The Architecture of American Rights Protections

Texts, Concepts and Institutions

Howard Schweber[*]

Abstract

This article examines the architecture of American rights protections. The term 'architecture' is used to convey the sense of a structure system with points of entry, channels of proceeding, and different end points. This structural understanding is applied to the historical development of national rights protections in the United States in three senses: textual, conceptual and institutional. The development of these three structured systems – architectures – of rights reveals dimensions of the strengths, limitations and distinctive character of the American rights protections in theory and in practice.

Keywords: American constitutional development, American legal history, Architecture, Bill of Rights, Congress, constitutional interpretation, constitutionalism, discrimination, due process, equal protection, equality, institutions, statutes, U.S. Constitution, 14th Amendment.

A Introduction

This article explores the 'architecture' of rights protections in the American system. The discussion is limited to national rights, those that are claimed to apply across all jurisdictions. This is the normal focus in discussions of constitutionalism, but in fact it leaves out an enormous amount. To take only one example, several State constitutions guarantee positive rights such as a right to education. State courts interpret and apply these provisions as legally enforceable rights claims to which the government of the State is required to respond; in other words, these are 'rights' in every meaningful sense of the term. Then there are rights protections that are adopted at the local level, as when a municipality bans discrimination on the basis of sexual orientation even in the absence of a State law to the same effect. Moreover, there is a tendency towards uniformity among State legal systems. In the nineteenth century, State courts and legislatures began citing and taking guidance from other States, a trend that continued in the twen-

* Professor of Political Science and affiliate faculty member of the Law School, Legal Studies, and Integrated Liberal Studies at University of Wisconsin-Madison. This volume (The EU Bill of Rights' Diagonal Application to Member States. Ed. Csongor István Nagy) was published as part of the research project of the HAS-Szeged Federal Markets 'Momentum' Research Group.

doi: 10.5553/EJLR/138723702018020002009

tieth century with the promulgatio and adoption of 'model codes'.[1] These publications have been highly influential, and many States have adopted various model codes with the result that legal rights have become significantly more uniform across the company. International law may also provide rights protections; these, too, are beyond the scope of this article.

Nonetheless, in this article, the focus will be solely on national rights secured by the U.S. Constitution and federal statutes and the legal architecture that has grown up around them. In addition, this inquiry is limited by virtue of its focus on the formal principles and structures of rights protection. Even a deep familiarity with the architecture of a building may not tell us very much about what it is like to live or work there. To understand the system of rights protections as it is experienced by real individuals, it would be necessary to focus as much on police authorities, lawyers, administrators and bureaucrats, and judges in trial courts as we do on Supreme Court opinions and acts of Congress. Again, however, this article is limited, and the focus is solely on the formal systems of rights protections. It is with respect to that formal system of national rights protections that the term 'architecture' is applied.

The use of 'architecture' appeals to a structural metaphor. Frank Kafka created famous analogies for law and government in the form of a city ('Before the Law') and a palace ('The Imperial Messenger').[2] In the first story, the focus was on the idea that the system of laws has multiple entry points, each with its own obstacles and each leading to particular routes towards a goal (or in Kafka's version, to never reach that goal or even get beyond the initial entrance). In the second story, the architecture of the palace was an impediment that prevented the direct reception of the command of the sovereign as the messenger traversed endless corridors clogged with endless government personnel. One need not adopt Kafka's despair or surrealism to recognize the aptness of his metaphors. To assert a claim for the vindication of a particular right is to choose a point of entry into a structured system of principles and authorities. This idea of an 'architecture' of rights protection is used here to describe three distinct kinds of structured systems: textual, conceptual and institutional. Together, these architectures define the availability of entry points, channels through which a claim must proceed and possible endpoints, and at each point the design of the architecture may impede or enable the process of defining, adjudicating and enforcing rights protections.

The decision to begin with an examination of textual structure is based on the observation that in the American system, national rights claims begin with a

1 The National Conference of Commissioners on Uniform State Laws was formed in 1892; later it joined with the American Law Institute, created in 1923 with a mandate to promote uniformity in the common law rules of different States as a remedy to the 'uncertainty' and 'complexity' of the system of State laws. The history and mission of these two organizations may be found at their websites: www.uniformlaws.org/and https://www.ali.org/, respectively (last accessed 25 January 2018). For a consideration of the project of the ALI at its founding, *see* Hull, N.E.H., 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute', *Law and History Review*, Vol. 8, 1990, p. 55.

2 F. Kafka, *Collected Stories* (W. Muir, E. Muir & G. Josipovici trans.), New York, 1993.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

written source of authority. The innovation of a written constitutional text was of great importance to early constitutionalists, as John Marshall explained in 1803. "This theory is essentially attached to a *written* Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."[3] The U.S. Constitution and the various State constitutions are the most obvious textual sources, closely followed by statutes, and then by recorded judicial decisions. These are the primary sources for rights protections, but other secondary textual sources are frequently employed to inform their interpretation. To be sure, at times critics have complained that judges invented rights out of whole cloth rather than truly deriving them from primary textual sources. In some instances, Supreme Court justices themselves have explicitly derived constitutional principles entirely from non-written sources.[4] Nonetheless, whether an asserted right was discovered or invented in the course of a judicial opinion, until that opinion is written down and published it cannot be referenced by other authorities or relied upon by litigants. To make things even more complicated, not all court decisions are published, and lawyers and lower court judges are only permitted to draw on published opinions as a source for precedent. Thus, the body of published court opinions is itself a text (or a palimpsest) that is produced through the repeated application of processes of design and articulation of a right.

A 'conceptual architecture' is displayed in the first instance in the sense that there is a particular analytical structure that is associated with the adjudication of a particular right. That is, the intellectual approach to determining a contested rights claim involves a structured system of inquiries that employ a specific conceptual vocabulary that structures the inquiry. The structure of the inquiry is different for different kinds of rights claims, so that at any given time there is a system – an architecture – of rights analysis with different entry points and analytical channels as well as different levels of rights protection at the end of the process. Over time, too, the structures of these inquiry have varied. To borrow terms from another field of study, the structure of the system of rights protection has both synchronic and diachronic dimensions.[5] In addition, some rights are given greater protection than others, some rights are derivative of others, and in some cases national rights work against one another. The relationships among rights claims define another level of conceptual architecture just as different floors of a building may have different internal features yet fit within a larger design.

3 *Marbury v. Madison*, 5 U.S. 137, 177 (1803), emphasis added.

4 These arguments tend to proceed from claims about background political theoretic understanding, especially those having to do with sovereignty. Examples include the derivation of inherent executive authority from the pre-constitutional status of the United States, the immunity of States from suit, and the immunity of State officials from a requirement of implementing federal laws. *United States v. Curtis-Wright Export Co*. 299/304 (1936) (holding that the authority of the President over foreign affairs predates the Constitution); *Printz v. United States*, 521 U.S. 898 (1987) (holding that State officials may not be compelled to enforce federal law because of background principles of sovereignty that predate the Constitution).

5 F. de Saussure, *Course in General Linguistics* (R. Harris trans.), C. Bally & A. Sechehaye, Eds., LaSalle, IL, Open Court, 1983.

The 'institutional architecture' metaphor is the easiest to apply; indeed, institutional actors tend to inhabit literal architectures in the form of dedicated buildings such as courthouses or legislative houses.[6] The institutional architecture of rights protection begins with courts, and specifically the U.S. Supreme Court. Additional elements of this architecture include lower federal courts and State courts, federal and state legislatures, and administrative offices at the federal, state and local levels. This description is far from exhaustive: a fuller discussion would include law enforcement officers, lawyers and activists. This chapter, however, focuses on the formal institutional architecture of the system by which national rights are formally articulated.

An initial overview of American rights protection would recognize that there are multiple systems, each of which has its own defining architectures as well as being situated within a larger structure. It is largely an artefact of scholarly prejudice that references to 'rights' in the American context automatically lead to the U.S. Constitution. To focus solely on the Constitution, however, is inadequate. To be sure, the Constitution and the Supreme Court's authoritative interpretations of its provisions stand at the apex of American rights protections. But federal statutes and regulations are an equally important source of protections. Some of these laws create assertable legal rights in themselves; others are legal expressions of constitutional rights protections. Particularly after the Civil War, federal laws enacted by Congress have been a critically important layer of rights protection. Each of these dimensions of the architecture of American rights protections has evolved and been subject to revision. As a result, this article will begin by proceeding historically, as follows.

