recognized in cases such as *Roberts* and *Duarte* that states have a compelling interest in eliminating discrimination against women in public accommodations." *Id.* at 2456.

96. The majority opinion explains that "in the associational freedom cases such as *Roberts*, *Duarte* and *New York State Club Ass'n.*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any 'serious burdens' on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interests on the other." *Id.* at 2456.

97. Apparently, in those cases, the State's constitutional interest in extending state constitutional protection to other groups cannot be used to limit the federal constitutional protections to speech and association granted to expressive associations. Thus, even if the New Jersey Constitution provided the basis of the public accommodation law, the deferential standard would still apply.

98. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (constitutionally protected right to cover up the New Hampshire state motto on auto license plates); *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977) (public sector union employee use of dues); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (mandatory state bar dues used for lobbying and other political activity).

99. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (parade organizer not required to include groups with whose message it disagrees).

100. If not, then the Court would have to overrule *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) and its progeny - *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537; *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); a step the *Boy Scouts of America* Court expressly refused to take.

protected class.<sup>101</sup> If so, the subterfuge and concealment of its creation, through this rule of discretion, does not make the application of constitutional principles in everyday contexts any easier.

Yet, isn't this precisely what we ought to expect from a decadent jurisprudence? The result of this furious argument is substantial uncertainty in a core collateral doctrine of First Amendment jurisprudence - it is clear that the Court now controls, on the basis of criteria known only to itself, the time and manner of its examination of the purposes for which expressive associations are formed.

Yet, the majority in *Boy Scouts of America* attempts more than that. In *Boy Scouts of America*, the majority stretches to make new constitutional doctrine by the process of analogy.<sup>102</sup> This time, the object was to stretch the relevance and utility of *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,<sup>103</sup> the way the majority in *Southworth* stretched the public forum doctrine to accommodate the facts as they found them in that case.

In *Hurley*, we applied traditional first Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here.<sup>104</sup>

The dissent, of course, found that "though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today."<sup>105</sup> Ultimately, however, the applicability of *Hurley* in *Boy Scouts of America* depends neither on the public accommodations doctrine nor the expressive association doctrine, but on the cultural truth of the nature of 'condition' that makes Dale different. Ultimately, the majority's major contribution to the law of public accommodation might be that an expressive association has the constitutionally protected right to discriminate against all

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101. That would seem to be the logic of cases such as *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding Dallas ordinance imposing age restrictions on admission to certain dance halls, though ostensibly based on a theory of no expressive content, the characteristic of the discrimination was not any form otherwise constitutionally protected).

102. There is a striking similarity between the use of analogy in *Boy Scouts of America* and in *Southworth*. The majority in *Southworth* stretched the public forum doctrine to apply, by analogy, but apply all the same, in the context of indirect support of speech through mandatory student dues. See discussion *supra* notes 74-76.

103. 515 U.S. 557 (1995).

104. *Boy Scouts of America*, 120 S. Ct. at 2457 n.4 (noting that dicta in *Hurley* pointed to the conclusion reached by the majority in *Boy Scouts of America*).

105. *Id.* at 2475 (Stevens, J., dissenting). The difference, as the dissent saw it, was that Dale's "participation sends no cognizable message to the Scouts or to the world." *Id.* In contrast, the petitioning group in *Hurley* was intent on delivering a message of their own as part of their participation in the parade. "If there is any kind of message being sent, then, it is by mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment." *Id.* Moreover, the dissent suggested that Dale, unlike the individuals in *Hurley*, had no intention of broadcasting any message, nor is it likely that BSA would be understood to send a message by hiring Dale. "The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling." *Id.* at 2476.

discrete minorities, on whatever basis such association cares to define difference for purposes of discrimination as long as the discrimination is not affected against groups which are protected against discrimination by the constitution. States have power, under their public accommodation laws, to add to the list of constitutionally protected groups, except that any such protections afforded under *state* public accommodation laws may not interfere with the *federal* constitutional rights of any group or association.

*F. The Germane Associative Purpose Doctrine.*

As with the public accommodation doctrine, application of the germane associative purpose doctrine is heavily dependent on the Court's characterization of the associative purposes of the expressive community. There are no First Amendment rights with respect to the incidents of association that do not substantially burden the expressive purposes of association.<sup>106</sup> While an association is entitled to select members who share the same expressive purposes as those of the association, it may not otherwise limit the ability of persons to join on the basis of factors other than disagreement with the expressive mission of the association. But, as the majority opinion in *Boy Scouts of America* now makes clear, the germane associative purpose doctrine is only as effective as the willingness of a court to independently determine the actual expressive purpose of an organization. The willingness to find that expressive associations generally have no germane expressive purpose that cannot be constitutionally burdened in the face of discrimination against a constitutionally protected group, wilts when the court is faced with a member of a group against which discrimination is permitted who seeks the same construction.

This deferential standard, based on the acceptance of an association's own characterization of its expressive purposes,<sup>107</sup> was not previously used by the courts.<sup>108</sup> A different test applied.<sup>109</sup> In those cases, the Court insisted on careful examination of the purpose of expressive association, requiring an association to prove, that "admitting women . . . will affect in any significant way the existing members ability to carry out their various purposes."<sup>110</sup> Though those cases

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106. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) [U.S. Jaycees]; *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) [Rotary Club]; *New York State Club Ass'n, Inc v. City of New York*, 487 U.S. 1 (1988).

107. See *id.* at 2452. "This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts view of homosexuality." *Id.* at 2470-71 (Stevens, J., dissenting).

