In Search of Constitutional Stability: Comparative Alternatives to Substantive Due Process

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The American doctrine of substantive due process, once standing as a reliable safeguard for fundamental rights, has grown increasingly unpredictable in contemporary constitutional law. As federal courts shift their philosophies and interpretations over time, the ability to consistently protect essential liberties by way of the Fourteenth Amendment has become more precarious, with some previously well-established rights now at risk of being undermined or outright overturned. This uncertainty makes it essential to explore models from other constitutional systems to determine whether they might offer more dependable protections for human rights in the United States moving forward. Drawing influence from the constitutional mechanisms employed in Germany, Spain, and Canada, this Note proposes three potential avenues to protect such rights. First, it considers how a redesigned and 'entrenched' constitutional framework could both secure rights and reduce the risks of judicial overreach. Second, it examines the potential benefits of integrating international human rights norms into the U.S. legal system as a way to establish a more stable rights regime. And third, it contemplates refining current methods of constitutional interpretation to better align legal standards with evolving societal values and enduring democratic principles. By weighing these alternatives, this Note hopes to better chart a path forward that ensures human rights remain consistently protected in the United States, even as legal landscapes—and the Supreme Court itself—shift at a seemingly breakneck pace.

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Introduction

The United States Constitution—and the Supreme Court tasked with interpreting it—is facing a crisis: In the realm of human rights, there is ever-growing concern that there may no longer be such a thing as constitutional law. Instead, according to this line of thinking, the Court has merely become an arena in which law is not distinguished from politics.[1] Recent decisions from the Court have emphasized a long-running trend of instability in its analysis of the Fourteenth Amendment, threatening to drastically alter the legal landscape in which fundamental human rights are protected in the United States. Regardless of whether these recent decisions are or are not correct, this Note posits that the unpredictability of the substantive due

1. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006) (arguing that the Supreme Court invokes the doctrine of substantive due process to "resolve deeply contested questions of political morality").

process doctrine leads to constitutional instability in American jurisprudence. As such, this Note analyzes three different constitutional schemes seen in nations around the world and attempts to determine which, if any, might contribute to greater predictability in American human rights law as a possible alternative to substantive due process.[2] One key question underlies this analysis: What makes constitutional change *legitimate* in the realm of constitutional law? If a mechanism designed to promote stability is nonetheless deemed to be illegitimate, it warrants no further discussion.

This Note begins by detailing the current landscape of Fourteenth Amendment jurisprudence in the United States, necessarily discussing the importance of constitutional stability while proposing a comparative framework through which to analyze the functionality of the modern doctrine.[3] With the necessary context outlined, this Note first considers constitutional unamendability—using the German *Ewigkeitsklausel* as an illustrative example—as a means of promoting stability and predictability within the realm of human rights.[4] Next, this Note analyzes the feasibility of promoting constitutional stability by incorporating international norms into the text of a constitutional document, with Spain providing a tangible example to compare against the controversial doctrine of American exceptionalism.[5] And third, this Note—pulling from the Canadian judicial system's living tree doctrine—examines whether certain types of constitutional interpretation are capable of providing constitutional stability without veering into the realm of judicial activism.[6] The analysis concludes with a discussion of the distinct advantages and challenges of each international alternative, and a call for greater analysis by American courts and policymakers alike as human rights law continues to evolve in the United States and beyond.

The existing literature on the Fourteenth Amendment and substantive due process is well-developed, particularly in exploring the Supreme Court's fluctuating interpretations and the intersection of law and politics.[7] Scholars have extensively analyzed the instability and unpredictability of the Court's rulings, emphasizing the challenges posed by political influences on judicial

2. This Note, for all intents and purposes, is not concerned with the likelihood that any of the three alternatives would or would not be implemented in American jurisprudence. Instead, the remainder of the analysis looks only at the costs and benefits that the actual implementation of each foreign constitutional device might carry.

3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See, e.g.*, Recent Case, Tyson v. Sabine, *42 F.4th 508 (5th Cir. 2022)*, 136 HARV. L. REV. 1014, 1017 (2023) (asserting that modern Fourteenth Amendment doctrine exists within "an era where the future of substantive due process rights as a viable means of redress is becoming increasingly unstable").

decision-making.[8] Comparative constitutional law is also a well-explored area, with various national frameworks providing valuable insights.[9] However, notable gaps remain, particularly regarding the practical application of international constitutional principles to the American context.[10] While integrating international norms has been suggested as a means to improve legal predictability,[11] its implementation and potential benefits are under-examined.[12] Additionally, the balance between judicial activism and stability in flexible constitutional interpretations requires further scrutiny. As such, the legitimacy of constitutional change, especially concerning procedural and substantive legitimacy in the U.S. legal system, is another critical area in need of further development.[13] This Note addresses these gaps by evaluating alternative constitutional mechanisms and determining how they might stabilize U.S. jurisprudence, providing a fresh perspective on an issue otherwise normally discussed exclusively within the default American framework. Additionally, this Note probes the legitimacy of the constitutional protection of human rights, a crucial factor in ensuring enduring legal reforms. By situating the United States within a broader international context, this Note contributes to the scholarly discourse of constitutional law and human rights, advancing innovative solutions to the

8. *See, e.g.*, Daniel Kelly, *Substantive Due Process: The Trojan Horse of Judicial Legislation*, 51 J. MARSHALL L. REV. 261, 268 (2018) ("This approach surely invites the courts to impute their own politics in rendering monumental decisions of which substantive rights deserve constitutional protection, and which ones do not.").

9. *See infra* subpart I(D).

10. Modern comparative scholarship primarily focuses on *education*, informing readers of the similarities and differences among various countries' constitutional frameworks. *See, e.g.*, Richard Albert, David Landau, Pietro Faraguna & Giulia Andrade, *Introduction* to 2022 GLOBAL REVIEW OF CONSTITUTIONAL LAW 5 (Richard Albert et al. eds., 2023) (advancing the "principal purpose" of "offer[ing] readers systemic knowledge about jurisdiction-specific constitutional law"). This Note seeks to advance that goal and 'take it a step further,' so to speak, by actually *applying* these international constitutional principles to the American experience and encouraging readers to consider whether such principles could feasibly operate within American constitutional jurisprudence.

11. *See, e.g.*, Nico Krisch, *The Dynamics of International Law Redux*, 74 CURRENT LEGAL PROBS. 269, 285–86 (2021) (identifying international law as a "unitary field" that can be consistently applied when discussing the processes of "law-making and change").

12. *See id.* at 286–87 (noting that despite the overarching goal of predictability in international law, "particular areas of international law—defined by issue area, geographical region or institutional sphere—have developed their own, particular structures of change," often requiring a nuanced, fact-specific analysis as to each country or issue).

13. The issue of legitimacy in constitutional change has been the subject of scholarly debate for decades. *See generally, e.g.*, Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535 (1995) (discussing potential threats to the "central premise of constitutional governance"—legitimacy within a representative governmental structure). Yet even today, this debate remains unsettled. *See* Alon Harel & Adam Shinar, *Two Concepts of Constitutional Legitimacy*, 12 GLOB. CONSTITUTIONALISM 80, 88 (2023) (identifying "constitutional discourse" within American jurisprudence caused by differing ideas of constitutional legitimacy).

challenges posed by the current unpredictability in Fourteenth Amendment jurisprudence. Through its comparative analysis, this Note not only fills existing gaps but also encourages American courts and policymakers to consider international examples as viable alternatives for promoting stability and legitimacy in constitutional law.

I. Setting the Scene

This Note begins with a discussion of substantive due process, often considered to be one of the most controversial and politicized areas of American jurisprudence. But highlighting the U.S. Supreme Court's constitutional analysis necessarily entails discussing threats to the modern doctrine, as captained by Justice Clarence Thomas and his originalist camp. With the problem outlined, this Note defines its main goal—constitutional stability—and analyzes how the constitutional schemes of foreign countries beyond American borders might be helpful in determining how to accomplish the desired stability while also protecting fundamental human rights moving forward.

A. Substantive Due Process: A Brief History

Nested in Section 1 of the Fourteenth Amendment of the U.S. Constitution, the Due Process Clause protects the "life, liberty, [and] property" of all persons from deprivation by the government "without due process of law."[14] The plain-text language of this clause, "as read procedurally," is uncontested: It "require[s] that judicial or executive deprivations follow fair procedures."[15] But the Court, some time after the Fourteenth Amendment's ratification, interpreted the Due Process Clause as also "placing a substantive constraint on state actions."[16] That is, the Court read the language as protecting certain substantive rights "so fundamental" that their infringement by the government should be "subject . . . to closer scrutiny," "regardless of the procedures that the government follows when enforcing the law."[17] Whether the Due Process Clause should be properly read as protecting substantive rights, in addition to procedural rights, has been the subject of great debate,[18] but this Note takes no stance on whether

14. U.S. CONST. amend. XIV, § 1.

15. John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997).

16. *Overview of Substantive Due Process*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-6-1/ALDE_00013814/ [https://perma.cc/HT64-74VC].

17. *Id.*

18. *See, e.g.*, Harrison, *supra* note 15, at 501 ("[T]here is a time-honored objection to the very idea of substantive due process. The objection is that the 'process' referred to in the Clauses is procedure."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' . . .

such doctrinal bifurcation was or was not appropriate. Instead, this Note follows the guidance of Justice Louis Brandeis, who eloquently stated that, "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."[19] In other words, the doctrine is so well-established in American jurisprudence that there is little probative value in arguing for or against its merits.

Yet despite this point of contention being "settled,"[20] as Brandeis put it, there remains today "[n]othing in constitutional law [that] is more controversial than substantive due process."[21] This controversy arises in large part due to the inconsistency in how and when the doctrine has been applied; inconsistency breeds instability, and instability yields dissatisfaction in the rule of law.[22] With roots in English law,[23] American substantive due process can be divided into three distinct eras. The first, characterized by "the rule that the legislature may not take away vested rights of property,"[24] most closely tracks the language of the Fourteenth Amendment itself. Despite using verbiage strongly paralleling now-controversial decisions by the Court,[25] this application of the Due Process Clause is seemingly the least problematic. But the Court faced its "first major backlash"[26] within due-process jurisprudence in 1905 when it decided *Lochner v. New York*,[27] a case in which the Court shifted its attention away from property rights and toward economic rights. By this point, the Court had already rejected the Privileges or Immunities Clause as a potential source of substantive rights,[28] leaving the Due Process Clause as the only vessel for recognizing new economic rights. In doing so, and for the decades that followed, the Court "promot[ed] and

Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms . . . ."); Conkle, *supra* note 1, at 69 ("By its terms, the language suggests no limitation on procedurally proper deprivations, nor does it authorize the recognition of substantive constitutional rights.").

19. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

20. *Id.*

21. Conkle, *supra* note 1, at 64.

22. *See* Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1963 (2020) ("To put things plainly, the controversial nature of substantive due process doctrine has made the Supreme Court's due process caselaw unclear.").

23. *Id.* at 1965.

24. Harrison, *supra* note 15, at 498.

25. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857) (enslaved party) (using "due process of law" as a justification to further institutionalize slavery).

26. Tymkovich et al., *supra* note 22, at 1979.

27. 198 U.S. 45 (1905).

28. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 82 (1872) (holding that the "regulation of civil rights" is a power reserved "for domestic and local government[s]" within "the balance between State and Federal power").

protect[ed] the economic philosophy of laissez faire."[29] But after facing criticism by the Executive and Legislative Branches during the Great Depression, when many believed the *Lochner*-era judicial activism "was hamstringing the other branches' ability to deal with economic crises," the Court's economic campaign ended almost as quickly as it began.[30] Certainly, enough persuasive literature has proven that *Lochner* and its companion cases were ill-founded,[31] and this Note does not mean to suggest that the departure from economic rights in the 1930s was improper. Yet the fact remains that the Court rewrote the entire doctrine of the Due Process Clause twice within the first century after its ratification. Such instability should concern scholars and laypersons alike.

Modern doctrine has not fared much better. Today, the Court uses substantive due process to protect certain unenumerated rights, but only if any given right is "deeply rooted in American history and tradition" or so essential to ordered liberty such that it is deemed "fundamental."[32] The issue, however, is that nobody can seem to agree which rights do or do not have a sufficient basis to earn protection under the Due Process Clause. Justices disagree, for example, on whether tradition should be defined according to "historical practices" or "aspirational principles."[33] In doing so, the Court repeatedly "highlights the conceptual chaos of modern substantive due process," threatening judicial legitimacy through "confusing doctrinal standards."[34]

Substantive due process is even more controversial when considered within the context of the principle of separation of powers, a foundational tenet of the American constitutional framework. According to its critics, substantive due process blurs the lines between judicial interpretation and legislative authority—thereby disrupting the balance intended by the Framers—because it allows unelected judges to influence policy decisions that should otherwise be determined through democratic processes.[35] This judicial overreach not only undermines the democratic legitimacy of policy

29. Conkle, *supra* note 1, at 70.

30. *See* Tymkovich et al., *supra* note 22, at 1979 ("[The Court] buried the economic rights it had only recently dug up . . . .").

