

A Reply to *The Right of Reply*

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I want to start by thanking Professor Youm for an interesting and instructive account of the right of reply in international and comparative constitutional law. In this brief comment on his article,¹ I aim to do three things: (1) clarify how more general structural differences between the U.S. Constitution and other constitutions affect how the particular issue of a right of reply is framed and analyzed, (2) present a few thoughts in response to some of Professor Youm's claims and arguments in support of his conclusion that U.S. courts should rethink the foreign experience on rights of reply, and (3) suggest why and how it is necessary to go beyond a right of reply if the goal of ensuring robust political debate is to be achieved.

I. *Constitutional Versus Statutory Rights of Reply*

In providing his account of how the right of reply is recognized in various foreign and international regimes, Professor Youm distinguishes between countries that grant a constitutional right of reply on the one hand, and the greater number of countries that grant a statutory right of reply on the other.² I think this basic distinction is less clear-cut in some of the countries that he discusses than it is in the United States because a statutory right of reply is constitutionally *required* and not merely constitutionally *permitted*. That is, constitutional courts in some of these countries have interpreted free-speech, reputational, or personality rights to impose a positive duty on the state for their protection. This is true, for example, in Germany³ and also under the European Convention of Human Rights.⁴

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¹ Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017 (2008).

² *Id.* at 1032.

³ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 205 (262–63) (F.R.G.), translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 405–06 (2d ed. 1997).

⁴ See *Melnichuk v. Ukraine*, App. No. 28743/03, Eur. Ct. H.R., 6–7 (July 5, 2005), availa-

Accordingly, constitutions may be the source of a right of reply in two different ways: (1) by granting an express constitutional right to this effect, as in Macedonia⁵ and Turkey,⁶ or (2) by imposing a positive constitutional duty on the state to protect the underlying speech, reputational, or dignitarian interests of individuals, normally fulfilled by enacting a statute, as in Germany.⁷ In other words, these are two constitutional devices that achieve the same result. Although the second may look as if it is only statutory protection, it is, in fact, a form of constitutional protection. Failure to enact such a statute, or one like it, would itself be an unconstitutional violation of the state's affirmative duty.

Given certain general, structural differences between the U.S. Constitution and those of many other countries, both of these routes to a constitutional right of reply face threshold difficulties in the United States—at least in the absence of a constitutional amendment—regardless of the constitutional merits of a right of reply. First, the express constitutional right of reply, as in Macedonia,⁸ imposes a direct constitutional duty on newspapers. This duty would raise serious state-action problems in the United States, where constitutional rights directly regulate government, but not private, actors.⁹ Moreover, under current understandings, it is unlikely that newspapers would be deemed to be performing a “public function” and so treated as state actors for constitutional purposes, although perhaps this is exactly how things should be understood. Second, the device of mandating a statutory right by imposing positive constitutional duties on the government to protect individuals' reputational or personality interests is generally foreign to the U.S. notion of the Constitution as a

ble at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Melnichuk&sessionid=6769082&skin=hudoc-en>.

⁵ See MACED. CONST. art. 16, *translated in* 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MACEDONIA 6 (Gisbert H. Flanz ed., Parliament of the Republic of Maced. trans., 2006) [hereinafter CONSTITUTIONS OF THE WORLD: MACEDONIA].

⁶ See TURK. CONST. pt. 2, ch. 2, § X, art. 32, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: TURKEY 11 (Gisbert H. Flanz ed., Ömer Faruk Genckaya trans., 2003) [hereinafter CONSTITUTIONS OF THE WORLD: TURKEY].

⁷ See Hamburgisches Pressegesetz [Press Law for the City of Hamburg], Jan. 24, 1965, GVBl. Hamburg at 15, art. 11, last amended Feb. 5, 1985, GVBl. Hamburg at 62 (F.R.G.).

⁸ See MACED. CONST. art. 16, *translated in* CONSTITUTIONS OF THE WORLD: MACEDONIA, *supra* note 5, at 6.

