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Horizontal Rights:

Constitutionalism and the Transformation of the Private Sphere

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Horizontal Rights:
Constitutionalism and the Transformation of the Private Sphere

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Abstract

Horizontal Rights:
Constitutionalism and the Transformation of the Private Sphere

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Though jurists have traditionally understood the constitution as a separate kind of law that obligates only the state, courts increasingly understand constitutions as creating obligations for private actors such as private individuals, businesses, schools, and hospitals. The practice of applying rights "horizontally" to private actors raises a range of questions from the theoretical to the practical and from the jurisprudential to the political.

I argue that we better understand the practical and political implications of such "horizontal rights" by studying them through the lens of republican political theory. Specifically, republicanism grounds (and foregrounds) the solidarity between citizens and the uniformity between public and private spheres that horizontality ascertains. Applying this framework, I examine constitutional debates, court cases, and political histories to show how courts have applied rights horizontally across time, place, and subject-matter. By situating my study in the larger historical-political context of each place, I examine the conditions that surround the horizontal application of constitutional rights to individual citizens and other private actors.

Chapter I lays out this theoretical grounding, drawing on classical and neo-republican theory to demonstrate the explanatory power of this framework. In the next two chapters, I examine the development of horizontal rights in national contexts, contrasting

efforts to bring solidarity to the private sphere in India and the United States (Chapter II), and comparing attempts to establish uniform standards to govern public and private spheres in Germany and South Africa (Chapter III). Chapter IV extends this discussion to the European Union, considering how the republican framework for horizontal effect accounts for duties and standards occurring across national boundaries.

In accounting for the practical power of courts to determine the rights and duties of private entities, this project contributes to our knowledge of how constitutional politics shape conceptions of public and private in our increasingly pluralistic world. This research engages and contributes to law and courts scholarship in political science. However, its findings will be of interest to all scholars interested the relationship between the state and civil society.

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Introduction

How far do rights extend? Put differently, *who* is responsible for protecting and promoting constitutional rights? Traditionally, a constitution was a source of obligations for state actors, constraining government from violating rights, for example, or charging government to take positive action to support rights. As constitution-makers have undertaken more ambitious projects in recent decades, so too have understandings of governments' obligations vis-à-vis rights expanded.[1] However, this expansion of the objects of constitutions does not by itself account for a shift in the *subject* of constitutions, that is, whom constitutions address. Indeed, courts and constitution-makers have increasingly applied constitutional rights *horizontally* to obligate private actors, altering the relationships that constitutional rights engender.[2]

Unsurprisingly, such a significant shift has faced pushback in scholarly and legal circles. In both venues, objections frequently stem from the fact that horizontal effect challenges some of the conventional understandings of liberal constitutionalism, namely, that we ought to maintain separate public and private spheres and, relatedly, that only the state should be responsible for upholding such public commitments as the constitution articulates. Of course, law has always been in the business of regulating private spaces and judges have long balanced claims of private actors against each other. The difference

[1] Mark Tushnet, *Weak Courts, Strong Right*s, Princeton: Princeton UP, 2008; David Robertson, "Thick Constitutional Readings: When Classical Distinctions are Irrelevant," *Georgia Journal of International and Comparative Law*, Vol. 35, 2007.

[2] Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa*. Cape Town: Juta, 2012, 267.

with horizontal effect comes in the fact that private actors incur some responsibility for and accountability to the constitution itself.

Whereas both critics and proponents tend to assume a liberal framework in thinking about horizontal effect, this project proposes an alternative theoretical framework for understanding this development and understanding it in the larger tradition of constitutionalism. In particular, I argue that horizontal effect can be understood in terms of republicanism, that is, classical and neo-republican political theory. A republican framework introduces new concepts and theoretical points of reference to the discussion that better account for the normative shift that horizontal effect entails. In some instances, this framework confirms a tension between horizontal effect and prior understandings of constitutionalism, while in others it reveals how aspects of the constitutional projects themselves depart from traditional liberal premises.

Though such a desire to align the private sphere with public goals or to establish constitutional duties of individuals is not necessarily irreconcilable with the conventional liberal account of constitutionalism, neither is it obviously native to it. The consistent decisions of American jurists to circumscribe the guarantees of the Fourteenth Amendment to state actors bears this out.[3] Given this uncomfortable fit between the conventional narrative of liberal constitutionalism and horizontal rights, it is unsurprising that this topic has received attention in the legal scholarship, as scholars seek to defend, criticize, and simply understand this legal doctrine.

[3] See the *Civil Rights Cases* (1883), *DeShaney v. Winnebago County* (1989), *U.S. v. Morrison* (2000).

For a long time, scholars took for granted the logic of liberal constitutionalism as expounded by such figures as John Locke.[4] If we grant that the function of government is limited to such objects as ensuring security and protecting individual rights, then it seems clear that the primary purpose of a constitution is to hold government accountable to these ends and these ends only. In the American context, this understanding of constitutions is evinced by the language of such provisions as the Fourteenth Amendment ("No State shall make or enforce any law..."), as well as subsequent interpretations of this Amendment, from the *Civil Rights Cases* of 1883 to *DeShaney v. Winnebago County* in 1989 that subscribe to a *state action* doctrine.

As increasingly more countries adopted constitutions in the twentieth century, some would follow the United States, at least initially, in limiting most provisions of their constitutions to the actions of the state. However, after much debate, Germany adopted the concept of *Drittwirkung*, or indirect third party effect,[5] in spite of the skepticism of some scholars and jurists. In particular, practitioners of private law had an institutional interest in keeping the private from being dominated by public law, and so insisted that any doctrine of horizontality bear on the private sphere indirectly (mediated through private law) rather than directly limiting the actions of individuals.[6] This goes to show

[4] John Locke, *Second Treatise of Government*, Ed. C. B. MacPherson, Indianapolis: Hackett, 1980.

[5] Renata Uitz, "Introduction," *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005.

[6] Mattias Kumm and Victor Ferreres Comella, "What is So Special about Constitutional Rights in Private Litigation?" *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review*, Vol. 102, 2003.

how even those countries that have adopted horizontal effect often attempt to uphold the conventional division between public and private, to some degree.

Regardless of any hesitance and qualification, however, the concept of horizontality had entered onto the constitutional scene, leading to much scholarship on the subject in the law journals. Scholars have sought to understand the effects and limits of horizontality, as well as justify this innovation in constitutionalism. Today, no less than forty-eight national constitutions explicitly state that rights bind private actors.[7] And this number does not include the several other countries whose constitutions point toward horizontality but depend on the courts to develop it more fully, such as Germany and India discussed herein. Moreover, the UK's passing of the Human Rights Act led scholars to ask what rights obligations EU law entails for private entities, a debate that has culminated in recent decisions of the European Court of Justice.[8]

While still acknowledging the tensions that horizontality creates within the long tradition of liberal constitutionalism, the general tendency of scholarship in the last couple of decades is to be more sympathetic to horizontal effect. In the United States context, the case *Shelley v. Kraemer* (1948)[9] initially illustrated that decisions

[7] Comparative Constitutions Project, "Binding effect of constitutional rights," *Constitute*, www.constituteproject.org/search?lang=en&key=binding&status=in_force&status=is_draft, 8 Jul. 2019.

[8] See for example Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act," *Public Law*, 1998*;* Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford UP, 2006. See also the three edited volumes on the subject of horizontality published in the years following the HRA: *Human Rights in Private Law*, Ed. Daniel Friedmann and Daphne Barak-Erez, Portland, OR: Hart, 2001; *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005; *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

[9] In this case, the U.S. Supreme Court decided it could not enforce a racially restrictive covenant because of the requirements of the Equal Protection Clause of the Fourteenth Amendment.

approximating horizontal effect were conceivable, and perhaps even desirable in the United States. Erwin Chemerinsky would make this very argument, stating that the state action doctrine is "anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish."[10] Moreover, in the context of the European Union, Eleni Frantziou maintains that the question of whether to apply rights horizontally ultimately amounts to a question of what "kind of society the EU is setting itself out to be and the values that lie in its core…."[11]

More recently, scholars have made various arguments to illustrate how horizontality is already in effect in U.S. Constitutionalism, or not a particularly novel innovation in constitutionalism in general. Stephen Gardbaum argues that Article VI's requirement that the Constitution be the "Supreme Law of the Land" effectively establishes indirect horizontal effect insofar as the Constitution must control the content of private law.[12] Moreover, in his book *Weak Courts, Strong Rights*, Mark Tushnet argues that whether a country has a formal state action doctrine or a doctrine of horizontal effect is of little import. In either case, a country maintains certain "background rules" of private law that necessarily confront and so already answer the substantive questions about the limits of private action and how public law bears on private relations.[13] Finally, in the German context, Mattias Kumm argues that

[10] Erwin Chemerinsky, "Rethinking State Action," Nw. U. L. Rev. Vol. 80, 1985, 506.

[11] Eleni Frantziou, The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality," *European Law Journal,* Vol. 21, No. 5, 2015, 675.

[12] Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review*, Vol. 102, 2003.

[13] Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008.

horizontality is just another development in the larger move toward "total constitutionalism" in contemporary law and politics. Denying that horizontality is particularly novel, Kumm sees it almost as inevitable as countries increasingly adopt more ambitious socio-economic rights in their constitutions.[14]

In light of the challenge that horizontal effect potentially poses to the conventional liberal logic, it is not surprising that legal scholars have invested so much energy in trying to explain how this phenomenon does (or does not) comport with the larger tradition of constitutionalism. Amid such arguments, I argue that we can make sense of this development in the rights tradition by understanding horizontality as republican.

Chapter I argues that horizontal effect is a republican vein in liberal constitutionalism by demonstrating that two key characteristics of horizontal effect approximate republican ideas. First, horizontal effect entails *uniformity* between the standards that govern public and private spaces. This concept of uniformity does not mean that public and private actors are subject to the constitution in exactly the same way, but rather that the same constitutional commitments serve as a *source* of obligation for public and private actors alike. This uniformity resembles the republican understanding of polity and public life as all-encompassing, in which public and private are not so distinct but are both subject to promoting the common good. Second, horizontal effect entails *solidarity* in the way it makes citizens responsible for each other. It creates individual duties out of public values that, previously, were understood to

[14] Mattias Kumm, "Who's Afraid of the Total Constitution?" *German Law Journal,* Vol. 7, No. 4, 2006.

obligate only the state. That Mary Ann Glendon finds a conception of duty so conspicuously absent in the United States is not all that surprising in light of enduring tendency to emphasize only "rights talk."[15] Indeed, the idea that citizens may have duties rooted in public commitments is much more at home in a republican framework. However, a language of responsibility is injected into constitutional understandings when horizontal effect creates individual duties out of the same rights obligations that bind the state.

Given horizontal effect's resemblance to republican theory, why describe it as a republican vein *within liberal constitutionalism* rather than simply republican? Even if one concedes that horizontal effect itself departs from some aspects of the conventional liberal narrative, arguably, it still operates within a liberal framework. Indeed, the practice of horizontal effect depends on such concepts as constitutionalism and rights, and even public and private. For example, the standards that courts apply horizontally to private actors emerge from entrenched principles of a constitution (typically understood as a liberal construct), rather than a less determined republican politics. Additionally, while horizontal effect does engender individual duties, these duties still emerge from the prior concept of rights (another liberal concept). On the other hand, horizontal effect necessarily challenges any belief of rights as trumps. This is because horizontal effect always involves balancing the rights of different private parties against each other.[16] All

[15] Mary Ann Glendon, *Rights Talk*, New York: Free Press, 1993.

[16] Similarly, one might consider the limitations clauses in some constitutions as potentially republican and perhaps even facilitating horizontal effect. Indeed, such clauses necessarily entail the balancing of rights against other rights and interests.

this is to say that while republican theory is a useful lens through which to understand horizontal effect, this framework ought not to be pushed further than is useful. Indeed, insofar as jurists and constitutional framers have not, as a historical matter, had republican political theory in mind when introducing horizontal effect, this comparison is likely to have some limits.

After arguing for a republican conception of horizontal effect, Chapter II and III take up in turn each of the two characteristics of solidarity and uniformity, showing how they occur in actual cases of horizontal effect. In particular, I examine solidarity in comparing the United States and India (Chapter II), and uniformity in comparing Germany and South Africa (Chapter III). This structure is not to suggest that only solidarity appears in the United States and India nor that only uniformity appears in Germany and South Africa. Both solidarity and uniformity will be present in each instance that rights are applied horizontally insofar as they are component, even overlapping, characteristics of horizontal effect in general. Nevertheless, the different circumstances of these countries prove useful to illustrate these respective characteristics. Although each pairing may highlight one over the other, therefore, both concepts are present in every case of horizontal effect.

Additionally on the logic of case selection, each pair of countries are similar in certain crucial respects. The United States and India both committed to a new equality, contra their entrenched systems of caste and slavery. Germany and South Africa both committed to such principles as dignity that promised wide and deep transformation in their afflicted polities. While these parallels are not necessarily similar enough to

constitute "most similar cases,"[17] per se, they represent in each pair sufficiently similar constitutional goals, the development of which may be meaningfully compared while also accounting for the particulars of each place in a small-n analysis. I thus observe the implementation and various understandings of these broad goals as articulated over time in various fora and primarily in the courts. In this way, we see differences in the interpretations of their seemingly similar constitutional projects and, moreover, how such differences are closely tied to the development of horizontal effect. Indeed, these comparisons reveal how horizontal effect (and, more generally, the relationship of public and private spaces) is a constitutional question in the highest sense.

In speaking about interpretations of constitutional projects, I do not mean to downplay the very real possibility of motivated reasoning as, for example, in the influence of an enduring racism in the United States Supreme Court's decision in the *Civil Rights Cases,* for example. For better or worse, such external factors are amalgamated with interpretation and are often key to understand the defining particularities of a place. Therefore, understanding constitutional interpretation in this broad way, we may observe how particular interpretive and implementing choices related to horizontal effect find a more or less comfortable fit in a constitution, and how these choices subsequently compound and shape politics more or less easily.

Chapter II's comparison of the United States and India illustrates the connection between horizontality and solidarity. Out of long histories of slavery and caste, both

[17] Ran Hirshl, "On the Blurred Methodological Matrix of Comparative Constitutional Law," in *The Migration of Constitutional Ideas*, Ed. Sujit Choudhry, Cambridge: Cambridge UP, 2017, 48-51

countries committed to equality in their constitutional projects. The Indian vision of equality was more expansive, however, to include from the outset the mutual cooperation of private actors or what I have called solidarity. That solidarity was a part of the constitutional project directly led to the decision to include strong foundation for horizontal effect in the Constitution itself. Subsequently, this existing foundation for horizontal effect facilitated the continued pursuit of solidarity in the long term. Something like solidarity might have also comprised the meaning of the Fourteenth Amendment in the United States Constitution. However, the Court stymied this interpretation in the 1883 *Civil Rights Cases*, a decision which the Court could never quite recant, even over a century later. Instead, the state action doctrine hardened in place of legislation that would have introduced horizontal effect aimed toward racial equality in private spaces. The legacy of this initial decision culminated in Congress's decision to ground the 1964 Civil Rights Act in its power to regulate commerce since the equal protection clause could not serve as a source of obligation for private actors. In this way, the state action doctrine still entails a certain detachment of individuals from public projects.

In a comparison of Germany and South Africa, Chapter III proceeds by illustrating the connection between horizontal effect and uniformity. Following such atrocities as the Holocaust and Apartheid, Germany and South Africa each sought to transform their societies, adopting new constitutions with the aim of preventing similar violence in the future. Indeed, both countries adopted horizontal effect early on with the express intent that constitutional values would come to shape society as a whole. The

particular vision that comprised each constitution differed in important ways, however, thus influencing the development of horizontal effect as well. Specifically, South Africa's Constitution was rooted in a new egalitarianism, the implementation of which could not but affect private actors. And indeed, the reach of horizontal effect has continually expanded over the Constitution's short history. On the other hand, Germany's Basic Law was largely consistent with the country's enduring civil law system and classical liberal tradition which, on balance, tend to privilege such principles as *Privatautonomie* rather than anything beyond formal equality. While the German Constitutional Court maintains a doctrine of horizontal effect, the very content of the Basic Law has restricted the ways in which horizontal effect expanded. Many in Germany resisted the European Union's expansion of anti-discrimination measures, for example, because the polity remained committed to distinguishing the values that governed public from those that governed private spaces. In comparing South Africa and Germany, we thus see the fundamental connection between horizontal effect and uniformity. While both countries genuinely aimed to transform their respective societies, uniformity was integral to the South African constitutional order to a much greater degree and supported the continued, natural growth of its doctrine of horizontal effect.

In both pairings of countries, practices of horizontal effect emerge from and expand according to the constitutional vision of a place. More to the point, the introduction and expansion of horizontal effect in each of these contexts tracks the constitutional vision's relative congruity with republican principles. The solidarity that the Indian Constitution seeks has justified the more frequent application of horizontal

effect, and the more thoroughgoing uniformity that South Africa's egalitarian vision requires laid groundwork for its ever-expanding practice of horizontality. Interestingly, we see a certain self-consciousness in the way these constitutional visions break from existing paradigms. Not only did the Indian framers adopt horizontality with the positive goal of achieving solidarity, but with explicit intention of rejecting the United States' limited formulation of equality in the Fourteenth Amendment. Moreover, South African framers and jurists expanded horizontality not only because they intended constitutional commitments to serve as a uniform set of values for the polity as a whole, but because they saw that Germany's more limited practice of horizontal effect had neither sought nor achieved the same transformation that constituted the South African vision.

Such episodes have more than symbolic significance. Indeed, they reveal intentional breaks from practices and conventional wisdoms that previously defined constitutionalism. While we may also see horizontal effect in more traditional constitutions, disharmonies[18] do seem to emerge in places with stronger liberal predilections. That such liberal predilections are obstacles to horizontal effect suggests that actors operate according to a different logic when they apply rights horizontally. Thus, the same characteristics that distinguished horizontal effect as republican in the abstract according Chapter I, also tend to the expansion of horizontal effect as a matter of fact as demonstrated in Chapters II and III.

Chapter IV bookends these case studies by considering horizontal effect in the European Union. The degree to which the Charter of Fundamental Rights of the

[18] Gary Jacobsohn, *Constitutional Identity*, Cambridge: Harvard UP, 2010.

European Union applies rights horizontally to create duties of citizens has been long-contested in both law and scholarship. The issue raises fundamental questions about the theoretical and practical implications of attaching obligations to citizenship across national boundaries. To the extent that the EU challenges the bounds of political community and citizenship, it is a critical case for my larger project of understanding horizontal effect in the light of republican political theory. Indeed, the way the debate over horizontal effect in the EU has unfolded, both in scholarship and in cases, tracks larger questions about the character and aspirations of European unity. More specifically, it is because the status of the EU as a political community and European citizenship are contested that we see scholars and jurists arguing about horizontal effect in the particular ways that they do. The republican lens is informative in this context to the extent that it foregrounds the connection between horizontal effect and other foundational issues, namely the prospect of a European *res publica* and a European citizenry.

What is clean in theory is often less precise in practice. By examining how horizontal effect has developed in actual places, we may appreciate the very different starting points and particular aspirations of each polity. In this way, we may also appreciate the politics involved with horizontal effect, a phenomenon that, up to this point, has primarily been studied in law journals. Though a fairly recent development, horizontal effect alters the terrain on which constitutional politics unfolds and the calculations of judicial decision-making across areas of law (including common law and private law). Moreover, to the extent that horizontal effect departs from the conventional liberal account of constitutionalism, it raises questions about how private actors will

relate to public commitments in the long-term, and whether this republican vein will continue to play a larger role in constitutionalism.

I. A Republican Vein in Liberal Constitutionalism

The classical liberal tradition has typically understood constitutions as protecting individuals from the encroachments of government. Of course, constitutions empower government, but they also seek to limit that power through checks and balances and, almost always, through enumerating a list of justiciable rights obligating the state.[1] Since the post-World War II era of constitution-making, increasingly more countries have included socio-economic or positive rights in their constitutions in addition to the classical political and civil rights. In either case, however, a constitution establishes a *vertical* relationship according to which government must respect and secure rights on behalf of the people. Ultimately, this vertical relationship leaves space for a separate private sphere in which individuals may pursue their own interests and projects free of government involvement, though admittedly supported by government structures.

Despite this conventional liberal account, constitutional framers and courts in some countries have given horizontal effect to certain constitutional rights, interpreting constitutional commitments to create duties not only of the state but of private entities or non-state actors as well. According to the Indian Supreme Court, for example, the constitutional right to equality creates rights obligations of corporations vis-à-vis workers.[2] According to the South African Constitutional Court, landlords may have

[1] Speaking of the purpose of the U.S. Constitution in Federalist 51, for example, Madison explains, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (Madison 319)

[2] *People's Union for Democratic Rights v. Union of India,* 3 SCC 235 AIR [1982] SC 1473.

positive obligations to ensure their tenants live in conditions consonant with human dignity.[3] Some scholars understand this move to give rights horizontal effect as a natural development given the more ambitious rights objectives of modern constitutions,[4] and given the larger trends toward making many political questions also constitutional questions.[5] Some further argue that offering constitutional remedies for rights abuses in the private sphere has the potential to bolster democratic commitments.[6] As mentioned in the Introduction, Erwin Chemerinsky indicts the classic vertical model embodied in United States constitutionalism as "anachronistic, harmful to the most important personal liberties, completely unnecessary..."[7] Nevertheless, others still worry that the shift to horizontality excessively empowers courts, threatening democratic political processes and the individual liberty people enjoy in private spaces.[8] They maintain that even while

[3] *Daniels v. Scribante and Another,* CCT50/16 [2017] ZACC 13.

[4] Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008.

[5] Mattias Kumm, "Who's Afraid of the Total Constitution?" *German Law Journal,* Vol. 7, No. 4. 2006. For an account of this phenomenon more general than the horizontality debate see, Ran Hirschl, *Toward Juristocracy*, Cambridge, MA: Harvard UP, 2004.

[6] The UK's passing of the Human Rights Act, for example, has led scholars to ask what rights obligations Strasbourg jurisprudence entails for private entities. See Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act," *Public Law*, 1998*;* Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford UP, 2006. See also the three edited volumes on the subject of horizontality published in the years following the HRA: *Human Rights in Private Law*, Ed. Daniel Friedmann and Daphne Barak-Erez, Portland, OR: Hart, 2001; *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005; *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

[7] Erwin Chemerinsky, "Rethinking State Action," Nw. U. L. Rev. Vol. 80, 1985, 506.

[8] See Bruno DeWitte, "The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law," *Citizenship Studies* 13.5, 2009, 515-525; Stephen Ellmann, "A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors," 45 *New York Law School Law Review*, 2001; Cass Sunstein, "On Property and Constitutionalism," 14 *Cardozo Law Review*, 1992, 921-922.

The consistent decisions of U.S. jurists to circumscribe the guarantees of the Fourteenth Amendment to "state actors" illustrates this line of thinking. See the *Civil Rights Cases* (1883), *DeShaney v. Winnebago County* (1989), *U.S. v. Morrison* (2000). Contrast the accounts of such decisions with Stephen Gardbaum's contention that Article VI's requirement that the Constitution be the "Supreme Law of the Land"

horizontal effect may produce positive outcomes, it depends on eroding the very separation between the public and private spheres that has traditionally founded liberal constitutionalism.

The fact that this phenomenon has generated such debate with respect to the purpose and limits of constitutionalism points toward the need for explanation beyond what can be offered by the conventional liberal wisdom, that constitutions regulate and limit only state actors. That horizontal effect departs from these liberal foundations thus warrants a search for alternative sources of explanation and even justification. The scholar or jurist committed to horizontal effect can no longer describe constitutionalism simply as obligating government to certain ends in a way that creates a separate private sphere of individual liberty. How, then, can we understand constitutionalism when constitutional commitments that oblige the state also oblige non-state actors, when the private comes to be governed by the same principles that govern the public? In the republican tradition one finds such a source of justification.

In this chapter, I identify two features of horizontal effect that garner support from republican principles. First, consider how horizontal effect obligates citizens to abide by public commitments and projects. Indeed, it incorporates private actors into the constitutional project directly in a manner that the vertical model does not. At most, the vertical model could bring private actors closer to public values through ordinary legislation, but this occurs wholly at the discretion of legislators and not as a result of the

effectively establishes indirect horizontal effect insofar as the Constitution must control the content of private law ("The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review*, Vol. 102, 2003).

constitution's requirements. In this obligation to constitutional principles and projects, horizontal effect reflects an affinity with the republican emphasis on "the public thing," best summed up in the commitment to the common good that recurs in republican thought. This is not to say that either horizontal effect or the republican tradition collapses the private into the public, but only that private entities are not cast as existing beyond or strictly separate from the public realm. I describe this orientation of private entities toward public projects in horizontal effect as a kind of *uniformity* in obligation to the constitution across spheres, one that resembles the republican ideal that the common good should move the polity understood as a whole.

In addition to this orientation of private entities toward public projects, horizontal effect gives rise to duties between private individuals. This *solidarity* among people for which horizontality calls resembles the republican idea that people possess individual duties to others by virtue of being equal citizens of a common polity. Of course, other traditions also call for certain dispositions of citizens. William Galston and Stephen Macedo have argued, for example, that liberalism requires particular virtues to ensure a requisite respect and tolerance among citizens.[9] However, these conceptions are more typically couched as individual virtues rather than public *duties* that citizens have toward the polity and toward one another, a formulation more naturally supported by republicanism. In these features of uniformity and solidarity, therefore, horizontal effect

[9] Stephen Macedo, *Liberal Virtues*, Oxford: Oxford UP, 1990; William Galston, "Liberal Virtues and the Formation of Civic Character," in *Seedbeds of Virtue*, Ed. Mary Ann Glendon and David Blankenhorn, Lanham, MD: Madison Books, 1995; see also *Liberal Pluralism*, Cambridge: Cambridge UP, 2002; Iseult Honohan, "Educating citizens: Nation-building and its republican limits," in *Republicanism in Theory and Practice,* Ed. Iseult Honohan and Jeremy Jennings, Oxfordshire, OX: Routledge/ECPR Studies in European Political Science, 2006, 203.

departs from certain ideals of liberal constitutionalism but finds grounding in the logic and values commonly associated with republicanism.

I begin with an overview of the liberal and republican traditions in order to distinguish them and describe each's justificatory core in their respective conceptions of liberty. I then elaborate how the particular principles of the common good and solidarity manifest in republican and neo-republican thought. This discussion sets up the core of the chapter, that particular features and the general practice of horizontal effect may find grounding in these republican principles. The final section raises potential republican concerns with the way horizontal effect results from judicial action, but also shows how some republicans have defended a role for courts on the very basis of republican liberty.

Distinguishing the Liberal and Republican Traditions

Insofar as this chapter argues horizontal effect reflects a republican logic in contrast with the conventional liberal understandings of constitutionalism, it depends on a comparison between liberalism and republicanism. Many scholars show how these different traditions have manifested in political histories in complex ways.[10] Though I do not engage this debate over the relationship between liberal and republican thought, nor

[10] On the liberal tradition in American political-constitutional history, see Louis Hartz, *The Liberal Tradition in America,*1955; Mary Ann Glendon, *Rights Talk,* New York: Free Press, 1991. Thomas Pangle, *The Spirit of Modern Republicanism,* Chicago: Chicago UP, 1990; Herbert Storing, "Slavery and the Moral Foundations of the American Republic," in *Toward a More Perfect Union*, Ed. Joseph Bessette, 1995. On the republican tradition, see Bernard Bailyn, *The Ideological Origins of the American Revolution,* Cambridge, MA: Belknap Press, 1992. Gordon Wood, *The Creation of the American Republic,* Chapel Hill: North Carolina UP, 1998; J. G. A. Pocock, *The Machiavellian Moment*, Princeton: Princeton UP, 2003; Rogers Smith, *Civic Ideals*, New Haven: Yale UP, 1999. See also the concept of a "republican synthesis" in Robert E. Shalhope, "Toward a Republican Synthesis," *William and Mary Quarterly*, Vol. 29, No. 1, 1972, 49-80.

the role of these traditions in broader histories, as of the American founding,[11] my argument does depends on the recognition that these traditions are different and distinguishable. This point is not predicated on any claim that these traditions are irreconcilable either in theory or in practice, but is fully compatible even with subtle accounts arguing that liberalism is nested within republicanism or vice versa. Joseph Postell offers such an account, demonstrating how republicanism and liberalism equipped Americans in the Early Republic with mutually reinforcing justifications to regulate various industries. Nevertheless, such accounts still depend on understanding liberalism and republicanism as different traditions defined by different concepts and commitments.

How then do these traditions differ? In some ways this may seem a vain effort as the history of political thought has seen many instantiations of each. However, both liberal and republican scholars have largely converged on the proposition that the fundamental and encompassing difference lies in how each tradition understands liberty.[12] It is the definition each offers of liberty that is most fundamental and that serves to distinguish one from the other most precisely. The tradition one finds most compelling, therefore, will largely depend on what conception of liberty one thinks is more accurate. Moreover, and more to the point of the present argument, the extent to which one

[11] Joseph Postell, "Regulation During the American Founding: Achieving Liberalism and Republicanism," *American Political Thought*, Vol. 5, Winter 2016, 84.

[12] This, however, opens up further debates about how properly to understand republican liberty. Contrast, for example, the accounts of liberal thinker Isaiah Berlin and republican thinker Philip Pettit (Isaiah Berlin, "Two Concepts of Liberty" (1958), *Four Essays on Liberty*, Oxford: Oxford UP, 1969; Philip Pettit, *Republicanism: A Theory of Freedom and Government,* Oxford: Clarendon Press, 1997; Philip Pettit, *On the People's Terms*, Cambridge: Cambridge UP, 2012).

endorses horizontal effect may in part depend on the extent to which one grants something like a republican conception of liberty.

The liberal tradition grew out of various wars that plagued Europe in the years leading up to the Enlightenment. Such political philosophers as Thomas Hobbes[13] and John Locke[14] sought a new basis on which to ground government authority, and so developed their theories of the state of nature. In each version, people exist in perfect freedom before the establishment of government, enjoying certain pre-political natural rights. However, the state of nature ultimately proves inconvenient at best and dangerous at worst, as no institutions exist to enforce these rights. Individuals, thus, contract with one another, ceding some of their natural rights to a governmental authority in exchange for order and protection. It is at this point that Hobbes and Locke crucially part ways. While Hobbes thinks it necessary to empower an absolute sovereign simply to get people to live in relative peace, Locke develops the liberal premise that government can and ought to be limited, acting within certain constitutional powers to protect people's rights but no further. On Locke's telling, government exists for the sole purpose of protecting rights and so may not act beyond this designated purpose. Out of all this comes the liberal understanding of freedom, variously called negative liberty,[15] freedom as non-interference,[16] the right to be let alone.[17] Government exists so that people may be let alone, and not face unwarranted interference in exercising their rights. Moreover, people

[13] Thomas Hobbes, *Leviathan*. Ed. Richard Tuck. Cambridge: Cambridge UP, 1996.
[14] John Locke, *Second Treatise of Government,* Ed. C. B. MacPherson, Indianapolis: Hackett, 1980.
[15] Berlin.
[16] Pettit 1997, 2012.
[17] Louis Brandeis and Samuel Warren, "The Right to Privacy," *Harvard Law Review*, Vol 4, 1890.

adopt constitutions to ensure that government operates within these designated limits, thus leaving space for a separate private sphere in which individuals may go about their lives without government interference.

Liberty in republicanism comes from a very different place. Classical republicanism finds its start in the Greco-Roman world with such philosophers as Aristotle, Polybius, and Cicero. In *The Politics*, Aristotle describes man as *zoon politikon*, a being that requires political community in order to flourish. Anyone that can flourish, let alone survive, without community must be either god or beast, he concludes.[18] Therefore politics is natural in a way that it is not for liberal social contract theorists and, indeed, is necessary for authentic freedom. For many republicans, freedom comes in the ability to engage in public life on an equal basis with one's fellow citizens, to debate the requirements of the common good, the laws under which citizens live, and the way forward for the polity.[19] From this common structure of republics, some conclude that republican freedom consists in "mastery over the self" and, by extension, an ability to shape and control the polity's way of life.[20] On the other hand, others insist that there is a more fundamental core to republican freedom in the concept of freedom as non-domination.[21] Laborde and Maynor sum it up: "In the old republican adage, the people want not to be a master, but to have no master."[22] The republican citizen is free,

[18] Aristotle, *The Politics,* Ed. Stephen Everson, Cambridge: Cambridge UP, 1996, I.1253a 2-3.
[19] Honohan.
[20] Berlin.
[21] Pettit 1997, 2012. Below I'll illustrate how freedom of nondomination has been understood differently.
[22] Cecile Laborde and John Maynor, *Republicanism and Political Theory*, Hoboken, NJ: Wiley-Blackwell, 2008, 11.

therefore, insofar as he or she is equal among his or her fellow citizens and not subject to arbitrary or alien rule. Moreover, insofar as the goal is non-domination and domination is conceivable in both public and private life (imperium and dominium, respectively),[23] republican liberty requires that law be able to govern all spheres of life. Neo-republican scholarship, as represented by Philip Pettit, follows this more negative cadence of freedom as non-domination. Though this formulation tries to carve out more space for liberty in private spaces, it also recognizes the need for law to intervene in private life when to prevent domination.

The Common Good and Solidarity in Republican Thought

In order to show how horizontal effect may find support in republicanism and this understanding of freedom as non-domination, it is necessary to exposit the particular principles of republicanism that can do this heavy lifting. This section elaborates the republican concepts of the common good and duty among citizens, showing how they emerge from a foundation of freedom as nondomination. This discussion, thus, lays the groundwork to connect these principles with horizontal effect in the section that follows.

