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Assessing Judicial Empowerment

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Abstract: Drawing on an ongoing international data collection effort, this paper examines the free expression jurisprudence of the Supreme Court of Canada and the European Court of Human Rights in an effort to assess the political beneficiaries of judicial empowerment. Free expression is a universally recognized fundamental right, and it is a right that is regularly invoked in court by a rich diversity of political actors. As such, free speech law provides an illuminating window onto how constitutional courts respond to similar claims from differently situated claimants. This paper compares the response by two influential courts to free expression claims filed by for-profit businesses and by labor advocates.

Keywords: judicial empowerment; judicialization; free speech; freedom of speech; free expression; freedom of expression; Supreme Court of Canada; European Court of Human Rights

1. Introduction

Who benefits when independent courts are empowered?

A central current of post-World War II political development has been the adoption of written constitutions with explicit guarantees of fundamental rights enforceable by constitutional courts (Ginsburg 2003; Hirschl 2014; Stone Sweet 2003). This phenomenon predates World War II in a handful of states, including Argentina, Norway, and the United States, but it spread throughout the industrialized world following the war, with the adoption of the Japanese Constitution in 1947, the German Basic Law in 1949, and the like. The trend accelerated further during the post-1989 wave of democratization in Eastern Europe. The post-World War II period has also witnessed development of *international* courts with quasi-constitutional review powers. In particular, the European Convention on Human Rights (ECHR), which entered into force in 1953, empowered the European Court of Human Rights (ECtHR) to enforce written guarantees of fundamental human rights, including many of the same rights that are guaranteed by most national bills of rights. Over time, and particularly since the 1998 adoption of ECHR Protocol 11, the ECtHR has developed into an institution that operates very much like a national constitutional court, albeit one that hears cases originating in forty-seven separate states (Shapiro 2002, pp. 154–55). In sum, the post-World War II period has witnessed judicial institutions becoming ever more consequential worldwide; "in more and more polities, with regard to an increasing variety of issues, politics would play out differently but for courts" (Kapiszewski et al. 2013, p. 410).[1]

This global expansion of judicial power has been celebrated in some quarters as a triumph of democratization and signal of an ever-broader global commitment to universal human rights

[1] As shorthand throughout, I use the terms "constitutional courts" and "high courts" to include a range of judicial institutions with constitutional or quasi-constitutional review powers. Except where otherwise noted, the term should be taken to include autonomous constitutional courts (such as Germany's), constitutional chambers of high courts (such as Costa Rica's), supreme courts with powers of constitutional review (such as the U.S.'s), and international courts that function very much like constitutional courts (such as the ECtHR).

norms. In particular, judges themselves have often characterized judicial empowerment as a means of protecting the rights of otherwise vulnerable segments of a democratic society. Shortly before World War II, U.S. Supreme Court Justice Harlan Fiske Stone famously suggested that one of the Court's principal functions was to protect "discrete and insular minorities" against discriminatory laws rooted in prejudice.[2] Two years later, Stone's colleague Hugo Black asserted that the U.S. Bill of Rights was drafted to protect the rights of "helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."[3] These sentiments have been echoed by judges elsewhere. In 2004, Justice Manuel José Cepeda-Espinosa, former president of the Colombian Constitutional Court, remarked that his Court "modified the balance of social and political power by . . . granting more power to weak, vulnerable, marginal, and disorganized persons" (Cepeda-Espinosa 2004, p. 650). In 2006, Justice Aharon Barak, then-President of the Israeli Supreme Court, published a book-length case for judges' central role in guarding fundamental democratic principles of human rights. On Justice Barak's account, a key lesson of the Holocaust and World War II was that "[t]he protection of human rights—the rights of every individual and every minority group—cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion" (Barak 2006, p. xi). These rights "are put into effect by judges whose main task is to protect democracy" (Barak 2006, p. 21). Since the mid-twentieth century, high court judges have regularly claimed that the empowerment of independent constitutional courts with the authority to enforce written bills of rights enables judicial protection of relatively powerless groups whose interests are not well-represented in elected legislatures.

In response, some influential scholarly skeptics have maintained that the "judicialization of politics"—or more polemically, the rise of "juristocracy"—has reflected the interests and demands of legal and political elites rather than (or at least more than) those of ordinary citizens. For example, Ran Hirschl (who coined the term "juristocracy") has argued that the empowerment of constitutional courts with the authority to enforce written rights guarantees has tended more to reinforce than to challenge existing power relations in democratic and democratizing societies. In particular, Hirschl has long argued that judicially enforceable bills of rights are unlikely "to be agents of effective reform in advancing progressive notions of distributive justice" (Hirschl 2004, p. 168). While the empowerment of judges to enforce constitutional rights is regularly justified by reference to left-liberal egalitarian values, Hirschl insists that, in fact, it has often "resulted from self-interested actions taken by hegemonic, yet threatened, socio-political groups fearful of losing their grip on political power." According to this "hegemonic preservation thesis," "[j]udicial empowerment . . . is often not a reflection of a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by certain groups to bolster their own position in the polity" (Hirschl 2006, pp. 58–60; see also Hirschl 2004, 2010, 2013b). Likewise, Jeffrey Goldsworthy has argued that judicial enforcement of constitutional rights in well-established democracies has emerged primarily because "a substantial number of influential members of the highly educated, professional, upper-middle class have lost faith in the ability of their fellow citizens to form opinions about important matters of public policy in a sufficiently intelligent, well-informed, dispassionate, impartial, and carefully reasoned manner." As such, they have turned to an institution (judicial review) that "shifts power to people (judges) who are representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are deemed more likely to produce enlightened decisions" (Goldsworthy 2006, p. 122).

Other scholars have advanced more optimistic assessments of judicial empowerment, with regard to either its egalitarian distributive effects or its broader impacts on the development of a stable middle class, the growth of civil society, and the consolidation of democracy (Brinks and Gauri 2014;

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[2] U.S. v. Carolene Products, 304 U.S. 144, 152 (US 1938).
[3] Chambers v. Florida, 309 U.S. 227, 236 (US 1940).