⁹ On the important ways in which the U.S. Constitution, like many other contemporary constitutions, imposes *indirect* duties on private actors, see generally Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387 (2003) (arguing that private actors are indirectly subject to the constitutional rights of others because those rights place limitations on laws that people invoke against one another).

charter of negative rights against the government, although the absolute nature of this principle should not be overstated.

These are, of course, general structural features of the U.S. Constitution that play out across the spectrum of individual rights and do not simply apply to a claimed particular right such as the right of reply. So, for example, even if the Supreme Court deemed a fetus a “person” under the Fourteenth Amendment’s Due Process Clause, a fetus’s constitutional right to life would neither bind private actors, such as its mother, nor would it directly impose positive duties on the government to protect it.¹⁰ A state would presumably no more have a constitutional duty to protect the life of a fetus against its mother than the life of Joshua DeShaney against his father.¹¹ Thus, in the United States, the constitutional issue surrounding abortion is whether it is permissible for states to prohibit the practice and not whether it is required for states to do so, as in some other countries.

Similarly, for these same general structural reasons, the constitutional issue surrounding a right of reply in the United States is the constitutional permissibility of a statutory right, rather than the constitutional requirement of such a statute (as in Germany)¹² or whether there is a direct constitutional duty imposed on newspapers (as in Turkey).¹³ And doctrinally, this U.S. constitutional issue in turn reduces to the question of whether there are sufficiently important public interests to justify limiting the First Amendment rights of the press. The argument that there *are* is that these interests are themselves in the

¹⁰ This latter point also distinguishes German abortion jurisprudence from that in the United States. The German Federal Constitutional Court has held not only that the fetus has a constitutional right to life, but also that the state has a constitutional duty to protect it. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (203) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1974, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (1) (F.R.G.), translated in *West German Abortion Decision*, 9 J. MARSHALL J. PRAC. & PROC. 605, 605 (1976) (Robert E. Jonas & John D. Gorby trans.). Nonetheless, in the United States, the Equal Protection Clause might be violated if a state chose to protect the right to life of all persons except fetuses. If so, this would be a form of conditional positive duty.

¹¹ I am, of course, referring to the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (holding that a state’s failure to protect a child from abuse by his father did not violate the Due Process Clause).

¹² See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 205 (262–63) (F.R.G.), translated in KOMMERS, *supra* note 3, at 405–06.

¹³ See TURK. CONST. pt. 2, ch. 2, § X, art. 32, translated in CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 6, at 11.

spirit, if not the letter, of the First Amendment itself¹⁴—namely, the goal of enhancing political debate. And, of course, in *Miami Herald Publishing Co. v. Tornillo*,¹⁵ the Supreme Court answered this question in the negative: a statutory right of reply is a constitutionally impermissible limitation on the First Amendment.¹⁶

II. Some Thoughts on Professor Youm's Claims

Contrary to Justice White in *Miami Herald*,¹⁷ Professor Youm takes a generally positive view of the effects on the press of the rights of reply recognized by the other countries and international regimes that he discusses. He states that rights of reply have had an overall positive, rather than chilling, effect on the press by invigorating coverage of political issues.¹⁸ It would be interesting to know if there is any detailed, systematic, empirical evidence pointing one way or the other on this issue, although obviously research is not an easy task. Perhaps a study of Florida before and after *Miami Herald*, or of Korea before and after the right of reply was established in 1980, might be useful in this regard.

As an *a priori* matter, the argument that a chilling effect will result does not seem entirely implausible. A newspaper might well be expected to choose to avoid what is essentially a *conditional* right of access by not printing the sorts of things that trigger the right. But even if there is a chilling effect, the appropriate response is not necessarily to reduce regulation, as the Supreme Court argued, but may be to increase it: to move from a conditional to an unconditional right, i.e., a general right of access. I will say more about this in Part III.

