

A CRITIQUE OF THE UNIQUELY ADVERSARIAL NATURE OF THE U.S.
LEGAL, ECONOMIC AND POLITICAL SYSTEM AND ITS IMPLICATIONS FOR
REINFORCING EXISTING POWER HIERARCHIES

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“For many claims, trial by adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our litigation system is too costly, too painful, too destructive for a truly civilized people.”

~Chief Justice Warren Burger

This article argues that the uniquely adversarial nature of the United States litigation system, rooted in the medieval English system of “trial by battle,” has replicated itself in almost all aspects of American society, distinguishing the United States from even its common law counterparts that shared the genesis of their legal systems in English “trial by battle.”

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This “trial by battle” is often characterized in the context of speech by terms such as the “marketplace of ideas,” or in the context of economics by terms such as “the law of the jungle.” Even resolution of basic Constitutional concepts are subject to battles between parties, rather than a proactive determination by a Constitutional Court as can be found in many other legal systems. Thus, American society is unique from all other industrialized nations in the extent to which it employs adversarial techniques to resolve conflicts in the areas of contract law, criminal law, constitutional law, labor law, and economic and social policy, in addition to its legal system.

This article suggests that the implications of this emphasis on procedure over substance are profound, and that the shibboleth of “procedural fairness” invoked to justify disparate substantive outcomes may be more illusory than real.

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INTRODUCTION

In a previous article,¹ Professor James Wilets analyzed the enormous amount of

¹ James D. Wilets, *Gender Dimorphism in the U.S. Legal System: A “Post-Feminist” and Comparative*

jurisprudential literature positing that the structure, values and processes of the American legal and educational system, are fundamentally “male-centered.”² This previous article focused heavily on the gendered lens with which many commentators have viewed the adversarial battle among parties in court, sometimes called the “gladiator” model,³ and in competition in law school. Wilets argued, however, that many of the dysfunctional aspects of the American legal system, are not *essentially* male, but simply different from the jurisprudential approach of the great majority of the world’s legal systems, many of which themselves are male dominated, and sometimes more male dominated than that of the U.S. legal system.⁴ The previous work argued that the adversarial approach may express itself in ways that certainly appear “male,” as that term is constructed in the United States but in fact the roots of this adversarial approach can be found primarily in the unique Anglo-Saxon historical legal experience rather than in any essentially male aspect of that legal system.⁵

Professors Imoukhuede and Wilets take this work further than the previous article. In this article, the authors argue that the American adversarial, or gladiatorial, approach to dispute resolution goes well beyond the original British model and has replicated the adversarial litigation approach in areas as diverse as: constitutional law (including areas such as speech, justiciability and fundamental rights), economics, contracts, labor relations, and even social benefits such as education and medical care. The United States’ particular gladiatorial – or adversarial – approach ostensibly focuses on the fairness of the battle itself, rather than on the specific substantive result or outcome. As this article illustrates, however, the “procedural fairness” upon which this dispute resolution and lawmaking framework operates is, in many cases, illusory.

Accordingly, the purpose of this article is not simply to illustrate a comparative law phenomenon, but also to suggest that many of the economic, legal, political and social differences apparent in otherwise similar societies can be explained by differing fundamental assumptions

Critique, 18 ILSA J. INT’L & COMP. L. 193 (2011)

² *Id.* See also LANI GUINIER ET AL., BECOMING GENTLEMAN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 28 (1997); Susan D. Carle, *Review Essay: Gender in the Construction of the Lawyer’s Persona: Florence Kelley and the Nation’s Work: the Rise of the Women’s Political Culture, 1830-1900*, 22 HARV. WOMEN’S L.J. 239, 244 (Spring 1999); Tanisha M. Bailey, *The Master’s Tools: Deconstructing the Socratic Method and its Disparate Impact on Women through the Prism of the Equal Protection Doctrine*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 125, 125 (2003); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175, 1177-78 (1992); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983) (arguing that the “objective standard” is simply the male point of view in disguise. Traditional liberal legalism makes male dominance invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society); Carrie Menkel-Meadow, *Portia Redux*, 2 VA. J. SOC. POL’Y & L. 75, 75 (1994); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 312 (1989); Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN’S L.J. 39, 40 (1985); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 36 U.C. DAVIS L. REV. 1119, 1125 (2006); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L & POL’Y 119, 121-122 (1997); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988) and Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 867-69 (1988).

³ Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L & POL’Y 119, 122 (1997);

⁴ Wilets, *supra* note 1, at 194-96.

⁵ *Id.*

about how to resolve dispute and mediate conflicting rights. This article suggests that the implications of this emphasis on procedure over substance are profound, and that the shibboleth of “procedural fairness” invoked to justify disparate substantive outcomes may be more illusory than real. We will, however, leave it to the reader to determine whether substantial fairness is best achieved through procedural fairness, or is best achieved through legislative codification of a specific substantive result.

I. A HISTORICAL, ECONOMIC, AND SOCIAL PERSPECTIVE ON THE ADVERSARIAL NATURE OF UNITED STATES ECONOMICS, POLITICS, AND LAW

The distinction between procedure and substance is critical in this analysis. Process is central to three aspects of law: (1) the manner in which law is *created*; (2) the underlying *assumptions* held by the legal system; and (3) how specific disputes are mediated or resolved. We will explore each of these distinctions in turn.

With respect to the manner in which law is *created*, there are more similarities than differences between the United States and other democracies. In a democracy, the creation of law such as statutes and constitutions is largely a political process. What does generally distinguish the U.S. and other common law countries is that judicial interpretation and application of law itself creates new law.⁶ This concept of “judge made” law of course arises from prior judicial precedent, which itself originally arose from an adversarial litigation context.

The United States, however, is markedly different from even many of its common law counterparts in the assumptions within the law regarding how different constituencies should pursue their interests or mediate their differences. Most democracies, whether common law or civil law, assume that their political bodies can create certain kinds of positive law that are not open to negotiation or waiver by contract. Such assumptions may include a minimum wage, vacations, severance pay, the prohibition of hate speech, a certain level of medical care, etc.

The United States does not differ from many of its common law counterparts in how *specific* disputes are mediated or resolved. Common law legal systems share an adversarial form of dispute resolution in the legal realm. What is unique about the United States is how it has applied this particularly adversarial form of common law dispute resolution to most aspects of its society.⁷ Some commentators have referred to the United States as a “jungle,” where only the fittest can survive.⁸ This article avoids such normative characterizations and is limited to investigating how this distinctive American phenomenon manifests itself in different areas of the

⁶ See *What is the Difference Between Common and Civil Law?*, THE ECONOMIST (July 16, 2013), <http://www.economist.com/blogs/economist-explains/2013/07/economist-explains-10> [https://perma.cc/A95R-GUED].

⁷ See Frank B. Cross, *Book Review: America the Adversarial*, 89 VA. L. REV. 189-190 (2003).

⁸ See David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 371-72 (2001); Jennifer L. Hochschild, *The Word American Ends in “Can”: The Ambiguous Promise of the American Dream*, 34 WM. & MARY L. REV. 139 (1992) (citing WILLIAM G. SUMNER, *THE CHALLENGE OF FACTS AND OTHER ESSAYS* 25 (Albert G. Keller ed., 1914)) (“[W]e cannot go outside of this alternative: liberty, inequality, survival of the fittest; not-liberty, equality, survival of the unfittest. The former carries society forward and favors all its best members; the latter carries society downwards and favors all its worst members . . . The growth of a large business . . . is merely a survival of the fittest.”); Lawrence S. Krieger, *What We’re Not Telling Law Students—and Lawyers—that they Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from its Roots*, 13 J.L. & HEALTH 25 (1999) (A “law-of-the-jungle” mentality is encouraged by this pervasive misperception of need, potentially creating a need to defeat, rather than support, classmates and peers . . . the adversarial nature of the legal system, which can encourage a win-lose, law-of-the-jungle mentality—literally survival of the fittest).

law, and the implications of this uniquely American phenomenon.

A. *From “Trial by Battle” to American Legalism*

This section posits that the adversarial, gladiatorial tradition in common law litigation is inextricably related to the divergent American legal, economic and political approach to a wide variety of issues. The peculiar adversarial manner in which the United States approaches economic, social, political and legal disputes differs so dramatically from other societies that an investigation into the peculiar economic, political and social history of the United States is warranted in order to understand why this difference continues to persist in so many aspects of American society. This article suggests that the implications of this emphasis on procedure over substance are profound, and that the shibboleth of “procedural fairness” invoked to justify disparate substantive outcomes may be more illusory than real.

All common law countries share the common history of the British legal system, which incorporated a literal “trial by battle” in its earliest genesis.⁹ This battle could take place between the parties or, somewhat later, through a symbolic battle between the defendant and God, also known as “trial by ordeal.”¹⁰ The trial by battle was narrated by numerous historians and authors, but the description which is more helpful to our research is that of F.M. Powicke, English legal historian, who noted how law and force were expressly interrelated throughout common law legal history:

Law in a feudal society was inseparable from force, but not obscured by it: they were informed by the theory of contract which informed all feudal relations . . . Force was never absent, yet was never uncontrolled. In civil procedure we find the elements of war, such as the duel, and the hue and cry; and in war, we find constant applications of legal theory. War was a great lawsuit. The truce was very like an *essoin*, a treaty drawn up on the lines of a final concord, the hostage a surety, service in the field was the counterpart of suit of court. *The closeness of the analogy between the field of battle and the law court is seen in judicial combat.* Trial by battle was a possible incident in all negotiations.¹¹

According to Chief Justice Warren Burger, the American system of dispute resolution

⁹ Wilets, *supra* note 1, at 197; Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 39 (2002) (“Civil and criminal disputes in medieval England were decided by primitive trials by battle”); JOHN H. LANBEIN, ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 99-100 (2009); Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L. J. 713 (1983); Edward L. Rubin, *Trial by Battle. Trial by Argument*, 56 ARK. L. REV. 261, 263-69 (2003).

¹⁰ The so-called “trial by ordeal” included specific litigation techniques, such as the “trial by fire” and the “ordeal of cold water.” *See, e.g.*, Jona Goldschmidt, 40 FAM CT. REV. 36, 39 (2002) (“Civil and criminal disputes in medieval England were decided by. . .trial by ordeal”); *see also* Stephan Landsman, *THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE* 8-9 (1984); *see generally* Henry Lea, *The Wager of Battle*, in Paul Bohannon, Ed., *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 233-53 (1967). For an outstanding statistical analysis and description of medieval English forms of adjudication and their prevalence, *see* Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 LAW & HIST. REV. 1 (2001). *See also* Judge Dale A. Kimball, *Freedom and Independent Courts*, 16 UTAH B.J. 29 (2003); Wilets, *supra* note 1, at 210.

¹¹ Matthew Strickland, *WAR AND CHIVALRY: THE CONDUCT AND PERCEPTION OF WAR IN ENGLAND AND NORMANDY, 1066-1217*, at 4 (citing F.M. Powicke, *THE LOSS OF NORMANDY, 1189-1204*, at 242 (2d rev. ed. 1961).

has preserved the traditional adversarial trial by battle.¹² Some commentators have distinguished the trial by battle from the adversary system, arguing that the latter is a relatively new concept.¹³ Those commentators, however, have tended to focus only on the technical aspects of the modern adversarial system, which certainly did arise later, mainly to offset certain specific, problematic consequences of the system in place. The common-law ancestors already understood that the system needed some adjustments in order to obtain more fair “divine judgments.” Thus, they introduced rules excusing from trials by battle all those people—like elderly or infirm persons and women—that were physically unfit for such a battle. Similarly, the present system is replete with examples of guarantees with the main—if not the only—scope of granting even-handed proceedings. Accordingly, it seems that the present adversarial system is fundamentally analogous to the original “trial by battle,” even if the mechanisms have changed throughout time.¹⁴ Indeed, as noted by Chief Justice Burger, our legal system still relies on an adversarial conflict between the participants, although “at great cost to the parties, and to society in general.”¹⁵

While the English were attempting to adjudicate “by beating each other to death, or drowning each other in an effort to determine God’s will,”¹⁶ other civilizations, were adopting different—maybe more rational—means of resolving disputes and creating—or adjusting—the law.¹⁷ This is not to say that the British were the only ones to opt for such “barbaric” forms of trial and legal procedure, but it is worth noting that other societies in Europe, Asia and Africa¹⁸

¹² Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO L.J. 185 (1983) (speaking about the battle model of the past and future’s law field and criminal justice system); see *infra* Part I and II.

¹³ See, e.g., Paul T. Wangerin, *The Political and Economic Roots of the “Adversary System” of Justice and “Alternative Dispute Resolution”*, 9 OHIO ST. J. ON DISP. RESOL. 203, 206–8 (1994) (“Adversarial proceedings themselves did not fully develop until the eighteenth and early nineteenth centuries in Europe”). See also Stephan Landsman, *THE ADVERSARY SYSTEM* (1984); Roscoe Pound, *JURISPRUDENCE* 696-703 (1959); Stephan Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO L. REV. 25 (1981).

¹⁴ Barbara Dawson, Michele L. Stevenson, *Getting Help with ADR: A Guide to the Main Players*, 10 FEB BUS. L. TODAY 51, 54 (2001).

¹⁵ See Wilets, *supra* note 1, at 197.

¹⁶ See, e.g., Paul R. Hyams, “Trial by Ordeal: The Key to Proof in the Early Common Law,” in *ON THE LAWS AND CUSTOMS OF ENGLAND* (1981) at 90–126

¹⁷ See Wilets, *supra* note 1, at 211–13 (Of course, “rational” does not always mean “good,” as evidenced by the variant of the civil law used during the Inquisition). To avoid oversimplification, it is important to note that English theories and philosophy of law shared a great deal with their continental counterparts, even though the actual procedure of dispute resolution may have differed substantially. See generally Harold J. Berman, *The Origins Of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1656-7 (1994) (“It is conventional wisdom that distinctively English conceptions of the nature, sources, and purposes of law can be traced back to the early history of the English common law in the twelfth to fifteenth centuries. In fact, however, there is little in the legal literature of those centuries that distinguishes English philosophy from that of other peoples of Western Christendom.”).