Cichowski 2006; Gauri and Brinks 2008; Ginsburg 2003; Iturralde 2013; Kende 2009; Landau 2012; Maldonado 2013). As Miguel Schor and Alec Stone Sweet have noted, the pessimistic judicialization literature has focused more on "the conditions that facilitate the emergence of judicial power" than on "what courts are actually doing" once empowered (Schor 2009, p. 192; cf. Hirschl 2004, pp. 100–48; Dugard 2013). Indeed, Stone Sweet has argued explicitly that "[t]he dynamics of judicial interpretation and lawmaking subvert efforts to predict what will happen from the preferences of those who delegated to judges in the first place," and hence that "the extent to which those who delegate are in fact able to rein in or otherwise shape the use of such authority should not be presumed, but rather constitutes a crucial empirical question" (Stone Sweet 2004, p. 9).

In sum, judges themselves have long claimed that judicial review benefits the relatively powerless. Some empirical scholars have advanced more skeptical accounts, but others have presented countervailing evidence, and the question remains open as to whether, when, and to what extent constitutional courts operating in democratic or democratizing polities have used their authority to defend the interests of the wealthy and powerful or the poor and weak.

2. Free Speech as a Window onto Judicialization

Free expression jurisprudence is a potentially illuminating window onto these debates.[4] Hirschl (2004, p. 148) describes the freedom of expression (FoE) as a classic negative liberty that constitutional courts are relatively good at protecting. He contrasts such liberties with socio-economic rights that would pose more fundamental challenges to the existing social order; on his account, constitutional courts have a much spottier record of protecting these latter rights. Whether this distinction is persuasive depends on what sort of free speech rights we are talking about. In the U.S., for example, free speech law has regularly enabled acts of social and political protest by outsider groups, with these protests in turn achieving significant policy change of the kind Hirschl emphasizes. Think, for example, of judicial decisions protecting the right of labor unions to picket employers or the right of civil rights protesters to hold sit-ins in government buildings or private businesses.[5] However, free speech norms can also be deployed by relatively powerful interests in an effort to promote neoliberal deregulatory ends. Think, for example, of *Citizens United v. FEC* (2010) or decisions trimming state regulation of tobacco advertising.[6] The relative balance between these different impacts of free expression jurisprudence should then provide an illuminating window onto Hirschl's thesis.

Put another way, freedom of expression is a particularly useful testing ground for the effects of judicialization because it is a near-universal commitment of written constitutionalism (at least on paper) and is a right that is invoked by all manner of political actors. By way of contrast, the right to shelter is guaranteed by 38% of the national constitutions currently in force, and where it is guaranteed, it tends to get invoked in court by people who lack homes.[7] Free expression is guaranteed by more than 95% of national constitutions, and it tends to get invoked by everyone—corporations and labor unions, religious minorities and majorities, left- and right-wing extremists, racists and egalitarians, pornographers and birth-control advocates. Because the existing literature provides no clear sense of how the world's constitutional courts are responding to claims from these varied actors, free expression law has significant untapped potential to shed light on who is benefiting from the judicial protection of rights.

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[4] I use the phrases "freedom of speech" and "freedom of expression" (and the abbreviation "FoE") interchangeably; unless otherwise specified, each should be read to include a broad family of free expression rights, including freedom of the press and freedom to engage in non-verbal forms of communications such as flag-burning.

[5] Note, for example, Thornhill v. Alabama, 310 U.S. 88 (US 1940), and Bell v. Maryland, 378 U.S. 226 (US 1964), respectively. On the use of judicial politics to enable other forms of democratic politics, see generally Keck (2014).

[6] Citizens United v. Federal Election Commission, 558 U.S. 310 (US 2010); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (US 2001).

[7] The figures regarding incidence of constitutional rights in national constitutions are drawn from Constitute, available at https://www.constituteproject.org.

Consider two mid-twentieth century First Amendment decisions from the U.S. Supreme Court. In *Terminiello v. Chicago* (US 1949), the Court heard a claim brought by Arthur Terminiello, a suspended Catholic priest known as "the Father Coughlin of the South." Terminiello had delivered an anti-Communist and anti-Semitic speech to a "Christian Nationalist" organization in Chicago; when the crowd outside became restless, he was arrested and subsequently convicted for breach of the peace. Two years later, the Court heard a similar claim brought by Irving Feiner, an undergraduate student at Syracuse University and member of the Communist Party of the U.S. Feiner had delivered a street corner speech in downtown Syracuse advocating racial equality; when the crowd became restless, he was arrested and subsequently convicted for breach of the peace. The Supreme Court found a First Amendment violation in the first case, but not the second. Reading the two cases in juxtaposition, one is left with the distinct impression that, in the Cold War-era United States, there was a First Amendment right to denounce Jewish Communists, but not to be a Jewish Communist.

Alternatively, consider two free expression cases from the German Federal Constitutional Court. In the *Lüth Case* (BVerfG 1958), the Court heard a claim brought by Erich Lüth, president of the Hamburg Press Club, who had called for a boycott of films written and directed by Veit Harlan, a notorious Nazi propagandist. Two film production companies filed defamation claims and obtained an injunction prohibiting Lüth from advocating the boycott. Lüth challenged this injunction on constitutional free expression grounds. Some years later, in the *Holocaust Denial Case* (BVerfG 1994), the Court heard a claim brought by the far-right National Democratic Party (NPD). The NPD had planned a rally in Munich featuring notorious Holocaust denier David Irving as keynote speaker. The local government threatened criminal prosecution unless the party ensured that the Holocaust was not publicly denied, and the NPD filed a constitutional complaint. The Constitutional Court found a violation of Art. 5 of the Basic Law in the first case, but not the second, suggesting that in post-war Germany, there is a constitutional right to boycott Nazis, but not to deny the Holocaust.[8]

Together with an international team of collaborators, I am currently collecting systematic data on the full universe of constitutional free expression decisions issued by a range of national, transnational, and subnational courts worldwide. The data in our Global Free Speech Repository (GFSR) will include many familiar features of existing judicial decisions datasets (such as the U.S. Supreme Court Judicial Database), but with more nuanced characterizations of the identity of the speech claimants in each case and the content and physical form of their speech acts. Drawing on preliminary project data, Figures 1 and 2 illustrate the distribution of speech claimants and speech content categories in cases from five national high courts.[9] As Figure 1 makes clear, the modal free expression claimant across jurisdictions is a journalist, but all five high courts hear cases filed by a range of other claimants as well. Twelve percent of the Canadian cases were filed by for-profit corporations (excluding media companies), and 18 percent of the Australian cases were filed by political activists. As Table 2 indicates, the expressive content of the speech act at issue most commonly consists of news reporting and/or (alleged) defamation, although in Australia, electoral speech is on par with defamation (each representing 32 percent of the sample). This latter finding is surely due to the fact that when the Australian High Court held that the Australian Constitution includes an implied guarantee of free expression, it expressly limited this right to political communication.[10] As such, we see comparatively few Australian cases involving hate speech, sexually explicit speech, economic speech, and academic/artistic speech.