There is no doubt that, with respect to a right of reply, the United States takes a different position than many other countries and international regimes, as Professor Youm shows.¹⁹ What is interesting is that in the broader context of general U.S. First Amendment exceptionalism, the United States is not *as* exceptional here as in many other substantive areas, such as libel law and hate speech.²⁰ For, on

¹⁴ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1653–64 (1967).

¹⁵ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

¹⁶ *Id.* at 258.

¹⁷ *See id.* at 259–63 (White, J., concurring).

¹⁸ *See Youm, supra* note 1, at 1058–60.

¹⁹ *See Youm, supra* note 1, at 1063.

²⁰ For a helpful survey of U.S. First Amendment exceptionalism, see generally Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., 2005).

this particular issue, there is more of a split between civil-law countries on the one hand, and common-law countries on the other. Like the United States, the United Kingdom, Canada, and Australia do not have a right of reply. The reasons for this split would be intriguing to explore.

The mention of libel laws leads me to Professor Youm's statement that, at least in the United States, a right of reply is often justified by its proponents as a less speech-restrictive alternative to libel law.²¹ Interestingly, few of the countries with a right of reply seem to see it this way, for the comparative lineup tends to be (1) no right of reply and weak libel laws, as in the United States;²² (2) a right of reply *and* strong libel laws, as in Germany;²³ or (3) no right of reply and strong libel laws, as in the United Kingdom.²⁴ The fact that few, if any, countries have adopted the suggested position of a right of reply combined with weak libel laws suggests that the right of reply is generally seen not as an alternative, but as a supplement to substantial protection of reputational and other personality rights.

III. *Beyond a Right of Reply*

Given the extent of the actual differences on this issue, Professor Youm's paper quite understandably focuses specifically on the right of reply. Here, however, I want to take up one of the claims made by some countries in justification of the right of reply in order to make the case for pushing beyond it. The right is commonly claimed to serve two goals: (1) protecting the reputation and dignity of the individual about whom the press has made a false statement,²⁵ and (2) promoting a wider dissemination of ideas and more robust political debate.²⁶

²¹ See Youm, *supra* note 1, at 1060–61.

²² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (“[T]he Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”).

²³ See, e.g., Hamburgisches Pressegesetz [Press Law for the City of Hamburg], Jan. 24, 1965, GVBl. Hamburg at 15, art. 11, last amended Feb. 5, 1985, GVBl. Hamburg at 62 (F.R.G.).

²⁴ The United Kingdom essentially maintains the traditional common law of defamation in which the only substantive defense to the making of a defamatory statement is for the defendant to prove the truth of the statement. For an overview, see Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom’s Failed Reform of Defamation Law*, 49 *FED. COMM. L.J.* 621, 624–25 (1997) (citing cases).

²⁵ See, e.g., Youm, *supra* note 1, at 1045 (discussing Hungary’s justifications for its right of reply).

²⁶ See, e.g., *N.Y. Times*, 376 U.S. at 270.

I believe this second claim is not terribly plausible. As Jerome Barron pointed out in his original article that we are celebrating,²⁷ a right of reply alone is insufficient to bring about this second goal of a genuine marketplace of ideas. As he explained: “A group that is not being attacked but merely ignored will find [the right of reply] of little use. Indifference rather than hostility is the bane of new ideas and for that malaise only some device of more general application will suffice.”²⁸ For Professor Barron, this necessary device was a general and unconditional right of access—that is, a right not dependent on whether the press affirmatively prints something that injures an individual’s reputation.