B. The Colonial Period and Early Constitutionalism: 1620-1870
C. From Reconstruction Amendments to the *Lochner* Era: 1870-1938
    I Textual Architecture: 'Liberty' and the Due Process Clause
    II Conceptual Architecture: Reasonableness and Property Rights
    III Institutional Architecture: Judicial Supremacy
    IV Summary: From Reconstruction to *Lochner*
D. The Modern Era: 1938 to the Present Day
    I Textual Architecture
        1 Constitutional Text; Due Process, Equal Protection and Incorporation
        2 Judicial Precedents
        3 Federal Statutes Enacted Under Reconstruction Amendments
        4 Federal Statutes and Regulations Enacted Under General Governmental Powers
    II Conceptual Architecture: Multiple Channels and Hierarchical Orderings

6 The U.S. Supreme Court building is decorated with a recurring theme of turtles carved into the interior stonework of the building. The turtle is said to symbolize the deliberate pace of legal reasoning. More generally, there is a surprisingly rich literature on the architecture of courtrooms and judicial buildings, in particular. *See, e.g.*, L. Mulcahy, 'Architects of Justice: the Politics of Courtroom Design', *Social and Legal Studies*, Vol. 16, 2007, p. 383-403.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

B The Colonial Period and Early Constitutionalism: 1620-1870

The settlement of the American colonies was an experiment in multiple ways. In Virginia, a commercial company sought to create an economic outpost and in the process created a new kind of polity. Across the New England colonies – Massachusetts, New Haven/Connecticut and Rhode Island – the element of experimentation in political and legal architecture was at the core of the mission as much as experimentation with religious doctrines and practices. In 1679, 50 years after the fact, James Allen looked back on the establishment of the Massachusetts colony:

> This was New England's glory and design. They came not hither to assert the prophetical or Priestly office of Christ so much, that were so fully owned in Old England, but his kingly, to bear witness to those truths concerning his visible Kingdom.[7]

Early attempts at written constitutions were among the products of these experiments. The Massachusetts Body of Liberties of 1641, in particular, was one of the first examples of a constitution that expressed higher law protections of rights.[8]

While these early constitutional texts were specific to their colonies, during the same period, the basis for national rights was already being established. Leading up to the American Revolution a common complaint was that the colonists were being denied 'the rights of Englishmen', a phrase that captured a vaguely defined but deeply felt set of entitlements grounded in a particular understanding of English common law. In the 1780s, the American conception of English legal rights was deeply influenced by William Blackstone's *Commentaries on the Laws of England*.[9] One interesting consequence of Blackstone's influence was that the American conception of English legal rights was far more uniform than that which prevailed in England, making it a suitable source for the assertion of national rights. The assertion that the British government was violating these rights was the crux of the justification for revolt. As a result, the language of justification for the revolution already contained an idea of rights national in their conceptualization and scope if not necessarily in their institutional allocation.

7 E.S. Morgan, *Puritan Family*, Cambridge, 1966, p. 2-3.

8 D.S. Lutz, *Origins of American Constitutionalism*, Baton Rouge, Louisiana State University Press, 1988.

9 In American political writings published between 1760 and 1805, the three most frequently cited were, in descending order, B. Montesquieu & P.D. Locke Carrington, 'The Revolutionary Idea of Legal Education', *William & Mary Law Review*, Vol. 31, 1990, p. 527-574; C.E. Klafter, *Reason Over Precedents*. Westport, Green Wood, 1993; D.S. Lutz, 'The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought', *American Political Science Review*, Vol. 78, 1986, p. 189-197.

The adoption of the national Constitution in 1791 created a limited set of national rights. While their scope was relatively narrow, extending almost solely to the protection of property rights, these constitutional protections displayed a distinctive textual, conceptual and institutional architecture from the outset.

The key element of the textual architecture in this early period was the 'Supremacy Clause' of Article IV, which declared that the Constitution, federal laws and international treaties would be 'the supreme law of the land', "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[10] The Supremacy Clause established a vertically hierarchical textual architecture with the U.S. Constitution at its apex. There were endless possibilities of debate and interpretation, but once agreement was reached on the meaning of a particular provision it would supersede any other textual authority. The references to federal law and international treaties were potentially more complicated, but by virtue of the superior position of the Constitution in the textual architecture, these other sources of 'supreme' law also stood above any competing textual sources.

Another aspect of the textual architecture of the Constitution was a sharp distinction between rights protections that applied to the national government and those that applied to the States. That is, the architecture of rights protections within the text was as important as the relation between the constitutional text and other sources of authority. The Bill of Rights, adopted as the first ten Amendments to the Constitution, declared a set of limitations on the national government exemplified in the opening words of the First Amendment, 'Congress shall make no law'. The only textual source for rights protections applicable to the States was Article I, sec. 10, which prohibited States from a specific set of practices; prior to the adoption of the XIVth Amendment, no other constitutional rights guarantees were 'national rights protections' in any meaningful sense. The one area in which significant rights protections were established was in the protection of property rights. The Contracts Clause prohibiting States from 'impairing obligations of contract' was a particularly fruitful source for successful claims by individuals against State governments prior to the Civil War.

The conceptual architecture of rights protection was thus largely contained within the category of property and contract rights. Common law principles were imported to give content to these legal concepts, and the extension of rights protection in a given case depended on how the asserted right fit within that vocabulary The use of the term 'contract' in the Constitution did not open a door to the creation of a new set of national legal concepts of contractual prerogatives and obligations; instead, it was used to nationalize existing legal conceptions.

Issues of institutional architecture were initially very much in doubt. Article III of the Constitution created a Supreme Court and federal courts with jurisdiction over cases 'arising under' the Constitution and federal laws as well as cases involving assertions of legal rights between citizens of different States. But the relative authorities of different institutional actors were a matter for debate.

10 U.S. Constitution, Art. IV, sec. 2.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

All three architectural dimensions were contested starting from the start. The very first important constitutional decision by the Supreme Court, *Chisholm v. Georgia* in 1793, involved a claim by a creditor against a debtor.[11] What made the case complicated was the fact that the debtor was the State of Georgia. Article III had granted federal courts jurisdiction over cases involving States and citizens of another State, the Contracts Clause gave those courts authority to define and enforce a set of rights between creditors and debtors. But Georgia claimed it had a tradition and unwritten privilege that superseded these elements of the constitutional text, 'sovereign immunity', that prevented the case from being heard in a federal court.

Georgia drew support for its arguments from numerous textual sources: historical practice, commentaries on 'the law of nations', principles of political theory. Conceptually, Georgia's appeal to 'sovereignty' raised the question of whether the Constitution articulated a set of principles specific to its design – that is, whether the Constitution founded a new conceptual architecture of rights protections – or whether the Constitution was attached to an inherited system of rights claims, prerogatives and practices. Institutionally Georgia challenged the place of federal courts in the system of adjudication for claims involving national rights and States.

James Wilson's opinion for the majority was a summary of Federalist constitutionalism. In Wilson's view, the entire concept of a 'sovereign' government was alien to the Constitution.

> To the Constitution of the United States, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. [The People] might have announced themselves 'SOVEREIGN' people of the United States.[12]

The point was not merely philosophical. Textually, the implication was that the mass of writings about sovereignty in the law of nations was excluded from the canon of sources in determining the scope of national rights. Conceptually, Wilson's approach meant that the meaning of the Constitution was a subject for independent inquiry without inherited categories of analysis or forms of argument. As for the question of institutional architecture, in 1793, Wilson simply took it for granted that it was the proper role of the Court to define the rights of individuals and States alike.

In response to *Chisholm*, the States' governments moved quickly to adopt the XIth Amendment establishing the immunity of States from suite in federal court for claims brought by citizens of other States, the kind of claim that had been presented in *Chisholm*.[13] This was the first amendment adopted after the Constitu-

11 *Chisholm v. Georgia*, 2 U.S. 419 (1793).

12 *Id.*, at p. 454.

13 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

tion with its Bill of Rights. As a matter of legal doctrine, this reflected a clear and powerful rejection of the Court's ruling. As a matter of architectural structure, however, the adoption of the XIth Amendment may be taken as confirmation of Wilson's propositions. The amendment would not have been needed, after all, if the text of the Constitution did not stand alone as the sole and sufficient point of reference. The amendment would also have been entirely unnecessary if the conceptual architecture of States' rights included theories of political philosophy or inherited understandings of 'the law of nations'. And the amendment would have been completely unnecessary if the ruling of the Supreme Court could simply be ignored, overridden or rejected in a particular instance of controversy.

Issues of textual, conceptual and institutional architecture arose again in 1796 in *Ware v. Hylton*.[14] The question was whether a Pennsylvania statute that prevented English creditors from seeking recovery of debts in State courts was rendered void by the terms of the Treaty of Paris that guaranteed access to American courts for that purpose. Writing for the Court, Justice Chase had no hesitation about declaring that the Supremacy Clause governed the outcome without reference to any other textual sources. The Supreme Court also had no hesitation in asserting that State courts could be required to apply such 'supreme' laws in cases brought before them. In light of this powerful combination of textual and institutional elements, Chase did not find it necessary to delve deeply into the implications of his decision for the conceptual architecture at work in *Ware*. However, he took the opportunity for just such an exploration in *Calder v. Bull* in 1798.[15] The question in *Calder* was whether the legislature of Connecticut had violated the Constitution when it adopted a measure setting aside a ruling by a State judge about a will. The case led Justice Chase to engage in a description of the conceptual scope of judicial review that to modern ears sounds almost incredible.