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[8] Art. 5 of the German Grundgesetz (Basic Law) provides that "[e]very person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

[9] All such case data reported in this article is drawn from the ongoing GFSR project.

[10] Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1; Australian Capital Television v Commonwealth (1992) 177 CLR 106. See Gelber (2012).

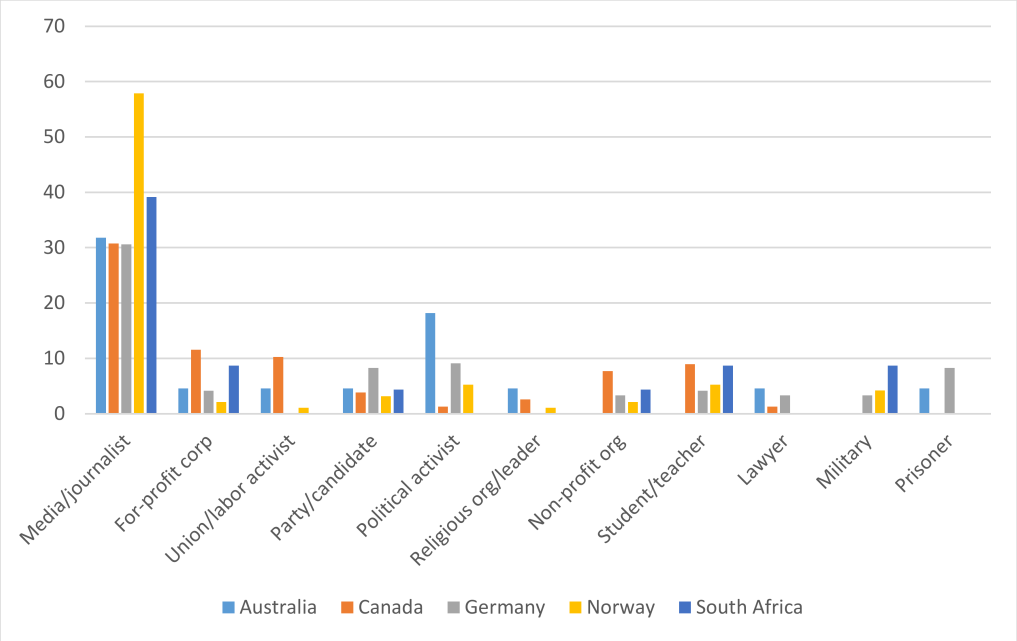

Figure 1. Percent FoE Decisions by Speech Claimant Type across Five National High Courts. Note: All known constitutional FoE holdings issued by High Court of Australia (N = 22), Supreme Court of Canada (N = 78), Federal Constitutional Court of Germany (Senate holdings only, not Chambers; N = 143), Supreme Court of Norway (N=95), and Constitutional Court of South Africa (N = 23). For-profit corp excludes media corporations. Political activist excludes labor and partisan actors. Non-profit org excludes labor, partisan, and religious orgs. Student/teacher includes writers and artists as well.

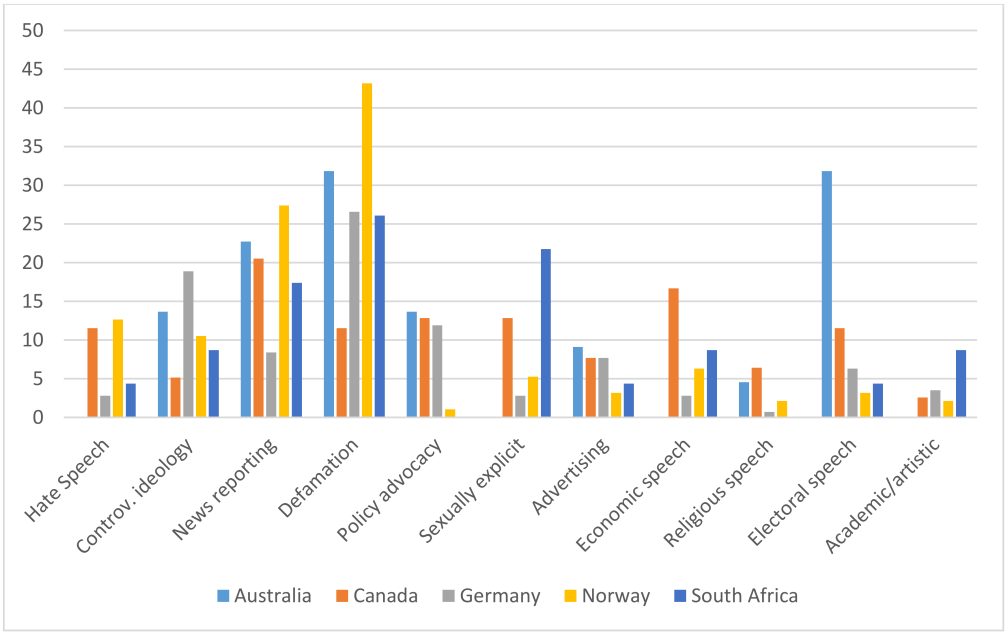

Figure 2. Percent FoE Decisions by Speech Content Type across Five National High Courts. Note: All known constitutional FoE holdings issued by High Court of Australia (N = 22), Supreme Court of Canada (N = 78), Federal Constitutional Court of Germany (Senate holdings only, not Chambers; N = 143), Supreme Court of Norway (N = 95), and Constitutional Court of South Africa (N = 23). Controversial ideology excludes advocacy of group-based hatred. Economic speech includes all speech in an economic context, other than commercial advertising.