¹⁸ See, e.g., Remigius N. Nwabueze, *Historical and Comparative Contexts for the Evolution of Conflict of Law in Nigeria*, 8 ILSA J. INT’L. & COMP. L. 31, 32 (2001) (“[I]t was in the Italian city-states in the Middle Ages that a scientific approach was adopted toward the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose”); see also Kenneth Pennington, “Law, Procedure of, 1000-1500,” *DICTIONARY OF THE MIDDLE AGES*, 7 (1986) at 502-506; Evan R. Seamone, *When Wishing On A Star Just Won’t Do: The Legal Basis For International Cooperation In The Mitigation Of Asteroid Impacts And Similar Transboundary Disasters*, 87 IOWA L. REV. 1091, at 1125, n.167 and accompanying text, citing RONALD W. CARSTENS, *THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM* 55 (1992) (in turn crediting John of Paris (1250/4-1304) for articulating the ideal of “stewardship as an authorization to use or to distribute goods,” and the idea that “the community

employed more logical means of creating law at a much earlier time.

In Europe, the greater development of more “rational” or “civilized” civil law approaches to dispute resolution flourished in the more Romanized areas of the former Roman Empire. While the Germanic and Anglo-Saxon areas of Europe adopted forms of the civil law later.¹⁹ The reason for that divergent development is discernible when considering the particularly historically focused evolution of the civil law, based in the ancient and longstanding Roman—and even earlier—legal jurisprudential traditions.

As opposed to the common law, the civil law system creates law through a conscious, deliberate, rational formulation and application of rules to regulate human conduct.²⁰ The rules are designed to cover every potential factual circumstance that could foreseeably arise.²¹ To use an imperfect analogy, civil law can be conceptualized as an old-fashioned hotel reception area with its set of cubbyholes in which keys and mail are placed. The law is structured as a set of cubbyholes of legal rules, into which every factual exigency can be placed. This civil law approach can be compared to the “*ad hoc*” manner by which law is created in the common law, although the apparently *ad hoc* nature of the common-law lawmaking process can understate the ways in which the assumptions in the common law create outcomes that generally perpetrate existing power structures and hierarchies. This is consistent with the overall thesis of this article that the common law process of lawmaking ultimately replicates pre-existing power hierarchies.

Comparative legal scholar Richard B. Cappalli describes the civil law’s arguably more rational and transparent lawmaking process as follows:

[The civil law’s] centerpiece is the civil code, a vast elaboration of legal concepts, definitions, institutions, principles, and rules stated at a high level of generality and purporting to cover the entire realm of private relations: persons and the family, adoption, succession, property rights, contractual obligations, agency, surety, unlawful harm-causing acts, labor, companies, prescription of actions, evidence, creditor preferences, and others. The goal of the civil code is to state in a general, orderly, integrated, and complete way the rules of private law needed to regulate private relations.²²

Legal commentators have named this elaborate process as “legal science.” The civil law is scientific in the sense that legal scholars must employ rational thought to create a logical legal structure. Deductive logic is then required to determine the law that should be applied to a particular set of factual circumstances.²³ Still in the words of Cappalli:

determines jurisdiction over the use of common things”); *id.* at 81 (citing Marsilio of Padua (1275/80-1342), based on the Aristotelian notion that “[t]he utility of government is measured by the degree to which it can provide the conditions necessary for a ‘sufficient life’”).

¹⁹ See generally Katherine Fischer Drew, *Public vs. Private Enforcement Of The Law In The Early Middle Ages: Fifth To Twelfth Centuries*, 70 CHL.-KENT L. REV. 1583, 1587 (1995).

²⁰ William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 687 (2000).

²¹ See *id.*

²² Richard B. Cappalli, *At The Point Of Decision: The Common Law's Advantage Over The Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87 (1998)

²³ See *id.* at 94.

The civilian codes, substantive and procedural, are structured as magnificent exercises in logic, starting with the most general purposes, propositions, and definitions, and logically elaborating their implications and interactions in a network of increasingly detailed rules. Once launched, the codes form the premises for case solutions. Through logical reasoning, deductive and analogic, the civilian lawyers and judges extract the code's solutions to myriad human conflicts.²⁴

Unlike the civil law, common law is created in piecemeal fashion, through a series of conflicts, or cases, between parties, occurring in a highly fact dependent context. In order to make sense out of these *ad hoc* legal determinations, these cases require an analytically complex process of synthesis. Thus, legal scholars must distinguish or analogize the facts of one case to those of other cases to provide some modicum of consistency among the different cases. Despite the complexity of the process, the results may not be as consistent as the rigorosity of the process would suggest. Depending upon the ultimate goal of the judge or parties, one case can often be differentiated from another without a theoretically consistent or neutral basis for doing so. It is sufficient to observe the amount of closely split U.S. Supreme Court decisions to detect that the common law synthesis process (or *stare decisis*) is less than scientifically accurate. Moreover, the correlation between the Justices' rulings and their pre-existing ideological inclinations seems to suggest that the inconsistencies in the described process are not random, but rather dependent on the particular makeup of a court at a specific point in time.²⁵ Thus, frequently, the process can be an attempt to mask the "trial by battle" by a pretense of theoretical consistency embodied in the legal concept of *stare decisis*.²⁶

Conversely, in the civil law, decisions are based on the existing facts and must rise and fall on the merits of the application of the law to the specific facts of the specific case.²⁷ This does not mean civil law judges are always impartial; they are actually far from it.²⁸ However, a civil law judge may render a certain judgment in a certain case based on the equitable nature of the conflicting interests without violating the common law's doctrine of *stare decisis*. This permits the judge in a civil law trial to apply the law in a legal manner without having to preside over a battle by warrior-lawyers arguing which cases are closer to the case at bar.

Clearly this view of the civil law contrasts with the common shibboleth that the civil code is designed in part to deprive the judges of arbitrary discretion. In theory, civil law judges cannot exercise discretion since they are strictly bound by positive law.²⁹ In practice, however, the absence of the *stare decisis* principle gives them considerably more latitude in deciding how to apply the text of a Code to a particular set of facts.

To be fair to the common law, the adversarial nature of the common law as opposed to the civil law can, in fact, sometimes promote fairness and justice. For example, the use of juries as independent fact-finders clearly helps avoiding sole reliance on potentially biased judges. Moreover, the adversary system between lawyers engaged in adversarial combat also arguably

²⁴ *Id.* at 89

²⁵ Adam Liptak, *The Polarized Court*, N.Y. TIMES: THE UPSHOT (May 10, 2014), <https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html> [<https://perma.cc/VTV3-WXV2>].

²⁶ *See id.*

²⁷ *See* Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1109 (2008).

²⁸ *See id.*

²⁹ *See id.* at 1108.

permits a greater exposition of every possible fact of relevance. In many civil law countries, bureaucratically-organized judges control all trial procedures, such as fact gathering, selection of witnesses and especially the final decision making. In adversarial systems like the U.S., the parties' attorneys control those processes.³⁰ The consequence is that American law can sometimes be more flexible, and open to the new legal and policy arguments set forth by the parties and their lawyers.³¹

Nevertheless, as this article argues, those admitted advantages of the common law, and they are by no means exhaustive, should not obscure the hidden preferences for pre-existing power hierarchies that the common law frequently propagates. And those hidden and not so hidden preferences for pre-existing power hierarchies are not limited to the legal system. As noted above, the *sui generis* United States gladiatorial approach to resolving disputes is also exhibited in resolving labor disputes, delineating the limits of free speech, as well as in the more quintessentially legal procedural issues of determining guilt and innocence in a criminal trial or economic liability in a civil trial. Indeed, many legal commentators defend the adversarial system precisely because it reflects the competition that is encouraged in other sectors of American society.³²

B. An Unbalanced "Matching of Forces: "The Legal Realist Critique"

A "legal realist" would view this adversarial or "gladiatorial" structure of the United States legal, political, economic and social system as not simply a product of the unique common law history and an accident of its translation to the United States. Nor would they view the unique American adversarial legal structure as a quixotic byproduct of a unique American individualism. Inequality of resources means that no entity can ever truly "fight" procedurally on a level playing field, and this procedural inequality can promulgate substantive inequality.³³ Some commentators

³⁰ Robert A. Kagan, Should Europe Worry About Adversarial Legalism? 17 OXFORD J. LEGAL STUD. 165, 167 (1997).

³¹ See *id.* (listing seven distinctive characteristics to describe this concept).

³² See Robert J. Kutak, *The Adversary System and the Practice of Law*, in David Luban, Ed., THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 174 (David Luban, ed., 1983) (adversarial system is culturally appropriate for Americans because of their predominantly competitive society and reflects "the same deep-seated values we place on competition among economic suppliers, political parties, and moral and political ideals. It is an individualistic system of judicial process for an individualistic society"); see also Anatol Rapaport, *Theories of Conflict Resolution and Law*, in COURTS AND TRIALS: A MULTIDISCIPLINARY APPROACH 22, 29 (1975) (U.S. adversarial system reflects the emphasis on competition in our society, and is a "direct transplant of competitive economics into the apparatus of justice").

³³ See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 552 (2012) ("The standing of those directly regulated by government action—most often businesses—is usually obvious, but those who benefit from regulation—by breathing less pollution or competing for integrated housing, for example—have a harder time showing standing to sue," and "the skilled strategist knows that one can no more predict the outcome of a case from the facts and the law than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing."). See also Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1412 (2000) ("The legal strategist manipulates those odds in a game of skill, expanding and developing the array of decisions, issues, and problems in a manner calculated to confuse and ultimately overwhelm the opponent. Even if the "merits" should ever reach a decision maker, it will be a decision maker identified by the game, and the "merits" will reach that decision maker in a form determined by the game."); Gene R. Nichol, *Law's Disengaged Left*, 50 J. LEGAL EDUC. 547, 555 (2000) ("[I]f a serious candidate takes positions that are congenial to powerful economic interests, funding advantages will

have argued that this is not simply an unfortunate, unintended consequence of the adversarial system. Commentators, some of whom are termed “legal realists,” would argue that the central purpose of this narrow interpretation of “case” and “controversy” is precisely to maintain the relative material positions of those entering into legal battle. In other words, without a substantive outcome determined by the will of the majority of the people in a jurisdiction, legal disputes are likely to be won, on average, by those parties with the greatest resources available for fighting that legal battle. Marc Galanter illustrates in a seminal study,³⁴ that:

accrue. If, on the other hand, a candidate serves as an advocate for the poor and dispossessed, funding sources will diminish. Every politician knows this. Every politician’s fundraising staff knows it even better. In a system in which campaign spending has a significant impact on electoral success, governance is thus systematically slanted toward the economically powerful and privileged.”); Gene R. Nichol, *Law’s Disengaged Left*, 50 J. LEGAL EDUC. 547, 557 (2000) (“A late-nineteenth-century Republican senator from Pennsylvania, Boies Penrose, described his role this way: ‘I believe in a division of labor. You send us to Congress; we pass the laws under which you make money. . . and out of your profits you further contribute to our campaign funds to send us back to pass more laws to enable you to make more money.’ Penrose’s picture of the dynamics of American politics remains too true today.”); Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 517 (1985). (White, J., dissenting: “The candidate may be forced to please the spenders rather than the voters, and the two groups are not identical.”); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 578 (1990). (“[T]he current era can be characterized as one of corporate due process. Consider, for example, the following recent Supreme Court decisions: a textile corporation successfully invoked the fifth amendment double jeopardy clause to avoid retrial in a criminal antitrust action; a consortium of major corporations, including the First National Bank of Boston, joined in a first amendment lawsuit that overturned state restrictions on corporate spending for political referendums; an electrical and plumbing concern invoked the fourth amendment to thwart federal inspections conducted under the Occupational Safety and Health Act; and, a California public utility relied on the first amendment to overturn state regulations designed to lower utility rates.”); Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1605–1608 (2006) (“Corporations spend millions of dollars annually seeking political influence through lobbying . . . Corporations are not simply constrained by society’s legal rules; they play a substantial role in shaping the rules by which they are governed.”); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266–267 (1982) (“Holmes said in an early essay: [w]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device or man or beast, must tend in the long run to aid the survival of the fittest . . . [I]t is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that . . . That fact is that legislation . . . is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else.”); McConnell v. Fed. Election Comm’n, 540 U.S. 93, 149 (2003) (quoting declaration of former Senator Alan Simpson: “Too often, Members’ first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a \$100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don’t pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother’s milk of politics, you never want to be in that situation.”); Fed. Election Comm’n, 540 U.S. at 149 (quoting declaration of former Senator Warren Rudman, “Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way.”).

³⁴ Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); see Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1450–71 (2000) (discussing how companies strategize by “case selection,” “making a record,” “legal planning,” “media spin,” “cost strategies,” “delay strategies,” “external strategies,” “contractual strategies,” “forum shopping,” and “settlement strategies,” all of which involves considerable expense above and beyond arguing the merits of the case).