> The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it….An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.[16]

It is interesting to consider what constitutional rights would look like in the modern era if the approaches of Wilson and Chase had remained dominant. But even among the justices on the Court there was disagreement. Justice Iredell insisted that the role of the Court was only to enforce the legal limitations prescribed in the constitutional text. Specifically, Iredell was disputing Chase's and Wilson's arguments that the constitutional text was an expression of a larger political theory that provided a source for rights protections. On the institutional ques-

14 *Ware v. Hylton* 3 U.S. 199 (1796).
15 *Calder v. Bull*, 3 U.S. 386 (1798).
16 *Calder*, 3 U.S. at 388.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

tion, however, there was no disagreement. Iredell, Wilson and Chase agreed that it was the proper function of the Court to review State laws and strike down those that were found to be unconstitutional.

Whether the federal courts had similar authority to review laws enacted by Congress was less clear. That issue was squarely confronted in 1803 in what is probably the most famous case for studies of American constitutionalism, *Marbury v. Madison*. In 1800, the outgoing President, John Adams, appointed a number of federal judges literally in the last day of his administration. The formal delivery of those appointments was left to the next administration, that of Thomas Jefferson. On Jefferson's instructions, the Secretary of State declined to deliver the official appointment documents. Marbury was one of the newly appointed judges. He sued in the Supreme Court under a federal law giving the Court jurisdiction over cases of this kind asking for a judicial order compelling the federal government to perform its duty (delivery of the commission).

In his opinion for the Court, Marshall ruled that Marbury had a right to the judicial appointment and that the matter was a proper one for judicial determination, but he also ruled that the law granting the Court jurisdiction over the case in the first place was itself unconstitutional and therefore void. As a result, while Marbury had a legally cognizable right, the Supreme Court could not provide protection for that right based on the institutional architecture of the Constitution.

In the process of reaching his three-part ruling, Marshall expanded on all three dimensions of rights-protecting architecture. Textually, Marshall used the case to reaffirm the primacy of the Constitution as a source of authority, and specifically its character as a written text. In making that argument, Marshall essentially took Iredell's side against Chase in *Calder*. The supremacy of the Constitution as written text meant a rejection of appeals to background principles of political philosophy or appeals to 'the rights of Englishmen' except insofar as those arguments addressed questions of textual interpretation.

At the same time, however, Marshall described the conceptual architecture of constitutional rights protections in a way that brought the system of common law principles back into the discussion. The conceptual categories of property rights permeated the discussion. Marshall relied on common law private property rights to declare that Marbury had a 'vested' (enforceable) right to the appointment. The use of this vocabulary reinforced Marshall's argument that the Court was solely engaged in legal as opposed to political or philosophical reasoning; in this way, Marshall adopted Iredell's legalistic understanding rather than the broader political conceptions of Wilson and Chase. That move, in turn, emphasized the extent to which constitutional rights protections would take their substantive meaning from established legal doctrines. After *Marbury*, it became a matter of general acceptance that only constitutional rights that could be expressed as legal claims could receive protection from a court.

The most famous element of Marshall's *Marbury* opinion was its description of an institutional architecture that followed directly from the textual and conceptual structures, and particularly the sharp division between legal and political questions. Judicial authority to review federal as well as State actions was based on the premise that courts would limit themselves to deploying a system of legal

concepts applied through a system of written texts. "It is emphatically the province and duty of the Judicial Department to say what the law is,"[17] wrote Marshall. To secure this claim to institutional authority, Marshall had to explicitly disavow any institutional role for the courts in determining the outcome of political issues.

> The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.[18]

This was the beginning of the 'political question doctrine', a major principle of institutional architecture that says that courts should only consider rights questions that can be expressed in purely legal terms.

In the decades between the decision in *Marbury* and the Civil War, the Supreme Court repeatedly reasserted the architecture of property rights protection: State courts were bound by federal courts' interpretations, States were obliged to observe contract rights and so on. The articulation of these rights continued to appear primarily in the context of claims that States had violated individuals' rights to property under the Contracts Clause.[19] In resolving these issues, the Court drew on a rich set of textual sources that included 'federal common law', a set of background legal concepts developed by federal judges. In 1837, for example, Taney applied a principle that monopoly contracts issued by the State should be read narrowly in order to promote the public good.[20] Conceptually, the Court continued to import legalistic concepts from traditional doctrines. And institutionally, the Court had no hesitation in continuing to declare itself the supreme arbiter of the requirements of the Contracts Clause.

But while these issues could be addressed within the architectures that had been expressed in *Ware* and *Marbury*, the same could not be said of the biggest and most important issue concerning national rights: slavery. The text of the Constitution was explicit in its recognition of slavery as a legitimate practice, most notably in the Fugitive Slave Clause that required free States to 'deliver' escaped slaves to their owners.[21] Congress adopted the Fugitive Slave Act to enforce the constitutional provision, and in 1842, the Court applied the idea of federal supremacy to compel unwilling States to cooperate in what was essentially a system of industrialized kidnapping without even the most minimal protections

17 *Marbury*, 5 U.S. at 177.

18 *Marbury*, 5 U.S. at 170.

19 *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Trustees of Dartmouth College f. Woodward*, 17 U.S. 518 (1819).

20 *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

21 "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due." U.S. Constitution, Art. IV, sec. 2.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

of due process.[22] Politically, the system of national government was twisted to protect the practice of slavery against the threat of federal legislation. Slave States were overrepresented in Congress, and when new States were added to the Union, the national authorities reached agreements binding them to the status of 'slave' or 'free' in order to artificially preserve a political balance (the 'Missouri Compromise').

The Supreme Court went to great lengths to forestall the assertion of any rights that might interfere with the practice of slavery. In the most infamous case of all, *Dred Scott v. Sanford*, Chief Justice Taney authored an opinion that invoked the first clear expression of 'originalism' to argue that slaves and their descendants could not be considered 'citizens of another State' for purposes of federal court jurisdiction on the grounds that in 1791 such individuals had not been considered members of the national 'people' and were therefore not parties to the U.S. Constitution. At the same time, Taney also struck down the Missouri Compromise as an unconstitutional limitation on the rights of new States to decide whether to permit slavery within their jurisdictions.[23]

The contradiction between the idea of the Constitution as an instrument of national rights protection and the existence of slavery challenged the architectures or rights protection at every level. Textually, contradictions both between and among texts made it impossible to identify the authoritative relevant sources. Conceptually, the multiple intellectual contradictions displayed in cases like *Dred Scott* threatened to render the idea of constitutionalism incoherent. And institutionally, the lack of clear mandates to define or enforce rights protections opened infinites possibilities for different States and different parts of the national government to deny the legitimacy of actions taken by the others.

After *Marbury* and up to the Civil War the architecture of rights protection can be described as a vestigial system focusing on legalistic interpretations of traditional rights of contract and associated property rights claims. Textually, this system depended on a small number of constitutional clauses and a body of judicial opinions built up around them. Conceptually, the narrow range of these rights claims made it easy to import legalistic categories from common law precedents, accompanied by federal common law doctrines addressing the specific legal questions that were raised. Institutionally, the federal courts first established and then jealously guarded their position of superiority over this narrow range of legal rights claims.

22 *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

23 *Dred Scott v. Sanford*, 60 U.S. 393 (1856). For a careful and provocative analysis of the case, *see* Graber, Mark, *Dred Scott and the Problem of Constitutional Evil*. Cambridge 2006. Graber concludes that according to the jurisprudence of the time Taney's ruling was arguably correct on the merits, a conclusion which points to the possibility that a constitution may legitimate a substantively evil practice.

C From Reconstruction Amendments to the Lochner Era: 1870-1938

Following the Civil War the U.S. Constitution was altered by the addition of three 'Reconstruction Amendments', the XIIIth (1865), XIVth (1868) and XVth (1870). The XIIIth Amendment abolished the Southern American version of slavery once and for all. The XVth Amendment imposed specific requirements on States to permit freed slaves and future members of racial minority groups to vote. These were enormously important in their historical context, but neither represented a fundamental reconceptualization of the scope of national rights. That was accomplished in the XIVth Amendment adopted in 1868,[24] arguably the single most important rights protecting element of the entire constitutional text and the beginning of a genuine system of national rights protections in the United States.