3. Corporate and Labor Speech in Canada and the Council of Europe

A key goal of this project is to identify a set of cases that might be used to assess the political beneficiaries of judicial empowerment. Consider, for example, the free expression case law of the Supreme Court of Canada. Since the 1982 adoption of the Canadian Charter of Rights & Freedoms, the Court has issued 78 substantive holdings relying on Sec. 2(b) of the Charter, which guarantees free expression.[11] Ten of these 78 decisions (13%) involved sexually explicit speech, and nine (12%) involved hate speech, but, as is typical with national high courts, the modal group of cases (24 cases, representing 31% of the total) involve media corporations and/or journalists as claimants, typically engaged in news reporting, sometimes with allegedly defamatory content. Another sizeable share (19 cases; 24%) involved commercial advertising or other speech in an economic context.

Nine of the Canadian cases involved for-profit businesses (excluding media companies) as speech claimants, and eight involved labor unions; these seventeen cases are listed in Table 1.[12] In four of the nine cases in the left column (those set in boldface), the Court ruled in favor of a corporate (or otherwise for-profit) FoE claimant. On Hirschl's account, these cases stand as potential evidence that judicial empowerment benefits already powerful interests.

Table 1. Canadian Supreme Court Decisions Resolving Sec. 2 Claims Filed by For-Profit Businesses or Labor Advocates.

For-Profit Businesses	Labor Advocates
Ford v. Quebec (1988)	RWDSU v. Dolphin Delivery Ltd. (1986)
Irwin Toy Ltd. v. Quebec (1989)	BCGEU v. British Columbia (Attorney General) (1988)
Rocket v. Royal College of Dental Surgeons of Ontario (1990)	**UFCW, Local 1518 v. KMart Canada (1999)**
RJR-MacDonald Inc. v. Canada (1995)	**Allsco Building Products Ltc. V. UFCW, Local 1288P (1999)**
Little Sisters Book & Art Emporium v. Canada (2000)	Delisle v. Canada (Deputy Attorney General) (1999)
Siemens v. Manitoba (2003)	**RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd. (2002)**
Vann Niagara Ltd. v. Oakville (2003)	**Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component (2009)**
Montreal v. 2952-1366 Quebec Inc. (2005)	**Alberta (Information & Privacy Commissioner) v. UFCW, Local 401 (2013)**
Canada v. JTI-Macdonald Corp. (2007)	

Note: Decisions in boldface ruled in favor of the Sec. 2 claim.

For example, in *Ford v. Quebec* (Can. 1988), the Court unanimously held that the freedom of expression protected by Sec. 2(b) encompasses commercial advertising, noting the U.S. Supreme Court's failed mid-twentieth century effort to treat "commercial speech" as an unprotected category of expression under the First Amendment.[13] Two years later, when Holiday Inn ran a newspaper and magazine advertising campaign featuring two dentists whose large storefront practice included a location in a Holiday Inn in downtown Toronto, the Court held that the dentists could not constitutionally be charged with professional misconduct for engaging in prohibited advertising.[14]

Most notably, when the Canadian Parliament banned almost all advertising and promotion of tobacco products and required warning labels on packaging, the Court invalidated several key provisions of the law in *RJR-MacDonald Inc. v. Canada* (Can. 1995). In dissent, Justice Gérard La Forest observed that the Court had used the case to extend constitutional protection to a form of expression (tobacco advertising) that "serves no political, scientific or artistic ends; nor does it promote participation in the

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[11] Sec. 2 provides that "[e]veryone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

[12] More precisely, the left-hand column of the table lists all decisions adjudicating Sec. 2(b) claims filed by for-profit businesses (excluding media companies), filed by such businesses' managers or directors, and/or filed by media or non-corporate actors in cases involving for-profit advertising. The right-hand column lists all such decisions filed by labor unions or other labor advocates.

[13] Ford v. Quebec (Attorney General) [1988] 2 SCR 712, para. 45–60.

[14] Rocket v. Royal College of Dental Surgeons of Ontario [1990] 2 SCR 232.

political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it." La Forest noted further that the principal motivation for this advertising is the "enormous profits" that it generates for leading tobacco companies and that rates of tobacco use were particularly high among the young and the poor. As such, he cautioned that "[i]n interpreting and applying the Charter . . . the courts must . . . ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[15] A clearer vindication of Hirschl's juristocracy thesis could scarcely be conjured.

As Table 1 indicates, however, the Canadian Court also ruled in favor of the FoE claim in five of the eight cases brought by labor advocates.[16] In *Greater Vancouver Transportation Authority v. Canadian Federation of Students* (Can. 2009), the Court held that the British Columbia Teachers' Federation (along with the British Columbia Component of the Canadian Federation of Students) had a constitutional right to post paid advertisements on the sides of public buses.[17] In *Alberta v. U.F.C.W., Local 401* (Can. 2013), it held that union members have the right to photograph people crossing picket lines.[18] In the *KMart*, *Allsco Building* and *Pepsi-Cola* cases, it held that workers have a constitutional right to distribute leaflets outside retail stores describing companies' unfair labor practices and urging customers to shop elsewhere.[19]

Writing for the Court in *U.F.C.W., Local 1518 v. KMart Canada* (Can. 1999), Justice Peter Cory remarked on "the vulnerability of individual employees, particularly retail workers, and their inherent inequality in their relationship with management," emphasizing that such workers "must be able to speak freely on matters that relate to their working conditions." Justice Cory also noted that the forms of expression at issue here—the distribution of leaflets and posters—are "typically less expensive and more readily available than other forms of expression. As a result, they are particularly important means of providing information and seeking support by the vulnerable and less powerful members of society." Finally, he noted that "[b]usinesses whose economic interests may be affected by leafleting are not a vulnerable or disadvantaged group in need of protection. Rather, it is those who are subject to the legislative restriction who form a vulnerable group in Canadian society."[20]

These decisions suggest that Hirschl's account tells only part of the story. If states empower independent courts to defend free speech, they are likely to rule sometimes in favor of tobacco advertisers, but they may also rule in favor of trade union picketers. Even on the corporate side, moreover, the story is not fully captured by Hirschl's account. Besides the *RJR-MacDonald* and Holiday Inn decisions, the other cases in which corporate speech claims were successful involved a dry cleaner and several other small businesses in Quebec, who wanted to display English-language signage, and a small LGBT bookstore in Vancouver, whose products (mostly imported from the U.S.) were repeatedly interdicted at the border under Canada's obscenity law.

In sum, of the nine cases in which the Court ruled in favor of a FoE claim brought by a for-profit business or labor advocate—i.e., all boldface cases in Table 1—only two are clearly consistent with Hirschl's account. And the Court subsequently backed away from one of them. In response to the 1995 *RJR-MacDonald* holding, Parliament enacted a new Tobacco Act, prohibiting certain forms of

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15 RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 SCR 199, para. 75–76.