“haves” will win more frequently because they are likely to have favorable law on their side, superior material resources, and better lawyers and because a number of advantages accrue to them as a result of their “repeat player” status. Superior resources allow the “haves” to hire the best available legal representation and to incur legal expenses, such as those associated with extensive discovery and expert witnesses that may increase the chances of success at trial. In addition, as repeat players, they will reap the benefits of greater litigation experience, including the ability to develop and implement a comprehensive litigation strategy that may involve forum shopping and making informed judgments regarding their prospects of winning at trial or on appeal.³⁵

In a 1995 Title VII case,³⁶ Seventh Circuit Chief Judge Richard Posner frequently cited Galanter and his work discussing the inherently unequal procedural position in which the adversarial system puts the economically disadvantaged party. Posner concluded, however, that this was an inevitable result of the adversarial system. While neither Judge Posner nor Mr. Galanter would reject the adversarial system because of this result, their observations reinforce a thesis of this article that the problem of procedural inequality in the adversarial system is inherent and unavoidable in the system itself. Judge Posner wrote that:

Even with the recent amendments to Title VII, the expected judgment in an employment discrimination case, especially one brought by an hourly wage worker, will rarely be large enough to repay a substantial investment in the development of evidence at the summary judgment stage, which is to say before the case even gets to trial. And on the other hand employers have incentives to invest heavily in the defense of these cases, in order to deter the bringing of them. This asymmetry puts the plaintiff at a disadvantage, as this case illustrates. There is no basis for confidence that the defendant did not discriminate against Russell on account of his race and age; it is simply that Russell has not presented enough evidence, perhaps because he could not afford to present more, to withstand the company’s motion.³⁷

C. Constitutional Adjudication

At the risk of generalization, it can be stated that constitutional adjudication in the United States differs from constitutional adjudication in most other countries in a number of salient ways. These differences can have a profound effect on substantive outcomes in ways that distort or shape political and economic systems.

1. The “Cases and Controversies” Requirement for Adversarial Constitutional Adjudication Reinforces Existing Power Hierarchies

The Supreme Court of the United States has interpreted the inclusion of the terms “cases” and “controversy” in Article II, Section 2 of the United States Constitution to limit judicial adjudication, including constitutional adjudication, to only those cases where there are

³⁵ Donald R. Songer et al., *Do the Haves Come Out Ahead Over Time? Applying Galanter’s Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC’Y REV. 811, 812 (1999).

³⁶ *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70-71 (7th Cir. 1995).

³⁷ *Id.* at 70-71.

parties in an actual, adversarial dispute.³⁸ The Supreme Court has noted that limiting a court's jurisdiction to a specific case or controversy has the advantage of presenting the issues in question in their sharpest contrast, and therefore in the most suitable context for adjudication.³⁹

However, most civil law countries employ a means of constitutional adjudication that does not rely solely upon a conflict between actual parties to resolve disputes over constitutional interpretation.⁴⁰ A great many of these countries employ Constitutional Courts that decide constitutional issues separate from an actual case, sometimes even before a disputed statute goes into effect.⁴¹ This can be observed, *inter alia*, in France⁴² and Germany.⁴³ The European Union provides a particularly insightful example of this separation of constitutional adjudication from a particular case or controversy.⁴⁴ These divergent approaches have wide-ranging implications,

³⁸ See, e.g., *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (explaining policy justifying the "case or controversy" requirement); *Poe v. Ullman*, 367 U.S. 497, 502–04 (1961) (explaining the case or controversy requirement in relation to doctrines of standing, ripeness and mootness); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (explaining the standing requirement and its injury in fact and redressability elements); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–102 (1983) (illustrating the element of the injury in fact); *Warth v. Seldin*, 422 U.S. 490, 502–03 (1975) (representing insufficient showing of causation and lack of redressability of the standing element); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (illustrating lack of redressability element of standing); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (explaining the prohibition of third party standing and its exceptions); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–50 (1967) (explaining ripeness doctrine element); *Poe v. Ullman*, 367 U.S. 497, 507–08 (1961) (showing insufficiency of ripeness element); *DeFunis v. Odegaard*, 416 U.S. 312, 316–17 (1974) (explaining mootness doctrine); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (explaining mootness doctrine and one of its exceptions); *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (describing political question doctrine).

³⁹ See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (the Court opined the core question of standing doctrine is whether the appellants had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"); see also *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (the Court considered the constitutional challenge to be "made in a form traditionally thought to be capable of judicial resolution", when the issues were "contested with the necessary adverseness" and the litigation was "pursued with the necessary vigor"); *U.S. v. Fruehauf*, 365 U.S. 146, 157 (1961) (the Court explained that cases lacking concrete adverseness often present issue which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests . . .).

⁴⁰ See generally Victor F. Comella, *Comparative Avenues in Constitutional Law: Constitutional Structures and Institutional Designs: The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705 (2004).

⁴¹ See *id.*

⁴² See, e.g., Nicolas M. Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 58, 78–79 (1994).

⁴³ Apart from ruling on individual constitutional complaints, the Federal Constitutional Court (Bundesverfassungsgericht) hears cases in so called abstract review procedure. A law passed by the federal legislative may be brought before the court by certain political institutions if they consider it unconstitutional. Moreover, while deciding a case, if any regular court doubts constitutionality of the applicable law, it must suspend that case and bring this law before the Federal Constitutional Court. See Danielle E. Finck, *Judicial Review: The United States Supreme Court Versus the German Constitutional Court*, 20 B.C. INT'L & COMP. L. REV. 123, 147 (1997).

⁴⁴ Court of Justice of the European Union gives preliminary rulings concerning interpretation of the EU Treaties. National courts and tribunals may request the European Court of Justice for advice regarding interpretation of the community law, if they consider that question to be necessary to enable it to give judgment (references for a preliminary ruling). It is mandatory for a national court of last resort to submit any such question to the Court of Justice for preliminary ruling. See The Treaty on the Functioning of the European Union, art. 267, May 9, 2008, O.J. (C 115/47), available at

extending far beyond process. One has only to look at *Bush v. Gore*⁴⁵ for an illustration of how putatively neutral constitutional adjudication can be warped by the presence of adversarial parties with an economic, political and social interest in the outcome.⁴⁶

2. Not Only Are the Gladiators Far From Equal in Resources, the *Rules* of the Playing Field Itself are Biased in Favor of Those in Power

A vivid example of how principles of constitutional standing are themselves obstacles to any challenge to the constitutionality of a governmental policy is provided by the Supreme Court case *City of Los Angeles v. Lyons*.⁴⁷ Adolph Lyons was a young black man stopped by the police for having a burned out taillight on his car. When the police shoved his hands above his head, his keys cut into his hand and he complained. The police then used a chokehold that rendered him unconscious. When he awoke, he was spitting blood and in pain. He had also urinated and defecated. He was issued a traffic citation and released. He later learned that sixteen individuals, mostly black men, had died from the use of the chokehold by Los Angeles police officers. Lyons sued for both money damages and injunctive relief to prevent the use of the chokehold except where necessary to protect the officers' safety. This particular procedure was an official policy of the Los Angeles police department.⁴⁸

The Supreme Court dismissed his claim for an injunction on standing grounds, holding that he was not entitled to seek an injunction because he could not demonstrate that he was likely to be choked again in the future.⁴⁹ Justice White, writing for the majority, explained, Lyons' "standing to seek the injunction requested depended on whether he [specifically] was likely to suffer future injury from the use of the chokeholds by police officers."⁵⁰ The Court concluded that "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional."⁵¹

The case's outcome begs the question of who can possibly meet the standing requirements of a "case or controversy" with the L.A. police department if an individual who has been choked as the result of an established policy of the L.A. police cannot. The irony is that the United States legal system relies on adversarial challenges to fix constitutional wrongs, but creates barriers that unreasonably foreclose such challenges, particularly for those litigants who otherwise have the least political, economic or other social power and resources.⁵²

<http://eurlex.europa.eu>.

⁴⁵ *Bush v. Gore*, 531 U.S. 98, (2000) (deciding the winner of the 2000 U.S. presidential election).

⁴⁶ See, e.g., Charles G. Haines, *General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*, 17 ILL. L. R. 96 (1923); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

⁴⁷ See generally *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

⁴⁸ *Id.* at 97-98.

⁴⁹ *Id.* at 113.

⁵⁰ *Id.* at 105.

⁵¹ *Id.* at 111.

⁵² See *Lujan v. Defenders*, 504 U.S. 555 (1992); Gene R. Nichol, Jr., *Standing For Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 333 (2002). ("Anomalously, the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government. The white

3. The Restricted Lack of Judicial Review to Challenge the Status Quo under the Equal Protection Clause

Another implication of the unique American adversarial approach to constitutional adjudication can be vividly seen in Equal Protection jurisprudence. The Equal Protection Clause of the United States Constitution provides that all individuals shall be entitled to the “equal protection of the laws.”⁵³ The Clause, by its terms, would seem to mitigate much of the problems of unequal legal power engendered by the adversarial system. For much of the Clause’s life, however, the courts have simply ignored its existence. For example, the Supreme Court of the United States first determined in 1873 that the Clause only applied to recently emancipated African Americans.⁵⁴ Then, in 1896, the Supreme Court essentially determined that even blatant discrimination against recently emancipated African Americans did not constitute a violation of the Clause.⁵⁵

It wasn’t until 1944, in *Korematsu v. United States*,⁵⁶ addressing the internment of Japanese-American citizens, that the Supreme Court interpreted the Equal Protection Clause in any meaningful way by applying a heightened level of scrutiny to discriminatory laws or governmental action; even in that case, the internment of the Japanese-Americans was found not to violate the constitution.

In these later interpretations of the Equal Protection Clause, the Supreme Court based its heightened scrutiny on a footnote in an earlier case, *U.S. v. Carolene Products*.⁵⁷ The footnote suggested that the Equal Protection Clause only requires heightened scrutiny of particular legislation when that legislation (1) “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . .”⁵⁸; (2) targets minorities that, because of prejudice, are unable to avail themselves of “those political processes ordinarily to be relied upon to protect minorities. . . .”⁵⁹; or (3) a specific Constitutional right.⁶⁰ In other words,

voters in Shaw, the white contractor in *Northeastern Florida*, and (most pointedly) George W. Bush fit no comprehensible vision of excluded minorities or historically victimized groups. Minority plaintiffs, poor litigants, unwed mothers, black prisoners, and indigent patients get the harshest treatment in injury law. Their burdens are higher, their barriers more substantial. They must prove greater consequential harms, must show closer causation links, and must surmount greater redressability hurdles. Article III determinations are driven neither by text nor history. They favor the powerful. They disadvantage the powerless.”); Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1472 (2000).

⁵³ U.S. CONST. amend. XIV.

⁵⁴ *Slaughter-house Cases*, 83 U.S. 36, 73–74 (1873) (“The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established . . . It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.”).

⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

⁵⁶ *Korematsu v. U.S.*, 323 U.S. 214, 220–224 (1944)

⁵⁷ *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

⁵⁸ *Id.*

⁵⁹ *Id.*

the mandate of equal protection, which presumably applies to *all* persons, is only applicable through heightened scrutiny of unfavorable legislation when a particular party is deemed unable to wage battle in the political systems to protect its own rights. Although limited in its scope, the more recent equal protection theoretical approach appeared, at first blush, to be a perfect means of remedying some of the problems of an unequal playing field.

Nevertheless, the benefits to politically weak or underfunded groups or minorities have been uneven. Although relatively recent applications of the Equal Protection Clause did ultimately result in the end of de jure legal segregation,⁶¹ and certain kinds of formal discrimination against certain groups,⁶² even those gains have been recently curtailed.⁶³ Perhaps, most importantly for the purposes of this article, the Court has been unwilling to squarely address the issue of inequality in the judicial forum through application of the Equal Protection Clause. The heightened scrutiny that has been extended to some historical victims of discrimination has not been extended to those literally without equal power in the adversarial forum: those without wealth or the means to otherwise adequately defend themselves against clearly stronger adversaries.⁶⁴ Moreover, in addition to lack of wealth not being a category that triggers heightened scrutiny, those without the means to fight in the political or judicial process are also handicapped by the limitation on the fundamental rights that are protected by the Equal Protection Clause.

As discussed above, the theoretical analysis in *Carolene Products* footnote 4 provides the rationale for judicial intervention to protect those less able to protect themselves. It also, however, suggests that heightened scrutiny may apply when the right involved is deemed fundamental and/or is a specific Constitutional right. Such a right includes those rights essential for groups to “fight” in the political process to vindicate their interests, such as voting,⁶⁵ but the court has been

⁶⁰ *Id.* (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”)

⁶¹ *Brown v. Board of Ed.* 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment”).

⁶² *Newport News v. E.E.O.C.*, 462 U.S. 669 (1983) (case involving the Pregnancy Discrimination Act against woman and their employers); *Minor v. Happersett*, 88 U.S. 162 (1874) (ruling that although women are citizens, they cannot vote).

⁶³ *See, e.g., Shelby County v. Holder*, 133 S.Ct. 2612 (2013) (involving the repeal of Section (b) of Voting Rights Act); *see also Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (wherein the Court struck down voluntary efforts by the Seattle and Louisville School districts to desegregate their districts). *Seattle School District* resulted in the anomalous situation that a remedy for segregated schools that would have been constitutionally required by *Brown v. Board of Education*, 347 U.S. 483 (1954), was essentially ruled unconstitutional by the Court. *See Breyer, J.*, dissenting at 868. (“The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.”)

⁶⁴ *See Kenji Yoshino, The New Equal Protection*, 124 HARV. L. REV. 747, 790-791 (2011) (citing *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1, 22-25 (1973)).

⁶⁵ *But see Holder, supra* note 64, wherein this protection was sharply curtailed.

unwilling to extend this fundamental rights analysis beyond the most egregious and formalistic violations of those rights. Consistent with the American belief that a battle or struggle is the principal means of achieving one's goals or rights, the discussion below speaks to how the Court has been particularly unwilling to extend this concept of fundamental rights to "substantive outcomes"⁶⁶ of wealth such as housing or health care.⁶⁷ Presumably, the greater the redistribution of substantive outcomes, the less incentive there would be for people to earn more money.