108. "This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further." *Id.* at 2471 (Stevens, J., dissenting).

109. See *U.S. Jaycees*, 468 U.S. 609; *Rotary Club*, 481 U.S. 537; *New York State Club Ass'n, Inc*, 487 U.S. 1.

110. See *Rotary Club*, 481 U.S. at 548. Justice Stevens explained that:

An organization can adopt the message of its choice, and it is not this court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's anti-discrimination law. More critically, the inquiry requires our independent analysis, rather than deference to a group's litigating posture. Reflection on that subject

involved attempts by organizations to prevent a woman from joining, until *Boy Scouts of America*, that process of inquiry was thought applicable in all contexts in which an expressive association limited membership.<sup>111</sup>

The majority opinion does not suggest that *Jaycees* or *Rotary Club* are inapplicable. Indeed, the majority appears to apply *Jaycees* and *Rotary Club*.<sup>112</sup> But in reality, the majority did not apply those cases. While they applied the result of the germane speech doctrine of those cases to the assistant scoutmaster, they avoided entirely the application of the rules for determining the purpose of expressive association at the heart of those cases. Justice Steven's dissent,<sup>113</sup> as well as that of Justice Souter,<sup>114</sup> forcefully highlights this constitutional maneuver by the majority. In truth, it is hard to believe that the *Jaycees* and *Rotary Club* line of cases can survive *Boy Scouts of America*, except to the extent that the earlier cases stand for an empty proposition. The expressive association rule, a gateway doctrine, has become the constitutionally decisive end in itself. The battleground now shifts to the procedure for determining the scope of expressive activity and away from the protection of germane speech and the rights to belong bundled into the public accommodations doctrine.

On the other hand, perhaps *Boy Scouts of America* can be distinguished from *Jaycees-Rotary Club*. In *Boy Scouts of America* the individual seeking membership in an expressive organization was a homosexual, but not just any homosexual. Dale was "an avowed homosexual and gay rights activist [whose

dictates that such an inquiry is required.

*Id.*

111. See *Boy Scouts of America*, 120 S. Ct. at 2471 (Stevens, J., dissenting).

112. See *id.* at 2456.

113. See *id.* at 2466-70.

Several principles are made perfectly clear by both *Jaycees* and *Rotary Club*. First, to prevail on a claim of expressive association in the face of a State's anti-discrimination law, it is not enough simply to engage in some kind of expressive activity. Both the *Jaycees* and the *Rotary Club* engaged in expressive activity protected by the First Amendment, yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the *Jaycees* and the *Rotary Club* did that as well. Third, it is not sufficient merely to articulate some connection between the group's expressive activities and its exclusionary policy. The *Rotary Club*, for example, justified its male-only membership policy by pointing to the 'aspect of fellowship . . . that is enjoyed by the [exclusively] male membership' and by claiming that only with an exclusively male membership could it 'operate effectively' in foreign countries.

*Rotary Club*, 481 U.S. at 541.

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The relevant question is whether the mere inclusion of the person at issue would 'impose any serious burden,' 'affect in any significant way,' or be 'a substantial restraint upon' the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.

*Boy Scouts of America*, 120 S. Ct at 2469-70 (Stevens, J., dissenting).

114. "I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." *Id.* at 2479 (Souter, J., dissenting).

presence] in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scout policy."<sup>115</sup> Perhaps here is where we reach the nub of the issue for the majority. The majority does what it tells us over and over in the cases that Courts shouldn't do - they conflate status, conduct, and in this case, speech, within the sexual desires of Mr. Dale, a conflation it finds logically absurd in the case of the heterosexual, but "gay-friendly" assistant scoutmaster.<sup>116</sup>

Moreover, the rule of deference flies in the face not only of the *Jaycees-Rotary Club* process, but also the process of analysis used in coercive speech cases when an individual seeks to avoid membership in the expressive activity of an expressive association. The Court in *Southworth* reminds us that in cases in which expressive associations, such as bar associations or public sector unions, "coerce speech" from members through the assessment of mandatory dues, some of which is used for expressive speech, the Court will carefully scrutinize the expressive purposes of the organization to determine whether the speech coerced is germane to the purpose of the association.<sup>117</sup> Even though this analysis can be difficult, it is a task that is at the heart of the application of First Amendment doctrine to expressive organizations in those contexts.<sup>118</sup> It seems odd that a majority of justices who are quite willing to carefully examine the expressive purposes of associations in the context of women seeking admission to all male associations or individuals seeking to avoid use of their association dues for expressive ends with which they disagree, should determine that such analysis of association purpose is unnecessary when a gay man seeks admission to an all male club. Doctrinal symmetry is broken. Again, we are left to wonder whether the fear of the homosexual predator<sup>119</sup> drove the court to constitutional folly.

What was, in *Jaycees*, *Rotary Club*, *Abood* and *Keller*, a willingness to more strictly construe the expressive purposes of the organizations in those cases, becomes, in *Boy Scouts of America*, a willingness to do the opposite. Yet the majority provides no explanation for the shift. Indeed, it cloaks the shift in language that suggests that nothing new has been done. The result guarantees a new generation of constitutional litigation as individuals and groups explore the border between *Jaycees* (seen as favoring the interests of individuals) and *Boy Scouts of America* (seen as favoring the interests of associations).

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115. *Boy Scouts of America*, 120 S. Ct at 2455.

116. This was not lost on the dissenting Justices. "Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism." *Id.* at 2476 (Stevens, J., dissenting) (citing Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1781-83 (1996)).