The XIVth Amendment is explicitly addressed to protecting rights against actions by the States, thus creating national rights outside Article I, Sec. 10. The substance of these new national rights was contained in three extremely broadly phrased clauses that followed the proscription 'No State shall': "deny the Privileges and Immunities of Citizenship," "deny the Equal Protection of the Laws" and "deprive any person of life, liberty, or property without Due Process of Law". Other elements of the Amendment established the principle of birthright citizenship, guaranteed protections of political representation and most important for this discussion in its final clause granted Congress the power to enact 'appropriate legislation' to carry out the purposes described in the remainder of the text. The Privileges and Immunities Clause, Due Process Clause and Equal Protection Clause are all contained in the first section of the Amendment ('XIV(1)') while the empowerment of Congress to enact a new category of national rights-protecting legislation is contained in the fifth and final section ('XIV(5)'). The XIIIth and XVth Amendments also contain clauses authorizing Congress to enact appropriate federal laws.[25]

For the first two decades, the Supreme Court took the position of denying that the XIVth Amendment had created any new national rights. In a series of judicial decisions between 1870 and 1890 the Court declared among other things that the Privileges and Immunities Clause did not create any significant rights that States were bound to respect; that States were not bound to respect the rights contained in the Bill of Rights nor could federal law be used to enforce those rights; and that racial segregation of public and private facilities was not

24 The last State to ratify the XIVth Amendment was Kentucky in 1976.

25 XIV(1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." XIV(5): "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," The omitted sections refer to diminution of a State's representation in Congress upon proof of voter suppression (XIV(2)), the requirement of loyalty for representatives (XIV(3)) and payment of public debts (XIV(3)).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

barred by Constitution.[26] Starting in the 1890s, however, the Court moved in a different direction, and in the process the architectural transformations of the XIVth Amendment became apparent.

I Textual Architecture

The Reconstruction Amendments established an entirely new textual basis for rights protections, with open questions to be resolved about the relevant library of supporting texts and the relation between the new Amendments and other provisions of the Constitution. Over time, a body of judicial opinions specifically about these new provisions would develop, creating a body of textual referents whose interpretation, application and reconciliation with other bodies of precedent would create new architectural structures.

The approach to defining a textual architecture changed dramatically in the 1890s as the Court moved to finding new expressions of the national property rights that had earlier been recognized under the Commerce Clause. There was no attempt to locate these rights in specific textual provisions. Instead, the focus was on the word 'liberty' as the source of property rights ('liberty of contract'), and on the terms 'due process' and 'equal protection' read together as a single broad principle forbidding laws that favoured one economic actor over others ('class' legislation) or laws that lacked a reasonable basis in a legitimate public interest ('arbitrary' legislation). In 1897, for example, the Court determined that a Colorado statue imposing liability for attorneys' fees on railroad corporations but not other defendants was an unconstitutional violation of both equal protection and due process.[27] The treatment of the text was striking. The terms 'due process' and 'equal protection' were applied without reference to any other textual provisions, including those occurring in the same paragraph as well as historical or contemporaneous legal sources.

In this specific context, at least, the Court was adopting a version of a textual architecture in which words in the Constitution would be read to identify broad concepts. Moreover, those broad concepts would not only supersede all other textual sources, they would stand alone as the source for future articulations by the federal judiciary, with all the implications for federal statutes and State courts and legislatures that were identified earlier. This was an approach that treated the textual architecture of national rights protections as an entirely separate structure broken off from the prior body of texts including the Constitution itself, a new library with empty shelves to be filled by the courts.

In the same period, however, another parallel version of a textual architecture was being explored. In the 1920s, in a series of cases, the Court rejected its

26 *Slaughterhouse Cases*, 83 U.S. 36 (1873) ('Privileges and Immunities Clause' does not create substantive rights protections); *United States v. Reese*, 92 U.S. 214 (1875) (XVth Amendment guarantee of right to vote does not require State authorities to count votes cast by African American voters); *United States v. Cruikshank*, 92 U.S. 542 (1876) (constitutional rights of assembly, expression, and bearing arms cannot be enforced by federal claims against individuals); *Civil Rights Cases* 109 U.S 3 (1883) (portions of the Civil Rights Act of 1875 prohibiting racial discrimination in places of public accommodation held unconstitutional).

27 *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1897).

earlier ruling that the Bill of Rights did not apply to the States and instead began to explore the idea that some of those rights might be 'incorporated' through the Due Process Clause of the XIVth Amendment. The only Amendment that was explored in this way was the First Amendment, and only those clauses in that Amendment protecting freedoms of speech and of the press. What makes this move particularly striking is that the First Amendment, unlike other elements of the Bill of Rights, states 'Congress shall make no law'. To apply this provision to the States was to break the remainder of the text out of its original container and import it into the text of the XIVth Amendment.

In 1925, the Court reviewed a criminal conviction of a publisher who had produced two pamphlets expressing radical political ideas under a New York State law against 'criminal anarchy'. Justice Sanford read the term 'liberty' in the XIVth Amendment's Due Process Clause as importing protections from the First Amendment. "For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[28]

The statement 'we…assume' accurately reflects the lack of any extended analysis, and the limiting clause '[f]or the present purposes' cast doubt on the reach of the already unclear principle. Nonetheless, the idea that the term 'Due Process' might in at least some circumstances incorporate other elements of the text in addition to acting as a freestanding protection against arbitrary or class legislation added a new element to the textual architecture of constitutional rights protections in which one clause of the Constitution (the XIVth Amendment's Due Process Clause) would be given substantive content by looking to another clause (the Ist Amendment). The interpretation of the Ist Amendment, however, would be undertaken as a new exercise in textual interpretation unmoored to earlier discussions. Later, a similar approach would be taken in the incorporation of other elements of the Bill of Rights.

Separate from the development of these judicial doctrines, by granting Congress the authority to create rights-protecting legislation entirely outside the scope of Article I the Amendments opened the door to new systems of federal law. Early on, Congress eagerly adopted its new role, starting with the Civil Rights Acts of 1860, 1861 and 1875, the 'Anti-Klan Act' of 1870 and 1871, and numerous other federal statutes. These statutes created separate and independent textual sources for the assertion of rights claims.

Most importantly, the textual sources for rights protection became national. To assert a rights claim one looked first to the Constitution and federal statutes; reliance on State constitutions or common law principles would be relegated to the position of a secondary strategy reserved for the relatively rare cases where they might provide greater protection or guarantee more rights than the XIVth Amendment. Where terms in State constitutions paralleled the language of the

28 *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See also Whitney v. California*, 274 U.S. 357 (1927), *Near v. Minnesota*, 283 U.S. 697 (1931).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

XIVth Amendment, the interpretation of those terms would increasingly be guided by federal courts' interpretations of the national Constitution. And where State constitutions or statutes contradicted the Reconstruction Amendments, they would no longer be available as sources of authority.

II Conceptual Architecture

The year 1897 is identified as the beginning of what is known as the '*Lochner* Era'. In that year, the Court announced the arrival of the theory that the Due Process Clause protected the 'liberty of contract'.

> The "liberty" mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[29]

The justices recognized that to apply this concept as a limitation on actions by the States was a novel step, as Justice Taft described the departure from historical practice.

> It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public.[30]

The most famous case from the period is the one that gives the era its name, *Lochner v New York*. In *Lochner*, the Court struck down a provision in a New York law that limited the working hours of bakers. Writing for the majority, Chief Justice Peckham described the right at issue in the Due Process Clause as the right to be free from 'arbitrary' legislation.

> Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[31]

29 *Allgeyer v. Louisiana*, 165 U.S. 587, 589 (1897).
30 *Wolf Packing Corp. v. Court of Industrial Rel.s, State of Kansas*, 262 U.S. 522 (1923).
31 *Lochner v. New York*, 198 U.S. 45, 57 (1905).

The rejection of 'arbitrary' lawmaking was one of two mainstays of the liberty of contract, the other being protection against 'class legislation', laws that benefitted some economic actors at the expense of others.[32] The two ideas together marked the intersection of the Due Process and Equal Protection Clauses, while their substantive application was found in the liberty of contract.

On the one hand, these passages articulated a broad conception of 'liberty', but on the other, the breadth of that concept was largely restricted to business activities; nothing in *Allgeyer* or *Lochner* suggested that the Court intended to revisit the narrow readings of non-contract-based rights with the possible exception of the First Amendment. Nonetheless, in a few cases, the idea of substantive due process was extended beyond this limited purpose. In two cases in the 1920s, the Court found that the Due Process Clause protected parents' decisions about the education and upbringing of their children, whether on religious or non-religious grounds.[33] This was a hint of things to come.

A critical element in the conceptual architecture of the liberty of contract was the relationship between national rights and democratic politics. Under traditional common law notions, States have broad 'police powers' to regulate conduct for the promotion of 'health, safety, welfare, and morals'. The justices in the *Lochner* Era believed that new political ideologies threatened cherished legal conceptions, especially with regard to property rights. As Justice Peckham put it in his majority opinion in *Lochner*, radical political theories were 'on the increase'.