31. *See generally, e.g.*, David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) (chronicling *Lochner*'s path to becoming part of the "anti-canon").

32. *Due Process Supreme Court Cases*, JUSTIA, https://supreme.justia.com/cases-by-topic/due-process/ [https://perma.cc/E4TQ-JG65].

33. Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. AM. ACAD. MATRIM. LAWS. 623, 630 (2023).

34. Conkle, *supra* note 1, at 66 (explaining that the Supreme Court substantive due process cases endorse three inconsistent theories of substantive due process).

35. *See* Tymkovich et al., *supra* note 22, at 1967 (discussing substantive due process's placement of "a number of *nonprocedural* rights beyond the legislature's power to regulate" within the context of separation of powers).

decisions but also risks entrenching the preferences of a few over the will of the majority. Under this line of thinking, the judicial branch's involvement in crafting substantive rights, rather than solely interpreting existing laws, introduces inconsistency and unpredictability into constitutional law. The determination of what constitutes a "fundamental" right is often based on subjective judicial interpretations, which can vary widely among justices and across different courts. This variability can lead to a mélange of legal standards that fluctuate depending on the composition of the bench, thereby eroding public confidence in the judiciary's impartiality and predictability.

The tension between substantive due process and the separation of powers also raises profound questions about the appropriate mechanisms for adapting the Constitution to evolving societal values. While proponents of substantive due process argue that the judiciary must protect rights in a dynamic society,[36] this perspective arguably overlooks the very purpose of the legislative branch. As the most responsive to the electorate, the legislative branch is best positioned to address changes in societal values and enact laws that reflect contemporary needs.[37] Legislative processes, including public debate and committee scrutiny, provide a comprehensive and democratic approach to addressing new challenges and rights claims. Even the constitutional amendment process, though rigorous, provides a structured and democratic means to modernize the Constitution without overreaching judicial authority.[38]

Given these tensions, it is worth considering whether an alternative method for protecting human rights, one more aligned with constitutional principles, might offer a more stable and effective solution than the current application of substantive due process. Such an approach would preserve the balance of power among the branches of government while ensuring that fundamental rights are safeguarded in a manner consistent with democratic principles.

B. Modern Threats to the Modern Doctrine

In line with the doctrine's unpredictable and ever-changing applicability, substantive due process appears poised to enter into yet another transformative period in the near future. The Court held in 1973 that a person's right to an abortion was within the scope of the Due Process

36. *See* Conkle, *supra* note 1, at 123–25 (discussing the idea of "evolving national values" as a potential justification for substantive due process).

37. *See generally* Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765 (2021) (arguing that "the law enables and encourages legislative responsiveness").

38. This Note makes no claims regarding the effectiveness of the current constitutional amendment process. Instead, it uses the rigid structure of this process to further contrast the instability and lack of constitutional predictability created by substantive due process as the primary means of protecting fundamental human rights.

Clause's protections.[39] This holding was slightly narrowed over time,[40] but for nearly half a century, access to an abortion was treated as a constitutional right in the United States. When the issue was revisited in 1992, the Court—in declining to overturn *Roe*—reached its holding largely on the basis of predictability within constitutional law. Said the Court:

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.[41]

In holding as much, the *Casey* Court understood the importance of stability in defining and protecting fundamental human rights. When the Court again reconsidered the issue in *Dobbs v. Jackson Women's Health Organization*,[42] however, it came to the opposite conclusion, overruling both *Roe* and *Casey* in finding that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion."[43]

Unsurprisingly, this decision "set off legal, political, and social earthquakes."[44] Not long ago, abortion was considered by many to be "the most important application" of the right to privacy, which is "the most important fundamental right" covered by the Due Process Clause.[45] Yet now, the procedure can be regulated on a state-by-state basis. Justice Clarence Thomas further contributed to the doctrinal chaos in his concurring opinion, going as far as saying that "any substantive due process decision is 'demonstrably erroneous.'"[46] Thomas therefore urged the Court to reconsider "all" of its "substantive due process precedents,"[47] calling into question the

39. Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that criminalizing abortion in certain circumstances "is violative of the Due Process Clause").

40. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992) (opinion of O'Connor, Kennedy and Souter, JJ.) (imposing a new standard to determine the constitutionality of legislation restricting access to an abortion).

41. *Id.* at 901.

42. 142 S. Ct. 2228 (2022).

43. *Id.* at 2284.

44. Mark Walsh, *Abortion Ruling by Supreme Court Sparks Closer Scrutiny of Substantive Due Process*, ABA J. (June 30, 2022, 12:18 PM), https://www.abajournal.com/web/article/supreme-courts-abortion-ruling-sparks-closer-scrutiny-of-substantive-due-process [https://perma.cc/AHN3-C96F].

45. Harrison, *supra* note 15, at 501.

46. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring)).

47. *Id.* Whether Thomas is looking to roll back certain rights or merely change the procedural method through which they are protected is of little consequence for the remaining analysis, as

stability of other unenumerated rights moving forward. Previous substantive due process cases have recognized the right to marry for both heterosexual[48] and homosexual[49] couples, the right to procreate,[50] the right to purchase and use contraceptives,[51] the right to engage in private, consensual sexual activity,[52] the right to keep the family together,[53] and the right to refuse life-saving medical treatment.[54] Now, in the wake of *Dobbs*, the threat of the Court reversing other substantive due process cases "remain[s] pertinent."[55]

In an effort to "ensure that [the] decision [was] not misunderstood or mischaracterized," the *Dobbs* majority sought to mitigate Justice Thomas's concurrence and instead asserted that "[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion."[56] The dissenting Justices, however, were not reassured.[57] After all, both *Roe* and *Casey* were part of the "same constitutional fabric" as other rights recognized by modern substantive due process.[58] Having been recognized through the same constitutional device, there is no true distinction between abortion and the rights that the *Dobbs* majority claims remain intact.[59] Instead, the rejection of abortion as a fundamental right "very much can put existing

either necessarily involves tearing down earlier Supreme Court precedent. *See id.* at 2302 (calling the Court to consider whether "any of the rights announced in [its] substantive due process cases" could be better qualified as "'privileges or immunities of citizens of the United States'" (quoting U.S. CONST. amend. XIV, § 1)).

48. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

49. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that "couples of the same sex may not be deprived" of the right to marry under the Due Process Clause).

50. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (applying the Due Process Clause to the forced sterilization of criminals).

51. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (extending the "constitutionally protected right of privacy" to "an individual's liberty to make choices regarding contraception").

52. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the Due Process Clause gives all persons "the full right to engage in [consensual sexual] conduct without intervention of the government").

53. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (recognizing "the choice of relatives . . . to live together" as a right necessary "to maintain or rebuild a secure home life").

54. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.").

55. McClain & Fleming, *supra* note 33, at 637.

56. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

57. *See id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone.").

58. *Id.*

59. *See* Zachary Mullinax, *Saying the Quiet Part Out Loud: Unenumerated Rights After Justice Thomas's* Dobbs *Concurrence*, 74 MERCER L. REV. 661, 669 (2023) (concluding that the "distinction between abortion and other claimed unenumerated rights is unpersuasive and legally irrelevant").

rights—rights that have already been recognized—in jeopardy."[60] This Note takes no stance on whether abortion—or any other liberty interest recognized under the Due Process Clause—should or should not be protected as a constitutional right.[61] This Note does, however, argue that the Court's incessant back-and-forth contributes to a growing instability surrounding American human rights jurisprudence. If, as some scholars argue, *Dobbs* "cannot logically be reconciled with prior unenumerated rights precedents,"[62] the aforementioned chaos will continue to plague the Court moving forward. Two sets of unenumerated rights—property rights and economic rights—have come and gone under the substantive due process framework. If it truly is "difficult [for American citizens] to predict what right will be next taken away by the Supreme Court's action or inaction,"[63] can it really be said that the Constitution is doing its job of protecting the rights of Americans in a way that is both stable and predictable? Just as the "discrediting" of one freedom leads to the "undermining" of another,[64] the repeated inconsistency of the substantive due process doctrine continues to threaten the existence of rights already recognized today.

C. Defining Stability

Stability within the rule of law is arguably the "most worthy objective" within the "forms and functions of constitutional government."[65] This ideal not only "preserve[s] certainty" but also "assure[s] that government and citizen alike may rely upon standards of constant value."[66] When such stability is not present within the constitutional scheme, "citizens have difficulty managing their affairs effectively."[67] That is, people live more

60. Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 436, 438 (2023) ("[T]he attack on substantive due process becomes dangerous because of the liberties that it would cause to be eliminated.").

61. *See* Mullinax, *supra* note 59, at 691–92 ("The question is not whether one supports abortion, or gay marriage, or any other issue addressed in the Court's substantive due process precedents. The question is one of political legitimacy . . . .").

62. *Id.* at 665.

63. Seema Mohapatra, *An Era of Rights Retractions:* Dobbs *as a Case in Point*, 48 HUM. RTS., no. 4, 2023, at 4, 5 (arguing that *Dobbs* signaled an "era of rights retraction").

64. *See* Chemerinsky, *supra* note 60, at 429 (recognizing the belief that the Court's departure from *Lochner*-era freedom-of-contract ideals has hindered the potential for substantive due process to protect other rights moving forward).

65. Robert B. McKay, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 203, 203 (1963) ("No society can long survive in which appropriate accommodation is not somehow made to assure stability without stultifying progress.").

66. *Id.*

67. *See* Stefanie A. Lindquist & Frank C. Cross, Stability, Predictability and the Rule of Law: *Stare Decisis* as Reciprocity Norm 1 (Mar. 26, 2010) (unpublished manuscript), https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf [https://perma.cc/VYP2-UPC3] ("When judges dispense with prevailing doctrine in favor of a new rule, it has the potential to throw citizens' expectations into disarray.").

freely when they not only know the law as-is but also are confident that the law will remain similarly predictable in the future.

That is not to say, however, that *stability* must be treated as an absolute synonym to *rigidity*. This Note instead adopts the particularly helpful definition of *stable* as "steady in purpose" and "firm in resolution."[68] In other words, a constitution can be stable without being unchanging, so long as the change is in the name of the constitution's purpose and ideals. After all, "[l]aw must be stable and yet it cannot stand still."[69] Justice Benjamin Cardozo recognized this necessary balance, writing that "[r]est and motion, unrelieved and unchecked, are equally destructive."[70] Thus, the function of judicial review is not necessarily incompatible with the ideal of a stable constitution. Both serve as "appropriate functions of the Supreme Court in its role as developer and expositor of constitutional law."[71] Stability is preserved within this scheme so long as any "conservative link with the past" nonetheless finds "current anchorage in the dynamics of the contemporary scene."[72] As such, the American constitutional system could, theoretically, find stability while allowing its Supreme Court Justices to continue engaging in substantive due process.

Yet *Dobbs* illustrated that substantive due process, as practiced today, allows Justices to not only "build on the [earlier] wisdom of others"[73] but also tear such wisdom down.[74] This is especially threatening to stability and the rule of law when the Court issues decisions at odds with the will of the nation's majority, aptly coined the "countermajoritarian difficulty."[75] But constitutional stability is best served when government officials have incentives to *honor* the democratic rules, a "series of civil and substantive

68. *Stable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/stable [https://perma.cc/M65H-ZV49].

69. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923) (arguing that "all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change").

70. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 2 (1924); *see also* Lindquist & Cross, *supra* note 67, at 1 ("While greater legal stability is generally preferred, absolute legal stability would produce a rigid legal paradigm impervious to changing societal norms and practices.").

71. McKay, *supra* note 65, at 210–11.

72. *Id.* at 211.

73. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) (discussing respect for precedent as a feature of constitutional stability).

74. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The legal framework *Roe* and *Casey* developed . . . has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents.").

75. *See* Sonia Mittal & Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 J. CONST. L. 337, 337 (2010) (analyzing threats to constitutional stability in a governmental system involving "an unelected Court with the power" to reach conclusions contrary to "the will of the prevailing majority").

citizen rights."[76] This tension necessarily suggests that, because the balance between stability and adaptation "creates difficulties that cannot be escaped,"[77] the American Court's approach to identifying and protecting fundamental human rights breeds more chaos than stability. If the United Nations is correct in asserting that the rule of law is "fundamental" to "protect people's rights and fundamental freedoms,"[78] another solution is required.