117. *Southworth*, 120 S. Ct at 1355.

118. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

119. See generally Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative Jurisprudence and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996) (on the gay man as sexual predator as an archetypal form of judicial expression of the essence of the average gay male).



G. *The Relevance and Irrelevance of Facts.*

*Southworth* and *Boy Scouts of America* join a growing line of Supreme Court cases in which facts are stretched to suit the applicability of doctrine, in this case a subsidiary doctrine of constitutional interpretation.<sup>120</sup> It is hard for anyone with a memory to think of the Boy Scouts of America as an organization whose expressive purpose was to stamp out homosexuality. It is as hard, perhaps, except during a momentary lapse to see the constitutionally significant connection between expressive coercion inherent in mandatory fees. And yet, we now understand, if we understand nothing else, that the Boy Scouts are indeed at the vanguard of the anti-homosexual crusade. Yet, even if we were inclined to see what the majority saw in *Boy Scouts of America*, it is hard to keep that vision steady in the face of the dissent's cogent recharacterization of the expressive purposes of the BSA.<sup>121</sup> Yet what the case may demonstrate in this regard is the kind of transformation of facts necessary for our contemporary constitutional doctrinal maze. The facts of *Boy Scouts of America* becomes easier to conceptualize were we, like the majority, to reduce the individual human being at the factual center of the case to the sum of a matrix of outward characteristics derived from the American sub-communities to which he has been assigned. Mr. Dale loses his humanity in the course of his reconstitution as a function of the matrix of constitutional doctrine. His individuality dies, to be resurrected, after an appropriate interval in the majority opinion, as the totem for the community for which he serves as proxy.

The opinion in *Southworth* is no stranger to this totemic recharacterization of facts in the service of doctrine. We understand that students can be taxed to buy speech, so long as the governmental purchaser agrees to buy the speech of substantially all who proffer speech for the revenue, otherwise the purchaser may buy no speech at all. The alternative suggestion, so clearly articulated in *Rosenberger*,<sup>122</sup> that such fees might constitute a constitutionally impermissible

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120. Some authors have noted the pattern in the context of race discrimination. See, e.g., Andrew F. Halaby and Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases*, 2 Mich. J. Race & L. 235 (1997) ("These opinions often seem like an attempt to manipulate the concept of stigma, taking advantage of its perceived legitimacy as a factor of constitutional magnitude, while in the final analysis leaving Justices free to achieve whatever end is sought"). *Id.* at 252-53. I have written about this before, from the perspective of a growing trend toward absurdity in Constitutional jurisprudence. See, Larry Catá Backer, *The Incarnate Word, that Old Rugged (Klan) Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L. J. 447 (1996).

121. This tendency is nothing new and seems to be a hallmark of modern constitutionalism. "Were all of the Justices reading from the same set of facts? It appears here that, even at the stage of factual exposition, our judicial [establishment] . . . cannot agree even on what they see!" Larry Catá Backer, *The Incarnate Word, that Old Rugged (Klan) Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L. J. 447, 458 (1996).

122. *Rosenberger v. The University of Virginia*, 515 U.S. 819, 840 (1995), citing *Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990) and *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209, 235-36 (1977). Accord O'Connor, J., concurring, *id.* at 851. But see Souter, J., dissenting, *id.* at 873-74, 891-92 (the fee is a tax used to fund religious expression).

exaction of speech with respect to which the student might seek a refund, is waved away in *Southworth*.<sup>123</sup> The justices now take it for granted that there is no tax-like exaction in the assessment of student fees, instead there is merely the collection of a fee which represents the equivalent of the expression of academic freedom, or perhaps tuition by another name. Yet it is hard to accept this characterization of student activity fee as the grease assuring the smooth running of the metaphysical academic *souk* when we still have ringing in our ears the alternative characterization of these fees as something far less benign. Are university's so different from other groups, like unions or bar associations, which, once joined, are difficult or impossible to leave without substantial economic effect? Again, *Southworth* loses its mystery when the facts of the case are reconstituted in totemic form. The University stands as the proxy for American socio-economic organization – the site of the operation of the myth of the democratic free-market state. To accept regulation of this free market, at the behest of a “customer” unhappy with some of the tenants of the bazaar, would require rejection of the free market totem upon which the United States has built its world wide identity.

Thus, the Court is at once weighed down by the baggage of its doctrine and at the same time using the complexity of doctrine as a way of hiding its expression of personal politics in its decisions. Perhaps every organization must stand on its own unique constitutional footing. Justice O'Connor once told us this in connection with the University of Virginia's student fee program problems.<sup>124</sup> Yet, if this is the case, then constitutional jurisprudence truly becomes both complex and irrelevant. Judgment based on the jurisprudence of peculiar facts, when all facts are peculiar, becomes no jurisprudence at all<sup>125</sup> – instead jurisprudence is reduced to the form of answer to the supplication made to an Old Testament judge.<sup>126</sup> Sadly, however, the cosmology of 21<sup>st</sup> Century Americans, unlike that of the ancient People of Israel, does not infuse judges with the spirit of God as the

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123. *Southworth*, 120 S. Ct. at 732 (student fees are not a tax, they simply belong to the students), quoting from *Rosenberger*, 515 U.S. at 852 (O'Connor, J., concurring). The reliance on Justice O'Connor's concurrence in *Rosenberger* is particularly craven, given that Justice O'Connor appeared in *Rosenberger* to argue, in the paragraph referenced in *Southworth*, that the student fee assessed escaped characterization as a tax because it resembled the mandatory bar dues in *Keller*, and, as such, might give rise to the same opt-out rights.