16 On both sides of the ledger, most of the pro-speech decisions (i.e., the boldface cases in both columns) featured invalidations of speech-restrictive statutes; as such, they were likely to have speech-expanding effects beyond the parties to the instant case. Such invalidations featured in three of the four decisions ruling in favor of a for-profit speech claimant and three of the five ruling in favor of a labor claimant.

17 Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component [2009] 2 SCR 295.

18 [2013] 3 SCR 733.

19 U.F.C.W., Local 1518 v. Kmart Canada Ltd [1999] 2 SCR 1083; Allsco Building Products Ltd. v. U.F.C.W., Local 1288P [1999] 2 SCR 1136; R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd. [2002] 1 SCR 156.

20 U.F.C.W., Local 1518 v. Kmart Canada Ltd [1999] 2 SCR 1083, para. 25, 28, 68.

advertising (lifestyle ads, ads targeting youth, etc.) and increasing the size of mandatory health warnings. The Supreme Court upheld this revised law in *Canada v. JTI-Macdonald Corp.* (Can. 2007).[21]

The case law of the European Court of Human Rights evinces a similar but even starker pattern. The ECtHR, which sits in Strasbourg, France, is charged with enforcing the European Convention on Human Rights in the forty-seven member states of the Council of Europe. Since the 1998 adoption of Protocol 11, individuals have been authorized to file applications directly with the Court, and the Court's jurisdiction has been compulsory in all member states. Unlike the Supreme Court of Canada, the ECtHR is not authorized to formally invalidate statutes. Nonetheless, the Convention obligates member states to provide "just satisfaction" of any identified violations, and in supervising compliance with the Court's judgments, the Council of Europe Committee of Ministers often requires states not just to "put an end to violations established" but also to adopt "general measures preventing similar violations."[22]

Article 10 of the ECHR provides that "[e]veryone has the right to freedom of expression," including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers," although it also notes that these liberties "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety," or any of several other named exceptions. From its inception through 2016, the ECtHR issued nearly 800 judgments regarding this Article.[23] Of these, only nine involved Art. 10 claims filed by for-profit businesses (again excluding media companies), with the Court ruling in the corporations' favor in five of those cases (56 percent). Twenty-three judgments resolved Art. 10 claims filed by labor unions or other labor advocates, with the Court ruling in their favor in nineteen of those cases (83 percent). The judgments are listed in Table 2.[24]

Consider first the five judgments in which the Court ruled in favor of an Art. 10 claim filed by a for-profit applicant. In *Barthold v. Germany* (ECtHR 1985), the Court heard a case similar in some respects to the Holiday Inn case from Canada. A Hamburg veterinarian had been quoted in the press complaining about fellow veterinarians' failure to offer overnight emergency medical services. The newspaper article in question was accompanied by the veterinarian's photo and indicated his own clinic's availability for overnight emergency calls, leading the state to fine him for engaging in unlawful medical advertising. The Court held that such an application of the state's unfair competition laws "risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect." As such, the German courts had violated Art. 10.[25] Five years later, when a Swiss electronics company was denied permission to demonstrate a then-new satellite television technology at a trade fair in Zurich, the Court again concluded that the member state in question had restricted commercial advertising to a degree not necessary in a democratic society and hence had violated Art. 10.[26]

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21 Canada (Attorney General) v. JTI-Macdonald Corp. (2007) 2 SCR 610.

22 Council of Europe, Committee of Ministers, Resolution: Execution of the judgment of the European Court of Human Rights, Ljaskaj against Croatia (adopted 31 January 2018), available online: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168077e19a (accessed 13 April 2018).

23 Cichowski and Chrun (2017) list 724 Art. 10 judgments from 1960–2014. The GFSR project team has identified an additional 71 such judgments from 2015–2016.

24 As with the Canadian cases, the left-hand column of the table lists all decisions involving Art. 10 claims filed by for-profit businesses (excluding media companies), filed by such businesses' managers or directors, and/or filed by media or non-corporate actors in cases involving for-profit advertising. The right-hand column lists all such decisions filed by labor unions or other labor advocates.

25 Barthold v. Germany (ECtHR 1985), application no. 8734/79.

26 Autronic AG v. Switzerland (ECtHR 1990), application no. 12726/87.

Table 2. ECtHR Judgments Resolving Art. 10 Claims Filed by For-Profit Businesses or Labor Advocates.

For-Profit Businesses	Labor Advocates
Barthold v. Germany (1985)	**Ezelin v. France (1991)**
Autronic AG v. Switzerland (1990)	**Ceylon v. Turkey (1999)**
Casado Coca v. Spain (1994)	**Nilsen and Johnsen v. Norway (1999)**
Lesnik v. Slovakia (2003)	Constantinescu v. Romania (2000)
Kwiecień v. Poland (2007)	**Karakoc and Others v. Turkey (2002)**
Société de Conception de Presse et d'Edition and Ponson v. France (2009)	**Karkin v. Turkey (2003)**
Hachette Filipacchi Presse Automobile et Dupuy v. France (2009)	**Varli and Others v. Turkey (2004)**
Bezymyannyy v. Russia (2010)	**Ceylan v. Turkey (No. 2) (2005)**
Šabanović v. Montenegro and Serbia (2011)	**Gümüş and Others v. Turkey (2005)**
	Karademirci and Others v. Turkey (2005)
	Arbeiter v. Austria (2007)
	Dyuldin and Kislov v. Russia (2007)
	Csánics v. Hungary (2009)
	Marchenko v. Ukraine (2009)
	Wojtas-Kaleta v. Poland (2009)
	Papaianopol v. Romania (2010)
	Gül and Others v. Turkey (2010)
	Palomo Sánchez and Others v. Spain (2011)
	Vellutini and Michel v. France (2011)
	Trade Union of the Police in the Slovak Republic and Others v. Slovakia (2012)
	Eğitim ve Bilim Emekçileri Sendikası v. Turkey (2012)
	Szima v. Hungary (2012)
	Bülent Kaya v. Turkey (2013)

Note: Judgments in boldface ruled in favor of the Art. 10 claim.

