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USING HUMAN RIGHTS LAW TO INFORM DUE PROCESS AND EQUAL PROTECTION ANALYSES

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I. Introduction

Short of natural law or an unwritten constitution, I have heard no principled explanation to justify the full sweep of judicially-imposed limits on majoritarian legislation under the written Constitution. The purpose of this Article is to argue that explanations of Bill of Rights limitations in the United States Constitution may be informed or illuminated by external sources of law that include emerging human rights norms. While ambitious, this thesis may be sustained by exam-

* The author wishes to give proper credit to Frederick Woodbridge, Jr., who assisted him in preparing this Article.

1. While there are principled limits to the process of judicial review outside the written Constitution—stare decisis, common law reasoning, inherent judicial power, the requirement of cases or controversies—these judicially imposed limits on legislation operate through the openness of the due process clauses, even if their external sources are custom and tradition, backed by moral reasoning. For a review of this problem in light of recent controversy, see Brest, The Fundamental Rights of Controversy: The Essential Contradictions of Normative Constitutional Law Scholarship, 90 Yale L.J. 1063 (1981). For an earlier attempt at reconciliation, see E. Bodenheimer, Jurisprudence 347-56 (1962).

The judicial construction of substantive limits on legislation through one of the enumerated rights in our Constitution requires similar, even less acceptable, use of sources external to the document. To shape an adequate theory of substantive limits to the power of governments—whether interpretist or non-interpretist, whether based on substantive due process, the first amendment, strict or deferential scrutiny, enumerated or unenumerated rights, or fundamental rights—modern courts in the process of constitutional adjudication must go beyond the text of the Constitution and examine the context of the particular governmental power and limitations to that power, using objective normative theory, conscious value preference or some other theory of interpretation that allows nornformal sources.

2. See generally Lillich, The Role of Domestic Courts in Promoting International Human Rights Norms, 24 N.Y.L. Sch. L. Rev. 153 (1978); see also Robin, U.S. Tort Suits by Aliens

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ining specific "windows" of various open-ended provisions of the Constitution. I focus here on the fifth and fourteenth amendments, and more particularly on the due process and equal protection standards of scrutiny of legislation and the underlying principles for scrutinizing both national and state action. Human rights norms are useful as positive sources for appraising those levels of scrutiny.

The use of human rights norms to aid in interpreting and applying constitutional limitations in questions involving rights similar to those protected under the Bill of Rights "informs" or illuminates the meaning of the limitation in a broader context than purely domestic. Human rights norms are a positive source of law external to the text of the Bill of Rights or cases interpreting it. External sources such as international law are not evidence of autonomous rules or authorities.

Based on International Law, Int'l Prac. Notebook, Jan. 1983, at 19 (underscore difficulties of determining the content and exact scope of international law norms applied to individuals).


3. "Open-ended provisions" refers to those provisions of the Constitution "that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." J. Ely, supra note 2, at 14. Examples are the first, ninth and fourteenth amendments, and the prohibition of cruel and unusual punishment in the eighth amendment.

4. This particular focus has been chosen because courts have combined the concepts of equal protection and due process with some confusion. Hampton v. Mow Sun Wong, 426 U.S. 88, 119 (1976) (Rehnquist, J., dissenting) ("Court . . . inexplicably melds together the concepts of equal protection and procedural and substantive due process . . . .").

5. The term "human rights norm" is used to mean those fundamental rights of individuals or groups that are expressed as valid claims against any state and that serve to guide official action under international obligations owed by all states. As they emerge, these rights are determined to exist by reference to traditional, positive sources of international law. For a discussion of the sources of international law, see J. Sweeney, C. Oliver & N. Leech, Cases and Materials on the International Legal System ch. 2 (2d ed. 1981); and L. Henkin, R. Pugh, O. Schacter & H. Smit, International Law, Cases and Materials ch. 2 (1980) [hereinafter cited as International Law]. See also infra notes 62 & 63.

6. The term "external sources" includes custom, practice, treaties and general expectations created by civilized states. Those sources of law may be found in subsidiary evidence such as writings of distinguished jurists, the foreign relations practice of the states, decisions of domestic courts and international tribunals, domestic laws common to all civilized nations and the practice of various international organizations. This Article will not address treaties and their application with respect to constitutional interpretation, since very few human rights conventions have been ratified by the United States.
that limit federal or state power under federal common law,\textsuperscript{7} although such an argument has indeed been advanced.\textsuperscript{8} Rather, such external sources form part of a universal context in which a right, because it is juridically shaped from these sources, assumes importance in interpreting a limitation in the Bill of Rights, or in other constitutional provisions designed to protect individual rights, in ways that avoid unnecessary conflict with a state’s obligations to the international community.

At the outset I am curious why our courts shun external sources of law—more specifically, contemporary decisions of foreign and international courts—and seldom consider other external sources such as custom. Occasionally state courts, federal district courts and courts of appeals refer to such sources of law, as in cases involving illegal aliens, minimum standards for prisoners, arbitrary detention and torture.\textsuperscript{9} Too often, however, critics argue out-of-hand that human rights law and international law do not exist because they cannot be enforced.\textsuperscript{10} Those arguments make an intellectual leap that denies to international and human rights law any status as external sources of law for purposes of constitutional interpretation. Custom suffers a similar fate formally, but less so in practice. That refusal seems greater now than at any time since the Founders accepted the law of nations.\textsuperscript{11} Nevertheless, as D’Amato’s argument explains, human rights law is a part of international law that is enforced by reciprocal sanctions by states.\textsuperscript{12} Human rights law may be used to express the larger community’s

\begin{itemize}
  \item \textsuperscript{7} See Christenson, \textit{The Uses of Human Rights Norms to Inform Constitutional Interpretation}, 4 Hous. J. INT’L L. 39, 40 (1981) (claim that human rights provisions of international instruments are part of federal common law is overbroad and aspirational).
  \item \textsuperscript{8} See \textit{1 THE LAW GROUP DOCKET 7} (1981) (published by the International Human Rights Law Group) (claiming that “[t]he effect of [Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)] is to direct American lawyers and judges to international sources of the rights of litigants.”); see also \textit{RESTATEMENT OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)} ch. 2 (Tentative Draft No. 1, 1980).
  \item \textsuperscript{10} See Note, 33 STAN. L. REV. 353, 358 (1981) (“International human rights law is generally only normative; it rarely provides enforcement procedures or rights of action.”).
  \item \textsuperscript{11} See L. Henkin, \textit{Foreign Affairs and the Constitution} 459 n.59 (1972).
  \item \textsuperscript{12} D’Amato, \textit{The Concept of Human Rights in International Law}, 82 COLUM. L. REV. 1110 (1982).
\end{itemize}
expectations even between a country and its own nationals, that relationship being a juridical construct of international law that may be reflected in domestic constitutional law.

II. PRELIMINARY PARADOXES: THE CONTEMPORARY CONTEXT

The most creative recent scholarship in constitutional theory offers scant attention to the international context in which our written constitution evolves internally. In reflecting on this problem, let us consider some obvious paradoxes. These paradoxes appear in many guises in interpreting ambiguous or general language in our Constitution and might provide understanding of the argument for the use of human rights norms.

A. Judicial Provincialism

While modern telecommunications make us aware of global interdependence with respect to almost every aspect of our daily lives, most United States courts, both state and federal, show less inclination now than at the beginning of the Republic to use sources of foreign, international and customary law to aid interpretation, especially in constitutional cases, and thereby link particular cases with a broader context. The paradox is that while court-cited provincial (their own) sources of law lead us to become juridically isolated, our perceptions refer nonetheless to the interconnectedness of global reality as justification for universal norms outlawing torture, preventing arbitrary arrest and detention, and condemning terrorism and gross violations of human rights. We are outraged when these norms are violated. Our present solution to this paradox is deference to the national policy and foreign affairs powers of the political branches. Unfortunately, this deference by necessity implies encroachment on the judicial protection of certain private rights, as we saw in the Iranian Assets case13 or in the Agee case curtailing travel abroad.14 The contradiction is that as international reality is accommodated consciously by judicial deference, judicial doctrine protecting individuals has turned inward to discount the international reality of developing human rights.15

15. The late Professor Karl Llewellyn, in a realistically refreshing essay, called it "extraordinary" that "the primary source of information as to what our Constitution comes to, is the language of a certain Document of 1789, together with a severely select coterie of additional paragraphs called Amendments." His astonishment at American provincialism, seen in the anachronism of applying language "framed to start a governmental experiment for an agricul-
B. The Problem of Unenumerated Rights

In constitutional interpretation a second paradox occurs. The Founders constructed our social contract using theories, such as those of Locke and Rousseau, based on inalienable or natural rights having no territorial confines and depending for their existence on no written constitution. Our present-day polity, however, with its skeptical and positivist attitude, accepts only the language of the Constitution in its context or Supreme Court decisions as sources of constitutional limitations. Yet the “living Constitution” changes with external conditions not within the context of the written constitution. This historical growth leads to the paradox of unenumerated rights.