The very purpose of the polity, as Aristotle understands it, is to facilitate people's achievement of their human good of virtuous living.[24] More precisely, the purpose of the polity is to pursue the *common* good, or the good of the community taken as a whole, above any one person's individual good. He states, "For even if the good is the same for a

[23] Pettit 1997, 36.
[24] Aristotle, *Politics* I.1252a 1-6.

city as for an individual, still the good of the city is apparently a greater and more complete good to acquire and preserve. For while it is satisfactory to acquire and preserve the good even for an individual, it is finer and more divine to acquire and preserve it for a people and for cities."[25] In this way we see an early articulation of the republican idea that there exists a discernible good of the community, as well as the republican ideal that the promotion of this good is the primary function of politics. The common good may be understood in contrast with private interests or even the aggregate of individual interests. Indeed, a republican conception of the common good refers to what is good for a community as such, the idea being that everyone ought to contribute to the good of the community and that the community will bear on each individual's good in turn. This concept is so constitutive of Aristotle's understanding of a well-ordered polity, that he employs it as *the* standard by which to distinguish good regimes from bad regimes, true forms of government from perversions.[26]

In Aristotle we already see core concepts of what would develop into republican political theory. First, Aristotle gives us an initial account of human beings as having a particular good that consists in virtue and in living the political life; second, Aristotle understands the common interest or common good as, in some ways, prior to the individual good. Even as republicanism has evolved, these points have been represented consistently in the various iterations of the tradition. Some even argue that one can only be a republican philosopher or a republican statesman in a limited sense if one does not

[25] Aristotle, *The Nicomachean Ethics*, Trans. Terence Irwin, Indianapolis: Hackett, 1999, I.2. 1094b 7-11; see also *Metaphysics,* Book VIII, 1045a 8-10.

[26] Aristotle, *Politics* III.1279a 29-33

accept these premises.[27] For others, the republican understanding of the common good is less a matter of teleology and more a matter of what is necessary to achieve authentic freedom. Daly and Hickey associate the more teleological understanding with Aristotle, and the more liberty-centered interpretation with Roman thought, citing Philip Pettit's conception of freedom as nondomination as an exemplar of this Roman republicanism.[28] Such differences in republican thought will reemerge below in considering how republicanism may ground horizontal effect and which versions of republicanism fulfill this role best.

Unlike Aristotle, Machiavelli did not base his thought on any particular understanding of the human good. However, "the public thing" features prominently in his republicanism, as Machiavelli considers citizens' ability to debate vigorously the common good of the polity an essential feature of republican freedom.[29] S. M. Shumer explains:

> People have different values and different perspectives rooted in their individual lives, and, too, they compete for the same scarce values. To destroy that conflict, even to seek to destroy it, is to destroy politics. Machiavelli takes this a significant step further: it is active (even passionate) conflict that is the life force of public liberty, civic virtue, and even military courage. [30]

[27] Stephen Gardbaum, "Law, Politics, and the Claims of Community," *Michigan Law Review, Vol. 90, No. 4* 1992, 685-760.

[28] Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution,* Manchester: Manchester UP, 2015, 42-44).

[29] Niccolo Machiavelli, *Discourses on Livy*, Trans. Harvey C. Mansfield and Nathan Tarcov, Chicago: Chicago UP, 1996.

[30] S. M. Shumer, "Machiavelli: Republican Politics and Its Corruption," *Political Theory*, Vol. 7. No. 1. 1979, 15

Amid this inevitable (and desirable) disagreement in public discourse, however, Machiavelli's ideal citizen will remain intent on pursuing the common good. Individual ambition and expression becomes "fused within the breast of each citizen" with the public good and liberty.[31] What made the Romans truly free, on Machiavelli's telling was that, even after tempestuous debate, they pursued with unequivocal and united commitment the common good as dictated by the results of those debates.[32]

In one of republicanism's later iterations, Jean-Jacques Rousseau represents the republican tradition in his concepts of the social contract and the general will. Individuals can only be truly free, Rousseau argues, if they are not subject to alien and arbitrary rule, if each individual is self-governing. Given that we are bound, as a practical matter, to operate within the confines of civil society, however, the best chance we have of achieving the authentic freedom that comes with self-government is to enter into a social contract with others.[33] In this social contract, we surrender our rights and agree to comply with the general will. Since each individual has consented and so vested his or her own will in the general will, individuals are obeying themselves in obeying the general will—they are, in actual fact, self-governing and free. Moreover, a community may "force to be free" those who would not comply with the decisions of the general will.[34] Thus, Rousseau's requirements for freedom lead to some relegation of the individual, and a republican understanding of human freedom as consisting in the political life. Though

[31] Shumer 16.
[32] Shumer 14-15.
[33] Jean-Jacques Rousseau, *The Social Contract*, Trans. Donald A. Cress, Indianapolis: Hackett, 2011, Book I, Ch. 6.
[34] Rousseau, *Social Contract*, Book I Ch. 7.

this goes further than most other versions of republican thought, Rousseau's emphasis on the public is characteristic of republicanism in general.[35]

From ancient republicanism to modern republicanism, therefore, we see the privileged status of the common good and prioritization of the "public thing." As Cicero explains in *On Duties*, "But when you have surveyed everything with reason and spirit, of all fellowships none is more serious, and none dearer, than that of each of us with the republic. Parents are dear, and children, relatives and acquaintances are dear, but our county has on its own embraced all the affections of all of us."[36] The *politeia* or *res publica* and its governing principles are all-encompassing and therefore, require the citizen's devotion, perhaps even at some cost to private interests, but always with the ultimate result of securing one's freedom understood as non-domination. Like liberals, republicans from Cicero to Pettit have maintained space for private interests and rights, as to property. However, in contrast with the liberal position, a republican of most any stripe would ultimately understand their freedom as contingent on, rather than infringed by, pursuing the larger commitments of the polity understood as the common good.

In this idea of devotion to the common good, we begin to see the outlines of republican solidarity, as well. Many republican philosophers and statesmen have discussed the importance of inculcating shared beliefs through civic education, for example.[37] Aristotle explains that the young must be "trained by habit and education in

[35] Pettit further distinguishes Rousseau from other strands of republicanism (Pettit 1997, 30).

[36] Cicero, *On Duties*, Ed. M. T. Griffin and E. M. Atikins, Cambridge: Cambridge UP, 1991, I.57.

[37] Iseult Honohan, "Educating citizens: Nation-building and its republican limits," in *Republicanism in Theory and Practice,* Ed. Iseult Honohan and Jeremy Jennings, Oxfordshire, OX: Routledge/ECPR Studies in European Political Science, 2006.

the spirit of the constitution."[38] Inhering in a constitution is a kind of ethos, a particular shared life, in which people must be educated if the polis is to persist.[39] In her own account of education as a vehicle toward republican solidarity, Iseault Honohan worries that "fostering solidarity has often been associated too closely with promoting cultural identity without taking sufficient account of the pluralist conditions of modern societies."[40] Honohan thus recognizes a common life to uphold in a republic, but insists that the solidarity that education should foster is better understood in "willingness to acknowledge and assume the responsibilities entailed by interdependence; self-restraint in pursuing individual or sectional interests rather than the common good; and the inclination to engage open-mindedly with viewpoints of others in the public realm."[41] This in contrast with promoting a particular cultural identity. Aristotle, Cicero,[42] Rousseau,[43] the American Founders,[44] and contemporary theorists such as Honohan[45] all emphasize, albeit in different ways, the role of education to cultivate in a people civic-mindedness and devotion to republican values and virtues. As Richard Bellamy states, "No constitution will itself survive long unless citizens identify with it."[46]

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[38] Aristotle, *Politics* V.1310a 17.

[39] For a more contemporary application of this idea, see Walter Murphy, *Constitutional Democracy*, Baltimore: Johns Hopkins UP, 2007, 13. Moreover, Maurizio Viroli explains how such local particulars as "memories, places, heroes, hymns" serve as vehicles for cultivating a love of a common liberty (Maurizio Viroli, *Which Patriotism for Europe?* Eutopia Magazine, 5 August 2014)

[40] Honohan 199.

[41] Honohan 204.

[42] Cicero, *On Duties*, Ed. M. T. Griffin and E. M. Atikins, Cambridge: Cambridge UP, 1991.

[43] Jean-Jacques Rousseau, *Emile*, Trans. Allan Bloom, New York: Basic Books, 1979.

[44] George Thomas, *The Founders and the Idea of a National University*, Cambridge: Cambridge UP, 2014.

[45] Honohan.

[46] Richard Bellamy, *Political Constitutionalism*, Cambridge: Cambridge UP, 2007, 219.

On this understanding, devotion to one's constitution entails devotion to one's *patria*, and by extension, a certain solidarity with the people in one's *patria*. Maurizio Viroli explains how people only come to love liberty and virtue through the cultivation of such local bonds.[47] Again, we see this idea as early in the republican tradition as Aristotle, who describes civic friendship as "the greatest good of states and what best preserves them against revolutions..."[48] Later in *The Politics*, Aristotle further explains the value of such friendship or solidarity:

> Such a community can only be established among those who live in the same place and intermarry. Hence there arise in cities family connexions, brotherhoods, common sacrifices, amusements which draw men together. But these are created by friendship, for to choose to live together is friendship.[49]

Thus, on Aristotle's understanding, friendship is requisite to community. This includes the sort of affection for one's neighbor which we might expect, but also a sort of proximity and sameness—shared blood to reinforce those affections. "To choose to live together," he states, "is friendship." Cicero further develops this idea of civic friendship in his account of duties. He states, "We are not born of ourselves alone,"[50] and suggests in his account of justice that we actually *owe* something to our country and fellow citizens. Not to give to our patria what we are able is nothing less than an injustice.[51]

In addition to the existential requirements of a polity and necessities of justice that Aristotle and Cicero respectively offer in support of civic friendship, republican thought

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[47] Maurizio Viroli, *For Love of Country*, Oxford: Oxford UP, 1995.
[48] Aristotle, *The Politics*, 1262b 7-8.
[49] Aristotle, *Politics,* 1280b 35-1281a 2.
[50] Cicero, *On Duties*, I.22.
[51] Cicero, *On Duties*, I.23.

values solidarity insofar as citizens must see one another as co-equals if they are to govern together in pursuit of the common good. This need for meaningful and acknowledged equality among citizens has been present even when republics were not so egalitarian, as in Greece, Rome, and the United States through Jim Crow.[52] Jack Balkin explains how "The historical tradition of republicanism... insisted that economic self-sufficiency was central to participation in republican government," that one had to have the requisite leisure time and financial security in order to participate in politics, both as practical matter and as a matter of being acknowledged as an equal. "This demand," Balkin continues, "produced both conservative and egalitarian versions of republicanism."[53] It produced the conservatism of those republics that allowed only propertied or noble members of society to be voting citizens. However, this same demand of economic self-sufficiency would give rise to more contemporary versions of republicanism that have sought either to raise individuals up to a certain level of independence and self-sufficiency, or to make material wealth less important so that a broader population may participate as equal members in politics and society.

In a way, both the conservative and egalitarian versions of republicanism operate on the same premise, that a certain equality is necessary for solidarity, which is, in turn, necessary for republican citizenship and collective self-government. The difference is that the conservative version identifies citizens from pre-existing castes, whereas the latter more egalitarian version makes a positive effort to equalize people and so bring

[52] Gordon Wood, Empire of Liberty, Oxford: Oxford UP, 2011, 8.
[53] Jack Balkin, "Which Republican Constitution," *Constitutional Commentary*, Vol. 32, 2017, 33.

them into the fold of citizenship.[54] In either case, we see the necessity of shared responsibility and solidarity toward fellow citizens in a republican framework.

The Neo-Republican Intervention

From the conservative versions of republicanism Balkin discusses to the populist bent we find in Rousseau, some scholars have worried about the broader implications and tendencies of republicanism. For example, Isaiah Berlin's well-known characterization of the ancients' positive liberty is less than attractive in its potential to legitimate an oppressive communitarianism and even authoritarianism as a function of the rights and privileges that come with self-rule.[55] Against such apprehension, Philip Pettit argues that a consistent understanding of republicanism—that is, "freedom as non-domination," properly understood—is not susceptible to these authoritarian perils, but actually serves to critique certain instantiations of republicanism as classist and homogenizing.[56] Daly and Hickey similarly explain how republicanism comes in different versions, some of which are more moderate than others:

> The term [republicanism] is associated with the unitary and indivisible State advocated by Jean-Jacques Rousseau, but also the federalism and checks and balances promoted by Madison....Some republicans have assumed that civic virtue can be realized only in a cohesive, austere and disciplined society, whereas more liberal-minded thinkers have argued that republican citizenship can occupy a more minimal domain and accommodate a range of co-existing private identities.[57]

[54] Pettit 2012; Frank Michelman, "Law's Republic," *Yale Law Journal*, Vol. 97, No. 8, 1988.

[55] Isaiah Berlin, "Two Concepts of Liberty" (1958), *Four Essays on Liberty*, Oxford: Oxford UP, 1969; Pettit 2012.

[56] Pettit 2012.

[57] Daly and Hickey 9-10.

Pettit does just this: argue for "a minimal domain" of republican citizenship that can "accommodate a range of co-existing private identities." Pettit juxtaposes republican freedom as nondomination with both the liberal conception of freedom as non-interference[58] and perversions of republican freedom manifest in more communitarian theories.[59] He follows Quentin Skinner in arguing that republican freedom is properly understood "not as the positive benefit of participation in sovereign self-rule, but as a negative good that such participation might instrumentally serve: the good of escaping the imposition of others."[60] In this way, Pettit's theory may require the addition of another category in Berlin's framework, namely, freedom as nondomination negatively conceived.[61]

How, then, does Pettit's take on freedom as non-domination comport with a republican commitment to the common good and solidarity among citizens? Though Pettit tends not to employ such language as "the common good" in the same way as classical republicans, the heart of his theory still reveals an essential kinship. First, he is very clear that nondomination *is* a common good, that is, a good that is good for all and can only be fully realized in common. He explains,

> ...[T]here can be no hope of advancing the cause of freedom as non-domination among individuals who do not readily embrace both the prospect of substantial equality and the condition of communal solidarity. To want republican liberty, you have to want republican equality; to realize republican liberty, you have to realize republican community.[62]

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[58] Pettit 2012, 8-11.

[59] Pettit 2012, 11-18. See also Jose Marti and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain*, Princeton: Princeton UP, 2012, 32, 45-46.

[60] Marti and Pettit 32.

[61] Pettit 1997, Ch. 1.

[62] Pettit 1997, 125-126.

In short, even republican liberty in its negative form of freedom as non-domination, as opposed to the more positive freedom as self-mastery, depends on a "republican community" dedicated to this conception of freedom and to its fruition for all members of the community. For Pettit, therefore, freedom is necessarily tied up with some understanding of a common good.

In the same way that freedom as non-domination requires republican community, so too might it be jeopardized by any sector of the community, by private and public entities alike. Pettit warns against the ways in which domination can occur in the private realm—one might think of the power of an employer over his or her employees, or of big money in politics. For this reason, true freedom requires the cooperation of all spheres with respect to this public principle of freedom as non-domination. Hence, Pettit follows his republican predecessors in maintaining that both public and private spheres remain obligated to this common good, even as a matter of law. The fundamental requirement for preserving freedom is that interventions in private life occur "on the people's terms."[63] In other words, the public principle of non-domination may warrant interference in the private sphere so long as the people maintain meaningful control over the governing institutions that make these decisions.

Pettit also accounts for republican solidarity. In *On the People's Terms*, he introduces the "eyeball test," the idea that freedom requires that an individual "should be able to look others in the eye without reason for fear or deference."[64] This is because the

[63] Pettit 2012.
[64] Pettit 2012, 298. Emphasis added.

ability to evoke the kind of fear that leads one to avert his or her eyes in deference amounts to domination. This kind of domination, or arbitrary power, Pettit believes, can be avoided if everyone enjoys a comparable standard of living. He explains, "Social justice, so interpreted, would require each citizen to enjoy the same free status, objective and subjective, as others. It would mandate *a substantive form of status equality.*"[65] According to Pettit, the securing of material factors, often controlled by the private realm, are necessary to achieving nondomination in a meaningful sense. Therefore, a polity must secure a requisite material wellbeing in order for citizens to be able to "look others in the eye," and so view one another as co-equals governing together. This concern with requisite material equality, to which the "eyeball test" draws attention, echoes the emphasis of classical republicanism on material equality and self-sufficiency as pre-requisites for participation in politics and society. And so, Pettit justifies intervention in the private both to secure such social and economic equality, as well as to prevent more direct forms of domination.

While republican thought is united by an understanding of freedom as non-domination, Pettit's theory admittedly focuses on the more negative concern of not being subject to the arbitrary power of others, in contrast with other versions of republicanism that focus on the positive of self-rule. In some ways, this distinction is important to the task at hand, to the extent that one version may encompass more persuasive connections with horizontal effect than the other. Indeed, horizontal effect does seem to have an affinity to Pettit's negative formulation of non-domination insofar as it emphasizes the

[65] Pettit 2012, 298. Emphasis added.

threats to freedom that may come in private spaces. In contrast, consider certain accounts of freedom as self-mastery, such as we find in Rousseau's concept of the general will discussed above that depends on a more complete subversion of one's individual will. Contemporary proponents of horizontal effect, still operating within the framework of constitutionalism, likely would recoil from the implications of such Rousseauvian theories and incline to more moderate neo-republicanisms to ground horizontal effect. Put differently, one might argue that it is in the context of neo-republicanism's negative conception of freedom that the practice of horizontal effect is likely to obtain as a republican vein within the tradition of liberal constitutionalism, as this chapter's title states.

At the same time, neo-republicanism arguably is an heir of classical republican theories and, to this extent, may still entail some of the same implications. As explained, one of the main points that we derive from Pettit's theory of freedom as nondomination is that such domination often occurs in the private sphere. Thus, in a similar manner as the classical theories, Pettit's account requires that the principle of republican freedom govern the polity taken as a whole, that is, in public and private spaces alike. This may not leave much room for difference in how individuals conceive of freedom, republican freedom, or the requirements for realizing that freedom. This is not to suggest that Pettit's theory of republicanism collapses into something like Rousseau's general will, but only

to highlight in his account certain limits to what "the people's terms" may ultimately include.[66]

Regardless of where one comes down on such questions concerning positive and negative formulations of liberty in republican thought, the principle of freedom as nondomination forms the fundamental core of this tradition. Consequently, it illuminates the role of such concepts as the common good and solidarity that, I argue, we find in the practice of horizontal effect.

Republicanism and Horizontality

What, then, is the connection between these principles of republican thought and horizontal effect? More specifically, how do the principles of the common good and solidarity serve to ground this emerging practice in constitutionalism?

Uniformity in Horizontal Effect

As republican thought holds up the common good as a standard for both public and private entities, so too does horizontal effect charge public and private actors with promoting constitutional values. This uniformity in the constitution's applicability to public and private entities can be justified by republicanism and, more fundamentally, by the common good that serves a republican conception of freedom.

[66] For a compelling account of these tensions in Pettit's thought, as between substantive justice and procedural legitimacy, see David Dyzenhaus, "Critical notice of *On the people's terms: a Republican theory and model of democracy,* by Philip Pettit, Cambridge University Press, 2012, xii + 333pp.," *Canadian Journal of Philosophy*, Vol. 43, No. 4, 494-513.

In contrast with the conventional vertical model of constitutionalism which requires some distance between the principles that bind each of the public and private spheres, horizontality brings private entities into conformity with public values as a function of what the constitution itself is understood to require. What is known as *direct* horizontal effect occurs when judges apply constitutional rights directly to private actors, creating duties somehow to respect, uphold, or promote the constitutional rights of other citizens. On the other hand, horizontality sometimes operates through ordinary legislation or through judges' development of common law. This *indirect* horizontal effect occurs when judges require legislatures to hold private actors to account for rights obligations in the way they legislate and regulate private spaces. [67] Despite these doctrinal minutiae, the function of horizontal effect remains the same: private entities accrue duties as a direct result of a constitution's commitments to certain rights. Legislatures may have some discretion in how they execute these constitutional requirements in law, but they do not have discretion in the core fact that the constitution's commitments must bear on private entities.[68]

Though these horizontal rights obligations may be mediated by private law, therefore, the fundamental point remains that public values or constitutional commitments become the source of duties of private individuals and entities. Hence, as in the republican tradition, individuals become responsible for and accountable to the larger

[67] Gardbaum 2002.

[68] Speaking to the distinction between direct and indirect horizontal effect, Mattias Kumm suggests the results of these doctrines ultimately are not so different. (Mattias Kumm, Who is Afraid of the Total Constitution? Constitutional Rights and the Constitutionalization of Private Law," 7 *German Law Journal* 341 (2006).352).

projects of the polity. In this way, we can say that horizontality constitutes something of an innovation of liberal constitutionalism in changing *who* is responsible for constitutional commitments, and in designating the constitution as the source by which individuals are made responsible. Moreover, this innovation may be justified to the extent that we find compelling a republican conception of freedom as non-domination. Whereas one subscribing to the liberal conception of freedom as non-interference may be troubled by the degree and nature of interference in private relations that horizontality entails, one who maintains a republican conception of freedom as non-domination will be more inclined to recognize this as leveraging the same constitutional principles that protect people from the domination of public entities (imperium) to protect them also from domination of private entities (dominium).

For an example of how uniformity manifests in an actual instance of horizontal effect and may be justified by republican principles, we need look no further than Germany's seminal *Lüth* case.[69] In 1951, German filmmaker Veit Harlan filed suit against Erich Lüth, arguing that Lüth had harmed his economic prospects in publicly calling for a boycott of his pro-Nazi film. While the district court initially granted Harlan's injunction, the Federal Constitutional Court (FCC) reversed the ruling seven years later, arguing that the German Basic Law committed the polity to an "order of objective moral and legal principles." Such principles have a "radiating effect," bearing on all areas of German law and life. For this reason, the Court argued that it would be remiss to pretend that Lüth's right to freedom of expression, guaranteed by the Basic

[69] *Lüth,* BVerfGE 7, 198 (1958).

Law, was irrelevant to the case. Indeed, the Court ultimately sent the case back to the lower court with the instruction that it consider how such principles of the Basic Law inform German civil law.

In *Lüth*, the FCC states explicitly the importance of uniformity on certain foundational questions and constitutional commitments in public and private venues alike. In the same way that the constitutional framers felt a sense of urgency to entrench in the Basic Law commitments to human dignity and the inviolability of human personality just a few years after the conclusion of World War II, one senses a similar urgency in the FCC's *Lüth* decision to ensure that these defining constitutional commitments actually be constitutive of the polity as a whole. In speaking of the German constitutional tradition, and the *Lüth* case in particular, Ulrich Preuss explains:

> [T]he right to free speech or to freedom of religion is not only a kind of concession of the society to individuals and their self-interest, but it equally serves the benefit of the society at large; a society in which each individual enjoys the fundamental rights of the Bill of Rights is *different and morally more advanced* than one in which these rights are lacking. Hence, it is in the interest of society itself to establish and sustain these rights. If this is so, *it cannot be tolerated that there are spheres of social life in which the spirit or the values of the fundamental rights are absent*.[70]

This interpretation of German constitutionalism suggests that the horizontal application of rights is motivated by more than the sheer convenience of enlisting the private sphere, or even by the goal of protecting individual rights. Rather, Preuss describes an ethos of the polity, a moral position which may permit some degree of difference, but ultimately

[70] Ulrich Preuss, "The German *Drittwirkung* Doctrine and Its Socio-Political Background," *The Constitution in Private Relations,* Ed. Andras Sajo and Renata Uitz, Utrecht, The Netherlands: Eleven, 2005, 26 (emphasis added).

begs for a united front in the commitment to certain governing principles. Thus, the horizontal application of rights can serve to infuse the life of the polity with the "spirit or the values of the fundamental rights," in the same way that citizens of a republican polity are equally held to pursue the common good of the polity as their own. In this way, constitutional rights commitments may be just as much "about" that private entity charged with promoting rights as they are about the rights-bearer.

One might object that the uniform commitment of public and private spheres that horizontality requires is different in some important ways from the principle of the common good associated with republicanism. Indeed, horizontality operates within the larger framework of rights which, on certain formulations, may exist in tension with the sort of civic-mindedness that republicanism requires.[71] The objection might continue that with horizontal effect we employ the language of rights and so frame the issue as a conflict of rights, an essentially liberal formulation that does not leave as much space for considerations of the common good.[72] Nevertheless, horizontal effect still entails a privileging of the public thing above one's immediate private interests, and not simply as a result of the sort of refereeing or policing that virtually all political philosophers have understood as being part of the role of government.[73] Rather, horizontality requires the

[71] Gordon Wood explains: "In a republic...each man must somehow be persuaded to submerge his personal wants into the greater good of the whole. This willingness of the individual to sacrifice his private interests for the good of the community—such patriotism or love of country—the eighteenth century termed 'public virtue.' A republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people." (Wood 1998, 68)

[72] Duncan Ivison, "Republican Human Rights?" *European Journal of Political Theory,* Vol. 9, No. 1, 31-47.

[73] This point, that humankind requires systems of government and policing, is particularly emphasized in such state of nature theories as those advanced by Hobbes and Locke. The obvious exception to this broad claim is anarchical theory.

suspension of private interests in the explicit service of public ends, a notion that one would be hard-pressed to find in the work of classical liberals. Indeed, horizontality will require that one yield his or her rights claims to other, perhaps more constitutive commitments of the polity, even if those simply be commitments to other rights. Hence, the German Federal Constitutional Court ruled that the radiating effect of the right to freedom of expression in some cases necessitates the concession or sacrifice of he who suffers economic harm as a result.[74]

Of course, courts do account for the burden that horizontal effect puts on private agents, concluding that the obligations of state and non-state actors may differ in intensity. Take for example, South African case *Daniels v. Scribante and Another*.[75] Living in conditions of utter disrepair, Yolanda Daniels began to improve at her own expense the dwelling she rented on Chardonne Farm. The property manager, Theo Scribante, argued that the relevant statutory law and constitutional provisions granted her no right to change the property without his or the owner's consent. Moreover, they had no positive duty to pay for any modifications she made to improve her living conditions. Tending to the social and historical context surrounding the case, the South African Constitutional Court ultimately decided that Daniels did, in fact, have a right to live in conditions that were up to standard and, more specifically, that this was required by her right to human dignity. Moreover, Scribante and the property owners were not necessarily exempt from covering these costs. Still, the Court acknowledged certain

[74] For cases with facts and outcomes similar to *Lüth*, see also, the South African case *Khumalo v. Holomisa* and the American case *New York Times v. Sullivan*.

[75] *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13.

limits to the duties that Daniels's right demanded of Scribante. In the majority opinion, the Court observes that private persons can only rely on "their own pockets" or private funds as opposed to public sources of revenue. Justice Madlanga explains, "It would be unreasonable, therefore, to require private persons to bear the exact same obligations under the Bill of Rights as does the State."[76] Because the capacities, resources, and status of private and public institutions are not identical, therefore, neither are their constitutional duties equal.

Nevertheless, the capacities of or burden on private entities is neither the only nor the most important consideration in determining whether rights should be given horizontal effect. In *Daniels*, the Court develops criteria introduced in earlier cases,[77] explaining the considerations upon which the horizontal application of rights depends:

> Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state"; and, would letting private persons off the net not negate the essential content of the right?[78]

This explanation of the South African Court's decision suggests that much more enters the calculation than the relative burden horizontal effect may create for private entities. Rather, the Court puts much weight on such factors as the importance or status of a given right, that is, how constitutive a right is in the context of the larger constitutional project,

[76] *Daniels v. Scribante*, pargraph 40.

[77] See *Khumalo v. Holomisa*, in which the South African Court decided that the horizontal application of Section 8(2) of the South African Constitution depends in part on the potential of private entities to impinge rights, but also, importantly, on the "intensity of the constitutional right in question" (paragraph 33).

[78] *Daniels v. Scribante and Another*, paragraph 39

as well as what the right's realization will require. We see this in the Court's consideration of "the nature of the right," and "the history behind the right." In such criteria, the Court considers not the burden on private individuals, but the status of particular rights against standards of justice and the meanings that arise out of particular historical and cultural contexts. Some rights are so important and important to a particular place,[79] the argument goes, that they must govern the polity uniformly, regardless of those projects and commitments existing in what we might otherwise understand to be a private space.

Solidarity in Horizontal Effect

In addition to uniformity, the horizontal application of rights also engenders a certain solidarity, akin to republican solidarity or civic duty. Specifically, in obligating private entities to promote the constitutional commitments of a polity, horizontal effect holds individuals accountable for the rights of fellow citizens, directing them toward some sense of solidarity and recognition of equal status. Of course, liberal political thought also depends on a belief in human equality. But again, one who subscribes to the liberal conception of freedom as non-interference will dispute the way horizontality seeks equality through enlisting private entities to public projects. On the other hand, the idea of solidarity or duty with respect to one's fellow citizens is part and parcel of the republican community to which Pettit refers.[80] That one would have obligations to one's

[79] *Daniels v. Scribante and Another*, paragraph 51
[80] Pettit 1997, 125-126.

fellow citizens as an extension of pursuing the good of the polity is beyond dispute in most any version of the republican tradition. Though not palatable to the typical liberal, therefore, this solidarity is a natural result of the republican conception of freedom as non-domination.

This connection between horizontality and solidarity is apparent in various scenarios, as when courts apply rights horizontally to achieve an outcome that might have been attainable through the conventional vertical model as well. For example, in the case *Society for Mohini Jain v. State of Karnataka*, the Indian Supreme Court decided that private universities could not be allowed to charge certain application fees as a constitutional matter, insofar as such fees would obstruct Article 14's guarantee of equality and Article 21's right to education. [81] These rights to equality and to education plausibly could have been secured through alternative means, however—perhaps through government subsidies to offset the cost of applying to private universities, or through making public universities more accessible.[82] When a court applies horizontally a right that government might have secured through state action, it seems to assume the distinct goal of bringing private entities to respect and guarantee the rights of others. Horizontal rights thus become just as much "about" those private entities charged with protecting rights and the disposition of those entities toward the rights-bearer.

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[81] *Society for Mohini Jain v. State of Karnatakawhen* (1992) 3 SCC 666. Gardbaum, "Horizontality in the Indian Constitution," *The Oxford Handbook of the Indian Constitution*, Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016, 608.

[82] For similar reasoning with respect to horizontal effect, see Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law," *I.CON*, Vol. 1, No. 1, 2003, 79-98

A similar motivation might underlie those instances in which a court imposes a penalty on private actors, on top of whatever steps are necessary to ensure that the rights-bearers' rights are secured. Consider, for example, the case of *M.C. Mehta v. State of Tamil Nadu* in which the Indian Supreme Court held that employing children younger than fourteen in the matchmaking industry violated Article 24. The offending employers were required to pay a fine to the "Child Labour Rehabilitation-cum-Welfare Fund" in order to provide for children who might otherwise be compelled to seek employment.[83] While a penalty might promote the deterrence of future violations of rights, it might also be motivated by the desire to reform private actors and, specifically, to reform private actors to participate in the project of promoting particular rights.

On the subject of solidarity, we might also revisit the case *Daniels v. Scribante and Another*.[84] In deciding that landlords must permit tenants to live in accommodations up to requisite standards of dignity, the South African Constitutional Court did more than simply hold private entities to account for public values. Rather, the Court decided that economic and social rights could directly create obligations of private individuals and non-state actors.[85] This entails the much broader conclusion that constitutional commitments may create *positive* obligations for private individuals and non-state actors. In other words, individuals against whom a right is applied horizontally may not simply

[83] *M.C. Mehta v. State of Tamil Nadu* (1996) 6 SCC 756. Gardbaum, "Horizontality in the Indian Constitution," 605.

[84] CCT50/16 [2017] ZACC 13.

[85] See also Aoife Nolan, "Daniels v. Scribante: South Africa Pushes the Boundaries of Horizontality and Social Rights," *I-CONnect: Blog of the International Journal of Constitutional Law*, 27 Jun. 2017, www.iconnectblog.com/2017/06/daniels-v-scribante-south-africa-pushes-the-boundaries-of-horizontality-and-social-rights, 20 Dec. 2017.

have to refrain from acting in a particular way, but may have to take positive action in pursuit of the commitments of the polity.[86] On this understanding, horizontal rights have the capacity to achieve an equality akin to Pettit's status equality.[87] Insofar as it holds private individuals to acknowledge and actively secure the rights of others, horizontality makes possible an equality that exceeds the typical negative and positive rights, but rather encompasses the mutual cooperation and recognition that might enable one to look others in the eye, according to Pettit's republican "eyeball test."

One might object that while the mechanism of horizontal effect seeks solidarity among citizens, it does so by judicial decree in contrast with the more typically republican emphasis on contestation and a robust civic culture.[88] The objection may continue that, in spite of the remedies that courts apparently provide, the very act of assigning rights obligations to private actors, such as landlords and private universities, only serves to underscore and even crystalize how rights-bearers continue to depend on such entities. In contrast, a remedy more faithful to republican principles would work ultimately to free people from dependence on such actors, insofar as freedom as nondomination is possible only in independence from external, likely arbitrary, forces.

[86] See also Stephen Gardbaum, "Horizontality in the Indian Constitution," *The Oxford Handbook of the Indian Constitution*, Oxford, Oxford UP, 2016; Colm O'Cinnede, "Irish Constitutional Law and Direct Horizontal Effect—A Successful Experiment?" *Human Rights in the Private Sphere*, Ed. Dawn Oliver and Jorg Fedtke, Abingdon, UK: Routledge-Cavendish, 2007.

[87] Pettit 2012, 37.