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives…The court looks beyond the mere letter of the law in such cases.[34]

To look beyond the letter of the law meant that legal rights defined the limits of legitimate politics. This expansive conception of the relation between legal and political principles had been previously expressed in a surprising source: the majority opinion in *Plessy v. Ferguson*.[35] Anyone with a passing knowledge of American constitutionalism will recognize *Plessy* as a leading member of the constitutional 'anti-canon', cases so disreputable that they exert influence by pushing people away from any argument reminiscent of their rulings.[36] In *Plessy*, the Court upheld racial segregation of railroad cars on the preposterous basis that the separation of the races was not intended to suggest any inferiority in one group compared with the other. At the same time, however, Justice Brown – without for

32 H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers*, Durham, Duke University Press, 1992.

33 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents have a right to have their children educated in a foreign language); *Pierce v. Society of Sisters*, 268 U.S. 510 (parents have a right to have their children educated in a religious private school).

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

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

36 R. Primus, 'Canon, Anti-Canon, and Judicial Dissent', *Duke Law Journal*, Vol. 48, 1999, p. 243.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

a moment abandoning a facially absurd factual interpretation – expressed the idea of a constitutional test for 'reasonableness'.

> It is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other…The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class…So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order.[37]

Notwithstanding the deferential evaluation of the State's justification, the standard of 'reasonableness' and the blanket rule against laws enacted 'for the annoyance or oppression of a particular class' are a form of judicial review of the political process that significantly altered the conceptual architecture of 'rights' that courts might enforce.

The proposition that the Equal Protection and Due Process Clause were an independent source of nationally protected rights described a new and different conceptual architecture. Where once it might have been said that the core or top-level conceptual vocabulary of rights protection was found in the Constitution and federal law, now the same statement would have indicated that 'the Constitution' referred to several different conceptual strains that operated independently from one another, each with its own analytical vocabulary, and that 'federal law' occupied yet another conceptual architecture of its own.

III Institutional Architecture

The transformations in textual and conceptual architectures were not matched by a similar differentiation among judicial authorities. If anything, the federal courts strengthened their claim to an institutional superior position on questions of rights, frequently be preventing State and federal authorities from protecting rights. In this context as elsewhere, the connections among textual, conceptual and institutional architectures become apparent. When Congress acted under the textual authority of XIV(5) to enact a law prohibiting racial segregation in places of public accommodation, the Court struck down that law as outside Congress'

37 *Plessy*, 163 U.S. at 549-550.

legitimate power by the terms of the clause authorizing 'appropriate' legislation.[38] When Congress attempted to adopt other laws that might be thought of as rights-protecting under its Article I authority, such as a law banning child labour, the Court struck down those laws based on its conception of interstate commerce.[39] Both of these actions reflected the Court's assertion of its position of institutional superiority vis-à-vis Congress, but the differences in conceptual and textual architecture pointed in different directions for future actions.

IV Summary: From Reconstruction to Lochner

To summarize, the period from 1870 to 1938 saw dramatic changes in the textual architecture of national rights protection with the adoption of the XIVth Amendment. Textual sources for rights protections both multiplied and became differentiated as a result: the XIVth Amendment, the First Amendment by incorporation through the XIVth Amendment, a new category of federal statutes authorized by XIV(5). Conceptually, the architecture of rights protections developed into broadly defined principles of 'liberty' drawing on legal rights contained in State and federal common law, with a strong hint of separately conceived incorporated rights. Institutionally, the expansion of the range of legal concepts available for the assertion of national rights encouraged the courts to take on a far greater role in policing the limits of legitimate politics and abandoning most of its deferences to both States and co-equal branches of the national government.

Substantively, the effects of these systems was to privilege some rights claims to a very great extent while essentially avoiding others altogether. In particular, the pattern of restricting substantive rights protections to economic and contract-based rights that had become clear in the early nineteenth century continued into the twentieth, with the obvious exception that formal slavery was abolished. Even where the XVth Amendment appeared to specifically identify a right of political participation, the Court used its position of institutional supremacy and its conceptual framework of formal legalistic rights based on the contract model to deprive that guarantee of substance. In 1876, the Court found that a federal law making it a crime for State election officials to destroy ballots cast by African Americans was not authorized by the XVth Amendment because that Amendment's reference to 'the right of citizens to vote' did not extend to having those votes counted.[40]

D The Modern Era: 1938-Present

In discussing the modern era, in particular, it is both critically important and sometimes difficult to separate the architectures of rights protections from the substantive content of protected rights. The period from 1940 to 1980, in particular, was marked by a consistently expanding set of non-economic national rights protections at every level even as the 'liberty of contract' theory was abandoned.

38 *Civil Rights Cases*, 109 U.S. 3 (1883).
39 *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
40 *United States v. Reese*, 92 U.S. 214 (1876).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

In the 1980s, there was a shift towards a more conservative constitutional philosophy that resulted in a partial retrenchment and in particular on the imposition of greater limitations on federal law.

The textual architecture of national rights protections retained its multipart structure: the constitutional text including the Bill of Rights (directly or by incorporation through the XIVth Amendment); the Equal Protection and Due Process Clauses of the XIVth Amendment; the body of judicial precedents interpreting these textual sources; acts of Congress undertaken as 'appropriate' legislation under the XIIIth, XIVth and XV Amendments; and acts of Congress and the executive branch under their original grants of authority including federal legislation and regulations promulgated by executive agencies. Strong rights claims became increasingly associated with specific constitutional clauses, in sharp contrast to the broad application of 'liberty' or the equivalency of equal protection and due process in the earlier era.

The same differentiation among textual sources was reflected in a proliferation of conceptual approaches. Each specific category of rights protection, moreover, was increasingly associated with its own analytical approach and body of relevant textual sources. As a result, the conceptual system of rights that has emerged displays an increasingly complex architecture. Due process, equal protection, free speech, freedom of religion, rights of criminal defendants, rights of political participation, and a dozen other specific categories of national rights protection with specific standards and tests for adjudication have been created, each anchored in a particular clause in the constitutional text. In addition, some rights have been declared to be of greater weight than others, a determination that directed disputes to different locations in the institutional architecture and to different textual sources. Most broadly and most importantly, national rights became defined less in terms of the limits of legitimate government action and more in terms of individually held prerogatives. By the same token, there has been a general trend away from conceiving rights as interests to be weighed against countervailing public interests, and towards the idea of 'strong rights' claims characterized by Ronald Dworkin in the phrase 'rights as trumps'.[41] Legal conceptions continued to provide necessary content for constitutional rights in some classes of cases, while in others a distinct and freestanding constitutional understanding was sufficient.

The elements of the institutional architecture of rights protection have proliferated along with the textual and conceptual systems. The authority to recognize national rights in the Constitution has been separated from the authority to create national rights in federal law. The authority to recognize constitutional rights has been institutionally segregated from the authority to enforce those rights. The Court continued to assert its position of supremacy and to reinforce the hierarchical relationship among itself, lower federal courts, and State courts and legislatures. At times this meant not only compelling States to protect certain rights but also preventing State and federal efforts to create legal rights protections on the grounds that they conflicted with constitutional principles including

41 R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1978.

both rights-protecting principles and others. At the same time, Congress and the Executive branch including federal administrative agencies have emerged as important institutional sources of rights and rights protections.

I Textual Architecture

1 Constitutional Text: Due Process, Equal Protection and Incorporation

The list of constitutional provisions that courts would consider as sources of national rights grew dramatically between the late 1930s and the 1970s. The most important alteration to the textual architecture of the Constitution was the continuing process of incorporation that brought additional elements of the original Bill of Rights into the architecture of rights protection. Various provisions were incorporated across the decades: the Free Exercise and Establishment Clauses of the Ist Amendment in 1940 and 1947 respectively[42]; the IVth Amendment rights to be free of unreasonable searches and seizures in 1961,[43] and many others throughout the 1960s and 1970s. The latest of these events was the 2010 incorporation of the Second Amendment to guarantee an individual the right to bear arms against State efforts to limit gun ownership.[44] Aside from any effect on the range of protected rights, the introduction of these varied textual sources for assertable rights claims constitutes a dramatic change in constitutional architecture all by itself.

In addition, the Due Process Clause and the Equal Protection Clause of the XIVth Amendment has each developed into the basis for separate and extensive bodies of protected rights. The Due Process Clause has come to be understood as the source of rights to privacy, procedural protections in criminal and civil proceedings, and rights deriving from family relationships, and as the basis for striking down actions that lack a sufficient justification under the 'bare animus' principle that was announced in *Plessy*. The Equal Protection Clause has been the basis for striking down actions by States that discriminated on the basis of race, religion, nationality and gender. And through a process of 'reverse incorporation', the requirements of the Equal Protection Clause have been applied to the federal government as well as the States.[45] None of these changes involved alterations to the text itself, only changes in the way clauses are treated relative to one another and relative to various forms of legislation or government action. There have also been amendments to the text that affected the architecture of rights protections by adding to the list of protected rights (voting at age 18, for example), although the most far-reaching proposal, the Equal Rights Amendment, was defeated in the 1980s.