The modern confusion about the expression “unenumerated rights” may be clarified only in part by referring to the Founders’ use of rights as political: political claims to rights surely can be enacted into positive legal rights. But are all unenumerated rights purely political? If so, as Ely points out, how do we account for the ninth amendment? Short of a natural law theory of how “to find” and give

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17. See J. Finnis, NATURAL LAW AND NATURAL RIGHTS (1980), for a modern theory of natural law that, in the Thomistic tradition, derives positive law from natural law and offers a framework to guard against pure subjectivism.

18. See generally Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 204 n.1 (1980) (author’s “originalism” and Ely’s “interpretivism” accord binding authority to constitutional text or intention of the Founders).

19. See Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 707-08 (1975):

In the important cases, reference to analysis of the constitutional text plays a minor role. The dominant norms of decision are those large conceptions of governmental structure and individual rights that are best referred to, and whose content is scarcely at all specified, in the written Constitution—dual federalism, vested rights, fair procedure, equality before the law.

For an application of “nonformal sources” of law to constitutional interpretation, see E. Bodenheimer, supra note 1, at 292-324, 347-56.

20. How can meaning be given to an unenumerated right if there are no sources other than the text from which the right may be derived?

21. This “scary” amendment, to use Ely’s word (J. Ely, supra note 2, at 34-41), plainly seems to be more than a rule of construction. Yet although hundreds of federal district court cases have cited the ninth amendment (most of them negatively or half-heartedly), only two Supreme Court cases have done so recently. The first, Griswold v. Connecticut, 381 U.S. 479 (1965), was a disaster for the ninth. Justice Goldberg’s concurrence, purportedly based on the ninth but in effect invoking natural law, made it easy to discount further use of the lost amendment. See
protection to those unenumerated rights, however, we are left with only textually enumerated rights as positive limits on power, unless some other principled means is found to prevent delegated powers from crowding out all unenumerated rights. This textual interpretation seems to contradict the plain meaning of the ninth amendment, and Madison’s intended result, that unenumerated rights be neither denied nor disparaged.

C. Radical Individual Autonomy vs. The Need for Cooperation

A third paradox, especially apparent within the United States, helps to explain the present friction between individuals and the collective majority. I am referring to the radicalization of individual autonomy. Judicial protection of individual autonomy, however, has been accompanied by a simultaneous increase in cooperative activity through collective law and regulation, made necessary for the common good by the interdependence of individuals.

The experience with which Choper, Ely and Tribe have worked springs from this apparent contradiction between radical individual autonomy, which is sheltered by judicial activism, and democratic theory, which seeks to provide a social fabric or framework within which “atomistic” individuals may communicate, relate, shape and share their destiny cooperatively. Indeed, individuals associated in

Griswold, 381 U.S. at 486 (Goldberg, J., concurring). Justice Black, moreover, demolished the argument. See id. at 507 (Black, J., dissenting). In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980), however, Chief Justice Burger used the ninth amendment in what may become another famous footnote. This time the unenumerated rights clause was cited as a means to justify protection for public trials not otherwise required to be kept public under the sixth amendment. See infra note 129. See generally B. Patterson, The Forgotten Ninth Amendment (1955); Paust, Human Rights and the Ninth Amendment: A New Form of Guarantee, 60 CORNELL L. REV. 231 (1975).

22. Bodenheimer characterizes such radical legal positivism as “interpretive nihilism” that “makes a theory of the nonformal sources of the law not only desirable but imperative.” E. Bodenheimer, supra note 1, at 295.

Miller explains that the operation of the myth of objective principles often masks subjective judicial preferences. He argues that the Supreme Court as a “Council of Elders” ought to use these preferences consciously in making value choices for future generations through its decisions, which are political accommodations. See A. Miller, Toward Increased Judicial Activism: The Political Role of the Supreme Court 19-21 (1982).

23. This friction arises from an interpretation of individual rights through the concept of judicial supremacy, a concept that developed uniquely within the United States.

24. See R. Nozick, Philosophical Explanations 498-504 (1981) (moral basis of autonomy); L. Tribe, supra note 2, ch. 15. It must be kept in mind that judicially protected autonomy may lead to “pure” democracy through use of two-way cable or satellite broadcasting. Instant majoritarian reactions to public issues of every kind can now be measured worldwide, as an electronic device on television sets now permits individuals to respond to issues. No debate in a public forum among the responding individual “atoms” is needed. Each one listens privately and

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cooperative enterprises or in governments often protect and promote individual welfare more effectively at the collective level than private individuals do by themselves.\textsuperscript{25} Clashes occur when individuals or private associations and groups of nation-states seek to promote collective ends that indeed may directly promote the general well-being but specifically harm minorities.\textsuperscript{26}

D. Challenges to the Rule of Law

When contemporaries in the United States imagine the rule of law, they cast a backward glance at the original nation-state concept,\textsuperscript{27} which rests upon certain historical conditions that helped shape the so-called "liberal" state.\textsuperscript{28} We imagine that this earlier liberal (now called conservative) state sought to liberate private individuals and groups of "citizens" from their dependence on a centralized system of powerful lords (elites) under a king (president). The liberal state resulted from a balance of power, a compromise to prevent the basic political ties between sovereign and subject from threatening the powerful lords and their private armies while maintaining a central government to keep the peace.\textsuperscript{29} Whether in a French or an English

responds privately. The first amendment protects information flowing in both directions. Should this use of two-way broadcasting become implanted, it will alter significantly the role of elected representatives in ways even the Founders with their own skepticism toward pure democracy did not foresee. Control over subliminal influences on public opinion, by public or private corporate expression that presently enjoys constitutional protection, could threaten profoundly a despised and insular minority. Let us not forget, in passing, that the United States, in a global context, is itself a prime minority target.

\textsuperscript{25} This idea is evident where the cumulative effects of private behavior add up to social harm and therefore must be regulated by the collectivity, even though any single private act might be quite harmless. For example, the emission of noxious gases from a single car exhaust or a single factory would not justify wholesale regulation. The cumulative effect of many such emissions might. The late Wolfgang Friedmann developed a coherent philosophy of international cooperation from this venerable theme. See W. Friedmann, Legal Theory 492 (5th ed. 1967); W. Friedmann, Law in a Changing Society (1959).

\textsuperscript{26} We are witnessing a struggle for a better global system based on principles of reason and common interest where the cumulative effects of all kinds of human activity know no territorial limitations. See the material on the international law of cooperation in International Law, supra note 5, at ch. 15.

\textsuperscript{27} The system of nation-states is a relatively recent phenomenon that emerged as a workable system following the religious wars of the sixteenth and seventeenth centuries. The Treaty of Westphalia in 1648 marks the symbolic birth of the nation-state system. While some scholars have written that the current nation-state and the international system composed of such states are conceptually obsolete, a more accurate statement is that reality no longer corresponds to the image raised by the word "state." See J. Schell, The Fate of the Earth (1982).

\textsuperscript{28} By "liberal state" I do not mean the current centralized welfare state, but the original conception of a state whose central power was limited in relation to liberty.

\textsuperscript{29} Magna Carta was an early result of efforts by the lords to limit the king's power. The exercise of central power was made "constitutional" when liberty, property or the king's peace
system, central power was limited essentially by negative restraints, i.e., by what those in power could not do by law to private individuals.

These conditions have changed. The change occurred as a result of the necessity for cooperation, since no juridically protected autonomous person or group is self-sufficient when at liberty. We find a most curious paradox resulting—the problem of cooperation: To be juridically autonomous, an individual requires entitlements of human need that are ultimately guaranteed by the state. These requirements can be produced only by cooperative activity, be they for security, economic well-being or education. No longer is it enough to define a human right through our backward glance, thinking the rule of law to be only a negative restraint on the central power’s intrusion into liberty.