[88] Jacobsohn addresses this very point in the Indian context: "[T]he very explicitness of the constitutional recognition (especially in Article 25) that meaningful social reform required attention to the critical role of religion in Indian life might suggest the futility of judicial intervention. Problems of such complicated scope and intricacy would very likely defy Court-mandated solution" (Jacobsohn, *The Wheel of Law*, Princeton: Princeton UP, 2009, 92).

To this overarching point, that horizontality achieves merely a pretense of republican objectives due to its continual reliance on external entities and top-down nature of implementation, one might argue that courts applying rights horizontally offer an education in republican virtues. In appreciating the institutional character and limitations of courts, one must concede that the ends that horizontality may achieve are also limited. Indeed, it would be misguided to expect too much too quickly from this legal-constitutional mechanism. Nevertheless, horizontal effect may serve as a stop-gap in particular instances,[89] as well as a kind of preliminary step in realizing republican aspirations, as to solidarity, on a broader scale. For, in setting out certain values and aspirations for a polity, the horizontal effect of rights may serve an instructive role, legitimating certain behaviors and decrying others in private relations. Perhaps this initially takes the form of top-down pronouncements against external forces. However, in taking the long view, such steps may ultimately contribute to the broader culture and, ultimately, render future interventions of the court less necessary. In the words of Eugene Rostow, "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."[90] Rostow goes on to cite the situation of African Americans in 1950s America, and argue for the good that the Court accomplished in advancing equality in both public and private venues.[91] In a similar vein, one could argue that doctrines and applications of horizontality offer people something of

[89] See also Jud Mathews's account of how courts employ horizontal effect when they find "normative gaps" in existing law (Mathews 2018).

[90] Eugene Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review*, Vol. 66, No. 2, Dec. 1952, 208.

[91] Rostow.

a civics lesson, and even promise some remedy for what some see as the dearth of republican-esque virtue and solidarity, and other ill effects of a pervading liberalism in modern constitutionalism.[92] It is to these concerns about the role of courts that I turn my focus in the final section.

Horizontality and the Republican Credentials of Courts

Despite the features of horizontal effect that can be justified in republican terms, the expansive role for courts that horizontality potentially entails may give some republican scholars pause.[93] As one scholar explains, "courts lack the fundamental democratic quality of allowing an equal input from all affected citizens—their 'right' to author their rights."[94] Such a tension emerges in one strand of republican thought not yet discussed, namely the Republican Revival in the legal literature. Interestingly, some republican revivalists, such as Frank Michelman and Mark Tushnet, have also written on horizontality.[95] However, these scholars never make the connection that horizontality has

[92] For example, Mary Ann Glendon argues that the great emphasis on individual rights in the American "dialect" of rights talk has led to a forgetting of the language of responsibility (Mary Ann Glendon, *Rights Talk*, New York: Free Press, 1991). See also Honohan 202. Eoin Daly has directly alluded to the potential of horizontality to advance republican ends, though he has not developed the connection in any great depth. See Eoin Daly, "Freedom as Nondomination in the Jurisprudence of Constitutional Rights," *Canadian Journal of Law and Jurisprudence,* Vol. 28 No. 2, July 2015, 306; and Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, Manchester: Manchester UP, 2015, 77-78.

[93] Daly and Hickey.

[94] Richard Bellamy, "Democracy as Public Law: The Case of Constitutional Rights," *German Law Journal*, Vol. 14, No. 08, 2013, 1030.

[95] Frank Michelman, "Constitutions and the Public/Private Divide," *Oxford Handbook of Comparative Constitutional Law*, Ed. Michel Rosenfeld and Andras Sajo Oxford: Oxford UP, 2012; Frank Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction," *Comparative Constitutional Law*, Ed. Tom Ginsburg and Rosalind Dixon, Cheltenham, UK: Edward Elgar, 2011; Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008.

a republican logic. A reason for this may lie in the nature of their endorsement of republicanism. Tushnet, for example, emphasizes such republican principles as self-government, dialogue, and deliberation,[96] principles that may not easily coexist in an increasingly court-centric world. Indeed, Tushnet has in other places argued that we must "take the Constitution away from the courts."[97]

Frank Michelman does find a role for courts in his republicanism, albeit his argument is premised on the very fact that there is a deep tension between, what he frames as, "rule of the people" and "rule of law." In *Law's Republic* Michelman states, "Republican thought thus demands some way of understanding how laws and rights can be both the recreations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law."[98] In other words, it is not immediately clear how citizens can be both self-governing and governed by law. As a solution, Michelman argues that courts are distinctly situated to assist the marginalized of society to join the governing body of citizens. For if a polity, taken as a whole, is to be truly self-governing, then its citizens must possess the requisite agency to govern. According to Michelman, courts can help widen the boundaries to encompass more people as citizens, and thus facilitate more perfect self-government. Nevertheless, a tension remains in Michelman's thought as he elsewhere concedes that the role of the court ought to remain fairly modest.[99]

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[96] Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law,* Lawrence, KS: Kansas UP, 2015.

[97] Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton: Princeton UP, 2000.

[98] Frank Michelman "Law's Republic," *Yale Law Journal*, Vol. 97, No. 8, 1988, 798.

[99] See the analyses of Michelman's thought in Jeff King, "Social Rights in Comparative Constitutional Theory," in *Comparative Constitutional Theory*, Ed. Gary Jacobsohn and Miguel Schor, Cheltenham, UK:

Richard Bellamy tries to strike a similar balance in his own work. [100] Drawing on a distinction first employed by Philip Pettit,[101] Bellamy concedes the usefulness of courts for their "editorial" capacity, that is, their ability to force legislatures to reconsider laws that may not have accounted for the interests of every group in the polity.[102] However, he worries that with judicial finality, courts instead begin to exercise an "authorial" role. This is the function of *making* law that, on a republican understanding of freedom as non-domination, ought to be retained by institutions accountable to and, therefore, controlled by the people, rather than unelected judges. Bellamy explains that if a court is allowed "to strike down legislation or to read into it its own reading of its fit with constitutional norms, then it is in effect usurping the authorial function of electoral democracy."[103] And indeed, insofar as people disagree so vastly in their views of the "sources and substance," the "subjects and scope" of rights, we have little reason to entrust judges with answering these inherently political questions about rights, much less their horizontal application. He states, "At the level of principle, these disputes have not proved any more resolvable in seminar rooms of philosophy departments than they have among policy makers and citizens."[104] In light of the inevitability of reasonable disagreement, therefore, the republican committed to freedom as non-domination may not view courts as proper venues to convene Eugene Rostow's national seminar. Rather, on Bellamy's telling, the

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Edward Elgar, 2018 and William Forbath, "Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present," 39 *Tulsa Law Review*, 2004, 631-636.

[100] Bellamy 2013.

[101] Philip Pettit, "Democracy, Electoral and Contestatory," in *Designing Democratic Institutions*, Ed. Ian Shapiro and Stephen Macedo, 2000, 105.

[102] Bellamy 2013, 1030.

[103] Bellamy 2013, 1036.

[104] Bellamy 2013, 1021.

authorial implications of rights questions make their resolution a matter for "real democracy."[105]

In his own article "The republican core of the case of judicial review," Tom Hickey addresses these same concerns.[106] Like Bellamy, Hickey is a political constitutionalist in that he views the source, substance, and scope of rights as political questions, rather than questions with set legal answers to be revealed by judges and lawyers.[107] In this spirit, Hickey joins Bellamy in arguing that judicial review cannot be justified in terms of judges' "epistemic" capacities, their ability to reach right answers, if we are operating on a republican conception of freedom as non-domination. However, Hickey departs from Bellamy in the extent to which he thinks judicial review can be justified in terms of judges' "legitimating" capacity without necessarily usurping the authorial function. This is because courts may actually support those processes by which the people retain control over governing institutions and so bolster their republican liberty. In particular, Hickey cites the ability of judicial review to "smoke out" dubious motives of legislators, draw attention to missed opportunities to accommodate minorities, and allow individuals whose rights may have been violated to raise their grievances.[108] Insofar as these features and capacities work toward legitimating law-making processes rather than seeking right answers, they become not only compatible with but instrumental toward a republican understanding of freedom as non-domination. In this way, Hickey

[105] Bellamy 2013, 1030.

[106] Tom Hickey, "The republican core of the case for judicial review," *International Journal of Constitutional Law*, forthcoming, https://papers.ssrn.com/ abstract=3137157.

[107] Hickey 5.

[108] Hickey 12-21.

argues, even strong judicial review may remain editorial without infringing on the authorial function more properly located in those electoral institutions over which people have more control.

The question underlying Hickey's and Bellamy's arguments about judicial review is the same question one would need to answer to quell any worries about horizontal effect as implemented by courts. Specifically, one must ask whether horizontal effect manifests primarily as an editorial or an authorial function. One persuaded by Bellamy would almost necessarily conclude that while horizontal effect comports with such republican principles as the common good and solidarity, it does not do so through republican means. On the other hand, insofar as Hickey understands republican politics to accommodate and actually benefit from fairly robust judicial review, so too might he admit of horizontal effect. One only need show that horizontal effect serves the legitimating purposes Hickey describes to conclude that it does not usurp the authorial function. In other words, one must determine whether horizontal effect contributes to the court's ability to legitimate those processes that engender republican freedom, or instead raises wholly new political questions that must be left to more democratic institutions. How one assesses these issues will directly bear on whether the republican principle of self-governance joins the principles of the common good and solidarity in supporting horizontal effect, or whether, in the words of Alec Stone Sweet, this aspect of horizontal effect instead constitutes a *"juridical coup d'état.*"[109]

[109] Alec Stone Sweet, "The Juridical Coup d'état and the Problem of Authority," *German Law Journal*, Vol. 8, No. 10, 2007.

Conclusion

The claim here is that horizontal effect constitutes a republican vein *within* the tradition of liberal constitutionalism. As explained above, the introduction of horizontal effect depends on the continued use of the liberal language of rights.[110] In understanding this innovation in constitutionalism through the lens of republican theory, therefore, this chapter does not intend to cast republicanism and liberalism as dichotomous, nor horizontal effect as wholly incompatible with liberal constitutionalism. Rather, it aims to draw attention to how particular features of horizontality reflect and finding grounding in republican principles, even as this intervention occurs within a larger liberal framework. To the extent that these traditions are different, however, we can ask where we find the best grounding for horizontal effect. Though previous scholarship understands horizontality in liberal contexts,[111] the republican tradition comfortably justifies such crucial features as the uniformity of private and public spheres' obligations and the solidarity that horizontal effect prompts.

At the same time, republican principles may also serve to caution courts that would give rights horizontal effect. For example, though horizontal effect finds justification in the republican principles of the common good and solidarity, the crucial

[110] Ivison.

[111] Scholars have understood horizontality in the context of social democracy (Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008) and Rawlsian thought (Sonu Bedi, "The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution," *Political Theory*, Vol. 42, No. 6, 2014, 716-738). One article departs from liberalism to make a Marxist and feminist argument for horizontality (Danwood Mzikenge Chirwa, "In search of philosophical justifications and theoretical models for the horizontal application of human rights," *African Human Rights Law Journal*, Vol. 8, 2008, 294).

role of the courts in applying rights horizontally may exist in some tension with republicanism's emphasis on self-government. As horizontal effect is still an emerging phenomenon, it remains to be seen how it will continue to be employed. Perhaps attention to these republican principles and distinctions will better equip scholars and jurists to consider horizontal effect as it does support republican freedom.

II. Solidarity in the United States and India

The previous chapter argued that horizontal effect can be understood as a republican vein in liberal constitutionalism, demonstrating how the doctrine itself entails uniformity between the standards governing public and private spaces, as well as solidarity in the duties resulting between citizens. The next three chapters build on this initial discussion by considering these doctrinal characteristics in the context of actual places. Whereas the previous chapter considered legal-constitutional doctrines of state action and, especially, horizontal effect as something like ideal types, the remaining chapters study them as (less precise) practices grounded in particular histories and contexts.

In the present chapter, I examine the United States and India to demonstrate the relationship between horizontal effect and solidarity. Both the United States and India have histories tainted by social stratification and caste, and eventually adopted constitutional commitments to equality. The fact that these countries maintain remedial constitutional provisions raises the question of the scope or horizontal effect of these commitments—whether the equality rights in their constitutions entail only formal equality or a more ambitious vision of solidarity, whether equality obligates state actors only or non-state actors as well.[1] Indeed, as systems of inequality are frequently rooted in

[1] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* Oxford: Oxford UP, 2006; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review*, Vol. 102. 2003; Mattias Kumm, "Who's Afraid of the Total Constitution?" *German Law Journal,* Vol. 7, No. 4. 2006; Mattias Kumm and Victor Ferreres Comella, "What is So Special about Constitutional Rights in Private

individual practices and beliefs, both countries naturally confronted the issues of whether and how this new commitment to equality would bear on the private sphere. Ultimately, the different doctrinal resources that resulted from these early constitutional decisions would engender strikingly different political-constitutional discourses over the long term.

The United States' state action doctrine of the Fourteenth Amendment requires the identification of and adherence to a line between state action and non-state action, so that constitutional rights are a source of obligation only for public actors.[2] Early on, this state action requirement was interpreted strictly to deny the possibility that any private institutions might also carry public significance and, by extension, some obligation to constitutional rights. On the other hand, in an effort to stem anything like the discrimination America continued to experience in the mid-twentieth century, the Indian Constituent Assembly provided for horizontal effect in guaranteeing access to public accommodations (Article 15), prohibiting untouchability in all spheres (Article 17), and in several other provisions. While the task of American jurists became one of parsing the line between state and non-state action, Indian jurists instead engaged in the task of discerning what constitutional obligations private actors had to each other. The different discourses that emerge in the opinions of the respective high courts evince how these doctrinal structures shape constitutional politics.

In short, this chapter recounts two different stages in each country's constitutional history to demonstrate the connection between horizontal effect and solidarity. First, the

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Litigation?" in *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz, Utrecht, The Netherlands: Eleven, 2005.

[2] The obvious exception is the Thirteenth Amendment, which I discuss below.

extent to which each polity assumed a constitutional vision of solidarity at the outset influenced its decision to adopt horizontal effect versus a state action requirement. This is not to suggest that either country saw a consensus on these issues. Indeed, political actors in both contexts expressed a range of views on the reach of their respective constitutional commitments to equality. In the words of Indian constitutional framer Jawaharlal Nehru, we might describe both situations as "semi-revolutionary"[3] insofar as only some people had ambitions to affect real solidarity in each polity. Nevertheless, in both contexts, a particular viewpoint amid these debates gained a foothold early on, whether through the Court's constitutional interpretation as in the United States or through explicit inclusion in the constitutional text as in India. Secondly, this chapter argues the separate but related point that the initial legal-constitutional decisions have had practical implications for later efforts to argue for the solidarity of citizens as a matter of constitutional politics. Although, at this secondary stage, forces seemed to push both the United States and India toward greater solidarity, India's foundation for horizontal effect better supported this effort as a constitutional matter.

The comparison of the United States and India is not to suggest a false equivalence either in their histories or in their constitutional projects. Indeed, inequality has taken different forms in each country, and their constitutional states of affairs are the result of many historical accidents. From the Reconstruction Era through the years of Jim Crow, racism pervaded much of America including many of its governing institutions.

[3] Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution*, Unpublished Manuscript, Forthcoming: New Haven: Yale UP, 2019, 153.

Moreover, the *laissez-faire* understandings that prevailed at the time that the Fourteenth Amendment was adopted supported early formulations of the state action doctrine. On the other hand, not even 80 years after American Reconstruction, India's constitutional moment emerged into a different time and world. While both the caste system and religious conflict continually plagued the country, the fact that the Indian Constituent Assembly coincided with the adoption of the Universal Declaration of Human Rights attests to the fact that this was a new era for understandings of equality. Given such historical contingencies, it is unsurprising that the pursuit of equality in these countries would take different forms. On this basis, their comparison may not seem worthwhile at first blush. However, insofar as one of the very purposes of this chapter is to examine the kinds of constitutional projects that do (and do not) give rise to horizontal effect, it does make sense to consider such different constitutional orders—one a product of the eighteenth century and primarily committed to classical political rights, and the other one of the most ambitious constitutions of the Global South and assuming a wider array of rights obligations. Even while comparing these two countries, therefore, we can also account for the constitutional development of each on its own terms.

Underlying this chapter is an appreciation for the necessarily political nature of questions concerning the relationship between public and private. The legal realists argued similarly in the early twentieth century, when they challenged many jurists in their belief that the American state action doctrine was neutral. Speaking specifically about the reach of the Fourteenth Amendment's Equal Protection Clause in the United States Constitution, Christopher Schmidt recounts the legal realist insight:

> The public-private distinction on which the state action doctrine relies is incomprehensible without a recognition of the socially constructed nature of the distinction. This, in turn, depends upon assumptions regarding the relative importance of nondiscrimination in certain activities and societal expectations of the appropriate scope of government responsibility to confront discriminatory action.[4]

In other words, regardless of jurisprudential particulars, the actual location of the line between public and private that the state action doctrine requires depends on normative judgments that cannot be determined on the basis of the doctrine alone.[5] More specifically, despite ostensive doctrinal constraints, an American judge may effectively bring to bear rights on the private sphere simply by defining "state action" broadly, as including, for example, judicial enforcement of private agreements.[6]

In a way, therefore, this project picks up on the legal realists' insight in examining doctrine in the context of the larger constitutional projects. This chapter also pushes further, however, in that it argues that doctrine does include some substantive content in framing the very questions that constitutional actors ask. While the liberal logic of state action invites jurists to frame their questions in terms of a divide between public and private, the republican logic of horizontal effect lends itself to an understanding of shared duties across spheres. Even if the particular location of the line between public and

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[4] Schmidt, "The Sit-Ins and the State Action Doctrine," *William and Mary Bill of Rights Journal,* Vol. 18, 2010, 780.

[5] Though the legal realists were right to draw attention to the underdetermined nature of the state action doctrine considered on its own, one need not concede on this basis their further point that any line between public and private is wholly arbitrary. In other words, one can grant the discrete jurisprudential point about the state action doctrine, while also disputing the claim that there is no constitutional or moral justification for distinguishing between public and private spheres. (I am indebted to J. Budziszewski for this point.) For a different take on a similar question, see Christopher Schmidt's discussion of "vagueness" and the "disconnect" between doctrine and norms (Christopher Schmidt, "On Doctrinal Confusion: The Case of the State Action Doctrine, *BYU Law Review,* 2016.)

[6] Shelley v. Kraemer 334 US 1 (1948).

private is not determined by the state action doctrine, the negotiating of the line between public and private in particular cases is influenced by the *fact of* a state action doctrine. In a similar way, while a doctrine of horizontal effect may not provide a determinative answer to which right should take precedence over the other as, for example, in a proportionality calculation between the right to freedom of expression and the right against the economic harm of boycotts,[7] the *fact of* a doctrine of horizontality influences understandings of the relationship between public and private.

I will proceed by recounting key moments in the development of the right to equality in the United States and India. While each country attached a legal-constitutional doctrine to equality fairly soon after this right was adopted, doctrine alone did not furnish all answers regarding the content of the right. Much negotiating of what the right to equality required would ensue in both countries. While understandings of the content and requirements of equality have changed, however, constitutional doctrine, though not determinative, is omnipresent and influential in bringing these larger logics of liberalism and republicanism to bear on conceptions of equality. These logics are present in constitutional doctrine themselves and have demonstrably impacted the constitutional history.

The American State Action Doctrine: Negotiating Equality Along the Public-Private Divide

[7] *Lüth* case, BVerfGE 7, 198, 1958.

This section argues in the context of United States constitutional history that the concept of state action itself entails a kind of liberal logic insofar as it seeks a definite line between public and private. While the outcome of a case may not be determined by doctrine alone, as the legal realists argue, the liberal logic of state action does influence judicial reasoning. Even while understandings of the requirements of equality began to change during the Civil Rights Movement, the liberal logic of state action had so accommodated prior notions of what ought to be considered private versus public, that justifying the regulation of public accommodations in terms of equal protection was largely understood as challenging the state action requirement itself. Even though Title II of the Civil Rights Act of 1964 managed to prohibit racial discrimination in public accommodations, the liberal logic of the state action doctrine persists in shaping our understanding of what equality requires as a constitutional matter.

In the first session of the 39th Congress, Senator Jacob Howard explained that the purpose of the proposed Fourteenth Amendment to the Constitution was "to abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[8] In this way the Republicans of the post-Civil War era hoped the forthcoming changes to the Constitution would set the stage for effecting the equality of all in the states. The Thirteenth, Fourteenth, and Fifteenth Amendments were thus ratified between the years 1865 and 1870. The text of each of these was clear enough. The Thirteenth abolished slavery. The Fourteenth extended

[8] Congressional Globe, 39th Cong., 1st Sess. 2766 (1866). See also Cass Sunstein, "The Anticaste Principle," *Michigan Law Review* 92.8, 1994, 2436.

citizenship to "all persons born or naturalized in the United States," and guaranteed the equal protection of the laws and due process of law to people in every state. The Fifteenth guaranteed that the right to vote would not be contingent on one's race. Congress quickly moved to exercise the power the amendments granted to enforce the new constitutional commitment to equality. To this extent, Congress had some preliminary say in determining what the new commitment to equality would require in practice. In the ensuing years, Congress enacted several laws in pursuance of these amendments, including the Civil Rights Act of 1875, which guaranteed, among other things, "'full and equal' enjoyment of inns, public conveyances, and places of public amusement, regardless of race."[9] As justification for this legislation, Congress cited its power to enforce both the Thirteenth Amendment's ban on slavery and the Fourteenth Amendment's guarantee of equal protection.

Even at the time that the Civil Rights Act of 1875 passed, Congress was fairly divided on whether legislating on public accommodations exceeded its constitutional powers to say nothing of prudence in a turbulent time.[10] Indeed, the end of the Civil War did not mark the end of political contestation. A strong contingent from the southern states sought to limit the progress of Reconstruction as much as possible, and the Republican Party was itself divided on how to understand and interpret the new commitment to equality. While the Radical Republicans were eager to read the new amendments as much more comprehensive in their reach, the Centrist Republicans were

[9] Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, Cambridge: Cambridge UP, 2011, 6. See also, Pamela Brandwein 2016, 341.

[10] Brandwein 2016, 342.

content to extend freed persons a more formal, limited equality.[11] This range of positions with respect to the new amendments were on full display when the Civil Rights and Enforcement Acts were eventually challenged in court. In a series of cases, known collectively as the *Civil Rights Cases* of 1883, the Supreme Court was tasked with offering its own interpretation of the Civil War Amendments and the extent to which Congress did or did not act within its proper limits in its subsequent legislation. In these cases, black plaintiffs sued for being excluded from theaters and transportation facilities, in violation of the Civil Rights Act of 1875. The owners of those businesses argued that Congress had no authority to regulate their establishments under the Thirteenth and Fourteenth Amendments.[12] In an eight to one decision, the Court ruled in favor of the business owners.

In the opinion of the Court, Justice Joseph Bradley addressed the extent of congressional authority on the basis of each amendment. The Thirteenth Amendment, he conceded, had no state action requirement. That is, the amendment prohibited slavery both with respect to the actions of the state as well as the actions of private (i.e. non-state) actors. However, the Court did not accept the plaintiffs' argument that their exclusion from such public places as theaters and transit facilities amounted to "badges of slavery."[13] To accept this interpretation, Justice Bradley maintained, would be to "[run] the slavery argument into the ground."[14] On Bradley's telling, black people had already

[11] Ibid.
[12] Brandwein 2011, 6.
[13] Para. 21.
[14] Sanford Levinson and Jack Balkin, "The Dangerous Thirteenth Amendment," Columbia Law Review, Vol. 112.7, 2012, 1472.

been granted their "essential freedoms" in their civil and political rights, and calling any act of private discrimination a badge or incident of slavery would render the actual protection meaningless. In private correspondences, Bradley further worried that capacious interpretations of the Thirteenth Amendment would impose "another kind of slavery" on white proprietors.[15] Treating public accommodations and private gatherings as belonging to the same category, Bradley insisted, "Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party."[16]

In this way, Bradley began to draw the lines of what equality would mean and require for American constitutional law. Freedom extended only so far as to grant civil and political rights. So long as black persons had such freedoms, the Thirteenth Amendment could not (and, Bradley's argument implies, should not) do more for them. Moreover, though Bradley conceded that the Thirteenth Amendment did not include a requirement for state action, underlying his reasoning on this constitutional provision was a palpable urgency that the Court maintain a strict line between public and private, and maintain that line in a particular place. Specifically, the Thirteenth Amendment only required individuals in private spheres not to have slaves. But it did not require anything more of individuals, and especially not in private arenas. Anything more would unduly make black people the "special favorite of the laws."[17]

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[15] Ibid. Levinson and Balkin suggest that, even in 1883, a plausible argument could have been made for reading the Thirteenth Amendment more expansively. Justice Harlan's dissenting opinion exemplifies such a reading. However, the majority of the Court was not keen on adopting such an interpretation given the fact that the Thirteenth did not have a state action requirement.

[16] Ibid.

[17] Para. 25. See also, Brandwein 2016, 330.

Bradley's reasoning with respect to the plaintiff's Fourteenth Amendment arguments would reflect a similar urgency to maintain a line between public and private. The difference here, of course, is that the text of the Fourteenth Amendment does include language that raises this question of state action. The text of the amendment reads:

> *No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[18]

To the extent that the text of the Fourteenth Amendment has a state action requirement, its application depends on some prior understanding of what constitutes state action (or state neglect, as it were[19]) as opposed to purely private action. Looking to draw such a line between public and private, Justice Bradley considered the requirements and content of the right to equality. In making this determination, he relied on the distinction between civil rights and social rights that he had begun to develop in his 1874 Circuit opinion for *United States v. Cruikshank*.[20] Brandwein explains that during the framing of the Fourteenth Amendment, "Centrist and Radical Republicans agreed on a core body of *civil rights*: contract, property, suing, testifying, and equal redress for injuries. For centrists, access to public accommodations, schools, intermarriage were typically social rights."[21] Brandwein continues to explain that while the Radical Republicans would have both the civil and social protected by the Fourteenth Amendment, Centrist Republicans drew this

[18] Constitution of the United States, Amendment 14, Section 1. Emphasis added.

[19] One of Brandwein's primary objects in *Rethinking the Judicial Settlement of Reconstruction* is to reveal how original formulations of state action, even by more centrist actors, were capacious enough to include instances of state neglect (Brandwein 2016, 334-335).

[20] Brandwein 2011, 16.

[21] Brandwein 2016, 341.

distinction for the very purpose of omitting social rights from the guarantee of equal protection.[22] Bradley thus pursued this line of argument in the *Civil Rights Cases*, setting the initial limits for the reach of equality in the polity.

Justice Harlan's lone dissent sheds light on the fact that the Court had a choice in *Civil Rights Cases* respecting the meaning of the new amendments. In his dissent, Harlan argues against Bradley's narrow interpretation, explaining that the Thirteenth Amendment protects against more than slavery per se. Indeed, the Thirteenth Amendment calls for a more capacious interpretation that includes the abolition of certain corollary "badges and incidents" of slavery. Contrary to Bradley's reading, therefore, the Thirteenth Amendment equipped Congress to contend with the many "burdens and disabilities" that freed persons confronted as a direct result of centuries of enslavement.[23] Full abolition of slavery, full freedom in any meaningful sense, required protection of "those fundamental rights which were the essence of civil freedom" and protection from "all discrimination against [freed persons], because of their race."[24] On Harlan's telling, "the essence of civil freedom" thus extended further than Bradley conceded to include the very venues that the Civil Rights Act proposed to regulate, namely, "inns, public conveyances, and places of public amusement."

Harlan understands the ability to use inns and public conveyances as part and parcel of a rudimentary conception of freedom and, thus, comprising the freedom that the Thirteenth Amendment intended to guarantee. Indeed, such services as these institutions

[22] Brandwein 2011, 60-86.
[23] Para. 34.
[24] Para. 35.

offer are "so far fundamental as to be deemed the essence of civil freedom," no less than those rights that the majority of the Court did concede.[25] That the agents of these institutions are technically non-state actors does not detract from the fact that they maintain public significance and power over the enjoyment of the rights in question. Harlan explains, "no matter who is the agent, or what is the agency, the function performed is *that of the State*."[26] On this account, these agents are executing public functions in offering these services and, thus, may be subject to Congress's efforts to give effect to the guarantees of the Thirteenth Amendment. In the Court's decision to rule otherwise, he explains, freed persons are "robbed of some of the most essential means of existence, and all this solely because they belonged to a particular race which the nation has liberated."[27]

Apart from this argument that the regulations of the Civil Rights Act follow from the Thirteenth Amendment's guarantee of freedom, Harlan also explains that access of all-comers to inns and public conveyances is a principle rooted in common law. In this light, the Court's rejection of the Civil Rights Act becomes even more significant as not simply a rejection of one possible interpretation of a constitutional amendment, but a rejection of long-standing common law intended to regulate such private interchange. On this point, Harlan quotes none other than Justice Story:

> An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation, and he must guard their goods with proper diligence. . . . If an innkeeper improperly refuses to receive or provide for a guest, he is

[25] Para. 35, 39.
[26] Para. 38. Emphasis in the original.
[27] Para. 40.

> liable to be indicted therefor. . . . They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.[28]

On this basis, Harlan highlights the public nature of such institutions as inns and public conveyances. With this "*quasi*-public employment," he explains, comes "certain duties and responsibilities to the public," to serve all guests without distinction as to race or color.[29]

Harlan proceeds next to consider the Civil Rights Act's attempt to regulate "places of public amusement." While such places as theatres do not necessarily qualify as "the most essential means of existence," they are still public in the sense that proprietors devote their property "to a use in which the public has an interest." To this extent, Harlan explains, these institutions operate only under the license of law, and so, the authority to establish and maintain them is public in nature. Harlan concludes on this basis that such institutions must "submit to be controlled by the public *for the common good*…."[30] This line of thinking, that such privately owned institutions operating under the law must comply with *the common good*, makes more explicit the republican significance that inheres throughout Harlan's opinion. In the Thirteenth Amendment and the Civil War Amendments more generally, Congress rearticulated the polity's "public thing" to include a conception of freedom now comprising racial equality. This was a project that involved much more than the abolition of slavery, but the abolition of those badges and

[28] Para. 40.
[29] Para. 41.
[30] Para. 42. Emphasis added.

incidents that also contradicted this new articulation of the common good. In the Civil Rights Act, Congress therefore affirms that "since the nation has established universal freedom in this country for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of public conveyances, inns, and places of public amusement." In other words, it established universal freedom as the object of the *nation* understood as a whole and sought to realize this object in both law and fact.

As Harlan understood the Thirteenth Amendment to be as much about discrimination writ large as about the institution of chattel slavery in particular, so too did he understand the Fourteenth Amendment as transcending formal equality to include all the "privileges or immunities fundamental in republican citizenship."[31] His more expansive interpretation of equality and citizenship comes through when he explains that the Fourteenth Amendment and, specifically, that the citizenship clause of Section 1 guarantee "[e]xemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government."[32] He goes on to read Congress's Section 5 enforcement power in light of this comprehensive understanding of citizenship. Given his broad reading, the new amendments are far from self-executing and necessarily require Congress to take positive action to give these new constitutional commitments their full effect, as it so attempted in the Civil Rights Act. Harlan explains the rationale undergirding the Fourteenth Amendment accordingly: "To meet this new peril to the

[31] Para. 47.
[32] Para. 56.

black race, that the purposes of the nation might not be doubted or defeated, and by way of further enlargement of the power of Congress, the Fourteenth Amendment was proposed for adoption."[33]

In this way, Harlan relies on the citizenship clause to justify Congress's authority to legislate pursuant to the Fourteenth Amendment. He argues that the Amendment's language is "distinctly affirmative in character,"[34] not simply prohibiting the states from violating the new commitment to equality, but empowering Congress to give effect to the Civil War Amendments. Ought not Congress to have the constitutional authority, he questions, to "do for human liberty and the fundamental rights of American citizenship what it did…for the protection of slavery and the rights of the masters of fugitive slaves"?[35] Harlan would thus have Congress pursue a notion of citizenship encompassing much more than a simple check list of traditional legal criteria.[36] Rather, the Civil War Amendments aimed at more than formal equality in citizenship, on Harlan's telling, to bring equality in all spheres of life with a vital solidarity among citizens as the ultimate goal. He states,

> It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights as citizens was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporation and individuals in the States. And it is to be presumed that it was intended by that section to clothe Congress with power and authority to meet that danger.[37]

[33] Para. 43-44.
[34] Para. 46.
[35] Para. 53.
[36] I am grateful to Gary Jacobsohn for this insight.
[37] Para. 5.

In this way, Harlan's account of the amended Constitution might be described as entailing more of a vision or project than did Bradley's. Indeed, his opinion reveals how the Civil War Amendments might have marked, in the words of Jacobsohn and Roznai, the beginning of a kind of step-by-step revolution toward full racial equality.[38]

That this was even a question that the Radical Republicans and Centrist Republicans debated in framing the Fourteenth Amendment, and that Justice Bradley and Justice Harlan debated as a matter of constitutional law in the context of the *Civil Rights Cases*, illustrates that there was a range of possible interpretations of equality. More importantly, this illustrates that the state action requirement did not, by itself, determine that regulation of public accommodations was beyond the Fourteenth Amendment's guarantee of equal protection. Brandwein does explain that the Radical Republican interpretation that public accommodation rights were included in civil rights had always been "a marginal position." Quoting Charles Calhoun, she explains "'For most Republicans...the good society entailed [civil and] political equality but not social equality.'"[39] Though this may have been the more common position, it was neither the only interpretation of the Fourteenth Amendment nor of the state action requirement.