124. Justice O'Connor remarked: “When two bedrock principles so conflict, understandably neither can provide a definitive answer. Resolution instead depends on the hard task of judging – sifting through the details and determining whether the challenged program offends the [Constitution].” *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

125. Constitutional law, in this sense, provides a grossly exaggerated example of the general disintegration of the value of precedence by the hyper application of the rules of avoidance. “In theory, precedence in the common-law countries is a strictly applied principle, but in practice the ability to distinguish a case means that precedence can be circumvented when it suits the purposes of the court.” Nigel Foster, *GERMAN LEGAL SYSTEM AND LAWS* 4 (2d ed. 1996).

126. Constitutional law, in a sense, follows the pattern of judging in the Biblical book of judges: the people of Israel “do evil in the sight of the Lord” (Judges 3:7; 3:12; 4:1; 6:1, etc.), they are punished, and then “cry out to the Lord” (Judges 3:9; 3:15; 4:3; 6:7; etc.), who send them deliverance in the form of a judge under whom things are made right again. A good judge is one “who will do what is in my mind and heart.” 1 Samuel 2:34. The judge functions, only to the extent he is able to serve as a conduit from the Divine.

essence of the act of judging.<sup>127</sup>

## II. DO THE EUROPEAN APPROACHES SUGGEST ALTERNATIVES?

Do other systems of constitutional interpretation suggest an antidote to the American interpretive model? I look at three alternative approaches for the suggestion of an answer. The French system grounds issues of constitutional interpretation on the political process - the judiciary is essentially excluded from the process, with one exception. The Germans provide a federal judicial forum for the determination of issues of constitutional interpretation, but limit the jurisdiction of that judicial body to questions of constitutional law affecting the German federation. The supra-national approach to the protection of human rights of the system of the European Convention also relies on quasi-judicial and judicial approaches to interpretation.<sup>128</sup>

The French solution to constitutional issues is political and straightforward. Generally speaking, there is no judicial constitutional review of legislative acts. Since 1958, however, a Constitutional Council has existed, composed of members appointed by the President of the Republic and the presiding officers of the French legislature.<sup>129</sup> This Constitutional Council is convened when certain public officials submit a provision to it for constitutional review. Such review may be obtained only prior to the promulgation of the provision.<sup>130</sup> Clearly an interesting system, but one which is not suitable to the American experience that, while resting on an affirmation of the rule of law, does not recognize the supremacy of the law as against the predilections of any jurist.<sup>131</sup> Even when indulging a comparative perspective, political reality, along with an understanding of the inertia of cultural habits, must overcome false hope.

127. "The Spirit of the Lord came upon him, so that he became Israel's judge . . ." Judges 3:10. It is a large leap to infuse the American federal Constitution with the spirit of the Divine, even in this age of renewed spiritualism.

128. I do not propose in this section to compare the jurisprudence of these European entities to that of the American Supreme Court in the context of the protection of speech and association rights. My comparative purpose here is more structural in focus. I examine whether the jurisprudential framework of the courts of these systems provide another, and perhaps healthier, approach to the interpretation of basic norms within their societies.

129. See Fr. CONST. (1958), tit. VII, arts. 58-61.

130. For a discussion, see, e.g., ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992) J. BELL, *FRENCH CONSTITUTIONAL LAW* 9-56 (1992); F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89 (1988). Administrative decrees promulgated by the President may be challenged for legality by the Conseil d'Etat.

131. Il s'écarte bien entendu du système américain. Celui-ci est à la fois contraire à la tradition française de souveraineté de la loi et à la conception française de la séparation des pouvoirs qui interdisent au juge ordinaire de statuer sur la constitutionnalité de la loi. Il s'adapte mal de plus au système existant d'un contrôle *a priori* exercé par un juge unique. Le modèle italien est également écarté, car il conduit à une surabondance de recours, parfois tout à fait injustifiés, favorise les manœuvres dilatoires et entraîne une lenteur accrue de la justice. Quant au modèle allemand et espagnol, il présente le désavantage souvent dénoncé d'une pléthore de recours directs, pléthore qui conduit les cours constitutionnelles à ne traiter qu'une très infime partie des questions qui leur sont soumises.

Laurent Habib, *Le Conseil Constitutionnel*, in *SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES* 215, 237 (Igor I. Kavass, ed. 1992).

The Germans have chosen another path, one perhaps closer to our own model in spirit. The German Basic Law (*Grundgesetz*) provides protection for speech<sup>132</sup> and assembly.<sup>133</sup> The German right of speech is narrower than that in the black letter of the American First Amendment.<sup>134</sup> The same can be said of the German basic right of association.<sup>135</sup> The basic approach of the German Constitutional Court is similar to that of the American Supreme Court, yet also fundamentally different.<sup>136</sup> The basic difference, in part, may be explained by the values conveyed by the German and American Constitutions.

The American federal constitution provides no guidance when basic rights conflict. Neither does it provide any instruction on the manner in which conflicting rights are to be balanced. In this context, the Supreme Court has developed rules more noteworthy for their impermanence than for their substantive value.<sup>137</sup> The German Constitutional Court interprets within the confines of the German Constitution's hierarchy of values, and on that basis created a sophisticated balancing test in which constitutional values are balanced against each other in the context of the injuries claimed to be suffered.