The struggle for a definition of fundamental rights or affirmative, substantive values in United States constitutional theory can be seen through different prisms. Whether the juridical shape these prisms take is called substantive due process, first amendment values, ninth amendment unenumerated rights, equal protection or the various forms of judicial scrutiny of legislation, the struggles to reconcile fundamental rights with democratic theory occur within the context of movement from the earlier liberal state to the later liberal state, which we might rename the corporate welfare state. In this kind of state, acts of representative majorities are not necessarily the embodiment of human dignity for collectives of millions of autonomous persons each wanting both freedom and security. The central constitutional theory of the earlier liberal state no longer has much legitimacy. Even deregulation or the attempt to reverse the New Deal requires federal activism by all three branches of the government. Federal allocation of power to private power centers or to the states requires as much unwritten constitutional mythology as earlier judicial activism. Furthermore, democratic socialism and Marxism,

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31. In theory, socializing the means of production under a democratic polity may permit the state as a business organization to promote positive human well-being. But socialism tends at the same time to require individual fealty to the state in return for redistributional entitlements in a manner incompatible with liberty. Moreover, the need to use science and technology to create new wealth through present capital investment looking to future returns receives scant attention from those with present need. The collective will is weak with respect to wealth-creating
alternate theories of cooperation, have found no better way to reconcile the conflicting interests of individuals and the state than have the western capitalist democracies.

Within this historical transition, the international human rights movement presents intellectual questions of enormous significance. It represents both a direct challenge to our constitutional provinciality and, at the same time, a difficult paradox challenging the rule of law. Over the last few decades the American outlook has been challenged by experiences typical of our epoch and recently thrust into prominence on the home front, e.g., the problems presented by refugees such as the Cubans, the Haitian boat people seeking political and economic asylum on our shores, illegal aliens with their children, the rise of a permanent underclass of unemployed citizens and inhuman conditions in prisons and mental institutions. Circumstances are thus bringing home to our courts in graphic fashion the impossibility of remaining indifferent to universal policy formulations. At present, the prospect of the United States under its written Constitution, being at once judicially isolated from the rest of the world and at the same time integrally enmeshed in this universal human condition, is even more frightening than the dangers that lent urgency to the human rights movement. An additional paradox is that the United Nations (UN), seeking to implement specific human rights for all people in its charter and in conventions and resolutions, has itself become a forum to express collective condemnation of individual states or groups of states ventures destined to bear fruit in a remote future. Pressing human needs demand present sharing under most democratic socialist regimes. Sacrifice for the next generation, sometimes justified by the need to "build socialism," is in reality suspect. Paradoxically, if new wealth is to be created through investment, rights in privately owned capital may need protection against the majority.

32. Marxism is also flawed. As Freud explained and John Rawls noted, in a Marxist context the special emotion of envy fuels the sense of injustice and promotes class struggle triggered by the demand for equality. See J. Rawls, A Theory of Justice 534-41 (1971). Ensuing claims for distributive justice permit the mythical class struggle to be exploited politically. Despite Marx's perceptive analysis of the contradictions of capitalism, Marxist regimes are born with destructive tendencies and yield another noneconomic kind of tyranny, a dictatorship ultimately inimical to human rights. Few limits on state power exist. Entitlements from the state, moreover, ensure decreasing productivity and wealth unless the central regime invests at the expense of the majority. See R. Heilbroner, Marxism: For and Against (1980), for a short, trenchant appraisal.


34. This movement did not arise under a nationalistic system of legal right. Neither did it result entirely from the natural law tradition. It sprang, rather, from an emerging consensus about universal human dignity in a world threatened with nuclear holocaust and nationalistic wars of survival, and boasting, ironically, only an impotent United Nations security system.

35. See Christenson, supra note 7, at 43 n.25.
episodically hated by a majority of the organization. An additional task for the international human rights movement, therefore, is to seek means of enforcing limits not only on governments but also on the UN.

III. INCORPORATING HUMAN RIGHTS NORMS

An adequate theory of incorporation of human rights norms into the process of constitutional interpretation requires prior acceptance of the contradiction between the negative limits and the affirmative goals that underpin human rights law. The allocation and exercise of power under some orderly expectations of restraint do not necessarily require a purely democratic global theory, which in effect would subject the institutions of the United States to the same kinds of majoritarian pressures that our own minorities face daily. But the growing, living American Constitution can be used as an intellectual and moral force in the world, and at the same time permit new normative experience to enter from the world through interpretation of its constitutional ambiguities and interstices.36

By what theory is it possible to use those open-ended provisions of the Bill of Rights as windows through which we may peer at the rich sources of fundamental rights or values beyond our own polity? The international human rights movement seeks a sharing of values and aspirations at a level that all states may accept. While domestic and international contexts differ, these values remain the same. If the Austinian state, where law is the sovereign command that restrains breaches of peace, is obsolete; if the nation-state system is in transition with various states of culture and structure; and if the contradictions of capitalism have also turned into contradictions within Marxist thought itself, then the great irony is that, ultimately, international human rights logically are claims from the larger community, interposed in any polity with whatever political ideology for both limiting power and allocating resources.37

The narrowest theoretical question for us, then, is by what constitutional means a court may interpose wider community norms between a nation-state and a citizen of that state to limit the acts of a representative majority.38 My interpretation suggests that consensus about in-

36. See id. at 55-57.
37. See D'Amato, supra note 12, at 1112-27 (seven propositions about the place of human rights in international law).
38. The question is thus narrowed because international law is a horizontal legal order limited by reciprocal enforcement applied to individuals directly by states or supranational institutions. See id. at 1118, 1123; 49 U. Cin. L. Rev. 880, 890-91 (1980).
ternational human rights is replacing the original social contract theory underpinning the European liberal state that formed the basis for our present constitutional system of rights. If this interpretation is sound, then our federal courts ought to pay heed, seeking to understand what they do in two situations. First, in one guise or another, by non-democratic judicial activism, they seek to evolve and implement affirmative values in a manner quite inconsistent with classic liberalism, where the rule of law places negative limits only for violation of a process due or for violations of specific Bill of Rights limitations. Without a proper understanding of the broader context, how can the full sweep of judicial activism be justified by principled reasoning? Second, by using common-law methodologies and open-ended texts, our federal courts, in effect, have made possible a source for recognizing unenumerated rights shaped in a global context. Without such a context to guide interpretation, how can the courts answer the charge of judicial abuse? Let us then turn to the particular issues of due process and equal protection, beginning with some concrete cases in the federal courts.

IV. Informing Due Process

Recent federal court decisions show better than theoretical paradoxes how the human rights context can help shape practical decisions. We have seen throughout history how a strict body of law can be humanized in its concrete application through the influence of ethical doctrines such as Greek stoic thought or moral principles operating in the guise of equity. In Roman law, for example, the *jus gentium* based on principles of right reason came to replace the stricter *jus civile* in cases involving non-Roman citizens tried under the edicts of the *praetor peregrinus*. Equity jurisprudence similarly relieved the strictures of the common law in England case by case. The vast heritage of moral philosophy informed decisions in each of these epochal examples of intrusions by external factors into the realm of positive law.

A similar process is presently showing signs of emerging in the United States. Given the spirit of judicial isolation in domestic courts, however, technical arguments are needed to sustain it. Two recent

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cases have been selected for study in this connection. One involves protection of excludable aliens from arbitrary detention,\textsuperscript{43} and the other involves children of illegal aliens deprived of access to public education and who successfully brought suit under the equal protection clause.\textsuperscript{44} Both cases open the door for potential use of human rights norms both to trigger heightened scrutiny of state action and to use in other cases involving national power.

In \textit{Fernandez v. Wilkinson}, the district court used international law as a factor to determine the protection to be accorded excludable aliens who had not gained entry to the United States. In that case, a federal district court in Kansas was confronted with a writ of habeas corpus of a Cuban refugee alleging “confinement” in a federal maximum security prison in violation of the eighth amendment and the due process clause of the fifth amendment.\textsuperscript{45} The refugee, who arrived with the “freedom flotilla” in June 1980, was excludable, but his deportation proved impossible because Cuba refused to readmit any of the refugees.\textsuperscript{46} Temporary detention of excludable aliens not immediately deportable is sanctioned by statute\textsuperscript{47} and court decision,\textsuperscript{48} but other than temporary parole, return to the transporting vessel or transportation to another country, no process for obtaining temporary release is available.\textsuperscript{49} In fact, under a revered fiction created by the Supreme Court, excludable aliens are considered not legally present in United States territory and therefore are outside the class of “persons” protected by the due process clause.\textsuperscript{50} An excludable alien seeking a


\textsuperscript{44} Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), \textit{aff’d}, 102 S. Ct. 2382 (1982).


\textsuperscript{46} 505 F. Supp. at 789, 792.


\textsuperscript{48} 505 F. Supp. at 790-91.

\textsuperscript{49} \textit{Rodriguez-Fernandez}, 654 F.2d at 1389, 1390.

\textsuperscript{50} The fiction excluding these particular aliens from constitutional protection is an old one, resting on the status of the aliens. \textit{See} Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953). It is based on the premise that excludable aliens have not been admitted into the United States and therefore are not technically within its jurisdiction even if they are physically present. This fiction, which is the functional equivalent of treating excludable aliens as non-persons, may be overcome by using human rights norms to interpret the word “person” in the fifth and fourteenth amendments. \textit{See} Christenson, \textit{supra} note 7, at 50.