Ultimately, the Centrist Republican conception of what equality required triumphed in the Civil Rights Cases. This particular line between public and private, with public accommodations falling decidedly on the side of private, came to be understood as required by the state action doctrine itself. Moreover, this division between public and

[38] Jacobsohn and Roznai 166.
[39] Brandwein 2011, 14.

private entailed by the state action doctrine was pushed to limit the rights of African Americans even further. Indeed, Brandwein's primary project in *Rethinking the Judicial Settlement of Reconstruction* is to show that the decision in the *Civil Rights Cases* did not necessarily entail "the rejection of black property, contract, safety, and voting rights," actions which would all be justified in the name of the *Civil Rights Cases* in the years of Jim Crow.[40] Put differently, these were not necessary outcomes of state action, what I have characterized as the liberal logic of drawing a line between public and private. Rather, these outcomes were also influenced by the widespread goal of reinforcing certain ascriptive categories and hierarchies, to use Rogers Smith's language,[41] rather than pure, good faith efforts to interpret the requirements of equal protection.

Nevertheless the state action requirement invites the drawing of the line between public and private, between state action and non-state action. Therefore, in deliberating the requirements of equality, a polity could decide that "social rights" do belong on the side of the private, as the Court did in the *Civil Rights Cases*. This is not to condemn American constitutional law to relativism and positivism, but only to highlight that this determination concerns prior conceptions of the content and requirements of equality, and so is not determined by the state action doctrine by itself.[42] While this history does

[40] Ibid. 3; Brandwein 2016, 345. See also Brandwein's recounting of Stephen Breyer's dissent in United States v. Morrison (2000): "Justice Breyer suggested that the canonical 1883 decision, the *Civil Rights Cases*, never considered the kind of claim advanced by the federal government in the *Morrison* case, namely, that Congress was authorized under the Fourteenth Amendment to remedy the failure of state actors to punish gender-motivated violence." (Brandwein 2011, xi)

[41] Rogers Smith, *Civil Ideals*, New Haven: Yale UP, 1997.

[42] Neither do I wish to condemn rights, as to equality, to complete indeterminacy, or to foreclose the idea that we can make such moral determination while still rooted in the Constitution. During the sit-ins of the early 1960s, for example, Martin Luther King, Jr. described the demand for equality in access to public accommodations as "the logical extension of the school segregation struggle" (Schmidt 788).

suggest that this initial determination, that "the social rights of men and races in the community"[43] were a strictly private matter, found a comfortable home in the liberal logic of the state action doctrine, the Court and larger polity had opportunities to renegotiate the initial line drawn in the *Civil Rights Cases.* Indeed, in the same way that Harlan's dissent revealed a plausible alternative interpretation of the Thirteenth and Fourteenth Amendments that might have brought equality to civil society, many forks in the constitutional road arose after the start of the twentieth century. A kind of path dependence ensued, however, that proved the force of precedent both real and imagined on these questions. While as the Court and the polity grew largely sympathetic to a broader conception of equality and the rights of citizens, therefore, any move toward greater equality would not be justified as a constitutional matter, even when a plausible constitutional argument was available.

After decades of an equality defined by "civil not social" and "separate but equal," the Court and general populace became receptive to a more capacious understanding of the content and requirements of equality. That the Court might in fact pursue a line of constitutional argument that allowed equality rights to reach private spaces seemed plausible when the Court briefly embraced a broader understanding of state action. In the 1948 case *Shelley v. Kraemer*, homeowners in St. Louis adopted a restrictive racial covenant that prevented African Americans and other minorities from purchasing properties in their neighborhood. The covenant stated, no property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the

[43] *Civil Rights Cases,* 109 U.S. at 22. See also Brandwein 2011, 73.

use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."[44] When one of the homeowners party to this covenant sold his house to an African American family by the name of Shelley, others in the neighborhood asked the courts to uphold the restrictive racial covenant as a private contract to which they had all voluntarily agreed. The Supreme Court of Missouri decided to enforce the covenant on the basis that it was a purely private contract and did not bear on the state's obligation to uphold the Fourteenth Amendment's commitment to equal protection. This was a matter of private action therefore, rather than state action. However, on appeal, the United States Supreme Court found that the very act of enforcing the covenant did constitute state action. In the Opinion of the Court, Justice Vinson explained that "the full panoply of state power"[45] was ultimately responsible for preventing the Shelley family from occupying the home they had purchased. To this extent, one could not honestly say that the state had "merely abstained from action, leaving private individuals free to impose such discriminations as they see fit."[46] While the Court could not prevent the drafting of such covenants, therefore, neither could it enforce them without directly participating in discriminatory actions and, thus, violating the Fourteenth Amendment.

In this way, the Court seemed to find a path forward from the strictures of Bradley's initial reasoning and subsequent developments that continually left Congress's bereft of any power to implement widespread equality. Indeed, in the years leading up to

[44] *Shelley v. Kraemer,* Para. 5.
[45] Para. 19
[46] Para. 19.

the sit-in protests, some spectators were hopeful that *Shelley*'s move to recognize the Court's enforcement of private contracts as constituting state action might next lead to the Court's reinterpretation of the Fourteenth Amendment to require equal access to public accommodations.[47] However, others were less optimistic about the impact of this case, whether for reasons of strategy or reasons of principle. In a 2010 article, Christopher Schmidt describes *Shelley* as "a singular case," explaining that "it is best understood as a court putting aside doctrinal complexities in order to attack an immoral and socially destructive practice."[48] And indeed, the case does constitute a kind of high water mark in the Court's willingness to stretch the bounds of the state action doctrine so as to hold private actors accountable for constitutional principles. No case after *Shelley* follows similar reasoning. While the Court would in some ways find workarounds to the state action doctrine, it "quickly reasserted a traditional, limited conception of state action," and in non-race cases in particular.[49]

That such retrospective analyses find *Shelley* to be anomalous in United States constitutionalism is not altogether surprising when viewed in the light of early accounts of the case. Many legal scholars, including many who were sympathetic to the cause of equality, faulted the Court for its reasoning and even the outcome it reached in *Shelley*. Herbert Wechsler criticized the Court for departing from "neutral principles" of the law. He explains:

> That the action for the state court is action of the state...is, of course, entirely obvious....What is not obvious, and is the crucial step, is that the

[47] Schmidt 785.
[48] Schmidt 784.
[49] Schmidt 2010, 783-784.

> state may properly be charged with discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make.[50]

In other words, according to Wechsler, while state action was present in the general sequence of events surrounding the *Shelley* case, one could not honestly say that state action was responsible for the particular discrimination at issue, namely the restrictive covenant. The state may have had a hand in the covenant's enforcement, but it was not the source of the discriminatory act. Any decision to the contrary, Wechsler argued, was merely a result of the Court's wanting to reach a more favorable outcome rather than to adhere to neutral principles of the law. The fact that such dissents came from parties that were likely to welcome the outcome in *Shelley* as a practical matter speaks volumes of the general understanding of the state action doctrine at the time. While the Court in *Shelley* had technically granted the premise that only state action was accountable to constitutional obligations, it departed from the thrust of the *Civil Rights Cases* in that constitutional standards ultimately governed the behavior of private actors.

That scholars and jurists objected to the Court's decision at the time is not to say that the issue of state action was settled, however. Indeed, *Shelley* and other cases such as *Marsh v. Alabama* (1946) did lead some to question the state action doctrine as traditionally understood.[51] Louis Henkin, for example, suggested in a 1962 article that the Court should have decided *Shelley v. Kraemer* by weighing the Shelley family's right to

[50] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review, Vol. 73 No. 1, 1959, 29.

[51] Schmidt 2010, 784.

equality against the other homeowners' liberty to enter a contract.[52] He explains, "Under today's concepts of due process, we have suggested, the state may not forbid a person to be whimsical or capricious in his social relations or as to whom he will admit to his home."[53] Regardless of how the Court decided in *Shelley*, its enforcement would have constituted state action aimed at depriving one of the parties' rights.

In this way, Henkin argues for a mode of decision-making that begins to resemble horizontal effect, explaining how the Court should have engaged in a process of balancing to determine which right ought to triumph in this particular instance. More often than not, he thinks, equal protection will triumph given the commitments of the Constitution. Nevertheless, the Constitution does permit, and even protects, a certain ability of individuals to act arbitrarily with respect to the company they choose to keep. And so, the Court cannot but account for such freedoms of association as well. On this understanding, Henkin explains, Shelley essentially asked the "the state not prefer the old contract over his new one, that it not lend support to organized zoning for an improper purpose, to a discrimination which has no basis but race and serves no purpose but prejudice."[54] Hence, while different rights may have been at stake here, the facts of the case and the commitments of the Constitution pretty clearly favored the Shelleys.

[52] Louis Henkin, "*Shelley v. Kraemer*: Notes for a Revised Opinion," *University of Pennsylvania Law Review*, Vol. 110, No. 4, Feb. 1962.

[53] Henkin 498.

[54] Henkin 496-497.

Henkin's heterodox take on state action never gained traction, however.[55] Indeed, something closer to Wechsler's understanding stuck in the American legal world and in the Court's own understanding. Just a couple of years after *Shelley*, the Supreme Court actually denied certiorari of a case in which the New York Court of Appeals had "found no state action in a racial discrimination claim against a private housing developer."[56] The Supreme Court opted to deny cert even in spite of the fact that "the developer had received extensive state support in the form of land condemnation, street closings, and a twenty-five year tax exemption for a New York case just a couple of years later."[57] In the end, Shelley was the exception that proved the rule, a fact that became even clearer as the Court began to confront the cases resulting from the sit-in protests. Even as the Court largely ruled in favor of protestors, finding ways to help them evade trespass laws during the sit-ins of the early 1960s, it deliberately avoided upsetting the status quo of state action.[58]

Around the time that Congress was debating the Civil Rights Act of 1964, the Supreme Court was deciding the case *Bell v. Maryland.*[59] In this case, twelve African American students were refused service in a Baltimore restaurant and convicted of criminal trespassing. As Schmidt explains it, "the question came down to which party

[55] At least Henkin's approach did not gain traction in the United States. Other countries, however, do practice something very close to what Henkin proposes in their doctrines of horizontal effect. See, for example, Laurie Ackermann take on South African constitutionalism (Ackermann 2012, 271-273).

[56] *Dorsey v. Stuyvesant Town Corp* (1949). See also Schmidt 2010, 783..

[57] Schmidt 2010, 783.

[58] McKenzie Webster, "Note: The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations," *Journal of Law and Politics*, Vol. 17. 2001.

[59] Bell v. Maryland 378 U.S. 226 (1964).

was the primary lawbreaker, the discriminating proprietor or the sit-in demonstrator."[60] Given its favorable rulings in the sit-in cases of the previous terms, it seemed possible that the Court would take this opportunity finally to overturn the *Civil Rights Cases*. And indeed, Justices Douglas and Goldberg were in favor of doing just this throughout the deliberations. Even in the earlier case of *Garner v. Louisiana* (1961), Douglas wrote in his dissent: "Restaurants, whether in a drugstore, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the State may not enforce a policy of racial segregation." Three years later and with the Civil Rights Act of 1964 on the cusp of passing in the legislature, the time seemed ripe to reconsider the constitutional question.

Even while a majority of the Court was sympathetic to the protesters, however, other considerations were in play that ultimately led the Court to vacate and remand the decision back to the Maryland Court of Appeals. Schmidt makes much of the fact that Justice Black was disquieted by the methods of the protestors, for example. Eager to maintain law and order and not to stamp civil disobedience with the endorsement of the Court,[61] Justice Black, along with Justices Harlan (II) and White, thus decided in favor of the restaurant owner. The remaining six justices wavered between considering the constitutional question and taking the intermediate step of vacating and remanding since Maryland had recently passed laws against discrimination in public accommodations. Led by Justice Brennan, the justices seeking the more moderate line put much weight on

[60] Schmidt 784.
[61] Id. 798-801.

the fact that the Civil Rights Act was about to pass Congress. If they could prevent any disruption of this progress by avoiding a (doctrinally) controversial decision, then so much the better.

Members of the public sympathetic to the Civil Rights Movement were largely unconcerned and even unaware of such jurisprudential hurdles, however. In fact, the primary impetus behind the sit-in protests was the widespread conviction that the principle of equality advanced in *Brown v. Board of Education* ought to apply to public accommodations as well. Moral and constitutional consistency, they held, required nothing less. At various moments, this view, that the constitutional commitment to equality directly bore on private spaces, received the imprimatur of such public figures as Martin Luther King, Jr. and Dwight Eisenhower.[62] Moreover, almost as if to draw from Harlan I's conception of citizenship in the *Civil Rights Cases,* John F. Kennedy stated that the "right to be served in facilities which are open to the public" was an "elementary" right and one of "the privileges of being American." [63] Chris Schmidt quotes him at length:

> If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?[64]

[62] Schmidt 2010, 788.
[63] Schmidt 2010, 790.
[64] Schmidt 2010, 790.

In light of this, it seems that any hesitance the justices felt about reinterpreting the state action doctrine was not a result of the desire to appease the public. On the contrary, those sectors of the public that were sympathetic viewed equality at lunch counters, restaurants, and the like as no less constitutive of the equality to which the polity had committed in the Fourteenth Amendment and clarified in *Brown*. In thinking about these venues, the protestors and even the aforementioned public figures were not so concerned about drawing a line between public and private, therefore, as much as they aimed to transform the polity understood as a whole and so support the requisite conditions for solidarity among all citizens.

Even those who were more aware of the doctrinal complexities of state action and equal protection did not necessarily view these precedents as insurmountable. In a 1960 article, for example, *The Washington Post* described the state action doctrine as "an evolving thing."[65] It stated,

> An assertion that would have been laughed out of court 20 years ago may be an established right today after a long step-by-step process of fashioning a new rule. The courts may not rule today that Negroes have a right to eat beside white persons in private stores. They might so rule three or five or 10 years from now after taking it a piece at a time.[66]

Such an account that "a long step-by step process" was unfolding does offer good reason to think that Bradley's interpretation of the Fourteenth Amendment was never going to be the final word. On this understanding, the Court could ultimately decide that African Americans had "a right to eat beside white persons," so reinterpreting the state action

[65] Schmidt 2010, 785.
[66] Schmidt 2010, 785.

doctrine to conform to the emerging conventional wisdom and, as it happens, closer to Justice Harlan's conception of citizenship in the *Civil Rights Cases.* Even the Chief Justice himself thought it possible that the jurisprudence might unfold in this way. Indeed, in speaking of the Court's practice of avoiding the merits and instead deciding the sit-in cases on more procedural issues, Earl Warren explained that he had hoped that the Court "could take these cases *step by step*, not reaching the final question until much experience had been had."[67] As Warren thus admitted the possibility and even some desire to develop the state action doctrine, in retrospect it was telling that these reflections came in a more general explanation of why the Court had not yet taken such steps.

Private correspondences suggest that many of the justices initially considered decoupling section 1 of the Fourteenth Amendment, establishing the legal principle of equal protection, from section 5, establishing Congress's enforcement power. This would allow the Court to "*follow* Congress in redefining the meaning of the Equal Protection Clause—that is, the congressional interpretation of equal protection would then be adopted by the Court as a self-enforcing constitutional right."[68] Even Justice Harlan (II) who ultimately dissented from Brennan's majority opinion in *Bell v. Maryland* was willing to consider this rationale, since it would have allowed them to tread lightly with respect to the jurisprudential precedent.[69] This approach was plausible enough to be

[67] The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions, Ed. Del Dickson. Oxford: Oxford UP, 2001, 718. See also Schmidt 2001, 791. Emphasis added.

[68] Id. 805.

[69] Ibid.

floated in Congress, too, during deliberations for the Civil Rights Act of 1964. Nevertheless, this decoupling strategy would not control the decision in *Bell v. Maryland*, and, as we will see below, would not serve as the primary authorization for Congress's Act.

Despite the potential doctrinal workaround of decoupling Sections 1 and 5, to say nothing of the favorable state of public opinion, the Court ultimately avoided the constitutional question altogether. Scholarship identifies a variety of contributing factors leading to this outcome, from Justice Black's fears of endorsing civil disobedience to the strategic calculation of how their decision might affect the contemporaneous efforts of Congress.[70] Among these factors, too, the justices simply were wary of taking on the significant endeavor of revisiting and revising the state action doctrine and even the equal protection clause itself. During one of the conferences, Justice Black seemed to echo Justice Bradley's argument in the *Civil Rights Cases*: "[The Fourteenth Amendment] does not destroy what has until very recently been universally recognized in this country as the unchallenged right of man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise."[71] The clear belief and fear here was that the Fourteenth Amendment maintained a particular distinction between public and private, and the regulation of public accommodations fell decidedly on the side of private, non-state action. So while the states were free to root any

[70] Id. 791.

[71] It is interesting that Black joined the majority in both *Marsh v. Alabama* and *Shelley v. Kraemer.* These cases blurred the lines between public and private but also granted the premises of state action and so maintained some semblance of this distinction. Nevertheless, this does not by itself explain why Black did not join Brennan's conciliatory opinion. Christopher Schmidt offers a compelling explanation in that Black was deeply concerned about the impact the sit-in protests would have on the rule of law more generally.

anti-discrimination law in their own commitments to equality, the United States Supreme Court at least had to abide by the line-drawing project defined decades earlier in the *Civil Rights Cases*, as well as the particular place at which the Bradley had located this line that prevented the application of equality in public accommodations.

Even those Justices who joined Justice Brennan's majority opinion were concerned not to depart too quickly or drastically from what they considered to be the requirements of doctrine. Perhaps their concerns were primarily strategic or prudential—even this, though, suggests that these distinctions between public and private and state action and non-state action remained deeply rooted in constitutional understanding to such a degree that such caution was warranted. That the general public's understanding of equality's requirements had largely albeit not completely changed by this period only throws the point into sharper relief. In the end, even the activist Warren Court was not up to the task of redefining equality as a constitutional matter, and so uprooting the conceptions of public and private that had developed around equality in the form of the state action doctrine.

Contemporaneous with the Court's tortured deliberations in the sit-in case *Bell v. Maryland*, Congress held debates similar in both subject and intensity. In working to pass the Civil Rights Act of 1964, members of Congress considered whether they might rely on their enforcement powers under section 5 of the Fourteenth Amendment. This basis was clearly more germane to the questions at issue than the alternative basis of Congress's power to regulate commerce. Moreover, a few of the Court's recent decisions (some concerning the sit-ins and others state action) suggested that at least some of the

justices might welcome the shift in constitutional discourse this would inevitably entail. On the other hand, relying instead on the power to regulate commerce was safer if this new Civil Rights Act was to withstand lawsuits. Indeed, even if its basis was less clearly connected to issues of discrimination and equality, the Commerce Clause would not pose the same challenge to the *Civil Rights Cases*' precedent.[72]

Apart from the high stakes of the particular issue of civil rights, Chris Schmidt explains that Congress simply did not accept its position "as a coequal branch on matters of constitutional interpretation"[73] and, for this reason, was ready to defer to the Court's 1883 precedent. Schmidt's account reveals a painful irony in Congress's deferential attitude. Indeed, the Court was actually looking to Congress to act on the constitutional issue. As mentioned above, the Court had in its own deliberations considered decoupling the first and fifth sections of the Fourteenth Amendment that would have allowed Congress to advance its own understanding of equality rights in law under its enforcement power.[74] Nevertheless, the Court's "evolving position on this question was largely hidden from view." [75] As Congress was not privy to these developments among the judges, it ultimately cited its power to regulate commerce as the primary constitutional basis by which it passed the statute. While it also cited its enforcement

[72] Schmidt 2010, 772.

[73] Schmidt 2010, 773.

[74] Speaking of the justices, Schmidt explains, "Among themselves at least—for only hints of this would reach published Court opinions—they recognized that a congressional definition of state action (under Section 5) might go beyond a judicial definition (under Section 1)" (Schmidt 804). Douglas resisted this possibility in hopes that the Court would take a stronger line on equality and so truly confront the precedent of the *Civil Rights Cases* (Schmidt 808).

[75] Schmidt 2010, 808-809.

power under the Fourteenth Amendment, this provision was "relegated to a supplementary role."[76]

Not long after the Civil Rights Act became law in 1964, proprietors began to challenge Title II's requirement that people not be denied access to public accommodations on the basis of race. In such cases as *Katzenbach v. McClung* and *Heart of Atlanta Motel v. United States*, the Court confronted the question of whether Congress acted within its constitutional powers in its recent legislation. Moreover, the Court considered what part of the Constitution gave Congress this authority. Although Congress had relied primarily on the Commerce Clause, that the law mentioned the Fourteenth Amendment at all kept section 5 in play as a possibility. Even at this stage, however, when the Court was in a position that it could defer to Congress, it upheld Title II on the basis of the Commerce Clause alone, "refusing to evaluate the alternative Fourteenth Amendment rationale to which most of the Justices felt Congress had not committed itself."[77] The justices considered the possibility in conference, but in the end only Douglas and Goldberg wanted to address Congress's Section 5 enforcement powers.[78] And so, what much of the country had come to understand as a question of constitutional morality remained a private space in constitutional law, to be regulated simply as a matter of commerce and not implicating rights in any way.

One might argue that this outcome of the Civil Rights Movement has not prevented progress in racial equality. Indeed, the Civil Rights Act has become quasi-

[76] Schmidt 2010, 772.
[77] Schmidt 2010, 772.
[78] Schmidt 2010, 819-820.

constitutional in nature[79] and, beginning even before 1964, many states have done much to combat discrimination in their own anti-discrimination laws. Nevertheless, recent cases show the fragility of statutes for the very reason that they do not enjoy the same entrenched status as constitutional law. One need look no further than *NFIB v. Sebelius* (2012) to see that the Court has periodically reined in Congress's commerce power, or *Shelby County v. Holder* (2013) to see that even such a milestone as the Voting Rights Act is not beyond incursion. Moreover, from an expressive or symbolic point of view, that the Civil Rights Act continues to be grounded in Congress's commerce power rather than the principle of equality seems to degrade its status in the constitutional order from the start.

As members of the Court fully admit that this area of law is a "conceptual disaster area,"[80] they continue to work within and around this framework. Particularly in the realm of civil rights, the Court has decided that privately owned institutions that are somehow "entangled" with the state or that serve what are traditionally thought of as "public functions" can, in fact, be regulated as state actors. Though these workarounds may bring the Court to the outcomes it desires, they reach such conclusions only by expanding the definition of the state, so preserving the core of Justice Bradley's legacy rather than obligating private actors to the constitutional commitment to equality. Perhaps it is not surprising that the Court has employed these doctrines of "entanglement" and

[79] William N. Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution,* New Haven: Yale UP, 2010.

[80] Charles L. Black, Jr., "The Supreme Court, 1966 Term—Foreword: 'State Action,' Equal Protection, and California's Proposition 14," *Harvard Law Review*, Vol. 81, 1967, 95.

"public function" in the area of civil rights more than any other.[81] Indeed, this is a realm in which the country has patently shifted its thinking as evinced in the sit-ins and the public's constitutional understanding of these protests. In other words, we see these workarounds to the state action doctrine occurring precisely where the polity has changed its position and when it did want to effect solidarity among citizens. This is not to say that this shift jeopardizes the state action doctrine in general. Indeed, that some private space ought to exist beyond the reach of public values remains the prevailing constitutional understanding. Nevertheless, in the sit-ins, the polity confronted the valid political question of whether to rethink concepts of public and private with respect to the particular issue of racial equality. This question, which many found so reasonable following *Brown*, would prove inviable as a matter of constitutional law.

In much the same way that the *Civil Rights Cases* generated a kind of path dependence in future cases, so too did the Court's continued abidance by (and its particular formulation of) the state action doctrine in *Bell v. Maryland* preserve this constitutional interpretation to see another day. The sit-in protests offered the Court a chance to draw the line between public and private anew, and so reconceive the Fourteenth Amendment to approximate Harlan's account of equality in his memorable dissent. Though many circumstances at the time seemed to favor such a decision, the precedent and certain institutional factors were powerful enough to lead the court to foreclose such alternative understandings of the state action doctrine, perhaps for good. While the state action doctrine was historically employed to nefarious ends, many

[81] See, for example, *Reitman v. Mulkey* (1967) and *Moose Lodge v. Irvis* (1972). See also, Mathews 9.

acknowledge the value in preserving some private sphere and in distinguishing between state and nonstate action.[82] Still, the fact that the Court has been willing to preserve this doctrine even when reaching outcomes it finds unpalatable illustrates the Court's continued commitment to the state action doctrine in general. To this end, I conclude this section with *DeShaney v. Winnebago County*.

A small child by the name of Joshua DeShaney suffered serious abuse at the hands of his father. Wisconsin Social Services reported to the residence several times on suspicions of abuse but did nothing to remove him permanently from his father's custody. The abuse continued until the boy suffered irreversible brain damage with which he would live for the rest of his life. Learning what had happened only after it was too late, the boy's mother argued that the state was culpable insofar as it knew about the situation but did nothing to protect her son's positive right to liberty under the Fourteenth Amendment. In an opinion by Chief Justice Rehnquist, however, the Supreme Court ruled that the Fourteenth Amendment did not establish an affirmative duty of the state to protect against private abuse. Because Joshua's injuries were inflicted by a private party, the harm at issue could not properly be described as state action. Moreover, neither did any negligence on the part of the social worker constitute a harm insofar as this was an instance of state *in*action as opposed to state action. Thus, the Constitution did not offer any rights protections to Joshua. His only remedy was found in the fact that the father had been convicted of child abuse.

[82] Louis Seidman and Mark Tushnet, "The State Action Paradox," in *Remnants of Belief: Contemporary Constitutional Issues,* Oxford: Oxford UP, 1996.

The state action doctrine thus persists and persists in rigid form, even in the face of tragic circumstances. Perhaps the idea that "state neglect" be counted as state action might have led to a different outcome in *DeShaney*.[83] While this understanding of state neglect was widely accepted in equality-based claims in the nineteenth century, Brandwein explains how it fell away from the jurisprudence after a few decades.[84] Even without the concept of state neglect, however, the Court might have reached a different outcome according to Brennan's dissent. He argues that the state *had* acted from the very moment that it established the Department of Social Services, taking upon itself a duty to protect. In assuming this role for itself, the state effectively obstructed any others who might have come to the young boy's aid. On this understanding, it seems the Court did have a choice in *DeShaney*, in much the same way that it had a choice in earlier state action cases.

Gary Jacobsohn offers a framework by which to understand this alternative outcome that might have been in *DeShaney* against the decision that the Court actually reached. Jacobsohn analogizes constitutional interpretation with the classic dramatic genres of comedy and tragedy. In much the same way that comedies conclude with happy endings, typically only after some manipulation and absurd turns of events, so too can we imagine "judges exercising creativity in the pursuit of acceptable outcomes."[85] On the other hand, in contrast to comedic figures, the tragic hero inevitably is "unable to escape

[83] Brandwein 2011, 242-243.
[84] Brandwein 2011, 242-243.
[85] Gary Jacobsohn, "Dramatic Jurisprudence," in *Constitutional Stupidities, Constitutional Tragedies*, Ed. William Eskridge and Sanford Levinson, New York: New York UP, 1998, 115.

the necessary consequences of his actions," try as he may.[86] Likewise, constitutional interpretation can have a tragic character, as when judges insist on "rigorous judicial adherence to norms of objectivity derived from neutral principles,"[87] even when alternative plausible interpretations might have been available. In the *DeShaney* case, we might say that Brennan's and Blackmun's opinions err on the side of the comedic while Rehnquist's tends to the tragic.[88]

Both approaches have their problems, however. Of the comedic approach, Jacobsohn explains that some "will find in these efforts an unfortunate subversion of the liberal constitutionalism of the Founding Fathers. "[89] Even if a person were convinced that a particular outcome was morally superior, it may not follow that the Constitution could support that outcome. Meanwhile, practitioners of the tragic approach are vulnerable to the different tendency of subscribing to an "exaggerated sense of law's determinacy."[90] Jacobsohn ultimately comes to the sober conclusion that constitutional interpretation is best understood in *tragicomic* terms, in which judges "strive for an accommodation between necessity and manipulation, between the obligation to find the law and the temptation to make it."[91] While this conclusion resists easy categorization and certainly calls upon judges to exercise their discerning capacities, it seems that

[86] Jacobsohn 1998, 115.
[87] Jacobsohn 1998, 116.
[88] One might also say that Herbert Wechsler's account of *Shelley v. Kraemer* was more tragic in the conclusions it reached.
[89] Jacobsohn 1998, 115.
[90] Jacobsohn 1998, 116.
[91] Jacobsohn 1998, 116.

neither tragedy nor comedy could by itself encompass a full account of the constitutional project.

Jacobsohn concludes that *DeShaney* seems to "represent a failure of judicial imagination,"[92] suggesting that the Court might have reached a more favorable outcome, perhaps along the lines of Brennan's opinion, without doing damage to constitutional structures. In support of this diagnosis, that the judges did have more room to reach a different conclusion than Rehnquist maintained, Jacobsohn points to the "degree of interpretive freedom manifest in the ambiguities surrounding the state action doctrine."[93] Notwithstanding this possible interpretive freedom, much of the history of state action jurisprudence seems to be characterized by similarly tragic interpretations when the Court very well might have decided otherwise.[94] In many of the landmark cases, including the initial *Civil Rights Cases,* the Court encountered plausible alternative interpretations that might have initiated the kind of step-by-step transformation of which Earl Warren later spoke. But the desire for full solidarity among citizens was not so widely held in 1883 as to lay foundations for this vision. And when during the sit-in protests the country was ready to embrace a vision of solidarity and embrace it as a constitutional matter, Bradley's strict line between public and private had already been cemented.[95]

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[92] Jacobsohn 1998, 117.

[93] Jacobsohn 1998, 117.

[94] The possible exception that proves this rule is *Shelley v. Kramer.* However, some critics such as Herbert Wechsler might dispute whether an alternative ruling would have stretched the Constitution too far to its detriment, in line with Jacobsohn's comedic approach.

[95] Brandwein shows that this history is more complicated than other scholars have previously acknowledged in that the Court did count such concepts as state neglect as encompassing state action. Nevertheless, she also explains how Harlan's account of the Fourteenth Amendment was not shared by many beyond the Radical Republicans in 1883.

That America would have had some version of a state action doctrine seems inevitable given the text of the Fourteenth Amendment and the conventional liberal understandings of constitutionalism. Indeed, even Harlan I's dissent depends on some distinction of these concepts. Nevertheless, Harlan and successors such as Douglas were ready to acknowledge the significance that certain private spaces carried for citizenship and racial equality as the Radical Republicans had envisioned it. The way these conceptions of public and private relate to the project of solidarity comes into sharp relief when we consider this American constitutional history alongside that of India. Whereas jurists, members of Congress, and even many scholars in the United States have basically assumed tragically static interpretations of equality that defined solidarity out of the Amendment's project, the Indian Constitution has from the beginning included foundations for a dynamic move toward an equality defined by solidarity. In Jacobsohn's terms, we might say that transformational interpretations that might be called "comic" in the United States actually served to advance the Indian constitutional vision.

Horizontal Effect in India: Citizens' Duties and the Commitment to Equality

While maintaining a line between public and private has been so important in the development of United States constitutional law and rights, the Indian Constitution was founded on a slightly different understanding, one that included explicit discussion of the duties of individuals and non-state actors in the context of the larger plan and aspirations of the Constitution. Even while some constitutional provisions stipulated that certain rights only controlled state action, an entirely different logic was operating in the framing

of the Constitution, one that assumed the private sphere would be directly affected by constitutional commitments, and so did not show the same urgency to preserve a divide between private and public according to the traditional model of constitutionalism. In this way, we might say there was a kind of republican logic at work that assigned a role to private individuals in the constitutional project and would manifest in the ongoing development of a doctrine of horizontal effect.

This is not to say that all of the Indian framers subscribed to the same vision of equality and social justice for India. In the years leading up to the Constitution's framing Nehru acknowledged that the Indian constitutional moment might be born of merely a "semi-revolutionary situation."[96] In this way, Nehru showed some confidence that India was approaching the moment in which it would reconstitute itself, as well as a kind of realism that the impetus for such a revolution likely would not pervade the country as a whole. Indeed, many remained tied to structures of oppression that ran contrary to the constitutional vision such figures as Nehru maintained.[97] Picking up on this idea of a "semi-revolutionary situation," Jacobsohn and Roznai further suggest that the polity at the time of Independence might have been comprised of only "a semi-revolutionary people."[98] Even by the time the framers adopted and drafted the Constitution, they point out, divergent strands of thought and conflicting positions contributed to the final document—some supported the Nehruvian project of secularism and equality, while others were inclined instead to constitute the country on the basis of Hindu nationalism.

[96] Presidential Address to the Indian National Congress, Lucknow, 4/12/1936.
[97] Jacobsohn and Roznai 153-154.
[98] Jacobsohn and Roznai 153.