In *Kwiecień v. Poland* (2007), the Court considered an Art. 10 claim filed by the operator of a car repair garage who had written an open letter to the head of the local municipal council urging him not to stand for reelection. (The operator of the garage was subsequently elected to the council himself.) The letter accused the incumbent of "maliciously and unlawfully" denying an application for a building permit, among other transgressions. The garage operator was convicted for distributing false campaign speech, but the ECtHR ruled in his favor.[27] In *Bezymyannyy v. Russia* (ECtHR 2010), the applicant was "a businessman and a former controlling shareholder of a private company OAO 'Restoran Belgorod.'"[28] Alleging that a number of third parties had fraudulently seized control of the company, he wrote to the prosecutor's office and the administrative office of the local court, criticizing the judge who had dismissed his fraud allegations. He later testified that the judge in question had accepted bribes. The judge sued successfully for defamation in the Russian courts, but the ECtHR found a violation of Art. 10. Finally, in *Šabanović v. Montenegro and Serbia* (ECtHR 2011), the director of a public corporation called The Water Supply and Sewage Systems held a press conference to respond to a newspaper report regarding bacteria in the local water supply. At the press conference, he accused the Chief State Water Inspector of raising unwarranted public health concerns in an effort to promote the interests of two private water companies. The Chief Inspector filed defamation charges, and the director was convicted and sentenced to three months' imprisonment, suspended and not to be enforced unless he committed another crime within two years. The ECtHR again found a violation of Art. 10.[29]

Out of nearly 800 Art. 10 judgments issued over its full history, these five cases are the only instances in which the Court ruled in favor of a free expression claim from a for-profit, non-media applicant. Collectively, they do not seem to provide much evidence for the judicial use of free

[27] Kwiecień v. Poland (ECtHR 2007), application no. 51744/99, para. 7.
[28] Bezymyannyy v. Russia (ECtHR 2010), application no. 10941/03, para. 6.
[29] Šabanović v. Montenegro and Serbia (ECtHR 2011), application no. 5995/06.

expression guarantees to benefit powerful corporate interests. The cases from Poland, Russia, and Montenegro and Serbia involve speech criticizing the policies or performance of state actors in ways that fall well within the conventional scope of free expression in a democratic society. Had the Court failed to protect free expression in these instances, it would rightly be criticized as falling short of its duty to defend fundamental human rights. The German case extended constitutional protection to a local veterinarian's conversations with the press regarding what he saw as shortfalls in emergency medical services for pets, which again hardly seems an example of a court protecting elite interests. Only the case of the Swiss electronics company fits the bill, and even that case is not as striking as the 1995 tobacco advertising holding from Canada.

On the issue of tobacco advertising, moreover, the ECtHR has explicitly held that "[i]n view of the importance of the protection of public health, of the need to combat the social scourge of smoking in our societies, of the pressing social need to act in this field, and of the existence of a European consensus on the issue," statutory bans on tobacco advertising are consistent with Art. 10.[30] This holding came in a judgment involving a French magazine that had published an article about the world's most highly paid athletes (complaining that French footballer Zinedine Zidane was outranked by so many Americans). The article was accompanied by a photograph of Formula 1 driver Michael Schumacher in which tobacco brand logos (from one of Schumacher's corporate sponsors) were visible. The magazine was fined for violating the French ban on tobacco advertising, and the ECtHR found no violation of Art. 10. The Court reiterated this approach in a second judgment on tobacco advertising issued the same day.[31]

In two additional holdings, the Court likewise found no violation of Art. 10 when a Spanish lawyer was reprimanded by the Barcelona Bar Council for placing advertisements in local newspapers and when a Slovakian businessman was convicted and sentenced to four months in prison (suspended) for insulting a public prosecutor in a series of private letters alleging prosecutorial misconduct.[32] These judgments were each issued over two dissenting votes, and the Court may well have fallen short of important free expression principles in these cases. However, regardless of which way they came out, they would not stand as evidence of a Court captured by elite interests. In sum, the empowerment of an international human rights court with authority to enforce an explicit FoE guarantee across 47 countries has led to virtually no decisions in which powerful corporate actors have successfully claimed that right as their own.

Consider now the right-hand column of Table 2. Of the twenty-three judgments resolving free expression claims filed by labor advocates, seven involved labor activists denouncing the Turkish state for extrajudicial killings or other human rights violations directed against the Kurdish people.[33] Turkey regularly prosecutes such speech acts under national hate speech and anti-terrorism laws, and the ECtHR has repeatedly held that such prosecutions infringe on the fundamental right of free expression, as guaranteed by the Convention. The ECtHR found a violation in all seven of these cases, along with three additional Turkish cases involving labor advocates outside the Kurdish rights context.[34] Whether these judgments have led to any meaningful policy change in Turkey is a significant

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[30] Société de Conception de Presse et d'Edition and Ponson v. France (ECtHR 2009), application no. 26935/05, para. 63 (translated from the French-language judgment).

[31] Hachette Filipacchi Presse Automobile et Dupuy v. France (ECtHR 2009), application no. 13353/05.

[32] Casado Coca v. Spain (ECtHR 1994), application no. 15450/89; Lešník v. Slovakia (ECtHR 2003), application no. 35640/97.

[33] Ceylon v. Turkey (ECtHR 1999), application no. 23556/94; Karakoc and Others v. Turkey (ECtHR 2002), application nos. 27692/95, 28138/95, 28498/95; Karkin v. Turkey (ECtHR 2003), application no. 43928/98; Varli and Others v. Turkey (ECtHR 2004), application no. 38586/97; Ceylan v. Turkey (No. 2) (ECtHR 2005), application no. 46454/99; Gümüş and Others v. Turkey (ECtHR 2005), application no. 40303/98; Bülent Kaya v. Turkey (ECtHR 2013), application no. 52056/08.

[34] In Gül and Others v. Turkey (ECtHR 2010), application no. 4870/02, labor activists had been convicted for shouting Marxist-Leninist revolutionary slogans at a public demonstration. In Karademirci and Others v. Turkey (ECtHR 2005), application nos. 37096/97, 37101/97, twenty-five leaders and members of the Health Workers' Union had been prosecuted for speaking to the press about mistreatment of students at a secondary school. And in Eğitim ve Bilim Emekçileri Sendikası v. Turkey (ECtHR 2012), application no. 20641/05, a national union representing 167,000 education and science workers had adopted articles of incorporation specifying the union's commitment to "defend the right of all individuals in society to

question, but the Strasbourg Court is at least attempting to defend the free expression rights of relatively powerless actors here.