The precise argument for using human rights norms to so interpret the fifth and fourteenth amendments must be narrow and should not suggest that all preventive detentions be barred. Even under human rights norms, some detention of excludable aliens is permissible. Detention should be prohibited only when it is not related to a compelling interest in protecting the public. The detention must not be arbitrary or unreasonably long in relation to the time needed to determine what should be done with the alien. Human rights norms provide a way in which the competing interests may be balanced; however, their use must not be overstated.
writ of habeas corpus, therefore, cannot look to the Constitution for protection from indeterminate detention. Confronted with this lacuna, the district court used international human rights norms to shape a remedy granting relief from arbitrary detention.

The Court of Appeals for the Tenth Circuit affirmed, based on its construction of the applicable statutes, and held that "detention is permissible during proceedings to determine [aliens'] eligibility to enter and, thereafter, during a reasonable period of negotiating for their return to their country of origin or to the transporter that brought them here. After such time, . . . the alien would be entitled to release." The Tenth Circuit deemed it proper to consider principles of international law in determining the fairness and propriety of detaining aliens pending exclusion and stated that its holding was consistent with accepted principles of international law that individuals be free from arbitrary detention.

The Fernandez and Rodriguez-Fernandez decisions are significant for several reasons. First, human rights law is used artfully to grant relief to a narrow group of persons who would otherwise not be entitled to protection because of a fiction that is the functional equivalent of treating them as non-persons. The district court in Fernandez was "unwilling to initiate the corrosion of this venerable legal doctrine [that excludable aliens are not legally present] by holding that the force of the fiction diminishes" as the time that an excluded alien is detained increases. The court thought such a holding unnecessary because it found that its review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law.


51. The court reasoned in Fernandez that "the machinery of domestic law utterly fails to operate to assure protection." 505 F. Supp. at 795.
53. Id. at 1388.
54. Id. at 1390.
55. See supra note 50.
56. 505 F. Supp. at 790.
57. Id. at 798.
Universal recognition of the principle that all human beings should be protected from arbitrary detention provides a narrow base from which a gap in United States constitutional law may be filled without a direct need to challenge the validity of Supreme Court jurisprudence.\textsuperscript{58} While the district court used autonomous human rights norms to fill a narrow gap in constitutional protection, the Tenth Circuit, in effect, used those same rules to expand the notion of due process. Observing that due process is an evolutionary concept that takes into account accepted notions of fairness, and recognizing the fundamental principle that all human beings should be free from arbitrary detention, the court determined that Fernandez had been detained arbitrarily.\textsuperscript{59} Rather than finding that the Constitution failed to provide protection, the court of appeals arguably interpreted the concept of due process, enlightened by principles of international law, to cover excludable aliens in detention situations. The opinions of the district court and the court of appeals thus show that autonomous international human rights norms can be used either to fill gaps in constitutional protection or to interpret constitutional commands, and that in both cases the results are substantially the same.\textsuperscript{60}

The second reason that the Fernandez and Rodriguez-Fernandez decisions are significant concerns the use of human rights norms in fixing a standard by which to define arbitrary detention with respect to a group of persons unprotected by the fifth amendment. The district court properly looked to positive sources of customary international law as evidence that a fundamental human right to be free from arbitrary detention exists.\textsuperscript{61} These sources of international law were treaties and the custom and practice of civilized nations.\textsuperscript{62} The district

\textsuperscript{58} An interesting aspect of this narrow use of international law in constitutional interpretation is that it would have been quite unnecessary to find and apply the positive human rights law had the Supreme Court given proper meaning to “persons” under the fifth amendment. The fifth amendment states that “no person” may be denied due process; it does not say “no citizen or legally admitted alien.” See \textit{U.S. Const. amend. V}; Christenson, \textit{supra} note 7, at 50.

\textsuperscript{59} 654 F.2d at 1388.


\textsuperscript{61} 505 F. Supp. at 795-800. The district court, citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), stated that “[p]rinciples of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general custom and practice of nations and relevant judicial decisions.” 505 F. Supp. at 798.

\textsuperscript{62} The district court's review of the sources of customary international law included the United Nations Charter, \textit{signed} June 26, 1945, 59 Stat. 1031, T.S. No. 993; the Universal Declaration of Human Rights, \textit{G.A. Res. 217A (III)}, 3 \textit{U.N. GAOR}, \textit{U.N. Doc. A/810} (1948), and the views of legal scholars that the Universal Declaration, through its wide acceptance, has made binding customary law; the American Convention on Human Rights, \textit{signed} Nov. 22,
court went no further than necessary to find and apply the particular norm against arbitrary detention, and did not invoke "natural law" to fill this narrow gap in constitutional protection. This laudable restraint is an important aspect of the proper use of international human rights norms by United States courts. These norms supply a context, guide interpretation and fill gaps in the positive law, but their use requires convincing technical presentation of the positive sources of customary international law before they are contextually persuasive.

This pattern of legal growth through ad hoc interpretation of discrete rights is new neither to the common-law tradition nor to its civil law counterpart. It is in fact remarkably similar to the preference shown in Bill of Rights litigation, after rejection of Justice Black's theory of wholesale incorporation of the Bill of Rights into the fourteenth amendment, for separate consideration of each fundamental right. One at a time, fundamental rights based on the first eight amendments have grown through constitutional adjudication and have been made directly applicable to state action by careful, manlike judicial use of open-ended constitutional provisions limiting the majoritarian power of government. My thesis is that the human rights context similarly offers an alternative source of tools for arriving at principled decisions while avoiding the dangers of subjective activism. Interpreting individual cases arising under the due process clause within this context can transform theoretical contradictions outlined above through practical decisions that avoid placing the United States in direct conflict with international law.

1969, OAS T.S. No. 36, OAS O.R. OEA/Ser. L/VII.23 doc. 21 rev. 6 (1979), O.R. OEA/Ser. A/I 16; the Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222 (1968); the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966. (The court cited these last three documents as "indicative of the customs and usages of civilized nations." 505 F. Supp. at 797.) The court also quoted Congressman Donald M. Frasier and Patricia M. Derian, former Assistant Secretary of State for Human Rights and Humanitarian Affairs, as members of the Congress and Executive Department who have recognized an international legal right to freedom from arbitrary detention. Id. at 797-99. Furthermore, the district court, citing France ex rel. Madame Julien Chevreau, M.S. Dept. of State, file no. 500.A1/1197 (cited in M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1937)), stated that "[t]ribunals enforcing international law have also recognized arbitrary detention as giving rise to a legal claim." 505 F. Supp. at 798-99.

63. A giant leap would be required if one were to argue incorporation of the entire corpus of human rights law into United States constitutional law, as some human rights advocates have insisted. The court did not make such a leap, nor should we. See Christenson, supra note 7, at 51.
64. See id. at 52 n.71.
65. See generally Brest, supra note 1; Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).
V. Informing Equal Protection Analysis

The recent case of *Plyler v. Doe* involved a Texas statute that denied reimbursement to local school districts of funds spent for the education of children who were not residing in that district or who were not legally in the United States. The Supreme Court did not apply the test of strict scrutiny, finding that illegal aliens were not a "suspect class" because their illegal presence in this country was constitutionally relevant and that the Constitution guaranteed no fundamental right to education. Justice Brennan, writing for a majority of five, applied an intermediate standard of scrutiny by reason of the "lifetime hardship" the statute in question represented for this "discrete class of children not accountable for their disabling status." The majority enunciated the standard of scrutiny it applied by predetermining the necessary rationality of the legislation upon the "[furtherance of] some substantial goal of the State." Citing *De Canas v. Bica* for the proposition that states "do have some authority to act with respect to illegal aliens . . .," the Court nevertheless found no congressional policy providing any support for the state statute.