At the same time, at the outset of the modern era, a major source of rights jurisprudence was abandoned. In 1938, in *Erie v. Tompkins*, the Court summarily stated that there is no such thing as federal common law. The case involved an

42 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
43 *Mapp v. Ohio*, 367 U.S. 642 (1961).
44 *McDonald v. Chicago*, 561 U.S. 742 (2010).
45 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

ordinary claim for negligence. Previously, federal courts had taken it upon themselves to declare principles of 'general law', common law principles that would apply nationally in place of State's own doctrines. Justice Brandeis denied the legitimacy of such a source of national rules.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.

The effect of this rule on the textual architecture was dramatic. For one thing, from that point onwards, federal courts would accept State courts' interpretations of State law as authoritative. For another, any national rights protection thereafter would have to be derived from a specific textual source. Earlier judicial opinions would continue to act as a source for reference, but only insofar as they addressed interpretations of other textual sources (the Constitution or federal statutes). The existence of a separate body of rights protections embedded in judicial opinions standing alone was abandoned.

Changes in the manner of textual interpretation also affected the textual architecture of rights protection. Beginning in 1980, in particular, judicially conservative justices introduced theories of 'textualism' and 'originalism'. These approaches both emphasized the importance of texts and expanded the range of texts relevant to the inquiry. Textualism, the idea that any discussion of rights protection must begin with a specific textual reference, quickly became a dominant orthodoxy. As late as 1980, writers could distinguish among 'interpretivists' and 'noninterpretivists', meaning judges who began with consideration of the text and those who operated in the absence of any textual referent at all (hence without 'interpretation').[46] By the 1980s, if not before, the idea of a genuinely atextual theory of national rights had become untenable whether the claim was based on the Constitution or a statute. As Justice Kagan said in a speech in 2015, 'we are all textualists now'.[47]

Originalism was and remains far more controversial. The idea that the meaning of a textual provision was fixed at some moment in history meant that judges and justices were required to examine historical texts to determine that earlier meaning. Court decisions, legal commentaries, the writings of supporters and opponents of the adoption of the Constitution, political philosophies prominent at the appropriate historical moment and other documents such as the Declaration of Independence all were grist for the historicist mill of originalism. In an

46 J.H. Ely, *Democracy and Distrust*: A Theory of Judicial Review, Cambridge, Harvard University Press, 1980.

47 E. Kagan, 'Delivering the Scalia Lecture at Harvard Law School', 18 November 2015, available at: https://www.youtube.com/watch?v=dpEtszFT0Tg (last accessed 25 January 2018).

originalist approach, the textual architecture underwent a transformation. Extended interpretations of historical texts became central to judicial opinions. In some cases, 'background understandings' from earlier periods of history could supplement or even replace the text outright in an inversion of the traditional textual architecture.[48]

2 Judicial Precedents

The modern era of constitutional rights protection began in 1938 with a complete reconsideration of the limits on both State and federal authority. In *West Coast Hotel v. Parrish*, the Court essentially repudiated the approach to defining national rights it had adopted in the preceding decades. Upholding a State minimum wage law, Chief Justice Hughes declared that it was not the business of the justices to evaluate the reasonableness of legislation, only to test its consistency with the Constitution.[49] The change in approach was even more clear in *United States v. Carolene Products*, where the Court declared that when Congress makes a policy determination in economic affairs, the courts should show extreme deference in evaluating the resulting enactment. Even in the absence of any evidence in the legislative record, said Justice Stone, courts should presume the legislature had an adequate and legitimate justification for its actions.

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[50]

This 'rational basis' approach to reviewing legislation – applied to both State and federal regulations of economic activities – could not have been farther from the *Lochner* Court's approach of evaluating the 'reasonableness' of such legislation.

But *Carolene Products* is not primarily remembered for its expression of judicial deference in questions of economic regulation. Instead, the most famous part of Justice Stone's majority opinion is a footnote that considers other kinds of rights claims. Footnote 4 is certainly the most famous footnote in American legal history and quite possibly the most famous footnote ever.

> 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.

48 "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition … which it confirms." *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996) (J. O'Connor).

49 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

50 *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. (...)
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[51]

Footnote 4 invited future lawyers and judges to look for claims that might justify rigorous scrutiny: in other words, to look for judicially enforceable rights claims. Each category also refers to a different textual authority. 'Rights identified in the constitutional text' invites examination of that text, and specifically consideration of whether particular elements of the Bill of Rights are incorporated by the XIVth Amendment to apply against the States. Not coincidentally, in that same year the Court went farther than it ever had before in describing a standard for incorporation: rights contained in the Bill of Rights that a court deemed 'essential to ordered liberty' would be incorporated, others would not.[52]

The reference in Footnote 4 to 'discrete and insular minorities' led courts directly to the development of the Equal Protection Clause, naming the conditions that would trigger invocation of that clause's protections. The textual reference involved in 'laws affecting the political process' was less clear, but in addition to giving forceful effect to the XVth Amendment's protection of the voting rights of racial minorities, the Court has used the XIVth Amendment as a basis for adopting the principle of 'one man, one vote' as a constitutional protection against unequal electoral districts.[53]

One thing that was notably missing from Footnote 4 was any equivalent to the idea that the term 'liberty' or other elements of 'due process' implied a set of unenumerated but enforceable rights. That idea, however, would later be resuscitated in a highly modified form.

Carolene Products was the beginning, not the end, of the development of a textual architecture contained in the body of judicial precedents. Over the decades that followed, numerous 'landmark' cases established new constitutionally protected rights. In sharp contrast to the reliance on 'liberty' in the earlier period, in the modern era specific rights have tended to be grounded in specific textual provisions, with the result that there is a body of texts in the form of judicial precedents that is attached to each relevant element of the text. To speak of any particular right is to automatically invoke a textual reference and a line of case opinions that interpret and apply that text in a particular manner.

51 *Carolene Products*, 304 U.S. at p. 152.
52 *Palko v. Connecticut*, 302 U.S. 319 (1937).
53 *Baker v.* Carr, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

There is an obvious analogy to religious text and the commentaries that accompany them, complete with duelling authorities, rival traditions and fights over what texts count as canonical or relevant. There is no serious argument that the textual record of Supreme Court decisions is not the relevant and primary source text for determining the scope of constitutional rights. The deployment of historical, philosophical or other extraconstitutional textual sources takes place within the discussion of the codex of Supreme Court case opinions. Supreme Court justices have the authority to revise that codex, but that freedom was not available to the judges in federal and State courts who heard the vast majority of cases involving rights claims. And even at the level of the Supreme Court there is a powerful *ethos* of conservation that cautions against making radical changes captures in the idea of *stare decisis*.

3 Federal Statutes and Regulations under the Reconstruction Amendments

A set of federal statutes provides the body of texts that implement and give specific substance to the guarantees of the XIIIth, XIVth and XVth Amendments. Three of the most important of these laws derive from the Civil Rights Acts of the 1860s and 1870s; these laws provide federal remedies for State violations of constitutional rights and prohibit racial discrimination in a range of areas including both public and private rights.[54] Arguably even more important have been the elements of the modern Civil Rights Acts that are included as exercises of XIV(5) powers. These along with the Voting Rights Act of 1965 are the backbone of national rights protections in areas of political participation, housing, education and numerous other areas. Although the authority for these laws derives from the constitutional text, these written statutes and their supporting materials provide a separate and independent system of textual references, informed by their own associated body of judicial interpretations and drawing on a specific set of historical sources. Furthermore, many of these rights-protecting statutes are implemented through federal agencies such as the Equal Employment Opportunity Commission that promulgate their own regulatory codes, adding yet another layer of textual authority. Each of the systems of textual authorities is brought to bear through a different proceeding, each is used to authorize different remedies and each involves its own distinctive analytical approach.

4 Federal Statutes and Regulations under Original Congressional and Executive Authorities

Separate from the texts of the Constitution and judicial opinions, federal statutes and regulations play an increasingly important role as rights-defining texts. Anti-discrimination rules and statutes, in particular, have become the primary mechanism for defining and enforcing national rights. In enacting the Civil Rights Acts of 1964, 1968 and 1991, Congress drew on its authority under Article I as well as the XIVth Amendment. In particular, federal laws prohibiting racial segregation in places of public accommodation have been upheld as a valid exercise of Con-

54 42 U.S.C. §§ 1981, 1982, 1983.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

gress' authority to regulate commerce.[55] This was precisely the goal that the Court had declared to be beyond the reach of Congress' power when it struck down provisions of the Civil Rights Act of 1875.[56]

Federal statutes and regulations also define a wide range of rights protections that apply within the apparatus of the national government itself, including employees, contractors and consumers of governmental services. There were more than 2.5 million federal employees in 2016, and it is impossible to calculate the number of persons affected by these rules as contractors and consumers.[57] These rights protections do not require any particular constitutional authorization; they are byproducts of the fact that all federal operations are generally subject to federal law. For example, in 1993, Congress adopted the Religious Freedom Restoration Act ('RFRA').[58] RFRA required both State and federal governments to provide accommodations for religious practices. As it applied to the States, the law was struck down on the grounds that the Court had previously ruled that such accommodations are not constitutionally required, and Congress had no authority to define constitutional rights beyond those recognized by courts.