D. Comparative Law as an Analytical Framework

Perhaps the solution to the U.S. Supreme Court's instability can be found not in American jurisprudence but instead across international borders and within the constitutional schemes of foreign countries. Comparative analysis is "the act of comparing the law of one country to that of another"[79] and, according to this Note, provides insight into potential alternatives for protecting human rights in America beyond substantive due process.

The use of foreign constitutional law to evaluate American precedent has not always been an uncontroversial analytical tool. For example, Justices Stephen Breyer and Antonin Scalia took widely divergent stances on the issue. While the former favored the use of comparative analysis (at least in a limited role or under specific circumstances), the latter strongly opposed the review of international materials in resolving American questions of law.[80] Scholars and judges alike maintained similarly opposing views.[81] Today, however, "comparisons between constitutional orders are commonplace," allowing for the effective use of comparative analysis in evaluating constitutional stability.[82] Even the U.S. Supreme Court itself has since relied on international law in handing down landmark human-rights decisions. In

76. *See* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 260 (1997) ("The survival of democracy and the rule of law requires that political officials have incentives to honor a range of limits on their behavior.").

77. *See* Newton Edwards, *Stability and Change in Basic Concepts of Law Governing American Education*, 65 SCH. REV. 161, 161–62 (1957) (defining the "dual function" of the law as balancing a "preservative and conservative influence" against "the development of new concepts and principles when a new social context requires them").

78. *What Is the Rule of Law*, UNITED NATIONS, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ [https://perma.cc/BCY5-P2KZ].

79. Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOB. STUD. L. REV. 451, 452 (2009).

80. *See* A Conversation Between U.S. Supreme Court Justices, 3 INT'L J. CONST. L. 519, 521, 524 (2005) (debating the merits of using other nations' constitutional law in evaluating and deciding U.S. constitutional questions).

81. *See* Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible?*, 135 HARV. L. REV. 2110, 2111 (2022) (reviewing ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020)) ("[T]he question—crudely put—was *whether* we could compare the constitutional law of different nations.").

82. *Id.*

Lawrence v. Texas,[83] for example, the Court looked to the European Court of Human Rights and "[o]ther nations" in determining that there is a "protected right of homosexual adults to engage in intimate, consensual conduct."[84] Similarly, in *Roper v. Simmons*[85] and other Eighth Amendment cases,[86] the Court "referred to the laws of other countries and to international authorities as instructive for its interpretation of" the Constitution.[87] That is, in analyzing the constitutional protection of a human right *within* American borders, the Court has indicated a willingness to look *beyond* those borders in reaching its ultimate determination. The relationship between American constitutional jurisprudence and international law was perhaps best summarized by John B. Bellinger III, then-legal adviser for the U.S. Department of State and former National Security Council member, in an address in the Netherlands: "The United States *does* believe that international law matters. We help develop it, rely on it, abide by it, and—contrary to some impressions—it has an important role in our nation's Constitution and domestic law."[88] Thus, despite its criticisms, the use of international law in American jurisprudence appears here to stay.[89] And because "democratic backsliding" has been a large contributing factor to the recent "outpouring of comparative literature,"[90] the *Dobbs* decision—arguably an instance of democratic backsliding in and of itself (depending on who you ask)—presents yet another opportunity to look beyond American borders. More specifically, this Note invokes the tools of comparative analysis in reviewing American substantive due process for two key reasons: similarity of *problems* and similarity of *problem-solving capabilities*.

First, foreign courts "grapple with the same (or very similar) constitutional issues as their U.S. counterparts."[91] Put differently, we presume that the problems faced by everyday Americans are the same as those encountered by citizens of other countries, even if they operate under

83. 539 U.S. 558 (2003).

84. *Id.* at 576.

85. 543 U.S. 551 (2005).

86. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing the European Union's *amicus curiae* brief and its analysis of death penalty jurisprudence).

87. *Roper*, 543 U.S. at 575.

88. John B. Bellinger, Remarks at The Hague (June 6, 2007) (transcript available at https://2001-2009.state.gov/s/l/rls/86123.htm [https://perma.cc/U2Q2-5HXA]).

89. For a more in-depth analysis of the U.S. Supreme Court acting "as a filter between international law and the American constitutional system," see Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CALIF. L. REV. 1567 (2016). The filtration system discussed therein allows American courts to "tailor international law to the U.S. domestic system," even when some aspect of international law is "ill-suited for direct application in the U.S. legal system." *Id.* at 1568.

90. Khosla, *supra* note 81, at 2111.

91. Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 561 (2007).

different constitutional schemes. Such similarities are especially prominent when discussing American substantive due process, which identifies fundamental liberty interests, because there has been "an international convergence of constitutional human rights norms."[92] As other nations become committed to the same fundamental principles as American constitutional law, such as equality, the overlap between the applicability of their human rights jurisprudence will increase.

Second, this Note recognizes the great similarities between the United States and each of the three foreign nations—Germany, Spain, and Canada—to be discussed in the following Parts. All four countries currently boast top-fifteen economies in the world by way of gross domestic products;[93] all have a total population in at least the eighty-fifth percentile of countries;[94] and all implement aspects of representative democracy within their constitutional mechanisms. Based on these similarities, we assume that each nation's constitutional courts "possess sufficient expertise, professionalism, judicial independence, transparency of process, and caliber of reasoning" such that their judicial histories involving human rights are "worthy of mature consideration."[95] That is, if the United States is indeed so similar to Germany, Spain, and Canada, there is likely sufficient support for the "potential utility of [the] foreign courts' judgments on common questions of law."[96]

In using cross-country data to "test hypotheses, make observations, and present causal theories,"[97] this Note's comparative analysis seeks to "understand[] and utiliz[e] international and foreign precedent"[98] in the quest for stability within the realm of human rights.

II. Alternative One: Constitutional Design

It is essentially uncontested that constitutions are "drafted to endure," acting as a constant source of "stability and a sense of identity" to both the country's societal and governmental norms.[99] But what happens when drafters take things a step further, making certain parts of their constitution

92. *Id.*

93. Caleb Silver, *The Top 25 Economies in the World*, INVESTOPEDIA, https://www.investopedia.com/insights/worlds-top-economies/ [https://perma.cc/E5N7-7D6Y] (last updated July 03, 2024).

94. *See Country Comparisons Population*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/field/population/country-comparison/ [https://perma.cc/CRK7-XT32] (ordering populations by country).

95. Rahdert, *supra* note 91, at 561–62.

96. *Id.* at 569.

97. Khosla, *supra* note 81, at 2112.

98. Rahdert, *supra* note 91, at 606.

99. *See* SILVIA SUTEU, ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM 1 (2021) (noting that "[f]rom constitutionalism's earliest days, constitution-makers have struggled with how to best calibrate basic laws in order to ensure they are not too easily discarded").

outright unamendable? This Part first discusses so-called "eternity clauses" and how they function within a constitution otherwise subject to the amendment process. Next, this Part will turn to a country that has arguably demonstrated the greatest *volte-face* in human rights jurisprudence within the last century—Germany—and analyze how the German eternity clause has succeeded or failed in protecting fundamental rights. After a brief detour to discuss an eternity clause whose textual foundation is less apparent, this Note then predicts how such a constitutional device would function within the American legal system.

A. Eternity Clauses, Generally Speaking

Most modern constitutions employ some level of general entrenchment, making the documents "harder to amend than ordinary laws."[100] Entrenchment often takes some procedural form, requiring a supermajority or ratification referendum (or any other procedural condition) before any given constitution can be amended.[101] "Eternity clauses," however, fully entrench part of a constitution such that certain amendments or constitutional changes are made "legally inadmissible,"[102] ensuring that "whatever topic is kept off limits cannot be changed by future generations."[103] In order to amend constitutional text covered by an eternity clause, a country would need to repeal the entire constitution and "create an entirely new" one.[104] The expectation is that the values protected by an eternity clause are so "fundamental" that "if changed, could undermine [the nation's] constitutional identity."[105] This language already tracks the language used by the U.S. Supreme Court in its substantive due process analysis, suggesting that an eternity clause could extend to the fundamental liberty interests currently protected under the Fifth and Fourteenth Amendments. The difference, though, is that eternity clauses function "to stabilize and preserve the system adopted by the state."[106] This stands in stark contrast to the system currently protecting human rights in America.[107]

Eternity clauses have been criticized for, among other things, violating the principle of *nulla potestas extra constitutionem* ("there is no authority

100. Michael Hein, *Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe*, 18 INT'L J. CONST. L. 78, 79 (2020).

101. *Id.*

102. *Id.*

103. Andrew Friedman, *Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies*, 4 MEXICAN L. REV. 77, 96 (2011).

104. *Id.*

105. Zbigniew Witkowski & Maciej Serowaniec, *Eternity Clause – A Realistic or Merely an Illusory Way of Protecting the State's Constitutional Identity?*, 17 TORUŃSKIE STUDIA POLSKO-WŁOSKIE – STUDI POLACCO-ITALIANI DI TORUŃ 173, 176 (2021).

106. *Id.*

107. *See supra* subpart I(B).

beyond the constitution")[108] by putting certain subjects beyond the reach of even a supermajoritarian population in a representative democracy.[109] But it is important to remember that the power of constitutional amendment is itself a "constituted power"; because the constitution "define[s] the requirements of a valid constitutional amendment," it stands to reason that a text-based limitation on this process is also constitutional.[110] The Supreme Court of India became the "first constitutional court" to explicitly endorse constitutional unamendability in 1973;[111] as such, the main inquiry within this Note is whether eternity clauses can contribute to constitutional stability, rather than whether they are *per se* constitutional in the first place.

As discussed above, a constitution can be stable without being unchanging.[112] But does the unamendability of text covered by an eternity clause become so rigid that it is incompatible with the definition of *stability* advanced by this Note? Surprisingly, the answer is no. Eternity clauses, under this line of reasoning, should not be regarded "as imposing unmodifiability and preventing change."[113] Instead, they should be seen as "not permitting changes violating the essence of the respective constitutional principles."[114] This falls squarely in line with the aforementioned definition of *stable* as meaning "steady in purpose" and "firm in resolution."[115] When dealing specifically in the realm of human rights, this interpretation would allow eternity clauses to expand alongside jurisprudential evolution, so long as the spirit of the right covered by the eternity clause is itself never violated. More broadly speaking, "fundamental rights" have been recognized as an area of

108. Ulrich K. Preuss, *The Implications of "Eternity Clauses": The German Experience*, 44 ISR. L. REV. 429, 429–30 (2011) ("The constitution is an institutional device that constitutes a polity in which all categories of political power are authorized by the supreme law of the land—*nulla potestas extra constitutionem* . . . .").

109. *See, e.g.*, Sharon Weintal, *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory*, 44 ISR. L. REV. 449, 466 (2011) (analyzing the tension between eternity clauses and popular sovereignty within a representative democracy).

110. *See* Preuss, *supra* note 108, at 430–31 (2011) (explaining that the amendment power is "subject to the relevant rules of the constitution that define the requirements of a valid constitutional amendment" and therefore any constitutional amendment that "does not meet these requirements" is invalid).

111. *See* Monika Polzin, *The German Eternity Clause, Hans Kelsen and the Malaysian Basic Structure Doctrine*, 7(2) COMPAR. COST. L. & ADMIN. L.J. 1, 4 (2023) (citing Kesavananda Bharati v. State of Kerala [1973] Supp. S.C.R. 1, 4 (India)) (explaining that "[t]he Supreme Court of India was the first constitutional court to adopt" the doctrine of "implied limits for constitutional amendments" in the case *Kesavananda Bharati v. State of Kerala*).

112. *See supra* subpart I(C).

113. Witkowski & Serowaniec, *supra* note 105, at 179.

114. *Id.* at 179–80 ("There is a close relationship between unmodifiable provisions and constitutional identity.").

115. *Stable*, *supra* note 68.

law most frequently "render[ed] . . . unamendable at any time and under any circumstances."[116]

This constitutional scheme, by explicitly distinguishing certain liberties as unamendable, necessarily institutes a hierarchy of rights. In elevating a smaller subsect of rights to a higher plane, this "pyramid of norms"[117] suggests that the "lower" constitutional rights—those not covered by an eternity clause and thus still subject to the amendment process—will be "read and interpreted" through the lens of the norms given greater importance or significance.[118] The issue here, of course, is that eternity clauses must still be judicially interpreted in a way that gives the constitutional text teeth; otherwise, the principle of unamendability becomes "a mere dormant declaration, a theoretical concept without any real practical implications."[119] Whether courts are capable of making such a determination without acting in a "democracy-adverse, judicially activist manner,"[120] which would set it apart from the modern American tradition of substantive due process, is the focus of the remainder of this Part.