In *Plyler*, as in *Fernandez*, some individuals were denied constitutional protection by reason of a status derived from a statutory classification. Human rights activists have argued that positive human rights law recognizes a right of access to free public education for all children. These arguments go beyond what is needed to inform the guarantee of equal protection. No Supreme Court decision has ever recognized a constitutional right to education, as the Court in *Plyler* affirmed. However, once a state decides to provide free public education, it may not lightly deny some children that privilege, although disparities due to wealth validly may exist. If children are denied

66. 102 S. Ct. 2382 (1982).
67. Id. at 2398.
68. Id.
69. Id.
70. Id.
71. 424 U.S. 351 (1976) (states have some authority to act with respect to illegal aliens, at least where state legislation embodies federal objectives and advances proper state goals).
72. 102 S. Ct. at 2399.
73. Id. at 2400.
75. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (any wealth discrimination against residents of less wealthy districts, created by ad valorem tax levied by
education solely by reason of their status as illegal aliens, however, a stronger argument would be that specific human rights provisions, binding upon many nation-states through external sources of custom or agreement, justify application of a stricter standard of scrutiny to discriminatory classifications burdening these rights. This argument is more persuasive than the argument that an autonomous human rights norm such as free public education, never recognized as such in United States constitutional law, limits state action. In a proper case, of course, the existence of such a norm might be so universal as to constitute a limitation on state action even if the strict scrutiny standard of equal protection fails (as in genocide). But to have to sustain the existence of such a limitation by using customary international law would impose a heavy burden indeed on the proponent.

Discriminatory classifications based on race, sex and legal alienage trigger strict, or at least heightened, scrutiny. The class of excludable aliens such as in Fernandez also may require heightened scrutiny of any state action not preempted by the federal power over foreign affairs. One question in Plyler, thus, was whether a classification entailing discriminatory treatment of children of illegal aliens had to survive a stricter standard of scrutiny than the normally minimal standard requiring merely that state action be rational.

One method of approaching this question, in addition to traditional tests, is to examine the broader context of the right being abridged by the discriminatory classification. Human rights norms can provide that context. They indicate the consensus of civilized nations that education and equal treatment for aliens or minorities without political power are important values. This Article argues that discriminatory classification that burdens a fundamental right reinforced by these international norms should trigger, under principles of equal protection, at least heightened scrutiny. This interpretation offers a principled way to recognize the growth of important unenumerated


77. For a discussion of the present tendency to use federal preemption instead of equal protection analysis, see Note, State Burdens on Resident Aliens: A New Preemption Analysis, 89 Yale L.J. 940 (1980) (preemption test with analogy inquiry more satisfactory than equal protection analysis to distinguish between permissible and impermissible state burdens on resident and illegal aliens).


rights related to those protected in our Bill of Rights while maintaining representative democracy in balance with judicial activism. Equal protection claims for stricter scrutiny might be reinforced with evidence of customary international law in which a given right is deeply rooted in a universal consensus using external sources of law. Constitutional theory thus can be used to invalidate discriminatory classifications that intrude upon fundamental human rights of illegal aliens without meeting the test of compelling or significant state interest by narrowly tailored means. \(^8\) Perhaps even citizens might use such an argument when rights accorded them by nation-states are established by traditional sources of international law.

This argument is tighter and less vulnerable than one that claims that a discriminatory law must fall because it violates either a treaty standard, when the treaty is not clearly self-executing, or a standard incorporated from customary international law. By using arguments of incorporation, in fact, human rights zealots can do much harm. If a vulnerable ground is presented to the Supreme Court, an advocate invites the Court to reject it, especially when it is neither essential to the case nor necessary for decision. Using human rights norms to buttress a claim for a standard of constitutional scrutiny more strict than it otherwise might be does not risk rejection of the claim. The interpretive aid, moreover, offers sources that reconcile customary international law with the Constitution. Claims for wholesale incorporation of customary international law, such as the Universal Declaration of Human Rights, \(^8\) into federal common law are simply too weak. \(^8\) Also, they can be superseded by statute. A comprehensive study, cataloguing basic human rights in the equal protection context through use of the conventions and customs available, might serve as an analytic tool to arrive at a more adequate standard of scrutiny in cases involving fundamental human rights.

\textit{Plyler} leads us directly to consider equal protection in other alienage cases. Supreme Court decisions in the last few terms have opened another area of confusion: the troublesome question of defining substantive grounds for determining the level of scrutiny to be used. In deciding how external sources might aid in defining these grounds, we need to trace the decisions.


\textsuperscript{82} See Christenson, \textit{supra} note 7, at 40.
VI. ALIENAGE: THE EVOLUTION OF TESTS APPLIED IN EQUAL PROTECTION CASES

Supreme Court tests for scrutinizing statutory classification schemes in suits by aliens invoking the equal protection clause of the fourteenth amendment (or the equal protection component of the fifth amendment) have evolved from an original preference for the rational basis test. Next, the Court introduced strict scrutiny of a suspect classification, with a recent return to a rational basis analysis for legislation supported by overriding national interests. The latter political or governmental exception to the new general rule of strict scrutiny in alienage cases presents curious anomalies questioning the validity of incorporating the equal protection clause of the fourteenth amendment (limiting state action) into the fifth amendment (limiting national power). The equal protection analysis under both amendments should be informed by external sources of developing human rights norms. My technical argument is that this interpretation offers a principled explanation of the anomaly with guidelines that provide a sound policy for protecting “discrete and insular minorities” in relation to national power.

Recent alienage cases requiring equal protection analysis have used the rational basis test when examining classifications of applicants for “public function” employment. Under the test derived from Sugarman v. Dougall,

each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. ... [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formation, execution, or review of broad public policy perform functions that go to the heart of representative government.

This test has meant rational basis scrutiny for (and the upholding of) requirements of American nationality to be a state trooper and intent at least to seek naturalization for potential public school teach-

83. See generally Hull, Resident Aliens and the Equal Protection Clause: The Burger Court’s Retreat from Graham v. Richardson, 47 Brooklyn L. Rev. 1, 39-41 (1980) (concluding that the Court appears to have retreated from, if not in fact repudiated, its holding in Graham v. Richardson, 403 U.S. 365 (1971)).
85. For the Court’s own historical overview of this process, see Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 604-05 (1976).
86. 413 U.S. 634, 647 (1973).
ers. In a very recent case, *Cabell v. Chavez-Salido*, the Court once again applied the "public function" exception to the strict scrutiny "rule" for aliens. The case involved resident alien applicants for the position of deputy probation officer, classified by statute in California under the general heading "peace officer." Although the classification of positions as "peace officers" was described as lacking any rational basis by the dissent, the Court in a five to four decision sustained as reasonable the state requirement that deputy probation officers, as peace officers whose functions went "to the heart of representative government," had to be American citizens. In *Plyler*, by contrast, although the Court in effect applied an intermediate standard of scrutiny to invalidate the tuition charge for children of illegal aliens, it refused to hold that they constituted a "suspect class."

Certain cases have applied due process analysis rather than equal protection principles to alienage classifications. In *Terrace v. Thompson*, a 1923 case that upheld a state statute prohibiting ownership of land by aliens who had not declared their intention to become citizens of the United States, the Court reasoned that the statute was not so capricious as to amount to an arbitrary deprivation of liberty or property. In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, the Court held unconstitutional a Puerto Rican statute barring aliens from private practice as engineers, under both the equal protection clause of the fourteenth and the due process clause of the fifth amendment, using the *Bolling v. Sharpe* technique of condemning egregious, offensive discrimination as violative of due process. In *Mathews v. Diaz*, the Court used the rationality test in a unanimous decision upholding under the due process clause a section of the Social Security Act that denied medicare benefits to aliens sixty-

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89. 454 U.S. 432 (1982).
90. Id. at 433-34.
91. Id. at 451-52 (Blackmun, J., dissenting).
92. Id. at 440, 445-47 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).
93. 102 S. Ct. 2382, 2398 (1982) (noting that in view of costs both to country and to alien children, "discrimination [worked by the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State").
94. 263 U.S. 197, 216-18 (1923). The Court also determined that the statute was not repugnant to the equal protection clause. Id. at 218-22. Thus the due process analysis the Court applied was not the exclusive test used to determine the constitutionality of the statute in question.
97. 426 U.S. at 599-606.
five years or older who had neither been admitted for permanent residence nor resided in the United States for over five years.98

The "traditional" strict scrutiny of alienage classifications seems to apply at present only to questions of private, economic benefits.99 Whenever the strict scrutiny test is applied to nonpolitical cases, in most instances it results in prompt invalidation of the challenged legislation.100 That the Court recognizes its lack of consistency in this area is evident from Justice Powell's declaration in In re Griffiths: "To be sure, the course of decisions protecting the employment rights of resident aliens has not been an unswerving one."101 The Court, not surprisingly, attaches no "particular significance" to the variety of adjectives that describe the kind of state interest required to overcome the strict scrutiny standard: "overriding," "compelling," "important," or "substantial."102

In addressing the constitutionality of state statutes involving aliens, the Court has used, in addition to the equal protection and due process clauses, analyses based on the supremacy clause, the exclusive federal power over immigration and naturalization, preemption and even "political question" considerations. The recent case of Toll v. Moreno confirms the present tendency of the Court to base its decisions in federal cases on the supremacy clause or Congress's immigration and naturalization power rather than the more traditional equal protection or due process analysis as applied to state action.103 The Moreno Court expressly declined to consider plaintiffs' due process and equal protection challenges to the University of Maryland's policy of refusing "in-state" status for tuition purposes to children of G-4 visa

98. 426 U.S. 67 (1976). The Court also relied on the great deference owed to Congress in the "political question" of 440,000 Cuban refugees and potential claimants then in the country, thus begging the question in part, because all legal questions at the same time contain political assumptions. See id. at 81-82 & nn 20-21.