In other words, Congress is not permitted to exercise its powers under XIV(5) to protect a right that is not recognized by the courts, an important element of institutional architecture.[59] But to the extent that the federal law governed operations of the federal government its constitutionality was not in question. From the operation of federal prisons to administrative offices, today all elements of the federal government are covered by the requirement to grant religious accommodations under RFRA and various successor statutes. To take another critically important example, all operations in the enormous system of federal agencies are bound by the protections of procedural rights defined in the Administrative Procedures Act of 1946 ('APA').[60] All acts of administrative rule-making and enforcement are subject to the requirements of the APA, creating a detailed system of procedural rights protections that operates within the systems of the national government. The Code of Federal Regulations is thus an important and often overlooked source of national rights protections in its own right.

II Conceptual Architecture: Multiple Channels and Hierarchical Ordering

The modern architecture of rights protection has been marked by increasingly separated channels defining the scope of particularized rights claims, a hierarchy among more or less preferred rights, and a shift in thinking about rights as limitations inherent in the design of the system of government to thinking about rights as individual entitlements.

55 *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

56 *Civil Rights Cases*, 109 U.S. 3 (1883).

57 These data are drawn from government websites: https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/and https://about.usps.com/who-we-are/postal-facts/size-scope.htm (last accessed 20 January 2018).

58 Codified at 42 U.S.C. 2000bb *et seq*.

59 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

60 Codified at 5 U.S.C. 500 et seq.

The contrast between the extreme deference shown to Congress' regulations of commercial transactions and the possible different treatment of other kinds of actions in *Carolene Products* pointed to an emerging pattern. In the earlier period, the Due Process Clause was understood to protect liberty of contract and not very much else. That is, these were very nearly the only 'rights' recognized as national. In the modern era, the range of national rights is far broader, but they are divided into more and less important rights. Rights recognized as 'fundamental' are protected against government action to a far greater degree than those considered merely incidental. The results of this distinction vary by the textual system within which the rights claim occurs. Where substantive rights are claimed under the XIVth Amendment without incorporation – that is, 'substantive due process' rights – *only* those rights determined to be 'fundamental' are given judicial cognizance. Where substantive rights are claimed on the basis of reference to the Bill of Rights by incorporation, only rights deemed to be sufficiently important are incorporated at all. But related rights that derive from incorporated principles may be protected to a lesser degree on the grounds that they are not fundamental.

Probably the most complete taxonomical system of differential rights protections appears in discussions of freedom of speech. Freedom of speech is treated as a 'preferred freedom',[61] protected to an even greater degree than other rights deemed 'fundamental'. Yet within that freedom there are categories of speech-like expression that are protected through incorporation but nonetheless trigger less extensive protections (commercial speech, expressive conduct), as well as categories of expression that have been found to fall outside the scope of protected rights at all (obscenity, blackmail, threats, fraud).

In the area of equal protection, building on the idea of a 'discrete and insular minority' the courts have found that differential treatment on the basis of categories such as race or religion trigger much stronger rights protections than differential treatment on the basis of 'neutral' characteristics such as age. Although the original conceptual basis for this distinction appeared to be a theory about the limitations of democratic politics in order to protect vulnerable minorities, in later years this intellectual underpinning was abandoned in favour of a formal statement that certain classifications are simply disfavoured, a shift captured in the move from the use of the phrase 'protected class' to the phrase 'suspect classification'.[62] But the architecture of equal protection remains marked by a series of levels of increasing protection against unequal treatment depending on the basis of the treatment.

Both with respect to equal protection and rights protections, the formal categories are referred to as 'tiers of scrutiny'. Where a law infringes on a 'fundamental' right or treats people differently on the basis of race, religion or nationality, a court will apply 'strict scrutiny', meaning that the burden is entirely on the government to demonstrate a 'compelling interest' that cannot be accomplished with

61 *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (C.J. Stone, concurring).
62 *Adarand v. Pena*, 515 U.S. 200 (1995).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

a 'less restrictive means'.[63] Other kinds of restrictions or other bases for classification trigger other levels of scrutiny, identified as 'intermediate' or 'rational basis', the test described in *Carolene Products* for economic regulations. In practice, the judicial application of these concepts often looks less like a series of clearly defined ascending steps and more like a continuum in which particular levels of scrutiny are devised for particular situations. For example, where discrimination on the basis of citizenship ordinarily only triggers rational basis scrutiny, but where the issue involved access to public education the Court applied a stricter version of that test on the grounds that education is an especially important public service.[64] Where expressive conduct rather than speech is concerned the Court has applied something like a combination of the standards developed for strict and intermediate scrutiny.[65] And in numerous instances, the application of the various formal standards suggests subtle adjustments in the level of protection, upward or downward depending on the particulars of a case.

The conceptual architecture of constitutional rights is directly reflected in the architecture of legal rights created pursuant to Congress' authority under XIV(5) and the equivalent provisions of the XIIIth and XVth Amendments. The Court has held that Congress' authority in this area is limited in a number of ways: Congress can only implement constitutional rights protections by addressing state actions, not private conduct; Congress' authority does not extend to discovering constitutional rights, only to enforcing rights identified by courts; and efforts to enforce constitutional rights through legislation are limited by tests of 'proportionality' and a 'remedial' purpose said to inhere in the term 'appropriate legislation'.[66]

The degree to which these limitations have been understood strictly has varied over time. In the 1960s, the Voting Rights Act imposed remedies on State governments that included requiring all changes in election laws to be subjected to prior review by federal courts to ensure they were not hidden attempts to disenfranchise racial minorities. These remedies were upheld in 1966[67]; 50 years later, the Court was much less sure and required a reconsideration of the basis for imposition of the rule.[68] On the other hand, and despite shifts in the prevailing doctrines, it is a matter of consensus that when Congress is acting under the XIVth Amendment in a proper case, the usual limitations imposed by principles of federalism will have far less force.

The conceptual architecture of legal rights established by federal law under Congress' Article I powers or by executive agencies under Article II is different. There is no equivalent sense of hierarchy of importance, because the key question

63 The first specific references to strict scrutiny appeared in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down a law imposing sterilization as a punishment for crimes of 'moral turpitude') and *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans during World War II).

64 *Plyler v. Doe*, 457 U.S 202 (1987).

65 *United States v. O'Brien*, 391 U.S. 367 (1968).

66 *City of Boerne v. Flores*, 521 U.S. 507 (1997).

67 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

68 *Shelby County v. Holder*, 570 U.S. 2 (2013).

is whether the creation of the 'right' was within the power of the government. In general, the protection of a right under a federal statute is found in the criminal justice system or civil remedies provided within the law itself. In other words, actions to enforce these rights are not treated differently than other forms of legal action. Norms of procedural fairness apply to these proceedings as they apply to any others, but conceptually these rights protections – their justifications, the sources of their creation, the approach to their interpretation – are separate from the system of constitutional rights. One key exception arises when Congress attempts to create a legal right for individuals in ways that courts find to infringe on the 'rights' of States. The phrase 'States' rights has been mentioned before. To explain this concept would be a difficult and contentious exercise. From the perspective of an architectural discussion, the important thing is to recognize that principles of federalism that limit the powers of the national government extend to limiting the power to create and enforce rights under the Articles in ways that do not apply when Congress acts under the authority of the Reconstruction Amendments.

The resulting conceptual architecture is characterized by separate and parallel channels attached to different textual provisions that act as points of entry. In some situations, a litigant may choose from among several possibilities, a choice that also involves choosing among different conceptual schemes. For example, consider the case of federal laws enacted to combat racial discrimination in employment. Such practices may be challenged, in an appropriate case, under either the XIVth Amendment's Equal Protection Clause or under a federal statute. At one time, the federal statute was designed to apply the same standards as the judicial interpretation of the constitutional provision. Specifically, in both contexts a case of discrimination could be demonstrated by a showing of 'disparate impact', an employment practice that appeared neutral on its face but that could be shown to consistently result in discriminatory outcomes.[69] In 1976, however, the Supreme Court altered the rules for proving discrimination under the XIVth Amendment; thereafter only proof of a deliberate intent to discriminate would suffice to state a claim.[70] Yet the standard under the federal statute remained the same.