The unity of the Constitution and its hierarchy of values are crowning principles of German Constitutional interpretation. Do these principles limit rights of speech? Justice Helmut Steinberger wrote that 'Art. 5 operates within an interrelated set of other fundamental rights and liberties, constitutional principles, rules and standards, institutional and procedural devices.' And thus, he continued, the freedoms secured by Article 5 need 'to be reconciled with the rights and liberties of other persons and groups as well as with other individuals and social interests recognized by the

132. "Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures and freely to inform himself from generally available sources." GG, art. 5(1), *translated in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, App. A at 507 (2d ed. 1997).

133. "All Germans shall have the right to form associations and societies." GG, art. 9(1), *translated in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, App. A at 509 (2d ed. 1997).

134. The Basic Law provides that: "These rights are limited by the provisions of the general laws, the statutory provisions for the protection of youth, and by the right to personal honor." GG art. 5(2), *translated in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, App. A at 508 (2d ed. 1997).

135. The *Grundgesetz* also provides that: "Associations whose purposes or activities conflict with criminal laws or are directed against the constitutional order or the concept of international understanding are prohibited." GG, art. 5(1), *translated in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, App. A at 507 (2d ed. 1997)). *But see* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 215 (1994) ("But the fact is that in periods of real or imagined danger we have tended to adopt measures strikingly similar in effect to those expressly countenanced by the Basic Law and the Supreme Court has tended to uphold them - in the teeth of an ostensibly absolute constitutional protection").

136. For a comparison of approaches in the related area of the regulation of obscenity, *see, e.g.*, Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the U.S.*, 21 MICH. J. L. REFORM 201 (1987/88).

137. The rise and fall of substance economic due process is a case in point. For a discussion, *see, e.g.*, Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). The creation and expansion of social substantive due process (in the guise of privacy and its related concepts) is another. For a discussion, *see, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1345 (1992).

Constitution.<sup>138</sup>

The utility of a hierarchy of values is not something to be dismissed lightly. Value hierarchy in constitutional rights thus accomplishes the textualist aspirations of many constitutional law jurists and scholars without sacrificing constitutional interpretation to the political whims of every generation's crop of textualists, either in the academy or on the bench. In the area of speech rights, it has proven to be useful, though not without providing complexity to the law.<sup>139</sup> Value hierarchy provides a base from which judges may bring their judgment to bear on the facts without the need to construct, at the same time, the value ordering, through subsidiary constitutional doctrine, the law. It provides a discipline for constitutional interpretation.<sup>140</sup> But it leaves the Court with the difficult task of interest balancing in the particular case.<sup>141</sup> Therefore, it is not a guarantee of just results.<sup>142</sup>

138. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 361 (2d ed. 1997) (quoting in part, Helmut Steinberger, *Freedom of the Press and of Broadcasting and Prior Restraints*, in *VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSHARKEIT, MENSCHENRECHTE, FESTSCHRIFT FÜR HERMANN MOSLER* 913 (Rudolf Bernhardt et al. eds, 1983)).

139. Donald Kommers thus outlines the value hierarchy of speech rights in the German Constitution:

First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion - as opposed to fact - constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of a case will depend on careful judicial balancing.

DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 424 (2d ed. 1997). See also, Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

140. In this context it is worth remembering that:

The Federal Constitutional Court constantly reminds itself of the hierarchy of values implicit in their constitutional order. It has delimited the inner boundaries of individual autonomy by placing the individual in the context of the polity. Moreover, it has carved out the outer boundaries of the principle of human dignity, by weighing the interests of the state and the autonomous individuals against the backdrop of the strong egalitarian principles of social democrat thought, and the moral principles of Kantian and Christian thought.

Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality in the Constitutional Jurisprudence of Germany, The United States and the Commonwealth of Puerto Rico*, R EVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 343, 383-384 (1998).

141. In applying a balancing test the German Constitutional court has tended:

to apply the more orthodox proportionality principle the Court has developed for testing limitations on other fundamental rights. A 'general law' restricting expression is valid only if it is adapted ('geeignet') to the attainment of a legitimate purpose, if it is necessary ('erforderlich') to that end, and if the burden it imposes is not excessive ('unzumutbar') in light of the benefits to be achieved. . . . [I]n short, despite constitutional provisions that differ significantly on their face, both the Constitutional Court and the Supreme Court have adopted a similar approach to defining the limits of free expression.

DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 180-81 (1994).

142. "A balancing test is no more protective of expression than the judges who administer it; only an

Students of American constitutional law are in the habit of suggesting that the Supreme Court is imposing a hierarchy of values.<sup>143</sup> Even if that is true, without the benefit of a political approval of the value hierarchy, such judicial interpretive solutions will always remain transitory and constitutionally suspect.<sup>144</sup> Sadly, constitutional changes of this sort are virtually impossible at the beginning of the twenty-first century. The Federal Constitution has assumed, in some respects, the qualities of the Old and New Testaments.<sup>145</sup> As the received word from those divinely inspired, it is taken as authoritative and difficult to change.<sup>146</sup> Should consensus ever emerge that the Bill of Rights, or the Constitution in its entirety ought to be revised, perhaps by the calling of a Second Constitutional Convention, it is likely, in this age of lack of political consensus among the many political communities inhabiting the United States, that the way would be opened for revolutionary change, as all segments of American political society would fight to impose its constitutional will on the revised document.<sup>147</sup>

Overlaying both European constitutional approaches is the system of fundamental rights protections under the European Convention.<sup>148</sup> The similarities, between the American federal Supreme Court and the European Court of Human Rights, have been noted by students of the field.<sup>149</sup> The

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examination of the actual decisions can give us an insight into the degree of freedom that prevails in Germany." DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 181 (1994). This sort of judging is not unknown even within the membership of the court as currently constituted. For example, Justice O'Connor is a strong example of a justice who has been outspoken about the focus of judges on balancing facts within the confines of a known universe of law. See, e.g., *Rosenberger*, 515 U.S. at 847, 852. The German approach avoids the need to construct and reconstruct the value universe.