99. See Toll v. Moreno, 102 S. Ct. 2977, 2988 (1982) (Blackmun, J., dissenting) (discussion of present state of affairs in the equal protection/alienage area, emphasizing that the Court has "experienced no noticeable discomfort in applying strict scrutiny to alienage classifications that did not involve political interests").

100. See, e.g., Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (citizenship requirement for civil engineering practice under Puerto Rican statute struck down); In re Griffiths, 413 U.S. 717 (1973) (citizenship requirement for admission to the Connecticut bar violates equal protection clause under strict scrutiny analysis); Sugarman v. Dougall, 413 U.S. 634 (1973) (New York statute barring aliens from competitive civil service struck down under strict scrutiny test); Graham v. Richardson, 403 U.S. 365 (1971) (state statutes relating citizenship requirements to welfare benefits failed strict scrutiny test and impermissibly encroached upon exclusive federal power over immigration and naturalization).


102. Id. at 722 n.9.

103. See 102 S. Ct. 2977 (1982).
holders (employees of international organizations, banks, etc. who are allowed to establish a domicile in the United States). That policy, the Court held instead, violated the supremacy clause.104 As sources of the federal power over immigration, Justice Brennan cited the “Uniform Rule of Naturalization,” the “foreign” commerce clause and the foreign affairs powers, and in a footnote cited an article by Perry to the effect that “commentators have noted . . . that many of the Court's decisions concerning alienage classifications . . . are better explained in preemption than equal protection terms.”105 This analysis, however, begs the question of why, if the same limitations of equal protection apply to the national government as to state action, a federal statute could do what a state statute could not.

In his dissent in Moreno, Justice Rehnquist maintained that the Immigration and Nationality Act in no way precludes states from passing laws that burden aliens, and those laws will be invalidated only if they frustrate Congress's “unambiguously declared . . . intention” to preempt the field.106 Moreover, he asserted that “[i]n light of several recent decisions, . . . it is clear that not every alienage classification is subject to strict scrutiny” and discussed the most commonly advanced justification for strict scrutiny of alienage classifications: lack of access to the political process and the ensuing powerlessness.107 He argued that in light of the recently enhanced political function exception to the strict scrutiny requirement in alienage cases, “the political powerlessness of aliens is itself the consequence of distinctions on the basis of alienage that are constitutionally permissible.”108 Thus he concluded that legislation affecting aliens should be subject only to rational basis scrutiny.109 Justice Blackmun, in a concurrence highly critical of Rehnquist's position, forcefully insisted that alienage continues to be a suspect criterion and that aliens remain members of a discrete and insular minority, often “victims of irrational discrimination.”110

Moreno illustrates the trends presently vying for predominance in the field of alienage: equal protection tests (strict scrutiny, heightened scrutiny or rational basis) and non-equal protection devices (the supremacy clause, preemption or federal powers over immigration or

104. Id. at 2986.
105. Id. at 2983 n.16 (citing Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023 (1979)).
106. Id. at 2991 (Rehnquist, J., dissenting).
107. Id. at 2997-99.
108. Id. at 2998.
109. Id. at 2997.
110. Id. at 2987-88.
foreign affairs). The area, in sum, is in a state of flux. An adequate conceptual framework, using external sources of human rights law, might offer a principled way out of the paradox of judicial provincialism at each of the points of equal protection or due process analysis.

VII. THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

As a transition between the discussion of equal protection regarding aliens and the incorporation of the equal protection component into the fifth amendment, no case is more appropriate than Hampton v. Mow Sun Wong, a five to four decision the Court handed down in that “year of the alien” 1976 (with which 1982 seems in serious competition). The most interesting aspect of Hampton is its express declaration that the federal government, by virtue of its exclusive power over aliens, validly can pass legislation that would be invalid under the equal protection clause of the fourteenth amendment. Hampton contains a relatively long comparison of the equal protection elements of the fifth and fourteenth amendments. In addition, the court mentions “overriding national interests” as possible justification for a rule “that would be unacceptable for an individual State.” This anomaly leads us to inquire whether the paradox of judicial provincialism might be broken by reference to a broader body of positive human rights norms, not as a limitation but as an external source that could inform the meaning and shape the growth of constitutional limitations.

Before discussing the vicissitudes and actual mechanics involved in grafting fourteenth amendment equal protection onto the fifth amendment stalk, it is useful to set forth the underlying philosophy of the operation. One of the best formulations of the Court’s conception

111. See infra notes 124-26 and accompanying text.
113. See 426 U.S. 88, 100 (1976).
114. id.
115. See Christenson, supra note 7, at 54 (human rights norms should be used to interpret existing constitutional standards rather than as independent authority to support claims of denial of fundamental rights).
of that rationale is found in Hampton: "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." This ideal impartiality is as difficult to attain as it sounds, and the Court is well aware that the line of its decisions involving equal protection, whether under the fifth or the fourteenth amendment, is far from "unswerving." Justice Rehnquist's majority opinion in the recent case of United States Railroad Retirement Board v. Fritz recognized the difficulty of deducing trustworthy guidelines from those decisions:

The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in Lindsley, . . . Royster Guano Co., . . . or any of the other cases referred to in this opinion and in the dissenting opinion.

After providing this revealing glimpse at the judicial attitude toward the solidity of precedent, the Justice explained how the Court avoids a non liquet: "But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires . . . ."

This realization that due process and equal protection cases are increasingly difficult to synthesize was mentioned once again by Justice Powell in his concurrence in a 1982 case, Logan v. Zimmerman Brush Co. His concurrence is yet another recognition of the anomalous results in the equal protection cartography:

It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved.

116. 426 U.S. at 100.
117. See supra note 101 and accompanying text.
118. 449 U.S. 166 (1980) (upholding with great deference Congress's classification by which some railroad employees eligible for both social security and railroad retirement benefits retained the "windfall" while others did not).
119. Id. at 176 n.10 (citations omitted).
120. Id.
121. 455 U.S. 422 (1982).
122. Id. at 443 n.* (Powell, J., concurring).
This awareness of possible inconsistencies in its equal protection decisions leads the Court on occasion to be skeptical about the different degrees of scrutiny and thus of the basis for deference to the legislature. Justice Rehnquist, writing for the majority in *Rostker v. Goldber*, described the dangers presented in applying equal protection scrutiny to the national government in the draft registration case: "Announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."123 The Court's deference in *Rostker* to the national power of Congress was extraordinary.

Despite the dangers and anomalies, it is possible to trace the evolution of equal protection incorporation into the fifth amendment. Commentators who have studied this evolution are not in agreement about whether the two modes of equal protection are identical. Kenneth Karst has maintained that the content of both equal protection norms is indeed the same.124 More recently, Robert Bohrer, insisting on Chief Justice Warren's language in *Bolling v. Sharpe*,125 asserted that the two are not identical, and that the inquiry under the equal protection component of the fifth amendment must remain "whether a discrimination is 'so unjustifiable as to be violative of due process.' "126 Bohrer pointed out that between *Bolling* and *Shapiro v. Thompson*,127 the Court ceased to make any distinction between the two modes of equal protection.128 Dean Ely's trenchant analysis of the annals of incorporation rests on the plain meaning of the fifth and fourteenth amendments, noting that if equal protection is included in the concept of due process, why was it necessary to make it an express limitation on the states?129 This gradual confusion lasted until *Hamp-*

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125. 347 U.S. 497, 499 (1954) ("[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases").
ton, and no attempt to work through a principled explanation of the incorporation was made. References to the problem of equal protection incorporation into the due process clause of the fifth amendment simply assumed the conclusion. Practically all such references have been made by way of a footnote. Little by little those footnotes became quite as stylized as African art, with only a few variations on the theme.\textsuperscript{130}

The leading case after Bolling was Schneider v. Rusk.\textsuperscript{131} The Schneider Court used the Bolling conception of due process type equal protection in a fifth amendment decision based in part on "impermissible presumption" grounds, the presumption being that naturalized citizens are apt to be less loyal to the United States than the native born variety.\textsuperscript{132} Five years later, in Shapiro v. Thompson, what became the state of the art footnote appeared in the body of the opinion: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"\textsuperscript{133} Chief Justice Warren's dissent in Shapiro expressed his dissatisfaction with the majority's application of a strict scrutiny standard to the right of travel, allegedly infringed by a District of Columbia statute imposing a residence requirement for welfare applicants to receive benefits.\textsuperscript{134} Justice Harlan, also in dissent, implied that the Court might become a super legislature if it picked out rights at random and labeled them "fundamental" without principled classificatory criteria.\textsuperscript{135}