Another example arose where Congress cited multiple textual sources of authority for enacting the Violence against Women Act in 1994. Reviewing that law, the Court found that Congress had exceeded its authority under either the Commerce Clause or the XIVth Amendment, but to reach that conclusion the majority had to separately analyse each textual source, its supporting texts (primarily judicial precedents) and its associated structure of analysis. The rights protections that Congress was seeking to protect was the same in the two discussions, but the analysis of the scope of the right and the limits on its implementation was sharply different.[71]

69 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
70 *Washington v. Davis*, 426 U.S. 229 (1976).
71 *United States v. Morrison*, 529 U.S. 598 (2000).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

The conceptual architecture of modern rights protections displays the same pattern of channels that was seen in the textual architecture, and the two are directly connected. The increasing reliance on specific textual provisions, the differentiation among those provisions and the association of a specific body of supporting texts in each category created an environment that encouraged the development of similarly different conceptual approaches. Within each of these conceptual challenges hierarchies of preference have emerged, among more or less preferred rights and more or less protected classes or disfavoured classifications. Rights-protecting federal statutes follow the models of their associated constitutional sources, as do the body of precedents deemed relevant in each area. The conceptual and textual architectures are thus marked by a multiplicity of entrance points, multiple parallel channels and differing endpoints. Unsurprisingly, this multiplication of textual and conceptual architectures is mirrored at the level of institutional design.

III Institutional Architecture: Federal Article III Courts, Other Courts, Legislatures and Agencies

Where the basis for an asserted national right is a direct appeal to the Constitution, the institutional architecture remains the same: the Supreme Court sits at the apex of a descending system of adjudicating authorities in the federal and State systems. But within this structure the Court has developed theories of jurisdiction and shared authority that have significantly altered the relationships among the structural elements of the system. Various 'prudential' doctrines have emerged that justify the federal courts and the Supreme Court in declining to consider rights claims. 'Abstention' doctrines explain why a federal court may decline to hear a case if it is thought to be properly within the jurisdiction of a State level court either because questions of State law are involved, a State proceeding has to finish before federal rights claims are established or simply because the justices conclude that State authorities will have more expertise on relevant matters specific to State policies and conditions.[72] 'Justiciability' rules of standing, ripeness and mootness explain that the courts may decline to hear rights claims if the circumstances are not sufficiently urgent to demand immediate resolution. And the 'political question' doctrine refers to a whole set of criteria that determine when a question of rights protection is best left for resolution to one of the other branches of the federal government, including the justices' conclusion as to "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded".[73] Justice Brandeis referred to these various rules as 'avoidance doctrines', principles developed by the Supreme Court to shift responsibility for various categories of claims (including rights claims) to other institutional authorities.[74] Issues of conflicting authority claims by State courts, on the other

72 *Railroad Commission v. Pullman Co*., 312 U.S. 496 (1941); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co*., 319 U.S. 315 (1943).

73 *Baker v. Carr*, 369 U.S. 186, 198 (1962).

74 *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

hand, have been relegated to history. The Court has made it clear, and its view is generally accepted, that the Constitution is the supreme law of the land and that the Supreme Court's interpretations define the specific requirements of constitutional rights protections.[75]

Congress' role in enforcing the protections of the XIVth Amendment through appropriate legislation has waxed and waned. During the 1960s and 1970s, Congress' authority was at its apex. Starting in the 1980s and continuing to the present day, the Court has been increasingly willing to find that Congress is limited by an institutional architecture – primarily the system of federalism – that creates limits to where Congress can go. On the other hand, as noted above, Congress has found that its authority to regulate 'commerce' under Article I give it the power to create and enforce national rights in ways that had previously been denied to it by the Court. As a matter of institutional role, then, Congress took up a larger place in the protection of national rights than had been the case in earlier eras.

Perhaps the biggest institutional change has been the creation of the administrative state, including both agencies and a system of administrative courts. Executive branch agencies produce rules, the interpretation and application of which is determined by Executive branch ('Art. II') courts. These determinations are very often the on the ground point at which rights protections are first enforced. A whole set of issues arise in determining the relationship between these administrative courts and more traditional federal ('Art. III') courts.

E Summary and Comparative Comments

One might imagine a system of national rights whose textual, conceptual and institutional architectures were simple. A single text might declare 'everyone has a right to be treated fairly in all things' and leave it at that. There might be one court with exclusive authority to enforce this general guarantee. There might be no practice of recording the ways in which that single rights guarantee was applied or interpreted, and as a matter of interpretive philosophy the relevant authorities might conclude that no other textual sources provide relevant guidance. As an analogy, this would be a structure with one door (the single sentence), no interior walls or corridors (once inside one may go wherever one pleases) and only one inhabitant. A one-room schoolhouse occupied by a single teacher.

The American system of national rights protections looks more like a multistorey office building. There are numerous points of entry, each leading to a complex system of corridors some of which intersect, leading to rooms that may be accessible from one entrance but not from another or may be accessed by very different routes.

The textual architecture of this system comprises at least five distinct, separate points of entry: the text of the U.S. Constitution, itself broken down into numerous specific provisions and clauses that affect the scope of other clauses, notably the XIVth Amendment; the text of federal laws enacted to give effect to

75 *Cooper v. Aaron*, 358 U.S. 1 (1958).

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009

constitutional rights guarantees; the text of federal laws enacted under the general authority of the national government; the text of regulations enacted by government agencies, in some case agencies created for the purpose of rights protection; and the text of judicial opinions interpreting these other sources.

The conceptual architecture of constitutional rights protections involves strong and specific rights claims, each associated with a particular mode of analysis that may or may not share characteristics with those of other rights protections even where the professed purpose is the same. Among constitutional rights, the level of protection for substantive rights varies along a hierarchy of more or less preferred rights or more or less dangerous forms of discrimination. Procedural rights protections similarly occupy a hierarchy in which the extent of procedural rights protections depends on an assessment of the significance of the action the government is undertaking.

Where rights protections derive from federal laws enacted to implement constitutional guarantees, the conceptual architecture of constitutional rights is repeated but in a modified form. Most importantly, constraining walls have been created to ensure that the laws implementing a right do not go far beyond the scope of the right itself. Where rights protections derive from laws or regulations adopted by the government in the exercise of its original powers, by contrast, the conceptual architecture is not specific to rights protections at all; it is the general architecture of the American systems of federalism and separated powers.

The institutional architecture gives pride of place to courts, and especially the U.S. Supreme Court. But only a small minority of rights claims are heard by the Court. Lower federal courts, administrative law courts and State courts hear the vast majority of complaints and are responsible for implementation of national rights protections in practice. Congress and agencies of the executive have the authority to enact statutes and rules for the same purpose.

As has been noted repeatedly, the architectures of rights protections are ultimately subject to constitutional review by the Supreme Court, including the place of that court itself in the system of legal institutions. Recently, the Court has indicated a willingness to reconsider significant elements of the architecture of rights protection. The role of Congress in enacting legislation to implement the protections of the XIIIth, XIVth and XVth Amendments has come into question. An earlier acceptance of an expansive authority to adopt 'prophylactic' legislation, a judicial willingness to focus on the kind of factors enumerated in *Carolene Products* and a significantly greater willingness to see courts second-guess Congress on the empirical facts establishing a relationship between a constitutional rights violation and a piece of legislation all have pointed towards a general pattern of limiting the role of federal statutes in defining national rights. Similarly, the Court is increasingly sceptical of federal efforts to use the general powers of government to protect rights where claims against States are involved. Conceptually, the current Court has reoriented the enquiries that apply to a number of different areas of rights protection. And textually, as noted above, the increased emphasis on various versions of 'originalist' interpretation has meant a concomitant increase in the range of historical texts that may be treated as sources of authority while at

the same time curtailing the appeals to empirical findings or modern extraconstitutional sources.

In considering the American architecture of rights protections comparatively, a number of observations emerge. The multiplicity of structures may be partly due to the absence of anything like the German *Wesengehalt* of human dignity.[76] That is, there is no single core substantive value around which claims of constitutional rights are centred; each 'right' or set of rights is grounded in its own set of normative principles. Second, there is nothing like the principle of subsidiarity or the margin of appreciation in American rights protection. Despite the complexity and variability of the analyses, ultimately the question comes down to a binary 'yes or no' – is there a national right at issue or is not there? – and the appropriate analysis proceeds from there. Finally, given that the United States is nearly as large in both area and population as the entirety of Europe, the emphasis on national rights in the American system is worthy of comment. The discussion in this article is focused on a system of national rights, but there was no inherent necessity for such a system to emerge at all, let alone in the detailed and extensive form that it has taken. Whether Europe's transnational textual, conceptual and institutional architectures of rights protections will develop in a similar fashion is a critical question for the future of rights protections across the European Union.

76 *See, e.g.*, *Regarding the Luftsicherheitsgesetz*, German Constitutional Court, Judgment of 15 February 2006, 1 BvR 357/05, BVerfGE 115, 118.

European Journal of Law Reform 2018 (20) 2-3
doi: 10.5553/EJLR/138723702018020002009