To some extent, this argument is consistent with a free market economy where accumulation of wealth is viewed as essential and desirable. It is also arguably consistent with an American belief in "equality of opportunity" but not "equality of result."⁶⁸ But, as discussed below, the United States has taken this position to the extreme, viewing health care as a good that can be purchased based on financial ability, the same as other goods, even though it arguably can involve an issue of life or death.

Nevertheless, as discussed below, the Court has been internally inconsistent in denying equal access to education, which is the very tool that individuals use to overcome their inequality of birth, and obtain equality of opportunity, a concept that is the bedrock of the "American Dream."⁶⁹

D. Education

Education can be viewed as a necessary tool for participation in the *procedural battle* in the United States for certain "end results" or particular "substantive outcomes" such as allocation of resources.⁷⁰ As opposed to being a particular "good" that individuals in an economically competitive society can be expected to acquire in greater "quantities," education can be viewed as a necessary tool with which a party can fight for her or his desired substantive outcome.⁷¹ This distinction is subtle, but critically important. Because education is itself essential to engaging in the adversarial battle for resources under the established rules of combat, there is a strong argument for characterizing education as a fundamental right rather than the ambiguous non-fundamental status it "enjoys" today.⁷² Indeed, not characterizing education as a fundamental

⁶⁶ The authors define "substantive outcomes" as involving goods, the purchase of which is dependent on wealth, such as cars, homes, etc.

⁶⁷ See discussion *infra* at Part 2(e)(1) and accompanying text.

⁶⁸ See, e.g., Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973) (speaking to the equality of an educational opportunity in poor school districts, specifically in Texas); Ashley Feasley, *The Dream Act and the Right to Equal Educational Opportunity: An Analysis of U.S. and International Human Rights Frameworks as they Relate to Education Rights*, 24 ST. THOMAS L. REV. 68 (2011) (analyzing the DREAM Act as it relates to opportunity in the U.S. and the "American Dream").

⁶⁹ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (finding that the argument in which education is a fundamental right or liberty unpersuasive, and "while education is one of the most important services performed by the state, it is not among rights afforded explicit or implicit protection under the Federal Constitution").

⁷⁰ See generally Stephen Lurie, *Why Doesn't The Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2013), <http://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/> [<https://perma.cc/4ZWC-QBAF>].

⁷¹ *Id.*

⁷² Other rights, such as the right to vote, are deemed fundamental precisely because they are essential to participation in political society; indeed, the Supreme Court has repeatedly declared that the right to vote is fundamental. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 872 (3d ed. 2006). In *Reynolds v. Sims*, the Court stated "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any

right is internally inconsistent with America's view of itself as bestowing equality of opportunity, as opposed to equality of result or allocation of goods. Without even rough equality of education, there cannot even be equality of opportunity.

The Court's struggle with whether to characterize education as fundamental or non-fundamental is presumably precisely because it contains these characteristics of a procedure rather than a "good" which could be expected to be purchased in greater quantity and quality by richer individuals. For example, in *Plyler v. Doe*,⁷³ a case involving the complete denial by a state of educational benefits to children of undocumented aliens, the Supreme Court refused to recognize education as a fundamental right,⁷⁴ but it *did* apply an ambiguously higher level of scrutiny than mere rational basis. The Court appeared to recognize that education was a necessary prerequisite for competing in an adversarial society, but could not bring itself to reconcile the inherent contradiction in endorsing a system of competition at all levels of society while simultaneously endorsing equal access to the means to effectively compete.

In a concurring opinion, Justice Powell explicitly stated "[o]ur review in a case such as this is properly heightened."⁷⁵ The Court emphasized the importance of education for developing in children the capability of meaningfully participating in civic institutions.⁷⁶ Justice Blackmun elaborated on this concept in his concurring opinion, where he stated "[i]n a sense, then, denial of an education is the analogue of denial of the right to vote: *the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage*"⁷⁷ (emphasis added). Indeed, a consistent theme in the jurisprudence of the Fourteenth Amendment of the United States Constitution is that courts will only intervene to undo unequal legislative outcomes (if at all) if one party has suffered a procedural disadvantage.⁷⁸ This decision exemplifies the idea that education may have more of a relationship to established "procedural" rights such as voting than to, for example, medical care, which may be viewed by some courts as a substantive benefit itself.

In *San Antonio v. Rodriguez*,⁷⁹ the Court refused to recognize education as a fundamental right. In this case, where one poorer school district spent \$356 per pupil and a wealthier district spent \$594 per pupil (as a result of the Texas system of funding public schools through local property taxes), the Court noted that the students in the poorer district were not being denied an education, and applied rational basis scrutiny.⁸⁰ This decision exemplifies the Court's unwillingness to apply heightened concern for procedural fairness, as opposed to substantive fairness.

What is critical in the American jurisprudential approach to specific rights is not their

restrictions on that right strike at the heart of representative government." 377 U.S. 533, 555 (1964). The Court has declared the right to vote as fundamental because it is the "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The ability to participate in the political process is seen by the Court as paramount to other rights. See *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

⁷³ 457 U.S. 202 (1982); see also *Rodriguez*, 411 U.S. at 8.

⁷⁴ *Plyler*, *supra* note 74, at 224.

⁷⁵ *Id.* at 238.

⁷⁶ *Id.* at 224.

⁷⁷ *Id.* at 234.

⁷⁸ See Equal Protection discussion, *supra* Part 2, 3 and accompanying text.

⁷⁹ 411 U.S. 1 (1973).

⁸⁰ *Id.* at 39.

importance in a general sense. Rather, what is important is the specific right's *procedural* value. Despite the courts' appreciation of the importance of education in the creation of equality of opportunity (versus outcome), the Court has not been willing to consider education a fundamental right, although the Court's jurisprudence on this issue has been subject to heated internal debate.⁸¹ Part of the reason for this heated debate is the internal contradiction it reflects about American jurisprudence in general. American jurisprudence claims to value procedural fairness over equality of result, yet ultimately is unwilling to modify procedural aspects of society sufficiently to fulfill that claimed goal or value. Some would call it hypocrisy; a legal realist might characterize it as deliberate deception to ensure the preservation of the socio-economic status quo under the illusion of equality of opportunity. Others would argue that even the idea of procedural equality has limits imposed by budgetary or other constraints.

1. A Comparative View of Education as a Fundamental Right

The United States approach to education is markedly different from that found in other countries, which have been much more willing to recognize education as a fundamental right.⁸² These provisions are usually contained in the Constitutions of those countries, ensuring that the right to an education is recognized as a fundamental and irrevocable right.⁸³ These rights are

⁸¹ See generally *id.* at 71 (affirming that education is not a fundamental right). Justice Marshall's dissent is an example of the debate over the place of education in an individual's spectrum of rights. He states:

More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district. In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. *Id.* at 70–71.

See also *Kadrmas v. Dickenson Public Schools*, 487 U.S. 450 (1988) (reaffirming that education is not a fundamental right). Where a state law authorized local school systems charging a fee for the use of school buses, the Court once again justified the use of rational basis review because education was not being denied. *Id.* at 463.

⁸² See, e.g., CONSTITUTION OF ALBANIA, Nov. 28, 1998, art. 57 ("Everyone has a right to education."); FINLANDS GRUNDLAG [CONSTITUTION], 1999 (rev. 2011), ch. 2, sec. 16 [Fin.] ("Everyone has the right to basic education free of charge."); REGERINGSFORMEN [RF] [CONSTITUTION], 1974, ch. 2 art. 21 (Swed.) ("All children covered by compulsory education have the right to a free basic education in a public school. The public administration shall also ensure the availability of higher education."); GRUNDLOVEN [CONSTITUTION], 1953, sec. 76 (Den.) ("All children of school age shall be entitled to free instruction in the elementary schools."); THE CONSTITUTION OF ICELAND, 1999, art. 76 ("The right to general education and suitable training shall by law be guaranteed to all."). See also Right to Education Project, *Module – Privatisation and the Right to Education* (2014), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Training_Module_Privatisation_and_the_Right_to_Education_Notes_2014.pdf [https://perma.cc/9MWW-48AE].

⁸³ See generally, Stephen Lurie, *Why Doesn't The Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2013), <http://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/> [https://perma.cc/BK5M-RZJ9].

frequently termed “positive” in that they are obligations that government owes the people,⁸⁴ requiring the government to fulfill a duty.⁸⁵

2. The Divergent Approach of the United States and its Root in the Philosophical Underpinnings of American society.

This approach to fundamental rights is all the more important in a society that has experienced such marked economic, political, and social inequality as the United States. Much of the unique history of the United States with respect to race is documented in the Brown University Steering Committee on Slavery and Justice (the “Brown Report”) discussing, *inter alia*, the University’s founders’ involvement in the slave trade.⁸⁶ As noted by the Brown Report:

If American slavery has any claims to being historically “peculiar,” its peculiarity lay in its rigorous racialism, the systematic way in which racial ideas were used to demean and deny the humanity of people of even partial African descent. This historical legacy would make the process of incorporating the formerly enslaved as citizens far more problematic in the United States than in other New World slave societies.⁸⁷

The United States was perhaps unique in the history of the world in its racialization of slavery. As noted by the Brown Report, “Few if any societies in history carried this logic further than the United States, where people of African descent came to be regarded as a distinct ‘race’ of persons, fashioned by nature for hard labor.”⁸⁸ This unique aspect of American history has particular implications for the peculiarly American emphasis on procedural “equality” over “substantive result.” Most Americans believe that American society ought to, and in general does, guarantee equality of opportunity to succeed but not equality of results.⁸⁹ As Imoukhuede noted:

Social inequality is justified as the necessary result of a *free* market competition amongst individuals. Of course, for a *free* market to be truly free, there must exist a means of assuring that everyone is similarly equipped to engage in a fair and equal competition. Otherwise, free market competition alone cannot serve as a moral justification for the coexistence of poverty alongside enormous wealth.⁹⁰

⁸⁴ See Helen Hershkoff, “JUST WORDS”: *Common Law and The Enforcement Of State Constitutional Social And Economic Rights*, 62 STAN. L. REV. 1521, 1540 (2010); Curt Bentley, *Constrained By The Liberal Tradition: Why The Supreme Court Has Not Found Positive Rights In The American Constitution*, 2007 B.Y.U. L. REV. 1721, 1721 (2007); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1326 (1984).

⁸⁵ See Hershkoff, *supra* note 85, at 1540; Bentley, *supra* note 85, at 1721; Kreimer, *supra* note 85, at 1326.

⁸⁶ “Slavery and Justice,” BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE at 8. http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf [https://perma.cc/9LL4-T2Q5] (hereafter, “Brown Report”).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *supra* Part II.C.3.

⁹⁰ Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y. 45, 46 (2011).

Logically, in order to make the argument that equality of opportunity trumps equality of results, there must first exist a genuine opportunity for every individual to “develop his [or her] talents to their full potential – unhampered by arbitrary barriers of race or birth or income.”⁹¹ This is particularly true when in many cases those barriers were not arbitrary at all, but the result of deliberate governmental policy intentionally discriminating against groups of people in what would now be recognized as a violation of constitutional and international law.⁹²

As Imoukhuede states in the *Fifth Freedom*, it follows that an adequate education is a prerequisite for any semblance of fair competition in a free market because, in order for any competition to be equal or fair there must exist a means of assuring that everyone is similarly equipped.⁹³ The meritocratic effects of intergenerational privilege must be equalized for there to be a semblance of equal opportunity that can begin to justify unequal results and pervasive social inequality.⁹⁴

Nevertheless, under the Supreme Court’s jurisprudence, education is merely subject to a rational basis test, which is the weakest protection afforded under the Fourteenth Amendment.⁹⁵ Despite its obvious importance in justifying the uniquely American economic system and democracy, education has not been deemed a fundamental right under the U.S. Constitution.⁹⁶ This would seem to support the legal realist position that it is not the purpose of the system to guarantee equality of opportunity, or procedural equality, but simply to guarantee the current hierarchy of economic privilege.⁹⁷

Without a right to public education, which President Lyndon B. Johnson referred to as the fifth freedom,⁹⁸ there is no equal opportunity for those born to less wealthy, less privileged

⁹¹ President Lyndon B. Johnson, Special Message to the Congress on Education: The Fifth Freedom (February 5, 1968) (Presidential Papers, 54); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”).

⁹² See, e.g. National Park Service, *Brown v. Board: Five Communities that Changed America*, TEACHING WITH HISTORIC PLACES LESSON PLAN, (Aug. 5, 2012) <http://www.nps.gov/nr/twhp/wwwlps/lessons/121brown/121locat1.htm> [<https://perma.cc/BJZ3-2LEJ>] (citing Richard Kluger, *SIMPLE JUSTICE* 327 (New York Vintage Books, 1977), and Jeffrey A. Raffle, *HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE* 86 (Westport, CT: Greenwood Press, 1998)) (In the early 1950s, the following seventeen states required racial segregation in public schools: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Four other states, Arizona, Kansas, New Mexico, and Wyoming permitted segregation in public schools if local communities wanted it). Of course, segregation of schools enabled unequal funding of schools based on their enrollment without affecting the elected representatives in states in which African-Americans were effectively denied the franchise.

⁹³ Imoukhuede, *supra* note 91 at 46.

⁹⁴ See *id.* Compare Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1205-06 (1987) (“[t]he prevailing view is that human welfare is best guaranteed by the ‘free market,’ which offers infinite economic opportunity to provide for the well-being of all Americans, if only people would exert themselves properly. However, the myth of equal economic opportunity is belied by the demographic reality”); See *Brown*, 347 U.S. at 493.

⁹⁵ *Rodriguez*, 411 U.S. at 40; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1159 (1999) (“any reasonably conceivable state of facts... could provide a rational basis for the classification”).

⁹⁶ See generally *Rodriguez*, 411 U.S. at 37.

⁹⁷ See *id.* at Part B.