143. On the judicial construction of a loose, and loosely binding hierarchy of values, see, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 974-87 (1987); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 353-55 (1993). For an attempt at a construction of a different doct of constitutional hierarchy of values, see, Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223 (1996).

144. Cf. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

145. See, e.g., Daniel Lazare, *America the Undemocratic*, 232 NEW LEFT REV. 3, 9-10 (1998); Cf. J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

146. And here I speak not of constitutional amendment in which we seek to add to the protections afforded, but rather, to constitutional amendment which seeks to affect the rights already in place, and particularly those in the Bill of Rights.

147. For a discussion of the national reluctance to indulge in significant formal Constitutional revisionism, see, Gerald Benjamin and Tom Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMPOSIUM 53 (1996).

148. For a discussion of the theory and utility of supra-national juridical organs and their effects on national courts, see, Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 325 (1997).

149. In several ways the Supreme Court is analogous to the European Court of Human Rights.

It often operates to bring States into line with minimum standards of human rights, and this may take place despite fierce opposition at the local level thousand of miles away. Also, both Courts may have to cope with the different substantive and procedural laws of the various States over which the Court has jurisdiction. This produces a similar dilemma for both Courts -whether to allow for local autonomy or concede to the demands for unity and uniformity. Of course the differences are significant. There is no system of federal courts in Europe, and the Council of Europe cannot be compared to the federal government of the United States. But in the specific context of human/fundamental rights the similarities are important.

European Convention contains protections for speech<sup>150</sup> and association.<sup>151</sup> The protections in the European Convention are articulated, within the black letter, as oppositional rights. With respect to speech, the European Convention articulates an absolute protection of speech, limited only by the European Convention's protections for the right of the State to regulate in a variety of contexts, and subject to various principals of action. With respect to association, the same form of construction follows. On the one hand the individual is accorded absolute rights. On the other hand, the state is accorded the power to interfere with those rights in the context of specific situations and within the parameters of certain principles.<sup>152</sup> These limiting parameters on state interference in the context of association rights are not identical to those set forth for speech rights.<sup>153</sup> In both cases, the interests of the individual in the preservation of his rights are balanced against the interest of the state, also of constitutional magnitude, to interfere with those rights.

The European Court of Human Right's jurisprudence, thus, is substantially based on and limited to interpretation (what do the Convention's terms mean in a particular context). Yet, equally important, interpretation requires the European Court of Human Rights to balance the competing interests of the parties before it in a wide variety of contexts. In the area of speech rights, the European Court of

ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 151-152 (1993).

150. Article 10 of the European Convention provides protection for speech.

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For a general discussion of the cases decided under Article 10, *see* J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 250-273 (1987); FRANCIS G. JACOBS AND ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 223-245 (2d ed. 1996).

151. Article 11 of the European Convention sets out the basic protection for rights of association:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . . .

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society, in the interests of national security or public safety, for the protection of health or morals, or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

On the right of association, *see, e.g.*, A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 160-64 (3d ed., 1993); DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 304-07 (1996).

152. Art. 10(2) and Art. 11(2) of the European Convention specifies those conditions under which some deviation from the fundamental right is permissible.

153. Compare Art. 10(2) with Art 11(2) of the European Convention. While the two provisions are similar, they are not identical.

Human Rights “seeks to balance the interests of the individual in paragraph (1) with the interests of the State in paragraph (2).”<sup>154</sup> Moreover, the European Court of Human Rights must also balance the relative value of rights guaranteed under the European Convention, in cases where they may conflict. Thus, for example, “the state may restrict the exercise of rights under Article 10 by invoking other articles under the Convention and not just the second paragraph of the Article itself.”<sup>155</sup> In this respect, the European Court of Human Rights, like the German Federal Constitutional Court and the U.S. Supreme Court is faced with a set of fundamental rights, neither absolute, nor subject to easy interpretation.<sup>156</sup>

Yet, like the German court, the European Court of Human Rights has the benefit of a black letter constitutional scheme in which the interests of the state are clearly articulated. As a formal matter, there is little room for the European Court of Human Rights to deviate from the list. The fly in the ointment, though, is that the Court’s power to interpret the black letter in particular contexts may prove as effective a means of expansion (or contraction) within the context of the European Court of Human Rights’ jurisprudence as a civil, rather than common-law, court.<sup>157</sup>

But the resulting balancing provides a substantial power over the objects of balancing and the weight accorded to each - one of the principal problems exemplified as decadent in the *Southworth* and *Boy Scouts of America* cases. Thus, for example, the European Court of Human Rights’ “margin of appreciation” doctrine provides the European Court of Human Rights with a discretion that may equal that of the Supreme Court in cases such as *Southworth* and *Boy Scouts of America*.

A compression of the margin of appreciation and its ancillary doctrines to one sentence would result in something resembling the

154. FRANCIS G. JACOBS AND ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 224 (2d ed. 1996).

155. See, e.g., DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 277-80 (1996).

156. “The overwhelming majority of the case-law of the Court has related to the limitations on freedom of expression contained in Article 10(2).” FRANCIS G. JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 224 (2d ed. 1996).