Granville Austin describes a related disjunction in the framing of the Constitution in his discussion of three "strands" underlying the Indian Constitution's philosophy: "protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians."[99] While these three strands were understood to be "mutually dependent and inextricably intertwined,"[100] they also came to exist in some tension.[101] Most relevant to the present project, the traditional rights that one might associate with the second strand's "institutions and spirit of democracy" did not always sit comfortably with the third strand's more ambitious goals of "social revolution." While the former was manifested in the Constitution primarily in Part III's guarantees as to formal equality, the latter appeared in Part IV's directives as to institute affirmative action programs (known as reservations) to benefit such historically disadvantaged populations as the Dalits. Though the directive principles of Part IV were technically nonjusticiable, they were essential to the constitutional vision, effectively charging the state to transcend formal equality in favor of a more substantive equality across Indian society. As Jacobsohn and Roznai point out, Nehru recognized both a static element and a dynamic element in the new Constitution. Whereas the static provision for formal equality would by itself support a more conservative tendency, a more aspirational substantive equality, what Marc Galanter calls the Constitution's "compensatory theme,"[102] comprised the more complete

[99] Granville Austin, *Working a Democratic Constitution*, Oxford: Oxford UP, 1999, 6.
[100] Austin 6.
[101] Austin 38.
[102] Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Berkeley: University of California Press, 1984, 381, 364. See also Jacobsohn and Roznai 173.

albeit dynamic vision. Nehru urged that this project could only be realized fully in duly recognizing the dynamic element, thus contending "step by step" with a political culture still hostile to much of this constitutional vision.[103]

In the interest of taking stock and thinking comparatively, then, in the United States' constitutional history we saw a kind of disharmony emerge later, as the formal equality of the *Civil Rights Cases* did not rest easily with the emergent commitment to solidarity in the Civil Rights Movement of the 1960s. In contrast, we see disharmony at the very start in India, from its constitutional moment. Given the juxtaposition of Nehru and others' aspirations with the broader political situation that promised to hamper their vision, disharmony existed from the outset. Nevertheless, in what Jacobsohn and Roznai understand as India's "step by step revolution" was a trajectory running its course, incrementally working out the constitutional vision. Inevitably, the process included both the "taking of steps backwards and forwards,"[104] but the end of such efforts was to lessen any disharmony by bringing the polity into accord with the constitutional vision. Therefore, whereas disharmony has proved to be a kind of terminus in America when the United States Court would not revisit the reach of equality during the sit-in protests, it is better characterized as the starting point of the Indian story as the meaning of equality initially reached further than civil society would permit. Indeed, the constitutional vision the Indian framers maintained extended beyond mere formal equality to encompass also

[103] Jacobsohn and Roznai 145.
[104] Jacobsohn and Roznai 149.

substantive equality, and beyond the involvement of state actors to encompass the cooperation of private actors as well.

According to Manjeet Ramgotra, the Indian independence movement and the constitutional framers sought unity and equality in the country's new founding.[105] A decade after independence, Jawaharlal Nehru used similar terms to articulate the constitutional project "to promote fraternity, assuring the dignity of the individual and the unity of the nation."[106] In this way, the architect of modern India identified "fraternity" as a factor in securing individual dignity and rights, to say nothing of the very unity of the newly-constituted polity.

This same idea, that the relationship between citizens was crucial to the success of a democratic India runs through the deliberations preceding ratification.[107] The Subcommittee on Fundamental Rights discussed at length the importance that citizens' duties should not be neglected amid so much discussion of rights. One member, K. T. Shah, cautioned that "the constitution would be incomplete, and even futile, if equal stress were not laid on obligations corresponding to rights,"[108] and that "every one of these rights [in the draft Statement of Fundamental Rights] would be impossible to

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[105] Manjeet Ramgotra, "India's Republican Moment," *The Indian Constituent Assembly: Deliberations on Democracy*, New York: Routledge, 2018, 219.

[106] Id. 213.

[107] See for example, Shiva Rao, *The Framing of the Indian Constitution: Selected Documents*, Vol. II, 38-48.

[108] Shiva Rao, *The Framing of the Indian Constitution: Selected Documents*, Vol. II, 38. This general emphasis on duties would manifest further when the 42nd Amendment to the Constitution would incorporate certain Fundamental Duties of citizens (see Article 51A of the Indian Constitution). Though not justiciable by themselves, the Supreme Court has rendered these Fundamental Duties justiciable through ordinary law or when attached to a fundamental right (Mahendra Singh, "India: Protection of Human Rights Against State and Non-State Action," *Human Rights in the Private Sphere,* Ed. Dawn Oliver and Jorg Fedtke,Abingdon, UK: Routledge-Cavendish, 2007, 181-82).

realise, unless, side by side, toleration is cultivated and enforced."[109] Shah goes on to develop this idea in a way that makes it immediately relevant to the present subject to horizontal rights, speaking of "the seeming conflict in certain rights due, so to say, to the right of one person or of one group becoming the obligation of another."[110] This explanation of a "conflict between rights" and of rights becoming "the obligation of another" speaks to the heart of what horizontality entails.

Throughout these deliberations, the framers seemed to be more concerned with cultivating a culture of mutual obligation among fellow citizens than the possibility of horizontality as a doctrine of constitutional law. Nevertheless, the very fact that some of the framers understood private individuals and non-state entities as having obligations vis-à-vis their fellow citizens is a far cry from the state action requirement that came to define equality in the American context. And indeed, the United States experience with equality (and inequality) had a direct influence on this stage of the drafting of constitutional rights to equality.[111] In his draft articles and notes, we see how the Father of the Indian Constitution himself was concerned to avoid the sort of discrimination America had tolerated in part by erecting such a stalwart wall between private and public. B. R. Ambedkar's draft articles explicitly dealt with access to public accommodations, eligibility for various offices, and the like.[112] In his notes on these particular draft articles,

[109] Id. 39.

[110] B. Shiva Rao, *The Framing of the Indian Constitution: Selected Documents*, Vol. II, 40. See also Rao 38-48.

[111] P. K. Tripathi, "Perspectives on the American Constitutional Influence on the Constitution of India," in *Constitutionalism in Asia: Asian Views of the American Influence,* Ed. Lawrence Beer, University of Maryland School of Law, 1988, 78.

[112] Rao Vol. 2, 86. Tripathi 78.

Ambedkar states that he borrowed language for some of the provisions from the Civil Rights Acts of 1866 and 1875, "passed by the Congress of the United States of America to protect the Negroes against unequal treatment."[113]

Whereas in the American context Justice Bradley worried that these laws would force whites to endure "another kind of slavery"[114] and Justice Black later worried that reading the Fourteenth Amendment to guarantee equal access to public accommodations would go too far to limit liberty, Ambedkar and others in the Drafting Committee for fundamental rights were intent not to define equality in such stark terms of private and public. In Ambedkar's own words, "Discrimination is another menace which must be guarded against if the fundamental rights are to be real rights. In a country like India where it is possible for discrimination to be practiced on a vast scale and in a relentless manner fundamental rights can have no meaning."[115] In this way, deliberations during the constitutional drafting and debates generally understood equality as necessitating at least some cooperation from the private.

Though the Subcommittee on Fundamental Rights did not ultimately adopt Ambedkar's draft articles, the articles that the Subcommittee did bring before the Constituent Assembly included four separate provisions aimed at securing the right to equality, including prohibition against discrimination in public accommodations (Article

[113] Rao Vol. 2, 96. Tripathi 78-79.

[114] Ibid. Levinson and Balkin suggest that, even in 1883, a plausible argument could have been made for reading the Thirteenth Amendment more expansively. However, the Court was not keen on adopting such an interpretation given the fact that the Thirteenth did not have a state action requirement.

[115] Rao Vol. 2, 96. Tripathi 78-79.

15) and the abolition of untouchability (Article 17).[116] These provisions made no distinction between public and private, and included no state action requirement.[117] The framers' preoccupation with encompassing private entities in the constitutional plan, and particularly the commitment to equality, is particularly evident in Article 15. This Article prohibits discrimination in two separate clauses: one aimed at the state, and the other aimed at private individuals or non-state actors. Both clauses employ the same language and specify the same protected categories: "religion, race, caste, sex, place of birth or any of them."[118] Though these clauses possess almost identical content, the framers nevertheless thought it necessary to include both in the final Constitution, Sadar Vallabhibhai Patel going so far as to say both were "absolutely essential."[119]

In some ways, however, the inclusion of two separate clauses, one obligating state entities and another private non-state entities complicates the story. On the one hand, the fact that the framers thought that it was necessary to specify that a right obligated the state suggests a departure from the traditional model in which one could assume that rights only ever obligated the state.[120] On the other hand, implicit in the fact of these separate clauses is the idea that private and public entities are distinct, and perhaps the

[116] The Civil Rights Act of 1955 implemented Article 17 by making untouchability an offense and creating a mechanism for prosecution (Krishnaswamy 52).

[117] Citing Article 15(2) and Article 21 (guaranteeing the right to life), Krishnaswamy explains that "the majority of rights are expressed in broad and general terms and ambivalent about who they are addressed to." He continues to explain that Articles 17, 18, and 23 expressly impose constitutional obligations on non-state actors. (Krishnaswamy 52).

[118] See Article 15, clauses 1 and 2 of the Indian Constitution. Constituent Assembly Debates, vol. 3, Lok Sabha Secretariat, 1986, 426. Gardbaum 603. See also the discussion on gender and "social equality" in Rao Vol. 5, 185.

[119] Constituent Assembly Debates, vol. 3, Lok Sabha Secretariat, 1986, 426. Gardbaum 603.

[120] Singh 188-189.

idea that their obligations are different. In the same remarks quoted above, Patel also describes prohibitions of private discrimination in such arenas as restaurants and hotels as "a completely different idea" from the state's obligation not to discriminate.[121] Moreover, in detailing additional private establishments, such as "wells, tanks, bathing ghats, roads and places of public resort," Article 15(2b) prohibits discrimination only in cases that these establishments are "maintained wholly or partly out of State funds or dedicated to the use of the general public." Similarly, Article 14 guaranteeing equality before law also seems to have a state action requirement attached. The text reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Though the framers maintained ambitious ideas of the duties of citizens, therefore, they still distinguished between state and non-state actors in matters of law and politics. Insofar as there are meaningful differences between the capabilities of state actors and non-state actors, it is not surprising that the framers would find the need to distinguish between their obligations as well. Indeed, the importance of the distinction seems to lessen in Indian constitutional thought as the capabilities of private entities increase.[122] Moreover, as explained above, this distinction in many ways defines liberalism—so to the extent that India is a liberal democracy, it is unlikely that constitutional framers and jurists would run together the public and private completely. In the years immediately following the Constitution's adoption, this distinction actually

[121] Ibid.
[122] Singh 191.

created some ground on which a conservative Supreme Court would argue against horizontal effect, at least in particular instances if not writ large. However, the constitutional debates and text do not seem to contain anything like the Centrist Republicans' understanding in post-bellum America that drove an impermeable wedge between social and civil rights. Indeed, there was broad consensus during the framing of the Indian Constitution that the right to equality required both.[123] Discrimination from any sector had to be fought if fundamental rights were to be "real rights" and "have meaning."[124] In this way, the Indian framers laid bare a path for dynamic constitutional development, even while some continued to insist on formal equality and verticality.

The Constitution's distinction between private and public in some of its provisions manifested in a few of the Supreme Court's earliest decisions that followed the precedent of other countries to confine the application of rights to the state.[125] Sudhir Krishnaswamy recounts how the Court was not always keen to understand constitutional rights as creating private obligations. In particular, *AK Gopalan v. State of Madras* (1950),[126] *PD Shamdasani v. Central Bank of India* (1952),[127] and *Vidya Verma v. Dr*

[123] Rao Vol. 5, 185.

[124] Rao Vol. 2, 96. Tripathi 78-79.

[125] Singh 189.

[126] 1950 SCR 88, 204. Krishnaswamy cites Justice Patanjali Shastri: "as a rule constitutional safeguards are directed against the state and its organs and that protection against violations of rights by individuals must be sought in the ordinary law." Krishnaswamy maintains that "This stipulative and unreasoning approach fails to pay attention to the constitutional text and the theoretical basis for deciding the scope and applicability of fundamental rights." (Krishnaswamy 57).

[127] AIR 1952 SC 59. "The petitioner was aggrieved by the bank's sale of his shared to recover a debt owed by him." He petitioned the court by a writ action to enforce his fundamental right under the former Articles 19(1)9f) and 31(1). (Krishnaswamy 55-56)

Shiv Narain Verma (1956)[128] were all decided according to the conventional understanding that rights only obligate the state. Krishnaswamy describes these as ambiguous cases. He explains that, based on the constitutional language alone, the Court could have decided either to apply the rights in question to the state only or also to private entities. Indeed, as suggested above, much seems to depend on what strands or themes of the Constitution one chooses to invoke, whether the static or the dynamic.[129] Moreover, these latter two Indian cases, and particularly *Shamdasani*, leave open the possibility for a doctrine of horizontality, as they "analyze fundamental rights provisions individually instead of deciding the issue wholesale by making some assumption about the nature of rights itself."[130]

In addition to resisting any move toward horizontal effect, the Court also resisted Parliament's efforts to make good on the new Constitution's "compensatory themes," manifested in Directive Principles that charged government with working toward a more substantive equality. In the case *State of Madras v. Champakam Dorairajan*, the Supreme Court struck down a state initiative that reserved specific spaces in government jobs and universities for members of lower castes.[131] Whereas the state of Madras had relied on

[128] AIR 1956 SC 108. The husband of the petitioner presented the supreme court with a habeas corpus petition to "release his wife from the custody of her father, alleging a violation of her fundamental right to life and liberty protected under Article 21." (Krishnaswamy 56))

[129] Jacobsohn and Roznai.

[130] Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India," in *Human Rights, Justice, & Constitutional Empowerment,* Ed. C. Raj Kumar and K. Chockalingam, Oxford: Oxford UP, 2007, 56.

[131] *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; see also Jacobsohn and Roznai 173.

Article 46 of the Directive Principles[132] in pursuing this policy, the Supreme Court operated on an understanding of formal equality grounded in a prioritization of Articles 16 (2)[133] prohibiting discrimination above other provisions in that same Article 16 that permitted greater complexity.[134] In much the same way as in the early cases concerning horizontal effect, the Court here proceeded on the choice to emphasize some aspects of the Constitution over others, maintaining that quotas in government jobs violated equality under the law. Further, whatever preference the Court already had toward a more conservative interpretation was reinforced all the more by the fact that the Directive Principles were nonjusticiable, in contrast with the equal protection of the laws and other such rights in Part III of the Constitution, the protection of which was clearly within the courts' purview.[135]

In response to such judgments "impeding the fulfillment of government's perceived responsibilities" under the Directive Principles,[136] Parliament passed the Constitution Act of 1951. In this First Amendment to the Constitution, a Parliament largely composed of the same members that had drafted the Constitution[137] pushed back against the Supreme Court's restrictive decision in *State of Madras v. Champakam*

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[132] This Article reads: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

[133] "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

[134] See, for example, Article 16 (4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

[135] Jacobsohn and Roznai 162-163.

[136] Austin 97.

[137] Jacobsohn and Roznai 173, fn. 99.

Dorairajan. The Amendment aimed to clarify a series of rights under Part III of the Constitution, including the rights to property and to equality, in order to preempt further claims that they somehow stood in the way of state-initiated reservation programs. In this way, such affirmative actions to assist historically deprived populations could not be challenged on the basis of discrimination. Jacobsohn and Roznai explain this as "a step forward in the dialogical advancement of a dominant, if not indisputable, view about achieving distributive justice in the polity."[138] However, the Court was not to take even a constitutional amendment as the final word on the question, waging an ongoing battle for power with Parliament in the ensuing years.[139]

A couple of decades, as well as several decisions and constitutional amendments, later the Court had a considerable opportunity to push back against Parliament in the case *Kesavananda Bharati v. State of Kerala*.[140] In this decision, the Court established what has become a crucial concept of Indian constitutionalism known as the Basic Structure doctrine, the idea that "specific features of the Constitution are deemed sufficiently fundamental to the integrity of the constitutional project to warrant immunity from drastic alteration."[141] The initial cause (and effect) of this decision was to declare that in fact the Court had power to determine if an amendment passed by Parliament (specifically, the 24th and 25th Amendments) went so far as to destroy rather than simply modify its basic structure. In particular, a narrow majority of the Court argued that while amendments

[138] Jacobsohn and Roznai 174.
[139] Jacobsohn and Roznai 160.
[140] *Kesavananda Bharati v. State of Kerala* (1973).
[141] Jacobsohn and Roznai 161.

could enact some limitations to individual rights, the Constitution permitted such limitations only to a point. The initial impetus for this judgment was, admittedly, to stem Parliament's power against the judiciary. However, this same basic structure doctrine would soon gain additional legitimacy when Parliament did pass a dubious constitutional amendment to enable Indira Gandhi's overstepping during the Emergency Era.[142] Thereafter the doctrine would be enlisted to the cause of a more complete understanding of the Indian constitutional project, including the support of the Directive Principles and even the expansion of horizontal effect.[143]

The Supreme Court thus assumed a fairly conservative posture in the years immediately following the adoption of the Constitution—it conceived of individual rights in such a way as to deter Parliament's efforts to enact transformative legislation and, moreover, insisted on a vertical model of rights that stemmed the influence of constitutional values in private spaces. Of course, the language and concept of a state action requirement appears in the constitutional debates and the Constitution itself, thereby allowing for the early decisions that prevented anything like horizontal effect.[144] Nevertheless, such requirements of state action did not accrue the same rigidity as did the counterpart doctrine of the United States' Fourteenth Amendment. Indeed, even if the state was the primary guarantor of rights, it was difficult to deny that the larger constitutional project of India set its sights on broader influence, even transformation.

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[142] Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court," *Washington University Global Studies Law Review*, Vol. 8 No. 1, 2009, 28-30.

[143] Jacobsohn and Roznai 149.

[144] Such as *AK Gopalan v. State of Madras* (1950), *PD Shamdasani v. Central Bank of India* (1952), and *Vidya Verma v. Dr Shiv Narain Verma* (1956).

That the Constitution aimed at widespread solidarity among all citizens was evident from the debates and the Constitution itself. Ultimately, the Indian Supreme Court would give indirect horizontal effect to Article Fourteen's guarantee of "equality before the law" and "equal protection of the laws" *in spite of* its state action requirement, and would not only support reservations but support them in private spaces. Nevertheless, it took years of political conflict and, ultimately, institutional consolidation before the Court arrive at this point. Indeed, this was a step-by-step revolution.[145]

Before long, the Supreme Court took initial steps toward acknowledging a constitutional project broader than its earlier decisions suggested, specifically in reassessing the reach of the fundamental rights in Part III of the Constitution. As Krishnaswamy explains, the fact that early cases assessed the reach of *specific* rights rather than decide the issue of horizontal effect wholesale gave the Court flexibility to decide differently in later cases.[146] In *State of West Bengal v. Union of India* (1963)[147] the Court thus took its first steps to develop a doctrine of horizontal effect, explaining that, "Prima facie, these declarations [of fundamental rights] involve an obligation imposed not merely upon the 'State', but upon all persons to respect the rights so declared, and the rights are enforceable unless the context indicates otherwise against every person or agency seeking to infringe them."[148] Mahendra Singh suggests this shift can be explained simply as the Court paying greater attention to the requirements of various articles of the

[145] Jacobsohn and Roznai 166.

[146] Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India," in *Human Rights, Justice, & Constitutional Empowerment,* Ed. C. Raj Kumar and K. Chockalingam, Oxford: Oxford UP, 2007, 56.

[147] AIR 1963 SC 1241, 1264.

[148] Ibid.

Constitution, as well as expanding the definition of "the State," per Article 12, in such a way as to admit greater horizontal application of rights.

In the wake of the Emergency Era of 1975-1977, a chastened Court was eager to reassert itself as a defender of all rights and not a mere instrument of the privileged.[149] Emboldened in this way, the Court acted to widen the application of fundamental rights, including through the horizontal application of certain constitutional rights. In *People's Union for Democratic Rights v. Union of India* (1982)[150] petitioners sought to enforce existing labor laws against contractors who were paying less than minimum wage in a construction project. The petitioners argued that the state had failed to enforce these labor laws, but also that the private contractors had violated their right to equality (Article 14), right to life (Article 21) and rights against exploitation (Article 23 and 24). With respect to the right against forced labor (Article 23), Justice Bhagwati explained that certain constitutional rights were "enforceable against the whole world."[151] Moreover, he described the right against child labor (Article 24) as "plainly and indubitably enforceable against everyone."[152] Insofar as Article 14 includes a state action requirement, Bhagwati dealt with it somewhat differently. Rather than giving Article 14's right to equality direct horizontal effect as with Articles 23 and 24, he gave this provision *indirect* horizontal effect, expanding the states' duties to ensure that private entities met minimum wage requirements.

[149] Singh 197.
[150] 3 SCC 235 AIR 1982 SC 1473.
[151] AIR 1982 SC 1473 (n. 35) 252-3. See also Krishnawamy 58.
[152] AIR 1982 SC 1473 (n. 35) 250. See also Krishnawamy 59.

Though limited in ways, *People's Union* is notable for the work it does to develop horizontal effect in Indian constitutional law, particularly on provisions that bear on equality. In spite of some language of state action in the Constitution, for example, *People's Union* illustrates how "differently phrased rights may apply horizontally to a different extent and in a different manner."[153] The concern of this case is pretty clearly not to negotiate equality along a boundary of what is public and what is private. Rather the interpretation of the Court entails the more positively constructed question of whether a right to equality does charge private individuals and non-state actors to, in fact, act. This approach, Krishnaswamy suggests, justifiably serves as a kind of model, "as it pays attention to the constitutional text, the nature of the right, and the context in which the right is claimed."[154] In this way, the Court avoids making all disputes automatically subjects of public law, while carving out a space to understand equality as creating constitutional obligations for private citizens.[155]

The approach the Court takes in *People's Union* is largely a product of the judges' ability to appeal to a foundation for horizontal effect in the first place. The logic of state action, for example, would not offer the conceptual space to consider the possibility of citizens' duties as such. It might have expanded the concept of state action so as to encompass non-state actors as a practical matter, an approach employed in both the United State and the Indian context at times. However, no concept of individual constitutional duty follows from this reasoning. On the other hand, in *People's Union,* the

[153] Krishnaswamy 62-63.
[154] Ibid.
[155] Ibid.

Court can draw from a pre-existing lexicon to formulate an understanding of constitutional duty. Admittedly, the concept of horizontal effect was still developing at this stage in Indian constitutionalism. Nevertheless, the sort of space that *People's Union* makes for private obligation finds its origins in the priorities of the framers as well as the constitutional text itself. "Appealing to the framers' understandings," Justice Bhagwati explains that Article 23,

> is clearly designed to protect the individual not only against the State but *also against other private citizens*. Article 23 is *not limited in its application against the State* but it prohibits 'traffic in human beings and beggar and other similar forms of forced labour' wherever they are found.[156]

That the framers laid groundwork for the concept of horizontal effect, therefore, likely spared the Indian Supreme Court some of the concerns the Warren Court faced in the 1960s.

The Indian Constitution's stronger foundation for horizontal effect in its constitutional vision comes to the fore in the outcomes of a couple of cases that have analogs in the canon of American constitutional law. First the case *Vishaka v. State of Rajasthan* (1997)[157] speaks to the issue of the state's duty to protect in ways not unlike the American case *DeShaney v. Winnebago County* (1989).[158] Apart from the usefulness of this case for its parallels with *DeShaney*, *Vishaka* is often considered an important case in its own right for horizontal effect in India. *Vishaka* involved a social worker employed by the State of Rajasthan who was brutally gang raped on the premises of her workplace

[156] Singh 202 (Singh's emphasis).
[157] *Vishaka v. State of Rajasthan.*
[158] *DeShaney v. Winnebago County.*

after she attempted to stop a child marriage. A trial court's acquittal of her attackers served as the impetus for others to file a class suit to establish laws against sexual harassment. Before *Vishaka* was decided in 1997, the only relevant provisions against such abuses were those couple of provisions of the penal code under which the social worker had sued. The petitioners argued that these did not adequately address the hazards to women in the workplace and that the issue should take on a sounder constitutional status.[159] The petitioners stated,

> The failure of the state to establish a legal framework to tackle sexual harassment in the workplace resulted in the violation of a woman's right to equality and against discrimination under Articles 14 and 15, her right to life under Article 21, and her right to 'practice any profession…'protected by Article 19(1)(g).[160]

Thus, petitioners sought to highlight the state's failure to protect rights by way of legislation and, by extension, how this failure directly resulted in the violation of women's rights by private actors.

In his careful reading of the case, Stephen Gardbaum points out that it is not entirely clear from the opinion whom the Court thought responsible for the harm of *Vishaka*. Indeed, given the facts of the case, the primary harm was arguably that which the assailants inflicted against the social worker.[161] Clearer in the judgment is the interpretation that the state inflicted a harm in failing in its duty to protect citizens from such crimes and from sexual harassment in general. Though this understanding falls short of direct horizontal effect, since the perpetrators are not themselves responsible for

[159] Robinson 9.
[160] Krishnawamy 53.
[161] Gardbaum 2016, 604-605.

upholding rights, this latter reading would be a clear instance of indirect horizontal effect. Indeed, private actors would still be held to the rubric of constitutional principles in the positive action that the state would take to regulate behavior. What previously would have been a matter of mere tort, contract, and criminal law became "a constitutional wrong" in *Vishaka.*[162]

Recall Justice Rehnquist's general argument in the American case *DeShaney v. Winnebago County,* that the Constitution's purpose "was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."[163] This reasoning and accompanying interpretation of the founding are a far cry from either of the two suggested readings of *Vishaka.* However one reads it, *Vishaka* does entail the state's positive duty to protect. Moreover, while in both India and the United States, the framers did look to the democratic political processes to execute such protections, it does not follow from this in *Vishaka* that such protections are discretionary. Indeed, the Parliament was compelled to undertake such action as a constitutional matter. In *DeShaney*, the United States Supreme Court insisted on the presence of state action to trigger constitutional rights protections, and that an absence of action that led to a private harm was not adequate. In *Vishaka*, on the other hand, Chief Justice Verma does identify such a positive obligation of the state, thus "widening the scope of application of rights as the court enforces a positive obligation on the state to

[162] Krishnaswamy 53-54.
[163] *DeShaney v. Winnebago County*.

intervene and decisively alter the relationship between private parties....”[164] Beyond the particular issues of gender equality which this case concerned, this reflects the more general divergence between the United States and Indian constitutional projects, the latter being much more concerned with positive steps which the state ought to take to remediate such abuses—historical, proximate, and the proximate rooted in the historical.

Also in *Vishaka,* and absent from *DeShaney*, is the understanding that citizens might have duties to one another under the Constitution. While the remedy in *Vishaka* did not necessarily come by way of the constitutional duties outlined in Article 51A, insofar as they are not justiciable,[165] the very fact that Chief Justice Verma cites them shows some continuity with the convictions aired in the Constituent Assembly debates. Krishnaswamy understands these constitutional duties as an “interpretive aid” to the Court.[166] Even if not controlling the case as a doctrinal matter, therefore, Verma’s citing these duties suggests that, on some level, “all citizens are under the constitutional obligation not to engage in sexually discriminatory behavior in the workplace.”[167] Contrast this outlook with Mary Ann Glendon’s account of the constitutional state of affairs in the United States, wherein she describes as “deafening” the silence of anything like citizens’ duties in law and in fact.[168]

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[164] Krishnaswamy 53-54.

[165] *Surya Narain v. Union of India*; see also Krishnaswamy 54.

[166] Another “interpretive aid” that Chief Justice Verma employed in *Vishaka* was the 1979 international treaty known as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Krishnaswamy 55). The invocation of this agreement raises interesting questions about the role and limits of supranational and international institutions in the developing horizontal rights obligations. This is a particularly salient question in light of the republican framework underlying the present project, and will be considered more fully in Chapter IV.

[167] Krishnaswamy 54.

[168] Glendon 77.

Another United States case that serves as a useful comparison to this moment in Indian constitutionalism is *United States v. Morrison* (2000). Indeed, both *Morrison* and *Vishaka* concern the introduction of legislation to deter and penalize gender-based violence and harassment. However, in passing the 1994 Violence Against Women Act, the United States Congress was not acting to fulfill any constitutional duty to protect. Indeed, in this Rehnquist opinion, the Supreme Court decided that the Commerce Clause and Equal Protection Clause did *not* empower Congress to enact certain sections of the law. Respecting the Commerce Clause, the Court argued that punishing gender-based crimes as VAWA proposed to do was beyond the purview of the national government, and ought to be left to the states to govern. Moreover, the Court argued that the legislature could not rely on the Equal Protection Clause in regulating private relationships. Citing the *Civil Rights Cases* as precedent, the Court maintained that the state action doctrine did not permit bringing constitutional commitments to bear on private actors. Neither did the state action doctrine empower the national government to hold to account state actors, such as the state legislatures, for their *inaction* to legislate against gender-based crimes.

The decision in *Morrison* illustrates plainly the contention that the United States Congress did not have the same constitutional duty to protect, and indeed could not assume such a duty, as did the Indian Parliament. On the one hand, one could argue that the role of federalism in American constitutionalism makes sense of the outcome in *Morrison.* Even though India is also a federal country, the arc of its constitutional jurisprudence places much less emphasis on the unique governing power of its states,

perhaps symptomatic of differences in its larger constitutional vision.[169] Nick Robinson explains that, "In contrast to the American Constitution, which largely solidified the economic and social status quo even while bringing momentous political changes, India's Constitution was born with an eye towards multiple transformations."[170] Moreover, as the 1994 *Bommai* decision discussed below reveals, such a transformative, national-scale project does not easily allow for significant deference to subnational units. However, it is worth noting, and noting separately from the federalism question, the general absence of anything like a duty to protect in the United States. The American states could regulate gender-based violence as they wished, but they also could do nothing if they wished and face no repercussions even as state actors. Thus, while the variable of federalism certainly influences the constitutional story in the United States, a more complete explanation of the difference between *Morrison* and *Vishaka* also requires attention to Glendon's insight about the dearth of "duties talk" in the United States. Whereas the Indian Supreme Court in *Vishaka* mandated Parliamentary action as a constitutional matter, the United States Supreme Court rejected Congress's initiative as a constitutional matter.

Another case, which has an American analog in the decision *Shelley v. Kramer*, may seem to undercut this chapter's argument at first blush. In 2005, the Indian Supreme Court decided *Zoroastrian Cooperative Housing Society v. District Registrar*.[171] This

[169] Granville Austin explains that, from the adoption of the Constitution, India did not have a robust understanding of citizenship at the state level. On the other hand, Vinay Sitapati explains that different states have different understanding of "other backward classes" ("Reservations," *The Oxford Handbook of the Indian Constitution*, Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016, 722).]

[170] Robinson 2-3.

[171] Zoroastrian Cooperative Housing Society v. District Registrar (2005) 5 SCC 632.

case involved a society that restricted membership only to Parsis. Since housing could only be transferred to members, the practical effect of the agreement was that only Parsis were permitted to purchase in the cooperative society. Both cases thus involved housing restrictions on the basis of classifications that had particular political salience in their respective contexts—race in *Shelley* and religion in *Zoroastrian Cooperative*. To this extent, comparing these cases offers a glimpse into how each polity has addressed solidarity among citizens in the area of housing. Recall that the United States Supreme Court decided *Shelley* based on the fact that it, the Court, was an arm of the state, and would have been implicated in discrimination contra the Fourteenth Amendment if it were to uphold the restrictive housing covenant. While the Court in *Shelley* technically toes the state action line and still decided the case in terms of different public and private spheres, the result clearly approaches something like horizontal effect and, according to some typologies, even represents a form of horizontal effect. Indeed, the case is rightly understood as an anomaly in the long history of state action in the United States. And yet, the Court's conforming to the doctrine of state action still serves to turn attention away from the actual issue of the case, which was a private harm, and instead make it about the courts' acts of enforcement.

Perhaps surprisingly, the Indian Supreme Court comes to a result in *Zoroastrian Cooperative* that more closely conforms to a strict state action line, at least in the particular outcome it reaches. Rather than rely on the fact that the Court would in effect be upholding the restrictive housing covenant in deciding in favor of the cooperative society, the Court instead seems to engage the validity of the cooperative society's

agreement itself. While the cooperative society argued its cases on the basis of its right to association (Article 19(1)(c)) and minorities' right to cultural preservation (Article 29(1)), the respondents argued that the restrictive covenant violated public policy, specifically Article 15 of the Constitution prohibiting discrimination in both public and private spaces. Thus, the arguments from both sides invited the kind of substantive analysis that the United States Court had avoided in Shelley. Although the Court ruled in favor of the cooperative society, however, it is unclear whether they based their decision on the constitutional rights to association and cultural preservation.

Legal scholars have acknowledged that the reasoning in *Zoroastrian Cooperative* is "obtuse," making it difficult to contend with and near impossible to come to any definitive conclusions about this case. For these reasons, as well as the potentially important fact that this case was decided only by a two-judge panel,[172] the present analysis is necessarily tentative. On Stephen Gardbaum's telling, there seem to be two lines of reasoning in *Zoroastrian Cooperative*.[173] On the one hand, although the cooperative society's bylaw preventing the sale of land to non-Parsis had to conform with "public policy," the Court argued that conformity with relevant statutory law, namely the Gujarat Cooperative Societies Act,[174] rather than directly to the Constitution was enough. It states:

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[172] Article 145 (3) of the Constitution of India suggests that cases decided by five or more judges are more authoritative than those decided by panels of only two or three. See also, Tarunabh Khaitan, "Equality: Legislative Review Under Article 14," *The Oxford Handbook of the Indian Constitution*, Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016; Gardbaum 2016, 613.

[173] Gardbaum 2016, 612.

[174] Gautam Bhatia, "Exclusionary Covenants and the Constitution-II: The Zoroastrian Co-op Case," 12 Jan. 2014. *Indian Constitutional Law and Philosophy*, indconlawphil.wordpress.com/2014/01/12/exclusionary-covenants-and-the-constitution-ii-the-zoroastrian-co-op-case, 25 Jan. 2019, 2.