⁹⁸ President Lyndon B. Johnson, Special Message to the Congress on Education: The Fifth Freedom (February 5, 1968) (Presidential Papers, 54).

families.⁹⁹ Public education is a means by which government ensures that all people enter the market with the foundational tools to compete without handicap or unfair disadvantage arising from the intergenerational effects of wealth that lie outside an individual's control.¹⁰⁰

The current rule of no fundamental right to education flows from a profound confusion regarding fundamental rights as duties.¹⁰¹ Negative rights function as bars to government actions¹⁰² that either discriminate against a protected class or infringe upon protected conduct. The failure to recognize The Fifth Freedom as a fundamental positive right, has created a major inconsistency in U.S. constitutional law so that U.S. fundamental rights doctrine is clearly out of step with broader understandings of social justice,¹⁰³ or even the theoretical basis upon which American society is based: equality of opportunity.

It could be argued that the peculiarly adversarial, libertarian approach to issue and dispute resolution results not *in spite of* the American history of gross inequality but *because of it*. It is precisely because Americans begin life in extraordinary unequal situations that the legal, economic and political elites have a vested interest in ensuring that the hierarchy of privileges remain intact. Arguably, in a homogenous society, a privileged member of society is more likely to look sympathetically upon fellow citizens of unfortunate circumstances. It is possible that the diversity of the United States contributes to its reluctance to extend equality of opportunity to all its citizens. Even in areas such as education. In this sense, the issue of equality of opportunity in education is vastly greater than simply the issue of race.

Thomas Jefferson and other founding fathers of the U.S. wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy.¹⁰⁴ They espoused normative arguments favoring public education.¹⁰⁵ As noted previously, international human rights conventions and treaties also present normative justifications for public education as an international human right.¹⁰⁶ This indicates strong foundational support for the right to public

⁹⁹ President Johnson announced that *freedom from ignorance* ought to be added to FDR's list of essential human freedoms as the *fifth freedom*. President Lyndon B. Johnson, Special Message to the Congress on Education: The Fifth Freedom (February 5, 1968) (Presidential Papers, 54).

¹⁰⁰ Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355-56 (2004) (discussing the best way to obtain education results is when disadvantaged children are placed in a wealthier school).

¹⁰¹ *But see Rodriguez*, 411 U.S. at 17-18 (holding there is no fundamental right to education under Constitution).

¹⁰² Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651, 651 (2006) ("The negative view sees the Constitution as a set of institutions for transforming popular preferences into law in a manner consistent with constitutional rights. This negative constitutionalism sees constitutional rights as exemptions from governmental power, exemptions it calls *negative liberties*; it emphasizes private rights over public purposes.").

¹⁰³ *Contra Rodriguez*, 411 U.S. at 17-18, 29-30 (holding there is no fundamental right to education under the Constitution. It did so using the language of negative rights. However, even as the Court failed to recognize a fundamental right, it simultaneously upheld existing precedent that recognized government's special duty to provide public education).

¹⁰⁴ See 2 EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 739-740 (Sol Cohen ed., 1974).

¹⁰⁵ See *id.* [hereinafter EDUCATION IN THE UNITED STATES]; U.N. Charter pmb., ¶ 2, 4 (describing the duty of the state to promote its citizens' higher standards of living and fundamental freedoms); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948) (U.N. non-binding resolution declaring, among other things, that the right to public education is a human right).

¹⁰⁶ See generally Universal Declaration of Human Rights, art. 26; International Covenant on Economic, Social, and Cultural Rights, art. 13; Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights*

education as well as an obligation under international law to fulfill the basic human right to public education.¹⁰⁷

Thomas Jefferson's several writings on the subject of public education and his Virginia "Bill for the General Diffusion of Knowledge" of 1779, demonstrated his educational philosophy that children should not be deprived of an education simply because they come from poor families.¹⁰⁸ Jefferson believed that society had a duty to educate children who could not afford education but had a demonstrated superior intellectual ability at the common expense.¹⁰⁹ He indicated a need for broad public involvement in funding public education.¹¹⁰ Samuel Knox's call regarding education is by comparison even broader as he explicitly called for the broadest form of public involvement in education.¹¹¹

Samuel Knox's 1799 writing, "An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States" was perhaps the earliest call for a *national* system of education in America.¹¹² Knox recognized that given the size of the U.S., it would be difficult to establish a system capable of affording education equally to every individual in the nation.¹¹³ He analogized those difficulties with difficulties in forming a national government and concluded that such difficulties ought not to detract from the goal of a national education system.¹¹⁴ "It does not appear more impracticable to establish a uniform system of national education, than a system of legislation or civil government."¹¹⁵

Under the more contemporary philosophy of John Dewey, the ultimate aim of society ought not be the mere production of goods, but the production of free human beings associated with one another on terms of equality.¹¹⁶ Formal education has become increasingly important as the scope of resources, achievements, and responsibilities in society has grown more complex.¹¹⁷ No longer can children get by with a mere three years of formal basic education and from there go on to apprentice themselves to adults. Education is a necessity of life for Dewey because, "what nutrition and reproduction are to physiological life, education is to social life" – a means of sustaining and perpetuating that which makes us human.¹¹⁸ In order to have an all-encompassing,

Norms to Inform Constitutional Interpretation, 34 UCLA L. REV. 1195, 1221 (1987); O.A.S. Charter, art. 47 & 49.

¹⁰⁷ See *id.*

¹⁰⁸ A Virginia bill, sponsored by Thomas Jefferson, that called for a school system subsidized by the state. See THOMAS JEFFERSON, BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), in 2 EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 739 (Sol Cohen ed., 1974).

¹⁰⁹ *Id.* at 40

¹¹⁰ *Id.*

¹¹¹ See SAMUEL KNOX, AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES (1799), in 2 EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 776 (Sol Cohen ed., 1974).

¹¹² *Id.* at 778-80.

¹¹³ *Id.* at 779.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See generally JOHN DEWEY, DEMOCRACY AND EDUCATION (1967).

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 9; see also Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1196 n.1 (1987) ("[B]asic human needs . . . refer to the fundamental requirements of food, shelter, medical care, and education. Although education may not intuitively seem necessary to the sustenance of life, the concept of 'basic needs,' as applied in development literature, commonly includes

interested deliberation, society needs a well-educated citizenry. We would argue, however, that there is more to the state's role in providing education than simply preparing its young citizens to govern themselves. Rather, we would argue that the state's purpose is not only to safeguard liberty, but also to provide the basic tools by which individuals may fully develop their capabilities.¹¹⁹

E. Health Care

Another manifestation of the gladiatorial approach of the United States political, economic and legal systems is illustrated by the unique American approach to the provision of health care.¹²⁰ Whereas under international law and in most of the industrialized world, health care is viewed as a fundamental right,¹²¹ and thus not subject to individual negotiation between buyer and seller characteristic of the provision of ordinary goods in a free market, there is considerable legal, political, and economic debate in the United States over whether health care should be considered a fundamental right.¹²² Health care, after all, ultimately determines whether an individual lives or dies. However, it would seem inconsistent with the American system of adversarial dispute resolution and reliance on adversarial negotiation to recognize health care as a fundamental right, since health care is arguably an "end product good" and thus not an essential tool in the battle for rights or to obtain specific "substantive outcomes."¹²³ This would distinguish health care from such recognized fundamental rights as participation in the political process, access to the courts, or right to counsel in certain circumstances, however imperfectly these fundamental rights have been actually implemented by the courts.

1. A Comparative View of Health Care as a Fundamental Right

In Europe and many other countries, health care is generally considered a fundamental

education as one of the five basic needs of human beings.").

¹¹⁹ *Id.*; see also AMARTYA SEN, *THE IDEA OF JUSTICE* (Belknap Press of Harvard Univ. Press 2011); MARTHA NUSSBAUM, *CREATING CAPABILITIES* 17-18, 32-33, 77-79 (2011). See also DEWEY, *supra* note 117, at 183.

¹²⁰ See Robert A. Kagan, *Review Symposium on Kagan's Adversarial Legalism: The American Way of Law: On Surveying the Whole Legal Forest*, 28 *LAW & SOC. INQUIRY* 833, 836 (2003).

¹²¹ See e.g., Charter of Fundamental Rights of the European Union, art. 35, 2000 O.J. (C 364) 2 ("Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."); International Covenant on Economic, Social and Cultural Rights, art. 12 § 1, Dec. 16, 1966, 993 U.N.T.S. 8 (provides that the signatories "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."); European Social Charter, art. 11, Oct. 18, 1961, E.T.S. 35 ("With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases.").

¹²² See e.g., Anita B. Pereira, *Live and Let Live: Healthcare is a Fundamental Human Right*, 3 *CONN. PUB. INT. L.J.* 481 (2004); Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 *U. PA. J. CONST. L.* 1325, 1327 (2010).

¹²³ See *supra* text accompanying note 67.

right.¹²⁴ The European public health policy is reflected in the Charter of Fundamental Rights of the European Union, Article 35, which provides: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”¹²⁵ The rationale for considering health care a fundamental right in international law and most national law descends directly from the protection of life as one of the most important of human rights, rather than merely an economic activity.¹²⁶ Just to provide a small sampling, constitutional provisions recognizing health care as the equivalent of a fundamental right can be found in the constitutions of Belgium,¹²⁷ Estonia,¹²⁸ Finland,¹²⁹ France,¹³⁰ Hungary,¹³¹ Italy,¹³² Latvia,¹³³ Lithuania,¹³⁴ Luxembourg,¹³⁵ The Netherlands,¹³⁶ Poland,¹³⁷ Russia,¹³⁸ Slovakia,¹³⁹ Slovenia,¹⁴⁰ and Spain.¹⁴¹

¹²⁴ See Charter of Fundamental Rights of the European Union, *supra* note 122; International Covenant on Economic, Social and Cultural Rights, *supra* note 122; European Social Charter, *supra* note 122.

¹²⁵ See Charter of Fundamental Rights of the European Union, *supra* note 122.

¹²⁶ See David Leonhardt, *A Lesson From Europe on Health Care*, N.Y. TIMES (Oct. 18, 2006), <http://www.nytimes.com/2006/10/18/business/18leonhardt.html> [<https://perma.cc/LS7W-GZMM>] (“[W]e talk about medical spending as if it were nothing more than a drag on the economy, rather than an investment in the most important thing of all: our well-being.”).

¹²⁷ LA CONSTITUTION, art. 23 (Belg.) (“1. Everyone has the right to lead a life in conformity with human dignity. 2. To this end, the laws, decrees, and rulings alluded to in Article 134 guarantee, taking into account corresponding obligations, economic, social, and cultural rights, and determine the conditions for exercising them. 3. These rights include notably: . . . the right to social security, to health care and to social, medical, and legal aid.”).

¹²⁸ CONSTITUTION OF THE REPUBLIC OF ESTONIA, July 3, 1992, art. 28 (“Everyone has the right to the protection of health”) EST. CONST. art. 28.

¹²⁹ LA CONSTITUTION OF FINLAND, June 11, 1999, §19 (“The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population.”).

¹³⁰ CONSTITUTION OF THE FRENCH REPUBLIC, Oct. 27, 1946, Preamble. (“[The Nation] shall guarantee everyone, particularly children, mothers and older workers, health protection, material security, rest and leisure. Any human being who is unable to work because of his age, his physical or mental condition or his financial situation, shall have the right to obtain the appropriate means for living from the community.”).

¹³¹ THE FUNDAMENTAL LAW OF HUNGARY 1949, ch. XII, art. 70/D, (“(1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. (2) The Republic of Hungary shall implement this right through institutions of labor safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment.”).

¹³² Art. 32 Costituzione (It.) (“The Republic shall protect the health as a basic right of the individual and as an interest of the community, and shall grant free medical care to the poor.”)

¹³³ CONSTITUTION OF THE REPUBLIC OF LATVIA, art. 111 (“The State shall protect human health and guarantee a basic level of medical assistance for everyone.”).

¹³⁴ CONSTITUTION OF THE REPUBLIC OF LITHUANIA, art. 53 (“The State shall look after the health of the people and shall guarantee medical aid and services for the human being in the event of sickness. The procedure for providing medical aid to citizens free of charge at State medical establishments shall be established by law.”).

¹³⁵ CONSTITUTION OF THE GRAND DUCHY OF LUXEMBOURG, art. 11 (“The law organizes the social security, health protection, and rest of workers and guarantee the freedom of trade unions.”).

¹³⁶ STATUUT NED, art. 22 (Neth.) (“The authorities shall take steps to promote the health of the population.”).

In these countries, the right to health care is commonly understood as a right to the enjoyment of a variety of goods and services necessary for pursuing the “highest attainable standard” of health.¹⁴² Thus, at a practical level, healthcare is provided on a free or low-cost basis to the entire population, where single individuals can still decide to undertake medical treatment in private facilities.

2. The Roots of This Divergence Between the United States and the Rest of the Industrialized World with Respect to Health Care.

It is the belief of many in the U.S.,¹⁴³ and it is consistent with America’s philosophical underpinnings, that individuals should have to “work” for their healthcare, just as they have to work for other commodities, services and “substantive outcomes” in their life.¹⁴⁴ Americans earn healthcare as an end product of their economic battle to succeed, and their political and social battle to consolidate and further those economic gains.

Consistent with this belief, the Supreme Court has been very reluctant to expand the

¹³⁷ The Constitution of the Republic of Poland, Article 68, provides: “1. Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute. 3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. 4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment. 5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.” POL. CONST. art. 68

¹³⁸ The Constitution of the Russian Federation, Article 41, provides that: “1. Everyone shall have the right to health care and medical assistance. Medical assistance shall be made available by state and municipal health care institutions to citizens free of charge, with the money from the relevant budget, insurance payments and other revenues. 2. The Russian Federation shall finance federal health care and health-building programs, take measures to develop state, municipal and private health care systems, encourage activities contributing to the strengthening of the man’s health, to the development of physical culture and sport, and to ecological, sanitary and epidemiologic welfare . . .” RUSS. CONST. Art. 41.