157. The results can vary considerably from those reached by the courts in the United States. Thus, for example, the European Court of Human Rights has determined that bar associations and architects’ associations may not be associations within the meaning of Article 11(1), functioning instead as public bodies. See *Revert and Legallais v. France*, 8 Sept. 1989, App. 14331/88 and 14332/88 (1989); 62 DR 309 (architects’ association); *A and Others v. Spain*, 2 July 1990, App. 13750/88 (1990) 66 DR 188 (bar association). As such, the freedoms of association for individuals do not apply. “Nor does the freedom of association include the freedom *not* to join an association.” FRANCIS G. JACOBS AND ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 241 (2d ed. 1996). Moreover, Article 11 may not protect an individual’s rights within an organization, or an association’s right to receive governmental funding or standing to sue. For a discussion, see, e.g., DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 304-07 (1996). Likewise, with respect to Article 10, the Court has reached results that might appear odd to Americans. For example, while the boundaries of freedom of expression are great, the European Court of Human Rights has not brought within it the right to be free of the consequences of speech. *Kosiek v. Germany*, 1986 Series A, No. 105 (1987) 9 EHRR 328 (an academic could be dismissed because of his extremist political party affiliation; employers were free to consider party membership in review of the individual).



following: The State enjoys a margin of appreciation to place a restriction on the exercise of an individual right, but subject to European supervision, in light of that restriction's necessity, and of the legitimacy of its aim, and of the proportionality of the restriction to that aim, with regard to the practice of other Convention States.<sup>158</sup>

Is there in these systems of human rights' protections a wisdom lacking in the administration of federal constitutional rights in the United States? I would have hoped so, but I think not. Each system exhibits the same interpretive tendency. The difference, then, is not one of form, but of degree. And that difference can be explained, in substantial part, by the form of the constitutional framework to which each court must ultimately remain faithful. The Europeans have provided their courts with a greater degree of guidance in making interpretive choices than are found in the American federal constitution. The result is greater clarity with respect to the tests and doctrines applicable in a given case than we have seen possible in cases like *Southworth* and *Boy Scouts of America*. Yet, even with these interpretive constraints, the courts have, in each instance, carved for themselves a wide area of interpretive freedom. The case of the German Federal Constitutional Court is instructive.<sup>159</sup> But there is a similar result within the interpretive

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158. Eric Heinze, *Principles for a Meta-Discourse of Liberal Rights: The Example of the European Convention on Human Rights*, 9 IND. INT'L & COMP. L. REV. 319, 330 (1999). For a discussion of the mechanics of determining consensus under the principle, see, e.g., Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133 (1993). Hilary Charlesworth has noted that:

A review of the approximately two hundred cases of the European Court permits the following generalizations. A wide margin of appreciation of judicial restraint is applied in the following contexts: (1) the law deals with economic policies; (2) the law is in transition; (3) the aim of the law is to protect public morals; (4) the subject matter of the law is the design of electoral systems; or (5) great diversity of approach currently exists among the contracting parties. On the other hand, a narrow margin of appreciation of judicial activism is applied where (1) the individual right is particularly important . . . ; (2) the infringement of the right is great or the essence of the right is affected; (3) the aim of the law is the protection of the authority of the judiciary; or (4) a great uniformity of approach exists among the contracting parties.

Hilary Charlesworth et al., *Resolving Conflicting Human Rights Standards in International Law* 85 AM. SOC'Y INT'L L. PROC. 336, 338 (1991). See generally, HOWARD CHARLES YUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 28 (1996). The doctrine has been criticized on a variety of grounds. Some commentators have noted that the essence of the principle results in an inevitably arbitrary application of the principle. See Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counseling Ltd. and Dublin Well Women Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 398 (1994); Natalie Klashtorny, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 441-42 (1996) (decrying the selective and arbitrary manipulation of the margin of appreciation to deny a state the right to criminalize homosexual activity, but not to deny a state the right to prohibit abortion).

159. The Constitutional Court has been most creative in its interpretation. Indeed many of the central concepts in German constitutional jurisprudence have no visible roots in the text or legislative history of the Basic Law: proportionality, reciprocal effect, the impact of fundamental rights on private conduct, the requirement of fidelity to the federal system. As in the United States, there has been a tendency away from rules and towards a balancing of competing interests. Among the consequences are an enhancement of judicial discretion and a reduction in the certainty of law.

jurisprudence of the European Court of Human Rights.<sup>160</sup> With the courts chosen as mediators between government and individuals, with government as mediators between conflicting social norms within society, it is unlikely that the problem of interpretive specificity can be reduced. The courts will remain important, though perhaps increasingly remote sources for guidance in the individual case.

Perhaps, ultimately, the French system comes closest to the democratic ideal of constitutional protection - by vesting the protection within the primary source of its abuse. It may well be that the democratic principle requires people to protect themselves through political participation or exit the system. An intermediary, like the courts, provides individual relief at the price of systemic breakdown by the weight of its interpretive history. Judicial supremacy in constitutional matters, essentially anti-democratic in a literal sense, robs the courts of authority to a certain extent, increasing the likelihood that judicial determinations will be ignored.<sup>161</sup> To the extent constitutional norms serve parochial interests, judicial constitutionalism acts to check the power of non-dominant communities to participate in the crafting of a nation's basic legal norms.<sup>162</sup> A system without intermediaries robs the individual of justice in a particular case, but preserves, for good, but probably more for ill, the consequences of democratic judgment exercised by the "genius" of a nation speaking through its elected representatives.<sup>163</sup>

160. It has been noted, with respect to the European Court of Human Right's margin of appreciation doctrine, that the "doctrine is a multifunctional tool in the hands of the Strasbourg authorities. As they choose not to fix its identity in any permanent way, this quicksilver notion may take the guise of a method of interpretation which the Court invokes at its discretion, and may even appear as a formal standard or test which the Court obliges itself to address." HOWARD CHARLES YOROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 195 (1996).