B. The German Ewigkeitsklausel

After World War I, Germany adopted the *Weimarer Verfassung* (the "Weimar Constitution"),[121] which declared the nation to be a democratic parliamentary republic.[122] In stark contrast to constitutions protected by the eternity clauses discussed thus far, it was *too easy* to amend the *Weimarer Verfassung*. A constitutional amendment required approval from only two-thirds of the elected parliament present at any given session, meaning the constitution could be changed, under the right circumstances, with the approval of less than fifty percent of the elected body.[123] In this way, a

116. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, COUNCIL OF EUROPE, STUDY NO. 469/2008, REPORT ON CONSTITUTIONAL AMENDMENT 12 (2010), https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2023)018-e [https://perma.cc/SD4E-PXE8].

117. Weintal, *supra* note 109, at 456.

118. *See* Witkowski & Serowaniec, *supra* note 105, at 174 ("[E]ven though in modern constitutions we attribute in an equal measure a special and supreme legal force to constitutional norms, we are also ready at the same time to accept the claim that some kind of hierarchy among these norms is possible.").

119. Ladislav Vyhnánek, *The Eternity Clause in the Czech Constitution as Limit to European Integration*, 9 VIENNA J. INT'L CONST. L. 240, 244 (2015).

120. Hein, *supra* note 100, at 79.

121. *Weimar Republic*, BRITANNICA (Oct. 13, 2024), https://www.britannica.com/place/Weimar-Republic [https://perma.cc/2Y8V-4WRJ].

122. *See The Weimar Constitution*, WIENER HOLOCAUST LIBR., https://www.theholocaustexplained.org/the-nazi-rise-to-power/the-weimar-republic/the-weimar-constitution/ [https://perma.cc/A2MT-D3YD] (describing the democratic and parliamentary features of The Weimar Republic).

123. Preuss, *supra* note 108, at 436.

constitutional amendment was a "mere variety of an ordinary law."[124] It is this broad emphasis on popular sovereignty and the power of a simple majority that allowed the Nazi Regime to seize power and begin chipping away at the human rights of people within and beyond German borders.[125] Adolf Hitler's ascendancy to the role of Chancellor of the German *Reich*, for example, fully conformed to the rules of the *Weimarer Verfassung*.[126] The human rights atrocities that followed need not be described in detail, but they nonetheless proved Justice Cardozo correct in his assessment regarding constitutional stability: "Rest and motion, unrelieved and unchecked, are equally destructive."[127] For minority populations in Germany, unchecked motion led to the destruction of fundamental rights in record time.

Cognizant of the nation's prior history, the framers of Germany's next constitutional law (the "Basic Law") took an opposite approach.[128] This Basic Law was "framed . . . in the shadow of the Third Reich and in the presence of a Communist dominated East Germany."[129] In doing so, the drafters "took great pains to avoid the weaknesses of the Weimar Constitution and to fortify the Basic Law against a repeat of this experience."[130] Human rights unsurprisingly took center stage in the Basic Law, "accentuating the primacy of human dignity and the state obligations that derive from it."[131] Article 1 of the German constitution (the "*Grundgesetz*") recognizes "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[132] But the drafters went further than merely codifying certain fundamental rights within the Basic Law. Article 79(3) creates an eternity clause (the "*Ewigkeitsklausel*") stating, "Amendments to this Basic Law affecting . . . the principles laid down in Articles 1 and 20 shall be inadmissible."[133] In

124. *Id*.

125. *See id.* at 440 ("[I]t is hardly deniable that [the Nazi Party's] seizure of power—which abolished the Weimar Republic—was facilitated by certain weaknesses in the Republic's constitutional system.").

126. *See The Weimar Constitution*, *supra* note 122 (noting that Article 48 of the *Weimarer Verfassung* "eventually allowed Hitler to 'legally' take control of Germany").

127. CARDOZO, *supra* note 70, at 2.

128. *See* Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477, 479 (2000) (noting that the Basic Law "categorically reject[ed] Weimar's principle of parliamentary supremacy in all things"). By this point, Germany had been defeated in World War II, and the occupying Allied forces had begun the process of denazification. PAUL R. BARTROP & EVE E. GRIMM, THE HOLOCAUST: THE ESSENTIAL REFERENCE GUIDE 52–54 (2022).

129. Kommers, *supra* note 128, at 477.

130. Preuss, *supra* note 108, at 439; *see also* Kommers, *supra* note 128, at 479–80 ("In short, the framers set out to correct the faults and close the loopholes believed to have contributed to Hitler's rise to power and Weimar's destruction in 1933.").

131. Kommers, *supra* note 128, at 478.

132. GRUNDGESETZ [GG] [Basic Law], art. 1, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0016 [https://perma.cc/5GJ5-ZPR2].

133. *Id*. at art. 79(3).

other words, the *Grundgesetz* cannot be amended in a way that would violate the *Ewigkeitsklausel* or the human rights principles that the eternity clause protects.[134] Notably, the human rights protected by the *Ewigkeitsklausel* are defined broadly; anything that constitutes "human dignity" is covered. This was an "intentional[]" decision by the framers, implemented "so that [the term's] concrete meaning could evolve on a case-by-case basis."[135] But what does this look like? And how does this differ, if at all, from substantive due process as employed by the U.S. Supreme Court?

Surprisingly, Germany has experienced "very little turmoil with regard to its eternity clause."[136] Over half of the *Grundgesetz* Bill of Rights (Articles 1–17) have remained untouched since 1949.[137] Other articles, in line with this Note's definition of stability, have been amended only insofar as they "*expanded* the guaranteed right affected."[138] The rare instances of controversy, however, are illuminating. In 1968, Article 10 of the *Grundgesetz* was amended to allow restrictions on the otherwise "inviolable" right to privacy when such restrictions "serve[] to protect the free democratic basic order or the existence or security of the Federation."[139] More specifically, the amendment allowed the government to wiretap a citizen's telecommunications without that person's knowledge or consent.[140] This amendment was challenged in court, with plaintiffs arguing that the "possibility of secret wiretapping" allowed by the text "infringe[d] the fundamental principles of human dignity and the rule of law"[141] made unamendable by the *Ewigkeitsklausel*. The court rejected the plaintiffs' claims, citing adherence to the "principle of proportiona[lity]" recognized under German common law.[142] This principle allows the restriction of freedoms of "paramount legal value" when that restriction is "indispensable

134. *See* Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 INT'L J. CONST. L. 680, 682 (2005) (noting that human dignity is recognized as "one of the eternally protected principles" within the *Grundgesetz*); *see also* Kommers, *supra* note 128, at 479 ("What differentiates these rights, values, and principles from previous German constitutions is their supremacy and permanence.").

135. Nohlen, *supra* note 134, at 682.

136. Friedman, *supra* note 103, at 86.

137. Kommers, *supra* note 128, at 487.

138. *Id.* at 488 (emphasis added).

139. *Id.*; GRUNDGESETZ [GG] [Basic Law] art. 10.

140. Kommers, *supra* note 128, at 488. The amendment also sought to remove judicial review of related controversies and instead grant the power of review to administrative agencies. *See* GRUNDGESETZ [GG] [Basic Law] art. 10 (allowing "restriction[s]" on the right to privacy that serve to "protect the free democratic basic order or the existence or security of the Federation").

141. Hein, *supra* note 100, at 98.

142. WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 659 (1977).

for the common good,"[143] mirroring the language of the 1968 amendment.[144] To be proportional, government action in Germany must serve a legitimate aim; promote the desired result; be *necessary* to achieve that aim; and be *reasonable* when considering the competing interests of those involved.[145] This also parallels the verbiage of the strict-scrutiny analysis used by the American Supreme Court in determining the reasonability of restrictions on rights identified and protected through substantive due process.[146] Three judges dissented, however, arguing that the amendment constituted an encroachment on at least two unamendable principles.[147] This judgment once again emphasizes that, in order for an eternity clause to carry any weight, it must be supported by a constitutional court willing to give it teeth. If a court merely disregards an eternity clause in its constitutional adjudication proceedings, or if it interprets the eternity clause in a way that nonetheless allows for its covered text to be legislatively altered, then that eternity clause is unlikely to be found to provide any sort of enduring protections at all.

So, then, can fundamental rights within the German constitution truly be considered "unamendable"? Scholars disagree. One stance, following the dissenting judges' lead, holds that the *Ewigkeitsklausel* acts only as a "general constraint on amendments," rather than a "de facto . . . unamendable provision."[148] Others posit that such changes do not "erode the *essential* nature of the constitution as a charter of limited government and individual rights," satisfied that the court's rulings adequately "curtail[ed] abuses" that might have otherwise arisen in their wake.[149] Regardless, the German *Ewigkeitsklausel* deserves consideration, at the very least, in considering constitutional unamendability as a mechanism of promoting constitutional stability.

143. Bernd Waas, Professor, Goethe Universität, The Principle of Proportionality in German Labour Law, Address Before the Labour Law Research Network Barcelona Conference at 7 (June 14, 2013) (presentation available at https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Waas-SLIDES.pdf/3518489f-a5ea-4d1d-958d-cbc02ee802a4) [https://perma.cc/8KCJ-75FT] (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 1961, 1 [BvL] 44/55 (Ger.)).

144. GRUNDGESETZ [GG] [Basic Law] art. 10 (allowing certain restrictions that "serve[] to protect the free democratic basic order or the existence or security of the Federation").

145. Waas, *supra* note 143, at 8.

146. To survive strict scrutiny, the government action must further a "compelling governmental interest," and the action must have been "narrowly tailored" to achieve the compelling interest involved. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/4ZQ4-8663] (internal quotations omitted).

147. MURPHY & TANENHAUS, *supra* note 142.

148. Hein, *supra* note 100, at 98 n.94.

149. Kommers, *supra* note 128, at 489.

C. India and Interpretive Unamendability

An alternative flavor of unamendability exists even in some countries that otherwise lack "codification of unamendability in the text of the constitution."[150] Unlike the *Grundgesetz*, which expressly enumerates certain rights as inviolable (and thus unamendable), countries using this secondary type of constitutional entrenchment—termed "interpretive unamendability"[151]—empower their constitutional courts to disallow certain amendments that violate that nation's constitutional norms, despite the amendment otherwise satisfying the "various procedural requirements in the constitutional text."[152] Put differently, a constitutional court applying interpretive unamendability holds that certain parts of its home country's constitution are otherwise unamendable, even if there is no explicit eternity clause within the constitutional text. This manifestation relies on the judiciary's authority to interpret and apply constitutional provisions in a way that ensures fundamental principles remain protected, particularly when faced with cases that evaluate whether legislative or executive actions align with the core values enshrined in the constitution. One particularly helpful justification for this judicial empowerment is as follows:

> [T]here is an underlying assumption that all democratic constitutions, insofar as they were not meant to be suicide pacts, should be seen as empowering their guardians—taken to be constitutional courts—with the power to strike down constitutional amendments on substantive grounds. Indeed, this is the same thinking at the root of constitutional courts interpreting formal eternity clauses as presupposing the power to enforce them in practice, even where the constitution is silent on the matter of substantive amendment review . . . .[153]

In this way, the role of judicial interpretation in maintaining interpretive unamendability impacts the broader evolution of constitutional law. By preserving core principles through judicial review, courts employing interpretive unamendability contribute to the stability and continuity of constitutional protections—and their constitution's foundational identity—while encouraging an ongoing dialogue between the judiciary, the legislature, and the general public in addressing and adapting to evolving societal values.

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150. Richard Albert, *The Constructive Unamendability of the U.S. Constitution*, N.Y.U. J. LEGIS. & PUB. POL'Y (Apr. 15, 2023), https://nyujlpp.org/quorum/albert-constructive-unamendability-constitution/ [https://perma.cc/4AKV-WH5A].

151. *See id.* ("The key distinction between codified and interpretive unamendability resides in the text of the constitution.").

152. Richard Albert, *Nonconstitutional Amendments*, 22 CANADIAN J. L. & JURIS. 5, 26 (2009).

153. SUTEU, *supra* note 99, at 126.

To be sure, this doctrine has also been criticized as "the product of an authoritative interpretation by legal or political elites,"[154] but a countervailing view holds that interpretive unamendability is "unavoidable and analogous to the judicial self-empowerment seen in other jurisdictions with strong versions of judicial review, whereby courts interpret themselves as the final authority on legislation amending the constitution."[155] The latter view, of course, implicates the American doctrine of judicial review as first established by the Supreme Court in *Marbury v. Madison*.[156] Thus, the fact that interpretive unamendability draws potential comparisons with American constitutional jurisprudence—and the doctrine's increasing prevalence around the world—warrants further discussion in the remaining analysis.