Indeed, some countries that recognize a right of reply have also recognized that it is insufficient and have taken other steps to promote more robust political debate. So, for example, in France, the *Conseil constitutionnel*²⁹ has declared that “the pluralism of daily newspapers dealing with political and general information is an objective of constitutional value,”³⁰ and that, accordingly, the legislature is prevented from weakening existing statutory limitations on how much market control a single newspaper owner can acquire (currently fifteen percent).³¹ This strategy thus attacks the other side of the equation—not the danger for robust debate of government regulation, but of the increasing monopolization and shrinking of competition in the unregulated newspaper market. Similarly, the German constitutional court has interpreted the right of free speech and expression to impose positive duties on the state to ensure pluralism and a wide diversity of views in broadcasting, although not in the print media.³²

At this point, I would like to broaden the discussion by suggesting that the most fundamental problems in ensuring the robust political debate necessary for a well-functioning democracy take us beyond issues of the media and its regulation altogether to more general features of the American political landscape. Faced with the fact of a

²⁷ Barron, *supra* note 14.

²⁸ *Id.* at 1660.

²⁹ This is the institution granted limited powers to review the constitutionality of legislation in France.

³⁰ CC decision no. 84-181DC, Oct. 11, 1984, Rec. 84, *translated in part in* JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 170 (1992).

³¹ *See* CC decision no. 86-210DC, July 29, 1986, Rec. 111-12, *discussed in* BELL, *supra* note 30, at 171.

³² *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 205 (262-63) (F.R.G.), *translated in* KOMMERS, *supra* note 3, at 405-06.

narrow range of views presented in the media, should we automatically infer that the media is doing most of the narrowing, or are there perhaps other factors responsible for much of this screening even before the media comes into play? Here, I think comparative analysis points to a number of pre-media screening devices that artificially narrow the range and robustness of political debate in the United States, even beyond the institutional checks and balances mandated by the Constitution's designers.³³

Most broadly, the general role of the market in this market society forecloses or marginalizes a great many views and radically limits what can be a live political issue. If one accepts Steven Lukes's definition of power as the ability to keep issues off the political agenda,³⁴ then clearly the market has great power in this country. Such near-universal contemporary social programs elsewhere as a national health system and paid parental leave are not even plausible political options in the United States, where mandated universal private health insurance and unpaid leave mark the outer boundaries of the politically possible.

In addition, several extraconstitutional features of the political system pull in the direction of convergence and narrowing, rather than pluralism and diversity of views. First, the political logic of a two-party political system combined with a simple majority electoral regime is to create something of a Tweedledum and Tweedledee effect between the parties in one direction or another.³⁵ Moreover, the "winner-take-all" aspect of this electoral regime operates as a highly effective barrier to entry, restraining the emergence of new, competing voices.

Second, this convergence effect is further enhanced by the campaign-funding system. The exceptional inability to limit campaign expenditures because it violates the First Amendment,³⁶ combined with the ever-increasing centrality and cost of paid political advertisements, ensures that the robust debate is largely conducted about and among the various multimillionaires or hugely successful fundraisers who can afford to run for public office. In this context, when the same powerful, influence-seeking interest groups hedge their bets and fund both

³³ The constitutionally mandated system of checks and balances—including bicameralism, the presidential veto, and judicial review—functions to require consensus beyond a simple legislative majority.

³⁴ STEVEN LUKES, *POWER: A RADICAL VIEW* 37 (2d ed. 2005).

³⁵ In recent years, this narrowing effect has veered toward the conservative end of the spectrum, whereas in the 1960s and 1970s it veered in a more liberal direction.

³⁶ See *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976).

sides in primaries and general elections, it is unsurprising if candidates' platforms are mostly variations on a theme, while unfunded views remain buried.

Finally, the U.S. presidential system itself discourages vigorous political debate by isolating the incumbent from institutional structures of ongoing political accountability and by pressuring those who are left to question him or her into a cooperative, pliant frame of mind. Absent any sort of required appearances before the legislature (other than the State of the Union monologue), the President typically tolerates only deferential handling by the media during purely voluntary press conferences, wielding as he does the threat of canceling press passes and appearances.

In sum, while a general, unconditional right of access to the media may well be necessary to solve the problem of private restrictions on free expression, it is unlikely to be sufficient to generate genuinely robust and wide-open debate within a broader political culture and system that functions to do largely the opposite.