161. See MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (on the legitimacy of the judicial control of constitutional interpretation); Frank Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1585 (2000).

162. Ran Hirschl suggests that:

Hence the process of judicial empowerment through the constitutionalization of rights may accelerate when the hegemony of ruling elites in majoritarian decision making arenas is threatened by "peripheral" groups. As such threats become severe, hegemonic elites who possess disproportionate access to and influence upon the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to the courts. The process of conscious judicial empowerment in relatively open, rule-of-law polities is likely to occur when the judiciary's public reputation for political impartiality and rectitude is relatively high, and when the courts are likely to rule, by and large, in accordance with the cultural propensities of the hegemonic community. In other words, judicial empowerment through the constitutional fortification of rights may provide an efficient institutional way for hegemonic socio-political forces to preserve their hegemony and to secure their policy preferences even when majoritarian decisionmaking processes are not operating to their advantage.

Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73, 75 (2000).

163. It may be that parliamentary supremacy works best in nations with homogenous populations. In states with non-homogenous populations, where hegemony is important to competing groups and where relations between groups is acrimonious, parliamentary supremacy provides a vehicle for its own distortion. South Africa during the Apartheid era provides a case in point. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 14-36 (1978). Pluralism, itself, in conjunction with the democratic principle and imperfect human beings, may serve as the best argument

### III. CONCLUDING THOUGHTS—WHAT'S NEXT

Charles Fried suggested that for the Supreme Court justices to inject the methods of comparative constitutional law into their constitutional jurisprudence would be remarkable indeed - though scholars engage in the practice as a matter of routine.<sup>164</sup> Perhaps this ought to be turned on its head. The authority of the courts is a delicate matter. This is all the more so when they are entrusted with the interpretation of the basic understanding of a community's social and political mores. Judicial authority is easily lost in that context as courts depart from the limited role of confirming and maintaining the social consensus.<sup>165</sup> Courts lose more authority as they draft away from the text of the Constitution itself.<sup>166</sup> Yet it seems that the weight of cultural authority continues moving towards the juridification of basic questions of concern to social and political communities worldwide.<sup>167</sup> The judge is here to stay. Judicial process, and the role of the courts as the embodiment of the myth of fair politics through process will be the twenty-first century's coping mechanism as the world's legal, economic and political systems converge, one way or another.<sup>168</sup> In that emerging milieu, insular judging, parochial judging, uncontrolled judging, will prove dangerous to any judicial system.

The act of comparing, judiciously applied, serves to remind us that any system can become lost in its own detail or buried under the mass of its own product. I have suggested that the American system of constitutional interpretation, at least in the area of First Amendment speech and association rights, is out of control. It has lost its moorings in the black letter and been tossed in a sea of secondary interpretive doctrines which effectively drain the constitutional protection of any meaning-save that attendant on the working out of the secondary doctrine, and the molding of fact to suit the requirements of that doctrine. Such doctrine is not contained within the limitations of black letter interpretive guidance, as is possible to some extent, in the European Convention

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of the need for juridification as the best, though imperfect, means of mediating between communities, locked together within a polity, on the basis of the shared norms constituting the basis of their political union. But judicial supremacy unchecked by the polity and formal basic law also provides the basis for excess and its own distortion. The hyper nuance of American constitutionalism provides a case in point. Hypernuance based on doctrine which drifts farther and farther from the legitimating instrument granting judicial authority creates the basis for judicial irrelevance. In a pluralist political system, irrelevance may lead us to an unhappy alternative - that of an underground culture of basic norms, outwardly obedient to the rejected order and inwardly loyal to an alternative system. The Soviet Union experienced this dual nature before its collapse.

164. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 816-820 (2000). See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 691 (1998) (on the provincialism of American jurists in this respect).

165. See Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291, 305-14 (2000).

166. In this regard, cf., MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

167. Cf. W. JACKSON AND C.N. TATE, *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* (1992), with A.R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989).

168. See, e.g., BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992) (judicially based constitutionalism and worldwide democracy); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

system. Neither is there a hierarchy of values provided (at least a generalized interpretive container) as provided by the German Constitutional Court. Instead, the American Supreme Court acts as its own gatekeeper and interpretive guide. There is no effective legislative control or interpretive guide beyond the bare language of the First Amendment itself. The result is the development of a progression of interpretive norms that, like the sand on a beach, drift on the wind of the whims and passions of a majority who occupy seats on the Court.<sup>169</sup> This is not to impugn the character of intentions of any particular member of the Supreme Court. But it suggests that despite the brilliance of the people who staff the Court, systemic openness results in the transfer of constitutional power from those with the political responsibility for setting its limits, to those with the mere task of applying those limits to the particular facts before them. Greater Constitutional black letter is desirable – it will not come in our day.<sup>170</sup> Our portion will be an increasingly complex and disjointed mountain of judging and the reconstruction of our basic rights to suit the character of the judges of the day.

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169. See JEFFEREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (landmark decisions reflecting the socio-political beliefs of the justices called to participate in the decision).

170. Cf. generally MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