Perhaps the "most famous instance of such a judicially created doctrine" is that of India's basic structure doctrine, which permanently entrenches certain constitutional rights "in the absence of . . . formal unamendability in the [Indian] constitution."[157] The drafters of the current Indian Constitution, which came into force in 1950, were tasked with the challenge of creating a document that would "fit but also unify a diverse society rife with religious, social, ethnic, linguistic, and regional tensions."[158] That is, the constitutional framers had to balance two related—but still competing—interests: the pursuit of "nation-building and the cultivation of a common identity and loyalty" and the prioritization of "minority protection at a time of lawlessness and violence."[159] In the end, India's drafters opted to implement the "ambiguous formulation of constitutional provisions" in order to "accommodate diversity and allow room for the uncertainties at the time of the founding . . . ."[160]

In the 1970s, the Indian Supreme Court further clarified the constitutional contours of the nation's amendment culture—seemingly fueled by the ambiguity built into the constitution itself—by deciding *Kesavananda v. State of Kerala*.[161] In *Kesavananda*, the court held that although the power to amend the Indian Constitution "cannot be narrowly construed," it is "not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features."[162] Thus, the

154. Albert, *supra* note 150.

155. SUTEU, *supra* note 99, at 129.

156. *See* 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who play the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

157. SUTEU, *supra* note 99, at 125–26.

158. *Id.* at 131.

159. *Id.*

160. *Id.*

161. Kesavananda v. State of Kerala, [1973] Supp. S.C.R. 1 (India).

162. *Id.* at 13.

Indian basic structure doctrine was born, as the Supreme Court created a level of entrenchment not otherwise seen within the text of the constitution itself. The foundational rationale of this proclamation is that, because "an amendment . . . cannot destroy the constitution," amendments which alter "its basic elements [are] prohibited just as eliminating the constitution is prohibited."[163] Now, the doctrine creates a presumption that "a constitution is more than a mere bundle of provisions," instead acting as "an architectural framework with a particular identity."[164] The court's use of interpretive unamendability therefore "capture[s] the distinction between legitimate and illegitimate constitutional change" while still "rely[ing] on textual anchors."[165] Importantly, what qualifies as part of the "basic structure" of the Indian Constitution "is to be identified by the court in the course of litigation on whether a given amendment is unconstitutional,"[166] and the Indian Supreme Court "has repeatedly declined invitations to provide an exhaustive list of elements it deems part" of such structure.[167]

Yet even with this permanent entrenchment within the Indian Constitution, the document has "proven easy to amend," with the country adopting 104 constitutional amendments between 1950 and 2020.[168] In other words, in applying the basic structure doctrine, the Indian Supreme Court must strike a "delicate balance . . . for such a doctrine to be democratically legitimate"[169]; striking down *every* proposed amendment as violative of the nation's basic structure would emphasize the country's chosen method of unamendability but jeopardize the court's judicial legitimacy in the process. So once again, stability within this form of constitutional unamendability is still reliant on a panel of judges to define, interpret, and enforce.

D. Unamendability in the American Constitutional Scheme

American constitutional law is no stranger to unamendability. For example, Article V of the U.S. Constitution originally disallowed certain amendments "prior to the year" of 1808.[170] This unamendability imposed additional "limitations on Congress's power to prohibit or restrict the importation of slaves," and on "Congress's power to enact an unapportioned

163. *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 137, 143 (2017) (discussing the self-preservation mechanisms of constitutional structure).

164. SUTEU, *supra* note 99, at 128.

165. *Id.*

166. Albert, *supra* note 150.

167. SUTEU, *supra* note 99, at 129.

168. *Id.* at 133.

169. *Id.* at 136.

170. U.S. CONST. art. V.

direct tax."[171] Although this unamendability was subject to an express time limitation, it demonstrates that even the Founders were comfortable with the idea of unalterable entrenchment within the American constitutional scheme. After all, "[t]emporary unamendability is one variation in the larger category of codified unamendability."[172] Permanent entrenchment has also been employed at the state level across the United States as well. Of the "state constitutions in force at the time of the Philadelphia Convention," as many as "eight of them codified rules suggesting unamendability," including Delaware's religious non-establishment rules and Georgia's protections of a free press.[173] At the time, none of these uses of constitutional entrenchment—at either the federal or state level—garnered much controversy. But would an eternity clause protecting fundamental human rights garner the same support, and would it function any differently than the Supreme Court's approach to substantive due process? All three countries discussed in this Part—the United States, Germany, and India—rely on judicial interpretation for the protection of fundamental human rights. But at least in Germany's case, two distinctions can be drawn that set it apart from American substantive due process: predictability and applicability.

First, the *Grundgesetz* establishes a clear hierarchy of rights by elevating certain liberties to a higher plane and making them unamendable.[174] No such distinction exists in American jurisprudence. When the rights of two persons clash, the American court has been relatively free to decide which of the two takes priority, which inevitably depends on the views of the Justices sitting on the Court at that time. For example, the Court in *Roe* placed the privacy interests of a pregnant person above any state interest, at least during the early parts of the pregnancy.[175] By contrast, the *Dobbs* Court decided that individual states' rights took priority over the liberties of pregnant persons within the push-and-pull of the issue's "competing interests."[176] India presents a similar issue, as the judicial construction of the constitution's unamendability (as opposed to an explicit textual eternity clause) once again leaves judges to determine which rights are more or less important than

171. *ArtV.5 Unamendable Subjects*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artV-5/ALDE_00013059 [https://perma.cc/7FRX-38HY].

172. Richard Albert, *America's Amoral Constitution*, 70 AM. U. L. REV. 773, 788 (2021); *see also id.* at 789 ("We can be certain that the Framers were well aware of codified unamendability as a constitutional design.").

173. *Id.* at 789.

174. *See supra* subpart II(B).

175. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (balancing the "privacy right" of a pregnant person against the states' "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life").

176. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257, 2259 (2022) ("Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing . . . .").

others. But the *Ewigkeitsklausel* solves this problem in Germany, establishing a clear hierarchical structure within the human rights context. After all, certain rights "are harder to violate than others" once actually codified in constitutional text.[177]

Second, the *Ewigkeitsklausel* ensures that the entire German *Grundgesetz* is read through the "lens" of human dignity.[178] That is, the entire constitutional scheme—covering not only human rights but also governmental structure or political processes, for example—is influenced by the general respect for human dignity and respect nationwide. By contrast, the Fifth and Fourteenth Amendments act only to constrain federal or state actors; private actors are generally left untouched and are thus free to operate as they choose. The far reach of the *Ewigkeitsklausel*, driven by a commitment to human dignity, stands in contrast to the more limited scope of its American counterparts.

Thus, while the American constitutional approach to substantive due process is unpredictable and often underscored by political influence, Germany's use of an eternity clause in the *Grundgesetz* offers a more structured and stable alternative. The *Ewigkeitsklausel* establishes a clear hierarchy of rights and extends its influence beyond the actions of state and federal actors while remaining guided by an underlying commitment to human dignity. While acknowledging that no model is perfect,[179] the German framework provides a more consistent and reliable foundation. As discussions on constitutional reform continue, these distinctions highlight the potential benefits of a more structured—or even unamendable—approach to protecting fundamental human rights moving forward.

III. Alternative Two: Constitutional Incorporation

A second alternative to substantive due process is the incorporation of the Universal Declaration of Human Rights[180] into the American constitution. This Part first discusses the scope of the UDHR, including its formation and

177. ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 7, 27 (2020) (arguing that some rights, once codified, become "self-enforcing" by implicating groups that have a vested interest in their protection).

178. *See* Witkowski & Serowaniec, *supra* note 105, at 174–75 (arguing that ideals "of particular importance or significance to the state's system of governance" guide the "hierarchical ordering of constitutional norms").

179. Constitutional unamendability has also been criticized for its impact on democracy, as permanent entrenchment necessarily requires taking away citizens' power to vote. However, because eternity clauses are not said to be de facto unconstitutional, this argument does not merit outright disregard of unamendability as a theoretical constitutional device within the American scheme. *See supra* notes 109–111 and accompanying text.

180. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. As used throughout this Note, the phrases "Universal Declaration of Human Rights," "UDHR," and "Declaration" all refer to the same document.

a brief overview of the rights covered. It then proceeds to analyze how the Declaration can be incorporated into a nation's constitutional scheme, using Spain as a case illustration. After a brief discussion of "American exceptionalism" and its impact on the United States' involvement in international human rights law, this Note looks at how the Declaration would function if actually ratified and implemented within American constitutional jurisprudence.

A. All About the Declaration

As with many developments in human rights jurisprudence, the creation of the Declaration can be traced back to the atrocities promulgated by the Nazi Regime during World War II. In 1946, the Commission on Human Rights was created within the newly founded United Nations with the goal of drafting an "international bill of [human] rights."[181] The Commission brought together representatives from France, Lebanon, China, Canada, and the United States—chosen for their "various political, cultural and religious backgrounds"—to draft the Declaration.[182] But it was Eleanor Roosevelt, widow of the thirty-second American president, who is largely credited with the creation of the influential document. "[R]ecognized as the driving force for the Declaration's adoption," Roosevelt served as the chair of the committee.[183]

In its infancy, the Declaration was built upon one key premise: "the idea that there are a few common standards of decency that can and should be accepted by people of all nations and cultures."[184] In 1948, the General Assembly adopted the UDHR without a single dissenting vote.[185] As noted by Hernán Santa Cruz, a Chilean representative on the drafting sub-committee, on the adoption of the Declaration:

> I perceived clearly that I was participating in a truly significant historic event in which a consensus had been reached as to the supreme value of the human person, a value that did not originate in the decision of a worldly power, but rather in the fact of existing—which gave rise to the inalienable right to live free from want and oppression and to fully develop one's personality. In the Great Hall . . . there was an atmosphere of genuine solidarity and brotherhood

181. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 4 (1999).

182. *History of the Declaration*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/history-of-the-declaration [https://perma.cc/TE6P-J3UJ].

183. *Id.*

184. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT'L HUM. RTS., no. 2, 2004, at 2.

185. Eight countries abstained from voting, however. *History of the Declaration*, *supra* note 182.

> among men and women from all latitudes, the like of which I have not seen again in any international setting.[186]

These feelings were apparently *so* widely felt that, in the time since its initial publication, the UDHR has become "the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today."[187] The Declaration identifies four groups of human rights, all of which have been deemed "fundamental."[188] Some articles were included with more or less controversy than others,[189] but the fact remains that all are now explicitly enumerated by the United Nations as being deserving of protection on an international level.

But the Declaration does not itself create legally binding obligations for any member states of the United Nations. Instead, the UDHR stands as a "common standard" for which each country should "strive" while "keeping [the] Declaration constantly in mind."[190] This has understandably drawn great criticism, with critics cognizant of the fact that "long lists of rights are empty words in the absence of a legal and political order in which rights can be realized."[191] Thus, even at its initial promulgation, the Declaration was subject to two different sects of thinking among international scholars: those that "regarded it as a milestone in the history of freedom" and those that viewed the Declaration as "a collection of pious phrases—meaningless without courts, policemen and armies to back them up."[192] It has been suggested that this concern was ignored by those on the drafting committee because some members were simply "more hopeful and more prescient" based on the experiences of their home countries—such as Eleanor Roosevelt, who held high admiration of the American Declaration of Independence, another "non-binding" document.[193] And to be sure, these "non-binding principles" were "carried far and wide by activists."[194] But the fact remains that the ideals of the Declaration's authors in the 1950s may not fully align with the priorities of modern world leaders.

Today, countries often look to the UDHR for guidance but ultimately decide to protect only certain rights in a "pick-and-choose cafeteria-style"

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186. *Id.*

187. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998).

188. UDHR, *supra* note 180, at pmbl.

189. *See* Glendon, *supra* note 184, at 7 (discussing the "controversy over [certain rights'] details and the manner of their implementation").

190. UDHR, *supra* note 180, at pmbl.

191. Glendon, *supra* note 184, at 2.

192. *Id.* at 11.

193. *See id.* (discussing the use of the Declaration of Independence "to counter the idea that a non-binding declaration would have little influence").