> So long as there is no legislative intervention of that nature [to eliminate a qualification for membership in the cooperative society based on sex or religion], it is not open to the court to coin a theory that a particular by-law is not desirable and would be opposed to public policy as indicated by the Constitution.[175]

Thus, the Court's argument amounts to a fairly robust state action requirement, insofar as it maintains some separation between the Parliament's ability to legislate private interchange and the Constitution. On this reading, Parliament has wide discretion in setting the parameters of such societies without running the risk of implicating the state in any discrimination in which the society chooses to participate.[176] On this reading, *Zoroastrian Cooperative* seems to involve a similar reasoning as in *Shelley*, only reaching the opposite outcome.

An alternative reading of *Zoroastrian Cooperative*, that Bhatia and Gardbaum both acknowledge as plausible albeit not fleshed out in the Court's judgment, is that the Court did engage in constitutional balancing here, that "its narrow conception of public policy was the *conclusion* and not the premise of its analysis." In other words, the Court did question and ascertain that the cooperative society's particular bylaw conformed to the Constitution, and therefore proceeded on this basis to balance the rights to freedom of

[175] *Zoroastrian Cooperative Housing Society*. See also Gardbaum 2016, 611.

[176] Bhatia shows that this may have been inconsistent with prior judgments, however. He quotes the Court in *Delhi Transport Corporation v. DTC Mazdoor Congress:* "…in the absence of specific head of public policy which covers. Case, then the court must in consonance with public conscience and in keeping with public good and public interest…declare such practice or rules that are derogatory to the constitution to be opposed to public policy" (Bhatia II, 12 Jan. 2014, 2). On this general point, Gardbaum suggests the greater discretion of the Court may hinge on whether the legislation in question concerns a mandatory law, "in that the State is prescribing the compulsory terms of private legal relationships," or instead permissive law, in which "individuals set the terms of their private legal relationships and the State enforces them whatever they are" (Gardbaum 2016, 612).

association and cultural preservation versus the right against discrimination. And indeed, there is some evidence for this in the opinion. The Court states:

> …it is open to that community to try to preserve its culture and way of life and in that process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotments of lands or buildings in one's capacity as a member of that society, to preserve its object of advancement of the community.[177]

This discussion about preserving one's "culture and way of life" suggests that such rights did factor into the Court's judgment, and that the decision in *Zoroastrian Cooperative* did not hinge simply on the right of private actors to enter any manner of contract under statutory law. Rather than base its decision primarily on a state action requirement, the Court did apply these rights horizontally on this reading. In balancing these constitutional commitments against each other, it simply came down in favor of the rights to association and cultural preservation rather than antidiscrimination. Apart from the fact that the Court seems to make reference to these competing constitutional rights, this reading is further corroborated by the fact that the liberty to enter contracts has never been understood as absolute in Indian constitutionalism.[178]

If there is any merit to this second reading, then this case does involve horizontal effect to a greater degree than does *Shelley.* Indeed, on this latter reading, *Zoroastrian Cooperative* actually takes up the constitutional substance of the question at stake rather than rely on the fact of judicial enforcement of contracts. One might question, then, how

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[177] *Zoroastrian Cooperative Housing Society*, para. 33. See also Bhatia II, 12 Jan. 2014, 4.

[178] Gautam Bhatia, "Exclusionary Covenants and the Constitution-III: Zoroastrian Cooperative and Political Liberalism," 13 Jan. 2014, *Indian Constitutional Law and Philosophy*. indconlawphil.wordpress.com/ 2014/01/13/exclusionary-covenants-and-the-constitution-iii-zoroastrian-cooperative-and-political-liberalism, 25 Jan. 2019. Bhatia points out that this has been the case since the debates of the Constituent Assembly.

this decision that seemingly favors discrimination comports with the larger purpose of the Indian Constitution. Is not the Indian project founded on the goal of equality and solidarity among all constituent religions, ethnicities, cultures? The key here may be the fact that the Parsis are a minority population in India. Bhatia cites the American case *Wisconsin v. Yoder*, in which the Court allowed Amish persons to make alternative educational choices for their children, thus acknowledging a need to accommodate differences of particular populations, even as they may sit in some tension with other constitutional commitments.[179] Indeed, such efforts toward accommodation are rooted in other constitutional commitments, as to cultural preservation in *Zoroastrian Cooperative*. This is not to say that rights of association and cultural preservation would always trump rights of antidiscrimination. It is less likely that such majority populations as adherents to the Hindu faith would have succeeded with the same arguments, for example, since Article 29 of the Constitution refers specifically to minorities' rights to cultural preservation.

While one cannot easily sum up the *Zoroastrian Cooperative* case, one also cannot ignore it when considering the development of horizontal effect in India, particularly given the case's implications for the larger constitutional object of solidarity. Bhatia and Gardbaum show that there are good reasons to adopt different readings of the case. Moreover, both express relative certainty that the case's outcome is circumscribed to the unique set of facts before the Court.[180] While one might be justified to draw

[179] Bhatia III, 13 Jan. 2014, 3.

[180] Gautam Bhatia, "Exclusionary Covenants and the Constitution – IV: Article 15(2), IMA v. UoI, and the Constitutional Case Against Racially/Religiously Restrictive Covenants," 14 Jan. 2014, *Indian Constitutional*

conclusions about this case only hesitantly, the later *Indian Medical Association v. Union of India* (*IMA*) sheds additional light on *Zoroastrian Cooperative* and the trajectory of horizontal effect in India more generally. Indeed, whereas *Shelley* has proved to be the highwater mark for horizontal effect in the United States, it is now clear that *Zoroastrian Cooperative* was only one episode in the Court's increasing efforts to render a doctrine of horizontal effect that conforms to the larger egalitarian constitutional project. In the *IMA* case that followed a few years later, we see converge in the issue of horizontal effect the different commitments adopted in Indian constitutionalism mentioned above, namely, the commitment to rights in Part III and the commitment to a more compensatory scheme of social justice in Part IV. In this later case the Indian Supreme Court showed itself willing to engage fully with these questions.

In its early years, the Indian Supreme Court supported what Jacobsohn and Roznai call the "static element" of the Constitution.[181] This manifested in its drawn-out battle with Parliament, including such episodes as the passing of the First Amendment and the *Kesavananda* case. Moreover, this manifested in its treatment of horizontal effect as early decisions adhered to a state action requirement with respect to Part III of the Constitution. Such cases as *People's Union* after the Emergency Era and, later on,

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Law and Philosophy, indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants, 25 Jan. 2019, 1. Bhatia explains, "the correctness of Zoroastrian Cooperative rests upon Article 19(1)(c) [freedom of association] read with Article 29 [rights of groups to preserve their culture], and is therefore grounded in its own set of specific facts. It does not serve as precedent for the legality and enforceability of restrictive covenants qua contracts, more generally."

[181] Jacobsohn and Roznai 145. They further explain that "the Court became the perfect embodiment of the disharmonies within the Constitution, as it found itself over time on both sides of the tension inherent in the dual commitment to socio-economic transformation and liberal democratic rights" (Jacobsohn and Roznai 157).

Vishaka show a marked shift in the Court on the reach of Part III rights. While *Zoroastrian Cooperative* may suggest that some actors seek to maintain a strict state action requirement, the obscure nature of this decision could be interpreted as additional evidence of the Court's desire actually to break from prior understandings. Indeed, later cases reveal a more ambitious trajectory with respect to horizontal effect than some readings of *Zoroastrian Cooperative* might by themselves suggest. In particular, the Court has incorporated Part IV of the Constitution, containing the directive principles, into its own constitutional purview, a development which has also influenced the horizontal application of rights to private actors.

In 1994, the Court decided *S. R. Bommai v. Union of India*, a case that Jacobsohn and Roznai describe as the "linchpin in Nehru's step-by-step progression."[182] The case arose amid ongoing violence between Hindus and Muslims following the destruction of a mosque in Ayodhya in the state Uttar Pradesh. The party in power in the state government, the Hindu nationalist BJP, was clearly complicit in its negligence to quell the violence. And so, pursuant to Article 356 of the Constitution, the President of India assumed rule over the state government. When the state challenged this action, the Supreme Court explained that, in its failure to take steps to put down the violence, the BJP-led government demonstrated that it "could not be trusted to follow the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution."[183] Furthermore, since the Constitution "does not provide for its own

[182] Jacobsohn and Roznai 166.
[183] *S. R. Bommai v. Union of India*, at 143.

demise,"[184] the President's actions were justified as necessary to save the basic structure of the Constitution, including such fundamental principles as secularism as an instrument of equality and the larger catalog of Directive Principles in Part IV.

Jacobsohn and Roznai explain how, in *Bommai,* the Court extended the basic structure doctrine of *Kesavananda* beyond constitutional amendments to bear on the actions that political actors pursue in the course of ordinary politics. Put differently, apart from the electoral repercussions politicians risk in ignoring the Directive Principles, the decision in *Bommai* established that "a Government will also have to answer for ignoring the Directive Principles of State Policy in a court of law."[185] In this way, the Court embraced within its purview the same Directive Principles before considered unenforceable, assuming a conviction that motivated many in the Constituent Assembly, namely, that the real soul of the Constitution necessarily included both Part III and Part IV.[186] *Bommai* thus marks an important development in the larger constitutional revolution at hand, rendering state *in*action respecting the Directive Principles constitutionally liable and subject to the judgment of the Supreme Court. Moreover, *Bommai* set the stage for a practice of horizontal effect that also accounted for the Directive Principles, as became evident in the *IMA* case.

Indian Medical Association v. Union of India (*IMA*) marks another moment in which the Supreme Court brought the basic structure doctrine to bear on Parliament's

[184] *S. R. Bommai v. Union of India*, at 237.
[185] Jacobsohn and Roznai 170-171.
[186] Jacobsohn and Roznai 158. See also *Minerva Mills v. Union of India*; Shruti Rajagopalan, "Constitutional Change: A Public Choice Analysis," *The Oxford Handbook of the Indian Constitution*, Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016, 138.

efforts to effectuate the Directive Principles by way of constitutional amendment. In addition to the usual issues surrounding the enforceability of social policy and reservations in particular, the Court faced the additional question of how such initiatives applied horizontally. Specifically, it considered the validity of the 93rd Amendment to the Constitution, adopted in 2005, that laid groundwork for legislatures to extend to private actors the charge to maintain reservations in education. The Amendment added a fifth section to Article 15 of the Constitution that read:

> Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions *including private educational institutions, whether aided or unaided by the State,* other than the minority educational institutions referred to in clause (1) of article 30.[187]

Similar to the First Amendment discussed above, this 93rd Amendment aimed to ensure that Article 15's guarantee of formal equality would not be deployed against efforts to realize a more substantive equality. This Amendment was importantly different from prior efforts, however, in that it applied to *both* public and private educational institutions, according to the capacious vision of the Indian constitution project.

Pursuant to this new amendment, the Delhi Act of 2007 prohibited certain educational fees and mandated that a number of seats in all educational institutions be reserved for "Scheduled Castes, Scheduled Tribes and other socially and economically backward classes."[188] In the very next year, a private, unaided professional school in

[187] Constitution of India, Article 15, Section 5. Emphasis added.
[188] Jacobsohn and Roznai 176, fn. 107.

Delhi called the Army College of Medical Sciences was founded, admitting to their student body only "wards, or children of current and former army personnel and widows of army personnel, who, the school's defenders claimed, had experienced educational disadvantages relative to the civilian population."[189] While the school did rank applicants matching this description according to their test scores, it made no distinction on the basis of social, economic, or cultural background. This admissions policy thus ran up against the Delhi Act and, by extension, the 93rd Amendment. The appellant argued that the law and amendment were both contrary to the basic structure of the Constitution insofar as they constituted "unreasonable restrictions" under Article 19 (detailing the "Right to Freedom") and were likely to destroy the freedom to maintain such unaided nonminority educational institutions.[190]

In prior years, the Court might have invoked the basic structure doctrine of *Kesavananda* to uphold an understanding of formal equality that favored the Army College of Medical Sciences' case. Instead, however, the Court followed *Bommai* here in that it acknowledged Parliament's efforts to implement the Directive Principles and thereby secure a more substantive equality as part and parcel of the larger constitutional project. On this understanding, the 93rd Amendment did not betray the basic structure doctrine, but rather moved the country forward in its protracted constitutional revolution. Moreover, the particular fact that the Amendment and subsequent law included such private institutions as the Army College of Medical Sciences in its efforts to achieve

[189] Jacobsohn and Roznai 184.
[190] *IMA*, par. 70.

greater equality did not detract from the constitutional vision. Rather, this effort to reach into private spaces was in line with early explanations of members of the Constituent Assembly, to bring private actors into the fold of the constitutional project and inculcate a conception of solidarity among citizens. Insofar as abuse occurred and inequality existed without distinction between public and private spaces, so too would the Constitution ultimately reach these spaces. The Court seems to adopt this position for itself in the *IMA* case, stating "[T]he same concerns of national purpose, goal and objectives that inform the constitutional identity [do not] miraculously disappear in the context of the private sector."[191] Although *IMA* concerned a constitutional amendment, the amendment in question was not only consistent with the Constitution, on the Court's telling, but actually augmented the fundamental constitutional project which had long aimed at transforming the private sphere to effect solidarity among citizens.

This effort to bring equality into private spaces took many forms, involving different rights of Part III and, as in *IMA,* different directive principles of Part IV. The area of education was of particular importance in the question of horizontal effect insofar as many Indian schools were privately-run. Any efforts to bring education into line with constitutional principles, therefore, necessarily raised the question of horizontal effect. Moreover, education was a natural sector in which to give effect to the constitutional project insofar as education influences so much of the life and future of a polity. The upshot of such regulation, however, was that schools, including private schools, faced a real call to action when the Delhi Act required the implementation of reservations. In

[191] Ibid., par. 108.

other words, this was not a simple or self-executing instance of horizontal effect. Moreover, these regulations also entailed a fundamental shift in the mission of the Army College of Medical Sciences as initially conceived. But then, the Indian Constitution was never a simple or self-executing project. As Jacobsohn and Roznai explain, "Since the greatest potential societal effect of group-based admissions policies implicates the private domain, it is only appropriate that a case confronting that issue directly became the occasion for instructive reflection on India's constitutional revolution."[192]

Observers of Indian constitutional politics may find a new area for the development horizontal rights in gay rights. In 2009, the Delhi High Court decided *Naz Foundation v. Union of India*, overturning a colonial-era provision in the Penal Code that criminalized homosexual activity on the basis of Article 14 (Equality Before Law), Article 15 (Prohibition of Discrimination), and Article 21 (Protection of Life and Personal Liberty).[193] Soon after the case was decided, Tarunabh Khaitan described the judgment as a natural conclusion given the principles of the Indian Constitution. He states, "Given the liberal, secular and egalitarian Constitution of India, it is the opposite result that would have surprised constitutional lawyers."[194] And yet, reach the opposite result is exactly what the Supreme Court did a mere four years later. In *Koushal v. Naz*

[192] Jacobsohn and Roznai 175.

[193] In its decision, the Delhi High Court goes out of its way also to treat discrimination on the basis of sexual orientation in private spaces. See paragraph 104: "Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15." See also Tarunabh Khaitan, "Reading *Swaraj* into Article 15: A New Deal for All Minorities," *NUJS Law Review*, No. 2, 2009, 427-429.

[194] Khaitan 2009, 420.

Foundation, the Supreme Court overturned the Delhi High Court's 2009 decision and, with it, what Khaitan had seen as a "new deal for all minorities."[195] The Court cited as reasons to overturn the 2009 judgment the "principle of presumption of constitutionality" and the need to ground important decisions in the polity's own principles rather than those of foreign jurisdictions (as the Delhi Court had).[196] Finally, in the same back and forth movement that Jacobsohn and Roznai argue defines the whole of India's constitutional history, the Supreme Court revisited the issue in 2018, this time ruling in favor of decriminalization. The Court stated:

> [T]he Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement….The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.[197]

In this way, the Court ultimately argued in its unanimous decision for continuity between the constitutional project and this new frontier for equality in India.

Insofar as the decriminalization of consensual homosexual activity involved questions about the state of the Penal Code, this particular sequence of cases implicated only the state and state action. It may seem surprising, therefore, that the Court seized the opportunity in its 2018 decision to lay groundwork to extend rights obligations further. It stated:

> It is not only the duty of the State and the Judiciary to protect this basic right to dignity, but *the collective at large also owes a responsibility to*

[195] Khaitan 2009, 420.
[196] Jacobsohn and Roznai 265.
[197] *Nautej Singh Johar and Others v. Union of India* (2018), par. 80. See also, Jacobsohn and Roznai 266.

> *respect one another's dignity*, for showing respect for the dignity of another is a constitutional duty. It is an expression of the component of *constitutional fraternity.*[198]

From the beginning, the Indian constitutional vision was one of "fraternity" or solidarity. In this light, it is unsurprising that the Court would gesture toward implications for private actors even as the case itself created obligations only for the state. As a practical matter, we can see this digression as foreshadowing future moves to hold public accommodations accountable for this extension of the Constitution to gay rights. But a symbolic element also pervades this and similar passages of the decision,[199] in much the same way as the Constitution as a whole includes both material and expressive elements. In discussing the significance of the Directive Principles, Marc Galanter explains, "The compensatory discrimination policy is not to be judged only for its instrumental qualities. It is also expressive: through it Indians tell themselves what kind of people they are and what kind of nation."[200] In a similar vein, the public and the private were never essentially distinct questions in the Indian constitutional project; rather, both spheres speak equally and speak together to what "kind of people" and "what kind of nation" India aims to be.

Conclusion

[198] *Nautej Singh Johar and Others v. Union of India* (2018), par. 134. Emphasis added.

[199] The Court speaks similarly in a couple other passages of the opinion. See paragraph 52: "In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values"; and paragraph 250: "To change the societal bias and root out the weed, it is the foremost duty of each one of us to —stand up and speak up against the slightest form of discrimination against transgenders that we come across."

[200] Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, 562.

The early adoption of a classical liberal line in the United States, that there exists a separate private sphere not subject to constitutional standards, continues to define constitutional presuppositions and debates, even after the Civil Rights Movement shifted the polity's orientation on the particular issue of equality. On the other hand, the Indian framers entrenched the application of equality rights against private actors in the Indian Constitution from the outset. Even while this commitment to equality has only gradually taken root in private spaces in India as a practical matter, the early entrenchment in the Constitution has shaped debates to presuppose that individuals do have constitutional duties to one another. Different legal-constitutional frameworks thus shaped constitutional politics in importantly different ways in the United States and India, both in their presuppositions concerning public and private spaces and in framing the very questions that the courts must answer.

More to the point of the larger project, the original formulation and ensuing development of these different versions of equality directly relate to each country's larger perspective on solidarity as part of its constitutional project. The Indian framers' understanding that equality required solidarity among citizens fit comfortably with the republican aspects of horizontal effect; thus, the Indian Court's apparent trajectory of applying horizontal effect more widely and more frequently is unsurprising. In contrast, early interpreters of the Fourteenth Amendment among Centrist Republicans and in the Supreme Court were content to enforce mere formal equality, a standard that falls short of republican ideals that citizens together enjoy a more substantive equality and even maintain duties to one another. The state action doctrine's insistence on maintaining a

strict separation between public and private spheres was thus entrenched and has had great staying power, even as public opinion has shifted to embrace something closer to solidarity as essential for racial equality.

III. Uniformity in Germany and South Africa

In the previous chapter I demonstrated how decisions to apply (or not to apply) rights horizontally are directly linked to political actors' intentions to foster solidarity among citizens of a place. Both the United States and India have at various points faced the decision of whether equality rights should hold in privately-owned spaces such as public accommodations and housing. In the *Civil Rights Cases*, the United States Supreme Court roundly rejected Congress's efforts to give equality horizontal effect. Against Justice Harlan's admonitions that such protections and solidarity were requisite to republican citizenship, Justice Bradley and the rest of the Court argued that relegating the reach of this right to state actors only was necessary if the country was to avoid "another kind of slavery." The Indian framers, on the other hand, deliberately entrenched the application of equality rights against private actors in Article 15 of the Constitution. Even while this right to equality has taken time to be activated in private spaces as a practical matter, the framers' concern with cultivating solidarity in the polity led the Constituent Assembly to give equality in private spaces constitutional status from the beginning. And indeed, observers of Indian constitutional politics are beginning to see the actualization of the foundations originally laid in other areas of rights. In examining these two countries alongside each other we see how horizontal effect has been construed and applied as an instrument to propagate solidarity among citizens.

In the present chapter, I examine the feature of horizontal effect that I have called uniformity. In both Germany and South Africa, a desire to unite each country under a

common standard of governance, a common good, motivated the introduction and development of horizontal effect. In their respective constitutional moments, we find these countries confronting their histories of systemic injustice and genocide, hence acting to enshrine from the outset such values as human dignity. These values would govern and, moreover, govern the polity understood as a whole. As Chapter I's discussion of uniformity suggested, the horizontal application of rights is *about* transforming private spaces to implement a uniform standard at least as much as it is about the protection of rights. It is not surprising, therefore, that the German and South African framers and founding jurists would introduce horizontal effect in light of the immense transformations[1] required to realize their constitutional projects.

Fairly early on, each country departed from the conventional liberal logic that rights only create obligations for the state. The German Federal Constitutional Court introduced indirect horizontal effect, or *Drittwirkung,* soon after its institution in the *Lüth* case. Moreover, South Africa explicitly provided for horizontal effect in both its Interim and Final Constitutions. The constitutional histories of both countries reveal that behind the specific decisions to implement horizontal effect were aspirations to create a new kind of society. German scholar, Georg Sommeregger, describes horizontality in terms of promoting a kind of constitutional morality or introducing "society's common moral yardstick" into private spaces.[2] Moreover, he characterizes the later expansion of

[1] Jacobsohn and Roznai 111-112.

[2] Gerog Sommeregger, "The Horizontalization of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere *via* Legislation," *The Constitution in Private Relations,* Ed. Andras Sajo and Renata Uitz, Utrecht, the Netherlands: Eleven, 2005, 53.

horizontal effect to equality rights as part of a process of "enlarging the circle of members of the polis."[3] Similarly, Nick Friedman explains how South Africa's doctrine of horizontal effect was part and parcel of the constitution's transformative project.[4] The motivation for bringing constitutional values into private spaces is intelligible in light of the deep change each polity sought in their new constitutions.

In both contexts, however, horizontal effect was also contested from the beginning. Academics and jurists alike debated the virtues and vices of this new legal-constitutional mechanism. Would accepting the Basic Law as a standard for Germany's entire legal system threaten its time-honored civil law and specialized courts? Would horizontal effect usurp the function of the South African legislature to decide political questions and such matters as appropriations? What would become of such values as autonomy if private actors were now also responsible for protecting and promoting constitutional rights? As Frank Michelman puts it, the "ghosts" of the conventional liberal wisdom[5] persisted in different ways, even as both Germany and South Africa committed to real and thoroughgoing transformation. Some wariness is not altogether surprising, however, given the extent to which horizontal effect does depart from the conventional understanding of constitutionalism. Indeed, the German courts had particular incentive to tread lightly as no court had argued for a doctrine of horizontal effect when the Labor and Constitutional Courts were acting in the 1950s.[6]

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[3] Sommeregger 49.

[4] Friedman 67.

[5] Frank Michelman, "Constitutions and the Public/Private Divide" in *Oxford Handbook of Comparative Constitutional Law*, Ed. Michel Rosenfeld and András Sajó, Oxford: Oxford UP, 2012, 304.

[6] Alec Stone Sweet and Kathleen Stranz, "Rights Adjudication and Constitutional Pluralism in Germany and Europe, Journal of European Public Policy, Vol. 19, No. 1, 2012. Some exceptions are the treatment of

In observing how horizontal effect emanates from larger constitutional visions, we see how uniformity is manifested as a feature of horizontal effect. However, we can also learn much from simultaneously studying those instances in which political actors try to stem horizontal effect. When is uniformity considered unnecessary or undesirable? Put differently, when actors are reticent to apply rights horizontally, the rationale is often related to the feature and result of uniformity.[7] Though both countries adopted horizontal effect early on, therefore, they did so only after much debate and after some concrete steps to limit its reach. Most obviously, both Germany and South Africa have predominantly adopted indirect, rather than direct, horizontal effect, ostensibly creating a buffer in the way public values come to bear on private actors.

We see further limits on closer examination of the constitutional projects themselves, and especially the substance of particular foundational principles. Germany has valued autonomy (*Privatautonomie*) throughout its legal-constitutional history. While this value has certainly undergone transformation since the reframing of the Civil Code in the nineteenth century, Germany recommitted to such individual rights in the wake of World War II. This has allowed elements of the conventional liberal wisdom to live on, even as jurists have embraced horizontal effect. Perhaps symptomatic of this, equality claims and nondiscrimination long received the lower standard of reasonableness review, while most other enumerated freedoms in the German Basic Law enjoyed more robust

speech in the Weimar Constitution and in new state constitutions before the adoption of the Basic Law. See Peter Quint, "Free Speech and Private Law in German Constitutional Theory," *Maryland Law Review*, Vol. 48, No. 2, 1989, 258.

[7] Sommeregger calls this "value monism" (Sommeregger 35).

proportionality review.[8] In fact, the few times that equality rights have been applied horizontally, it has been through the Federal Labor Court rather than the Constitutional Court. Moreover, the relatively recent intervention of EU directives requiring heightened antidiscrimination policies in Member States initially met much resistance in Germany, as private actors voiced objections reminiscent of the early concerns of scholars and jurists in the 1950s. These events reveal something about the content of the commitments and constitutional project in which horizontal effect operates. Jurists accept that the principles of the Basic Law have a radiating effect such that constitutional values inform the polity understood as a whole. However, that these values tend toward autonomy and individual rights bears on how easily the polity has accepted horizontal effect in the context of other rights (as to equality or against indirect discrimination), and particularly those that seem to require more of individual citizens.[9]

On the other hand, equality comprises the heart of the South African vision, enjoying pride of place alongside dignity and freedom. On the South African telling and in understanding the South African project, these three values are impossible to separate from one another and even define one another according to former Justice of the Constitutional Court Laurie Ackermann.[10] Horizontal effect is limited in this context insofar as the South African Court primarily understands the Constitution as bearing on private life indirectly, that is, by way of common law and statutory law. Nevertheless, no

[8] Stone Sweet 2012, 100.

[9] It is worth noting that some of this resistance was a result of EU influence on member states. While I will consider this in the present chapter, insofar as it is an essential part of the story, this relationship will be the focus of Chapter IV.

[10] See generally Ackermann 2012.

one area of rights, such as equality, has proved to be a limit to how far the Court is willing to apply horizontal effect. Indeed, to effect equality across spheres has defined the South African vision from the beginning, such that even definitions of autonomy in South Africa are suffused with a concern for equality. Though South Africa's Constitution is much younger, the practice of horizontal effect has steadily expanded, evinced in the shift from *Du Plessis v. De Klerk* in 1996 (which showed some signs of Michelman's liberal ghosts, even while laying the groundwork for the expansion of horizontal effect) to the most recent case *Daniels v. Scribante* in 2017 (which suggests that private actors potentially have duties with respect to their fellow citizens' socioeconomic rights). In general, the South African Court has largely embraced the uniformity that horizontal effect actuates and embraced it in the context of a range of values of the South African Constitution. For the feature of uniformity itself fulfills the core of South Africa's constitutional vision to transform private spaces.

Scholars often identify Germany and South Africa as archetypes for horizontal effect. And indeed, horizontal effect seems naturally to grow out of their respective constitutional projects. Nevertheless, their different histories lead them to take somewhat different paths which, I argue, can be understood in terms of each country's posture with respect to horizontality's characteristic uniformity. In particular, South Africa's more egalitarian bent lends itself to a more expansive approach in contrast with the liberal commitments built into the content and structure of German law. That both Germany and South Africa have undertaken such debates in academic and juristic fora offers a unique

opportunity for comparison and study of horizontal effect.[11] Indeed, their deliberations make clear that each country wrestled with the role horizontal effect would play in their respective legal orders and reveal how, at base, the choice to apply horizontal effect is nothing less than a choice about the character of a constitution.

German Drittwirkung[12]*: Persistent Liberalism and Radiating Constitutional Values*

Given the argument of the present project, one might expect the republican tradition to loom large in such a country as Germany that is a bastion for horizontal effect. Nevertheless, Germany's body of law is often described as finding its roots in liberalism and, at least in the nineteenth century, a kind of libertarian liberalism, at that.[13] Taking a cue from Louis Hartz,[14] legal scholar Peter Quint explains that the German Basic Law reflects the same concern with classical liberal rights that we find in American constitutional-political history.[15] From the insistence on maintaining the integrity of private law as separate that we find in the civil law tradition, to the Basic Law's codification of autonomy and other classical liberal rights, a new disharmony[16] emerges with the adoption of the Basic Law in 1949, one that maintains the real regard for private life that pervades German legal history while also enshrining a set of values that would govern the German polity uniformly, that is, the polity understood as a whole.

[11] It is worth noting, too, that the German constitutional experience strongly influenced the South African Constituent Assembly four decades later.

[12] Horizontal effect or literally, third party effect. See Jorg Fedtke, "*Drittwirkung* in Germany," In *Human Rights and the Private Sphere,* Ed. Dawn Oliver and Jorg Fedtke, Oxford: Rutledge-Cavendish, 2007, 125.

[13] Jud Mathews, *Extending Rights' Reach*, Oxford: Oxford UP, 2018; Quint 249.

[14] Hartz 1991.

[15] Quint 249.

[16] Jacobsohn 2010, 15.

How, then, does horizontal effect develop in this context? Is it, and in what sense is it, republican? How do the debates and particular decisions concerning horizontal effect in German constitutionalism reflect the characteristic of uniformity given the essentially liberal assumptions of its legal history? This line of questioning is not to suggest that the liberal and republican traditions are incompatible or diametrically opposed. As explained in Chapter I, the fact that there are myriad versions of each tradition, to say nothing of the fact that apparently liberal philosophers such as John Locke clearly maintain republican commitments,[17] renders such a simplistic account implausible. Prior scholarship aims to show the complex ways in which these traditions relate.[18] Nevertheless, certain characteristics of liberalism—including the kind of individualism and autonomy that permeate Germany's legal tradition, as I will recount—do not naturally tend toward emphasizing the common good, citizens' duties, the cultivation of virtue. This raises questions about how horizontal effect has manifested amid the liberal principles built into the civil law tradition and that evolved to serve as the lodestar for postwar Germany. Somewhat paradoxically, these liberal principles have been adapted to furnish the content for a kind of constitutional morality in Germany that, with the development of *Drittwirkung*, applies uniformly[19] to public and private alike.

[17] For example, Locke's commitment to representative government has clear republican roots.

[18] Much scholarship makes these arguments in the context of American history but multiple political traditions are no doubt present in German history, as well. See, for example, Joseph Postell, "Regulation During the American Founding: Achieving Liberalism and Republicanism," *American Political Thought*, Vol. 5, Winter 2016, 84; Rogers Smith, *Civic Ideals*, New Haven: Yale UP, 1999; Jeffrey K. Tulis and Nicole Mellow, *Legacies of Losing in American Politics*, Chicago: Chicago UP, 2018; James W. Ceaser, *Liberal Democracy and Political Science*, Baltimore: Johns Hopkins UP, 1990.

[19] When I say uniformly, I do not mean to suggest that there is no difference in the way that public and private entities are responsible for upholding these rights. Indeed, the German courts have recognized

In adopting horizontal effect, the Constitutional Court effectively took these liberal values as the content for the new German constitutional order, to serve as a standard both for public and private actors. In this way, horizontal effect, makes these values over into a conception of the common good, obliging the polity understood as a whole. As Jacobsohn and Roznai explain, the adoption of the Basic Law "signals the moment when the foundation for achieving a new identity in that country was established."[20] And indeed, horizontal effect is nothing less than an instrument to ensure this new identity is realized in toto.[21] Thus, the liberal tradition shaped the development of horizontal effect in Germany, keeping alive typical liberal arguments in the longer-term trajectory and making any extension to egalitarian concerns more difficult. Of course, Germany was committed to social democracy and equality from the very beginning, but to require that such values govern uniformly across spheres was another question altogether.

I will proceed as follows. I will demonstrate the deep liberal roots of Germany's civil law tradition, and how these principles went on to inform the commitments of the Basic Law. I will then recount the development of horizontal effect in legal scholarship and in doctrine, showing how theoretical and institutional commitments related to Germany's civil law tradition resurfaced alongside aspirations to secure a new constitutional identity for the polity. Thus, the search for uniformity in horizontal effect

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that the state still carries more responsibility (Quint 260-263). Instead, I mean to say that the content of those rights applied horizontally serve as an ultimate standard for public and private without distinction.

[20] Jacobsohn and Roznai 111.

[21] Kumm 2006.

was inflected by particular principles that potentially tended to the contrary. I will conclude by highlighting important developments in horizontal effect over the decades, culminating with anti-discrimination legislation the German Parliament proposed to fulfill directives of the European Union. As this anti-discrimination legislation caused quite a stir among private actors in such arenas as business and religion, I point to this legislation and ensuing controversy as evidence of an enduring liberal ethos and what is still occasionally an uneasy fit with horizontal effect's tendency toward building a cohesive polity uniformly committed to the same principles.

German law long maintained individualistic and laissez-faire presuppositions. This was true of both the structure of the legal system and the content of the law itself. As was the case in many European countries in the nineteenth century, the German system was developed to comprise two distinct categories of law and, corresponding to those categories, independent systems of courts. [22] The Civil Code constitutes the private law, "the body of rules that seeks to do justice between private individuals and which does not ordinarily concern the state as a party,"[23] while the public law pertains to "obligations or regulations of the political organs of the state."[24] These systems of law originally operated independently of one another and, in general, did not intersect.