A number of cases have held that the Court's analysis is the same in all equal protection cases regardless of their ultimate basis in the fifth or the fourteenth amendments.\textsuperscript{136} More recent decisions have used the

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\item 130. For other uses of footnotes, see, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (the famous Carolene Products footnote). In a more recent example, Chief Justice Burger used the ninth amendment with respect to unspecified aspects of the sixth amendment right to public trial in what may become another famous footnote. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (ninth amendment drafted to allay the fears of those concerned that expressing certain guarantees could be read as excluding others).
\item 131. 377 U.S. 163 (1964). A section of the Immigration and Nationality Act depriving naturalized citizens of their American nationality if they resided more than three years in their country of origin was struck down as discrimination "so unjustifiable as to be violative of due process." Id. at 168 (citing Bolling, 347 U.S. 497, 499 (1954)).
\item 132. Id.
\item 133. 394 U.S. 618, 642 (1969) (citing Bolling, 347 U.S. 497, 499 (1954)).
\item 134. See id. at 652-53 (Warren, C.J., dissenting).
\item 135. Id. at 661 (Harlan, J., dissenting).
\item 136. Among the more forceful affirmations of that idea are those in Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); Weinberger v. Salfi, 422 U.S. 749, 770 (1975) ("While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth

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same tests or levels of scrutiny under both modes of equal protection. An interesting suggestion that equal protection guarantees were part of the Constitution even before promulgation of the fourteenth amendment and therefore obviously as much a part of the fifth as the fourteenth is found (in a footnote!) in Vance v. Bradley:

Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States . . . . Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws. 138

This literary conceit surely is a legal fiction, for how can the need for the express equal protection clause be explained other than to admit a stricter standard for states than for the federal government? The reason is that the new normative experience buttressing the judicial notion of similar limits on all power grew from the values underpinning the concerns for human rights after World War II. Yet, the justices are so skeptical of subjectivism that they blanch at any attempt at defining unenumerated fundamental rights. 139 Partly, this reluctance rests on the fallacy of the Court’s own subjective preference for tailoring external sources of law in constitutional interpretation. This reluctance becomes a provincial paradox when the very reason used for asserting an overriding national interest in controlling aliens is a concept of international law called “sovereignty.” If that concept is used to assert power requiring less strict scrutiny than that provided under equal protection analysis, then why not use international law

137. See, e.g., Califano v. Westcott, 443 U.S. 76, 89 (1978) ("We conclude that the gender classification of [the statute] is not substantially related to the attainment of any important and valid statutory goals. It is, rather, part of the 'baggage of sexual stereotypes' . . . . Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment").

138. 440 U.S. 93, 94 n.1 (1979) (citing Hampton, 426 U.S. 88 (1976); Buckley, 424 U.S. 1 (1976); Weisendfeld, 420 U.S. 636 (1975); Bolling, 347 U.S. 497 (1954); other citations omitted). In Vance, the Court upheld a provision of the Foreign Service Act that provided for mandatory retirement at age sixty under the rational basis standard.

139. See supra note 18 and accompanying text.
concepts to inform the meaning of limits on sovereignty suggested by the emergence of new norms of human rights law, established under traditional methods using well-defined sources of law? Under this conception, the principled basis for heightened scrutiny in fifth amendment cases would not be to incorporate these norms into the Bill of Rights, as some have suggested, but to use them to determine whether the burden on human dignity is so fundamentally proscribed that scrutiny of the exercise of sovereign power increases.

The cases in which the identity of fifth and fourteenth amendment equal protection is asserted are cases in which the “levels of scrutiny” the Court applies to federal legislation are the same as those it applies under the fourteenth. When the Court in Califano v. Boles refused to “certify” a class as actually discriminated against by the allegedly discriminatory legislation, and thus applied a rational basis standard of review, it made no express references to incorporation of fourteenth amendment equal protection into fifth amendment due process. The Court simply stated that “to make out a disparate impact warranting further scrutiny under the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against consequently suffers significant deprivation of a benefit or imposition of a substantial burden.” Human rights norms would aid in determining whether a deprivation or burden might result in a substantial departure from universal expectations of human dignity and thereby inform the Court’s use of strict scrutiny.

Hampton v. Mow Sun Wong was a crossroads of issues, and marks either a turning point or an accident in the evolutionary process under consideration here. That case involved the constitutionality of Civil Service Commission regulations barring aliens from Civil Service employment. The decision referred to the difference between equal protection clause of the fourteenth amendment and the equal protection component of the fifth. “[B]oth Amendments require the same type of analysis” according to the Court, but “the two protections are not always coextensive.” Pointing out that while both amendments contain identical due process clauses, only the fourteenth boasts an equal protection clause, the Court stated in a footnote its belief that “the primary office of the [Equal Protection Clause] differs from, and is

140. See 443 U.S. 282 (1979) (statute denying social security insurance benefits to unwed mothers upon death of the father held constitutional; classification was rationally related to a legitimate legislative purpose).
141. Id. at 295.
143. Id. at 100.
additive to, the protection guaranteed by the [Due Process Clause].” The Court went on to underscore that in certain circumstances, equal protection analysis is more stringent when applied to the states: “there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.” When there are no “overriding national interests,” the Hampton Court noted that “the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.” As an example of legislation not presenting an “overriding national interest,” the Court indicated “a federal rule . . . applicable only to a limited territory, such as the District of Columbia, or an insular possession . . . ”

Hampton seems to be the first case in which the Court stated that a difference may exist in the equal protection standards applied to the government and to the states, although Justice Harlan, dissenting in Shapiro, previously mentioned that possibility. According to Hampton, however, the different, less stringent standard would apply to federal legislation only when “an overriding national interest” is involved. Whether the Court has always followed that directive, and whether that directive is limited to alienage cases, is difficult to ascertain because equal protection cases in each instance turn on complicated legislative facts. A 1981 case, Schweiker v. Wilson, illustrates the Court’s traditional conceit, i.e., that equal protection tests and principles of scrutiny remain the same under the fifth and the fourteenth amendments: “This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” Schweiker, however, upheld in a five to four decision a section of the Social Security Act that in effect denied federal “comfort money” to certain residents of public mental institutions. Congress had excluded from the Supplemental Security Income

144. Id. at 100 n.17.
145. Id. at 100 (emphasis added).
146. Id. (citing Bolling v. Sharpe, 347 U.S. 497 (1954), and Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926)).
147. Id.
148. Id.
149. Justice Harlan rejected, however, the need to resolve the problem at that time: “In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.” Shapiro v. Thompson, 394 U.S. 618, 658 n.3 (1969) (Harlan, J., dissenting).
150. 426 U.S. at 100.
151. 450 U.S. 221, 226 n.6 (1981).
program (SSI) those needy and disabled persons who were inmates of public institutions; it then made an exception to the exclusion and granted reduced comfort money (not over $300 per annum) to eligible persons in public facilities that received Medicaid funds. As the Medicaid program does not include persons from twenty-one to sixty-four in public mental institutions, those persons were denied the $25 or so per month under the SSI program. The majority applied a rational basis test to the facts, holding inter alia that the mentally ill as a class had been only indirectly deprived and declining to "intimate [any] view as to what standard of review applies to legislation expressly classifying the mentally ill as a discrete group."152 The district court had held the mentally ill to constitute a suspect classification.153

The holding in Schweiker seems to herald a loosening of the standards applied to the government when "national interests" are "overriding," in consonance with Hampton. If the national interest requires keeping international obligations, then the relevant human rights norms that protect the mentally ill and that can be found in external sources of law necessarily would be part of the analysis of overriding national interest. Perhaps the emerging norms would help define the minimum standards of human dignity that, when burdened, would result in heightened scrutiny. However, loss of a comfort benefit scarcely appears to burden those standards, even if the Court had found the mentally ill plaintiffs in Schweiker to have been express targets of the potentially unconstitutional legislation.

In any event, both Schweiker (1981) and United States Railroad Retirement Board v. Fritz (1980) are part of a trend toward showing great deference to the legislative branch. "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."154 Justice Rehnquist went on in Railroad Retirement Board to cite Flemming v. Nestor155 for the proposition that "it is, of course, 'constitutionally irrelevant' whether this reasoning in fact underlay the legislative decision . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."156 Justice Brennan's dissent in Railroad Retirement Board warned that "the mode of analysis employed by the Court . . . virtually immunizes

152. Id. at 231 n.13.
156. 449 U.S. at 179.
social and economic legislative classifications from judicial review."^{157} The Schweiker majority noted along this line that "[t]his Court has granted a 'strong presumption of constitutionality' to legislation conferring monetary benefits."^{158} Were the Court to consider external sources of human rights norms, it would at least have introduced a framework for review in difficult questions, even if positive norms cannot be established.