¹³⁹ Constitution of the Slovak Republic, Article 20, provides that: “(1) Everyone shall have the right to own property. Property rights of all owners shall be uniformly construed and equally protected by law. The right of inheritance is guaranteed. (2) The law shall establish certain property, which is necessary for the purposes of safeguarding the needs of the society, the development of the national economy and the public interest, except the property defined in Art. 4 of this Constitution as the exclusive property of the State, the municipality or specific legal persons. A law may also lay down which property only individual citizens or legal persons residing in the Slovak Republic may own.” SLOVK. CONST. art. 20.

¹⁴⁰ Constitution of the Republic of Slovenia, Article 51, provides that: “Everyone has the right to health care under conditions provided by law. The rights to health care from public funds shall be provided by law. No one may be compelled to undergo medical treatment except in cases provided by law.” SLOVN. CONST. art. 51.

¹⁴¹ Constitution of the Kingdom of Spain, Article 43, provides that: “1. The right to health protection is recognized. 2. It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect.” SPAIN CONST. art. 43.

¹⁴² Pereira, *supra* note 123, at 486-87.

¹⁴³ See Gallup, *Healthcare System* (Apr. 15, 2017), <http://www.gallup.com/poll/4708/healthcare-system.aspx> [<https://perma.cc/2L9H-TEJT>].

¹⁴⁴ See *supra* text accompanying note 67.

scope of fundamental rights to rights that would implicate “substantive outcomes.”¹⁴⁵ As a result, although the right to health care is recognized by the international community in the Universal Declaration of Human Rights, and the same right is arguably implicit in the Constitution’s Preamble as requiring the federal government to take affirmative steps to secure the “Blessings of Liberty,”¹⁴⁶ health care has never received constitutional protection.

As a matter of law, there are three main arguments rooted in American law that support such a belief. First, the U.S. Constitution does not expressly recognize the right to health care.¹⁴⁷ Second, the federal Constitution protects individual liberties and freedoms from government intrusion rather than imposing governmental duties or obligations.¹⁴⁸ Third, the Tenth Amendment is generally construed as reserving the power to regulate health, safety, and welfare to the states, which can better define and address the different health care needs of their residents.¹⁴⁹

An explanation for this divergence between the United States and much of the rest of the world is provided by N. Gregory Mankiw:

The push for universal coverage is based on the appealing premise that everyone should have access to the best health care possible whenever they need it. That soft-hearted aspiration, however, runs into the hardheaded reality that state-of-the-art health care is increasingly expensive. At some point, someone in the system has to say there are some things we will not pay for. The big question is, who? The government? Insurance companies? Or consumers themselves? And should the answer necessarily be the same for everyone?

Inequality in economic resources is a natural but not altogether attractive feature of a free society. As health care becomes an ever larger share of the economy, we will have no choice but to struggle with the questions of how far we should allow such inequality to extend and what restrictions on our liberty we should endure in the name of fairness.¹⁵⁰

Economics professor Walter E. Williams of George Mason University writes of the right to health care as violative of the American conception of rights in general:

True rights, such as those in our Constitution, or those considered to be natural or human rights, exist simultaneously among people. That means exercise of a right by one person does not diminish those held by another. In other words, my rights to speech or travel impose no obligations on another except those of non-interference. If we apply ideas behind rights to health care to my rights to speech or travel, my free speech rights would require government-imposed obligations on others to provide me with an auditorium,

¹⁴⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁴⁶ U.S. CONST., preamble.

¹⁴⁷ Leonard, *supra* note 123, at 1328.

¹⁴⁸ *Id.* at 1328.

¹⁴⁹ *Id.*

¹⁵⁰ Robert M. Beren, Ph.D., *Why Health Care Will Never Be Equal*, NY TIMES (Sept. 19, 2009), available at <http://www.nytimes.com/2009/09/20/health/policy/20view.html>.

television studio or radio station. My right to travel freely would require government-imposed obligations on others to provide me with airfare and hotel accommodations.¹⁵¹

Thus, making health care a fundamental right would arguably violate the underlying American presumption of non-governmental interference in substantive outcomes based upon each individual's competitive abilities in the national and presumably global marketplace. As appears evident from American jurisprudence, American courts will only intervene in the allocation of benefits if fundamental rights or a suspect class¹⁵² is involved, and only then will it do so reluctantly.¹⁵³

It could be argued that incapacitating diseases and critical illness may completely impair the opportunity of a person to exercise any of his or her rights, including the most protected and fundamental right to vote. According to one commentator, Roosevelt himself believed the Second Bill of Rights should provide that each person had the right to health care.¹⁵⁴

F. *The Unique American Adversarial Approach to Freedom of Expression*

1. American Divergence from International Law and Other Countries in its Adversarial Approach to Hate Speech.

Few areas of constitutional adjudication better exemplify the particularly adversarial/gladiatorial view of issue resolution than in the areas of regulation of speech, particularly regulation of "hate speech."¹⁵⁵ Expression is usually considered to constitute hate speech when it is directed at individuals because of their membership in certain groups and is "abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination."¹⁵⁶ This article does not attempt to judge whether the United States jurisprudential approach is appropriate, but simply notes the extraordinary differences between the approach of the United States and every other country in the world, including countries with a common law legal heritage.¹⁵⁷

In contrast to United States jurisprudence, the vast majority of national constitutions and all relevant international human rights instruments prohibit hate speech based on race, religion, or

¹⁵¹ See Mark Berman, *Is Health Care a Fundamental Right?* (Mar. 23, 2010), <http://www.opposingviews.com/i/is-health-care-a-fundamental-right> [<https://perma.cc/RAM3-R2W7>].

¹⁵² But see Cassandra Jackson, *Why the War on Affordable Health Care is a War on Black and Latinos*, HUFFINGTON POST (June 8, 2012), http://www.huffingtonpost.com/cassandra-jackson/why-the-war-on-affordable_b_1567650.html [<https://perma.cc/DA5J-YM6D>] ("Currently 21.6 percent of blacks and over 33.3 percent of Hispanics are uninsured, compared to just 13.9 percent of whites.").

¹⁵³ See *supra* Part II (c)(3).

¹⁵⁴ See Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 419–20 (2006) (citing Cass R. Sunstein, *Economic Security: A Human Right, Reclaiming Franklin Delano Roosevelt's Second Bill of Rights*, AM. PROSPECT, SPECIAL REPORT ON U.S. HUMAN RIGHTS, Oct. 2004, at A24-A26 (arguing for the advancement and rescue of Roosevelt's Second Bill of Rights)).

¹⁵⁵ STRIKING A BALANCE, HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION v (Sandra Coliver ed., 1995).

¹⁵⁶ *Id.*

¹⁵⁷ See Adam Liptak, *Unlike Others, U.S. Defends Freedom to Offend in Speech*, N.Y. TIMES (June 12, 2008), available at <http://www.nytimes.com/2008/06/12/us/12hate.html> [<https://perma.cc/3SRV-8ZMW>].

nationality and in some cases, other categories such as sexual orientation as well.¹⁵⁸ In the United States, First Amendment protection even covers speech with the declared goal of encouraging genocide, murder and other domestic and international crimes against humanity, as long as such activities are limited to speech and not incitements to *imminent* criminal action.¹⁵⁹ In contrast to United States jurisprudence, all relevant international human rights instruments and the vast majority of national constitutions prohibit hate speech based on race, religion, or nationality and in some cases, other categories as well.¹⁶⁰ The vast majority of the world's legal systems understand and incorporate into their jurisprudence the assumption that speech against members of certain groups may be actionable, provided the traditional elements of defamation or criminal liability are present.¹⁶¹ Those elements are: (1) intent to materially harm a specific group; (2) by means of speech; (3) based on actions meeting the legal definitions of defamation and/or criminal conspiracy.¹⁶² Despite the condemnation and prohibition of such words in every relevant human rights document,¹⁶³ and the prohibition of such words in the vast majority of the world's national constitutions and laws,¹⁶⁴ the United States stands alone in constitutionally protecting such speech. Significantly, the United States position is contrary to the International Covenant on Civil and Political Rights (the ICCPR),¹⁶⁵ the American Convention on Human Rights,¹⁶⁶ the

¹⁵⁸ The constitutions of Norway, Denmark, Netherlands, Ireland, and South Africa prohibit hate speech directed at individuals because of their sexual orientation. See NOR. CONST., DEN. CONST., NETH. CONST., IR. CONST., S. AFR. CONST. art. 16, §2(c).

¹⁵⁹ See Liptak, *supra* note 160.

¹⁶⁰ *Id.*

¹⁶¹ See Thomas J. Webb, *Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 460-67 (2011).

¹⁶² Malla Pollack, *Litigating Defamation Claims*, 128 AM. JURIS. TRIALS 1 (2013).

¹⁶³ See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 13, 30 I.L.M. 1517 (1990); Convention on the Rights of the Child art. 13, Nov. 20, 1989, 1577 U.N.T.S. 3 (1990); International Covenant on Civil and Political Rights art. 20, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (1976); International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 (1969); Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, Article 3 (1951); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

¹⁶⁴ See, e.g., *Racial Discrimination Act 1975* §IIA; Law of July 30, 1981 on the Punishment of Certain Acts inspired by Racism or Xenophobia (1981), Holocaust denial law (1995) (Belgium); CONSTITUIÇÃO FEDERAL (Brazil); CRIMINAL CODE art. 174 (Croatia); CANADA CRIMINAL CODE, R.S.C. 1985, ch. C-46, art. 319(2); CRIMINAL CODE (Order No. 909/2005) §266B (Denmark); Public Order Act 1986, ch. 64, §18 (U.K.); Racial and Religious Hatred Act 2006, ch. 1 (U.K.); CRIMINAL JUSTICE AND IMMIGRATION ACT 2008, ch. 4, §74 (U.K.); FINNISH PENAL CODE (RIKOSLAKI/STRAFFLAGEN) ch. 11, §8 (Finland); PENAL CODE, DÉCRET N° 2005-284 DU 25 MARS (2005), LAW AGAINST RACISM, Loi n° 72-546 du 1er juillet 1972 (1972), PRESS LAWS, La loi du 29 juillet 1881 (France); GERMAN CRIMINAL CODE (STRAFGESETZBUCH), art. 130; ICELANDIC PENAL CODE, art. 233; Constitution, §19, INDIAN PENAL CODE, e.g. §§153A and 295A; PROHIBITION OF INCITEMENT TO HATRED ACT (1989) (Ireland); HUMAN RIGHTS ACT (1993), §61 (New Zealand); NORWEGIAN PENAL CODE, (STRAFFELOVEN), §135a; CRIMINAL CODE OF POLAND, art. 196, 256 and 257, Broadcasting Act (1992), art. 18; SERBIAN PENAL CODE, §317; SOUTH AFRICA, ACT NO. 4 OF 2000: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT; SWEDISH PENAL CODE, (BROTTSBALKEN), ch. 16, § 8.

¹⁶⁵ United Nations International Covenant on Civil and Political Rights art. 20.2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"].

¹⁶⁶ Organization of American States American Convention on Human Rights art. 13, §5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁶⁷ and the Rome Statute of the International Criminal Court.¹⁶⁸ The United States position is also directly contrary to the Statute of the International Criminal Court which explicitly disallows a free speech defense for “incitement to genocide.”¹⁶⁹

The principal international human rights treaties unanimously require governments to prohibit “hate speech” based on race, religion, or nationality. For example, the ICCPR states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹⁷⁰ Article 13, paragraph 5 of the American Convention contains the broadest prohibition:

[A]ny advocacy of national, racial or religious hatred that constitute[s] incitements to lawless violence or to any other similar action against any person or group of persons *on any grounds including* those of race, color, religion, language, or national origin shall be considered as offenses punishable by law (emphasis added).¹⁷¹

The clause “on any grounds including” would seem to provide an international treaty basis for protecting other groups from hate expression as well.

Although the European Convention does not contain an explicit prohibition of hate speech, cases interpreting the Convention have held that such a prohibition is implicit in Articles XVII and XIV.¹⁷²

The Statute of the International Criminal Court provides that “free speech” protection cannot constitute a defense to persecution under that statute, even when the hate speech is committed by organized movements that do not yet have the status of a state, and the speech would not have the quality of traditional state action.

Relevant international treaties are unanimous and unequivocal in their condemnation of hate speech. These treaties are, however, simply a reflection of the almost universal prohibition of hate speech under national law, with the notable exception of the United States.¹⁷³ Indeed, from a comparative legal perspective, many constitutions already prohibit hate expression,¹⁷⁴ so the effect of international law in those countries may be limited. Nevertheless, international law can have an impact on the manner in which national courts interpret their own existing statutes. Australia provides one such example. Australia is a signatory, with reservations, to two

¹⁶⁷ United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 4., 21 December 1965, 660 U.N.T.S. 195 [hereinafter “CERD”].

¹⁶⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court art. 7.1.h*, July 17, 1998, A/CONF. 183/9 (Jul. 17, 1998) (last amended 2002).

¹⁶⁹ ICCPR *supra* note 168, at art. 6.

¹⁷⁰ *Id.* at art. 20.

¹⁷¹ Organization of American States, *supra* note 169.

¹⁷² See generally STRIKING A BALANCE, *supra* note 158; see also Stephanie Farrior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 66-69 (1996); Glimmerveen and Hagenbeek v. Netherlands, App. No. 8348/78 & 8406/78, 23 Y.B. Eur. Conv. on H.R. 366 (Eur. Comm’n on H.R., 1979); Jersild v. Denmark, App. No. 15890/89 19 Eur. Ct. H.R. (ser. A) 1 (1994).

¹⁷³ See Robert A. Khan, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Lowenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 547 (2013).