Germans jurists located the Civil Code in the ancient tradition of Roman law, so endowing private law and its practitioners with great prestige. On the other hand, the

[22] Ibid. John Henry Merryman, *The Civil Law Tradition*, 3rd ed, Stanford: Stanford UP, 2007; Alan Watson, *The Making of The Civil Law*, Cambridge: Harvard UP, 1981, 144-57.
[23] Quint 255.
[24] Quint 256.

public law was relatively new and primarily concerned with administration, as of social insurance and welfare programs following Bismarck's 1890 reforms.[25] Public law thus lacked the same storied history and reputation for rigor that came to be associated with the Civil Code. Nevertheless, jurists understood the distinction as indispensable. Indeed, by separating the rules governing the state from those that governed private relations, the law both delineated a separate sphere of private life and outlined ostensibly neutral rules of engagement for private interchange.[26] Quint explains,

> The apparatus of the state was excluded from private law, except to the extent necessary for the judiciary to allocate the private rights recognized by the Civil Code, and these rights generally implied a maximum of individual autonomy and a minimum of intervention to redress individual or group inequalities already existing in society.[27]

Thus, the Civil Code presumed formal equality and reflected what Philip Pettit calls freedom as noninterference.[28] Though both public and private law were necessary to governance, it was the Civil Code, the private law, that jurists credited with preserving freedom for Germany. In contrast, even when the Weimar Constitution later adopted a long list of rights, these rights were deemed judicially unenforceable,[29] and still failed to occupy the same position as did the Civil Code in the German imaginary.

Apart from the civil law system's structure that allowed for the referee of private relationships separately from the constraints of public law, the substantive content of law

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[25] Quint 256.

[26] This calls up such arguments as Wechsler's call for neutral principles (1959), on the one hand, against the likes of Hale (1923) and Tushnet (2008). See also Kumm 341-342, 365-366.

[27] Quint 255.

[28] Pettit 2012; Chapter I.

[29] Kumm 342. Kumm goes onto explain that this decision not to make rights justiciable was, at least in part, a result of observation of the United States' experience with a Supreme Court.

and belief in the Civil Code's neutrality also shows the liberal predilections of the contemporaneous legal world. In particular, the rules of private law "were thought to enhance a more general freedom of individuals not to be interfered with by the state—particularly in commercial relationships but also in other areas of everyday life."[30] Thus the Civil Code promised order and protection in such areas of private interchange as contracts, torts, inheritance, and family relationships. Indeed, some continue to point to the Civil Code as an essential source of freedom for the German people, even after the adoption of the Basic Law.[31] Moreover, such guarantees as that of private autonomy (*Privatautonomie*) were "highly cherished" for their role in securing a new middle class seeking economic freedom in the nineteenth century.[32] Notwithstanding a few exceptions,[33] therefore, the bourgeois idea "that contracting parties are formally free and equal"[34] and that private transactions ought not be hindered defined the substance of German law until the early twentieth century, when these liberal precepts were called into question.

The perception of the neutrality of the Civil Code was disputed in the early twentieth century as scholars and political actors observed that political choices undergirded decisions pertaining to both the code's legislation and interpretation. Severe economic crisis also generated a new urgency to modify the private law to meet the

[30] Quint 256.

[31] See Quint 263, including footnote 60 paraphrasing Dürig 1956.

[32] Fedtke 129.

[33] Most notably, the general clause of the BGB, section 138. (Quint fn. 18; Sommeregger 43). This provision in the Civil Code was intended to allow legislators to regulate private behavior.

[34] Zweigert and Kotz trans. 1987, quoted by Quint in fn. 25. See also see Morton J. Horowitz, *The History of the Public/Private Distinction*, *University of Pennsylvania Law Review*, Vol. 130, 1982.

escalating needs of the country.[35] Later, in the wake of World War II, the realization that the Weimar Constitution could be so easily leveraged to serve odious political ends further exposed the problems of striving for value neutrality in the law.[36] As Germany moved to amend its Civil Code and adopt a new Basic Law, therefore, its constitutive liberal principles underwent a kind of transformation. To be sure, the Weimar Constitution was a significant influence on the new constitution and the Civil Code was initially imported into the new regime unamended. Nevertheless, new commitments and historical memory both imbued the law with new meanings. Most notably, dignity figured prominently in the new constitution. The very first provision of the Basic Law states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[37] Such an emphasis on dignity is certainly consistent with liberalism's concern for the individual, and even expands on Kantian strains that some scholars identify in earlier instantiations of German law.[38] In his book *Human Dignity*, Aharon Barak states that there is "no other constitution in which human dignity has such a central role."[39] Indeed, that Germany has enshrined dignity as its supreme constitutional value, never to be amended, reflects its uncompromising rejection of the violations of human dignity inflicted by the Third Reich.[40]

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[35] Kumm 341-342.

[36] Quint 262.

[37] Basic Law Article 1 Section 1.

[38] See Quint 255, and accompanying citations: H. Hatfenhauer, Die Geistesgeschichtlichen Grundlagen Des Deutschen Rechts 186, 235 (3d Ed. 1983); K. Larenz, Methodenlehre Der Rechtswissenschaft 24 (3d Ed. 1975).

[39] Barak 231.

[40] Jacobsohn and Roznai.

While this new commitment to dignity certainly comports with Germany's long liberal tradition, it depends less on the liberal conception of separate public and private spheres, even as it continues to operate in a civil law system. Indeed, with this and other additions to the Basic Law, the content and very purpose of fundamental law expands.[41] Barak explains that most approaches to understanding the role of dignity in German constitutionalism understand it in the context of "the framework of society. Human dignity is not the human dignity of a person on a desert island."[42] In this way, we see a shift from the pure individualism and aspiration to value neutrality of the nineteenth century to something of a moral proposition for how the individual ought to be treated in German society and, by extension, what society itself ought to look like. Returning to the provision of the Basic Law, the second clause reads that "To *respect* and *protect* [dignity] shall be the duty of all state authority."[43] Barak explains that this provision has the potential to make both negative and positive demands of government.[44] The duty to respect requires that the state not do anything to limit human dignity, a principle that seems to grow fairly naturally out of the liberalism of the German legal tradition. The duty to protect, on the other hand, seems instead to require that the state take some positive action in pursuance of human dignity, though the text itself does not specify what this ought to entail. Almost a decade after the adoption of the Basic Law, the Federal Constitutional Court offered additional meaning and clarity on this duty to

[41] As David Robertson explains, constitution-makers no longer restrict the constitutional text to the structure and limits of government, but rather articulate aspirations and even an identity for the polity, as well (Robertson 2007). See also Jacobsohn on Constitutional Identity.

[42] Barak 236.

[43] Basic Law Article 1, Section 1. Emphasis added.

[44] Barak 237-238.

protect, interpreting it to require the defense of human dignity against violations by private actors.[45]

In this way, human dignity emerges as both a value of the German constitution and an enforceable right. As a value, it constitutes the basis of the German polity and, to this extent, engenders a kind of "common good." Robert Alexy's important distinction between subjective and objective rights further illuminates this development. Subjective rights align with the typical conception of rights as justiciable and as giving rise to claims against particular parties, usually the state. In contrast, objective rights comprise the broader values of a given constitutional order.[46] Objective rights are not immediately justiciable, though sometimes judges may decide cases in ways that derive duties from them. Discussing this shift to extract some understanding of a common good out of what formerly would have been mere rights claims, Habermas discusses the now recurring commitment to human dignity in national constitutions today. He states:

> "Human dignity" performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that citizens of a political community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons. *The guarantee of these human rights gives rise to the status of citizens who, as subjects of equal rights, have a claim to be respected in their human dignity.*[47]

If a constitution proposes an encompassing principle to guide a polity, a "seismograph" as Habermas puts it, then it is no longer a stretch to argue that citizens, too, ought to

[45] BVerfGE 7, 198 (1958); BVerfGI 39, 1 – Abortion I (1975); Mathews 68-72.

[46] Robert Alexy, *A Theory of Constitutional Rights*, Oxford: Oxford UP, 2010. See also, Quint 261-262.

[47] Jurgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy*, Vol. 41, No. 4, 2010, 469. Emphasis in the original.

conform to this standard. Put differently, human dignity begins to clear the path formerly occupied by the nineteenth century commitment to laissez-faire thinking, so preparing German liberalism for the kind of uniformity that horizontal effect would ultimately actuate.[48]

This concept of objective rights thus served as an intellectual bridge in constitutionalism, expanding the meaning of rights to encompass a kind of public morality. In the terms of the present project, we might say that this move to conceive of dignity as the moral basis for the new constitutional order gestures toward a new paradigm of governing all spheres according to a common standard. While the Basic Law does not explicitly take this step, its inherent vision as well as its specific content laid groundwork for such an interpretation. We get such a glimpse into the expanse of the German constitutional project from Jorg Fedtke's explanation of the years during the Third Reich, of the "climate of fear, terror and oppression, which went far beyond the many single instances of human rights infringements by the regime."[49] He states,

> Nazi ideology permeated society as a whole—the working environment, the arts, journalism, the scientific community, architecture, the church, schools and universities, social relationships, local communities where people went about their daily lives, and even the allegedly safe nucleus of the family home.[50]

As the pathologies and abuses had transcended spheres of life, therefore, the reconstituted German law had to be adequately equipped to effect change across spheres as well. Specific provisions in the original text of the Basic Law suggest as much. In addition to

[48] See also the *Elfes* case, BVerfGE 32, 6 (1957).
[49] Fedtke 128.
[50] Fedtke 128-129. See also Ackermann 322.

the commitment to human dignity, Article 1 Section 3's statement that rights bind the judiciary "as directly applicable law" begins to challenge the understanding of the role of courts in the civil law tradition, that the judiciary's role was simply to administer the Civil Code amid private transactions.[51] Indeed, the idea that rights bind the judiciary could be interpreted as a charge that judges continued to remain accountable to constitutional rights and values in the very process of applying the Civil Code.

On such questions, Article 9 Section 3 states explicitly that certain private relationships had to meet a constitutional standard, guaranteeing the "right to form associations to safeguard and improve working and economic conditions" against all actors, regardless of occupation or profession.[52] Thus, the constitutional drafters left little guesswork about the extent of this provision's application. Though this and the aforementioned provisions in the Basic Law in some sense signaled the capaciousness of the constitutional project, however, their presence also seemed to cut in the opposite direction to contemporaneous observers. Specifically, the act of stating explicitly when private actors were implicated by the commitments of the Basic Law was construed as implying that the remainder of the text obligated only state actors. And indeed, it was not long after the Basic Law was adopted that jurists and legal scholars began contemplating these questions.

Although the apex courts of the German legal system had already been charged with ensuring consistency *within* each branch of civil law,[53] the prospect of horizontal

[51] Fedtke 127.
[52] Fedtke 126.
[53] Quint 256.

effect suggested for the first time the possibility of consistency, or uniformity, across areas of law. While some of the content of the Basic Law set the stage to break from the old paradigm and to adopt some version of horizontal effect, however, it did not necessarily entail horizontal effect by itself.[54] Indeed, the reconstituted law provoked more questions than it answered with respect to the relationship between private law and public law, and the obligations of private actors with respect to public law. And it certainly did not settle the question of German constitutional identity, particularly with respect to the weight that old liberal values of the civil law system would hold in light of the evidently transformative additions made to German fundamental law. The potential for disharmony was clear, and much depended on how jurists sorted out these tensions in the ensuing years.

Given Germany's plural court system, these questions were as much about constitutional identity as they were about institutional power. Indeed, jurists from every area of law weighed in. Many jurists and legal scholars initially reacted by falling back on the orthodoxy of civil law systems, namely, that public law, now the Basic Law, had no influence on private disputes.[55] Some argued that the constituent assembly simply was not authorized to adopt a Basic Law that affected private relationships, even if it wanted

[54] Fedtke explains that "the existence of an objective duty of the state to protect individual private interests need not necessarily translate into a subjective right of individuals to invoke this protection in court." (150)

[55] Quint Cites Many German Scholars That Rehearse These Classic Arguments (255-257). See, For example, I K. Zweigert & H. Kotz, Introduction To Comparative Law 154 (Trans. T. Weir, 2d Ed. 1987); K. Larenz, Supra Note 24, At 48; G. Radbruch, Einfohrung In Die Rechtswissenschaft 103-05 (K. Zweigert Ed. 1980); F. Wieacker, Privatrechtsgeschichte Der Neuzeit 479-83 (2d Ed. 1967).

to.[56] Public law was, by definition, meant to protect against government institutions insofar as they possessed more power, in contrast with private law which was framed to govern relationships among equals.[57] Still others argued against horizontal effect in terms of the Basic Law itself. As explained above, a few specific provisions suggest that the state has a duty to protect against private abuses (Article 1, Section 1, 3) or that certain private relationships are, in fact, held to a constitutional standard (Article 9, Section 3). The presence of such provisions could imply that other parts of the Basic Law were not intended to bear on private relationships.

Other scholars challenged this conventional wisdom that the civil law system required a strict separation between public and private law. Quint explains the argument of some, that early conceptions of basic rights did not, in fact, distinguish between public and private offenders.[58] Presumably, too, recent events demonstrated to scholars of the day the ways in which private entities could inflict great harm, whether in consort with state authorities or independently. Hans Carl Nipperdey, Chief Judge of the Federal Labor Court from 1954 to 1963, believed as much and led the Labor Court in arguing not merely for a conception of horizontal effect, but of *direct* horizontal effect, meaning the Constitution itself could create duties of private individuals rather than simply influence

[56] Quint 257. See Also Schatzel, Wek/Hen Einfluss Hat Art. 3 Abs. 2 Des Bonner Grundgesetzes Auf Die Nach Dem
24. Mai 1949 Geschlossenen Einzelarbeits- Und Tarifvertrige?, 1950 Recht Der Arberr [Rda] 248, 250; 1 H. Von Mangoldt, F. Klein & C. Starck, Das Bonner Grundgesetz 136 (3d Ed. 1985);

[57] Schatzel, Wek/Hen Einfluss Hat Art. 3 Abs. 2 Des Bonner Grundgesetzes Auf Die Nach Dem
24. Mai 1949 Geschlossenen Einzelarbeits- Und Tarifvertrige?, 1950 Recht Der Arberr [Rda]
248, 250; F. Lawson, A Common Lawyer Looks At The Civil Law 89 (1953)

[58] Quint 257. W. Leisner, Grundrechte Und Privatrecht 3-29 (1960); A. Bleckmann, Staatsrecht Ii: Allgemeine Grundrechtslehren.
162 (2d Ed. 1985).

private interchange through private law.[59] In a series of cases, before and even after the Constitutional Court decided *Lüth*, the Labor Court adopted this position that basic rights, and particularly those rights that are most constitutive to the German project, could be deployed directly against private individuals. Indeed, these rights were so important as to constitute "general rules for the governance of all of society."[60] Nipperdey and other advocates of direct horizontal effect cited elements of the Basic Law itself in support of their position. For example, Article 20 Section 1's description of the polity as "a democratic and social federal state" suggests that some intervention of the state in private affairs was permitted "to ameliorate various forms of societal, rather than governmental, oppression."[61]

The Labor Court certainly had strategic incentives to argue in favor of direct horizontal effect, insofar as this move allowed the Labor Court to participate, without mediation, in giving meaning to the Basic Law. Indeed, this approach would effectively place the Labor Court alongside the Constitutional Court as "an alternative source of constitutional adjudication."[62] Other jurists and scholars of private law came to opposite conclusions, however, fearing that the ultimate result of horizontal effect would be not to expand the domain of the private law courts but to expand the role of the Constitutional Court as overseer of private law. Thus, such jurists and scholars argued against horizontal

[59] Quint 259. Nipperdey, Grundrechte Und Privatrecht, In Festschrift Fur Erich Molitor 17-33 (1962); Nipperdey, Gleicher Lohn Der Frau Ftir Gleiche Leistung, 1950 Rda 121; Nipperdey, Die W'rde Des Menschen, In 1 Die Grundrechte Pt. 2, At 1-50 (F. Neumann, H. Nipperdey & U. Scheuner Eds. 1950).
[60] Quint 260. Mathews 28.
[61] Ibid. See also Article 28, Section 1 of the Basic Law.
[62] Mathews 44.

effect to ensure they retained their status as experts and final arbiters in their respective areas of law.[63]

Within these strategic considerations was a real intellectual disagreement, a clash of visions, about the identity of the new German constitution and how seemingly competing values would relate moving forward. Some scholars understood the system of law to be essentially the same as before. Human dignity and other values that gained expression in the Basic Law certainly changed the landscape of constitutional law but, such arguments maintained, bore neither on the essential civil law framework, nor on the governance of private relations. Others, most notably Nipperdey, took the new content of German fundamental law to be more transformative, to include a new charge to order civil society according to the principles of the Basic Law.[64] In this way, many parties had a stake in these questions and found support for their preferred answers in the particular factors they chose to emphasize out of the disharmony—whether the institutional separation built into the civil law, thought also to support individual autonomy, or instead a new social character that the Basic Law introduced to the constitutional-legal schema. We see such interpretations in particular decisions of the Civil Courts leading up to the Constitutional Court's decision in *Lüth*.

In 1954, the Federal Court of Justice first held that personality rights had horizontal effect in the *Schacht* case.[65] This gave Nipperdey and the Labor Court

[63] Fedtke 139.
[64] Fedtke 140.
[65] BGHZ 13, 334. Translated: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=740. Ferreira explains that this case determined that "private letters can only be published with the consent of their authors and under the terms defined by them" as a

additional basis on which to argue for direct horizontal effect.[66] And indeed, just six months later, the Labor Court declared that certain rights were so constitutive to the Basic Law that they ought to apply to public and private actors alike.[67] The case involved an employee who was fired for distributing pamphlets in support of the Communist Party at his workplace, thus implicating Article 3 Section 3 (prohibiting discrimination on the basis of political views) and Article 5 Section 1 (guaranteeing the freedom of expression).[68] Though the Court decided in this particular case that the employer had dismissed the employee for reasons not related to political censorship, they took the opportunity to declare that the Basic Law did create rights obligations for employers and other private actors. Quint translates part of the opinion, that certain fundamental values "'entered into [the basic legal] framework, and neither the organization of a workplace nor agreements nor acts of legal peers should be allowed to contradict those values….Thus these basic rights affect not only the relationship of the individual citizen to the state, but also the interrelationship of the citizens as legal equals.'"[69]

The Labor Court thus staked its ground in the debate over the nature of the Basic Law and its ability to command the nature of private relationships. Indeed, the constitutional choices of the Basic Law, the Court argued, furnished guidelines (or an *ordre public*) for organizing the larger German society. While the classical-liberal

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function of the right to free development of personality (Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children,* New York: Routledge, 2011, 34).

[66] Ferreira 34.

[67] 1 BAGE 185, 191 (1954).

[68] Fedtke 139-140.

[69] Quint 260, Fn. 47. 1 BAGE 185, 193 (1954).

catalogue of rights in the Basic Law[70] certainly factored into these decisions and continued to form the content of German law, the Court also drew from the idea of social justice (*Sozialstaatsprinzip)* present in Articles 20 and 28 to justify their broader view of what the Basic Law aimed to accomplish.[71] Although their reasoning was grounded in a conception of freedom, therefore, it was a more expansive conception that sought to account for the realities of power relationships and discrepancies in bargaining positions.[72]

The Labor Court would continue in this vein a few years later in the *Zölibat*[73] decision. In this case, a woman was dismissed from her job at a hospital when she got married as she had violated the terms of employment requiring that workers remain single. The Court considered deciding the case on the basis of certain potentially relevant provisions of the Civil Code.[74] However, it instead opted to continue developing the concept of direct horizontal effect of constitutional rights, deciding the case on the basis of Article 6 Section 1 (protecting marriage and the family) as well as Article 2 Section 1 (guaranteeing free development of personality).[75] In the spirit of its previous 1954 decision, the Court doubled down on the claim that private relationships and transactions ought not to contradict the *ordre public* established by the Basic Law. Nipperdey argued:

> A number of constitutional rights do not merely guarantee individual freedom against the power of the state, but rather are ordering principles for society, which have immediate significance even for the private legal dealings of citizens amongst one another. The Senate [of the Court] has

[70] Fedtke 137.
[71] Fedtke 139-140. 1 BAGE 185, 193 (1954).
[72] Ibid.
[73] 4 BAGE, 274 (1957).
[74] For example, the public policy or good morals general clauses, which I will discuss below.
[75] Mathews 45.

> also previously indicated, that private law agreements, legal transactions and undertakings may not be set in opposition to that which one may call the ordering structure, the *ordre public* of the actual political and legal regime.[76]

The immediate result of this line of argument was to expand the protections offered by constitutional rights by recognizing employers and other private actors as themselves having constitutional duties. Nevertheless, Nipperdey's reasoning reveals an additional innovation that constitutional rights mandated a particular social order. What in one sense was an expansion of rights protections, was in another sense a directive that private actors "uphold the public order and the common good."[77] In this way, the Labor Court argued for a Constitution that ranked the uniformity of the new commitments of the Basic Law higher than the preexisting frameworks of the civil law system.

In arguing specifically for direct horizontal effect, moreover, the Labor Court showed some readiness to dismantle the distinction between public and private, previously thought essential in guaranteeing individual freedom.[78] Jud Mathews suggests that the constitutional theory underlying such decisions in the Labor Court had an "anti-individualistic and antiliberal" bent.[79] Others find even more in these decisions, arguing that "this orientation toward the priority of collective interests over individual interests reflects a holdover from the labor law doctrines of the Third Reich..."[80] Notwithstanding

[76] 4 BAGE, 274 (1957). Mathews 45.

[77] Mathews 45.

[78] Even still, the Labor Court showed some hesitance, setting a high bar for direct horizontal effect in insisting that the rights violation be of the gravest nature (Quint 259-260, 265).

[79] Mathews 45. Mathews later states, with less qualification, that the Labor Court's decision to apply direct horizontal effect reflected its "statist orientation to the project of constitutionalism" (Mathews 46).

[80] Mathews 45. See also, Thomas Henne, "Die neue Wertordnung in Zivilrecht—speziell Familien-und Arbeitsrecht." In *Das Bonner Grundgesetz: Altes REcht und neue Verfassung in den ernsten Jahrzehnten der Bundesrepublik Deutschland (1949-1969),* Ed. Michael Stolleis, Berliner Wissenschafts-Verlag 2006, 21.

the accuracy of this more extreme suggestion, it is at least clear that the Labor Court put much weight on a new capacity of rights to dictate social goods, and thereby transform structures that were previously thought necessary to protect freedom in the German constitutional order. In other words, it was ready to adopt a kind of conception of the common good to govern directly the polity understood as a whole.

Despite the Labor Court's arguing that the Basic Law established a new *ordre public*, the question of horizontal effect was by no means settled. In its decisions, the Labor Court had identified one possible equilibrium amid the disharmony in German law as it had been reconstituted, choosing to emphasize the principles of the Basic Law as obligating all of German society and even obligating private actors directly. This was in stark contrast with the legal orthodoxy that still persisted even after 1949 when the Basic Law was adopted, that separation between public and private was essential to the service of such values as *Privatautonomie*. The Federal Constitutional Court would refer to these positions as two "extreme" views,[81] suggestive that there could be another interpretation of the German constitutional order and, moreover, that such an alternative may be preferable. And indeed, just a few months after the Labor Court decided the *Zölibat* case, the Constitutional Court offered its own take on the question of horizontal effect as the supreme authority responsible for interpreting the Basic Law.

In 1958, the Constitutional Court handed down the *Lüth* decision,[82] a case that continually features in scholarship as seminal for the practice of horizontal effect. The

[81] *Lüth,* BVerfGE 7, 198 (1958). Quint 258.
[82] BVerfGE 7, 198 (1958).

facts of the case appear in Chapter I, but I present them again here for the sake of a full analysis. In 1950, a former Nazi propagandist by the name of Veit Harlan produced an anti-Semitic film, the title of which translates to *Immortal Beloved*, even after having been acquitted of the war crimes for producing similar films during the war. In response, journalist Erich Lüth called for a boycott against Harlan's new film. Harlan, in turn, called for an injunction against Lüth on the grounds that he intended to harm Harlan's economic prospects. The district court in Hamburg granted the injunction, only for it to be overturned in 1958 when the Federal Constitutional Court finally weighed in. As explained in Chapter I, the Constitutional Court took issue with the fact that the lower court had not properly accounted for the Basic Law as establishing "an order of objective moral and legal principles"—that is, the fact that the Basic Law not only establishes subjective rights (that create rights obligations between particular parties), but also principles to guide the life of the polity understood as a whole. These principles had a "radiating effect" on all sectors of German law for which all courts had to account. The lower court had thus erred when it held that the Civil Code alone governed the case's outcome without considering how the values of the Basic Law might intervene in the calculus. The Constitutional Court was careful to stipulate that this was still ultimately a dispute between private persons and, as such, ultimately governed by the Civil Code. Nevertheless, Lüth's right to freedom of expression (guaranteed under Article 5 Section 1) was relevant to the question at hand as a commitment of the Basic Law. Moreover, though all provisions of the Basic Law were potentially relevant to such calculations, the right to freedom of expression was of particular import insofar as it was "absolutely

constitutive" (*schlechthin konstituierend*) in a liberal constitutional order.[83] Thus, the fact that this was a dispute between private actors did not exempt the courts from considering how the relevant provisions of the Civil Code themselves comported with the commitments of the Basic Law, and particularly such foremost guarantees as that to freedom of expression.

That the Constitutional Court's decision in *Lüth* employed a doctrine of horizontal effect would seem to follow the Labor Court's preceding decisions. Indeed, both Courts conceive of rights as objective values aiming toward a common good of society. Moreover, both grounded their decisions in a concession that such values could be impaired in the context of private relationships and interactions with the state alike. Crucial, however, was the different mechanisms employed by each court in their respective decisions. In *Lüth* the Constitutional Court struck a kind of middle ground in deciding that the values of the Basic Law applied to private actors only indirectly, that is, by way of their influence on private law. In so reasoning, the Constitutional Court charted a middle path between two extremes, departing from a strict understanding of the separation between public and private law as well as from the Labor Court's argument that the Basic Law itself created duties of private actors. First proposed by eminent law professor Günter Dürig, this intermediate position of indirect horizontal effect was quickly accepted, even praised, by scholars and jurists alike.[84]

[83] Quint 283.
[84] Quint 265, fn. 66. Ackermann 321.

The decision in *Lüth* and the particular way in which the Constitutional Court developed horizontal effect for the German polity marked a sort of moment of truth with respect to both the larger architecture of law and courts, as well as the actual content of law. With respect to the architecture of law and courts, some legal scholars have questioned whether the indirect effect that *Lüth* introduces actually produces outcomes different from those under direct horizontal effect. Both ultimately entail the balancing of rights, the argument goes, even if the indirect method involves the intermediate translation into private law.[85] While this is an important point and likely true in at least some cases, it does not fully appreciate the symbolic difference between these methods of horizontal effect, specifically when one accounts for the particularities of the German system. Indeed, it was because the position that the Constitutional Court adopted managed to balance competing values of the old civil law system and new constitutional values that its version of horizontal effect was so quickly accepted as both a theoretical and a practical matter. Moreover, what may seem to be a mere symbolic difference in indirect horizontal effect at first blush has the practical result of keeping the civil law relevant in such balancing of rights. Indeed, the Constitutional Court did not decide that the Basic Law controlled all outcomes, but that it had to be *considered* against the existing rules of the civil law. In this way, the Court preserved the potential of the Civil Code to factor into cases as a separate source of content and values.

In navigating old and the new legal traditions in this way, moreover, the compromise in *Lüth* had the practical effect of preserving largely intact separate systems

[85] Kumm; Mathews.

of law and courts. As Michelman explains, horizontal effect in Germany is limited by the very fact that it operates in a dualist system of civil law and constitutional law.[86] Following *Lüth*, the Constitutional Court did expand its domain to be able to hold questions under civil law to a constitutional standard.[87] Nevertheless, even after *Lüth*, the Court seemed intent on "honoring this restriction of its competence"[88] and not using its power to encroach on the interpretive role of its counterpart apex courts. It insisted that courts at every level and even the legislature show due consideration for the principles of the Basic Law, but did not insist on any particular interpretation of these principles. Furthermore, the private law courts remained the final interpreters in their respective areas of law, wherein the Constitutional Court largely refrained from interfering. Indeed, beginning in *Lüth* and continuing in subsequent horizontality cases, the Basic Law's influence reaches only to a couple of specific provisions in the Civil Code known as the "general clauses." One of the most important of these, Section 826 of the Civil Code, states "Whoever intentionally causes injury to another person in a manner contrary to good morals has the duty of compensating for that injury."[89] The Civil Code's reference to "good morals" seems to admit of some external standard of evaluation, and the

[86] Michelman 2011, 289-290.

[87] In arguing that the Basic Law influences the duties of private actors not directly but in the way that constitutional values influence the civil law, the Constitutional Court was reasserting its role as the supreme interpreter of the Basic Law. Whereas the direct horizontal effect served to give the Labor Court significant say in interpreting constitutional principles and their effect on private actors, by inserting the civil law back as mediating and insisting that the question in *Lüth* was at base one of civil law, the Constitutional Court also reinserted itself into the equation. On such an approach, the civil courts would once again engage directly with the civil law and, in theory, rely more on the Constitutional Court's interpretations of constitutional law (Mathews). Though this argument makes sense in the abstract, it is not necessarily borne out by subsequent cases, such as *Mephisto* (see Quint).

[88] Michelman 2011, 289.

[89] Quint 349. See also Quint 284-285 and Sommeregger 43 for discussions of *Lüth*.

Constitutional Court exploited this opening to bring the principles of the Basic Law to bear on private law. In so doing, however, it effectively limited its own interpretive authority to these particular provisions, so as not to fashion itself as a "super ordinary court"[90] that interprets any provision of the Code it wishes. In those instances when the Constitutional Court cannot reach a "constitutionally satisfactory solution" without breaching jurisdictional divides, it actually looks to the legislature to revise the law.[91] Thus, "simultaneous, colliding commitments"[92] persist in Germany's practice of indirect horizontal effect, as the polity remains wedded to separate systems of law and courts as well as the idea that the Basic Law sets the standard for the polity as a whole.

In addition to serving as an important moment in preserving the liberal character of the legal structure, *Lüth* also preserved a liberal character in the very content of the law. Of course, the Court endorsed the need to propagate a *society* committed to certain uniform norms—indeed, the freedom of expression was prioritized in *Lüth*, at least in part, for its public value and not solely for Lüth's private interests as an individual.[93] Nevertheless, the content of such societal norms applied horizontally is firmly rooted in the liberalism of both the Basic Law and Germany's enduring civil law. In short, liberalism was the constitutional project. On the very same day that the Court decided the *Lüth* case, it handed down another decision in which the right to freedom of expression gave way to "certain traditional property interests."[94] Granted, the new content which the

[90] Michelman 2012, 289.
[91] Michelman 2012, 290.
[92] Michelman 2012, 290.
[93] Quint 284; Sommeregger 43.
[94] 7 BVerfGE 230, 1958. Quint 286-287.

Basic Law brought to the law was a far cry from the laissez-faire values of the nineteenth century. To this extent, liberal principles certainly underwent some revision in its turn from neutrality of Weimar toward objective values. Nevertheless, the Constitutional Court kept relevant a particular liberal understanding, present in the Civil Code and the Basic Law alike, that might have lost its strength had the Labor Court's interpretation gained more traction. Although new obligations of private individuals emerged, this new societal morality was decidedly liberal in character and, as such, committed to private autonomy even as it was adapted to yield individual duties.

The years that followed evince this preservation of liberal norms. Indeed, the history shows persistent disharmony, traceable to the Constitutional Court's decision in *Lüth* to keep alive old liberal structures and values amid its push to foster a society uniformly obligated to constitutional norms. Specific cases reveal how *Lüth* had set a course that supported a kind of individualism in opting for indirect effect and, more specifically, in reserving a space for the private law. And indeed, we see the "reassertion of private law" in the *Mephisto* case.[95] In this 1971 decision, the Court interpreted the constitutional rights of human dignity and free development of personality (Articles 1 and 2, respectively) to encompass, that is, elevate to constitutional status, traditional rights that protect against injury to "the life, the body, the health, the freedom, the property …" as found in general clause 823(1) of the Civil Code.[96] In other words, the Civil Code actually gave content to the Basic Law, insofar as it was incorporated into the Court's

[95] Quint 291.
[96] Mathews 60.

understanding of human dignity and personality. In this way, it could be balanced against and even take precedence over such rights as to artistic endeavor (Article 5, Section 3) that occur in the Basic Law explicitly.[97] One might speculate how *Mephisto* and other cases might have had differed had the Labor Court's approach of direct horizontal effect gained traction. With direct horizontal effect, constitutional rights obligations would apply to private actors directly. Thus, private law would not serve as a necessary intermediary, nor enjoy the same opportunity to bear on decisions as a unique source of values.

While *Mephisto* goes further than many cases in the extent to which the Civil Code informs constitutional interpretations, it is not unique in putting into dialogue private law and the Basic Law and, more to the point, holding up the private law as a source of values in its own right. The earlier *Blinkfüer* case also translated the Civil Code into constitutional terms, finding that the freedom of the press (Article 5, Section 1) supported claims under the aforementioned clause 823(1) of the Civil Code. In this case, the leftist magazine *Blinkfüer* won against the freedom of expression of a conservative publisher calling for a political boycott of the magazine. Moreover, in the 1973 *Soraya* case, the Constitutional Court leveraged the constitutional right to personality in order to compel a remedy corresponding to the Civil Code's protection of personality rights. On the one hand, some argue this step constitutes a rewriting of the Civil Code to align it with the Basic Law, insofar as the Code expressly states that "intangible and

[97] Quint 297

nonpecuniary harms" could *not* be rewarded for damages.[98] However, with the introduction of horizontal effect, even indirect horizontal effect, we would expect that constitutional values would bear on private law in such ways. What is unique in the German jurisprudence, and what we see in such cases as *Blinkfüer*, is the way the Civil Code maintains a certain stature and is put into dialogue with the Basic Law, in spite of the primacy and "radiating effect" of the latter.[99] That this is extraordinary (or at least not universal) will come into sharper relief in the next section that considers the common law of South Africa, which is more completely beholden to the South African Constitution and, importantly, entirely within the jurisdiction of South African Constitutional Court to uphold or to modify.