Deference to legislative decision without inquiry about reasonableness has created a new focus of debate that centers on the extent to which congressional "intent" must be actual. In Railroad Retirement Board, Justice Brennan maintained in dissent that the actual legislative purpose must be identifiable.^{159} Justice Rehnquist declared in his opinion for the Court that "we have historically assumed that Congress intended what it enacted."^{160} Justice Stevens, concurring, stated that the purpose must be something more than merely plausible, but not necessarily the actual purpose, it being sufficient that the purpose be legitimate such that "we may reasonably presume [it] to have motivated an impartial legislature."^{161}

The deferential rational basis test seems to be the method by which the Court at present reviews federal welfare legislation.^{162} Efforts are made to avoid finding suspect classes, and great deference is shown to the legislature, whose intent may even be presumed or supplied post hoc (although this attempt at extending the rational basis test is presently subject to lively debate in the Court).^{163} Since the rational basis variety of review in equal protection cases is similar to the test for valid legislation in due process cases, it is tempting to conclude that because the fifth amendment contains only a due process clause, the relationship of reasonable means to legitimate ends so characteristic of due process analysis also serves the equal protection component of the fifth amendment, except when specific and invidious discrimination of a suspect class is present. Otherwise, the textual absence of the equal protection clause might reinforce the use of the rational basis test in scrutinizing federal legislation to the detriment of higher levels

157. Id. at 183 (Brennan, J., dissenting).
159. 449 U.S. at 187 (Brennan, J., dissenting) (citing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)).
160. Id. at 179. Justice Brennan dismissed this declaration as tautological. Id. at 186.
161. Id. at 180-81 (Stevens, J., concurring).
162. See, e.g., Califano v. Boles, 443 U.S. 282 (1979) (Court applied rational basis test to uphold provision of Social Security Act denying "mother's insurance benefits" to unwed mothers and engaged in a general discussion of welfare cases since the 1930's).
163. See supra note 159 and accompanying text.
of equal protection scrutiny. This argument suggests that universal human rights norms offer a principled basis for heightened scrutiny to avoid conflict with responsibilities under international law, and that this analysis similarly informs the equal protection clause. Applying due process concepts in fifth amendment equal protection cases was quite possibly what the Bolling Court meant all along, without introducing the levels of scrutiny. If human rights norms can be introduced as valid external law for the purpose of construing ambiguities to avoid conflict with international law, then a stricter standard of scrutiny would be available in cases presenting the proper question.

The question of what external sources the federal courts could or should invoke in fifth amendment equal protection cases is an interesting one, especially when the exact role of the usual domestic sources—text, precedent, legislative history and legislative intent—is the object of heated debate.164 Suspect classes, formed on the basis of race, alienage, sex and illegitimacy, inter alia, are protected in many international instruments, and rights have been recognized in members of those classes.165 Modern constitutions contain lengthy references to them also: for example, the 1978 Spanish constitution, and subsequently the Civil Code and social security laws have eliminated to a large extent the former discrimination against illegitimate offspring.166 Modern African constitutions contain interesting reflections on “racist” speech, and the corresponding penal codes criminalize racial slurs and insults.167 While many international instruments hold that the right to leave one’s own country is a fundamental right, the right of international travel in this country has been held to constitute part of fifth amendment liberty and is susceptible to being curtailed by Congress through due process of law.168 Our federal courts could and should use international and comparative law sources to ascertain “modern” standards to fill any gaps in our domestic jurisprudence.169

164. Id.
166. Const. art. 39.2, 39.3 (Spain); Codigo Civil art. 108 (Spain).
168. See, e.g., Haig v. Agee, 453 U.S. 280, 306-07 (1981); Califano v. Torres, 435 U.S. 1, 4 n.6 (1979), and cases cited therein.
169. Two courts have done so in interpreting state constitutions in cases involving prisoners’ rights. See Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9, 1192-93 (D. Conn. 1980) (court
While the results of equal protection analysis may differ, even using external sources, the anomaly will have been avoided in reviewing state and federal action, and a way to limit judicial deference to the external sources, the anomaly will have been avoided in reviewing state and federal action, and a way to limit judicial deference to the national political branches will have been found.

VIII. Conclusion

The tradition of using external sources to interpret the Constitution is very strong in the United States. That tradition reflects both natural law, in which concepts such as reasonableness, experience, custom and universal principles are used as guides to clarify constitutional ambiguities, and positivism, in which judicial activism must be grounded in text since non-textual interpretations lack legitimacy. The modern strains of the struggle between natural law and positivism are as powerfully expressed today as they were when Story, Pound and Llewellyn were arguing them in different forms.170

The contemporary debate, however, is provincial rather than universal, for the intellectual assumptions that seem to be at work within the United States resist (and even consciously reject) an international context for judicial decision. But world-wide forces are as much at work in our polity today as were the domestic forces of frontier expansion, industrial revolution and depression during earlier periods of constitutional development. The curiosity is how, in the overwhelming explosion of cases and technical materials, our best minds have focused on inner coherence with little reflection on the connections between public order and the world of which we are a part. The responsibilities of those in universities, the American Law Institute, and the bench and bar make it imperative that we not turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders.

This Article, after presenting some of the paradoxes and contradictions arising from an interconnected world struggling for human dignity, and after outlining current challenges to the rule of law, offers a technical analysis and recommendation of a principled way by which new experience may be reflected in due process and equal protection

170. In a compelling recent argument for using modern natural law to overcome “internal or external” skepticism about judicial decisions, Ronald Dworkin’s Dunwody Distinguished Lecture in Law at the University of Florida defends the naturalist tradition amidst the ongoing debate. Dworkin, “Natural” Law Revisited, 34 Fla. L. Rev. 165 (1982).
decisions without the dangers of unfettered judicial activism. It draws
on the long tradition of using external sources to inform constitutional
interpretation in these cases.

Human rights norms emerging in positive international law can be
used to inform constitutional interpretation about the contemporary
meaning of due process and equal protection. I have focused on the
discrete and insular minorities—children of illegal aliens, undocu­
mented aliens in prison, and aliens subject to discriminating state and
national legislation—as well as some anomalies. While other minori­
ties among us might make use of similar arguments, my focus has been
narrower. I believe the principles are the same whenever the cases
present the proper questions.\textsuperscript{171}

I do not develop the case for using external sources of law in
general, but only as they come from the general category of positive
international law and a specific subcategory of emerging human
rights law.\textsuperscript{172} I offer the following criteria for use by the federal courts
when they face the need to link the judicial process to the protection of
basic rights in a changing world:

1. In cases involving constitutional protection for aliens or other
special groups under the due process clause, a court may use fundamen­
tal human rights norms established by traditional external sources of
custumary international law to help fill lacunae or to provide a context
for interpretation.

2. In determining the constitutional validity of legislation that dis­
criminates against unprotected aliens or other persons under the equal
protection clause, the same fundamental human rights norms may be
used to support a stricter standard of scrutiny for the classification than
that offered by the rational basis test. This use should avoid conflict
between democratic theory and the universal standards of the interna­
tional community.

3. The anomaly of different standards of scrutiny of state legislation
under the equal protection clause of the fourteenth amendment and of
national legislation under the equal protection component of the due
process clause of the fifth amendment may be reconciled by use of
fundamental human rights norms.

These three guides to constitutional interpretation will allow the
judiciary to use a narrow category of external sources of law to inform
our own democratic majority of the meaning of fundamental rights on

\textsuperscript{171} See Human Rights, supra note 79, at 773.
\textsuperscript{172} Human Rights offers a useful and comprehensive understanding of the international law
of human dignity. Id.
a more universal scale. Within this global context, perhaps we may continue to allow our Constitution to live and to avoid the dangers of "interpretive nihilism." 173

173. See E. Bodenheimer, supra note 1, at 295:

The interpretive nihilism to which a radically conceived legal positivism may easily lead makes a theory of the nonformal sources of the law not only desirable but imperative. We know today that the positive system established by the state is inescapably incomplete, fragmentary, and full of ambiguities. These defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as the formalized source materials of the law, but which nevertheless give some degree of normative direction to the findings of the courts. In the absence of a theory of the nonformal sources, nothing remains outside the boundaries of fixed, positive precepts but the arbitrariness of the individual judge.