Seven additional cases, from six different states, resulted in ECtHR holdings that Art. 10 protected trade union officials engaged in anti-government speech of various sorts. In *Dyuldin and Kislov v. Russia* (ECtHR 2007), a journalist and trade union official who co-chaired the regional voters' association published an open letter criticizing the regional governor, the governor's "acolytes," the governor's "team," and the "regional authority" more generally. In an episode reminiscent of *New York Times v. Sullivan* (US 1964), more than two dozen members of the regional government—none of whom were personally named in the letter—filed a successful defamation action in the Russian courts. The ECtHR found a violation of Art. 10, observing that "[i]f all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog."[35] The Court noted further that Russian defamation law made no distinction between value judgments and statements of fact, and that, in requiring the applicants to prove the truth of all statements in their open letter, the Russian courts had held that "a description of the governor's policy as 'destructive' would only be true if it was based on a scientifically sound comprehensive assessment of the social and economic development of the region."[36] The European Court's holding, resulting from an Art. 10 application filed jointly by a journalist and a trade union official, undoubtedly represents an important declaration of the right of ordinary citizens to criticize their governments.

The ECtHR likewise found Art. 10 violations in *Ezelin v. France* (1991), in which the Vice-Chairman of the Trade Union of the Guadeloupe Bar took part in a protest march, during which offensive graffiti was painted on the walls of the Law Courts (calling one of the judges a fascist and all of them pimps) and demonstrators chanted death threats against the police; *Arbeiter v. Austria* (ECtHR 2007), in which a Social Democratic member of a regional parliament (Landtag), who was also chairman of a regional hospital Workers' Committee, was quoted in a newspaper criticizing regional governor Jörg Haider, Haider's right-wing Freedom Party, and the director of a private company who was proposing to privatize regional hospitals; *Marchenko v. Ukraine* (ECtHR 2009), in which a teacher and trade union leader had written to the public audit service alleging that the Director of the local Board of Education had misused public resources that belonged to a school for the disabled; *Wojtas-Kaleta v. Poland* (ECtHR 2009), in which the president of the Polish public television journalists union published an open letter criticizing programming decisions for slighting Polish music and culture; *Papaianopol v. Romania* (ECtHR 2010), in which a journalist who was also leader of a teachers' union published an article criticizing a high school headmaster; and *Vellutini and Michel v. France* (ECtHR 2011), in which the president and general secretary of a local police union had distributed a flier to members of the city council that criticized the mayor for his mistreatment of a female police officer.[37]

Two additional Art. 10 applications from trade union officials led to pro-speech holdings from the ECtHR. In *Nilsen and Johnsen v. Norway* (1999), a police inspector and a police constable who were also officers in the police union were quoted in the press alleging that a professor's recent report on

receive, with equality and freedom, a democratic, secular, scientific and cost-free education in their mother tongue" (para. 6). The Turkish courts ordered the union dissolved for violating the national constitutional provision specifying Turkish as the official language.

35 Dyuldin and Kislov v. Russia (ECtHR 2007), application no. 25968/02, para. 10, 43.

36 Dyuldin and Kislov v. Russia (ECtHR 2007), application no. 25968/02, para. 48.

37 Ezelin v. France (ECtHR 1991), application no. 11800/85; Arbeiter v. Austria (ECtHR 2007), application no. 3138/04; Marchenko v. Ukraine (ECtHR 2009), application no. 4063/04; Wojtas-Kaleta v. Poland (ECtHR 2009), application no. 20436/02; Papaianopol v. Romania (ECtHR 2010), application no. 17590/02; Velutini and Michel v. France (ECtHR 2011), application no. 32820/09.

police brutality contained misinformation.[38] In *Csánics v. Hungary* (ECtHR 2009), a trade union leader was quoted discussing a recent demonstration against the planned sale of one private company to another company that the union viewed as hostile to labor rights.[39] The Norwegian professor and the managing director of the impugned Hungarian company each filed successful defamation claims in their domestic courts, but the ECtHR found a violation of Art. 10 in both cases.

The only labor-related cases in which the Court has declined to defend free expression are *Constantinescu v. Romania* (ECtHR 2000), in which the General Secretary of a teachers' union was quoted in the newspaper alleging embezzlement by several named teachers and anti-union activities by police and prosecutors; *Palomo Sánchez and Others v. Spain* (ECtHR 2011), in which a trade union's monthly newsletter published an article criticizing a corporate human resources manager and two employees who had testified in favor of the employer in recent proceedings, accompanied by a cartoon depicting these persons engaged in sexual acts with one another; *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (ECtHR 2012), in which members of a police union held an anti-government demonstration featuring a banner that read "If the State doesn't pay a policeman, the mafia will do so with pleasure"; and *Szima v. Hungary* (ECtHR 2012), in which the chairperson of a police union published on the union's website allegations of nepotism, lack of qualifications, and abuse of power by senior police staff.[40] All four of these decisions were issued by divided chambers or grand chambers, indicating that some ECtHR judges would like the Court to defend labor-related free expression interests even more robustly. In *Szima v. Hungary*, for example, the chamber's majority noted that some of the union leader's online comments "overstepped the mandate of a trade union leader, because they are not at all related to the protection of labour-related interests of trade union members." Belgian Judge Françoise Tulkens replied in dissent that the Court's majority had perhaps "overstepped its mandate by casting this judgment on the role of a trade union leader and on the 'legitimate' scope of trade-union activities." Rather than confining "the role of a union to the protection of workers' interests *stricto sensu*," the Court ought to consider that "such protection could extend more broadly to criticism about alleged failings in the institution itself."[41]

Thus, in four of its twenty-three judgments resolving Art. 10 claims filed by labor advocates, the ECtHR did not protect free expression as fully as some of its judges would like. However, it is clear that the Court has protected labor-related free expression claims more frequently and more consistently than corporate free expression claims, and that a number of the labor-related judgments have reflected important principles of free expression in a democratic government.

4. Judicialization and Comparative Free Speech Scholarship

It is certainly true that judicial institutions regularly serve the interests of the wealthy and powerful. The same is also true of legislative institutions, but if it were equally true of judicial institutions, that would indeed be a notable (and troubling) finding.[42] The American civil libertarian tradition is a worthy one in part because the legacy of judicially enforceable free expression is not just decisions protecting the rights of the wealthy and powerful, but also decisions protecting the poor and the weak. Indeed, the entire history of independent courts suggests that we can have courts that are agents of the powerful or we can have courts that are at least somewhat committed to equal

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[38] Nilsen and Johnsen v. Norway (ECtHR 1999), application no. 23118/93.