¹⁷⁴ *Id.*

international conventions which impact attempts by countries to legislate against racial vilification: the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the International Covenant on Civil and Political Rights (ICCPR). Numerous countries' constitutions explicitly prohibit hate speech in a manner very consistent with the international law prohibitions discussed above, including those of Azerbaijan,¹⁷⁵ Bulgaria,¹⁷⁶ Croatia,¹⁷⁷ Fiji¹⁷⁸, and Greece.¹⁷⁹

¹⁷⁵ AZER. CONST. art. 47. provides: "(1) Everyone may enjoy freedom of thought and speech. (2) Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions. (3) Propaganda provoking racial, national, religious and social discord and animosity is prohibited."

¹⁷⁶ BULG. CONST. art. 39 provides: "(1) Everyone is entitled to express an opinion or to publicize it through words, written or oral, sound, or image, or in any other way. (2) This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone."

¹⁷⁷ CROAT. CONST. art. 39 provides: "Any call for or incitement to war, or resort to violence, national, racial, or religious hatred, or any form of intolerance is prohibited and punishable."

¹⁷⁸ FIJI CONST. ch. 2 § 17.1(a)-(b) provides: (1) Every person has the right to freedom of speech and expression, including: (a) freedom to seek, receive and impart information and ideas; and (b) freedom of the press and other media. FIJI CONST. ch. 2 § 19.1(a)-(f) provides:

A law may limit, or may authorise the limitation of, the right to freedom of expression in the interests of: (a) national security, public safety, public order, public morality, public health or the orderly conduct of national or municipal elections; (b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including: i. the right to be free from hate speech, whether directed against individuals or groups; and ii. the right of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law; (c) preventing the disclosure, as appropriate, of information received in confidence; (d) preventing attacks on the dignity of individuals, groups or communities or respected offices or institutions in a manner likely to promote ill will between races or communities or the oppression of, or discrimination against, any person or persons; (e) maintaining the authority and independence of the courts; (f) imposing reasonable restrictions on the holders of public offices in order to secure their impartial and confidential service.

¹⁷⁹ SYNTAGMA [SYN.] [CONSTITUTION] art. 14 (Greece) provides:

(1) Any person may express and propagate his opinion orally, in writing, or in print, with due adherence to the laws of the State. (2) The press is free. Censorship and all preventive measures are prohibited. (3) The seizure of newspapers and other printed matter, either before or after circulation, is prohibited. By exception, seizure after publication is permitted upon instruction by the Public Prosecutor because of: a) insult to the Christian and all other known religions, b) insult to the person of the President of the Republic, c) a publication which discloses information relating to the composition, armament, and disposition of the armed forces or the fortifications of the country, or aims at violently overthrowing the political system or is directed against the territorial integrity of the State, d) obscene publications which manifestly offend public decency, in the cases specified by law. (4) In all of these cases, the Public Prosecutor must, within twenty-four hours of the seizure, submit the case to the judicial council which, within a further twenty-four hours, must decide whether the seizure shall be maintained or withdrawn, otherwise the seizure shall be lifted ipso jure. The publisher of the seized newspaper or other printed matter and the Public Prosecutor are allowed to appeal to the Appeal Court and the Supreme Court. (5) The law shall determine the manner rectifying in full through the press erroneous publications. (6) After at least three convictions within a five year period for crimes specified in Paragraph (3) hereof, the court shall order the permanent or temporary suspension of issue of the publication and, in serious cases, prohibit the practice of the profession of journalist by the person convicted, as provided by law. Such suspension or prohibition

The requirement of immediacy for speech that would be criminal but for their hate content, is somewhat particular to United States law.¹⁸⁰ For example, in the United States, it is protected free speech to call for the extermination of individuals based on their race, religion, or ethnic origin, as long as such speech does not result in immediate criminal harm. Despite the condemnation and prohibition of such words in every relevant human rights document,¹⁸¹ and the prohibition of such words in the vast majority of the world's national constitutions and laws,¹⁸² the United States stands alone in constitutionally protecting such speech. The First Amendment protection even covers speech activities of groups with the declared goal of engaging in genocide, murder, and other domestic and international crimes against racial, ethnic, and religious groups in the United States, as long as these activities are limited to speech and not incitements to *imminent* criminal action.¹⁸³ This rule applies even when the group has taken clear steps to organize and recruit members for what may otherwise be a criminal conspiracy to commit murder and/or genocide.¹⁸⁴ In other words, hatred creates, or comes very close to creating, a defense for conduct that would otherwise constitute criminal conspiracy, or civil tort liability.¹⁸⁵

What makes the United States' approach to free speech all the more striking is that it is not shared by any other democracy, even those that are well-known for robust political discourse.¹⁸⁶ Perhaps even more notable is that this approach is not shared by the United Kingdom or other common law countries, with which the United States shares a legal heritage.¹⁸⁷ This is striking, as much of the reason for the peculiarly adversarial United States approach to dispute resolution can be found in the origins of the British common law. However, the divergence between the British and the U.S. approach in several significant areas, such as free speech, suggests that the United States stands apart even from its common law ancestor.¹⁸⁸

Although there are a number of justifications for the unique position of the United States, the most common one is to preserve the "marketplace of ideas."¹⁸⁹ The "marketplace of ideas" is yet another analogy to battle, relying on the stronger argument to carry the day. Of course, as noted below, problems arise when the "stronger" idea may not be the most meritorious, but simply the better funded or "stronger" for other reasons. One such example would be the power of

shall commence from such time as the sentence becomes irrevocable. (7) Press offenses shall be deemed offenses in flagrante delicto and shall be judged by the courts as the law provides. (8) The law determines conditions and qualifications for the practice of journalism. (9) The law may lay down that financing newspapers and periodicals be made known.

¹⁸⁰ Liptak, *supra* note 160, citing ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007).

¹⁸¹ See *infra* Part II(F)(1).

¹⁸² See generally John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006).

¹⁸³ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *National Socialist Party of America v. Village of Skokie* 432 U.S. 43 (1977).

¹⁸⁴ The authors would argue that it may even be possible to reformulate the United States jurisprudential approach to hate speech largely within the domain of existing tort and criminal law theories.

¹⁸⁵ Such tort liability that otherwise may arguably exist in the absence of a hate component would include: defamation, intentional infliction of emotional distress, harassment libel and false light.

¹⁸⁶ See Liptak, *supra* note 160.

¹⁸⁷ See Webb, *supra* note 164, at 464-65.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). ("[The] purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.")

Nazi ideas, despite the odiousness of their substantive content,¹⁹⁰ or the strength of religious ideas justifying slavery.

The attractiveness of this peculiar American approach is nevertheless difficult to deny. An absolutist approach to free speech at least insures that all speech will be permitted without regard to content, protecting politically unpopular groups from government regulation.¹⁹¹ However, it should also be noted that numerous other democracies have managed to develop energetic civil rights movements and a robust exchange of ideas, while still regulating speech that transcends the boundaries of “discourse” and descends into advocacy of hatred and genocide.

In summary, it can be concluded that first, the United States jurisprudential approach to hate speech is, as an empirical matter, out of sync with the vast majority of industrialized democracies, *even those who share a common-law legal tradition*. Second, the approach of those other democracies to hate speech, has not compromised their protection of free speech generally. Third, the United States jurisprudential approach to hate speech is substantially inconsistent with international law, as evidenced by all international treaties addressing the issue of free speech and hate speech, specifically. Fourth, the U.S. approach to regulating hate speech is, to some extent, inconsistent with U.S. and general principles of law regarding criminal conspiracy. Thus, the U.S. approach creates a kind of criminal defense to conduct that may otherwise be actionable as a conspiracy to commit murder, battery, or even genocide. In this sense, the United States approach to hate speech is a vivid illustration of the value American society places on conflict, even when it would otherwise run afoul of other fundamental legal principles, such as conspiracy to commit murder.

However, United States jurisprudence recognizes that in the work arena, hate speech directed at a particular group may be actionable.¹⁹² It is actionable when it results in palpable discrimination against, and damage to, the recipient of the hate speech.¹⁹³ It would not seem a legally radical step to extend these protections to historically discriminated groups in contexts other than the workplace.

2. Creation of Law by the Economically Powerful through the “Battle of Ideas”

The gladiatorial approach to free speech does not just implicate the ability to exercise hate speech against vulnerable groups. Free speech has recently been extended to corporations by the Supreme Court, allowing corporations to influence the political process under the rubric of “free speech” through political donations to the same extent as individuals.¹⁹⁴ It should be noted that corporations always possessed the right to present their points of view through advertising and other means, but they had traditionally been excluded from being able to enjoy the same rights as individuals when it came to financial contributions to political candidates.¹⁹⁵ Free speech

¹⁹⁰ See Liptak, *supra* note 160.

¹⁹¹ See generally *id.*

¹⁹² Michael Dolgow, *Where Free Speech Goes to Die: The Workplace*, BLOOMBERG (Aug. 3, 2012), <http://www.bloomberg.com/news/articles/2012-08-03/where-free-speech-goes-to-die-the-workplace> [<https://perma.cc/45HT-E86T>].

¹⁹³ *Id.*

¹⁹⁴ See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

¹⁹⁵ See Matt Bai, *How Much has Citizens United Changed the Political Game?*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html> [<https://perma.cc/YED7-TN4Q>].

standards had previously been held to invalidate some aspects of campaign finance reform that limited financial contributions from individuals, but those standards had never previously been extended to prevent limitations on donations by corporations.¹⁹⁶ In large part, this is because the Constitution, by its own words, only protects persons, and corporations had not been held to be people in the Constitutional sense of the word. Of course, many individuals enjoying free speech rights are part of large corporations, thus already giving corporations a role in free speech in political discourse.¹⁹⁷ However, granting corporations the right to actively participate in political discourse directed at, or for, specific candidates, extends the rights of free speech beyond the marketplace of ideas, to the laws relating to political financing, which has traditionally been a somewhat distinct field from free speech, with its own set of public policy concerns.

G. Labor Standards

With respect to labor standards, the United States stands alone among industrialized nations in failing to elaborate substantive labor standards that incorporate guaranteed vacation,¹⁹⁸ severance pay,¹⁹⁹ and other standards considered basic in the rest of the industrialized world. For example, under the British system, all employees are statutorily protected, under the Employment Protection Act of 1978, from unfair dismissal and must be given advanced notice of dismissal, as well as two days off with pay to look for work. Additionally, under collective dismissals, the employer must pay redundancy or severance payments to the dismissed employees.²⁰⁰ In Germany, as in the United Kingdom, job security is provided by law.²⁰¹ Dismissals which are “socially unjustified” are legally void.²⁰² In Sweden, dismissals must be based on “objective cause” and dismissed employees are entitled to severance pay.²⁰³ The underlying premise of this is that the employee has the right to continued employment. These examples obviously directly contrast with the American doctrine of at-will employment. In Japan, the Japanese Constitution “declares the right to work a fundamental human right.”²⁰⁴ Dismissals require an “objectively and socially reasonable cause.”²⁰⁵ American employees are not legally entitled to vacation, whereas in most other industrialized countries, vacation time is mandated by the labor code or the countries’ constitutions.²⁰⁶

¹⁹⁶ See generally *id.*

¹⁹⁷ See generally *id.*

¹⁹⁸ Tanya Mohn, *U.S. The Only Advanced Economy That Does Not Require Employers to Provide Paid Vacation Time, Report Says*, FORBES (Aug. 13, 2013, 1:38 PM), <http://www.forbes.com/sites/tanyamohn/2013/08/13/paid-time-off-forget-about-it-a-report-looks-at-how-the-u-s-compares-to-other-countries> [<https://perma.cc/VS9J-RH4Q>].

¹⁹⁹ See generally Samuel Estreicher & Jeffery M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C.L. REV. 343, 354 (2014).

²⁰⁰ Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1043 (1995).

²⁰¹ *Id.* at 1043.

²⁰² *Id.*

²⁰³ *Id.* at 1048, 51-52.

²⁰⁴ *Id.* at 1053.

²⁰⁵ *Id.*

²⁰⁶ See Kevin Cranman & Natasha Baker, *Where in the World Are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Employment*, 36 J. COLL. & UNIV. L. 565, 599–600 (2010) (comparing U.S., French, and Chinese employment laws); Helene Jorgensen, *Give Me A Break: The Extent of*

The United States approach to labor law is embodied in the “employment at will” doctrine, which essentially gives both the employer and employee full freedom to terminate their relationship with each other at any time they choose, absent a contract between the two to the contrary.²⁰⁷ The US legal system therefore relies on “gladiatorial” conflict between employers and employees with “negotiation” as the process and labor strikes as the weapon. This American gladiatorial free market approach posits that the parties, rather than the government, should arrive at the substantive terms.²⁰⁸ Without drawing normative conclusions about the American approach, it suffices to note that every other industrial democracy has recognized the glaring inequality between the employer and employee in most hiring situations and have generally instituted some kind of minimum job security standards for non-executive employees, as noted above.

The American rule was first iterated in 1877 by Horace Gay Wood, a legal scholar and treatise writer from New York. He stated the rule as follows: “[T]he rule is inflexible that a general or indefinite hiring is prima facie a hiring at –will and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . “²⁰⁹ One curious aspect about Wood’s rule is that the author claimed to be simply restating the existing rule rather than creating a new rule. In fact, the rule reflected neither an established American rule nor the British rule regarding employment. Indeed, there has been controversy as to whether Wood created his rule of employment at will from an inaccurate synthesis of existing precedent.²¹⁰

Whatever the reasons for Wood’s establishment of his rule, it became the overwhelmingly dominant rule in American law, and reflected the predominance of a laissez-faire approach to economics existing at the time. Indeed, this was the legal period known in America as the “Lochner Era” in which socially established rules for workers, or vulnerable groups in society, were eschewed in favor of permitting the parties with the most economic and political power to

Paid Holidays and Vacation, Center for Economic and Policy Research (Sept. 3, 2003), http://www.cepr.net/documents/publications/give_me_a_break.htm [<https://perma.cc/ZCF5-GLB9>] (comparing time off between U.S., European, and Japanese workers); Jeanne Sahadi, *Who Gets the Most (and Least) Vacation*, CNNMONEY (June 14, 2007), http://money.cnn.com/2007/06/12/pf/vacation_days_worldwide [<https://perma.cc/9Y3H-TX52>] (“All members of the European Union . . . must provide workers with a minimum of 20 paid vacation days a year plus public holidays.”).