194. *Id.* at 12.

manner.[195] Much of this inconsistency is rooted in the member nations' views on the rights actually enumerated in the Declaration. Some countries, based on their own constitutional schemes, "openly maintain that all rights are relative"; a second group of foreign entities "assert the priority of economic interests over human rights"; others "charge that universality is a cover for Western imperialism."[196] The United States, for example, has adopted constitutional security for some—but not all—rights enumerated in the UDHR.[197] So despite the common language shared by members of the United Nations, the rights protected by each nation vary on a case-by-case basis.

The issue, though, is that the Declaration is "meant to be read . . . as a whole," with each principle "related to one another and to certain over-arching ideas."[198] This stands in harsh contrast to the American Bill of Rights, which is widely read "as a string of essentially separate guarantees,"[199] and instead mirrors the *basic structure* guiding judicial interpretation in India and that of human dignity underlying the whole of the German *Grundgesetz*.[200] Thus, when a country applying the UDHR "isolat[es] each part from its place in an overall design," they "promote[] misunderstanding and facilitate[] misuse" of the document.[201] The potential for such misuse must be considered in determining whether incorporation of the UDHR would contribute to constitutional stability or further destabilize a nation's human rights jurisprudence.

B. Spanish Incorporation

Section 10 of the Spanish constitution again deems the "human dignity" as entailing "inviolable," "inherent rights."[202] This emphasis on human dignity was incorporated into the country's constitutional fabric after the fall of Francoist dictatorship in the 1970s.[203] But the text then goes a step further,

195. *See* Glendon, *supra* note 187, at 1153–54 ("The sections devoted to traditional political and civil liberties are frequently, but unevenly, invoked.").

196. *See id.* at 1154 (contrasting different applications of the UDHR despite the fact that "virtually all U.N. members are committed in principle to the proposition that the Declaration's rights are universal").

197. *See infra* subpart III(C).

198. Glendon, *supra* note 187, at 1163.

199. *Id.*

200. *See supra* subparts II(C)–(D).

201. Glendon, *supra* note 187, at 1174.

202. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, art. 10(1), Dec. 29, 1978 (Spain) [hereinafter C.E., B.O.E.].

203. *See* Alberto Oehling, *Human Dignity in Spain*, *in* HANDBOOK OF HUMAN DIGNITY IN EUROPE 851, 864 (Paolo Becchi & Klaus Mathis eds., 2021) (noting that the Spanish Constitution of 1978 requires that "the legal system should be performed . . . in accordance with the principle of [human] dignity"); *see also* Omar G. Encarnacion, *Reconciliation After Democratization: Coping with the Past in Spain*, 123 POLI. SCI. Q. 435, 437 (2008) ("[T]he Spaniards undertook to democratize in 1975, in the wake of Franco's death of natural causes . . . .").

instructing that all provisions "relating to the fundamental rights and liberties recognised by the Constitution" must be "interpreted in conformity with the Universal Declaration of Human Rights."[204] The same interpretive guidance applies to all "international treaties and agreements" that Spain has ratified.[205] Spain's willingness to incorporate the Declaration into its constitution is particularly interesting. The Spanish government didn't join the United Nations until 1955,[206] nearly a decade after the Declaration itself had already been approved. Thus, the Spanish government had enough confidence in the principles embodied by the Declaration that it was willing to adopt a document that the nation itself played no part in drafting. Whether this public act actually impacted human rights in Spain for the better, however, is a different inquiry.

As the constitutional text makes explicitly clear, Spanish courts are required to follow the guidance of the Declaration only when reviewing controversies involving "fundamental rights and liberties *recognised by the Constitution*."[207] Thus, if a right is within the scope of the UDHR but is not recognized by the Spanish Constitution, the Declaration carries little—if any—weight in the judicial process. For example, the Declaration makes clear that access to "medical care and necessary social services" is a right to which "*everyone*" is entitled, without qualification.[208] The Spanish Constitution uses similar language, holding that the "right to health protection is recognised,"[209] which would seem to indicate that Spanish courts were bound by the Declaration in adjudicating claims regarding one's access to health treatment. But the Spanish government disagreed, adopting a change in 2012 that excluded undocumented migrants from access to free healthcare.[210] In focusing on the "legality of residence in the country,"[211] the government seemed to suggest that Article 43 of its constitution created a right only for citizens of Spain, apparently distinguishing it from the Declaration's discussion of the same right, which applies to everyone. The government's implication that undocumented migrants are not entitled to

204. C.E., B.O.E. art. 10(2), Dec. 29, 1978 (Spain).

205. *Id.*

206. *Spain and the United Nations*, MINISTERIO DE ASUNTOS EXTERIORES, UNIÓN EUROPEA Y COOPERACIÓN, https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/EspanaNacionesUnidas.aspx [https://perma.cc/2TA4-LNUV].

207. C.E., B.O.E. art. 10(2), Dec. 29, 1978 (Spain) (emphasis added).

208. UDHR, *supra* note 180, at art. 25 (emphasis added).

209. C.E., B.O.E. art. 43(1), Dec. 29, 1978 (Spain).

210. *See* Off. of the U.N. High Comm'r for Hum. Rts., UN Rights Expert Calls on Spain for "a Meaningful Commitment to Protecting the Human Rights of All," UNITED NATIONS (Apr. 29, 2014), https://www.ohchr.org/en/press-releases/2014/04/un-rights-expert-calls-spain-meaningful-commitment-protecting-human-rights [https://perma.cc/Q8ZK-BA5J] (discussing concerns that Spain has failed to "keep[] with the country's human rights obligations" by excluding undocumented migrants from access to free healthcare).

211. *Id.* (statement of Magdalena Sepúlveda, United Nations Special Rapporteur).

equal access to healthcare has since been lambasted, with some claiming that the government failed in "fulfilling its international human rights obligations."[212]

The incorporation of the Declaration has not been wholly ineffective, however, and at times has actually benefited the advancement of human rights around the world. Take, for example, Resolution 64/292 of the United Nations General Assembly.[213] In adopting this resolution, the United Nations officially recognized "the right to safe and clean drinking water and sanitation" as a fundamental right that is "essential for the full enjoyment of life and all human rights."[214] Spain is largely credited with this advancement, having jointly presented the Resolution—alongside Germany—to the Third Commission of the General Assembly of the United Nations.[215] Since then, member states of the United Nations have been "oblige[d] . . . to work towards achieving universal access to water and sanitation for all, without any discrimination."[216] Spain has also indicated support for another "generation of rights," such as "digital rights," to be recognized within the Declaration; these rights would involve both "access to the internet" and "the defence that all human rights that exist offline should also be protected online."[217] And even beyond the scope of the UDHR itself, the country's decision to make other international human rights treaties *binding* has similarly allowed the advancement of certain rights within Spanish borders.[218]

Thus, the incorporation of the Declaration into the Spanish Constitution is properly subject to both criticism and praise. On one hand, the text of the Constitution allows the Spanish government to engage in the aforementioned

212. *Id.*

213. G.A. Res. 64/292 (July 28, 2010).

214. *Id.* ¶ 1.

215. *General Assembly of the United Nations Resolution on Human Rights to Drinking Water and Sanitation*, LA MONCLOA (Nov. 25, 2015), https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2015/20151125-humanrights.aspx [https://perma.cc/X9Q4-8VYU].

216. Off. of the U.N. High Comm'r for Hum. Rts., About Water and Sanitation, UNITED NATIONS, https://www.ohchr.org/en/water-and-sanitation/about-water-and-sanitation [https://perma.cc/4HE6-VQ7V].

217. *International Human Rights Day: The Spanish Presidency Underlines Its Commitment to the Declaration on Its 75th Anniversary*, SPANISH PRESIDENCY COUNCIL EUR. UNION (Dec. 10, 2023), https://web.archive.org/web/20240627212054/https://spanish-presidency.consilium.europa.eu/en/news/international-human-rights-day-spanish-presidency-underlines-commitment-declaration-75-anniversary/ [https://perma.cc/KF3J-DAQ9].

218. *See, e.g.*, Off. of the High Comm'r for Hum. Rts., Spain Sets Milestone in International Human Rights Law, Say UN Women's Rights Experts, UNITED NATIONS (Nov. 8, 2018), https://www.ohchr.org/en/press-releases/2018/11/spain-sets-milestone-international-human-rights-law-say-un-womens-rights [https://perma.cc/82F9-PRZW] (detailing a decision of Spain's Supreme Court applying international law to affirm the rights of Spanish citizens and recognizing it as binding).

"pick-and-choose" method of protecting fundamental liberties,[219] resulting in the failure to protect certain Declaration-recognized rights. On the other hand, Spain's commitment to the advancement of human rights on an international level has undoubtedly led to the expansion and protection of such rights in countries that might not have otherwise taken the initiative to do so on their own.

C. American Exceptionalism

Perhaps the biggest obstacle to implementing this constitutional device—the explicit incorporation of international norms—within the U.S. Constitution is the concept of American exceptionalism.[220] This train of thought posits that, because America is a "unique and even morally superior country for historical, ideological, or religious reasons," the nation is "obligated to play a special role in global politics."[221] Or, put differently, figures in the American government may feel that they can *contribute to* other nations' constitutional jurisprudence without also *learning from* those foreign countries in return. For example, the drafting subcommittee of the Declaration, including Mrs. Roosevelt, "appointed itself" to captain the document's creation.[222] It was not until "several delegates protested that the group was insufficiently representative" that the drafting subcommittee was expanded from three to eight members.[223]

And the exceptionalism does not end there. From the Declaration spawned nine "core" international human rights treaties, each addressing specific concerns in the human rights sphere, such as racial discrimination, torture, disability rights, or political involvement.[224] The United States voted in favor of seven of the nine treaties, yet chose to ratify only three of them.[225] Put differently, there are at least four spheres of international human rights that the United States believes should be protected, without question, in

219. *See supra* notes 207–212 and accompanying text.

220. *See* Rahdert, *supra* note 91, at 589 ("Contemporary negative reactions to the use of comparative constitutional precedent tap into a longstanding tradition of exceptionalism and particularism in American attitudes toward foreign law.").

221. Adam Volle, *American Exceptionalism*, BRITANNICA ONLINE ENCYC., https://www.britannica.com/topic/American-exceptionalism [https://perma.cc/UG7L-ANKH].

222. Glendon, *supra* note 187, at 1158.

223. *Id.*

224. U.N. Off. of the High Comm'r, *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS, https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies [https://perma.cc/E25K-CJVB].

225. *Id*; *see also Ratification of International Human Rights Treaties – USA*, U. MINN. HUM. RTS. LIB., http://hrlibrary.umn.edu/research/ratification-USA.html [https://perma.cc/F3TT-63RF] (documenting which international treaties have been signed, ratified, or outright ignored by the United States).

foreign countries, but not necessarily within American borders.[226] For example, the United States is one of only seven United Nations member states to have not ratified the "Convention on the Elimination of all Forms of Discrimination Against Women" (CEDAW),[227] and one of only two that did not ratify the "Convention on the Rights of the Child" (CRC).[228] This has earned the United States "one of the worst records of any country in ratifying human rights . . . treaties."[229] In addition to "undermin[ing] the credibility of those treaties," this type of American exceptionalism "raise[s] concerns about the United States' own commitments to matters such as human rights."[230] Such concerns understandably increase the risk that the United States will "lose other countries' trust" or, worse yet for the development of international human rights, "implicitly giv[e] permission to other countries to free ride and follow the rule of law established by treaties only when it is in their best interest."[231]

But it is this Note's position that American exceptionalism need not persist in the modern day. For example, the "physical separation" of American territories from those of foreign powers at and immediately following the nation's founding no longer inhibit American involvement in global affairs.[232] Instead, several distinct factors have caused the constitutional isolation of American jurisprudence to "slowly break[] down."[233] American involvement in international governing bodies such as the World Trade Organization and the United States-Mexico-Canada Agreement (USMCA) necessarily "creates a pressure for conscious complementarity of decisionmaking between American and foreign tribunals."[234] After all, "divergent interpretation"—which is inherent in the theory of American exceptionalism—has the potential to "trigger various forms of international conflict."[235] In fact, the language of the Declaration supports this conclusion. The UDHR calls for "*universal* respect for and

226. *See* Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOB. JUST. CTR. (June 22, 2017), https://www.globaljusticecenter.net/u-s-aversion-to-international-human-rights-treaties/ [https://perma.cc/DEW7-L2DU] (arguing that the United States "regularly favors domestic political concerns over the international human rights community").

227. Iran, Nauru, Palau, Somalia, Sudan, and Tonga are the other six. *Id.*

228. The only other United Nations member state to not ratify the CRC is Somalia. *Id.*

229. Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL FOREIGN RELS. (Jan. 7, 2022, 5:08 PM), https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball [https://perma.cc/BDM8-GY3X].