[39] Csanics v. Hungary (ECtHR 2009), application no. 12188/06.

[40] Constantinescu v. Romania (ECtHR 2000), application no. 28871/95; Palomo Sánchez and Others v. Spain (ECtHR 2011), application no. 28955/06; Trade Union of the Police in the Slovak Republic and Others v. Slovakia (ECtHR 2012), application no. 11828/08; and Szima v. Hungary (ECtHR 2012), application no. 29723/11.

[41] Szima v. Hungary (ECtHR 2012), application no. 29723/11, para. 31 (majority), para. 4 (dissenting opinion of Judge Tulkens) (italics in original).

[42] On the elite bias of legislative institutions in the U.S. context, note Beienburg and Frymer (2016, p. 255), citing recent work on concentrated economic power by Gilens (2012) and Carnes (2013).

justice for all. In the latter case, judges will still defend the powerful, but they will be committed to an institutional mission that sometimes leads them to defend the relatively powerless too.

These dynamics are not well-explored in the existing comparative free speech literature. Most scholarly attention to date has been devoted to cross-national variance in constitutional doctrine, particularly with regard to the U.S. as an outlier. Much of this literature is focused on hate speech, which has received more robust constitutional protection in the U.S. than almost anywhere else (Bangstad 2012, 2014; Errera 2005, pp. 36–40; Feldman 1998; Parekh 2012; Rosenfeld 2012; Schauer 2005a, 2005b; Suk 2012; Waldron 2012). The key goals of this literature have been to explain and assess the U.S. departure from the rest of the constitutional world, though some scholars have argued that this American exceptionalism has been exaggerated (Baker 2012; Jacobson and Schlink 2012; see also Gould 2005). As Maussen and Grillo (2014, p. 176) have noted, the hate speech literature has been heavily weighted toward doctrinal and normative accounts; on these fronts, "[t]he literature is often repetitive, on both sides (pro and anti-regulation) going over the same or similar ground, making the same or similar points, using the same examples."

While doctrinal/normative studies of hate speech represent the largest segment, the comparative free speech literature also includes valuable studies of other types of speech (Belavusau 2013, pp. 201–46; Gelber 2016; Krotoszynski 2006; Krzeminska-Vamvaka 2008; Langer 2014; Leigh 1998; Stone and Williams 2000; Warbrick 1998), along with single-country studies that canvas a broad field of free speech jurisprudence within a particular national setting (Chesterman 2000; Moon 2000; Youm 2002). Though most of these works are written by non-Americans, they regularly use U.S. jurisprudence as an explicit or implicit baseline for comparison, and their principal focus is on the internal development of the law, without clear reference to the external political sources or impacts of the holdings. Much of the literature does not even mention the speech claimants who are responsible for initiating the legal challenges that enable the evolution of judicial doctrine.

There are, however, exceptions worthy of note. Some scholars have moved beyond doctrinal analysis in seeking to describe and explain patterns of convergence and divergence in free speech law across nations (Barendt 2012; Belavusau 2013; Bleich 2011, 2014; Gelber 2016; Kahn 2004; Stone 2011; Stone et al. 2014). Others have investigated the diverse array of political actors who invoke constitutional free speech rights. In the U.S. context, some have sought to explain the increasing prevalence of free speech claims on the right and the apparently decreasing support for free speech on the left (Batchis 2016; Bernstein 2003; Epstein et al. 2013, pp. 5–6; Kairys 2013; Rabban 1996; 1999, p. 382; Schauer 1993; Wilson 2013). In a landmark book on free speech in Australia, Michael Chesterman reviewed these U.S. developments, noting the invocation of the First Amendment by conservative opponents of campaign finance regulation, legal abortion, and hate speech bans, and concluded that "a simple rule of thumb . . . that freedom of speech mainly benefits 'dissenters, radicals, outspoken critics of government action and (in broad terms) the political left' . . . is plainly inadequate nowadays, even if [it once] had some validity" (Chesterman 2000, p. 308). Applying a similar lens to Australian free expression law, Chesterman noted that "the principal immediate beneficiaries of the emergence of the implied constitutional freedom [of speech] have been media organisations" (Chesterman 2000, p. 311).[43]

These empirical studies of the beneficiaries of free speech jurisprudence remain the exception rather than the rule. Comparative free speech scholarship more commonly references the longstanding debate in political and legal philosophy about whether free speech is best justified on marketplace-of-ideas, democratic governance, or individual autonomy grounds; adopts one of these key normative goals; and then uses that frame to evaluate the judicial response to particular free speech claims. As Hirschl (2013a) has emphasized, one thing missing from much comparative constitutional scholarship is attention to the indisputable extra-judicial influences on judicial decision-making. In this light, one key goal

[43] Note also Bleich (2018), which investigates the diverse array of claimants in hate speech rulings issued by the French Court of Cassation.

of the GFSR project is to bring to comparative free speech jurisprudence the same political eye that Martin Shapiro brought to U.S. free speech law forty years ago (Shapiro 1966). Shapiro's early work was an effort "to reframe the discussion [of free speech and other "preferred freedoms"] from one that focused on matters of 'constitutional interpretation' to one that examined the practical political issues surrounding 'the power of one segment of a government vis-à-vis other segments of that government and the public'" (Gillman 2004, p. 364, quoting Shapiro 1962). Shapiro emphasized that courts have a clientele "consisting of precisely those interests which find themselves unable to obtain representation from other agencies," and he suggested that "marginal groups can expect a much more favorable hearing from the Court than from" institutions more tightly constrained by electoral incentives (Shapiro 1961, pp. 196–97; see Gillman 2004, p. 364). Hirschl's account of comparative constitutional politics adopts a broadly similar framework of "political jurisprudence," but emphasizes that courts act in the interests of entrenched power holders more often than those of the relatively powerless. Much further research remains to be done on the wide variety of ways in which strong judiciaries may benefit elite interests, but the free expression jurisprudence of the Supreme Court of Canada and the European Court of Human Rights appears to provide support for Shapiro's expectation that they would benefit the relatively powerless as well.

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