²⁰⁷ Liz Ryan, *How At-Will Employment Hurts Business*, FORBES (May 1, 2014), <http://www.forbes.com/sites/lizryan/2014/05/01/how-at-will-employment-hurts-business> [<https://perma.cc/JLB9-ZQED?type=image>].

²⁰⁸ See, e.g., *Valley Mould & Iron Corp. v. N.L.R.B.*, 116 F.2d 760, 764 (1940) (stating the purpose of National Labor Relations Act was to protect the right of the employee to collectively bargain with the employer regarding labor terms.) Federal policy favors arbitration or other forms of extra-judicial methods in resolving labor disputes, but does not limit the NLRB to utilizing solely these methods. *N.L.R.B. v. Local 282, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 344 F.2d 649, 652 (1965). See also Marion Crain, *Work Matters*, 19 KAN. J.L. & PUB. POL’Y 365, 374 (2010) (“U.S. law treats the employment relation as if it were nothing more than a market transaction, as if labor were nothing more than a commodity, as if workers invested nothing more than their sweat.”).

²⁰⁹ HORACE GAY WOOD, *MASTER AND SERVANT* 272 (1877).

²¹⁰ Compare Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) and Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 739 (1991) with Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 552, 554 (1990). For an important empirical contribution to the historical debate, see generally, Andrew P. Morris, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

set the rules.²¹¹ Although framed in terms of freedom of contract and freedom to negotiate, the *Lochner* era actually prevented workers and other subaltern classes from fighting for their own rights in the political system. This result was directly contrary to the ostensibly adversarial ethos of American democracy. Indeed, the enshrining of employers' rights as Constitutional rights precluded meaningful adversarial combat in the political arena and was therefore incapable of being challenged via the democratic process.²¹²

This emphasis on the primacy of contract law over worker rights is reflected much more broadly in American contract law. As the discussion below demonstrates, labor law is a vivid illustration of this approach, but far from the only one.

H. *Supremacy of Contract: The Illusion of a Fair Battle*

One of the most pronounced areas where the adversarial, gladiatorial mode of issue resolution is employed is in the area of contracts. Judicial commentators recognize that the United States legal system reflects an unusually strong adherence to the supremacy of contract.²¹³ Such a value is especially prominent in the United States because contracts are the result of a battle, or negotiation, between two parties. The results are not determined by legal rules established by the state, but rather by the parties themselves through their adversarial negotiation. Indeed, the preference for contract over state-enforced standards is so pronounced that courts have enforced contractual provisions requiring arbitration over access to the courts even in contexts where the contracts could only be characterized as adhesion contracts.²¹⁴ Examples include mandatory arbitration clauses in labor agreements and consumer contracts.²¹⁵ Taken to its logical conclusion, supremacy of contract can effectively derogate the most fundamental rights of most Americans, including the right of access to the court system.²¹⁶ Indeed, in 2011, the Supreme Court determined that consumers can contract away their right, in a contract of adhesion, to join together as a class to take on the big corporations.²¹⁷

²¹¹ See generally Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

²¹² See *Lochner v. New York*, 198 U.S. 45, 64 (1905).

²¹³ See David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. DEV. J. (2013) 1, 13 (“The freedom of contract was imported with the rest of the common law in the founding of our country, and provided a bedrock on which our society was conceived . . . While restrictions of many shapes and sizes are expected on many different types of contracts, the inherent ability of an individual to contractually obligate himself and likewise receive the obligation of another has roots that go back thousands of years, at least for the privileged. Given the broad scope of authority conveyed by the right to contract which literally extends from birth to death and even beyond, it is one of the most powerful rights we possess.”).

²¹⁴ Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DePaul L. REV. 1191, 1192-8 (2001).

²¹⁵ See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²¹⁶ Linda S. Mullinex, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988) (“The thesis of this Article is that the supremacy of contract law over long-established jurisdictional doctrines has significantly eroded certain fundamental litigation rights. This is particularly egregious insofar as various mechanisms for securing consensual adjudicatory procedure are becoming pervasive throughout a wide array of party relationships.”)

²¹⁷ *Concepcion*, *supra* note 220 at 1760 (“Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts . . . A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase

On the one hand, this preference for “negotiated standards” over standards instituted by the government presumes that there is a real negotiation between the parties. On the other hand, a legal realist would argue that the legal system is aware that there is actually no real negotiation but that it has no qualms about consistently enforcing the rights of the more powerful party to a one-sided “negotiation.” As noted by one legal scholar:

Contract law, due to its inherent flexibility as private law, is a tool that companies can use to achieve strategic goals within the legal environment and, more creatively, to frame its business activities outside a prescribed set of rules that make up the legal environment. In other words, contract law can be used in business to create a more favorable legal environment, by avoiding obstacles presented by immutable rules of law.²¹⁸

Again, one of the ways corporations create a favorable legal environment for themselves is by strong-arming consumers, patients, and employees into forced arbitration.²¹⁹ This is accomplished under the rubric of freedom of contracts. The Supreme Court consistently sides with big corporations when it assumes that those who are accepting the terms of a contract with an employer, hospital, or insurance company have a choice when presented with an adhesion contract.²²⁰

Today, many credit card providers, banks, insurers, health care providers, service providers, product sellers, and employers are using small print clauses to require individuals to trade their right to a day in court for a right to arbitrate future claims. Pursuant to the FAA, the clauses need not be signed to be enforceable; therefore many companies simply use envelope stuffers, warranty provisions, or employee handbooks to specify the available procedural recourse. Other companies obtain a signature on a credit card or employment application, a form filled out in a doctor’s office, or a loan agreement. Sometimes the clauses are provided on-line, and “accepted” by the customer who clicks ‘enter’.²²¹

In *Adkins v. Labor Ready, Inc.*, the Fourth Circuit acknowledged that forced arbitration in a class action suit was acceptable even where the evidence showed that many of the plaintiffs were uneducated and poor and did not even understand what arbitration was at the time they

the speed and efficiency of arbitrating a dispute, but the State can forbid it.”).

²¹⁸ Larry A. DiMatteo, *Strategic Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 750 (2010).

²¹⁹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/H6LS-M3BZ>].

²²⁰ *Gilmer v. Interstate*, 500 U.S. 20, 33 (1991). (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) (This case also involved signing a U-4 form agreeing to mandatory arbitration as in *Gilmer*. But in this case, the court ruled that the arbitration was enforceable even if it was a condition to employment).

²²¹ Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 834–35 (2002).

agreed to the employment terms.²²² The defendant, on the other hand, was a multi-million dollar company generating more than \$850 million in earnings and was considered “large” and “sophisticated.”²²³ In a marvelous example validating the arguments of the most cynical legal realists, a unanimous panel disagreed that the contract was not enforceable, admitting that, “[a] ruling of unconscionability based on this analysis alone could potentially apply to every contract of employment in our contemporary economy.”²²⁴

The problem with arbitration is that those who have economic advantages (‘Haves’) frequently have legal advantages as well. As Carrie Menkel-Meadow notes:

While some argued a version of “[w]hy the ‘Haves’ come out ahead” by suggesting that the least powerful were being forced into systems of second class justice in neighborhood justice mediation just as they were achieving more legal rights “on the books,” others pointed out that it was the “Haves” who were in fact exiting the system by first choosing more streamlined and controlled forms of private justice when they disputed with each other, and now when they impose mandatory private dispute resolution on their employees, clients, customers, patients, franchisees, and licensees. To put it simply, the “Haves” come out ahead by being able to choose and manipulate what process will be used to enforce substantive rights.²²⁵

This is demonstrated by the modified gladiatorial approach of arbitration – even the protections normally provided by rules of evidence do not apply. Discovery is very limited and the person overseeing the whole process is not even required to have legal training.²²⁶ All of this is accomplished because the individual is forced to contract away all his rights with the blessing of the courts.²²⁷

At the other end of the spectrum, European law prescribes that “any term of a consumer contract, with the exception of subject matter and price, can be challenged on the grounds that it has not been individually negotiated and is unfair.”²²⁸ In addition, mandatory “pre-dispute” arbitration, not covered by “legal provision,” is prima facie evidence of unfairness and therefore void.²²⁹

Some EU countries have laws and regulations that empower their populations to negotiate better terms, rather than leaving it up to the free market. For example, Germany has strict guidelines regarding arbitration. Companies that wish to include a pre-dispute arbitration

²²² 303 F.3d 496, 501 (4th Cir. 2002).

²²³ *Id.* at 501-502.

²²⁴ *Id.* at 501.

²²⁵ Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 25 (1999). (Author “explore[s] theoretically and address[es] empirically . . . the question of whether the ‘haves’ come out ahead in ADR too, as they do in the more official arena of litigation”).

²²⁶ Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice by Corporate America*, CENTER FOR JUSTICE & DEMOCRACY (2005), <https://www.centerjd.org/content/white-paper-mandatory-binding-arbitration-civil-injustice-corporate-america> [https://perma.cc/2M4T-R92B].

²²⁷ See generally Silver-Greenberg & Gebeloff, *supra* note 224.

²²⁸ Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT’L L. & COM. REG. 357, 363 (2002).

²²⁹ *Id.* at 366.

agreement, must do so “in a separate and mutually signed document that solely contains the agreement to arbitrate.”²³⁰ Moreover, an arbitration agreement between an employer and employee requires a “separate system of arbitral proceedings,” in which the tribunal consists of “an equal number of workers and employers.”²³¹

Perhaps the difference in attitude can be attributed to “legal tradition.”²³² European law takes a much less absolutist approach toward contracting, whereas the U.S has a more gladiatorial focus on absolute supremacy of contract regardless of how unfair the outcome.²³³ One commentator has explained:

Whereas American law seems focused on the freedom of the parties to commercial transactions to arrange their affairs in accordance with their own needs, the European approach seeks to protect those whom it considers to be the weaker party to a commercial transaction. At its simplest, and perhaps therefore most misleading, the American approach gives primacy to a more absolute concept of autonomy of the will, whereas the European approach holds that public policy may limit that autonomy.²³⁴

This is exemplified by the fact that “[u]nlike European . . . systems, the United States . . . system provides for the right to jury trial in civil cases, broadly available class action procedures that permit claimants to aggregate small claims, and a wider availability of punitive damages. American businesses use arbitration to reduce their . . . risks from each of these sources.”²³⁵ Additionally, as noted by Caroline Fredrickson:

One of the fundamental differences between civil and common law systems is that in the former [h]uman dignity and personal freedom derive from the rights and duties laid down in law. Law therefore serves as a guide to freedom and right living. In the common law tradition, by contrast, freedom precedes law; freedom, after all, is the individual’s natural state; judges therefore make law on a case-by-case basis as persons seek remedies for intrusions upon their freedom.²³⁶

The U.S. holds freedom of contract in such high regard that one judge, in writing a legal opinion, remarked: “The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to speak without restraint.”²³⁷

²³⁰ Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons From Abroad*, 65 DISP. RESOL. J. 30, 34 (2010).

²³¹ *Id.* (citing PATRICIA NACIMIENTO & CONSTANTIN DÜCHS, INTERNATIONAL COMPARATIVE LEGAL GUIDE TO INTERNATIONAL ARBITRATION 2008, 140 (Alan Falach, et al., eds., Global Legal Group (UK) 2008)).

²³² Drahoza & Friel, *supra* note 233, at 384.

²³³ *Id.* at 385.

²³⁴ *Id.* at 386.

²³⁵ *Id.* at 389.

²³⁶ Caroline R. Fredrickson, *Freedom of Contract and the Remedy of Forced Hiring: A Comparative Assessment of German and American Anti-Discrimination Law*, 4 J.L. & POL’Y 1, 27 (1995).

²³⁷ *Mark-It Place Foods, Inc. v. New Plan Excel Realty*, 804 N.E.2d 979, 1002 (Ohio Ct. App. 2004).

II. CONCLUSION

The uniquely adversarial nature of the United States legal system, rooted in the medieval English system of “trial by battle,” has replicated itself in almost all aspects of American society, distinguishing the United States from even its common law counterparts that shared the genesis of their legal systems in English “trial by battle.” Even resolution of basic Constitutional concepts is subject to battles between parties, rather than a proactive determination by a Constitutional Court as can be found in many other legal systems.

American society is unique from all other industrialized nations to the extent that it employs adversarial techniques to resolve conflicts in the areas of contract law, criminal law, constitutional law, labor law, and economic and social policy, in addition to its litigation-based legal system. These adversarial methods of not only resolving disputes but also creating policy *outcomes* tends to perpetuate existing power hierarchies: those with power and the “tools of battle” accompanying it are better able to compete in such a context. The much-vaunted American emphasis on procedural fairness thus masks an underlying substantive unfairness in outcomes. Proscribed rules of battle, with a putative emphasis on “fairness,” mean little if the battle itself is fought by parties with vastly different resources.

At a minimum, the extraordinary differences between the uniquely American adversarial legal, economic and political systems and the systems of other developed democracies, including ones with a common-law heritage, suggest that those differences cannot simply be the results of happenstance; rather, they have an underlying purpose. This article does not claim that perpetuating existing power structures is the sole consequence of this system, but it serves as a useful springboard for further empirical and normative investigation of the precise implications of this uniquely adversarial societal system.