230. *Id.*

231. *Id.*

232. *See* Rahdert, *supra* note 91, at 590 ("Recent technological advances have erased much of that sense of physical separation.").

233. *Id.* at 602.

234. *Id.* at 602–03.

235. *See id.* at 604 ("Given the prospect for such international consequences, it would behoove American courts to attend carefully to potential interpretive divergences from foreign tribunals.").

observance of human rights and fundamental freedoms."[236] In its most literal interpretation, this language "repudiates the long-standing view that the relation between a sovereign state and its own citizens is that nation's own business."[237] If this is the case, respect for fundamental human rights at an international level is incompatible with American exceptionalism; the Declaration is, in theory, most powerful when nations' constitutional norms converge with one another, rather than diversify.

D. International Incorporation in the American Constitutional Scheme

With the necessary background and comparative framework established, this Part has just two questions left to answer: Would such a constitutional device even be possible in the United States? And, if implemented, would it contribute to constitutional stability when dealing with human rights? This subpart addresses both questions in turn.

The answer to the first is a resounding *yes*. As with an eternity clause, such as the *Ewigkeitsklausel* within the German *Grundgesetz*, incorporating the Declaration into the American constitutional text could be accomplished by mere constitutional amendment. Whether such an amendment would ever actually succeed in garnering the necessary approval in both the Senate and the House of Representatives is, of course, another debate.[238] But this Note assumes, *arguendo*, that the American constitution is still feasibly amendable.

The second question, however, is trickier to conclusively answer. As demonstrated by the Spanish Constitution, incorporation of the Declaration can be limited by constitutional text in a way that excludes certain rights from the scope of American adherence to the UDHR. Though this still contributes to the American "pick-and-choose" approach to protecting human rights at the international level,[239] it at least puts the decision-making powers in the hands of the duly elected legislature. As discussed above, the legislature is the branch of government most responsive to the general American population.[240] Unlike the judiciary, which must operate within the confines of established legal precedents, the legislative branch has the capacity to respond dynamically to emerging human rights concerns through new legislation. By prompting the legislature to incorporate and enforce UDHR principles, the process of human rights protection becomes more transparent

236. UDHR, *supra* note 180, at pmbl. (emphasis added).

237. Glendon, *supra* note 187, at 1163.

238. For more information surrounding the politicization (and subsequent gridlock) of American amendments, see Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution [https://perma.cc/3Q85-VZP3].

239. *See supra* notes 207–212 and accompanying text.

240. *See supra* notes 36–37 and accompanying text.

and subject to public scrutiny, leading to more democratic and participatory governance. Assuming these electorates are subject to accountability within the political representation process, taking the decision out of the hands of the Supreme Court Justices would promote stability by mitigating the risks of judicial activism, one of the most compelling criticisms of the modern substantive due process doctrine. The Spanish experience also suggests that incorporating the Declaration into a nation's constitutional identity allows that nation to play a crucial role in advancing global human rights.[241] And lastly, the incorporation would provide a clear framework for Justices to use in assessing human rights, ensuring that the U.S. Constitution aligns with (and contributes to the convergence of) international standards. This success, of course, would depend on overcoming historical trends of American exceptionalism, but in light of the potential benefits thereof, a careful evaluation of the role of international norms may prove valuable in the pursuit of constitutional stability and human rights in the United States.

IV. Alternative Three: Constitutional Interpretation

This Note's third international alternative for protecting substantive rights differs from the first two in that, instead of operating by way of constitutional amendment, it is achievable by a mere shift in the judiciary's chosen method of constitutional interpretation. As applied by the Supreme Court of Canada, the living tree doctrine governs how constitutional text should be interpreted in adjudicating questions of fundamental human rights and other areas of law. This Part begins with a brief discussion of the Canadian living tree doctrine, including the doctrine's alleged criticisms and advantages. This Part then turns to the doctrine of living constitutionalism within the United States, comparing the two and highlighting their doctrinal similarities and differences. Discussion of Canadian law then concludes with an analysis of how the living tree doctrine could or would function within the American system of jurisprudence.

A. The Canadian Living Tree Doctrine

Nearly a century ago, Canadian courts set out to answer a question that would fundamentally shape the nation's jurisprudence thereafter: How should constitutional texts in Canada be interpreted? Before that point, women were ineligible to sit in the Senate of Canada.[242] With the force of female lobbyists nationwide, the exclusion of women from the Canadian legislature was challenged in court, with the case[243] ultimately reaching the

241. *See supra* notes 213–218 and accompanying text.

242. *Living Tree Doctrine*, CTR. CONST. STUD. (July 4, 2019), https://www.constitutionalstudies.ca/2019/07/living-tree-doctrine/ [https://perma.cc/CGP3-7NA5].

243. Edwards v. Att'y Gen. for Canada [1930] AC 124, 124 (appeal taken from Can.).

Judicial Committee of the Privy Council.[244] The main issue in *Edwards* was the use of the word "persons," as outlined in Section 24 of the British North America Act of 1867, in determining eligibility to sit in the Senate.[245] Obviously, a strictly textual reading would suggest that the word "persons" includes women. Yet when *Edwards* was being decided, the term "persons" had always referred exclusively to men.[246] Ultimately, the Judicial Committee held that women—thanks in large part to the social progress achieved outside the courtroom—should be included within the meaning of the term "persons" moving forward.[247] Thus, at the direction of the judiciary, women were allowed to sit in the Senate for the first time.[248] Said the court: "The *British North America Act* planted in Canada a *living tree* capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. 'Like all written constitutions it has been subject to development through usage and convention.'"[249] And so, the living tree doctrine in Canada was born, directing judges to interpret the nation's constitution in a way that is both broad and progressive, allowing the "tree" that is Canadian constitutional jurisprudence to continue growing outward and upward alongside society itself. Supporting this method of constitutional interpretation is that any alternative would result in a document that might "be frozen in time and become more obsolete than useful."[250] This "broad and versatile approach to constitutional principles"[251] allows the Canadian Constitution to "change and evolve over time while still acknowledging its original intentions."[252]

The doctrine was further expounded upon in 2004, when the Supreme Court decided *Reference Re Same-Sex Marriage*.[253] Central to this controversy was the question of whether the Canadian Constitution

244. At this time, decisions by the Supreme Court of Canada were still subject to review under the British Crown. Tabitha Marshall, *Persons Case*, BRITANNICA, https://www.britannica.com/event/Persons-Case [https://perma.cc/3QGN-LUKM]. The Committee served as the court of last resort for all territories and countries within the British Empire, other than the United Kingdom itself. D.M.L. Farr & Andrew McIntosh, *Judicial Committee of the Privy Council*, CANADIAN ENCYC. (May 1, 2020), https://www.thecanadianencyclopedia.ca/en/article/judicial-committee-of-the-privy-council [https://perma.cc/5NWK-YL6L].

245. *Edwards*, [1930] AC 124 at 124–25 (citing British North America Act, 1867, 30 & 31 Vict., c 3 (U.K.)).

246. *Id.* at 127.

247. *Id.* at 129.

248. *Id.* at 143.

249. *Id.* at 136 (emphasis added) (quoting ROBERT LAIRD BORDEN, CANADIAN CONSTITUTIONAL STUDIES 55 (1921)).

250. *Living Tree Doctrine*, *supra* note 242.

251. Emma C. Howes, *Living Tree Doctrines of the Canadian Constitution and Indigenous Law*, 31 DALHOUSIE J. LEGAL STUD. 31, 50 (2022).

252. *Living Tree Doctrine*, *supra* note 242.

253. [2004] 3 S.C.R. 698, 710 (Can.).

guaranteed the right to same-sex marriage.[254] Interveners to the case argued that because same-sex marriage had not been recognized at any point prior in Canadian history, the term "marriage" had a fixed definition that applied only to marriage between a man and a woman.[255] The court disagreed, concluding that, even if the term "marriage" had applied exclusively to heterosexual couples in the past, the living tree doctrine dictates that such analysis adapt to comport with contemporary times.[256] The court took special issue with the idea of a constitution being governed by "frozen concepts," writing:

> The 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.[257]

Regarding the question of whether the living tree doctrine can encourage constitutional stability, the decision in *Reference Re Same-Sex Marriage* seemingly indicates an answer to the affirmative. In its quest for both predictability and flexibility,[258] the court promoted *predictability* by protecting a fundamental right—marriage—as intended by the founders and promoted *flexibility* in allowing the constitutional scope of the liberties involved to expand. By accepting that a constitution "has a dynamic meaning,"[259] the Canadian scheme of constitutional adjudication certainly allows for the expansion of fundamental human rights without an explicit amendment to the nation's constitutional text.

B. Doctrinal Criticisms and Advantages

Like the other alternatives proposed by this Note, the living tree doctrine is itself the subject of disagreement within its application. The court "began with a fairly shared vision" of the doctrine's borders, deciding thirteen of its fifteen constitutional cases after *Edwards* unanimously.[260] But of the thirty-two disputes that followed, dissents were written for sixteen.[261] If the doctrine is interpreted literally as a true metaphor for a living tree, such a tree would

254. *Id.* at 705–06.

255. *Id.* at 709.

256. *See id.* at 710–11 (holding that a religion-focused definition of marriage is "no longer the case" in Canada).

257. *Id.* at 710.

258. *See Living Tree Doctrine*, *supra* note 242 ("The doctrine achieves a balance between two seemingly contradictory goals: predictability and flexibility.").

259. Leonardo Pierdominici, *The Canadian* Living Tree Doctrine *as a Comparative Model of Evolutionary Constitutional Interpretation*, 9 PERSPS. ON FEDERALISM, no. 3, 2017, at 85, 94.

260. Allan C. Hutchinson, *Living Tree?*, 3 CONST. F. 97, 98 (1992).

261. *Id.*

need to be cultivated or gardened to ensure its healthy growth. Yet "judges have disagreed strongly over the tools to be used and the horticultural philosophy to be embraced."[262] In other words, while there appears to be little controversy regarding the nation's constitutional scheme being capable of growth, varying stances exist on how that growth should actually be accomplished.

One camp of judges and scholars has adopted a "more hands-off approach," "content with letting democratic nature take its course."[263] Put differently, followers of this view allow only for the *natural* development of constitutional norms. By contrast, a second sect has fallen in line with a "more interventionist, hands-on style" in constitutional adjudication.[264] Judges subscribing to this stance have a definite view on "what [the Canadian Constitution] *should* look like,"[265] sometimes engaging in judicial activism comparable to that of American judges throughout their substantive due process analysis. And worse yet, the Supreme Court of Canada has provided no guidance on how this doctrine should be applied in practice, potentially destabilizing the nation's human rights jurisprudence.

Another criticism of the living tree doctrine is that it is ultimately judges who have control over the expansion of Canadian constitutional law, and those same judges are subject to external pressures beyond black-and-white law or even societal progress.[266] For example, some critics believe that large Canadian corporations are "[a]ble to influence and reinforce the judges' horticultural instincts,"[267] skewing the development of constitutional law in favor of corporate, rather than private, rights. Such influence is especially problematic within the development of human rights, as the "more privileged sectors of society"[268] are often the cause—rather than the victim—of the violation of constitutional rights.

But the living tree doctrine has also served to advance human rights on an international level, with Canada becoming "more and more a source of inspiration and a model in comparative terms."[269] For example, the Canadian Charter of Rights and Freedoms has served as the "leading influence" in the drafting of constitutional documents worldwide, including "the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* (emphasis added).

266. Grant Huscroft, *The Trouble with Living Tree Interpretation*, 25 UNI. QUEENSLAND L.J. 3, 4 (2006) ("Whether a particular judicial decision is considered aberrant or enlightened may depend on whose ox is gored.").

267. Hutchinson, *supra* note 260, at 98.

268. *Id.* at 99.

269. Pierdominici, *supra* note 259, at 87 (internal citations omitted).

Rights, and the Hong Kong Bill of Rights."[270] If it is true that the living tree doctrine has allowed the Canadian Supreme Court to become "one of the most influential domestic courts worldwide on human rights issues,"[271] then it stands to reason that this constitutional device has promoted stability and consistency throughout modern international constitutional law. Thus, the doctrine's potential for shaping constitutional growth and advancing human rights—both domestically and internationally—underscores its significance in modern jurisprudence, despite specific instances of criticism in its application.

C. Point of Comparison: Living Constitutionalism

The living tree doctrine, as a method of constitutional interpretation, is perhaps most comparable to the doctrine of *living constitutionalism* sometimes seen in the United States. Living constitutionalism generally holds that the meaning of the American Constitution should evolve and adapt to changing societal norms, values, and circumstances.[272] This approach diverges from strict textualism or originalism by emphasizing the dynamic nature of constitutional interpretation and acknowledging that the Constitution is a living document capable of addressing contemporary issues and challenges.[273] One apt description of this ideal is especially persuasive:

> Law and society are inextricably interrelated; each strives constantly to remake the other into its own image. No one can say which takes the lead in the continuous process of change or which is superior to the other, for in truth each is anterior to its counterpart, while equally each succeeds the other.[274]

Put differently, the law fails to "serve its proper role in society" if it ever becomes "fully at rest"; constitutional law "must always be to some extent in motion, ever searching for its own best ends."[275] Yet for this "motion" to be continuous, judges engaging in judicial review should both "preserve a conservative link with the past" while simultaneously "seeking current anchorage in the dynamics of the contemporary scene."[276]

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270. *Id.* at 88.

271. *Id.* (quoting Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 558 n.316 (2005)).

272. Martin Goffeney, *Constitutional Interpretation: Legal Realism, Originalism, and Living Constitutionalism*, HEINONLINE BLOG (Oct. 20, 2023), https://home.heinonline.org/blog/2023/10/constitutional-interpretation-legal-realism-originalism-and-living-constitutionalism/ [https://perma.cc/D4BZ-N2HH].

273. *Id.*

274. McKay, *supra* note 65, at 207.

275. *Id.* at 213.

276. *Id.* at 211, 213.

Of course, this basic requirement of living constitutionalism is often subject to the same criticisms as substantive due process—that is, that living constitutionalism might empower judges to make policy decisions that should be left to elected representatives, thereby disrupting the balance of power among the branches of government[277]—by those worried that the doctrine "amounts more to a result-oriented rhetorical device than a coherent theory of constitutional interpretation."[278] Yet we must recognize that law, "particularly constitutional law," is "not simply 'discovered.'"[279] After all, "conscious judicial participation" is necessary in the "formulation and development of controlling principles."[280] Even the Constitution's Framers—those whose beliefs are honored by originalists nationwide—recognized this necessity. The American shift from the Articles of Confederation to the Constitution, for example, represented a move "from an almost unamendable charter" and toward a document that "provided flexibility for growth and change."[281] The need to leave room for constitutional growth has since been recognized by members of the U.S. Supreme Court, with Justice Cardozo stating that a constitution should consist of "principles for an expanding future," rather than "rules for the passing hour."[282] "In so far as it deviates from that standard, and descends into details and particulars," Cardozo said, "[the Constitution] loses its flexibility."[283]

In addition to concerns about judicial overreach and the balance of power, critics of living constitutionalism frequently argue that this approach can lead to a lack of consistency in constitutional interpretation.[284] Put differently, this line of thinking posits that because living constitutionalism allows for the meaning of the Constitution to evolve with societal values, it risks creating a patchwork body of legal principles that could vary from case to case and over time. If this is true, such perceived variability could undermine the predictability of the law and erode public trust in the judicial system. Critics further assert that such variability could lead to legal

277. *See* Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221, 223 (2022) (noting that some people view living constitutionalism as "a cover for judicial intervention and lawmaking").

278. *See* Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1517 (2012) (discussing criticisms of the "continual reaffirmation" model of living constitutionalism).

279. McKay, *supra* note 65, at 212.

280. *Id.*

281. *Id.* at 204.

282. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921).

283. *Id.*

284. *See, e.g.*, David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 976 (2011) (highlighting the difficulty of "know[ing] ahead of time when it is lawful to reach a result that is inconsistent with the original understandings" of the Constitution).

uncertainty, making it difficult for individuals and institutions to rely on constitutional guarantees.[285] However, this criticism can be countered by once again emphasizing that living constitutionalism does not encourage the wholesale abandonment of legal consistency. Instead, it advocates for an adaptive framework that respects both established principles and evolving societal contexts. By relying on structured methodologies and precedents, living constitutionalism aims to strike a balance between flexibility and stability. For instance, while the interpretation of constitutional provisions may evolve, it does so within a framework that seeks to maintain the Constitution's core principles and continuity. This ensures that any changes in interpretation are anchored in historical context and legal tradition, rather than being arbitrary or capricious. The doctrine of stare decisis further serves as a safeguard against excessive variability and maintains a degree of consistency in the law.

Another criticism of living constitutionalism is the concern that it might lead to judicial decisions that are influenced more by contemporary political pressures than by neutral legal principles.[286] Critics argue that this interpretive approach could make judges susceptible to current political or social trends, potentially undermining the objectivity of judicial decisions by producing rulings that reflect transient social sentiments rather than enduring constitutional values.[287] But again, the doctrine of living constitutionalism includes mechanisms to prevent such undue influence. Firstly, living constitutionalism emphasizes that judicial review should be grounded in the principles of the Constitution and its historical context, rather than purely contemporary political pressures. Thus, judges are guided by a framework that integrates historical understanding with contemporary relevance, which helps preserve the integrity of constitutional principles. Moreover, the judicial process involves rigorous analysis, debate, and scrutiny, further mitigating improper influences. Decisions are not made in isolation but are subject to detailed examination and discussion within the judiciary—a process that includes reviewing legal precedents, considering scholarly interpretations, and engaging in thorough legal reasoning. Such comprehensive deliberation helps prevent decisions from being unduly

285. *See* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 225 (2010) (discussing the "obvious difficulties for the Rule of Law" caused by the adaptability of living constitutionalism).

286. *See Living Constitutionalism*, AM. CORNERSTONE INST. (Aug. 11, 2023), https://americancornerstone.org/living-constitutionalism/ [https://perma.cc/2JCC-FU94] ("By concerning oneself with the practical consequences of a ruling, politics is inserted into what ought to be an apolitical process.").

287. *See id.* ("The primary aim of this method is to ensure that rulings always favor the 'moral choice' and do what is best for society, regardless of what the [Constitution] itself says.").

influenced by fleeting political or social trends while still providing room for flexibility that respects current and evolving societal realities.

Certain areas of constitutional law have adopted this flexible approach regardless of which judge—living constitutionalist or otherwise—is overseeing a case. In Eighth Amendment jurisprudence, for example, the Supreme Court recognizes that "the words of the [Eighth] Amendment are not precise, and that their scope is not static."[288] Instead, in every subsequent case involving a person's right to be free from cruel or unusual punishment, the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[289] According to the Court, such flexibility is permitted because the "basic policy reflected in [the Eighth Amendment's] words is firmly established."[290] This final requirement should be enough to mitigate risks of judicial activism, as judges could not use living constitutionalism to advance any policy that is not already "firmly established" by the Constitution. Indeed, this form of judicial review—which leaves room for growth but is nonetheless constitutionally constrained and has natural limitations—can "contribute[] to constitutional stability" by "lowering stakes in politics, establishing new constitutional focal points, and creating adaptive efficiency."[291]

D. Living Trees in the American Constitutional Scheme

The Canadian living tree doctrine presents an intriguing alternative for governing the interpretation of American constitutional human rights law.[292] But the implementation of this doctrine within the framework of American jurisprudence would require several changes to the Nation's current approach to constitutional interpretation. Quite obviously, the American judiciary would need to adopt a more dynamic understanding of the Constitution. Living constitutionalists like Justice Thurgood Marshall[293] are no strangers

288. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).

289. *Id.* at 101.

290. *Id.* at 99–100.

291. Mittal & Weingast, *supra* note 75, at 349.

292. Admittedly, the living tree approach to constitutional flexibility presents great tension with constitutional unamendability as a structural design. *See supra* Part II. Conversely, the two approaches could hypothetically complement each other, should a country choose to make rights and freedoms unamendable insofar as those amendments *diminish* the scope of the rights, but still allow for amendments that *increase* the breadth of those protections. Regardless, this Note does not mean to advocate for the adoption of all three international alternatives concurrently. Instead, it details the theoretical effectiveness of each alternative in a vacuum separately from the other two, at least to the extent that the implementation of one would impact the feasibility of another.

293. *See* Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii (May 6, 1987), *in* 40 VAND. L. REV. 1337, 1338 (1987) (speaking against the notion that "the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention" and criticizing the belief that "the wisdom, foresight, and sense of justice exhibited by the Framers [was] particularly profound").

to the bench, but the influence of devout originalists like Justice Clarence Thomas on the modern Court[294] seemingly make institutional progress on that front unlikely. Yet current ideological divides aside, the Eighth Amendment framework of analyzing new cases in light of modern society[295] suggests that a more flexible and forward-thinking approach to constitutional analysis could operate effectively in disputes involving other fundamental human rights.

Concerns of judicial activism would likely also recede with close adherence to the Canadian model. In the U.S. Supreme Court, different Justices subscribe to different methods of constitutional interpretation; such disagreements feed into the "broadening chorus of criticism" that the decisions of certain Justices are "ideological in nature and operation."[296] By contrast, the Supreme Court of Canada provided in *Edwards* explicit instructions on how *all* constitutional text should be interpreted. Thus, as an interpretive device, the living tree doctrine has been "formally endorsed" by "major Canadian scholars," "Justices in a personal academic capacity," and the Supreme Court in its institutional entirety.[297] This harmony in American jurisprudence would undoubtedly contribute to greater stability and predictability in the development of constitutional doctrine moving forward.[298]

Overall, incorporating some variation of the living tree doctrine into American constitutional law would necessitate a fundamental shift in constitutional interpretation, embracing a more dynamic and progressive understanding of the Constitution. While there are challenges and criticisms associated with this approach, its potential to promote constitutional growth, advance human rights, and ensure the continued relevance of the Constitution in a changing society underscores the importance of thorough evaluation of such flexibility in constitutional interpretation in the future.

Conclusion

The importance of constitutional stability cannot be overstated, and in the realm of fundamental human rights, it is an outright necessity. Predictability ensures that citizens have a clear understanding of their rights and obligations under the law, helps guard against the arbitrary or

294. *See* Chemerinsky, *supra* note 60, at 433–34 (discussing the "enormous modernity problem with originalism").

295. *See supra* subpart IV(C).

296. *See* Hutchinson, *supra* note 260, at 98.

297. Pierdominici, *supra* note 259, at 94.

298. *Cf.* Caleigh Harris, *The Draconian Future Following the* Dobbs *Decision*, U. CIN. L. REV. BLOG (July 20, 2022), https://uclawreview.org/2022/07/20/draconian-future-following-dobbs-decision/ [https://perma.cc/5CHS-THN6] (describing the instability and unpredictability engendered by the *Dobbs* decision).

discriminatory application of law and policy, and enhances public trust and confidence in the rule of law. To be sure, none of the foreign constitutional schemes discussed in this Note stand as perfect alternatives to substantive due process as a means of protecting human rights; each offers distinct advantages and challenges in promoting predictability in human rights law. Constitutional unamendability provides a strong safeguard against the infringement of basic rights but risks rigidity and governmental abuse. However, the explicit hierarchy of rights elevated by eternity clauses like the German *Ewigkeitsklausel* (and its commitment to human dignity as an underlying lens through which judges are meant to read the entire *Grundgesetz*) advances stability otherwise missing from the American substantive due process analysis. Similarly, the incorporation of international norms into a nation's constitutional text invites a "pick-and-choose" approach to protecting human rights at the international level—as demonstrated by Section 10 of the Spanish Constitution—but nonetheless promotes predictability by removing judicial activism from the equation. This would instead allow the elected legislature, who is subject to political accountability under the American constitutional scheme, to be the protector of human rights while also encouraging American constitutional law to better align with international standards. And third, although encouraging living constitutionalism as the preferred method of constitutional interpretation might once again open the door for judicial activism, the Canadian tree of life doctrine proves that such fears can be mitigated with an emphasis on adherence to the core principles and values enshrined in the American Constitution. This method of interpretation would allow for the Constitution to maintain legitimacy and authority by responding to modern needs and values in the realm of human rights law.

Thus, in a global landscape where the protection of fundamental human rights stands as a cornerstone of democratic governance, the quest for constitutional stability emerges as a top priority. Across diverse constitutional frameworks—from the rigid safeguards of constitutional unamendability to the nuanced incorporation of international norms and the adaptive principles of flexible constitutional interpretation—nations grapple with the delicate balance between preserving constitutional tradition and responding to societal needs. Through deliberate exploration (and the potential implementation) of these international constitutional mechanisms as alternatives to substantive due process, the United States has the opportunity to foster a future in which stability, predictability, and respect for fundamental human values converge to sustain the fabric of democratic governance within U.S. borders and beyond. Amidst this complexity, the overarching aim remains the same: to fortify the foundations of justice, equality, and liberty upon which democratic societies thrive.