Liberal values that would seem to exist in tension with the move toward horizontality persist not only in the continued institutional and legal division between the private law and public law, but in the content of the Basic law itself. The Basic Law offered a revised liberalism that transcended classical laissez-faire values in favor of such commitments as to human dignity. Nonetheless, Fedtke views the catalogue of rights in the Basic Law as still "classical-liberal in character."[100] Following human dignity as the foundational value come "an extensive range of individual freedoms," including,

> the right to life and physical integrity, religious freedom, free speech and freedom of the press and the media, protection of marriage and the family, freedom of assembly and association, privacy of correspondence and telecommunications, freedom of movement with the federal territory, the

[98] Mathews 64.
[99] Mathews 140.
[100] Fedtke 137.

> protection of economic activity, inviolability of the home, and the protection of property.[101]

In addition to these enumerated rights, the right to free development of personality" has been interpreted by the Constitutional Court as a kind of "catch-all right," protecting a vast range of liberty interests so as to make the Bill of Rights basically comprehensive.[102] After a couple of decades, moreover, the priority of such rights settled into the popular imaginary. Jud Mathews explains that 1959 to 1974 constituted "the high phase of liberalization in Germany."[103] Mathews cites as evidence a series of public opinion polls conducted in Germany between 1949 and 1963. The poll asked respondents to rank different rights in order of importance. In 1949, 35 percent of respondents identified freedom from want as most important, in contrast with 26 percent who selected freedom of expression. By 1963, in contrast, only 15 percent of respondents selected freedom from want, while 56 percent identified freedom of expression as most important. Moreover, in a 1964 poll, German voters ranked freedom as a more important value than either order or prosperity.[104]

More to the point, this surge in liberal values reflected in the sorts of rights that tended to be applied horizontally, in this particular era and in general. Considering the aforementioned cases, we see the prevalence of such rights as the freedom of expression, freedom of the press, and the free development of personality as constituting the subject of the earliest horizontal effect cases. And indeed, most of the core horizontality cases in

[101] Fedtke 137.
[102] Barak 231.
[103] Mathews 53.
[104] Mathews 53, fn. 10.

Germany involved such classical liberal values.[105] While the horizontal application of rights necessarily created obligations of private actors, the values underlying those rights obligations were widely accepted and, crucially, required only negative action on the part of these private actors.

One could say that this emphasis on classical liberal values acted for a long time as a kind of in-built limit on how far horizontal effect would be applied in Germany. Indeed, on the opposite side of this same coin, the right to equality (Article 3) was rarely applied horizontally. It took the outside force of the European Union to change this, when the European Council directed Member States to implement anti-discrimination measures in 2000.[106] Until these more recent developments, however, the German Constitutional Court took a fairly conservative approach to Article 3's equality provisions. Stone Sweet and Mathews both explain how the Court considered equality cases under the lower standard of "arbitrariness review as opposed to a more intensive proportionality review."[107] Laurie Ackermann, former justice of the South African Constitutional Court, tells a similar story of the German constitutionalism:

> As point of departure the Basic Law by 'upgrading' ('*Aufwertung'*) the freedom 'flowing from human worth' and by making a primary choice in

[105] For a more comprehensive list that further illustrates this point, see *Fundamental Rights and Private Law in the European Union: Volume 1,* Ed. Giovanni Comande, Gert Bruggemeier, and Aurelia Colombi Ciacchi, Cambridge: Cambridge UP, 2010, 277-279. See also Ackermann 328.

[106] The exception to this is the way in which Parliament largely rewrote Book 4 of the Civil Code, governing family law, to conform to Article 3 of the Basic Law as well as contemporary views about the equal status of mothers and fathers (Mathews 67-68). Such revisions came almost entirely through Parliament, however, rather than through the Courts. Moreover, this was the only part of the Civil Code that was so overhauled as a result of the adoption of the Basic Law.

[107] Mathews 80; Stone Sweet 2012, 100.

> favour of personal freedom, places it beyond doubt that thereby freedom is also sanctioned as between equals, as against demands of equality. [108]

None other than Günter Dürig offers a coinciding account, seeing freedom under the Basic Law as "the primary manifestation" of human dignity,[109] and, moreover that "a preference for freedom as against equality has been established."[110]

The few times that equality was applied horizontally before the EU introduced its directives was in the Labor Court. Indeed, this is the exception that proves the rule, and consistent with the Labor Court's approach to horizontal effect since the 1950s.[111] The Labor Court has been quicker to rely on the constitutional commitment to equality in adjudicating fair relations between employer and employee.[112] Insofar as the labor courts' jurisdiction is circumscribed to labor law, the German legal community generally acknowledges that they operate in an area warranting a more thorough consideration of social power, and even the continued application of *direct* horizontal effect.[113] In light of this tendency to give more weight to equality in the labor courts, it is not surprising that they largely allied with the European Court of Justice after the issuance of the 2000

[108] Ackermann 326. Interestingly, Ackerman thinks that South Africa ought to take heed of Germany's example in limiting the extent to which the Basic Law's right to equality applies to private law (Ackermann 327). Ellmann calls for similar limits in his 2001 article "A Constitutional Confluence." As the next section demonstrates, however, the South African Constitutional Court seems to be on a more ambitious course than Ackermann and Ellmann may prefer.

[109] Ackermann 326.

[110] Ackermann 327.

[111] Ackermann 328.

[112] Stone Sweet explains that the Labor Court has even employed its own invented "General Clause of Equality" to this end (Stone Sweet 2011, 11-12).

[113] The Labor Court continued to employ direct horizontal effect through the 1980s without much resistance. Indeed, some even reason that "the one-sided relations of social power" that tend to characterize employment cases justify a higher accountability to constitutional standard than is necessary for other private relationships. (Quint 265, fn. 66.)

antidiscrimination directives. The High Labor Court even asked the ECJ for preliminary references about the requirements of these new policies, while the Constitutional Court instead followed along to the extent that was required.

While equality was certainly present in the Basic Law, therefore, it did not feature prominently in the context of private relations, a fact consistent with the long German emphasis on *Privatautonomie*. Indeed, it took the external force of the EU to change the status quo and push equality to have a stronger horizontal presence. The two directives that the European Council required in national law included Council Directive 2000/43/EC (the Racial Equality Directive) and Council Directive 2000/78/EC (the Employment Equality Framework Directive). The former aimed to bring all public and private law into line with EU equality norms, specifically as concerned racial and ethnic discrimination. The latter directive, in contrast, aimed only to influence employment law, but required equal treatment across a range of classifications including "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[114] The German Parliament first attempted to implement these directives in the Anti-Discrimination Act (ADG) of 2001.[115] The Act generated much controversy from all sectors of German

[114] Sommeregger 36; Mathews 79.

[115] Georg Sommeregger summarizes the changes the Act proposed:

It would have regulated the conclusion, termination, content, and execution of contracts whose objects are goods and services offered in a market situation, (i.e., publicly), and in particular, contracts of purchase or sale, rent, credit, and insurance. Both direct and indirect discrimination would have been prohibited, and, new for German law, so would harassment. A striking feature of the rules of evidence was the intended reversal of the burden of proof in favor of the plaintiff. The defendant would, in other words, be called to adequately and convincingly prove his/her lack of intent to discriminate. Another new item was the right of associations to take legal action (*Verbandsklagerecht)* on behalf of the victim of the alleged discrimination. Associations could even have proceeded without the consent of the victim. (Sommeregger 39)

society, as politicians, jurists, and many others in civil society argued the Act "would go too far in curtailing the principle of private autonomy."[116] Others argued that it was, in fact, necessary not to exempt "predominant sectors of social life from scrutinization" in order to take non-discrimination seriously.[117]

In his contemporaneous analysis of the arguments surrounding the ADG, Georg Sommeregger recounts the worries of some scholars at the time, that "the introduction of equality in the private sphere by doctrines of horizontality is in substance mandated virtue imposed by the state on the individual….In this criticism the state appears as a missionary that tries to make citizens morally 'good.'"[118] Whereas recognition of some private sphere admits the potential for some diversity of views, the abolishment of the public-private divide, as some characterized the effects of the new legislation, would entail "subjecting private action to the same moral yardstick (or values) as are valid for public agents."[119] If such came to pass, the argument continues, the result would be the "crushing of the possibility of private choice by 'public virtue.'"[120] Thus, the prospect of bringing the value of equality to bear on private spaces yielded strong reactions for the very reason that it would require a kind of uniformity. Sommeregger stipulates, however, that this uniformity (what he calls "value monism") was only required in select areas and with respect to particular categories. The legislation did not entail a blanket requirement

[116] Sommeregger 37-39; Mathews 81; Fedtke154. Sabine Berghahn also describes the reactions of churches and other religious organizations in Ben Knight, "European Court of Justice Tells German Churches to Respect EU Discrimination Law," *Deutsche Welle*, 11 Sept. 2017, https://p.dw.com/p/2nMsu, 9 Jul. 2019.

[117] Sommeregger 44.

[118] Sommeregger 44.

[119] Sommeregger 44.

[120] Sommeregger 44.

that all private choice conform to public standards, but only that some private choices conform. On this basis, he concludes that the legislation "did not introduce a new paradigm but shifted the line between uncensored and censored private behavior (too far for some), with the result that the private sphere is decimated without being liquidated conceptually."[121] Such shifting of the line that comes with the transmission of the public moral yardstick into private spaces ultimately amounts to a political question, the answer to which likely depends on a given country's particular history, commitments, and shifts in public opinion.

In many ways, these fears about the consequences for autonomy echo those same fears articulated in the run-up to the *Lüth* case in the 1950s. Nevertheless, this anti-discrimination legislation is different from the initial move to horizontality in a couple of ways. First, the content of the rights in question is qualitatively different from those that had been given horizontal effect in prior decades.[122] Sommeregger explains, "In the horizontalization of other fundamental rights the fundamental tension between liberty and

[121] Sommeregger 48.

[122] Rather than depend entirely on a distinction between liberty and equality, Sommeregger goes further to explain this as a difference between two concepts of equality. This distinction is analytically useful and achieves a level of nuance, often lost in similar discussions, insofar as classical liberalism consistently counts equality among its foundational principles. He states: "In the public sphere, equality equals the principle of non-discrimination….In the private sphere, equality refers to the equal standing or equal autonomy, of the individuals relative to each other, i.e., the lack of hierarchy, or 'natural' equality…. The passing of anti-discrimination legislation means the transferal of the logic of equality in the public field (constitutional law field) to private law/private relationships. The introduction of the logic of equality-non-discrimination into private law, which hitherto functioned on the logic of equality-as-autonomy, means that in the private sphere) the 'state' element of the public formula (i.e. the relationship state v. individual) is transferred to the 'individual' element of the private formula (relationship individual v. individual). The result of the substitution is that the individual (now in the place of the state) has a duty not to discriminate (on the grounds spelled out by the law), but can no longer oppose to its own rights to autonomous choice. The space formerly filled autonomously and arbitrarily by individuals is now filled by the state, and filled with the common standard of the community." (Sommeregger 46-47)

equality is in the background, whereas in the case of the anti-discrimination legislation it comes to the fore because of the fact that equality itself is the object of horizontalization."[123] The argument of the present project presumes that horizontal effect *always* entails uniformity, insofar as it always brings public values to bear in private spaces. Even when classical liberal rights are at issue in a case, therefore, one of the parties will still be required to conform to those classical liberal values of the constitution—for example, the freedom to develop human personality in *Mephisto* or the freedom of the press in *Blinkfüer.* To this extent, the EU directives and subsequent legislation of the German Parliament were not different, but simply added new rights to the catalogue of those that would in some way have horizontal effect.

In the particular context of Germany, however, with its civil law tradition and generally liberal orientation, a good deal of the population subscribed to the values underlying that liberal catalogue of rights that had applied horizontally historically. These values inspired consensus (evinced by the liberal surge in the post-war years) that such a liberal ethos was necessary if society was to avoid the recurrence of past tragedy. In Sommeregger's terms, a kind of "value monism" with respect to these rights did not give rise to controversy. When the prospect of individual duties pertaining to antidiscrimination arose, however, many worried (whether justifiably or not) that the new duties that would arise would touch subjects that did comprise a continued "value pluralism" in German society. With the ADG, some believed the content of those rights

[123] Sommeregger 45.

for which private actors would be held responsible held the potential for conflict with their priors.[124]

Also different from the early debates that preceded *Lüth*, the move to give equality and, more specifically, antidiscrimination horizontal effect was initiated through legislation, first through the European Council and then the German Parliament. [125] Whereas the practice of horizontal effect in courts applies rights obligations to private actors in single, isolated cases, the developments following the EU directives came through legislation and therefore amounted to a change in the very "base-line of private law."[126] Claims to autonomy, people feared, would no longer be balanced or weighed on a case-by-case basis, but would necessarily yield to equality. As Sommeregger puts it, "The moral standard (one and only) of the community trumps the individual moral

[124] Jud Mathews recounts some of the cases that followed the AGG (the legislation that ultimately was successful following the ADG) He states:

A number of cases concern indirect discrimination on the basis of language: for example, the state labor court in Nuremberg ruled that a job requirement of "very good knowledge of German" in a job posting for a software specialist could be evidence of discrimination. Cases concerning unequal treatment on the basis of religion have been numerous, and their outcome shave often turned on whether equal treatment would infringe the employers' own confessional rights. A Muslim dental trainee had a right to wear a headscarf at work, according to a labor court in Berlin, but a Protestant hospital could legally forbid a Muslim nurse from wearing a headscarf, according to the state labor court in Hamm. The Federal Labor Court ruled that it could violate the AGG for an employer to fire a Muslim warehouse employee for declining on religious grounds to move alcohol, and a labor court in Stuttgart ruled that a Catholic organization could fire a teacher for entering a same-sex civil union.

Courts have also considered gender discrimination claims in a number of contexts, reaching various results. A labor court in Cologne held that an airline's minimum height requirement for pilots could constitute a form of indirect discrimination, while the state labor court in Mainz held that employers may give women preferential access to parking spaces. A series of cases concerns unequal access to discos and nightclubs, on the basis of gender or race. A man won a 300euro judgment against a dance club in Berlin that turned him and his friends away because, according to the bouncer, "you guys are too many men." A dark-skinned law student in Bremen won his claim that he was turned away from a disco on account of his race because several witnesses confirmed his account and the defendant could not prove its claim that he was in fact turned away because he was dressed unfashionably. (Mathews 83-84)

[125] Of course, this situation raises questions about the relationship between EU and national processes. I bracket this issue here as it is the focus of Chapter IV. See also van der Walt 2014.

[126] Sommeregger 48.

standards (resting on personal choice) of the individuals in the specific fields."[127] While a common objection to horizontal effect is that courts are not politically accountable in the same way as legislatures, people in this instance were concerned less about the venue of decision than they were generally about "this move of public virtue into the private sphere."[128] In the terms of the current project, one might say the full republican potential of horizontal effect came to the fore when it extended to equality rights, in the recognition that public values were governing the polity as a whole and, moreover, that this might actually entail the compromise of private interests. Given that German horizontal effect had developed around the classical liberal canon of rights, instances of horizontal effect did not typically require great positive action on the part of private actors, and so the full potential of horizontal effect had been muted. Although on some level the country recognized a need to build a polity on certain common values after World War II, this commonality only extended so far as the liberal canon. It is no coincidence, therefore, that the impetus to extend horizontal effect further came from EU institutions, that is, sources external to Germany.

Ultimately the ADG failed under this political pressure. Moreover, Mathews suggests, the ensuing controversy led Parliament to change the law actually to allow more discrimination, specifically in lessening protections for workers dismissed from their jobs on the basis of age.[129] The debate and failure surrounding the ADG attests to the informal limits of horizontal effect that had long permeated the structure, content, and ethos of the

[127] Sommeregger 48.
[128] Sommeregger 47.
[129] Mathews 82.

German legal system. Nevertheless, EU institutions stood their ground on the issues at stake when, in the *Mangold* case, the European Court of Justice described antidiscrimination as one of the EU's "general principles" that ran deeper than the recent directives, thereby insisting on German compliance. While the Constitutional Court might have reasserted "control over equality law in Germany," it instead followed the ECJ, and the Labor Court as it were, so as not to appear an opponent of equality.[130]

In 2006, the German Parliament finally managed to pass the General Equal Treatment Act (AGG) in fulfillment of the EU directives. Though not substantially different from the original ADG legislation, it passed with much less controversy, perhaps a sign of a shift in the larger polity not unlike the shift in political culture following World War II. Nevertheless, most decisions related to the anti-discrimination legislation have since been issued by the civil courts and labor courts rather than the Constitutional Court,[131] possibly an additional sign of continued hesitance to have equality apply to private actors as a constitutional matter.

In *Lüth*, the Constitutional Court declared that the Basic Law engendered an objective order of values, and thus, that the constitutional project aspired to influence German society as a whole. Nevertheless, the fundamental structure of legal system remained in place with *Lüth*, as the Court acknowledged that private law contributed to "the autonomy of the individual—and to the public good—and therefore should remain in effect…even when confronted by the countervailing objective and public values of

[130] Mathews 82; Stone Sweet 2011, 102
[131] Mathews 83.

constitutional law."[132] The Constitutional Court thus reaffirmed the presuppositions of the civil law system so that the Basic Law could influence the private law but not supplant it.[133] In pursuing a moderate course the Constitutional Court opted to rest in the disharmony that had emerged between an enduring liberal system and the propagation of certain values (albeit liberal values) in private spaces. As a practical matter, this preserved a general liberal ethos at a critical moment when the Court might have chosen a different direction, as in following the Labor Court's approach, for example. This liberal equilibrium that the Court maintained in *Lüth* endured until the EU's 2000 directives. These upset the equilibrium in adding the rights to equality and anti-discrimination to the catalogue of those for which private actors would be responsible. With this development, the public morality of Germany expanded to encompass a new egalitarianism and the uniformity that horizontal effect had always required became salient.

That this particular development marked a shift for horizontal effect in Germany becomes even clearer when compared with South African constitutional history. Indeed, South Africa was site to similar debates about horizontal effect, related to the constitutional commitments that would apply across public and private spaces alike. As will become clear in the next section, the primary difference between these countries was the more ambitious nature of South Africa's constitutional project which forced the

[132] Quint 263.

[133] Quint explains that "the fact that the action remains a private law action may have a significant limiting effect on the scope of the Constitutional Court's review" (Quint 273). Whereas, in the United States, an actor can be held to a constitutional standard if he or she can be shown to be sufficiently entangled or serving a public function, private relationships remain private relationships in Germany and are governed as such even while being influenced by the Basic Law.

polity, and the Constitutional Court in particular, to come to terms earlier with the uniformity that horizontal effect entailed. Indeed, the Constitution of South Africa was never a moderate or limited project. Though both the German and South African constitutions engendered transformative projects, South Africa's egalitarian vision relied much more on the uniform application of new moral commitments that horizontal effect entailed.

Horizontal Effect in South Africa: Instrument of Societal Transformation

Amid the numerous national constitutions adopted throughout the twentieth century, that of South Africa stands out in the transformation to which it aspires. Frank Michelman goes so far as to describe it as "post-liberal."[134] After years of apartheid, political imprisonment, and protests, the situation in the early to mid 1990s finally allowed the South African people to reconstitute itself and form a nation out of a history of division.

As the previous section demonstrated, horizontal effect was an issue of major debate in Germany, in that its characteristic uniformity had to be reconciled with other commitments and aspects of the country's civil law system. A certain disharmony emerged as prototypical liberal values became the stuff of German constitutional morality ultimately to be applied uniformly across public and private legal relationships. Whereas Germany's adoption of horizontal effect came through the Court's constitutional interpretation in the *Lüth* case, the major part of the debate over horizontal effect in South

[134] Michelman 2012, 311.

Africa transpired in the deliberations over the Interim and Final Constitutions. And in general, horizontal effect fits more easily in South Africa's larger project. That such values as dignity, equality, freedom[135] might suffuse the polity as a whole was the essence of the project. Granted, we see in South African scholarship many of the same objections that appear in Germany and elsewhere. Nevertheless, a certain egalitarian bent characterized the South African vision that distanced the polity from a firm classical liberal line. Response to such objections therefore came more easily, as its constitutional project was not so easily undercut by the uniformity that horizontal effect promised. Speaking specifically about South African history, Nick Friedman, seems to suggest that horizontality is actually *required.* He states:

> Firstly, [horizontal effect] commits individuals to the rebuilding of the ethical relations so radically shattered during apartheid, through the undertaking of legal duties to improve their communities. Secondly, given the enormous task of reconstruction faced by the new South Africa, the limited resources of the state, and the grossly unequal and enormous wealth which resides in the private sector, horizontality breathes new hope into the possibility of creating a more equal and just society in the medium term. Thirdly, by requiring individuals to uphold their moral duties towards one another and to cooperate in realising a new vision for a shared future, horizontality reaffirms the human dignity of those who bear such duties as much as it does those who benefit from their performance. Insofar as direct horizontality contributes to the realisation of substantive equality and the establishment of the conditions necessary for an autonomous life, it promotes freedom and fosters a culture in which the infinite worth of each person is respected and valued.[136]

[135] South African Constitution, Chapter 1, Section 1.

[136] Friedman 67. See also Aoife Nolan, "Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland." *International Journal of Constitutional Law.* Vol. 12. No. 1. 2014, 76.

The South African Constitution and the large-scale malaise it aims to ameliorate more easily accommodated horizontal effect and, specifically, the uniform constitutional standard it brings to public and private spaces.

The process by which South Africa adopted its new constitution is well-known in comparative constitutional scholarship. The National Party (what historically had been the Afrikaner ethnic nationalist party) and the African National Congress (the still-existing party founded to realize equality and end apartheid) agreed to pursue a two-stage constitution-making process, adopting an Interim Constitution after much debate in November 1993.[137] This Interim Constitution along with certain key constitutional principles set the program for continuing deliberations over the Final Constitution. In the meantime, the first non-racial election was held in April 1994, allowing the African National Congress to assume its status as, in fact, representing the majority of South Africans. In 1996, the Constituent Assembly submitted the Final Constitution for the Constitutional Court's review, so as to ensure conformity with the aforementioned constitutional principles. Ultimately, the Constitutional Court required nine changes to be incorporated into the final document. After the Assembly made the required changes, the Final Constitution was effective in February 1997, cementing the country's new constitutional vision.

The Constituent Assembly understood the legacy of racism as deep-seated in the social fabric, and thus aimed to secure more than formal equality. From the outset, the

[137] Richard Spitz with Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*, Oxford: Hart, 2000.

drafters set their sights on an ambitious standard of equality, one that provided for socioeconomic rights, for example.[138] With such goals figuring prominently in the deliberations, perhaps it is not surprising that both the Interim and the Final Constitutions considered at length the question of horizontal effect, as well. For various reasons, the drafters of the Interim Constitution proceeded with some caution. Even such ambitious justices as Albie Sachs were hesitant to give rights direct horizontal effect in the 1996 decision *Du Plessis v. De Klerk.*[139] However, the incremental development of horizontal effect jurisprudence thereafter largely has been one of expansion. Indeed, the latter Final Constitution stated unequivocally that, in fact, rights would apply horizontally to private actors.[140] Certain doctrinal questions, such as whether horizontal effect applies to private actors directly or indirectly, remain subject to debate. Nevertheless, there is basic consensus that the text and the very nature of the constitutional project[141] require some kind of horizontal effect.[142]

I will proceed by first recounting the deliberations over horizontal effect in the drafting of the Interim Constitution. Indeed, much time was dedicated to the question of horizontal effect at this early phase. This set the stage for the foundational case, *Du Plessis v. De Klerk*, decided under this preliminary standard. The different opinions reveal simultaneously the Court's general appreciation for the transformative project at hand as well as a lingering diffidence that the particular Interim Constitution operative at

[138] Nolan 2014.
[139] *Du Plessis v. De Klerk and Another* (CCT8/95) [1996] ZACC 10.
[140] Constitution of South Africa, Chapter 2, Section 8.
[141] Some might call this a purposive or teleological take. See Friedman 66, 82.
[142] Nolan 2014, 76.

that time did authorize this step toward uniformity. The lingering ambiguity on display in *Du Plessis* led the drafters to double down on the necessity of horizontal effect in the text of the Final Constitution, and subsequent cases reveal a Court and a Constitution come into their own on this question. Certainly in comparison with *Du Plessis*, later cases show less concern for traditional distinctions in law and more attention to the path laid before South African governing institutions to fully realize the new constitutional vision across the polity.

That apartheid had propagated inequality across spheres of life in South Africa might suggest that the question of horizontal effect was always an easy one for the constitutional drafters. However, the prospect of applying rights horizontally was widely debated both among and within parties involved in the deliberations of the Interim Constitution. Richard Spitz offers a detailed account of the discussions and shifting positions on this question.[143] Perhaps unsurprisingly, the National Party advocated a vertical model for the Bill of Rights that would obligate only state actors and, hence, not change so drastically the status quo that still privileged white populations.[144] On the other hand, representatives of the African National Congress initially argued in favor of horizontal effect insofar as they did intend significant change with this new constitutional order.

Some members of the ANC came to question the efficacy of horizontal effect to their cause, however. For one thing, they worried that cementing horizontal effect of

[143] Spitz 268-278.
[144] Spitz 269.

some rights in the Interim Constitution would prevent courts from employing the range of their interpretive powers to apply additional rights horizontally as well. Spitz also attributes the split between members of the ANC who did and did not support horizontal effect to Halton Cheadle's consultation with American law professor Laurence Tribe. Apparently, Tribe cautioned Cheadle against horizontal effect, for the commonly offered reason that legislatures, rather than courts, are better suited to regulating private relations.[145] Cheadle was persuaded by such arguments from democratic accountability, not least because of the real possibility that National Party judges would be among those determining the outcomes of such important questions if they were constitutionalized. Moreover, himself as a practitioner of labor law, Cheadle worried that horizontal effect would bring too much within the purview of the Constitutional Court to the detriment of those issues and institutions dedicated more specifically to fair labor practices. Indeed, his concern was not unlike that of some German practitioners of labor law in the years leading up to *Lüth*. Spitz explains how such worries over horizontal effect were symptomatic of the joint presence and different preoccupations of practitioners and academics in the Assembly.[146] While the former were more inclined to preserve traditional distinctions in law, the latter were convinced that some provision of horizontal effect was essential to realizing constitutional values writ large.

In this way, Cheadle brought not a few concerns to the ANC and larger Assembly on the subject of horizontal effect, making this particular debate one that began to cut

[145] Spitz 271.
[146] Spitz 279.

across party lines.[147] Indeed, a serious dispute broke out between Cheadle and Albie Sachs on this question, Sachs counting himself among those who thought horizontal effect necessary to prevent the privatization of apartheid.[148] Cheadle had the upper hand, however, as he served on the Ad Hoc Committee charged with these issues concerning the application of rights.[149] Though ultimately comprising a vertical model of rights, the Interim Constitution permitted the possibility of some kind of horizontal effect in two sections at the end of the Chapter on Fundamental Rights. First, Section 33(4) stated: "This chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of 7(1) [concerning legislative and executive organs of state]." That the Interim Constitution adopted a vertical framework did not prevent the legislature from passing laws that would effectively pursue constitutional values in private spaces, including and perhaps especially anti-discrimination. Presumably, this achieved a kind of middle ground, still far from direct horizontal effect, but also taking deliberate steps to avoid such outcomes as the *Civil Rights Cases* that facilitated Jim Crow in the United States.

The second section of the Interim Constitution that provided for horizontal effect was Section 35(3) which stated, "In the interpretation of any law and the application and development of the common law and customary law, a court shall have regard to the

[147] Spitz 270-271.

[148] Spitz 271. Ironically, Sachs would also decide against horizontal effect in the early decision *Du Plessis v. De Klerk* discussed below.

[149] Spitz 278.

spirit, purport and objects of this Chapter."[150] This formulation would not be all that unusual as justification for the horizontal application of rights in other contexts. Indeed, it resembles Stephen Gardbaum's argument (admittedly unorthodox in the U.S. context) that the supremacy clause offers some foundation for horizontal effect in the United States. In particular, he argues that it can be interpreted as requiring courts to apply common law and statutory law only as it coheres with the Constitution.[151] Moreover, this language in 35(3) in the Interim Constitution also resembles the reasoning of the German Federal Constitutional Court in *Lüth*, namely, that inhering in the Basic Law was an objective order of values that necessarily informed the interpretation of all other areas of law. To this extent, the Interim Constitution left an opening for some form of horizontal effect, but was not so conclusive as to obviate debate.

In the years that the Interim Constitution was effective, from 1993 to 1997, the question of horizontal effect remained a live one.[152] Indeed, the Constitution was sufficiently indeterminate to give rise to real debate when the newly established Constitutional Court decided the case *Du Plessis v. De Klerk*. This judgment has received much attention since it was decided in 1996, largely because the majority assumed the conventional liberal line of argument in filling in the gaps of the Interim Constitution, thus opting for a more banal indirect horizontal effect rather than the direct horizontal

[150] Interim Constitution of South Africa, Section 35 (3). Danwood Mikenge Chirwa, "The horizontal application of constitutional rights in comparative perspective," *Law, Democracy, and Development*, Vol. 10, No. 2, 2006, 38.

[151] This in spite of strict interpretations of the state action doctrine in the context of other provisions. Gardbaum's primary example is the case, New York Times v. Sullivan (1964).

[152] Delisa Futch, "*Du Plessis v. De Klerk*: South Africa's Bill of Rights and the Issue of Horizontal Application," *North Carolina Journal of International Law and Commercial Regulation,* Vol. 22, No. 3, Summer 1997, 1011.

effect for which many were already arguing. In *Du Plessis,* a newspaper reported that South African citizens had been transporting weapons to rebel forces in Angola via covert flights. The newspaper suggested that such private air operators as Gert De Klerk were intentionally fueling the Angolan civil war in order to make a profit. De Klerk sued the newspaper for defamation, arguing that these articles had damaged both his reputation and his business.[153]

The decision itself hinged on whether the Interim Constitution could be applied retrospectively insofar as the newspaper (the plaintiffs) sought to rely on section 15, protecting the freedom of speech and expression, including "freedom of the press and other media." However, the fact that the Interim Constitution was not adopted until after the articles were published and damages were incurred posed some difficulty to their argument. Implicit in this question of retrospectivity, moreover, was the further question of whether an article of the Constitution could even be brought to bear on a private relationship in the way that the newspaper argued. The case made its way to the Supreme Court of Appeal which decided against the newspaper. Specifically, the Court decided that the Interim Constitution could not apply retrospectively and that the Bill of Rights of the Interim Constitution only had vertical effect, that is, it only applied directly against the state actors.[154]

[153] Futch 1012-1013; Stuart Woolman and Dennis Davis, "The Last Laugh: *Du Plessis v. De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions," *South African Journal on Human Rights,* Vol 12, 1996, 363-364.

[154] Futch 1012-1013; Woolman and Davis 363-364.

The Supreme Court of Appeal was considered to be the final court of appeal in all areas of ordinary law. Both the question of retrospectivity and horizontality in the case at hand seemed to implicate constitutional questions, however. Crucial to the outcome of this case was the question of how the common law related to the Constitution—were such aspects of the common law, such as the rule governing defamation, ultimately subject to the Article 15 commitment to free expression? With such questions straddling the divide between ordinary and constitutional law, the case went to the Constitutional Court. The Constitutional Court, in turn, agreed with the Supreme Court of Appeal that the Interim Constitution could not apply retrospectively. While this judgment alone would have been sufficient to determine the case's outcome, the Court took the additional step of deciding the question of horizontal effect as well.[155] Justice Kentridge cited the Interim Constitution's aforementioned Section 7 to argue that the Constitution included no basis for direct horizontal effect; indeed, Section 7 only obligated the Executive and Legislature to uphold the Bill of Rights. The Court thus reasoned that the text of the Interim Constitution provided a foundation for a kind of indirect horizontal effect that, in fact, closely resembled the German practice of *Drittwirkung.*[156] On this understanding, the Bill of Rights of the Interim Constitution obligated private relationships only insofar as statutes attempted to regulate them.

South Africa was also importantly different from Germany, however, in that it maintained a system of common law. This common law, the Court concluded, was not

[155] Futch 1013-1014.

[156] Indeed, Kentridge's opinion suggests that horizontal effect in the Interim Constitution resembled the German model more than any other approach to horizontal effect in a national constitution.

subject to the Constitution in the same way. Of course, Section 35(3) of the Interim Constitution required that a court should have regard for "the spirit purport and objects" of the Bill of Rights in interpreting any law, and the provision explicitly included the common law in this.[157] Nevertheless, Justice Kentridge betrayed his belief that the Constitutional Court was not up to this task, explaining that it simply did not have the capacity to balance matters of common law in the way that would be required in applying horizontal effect. In particular, he worried that in deeming some rule of common law as incompatible with the Constitution, the Constitutional Court would then be charged with making law to fill the resulting gap.[158] In addition to such steps that Parliament could take in the realm of statutory law, the ordinary courts and particularly the Supreme Court of Appeal were better equipped to apply horizontal effect in their "routine common law interpretive work."[159] Kentridge's argument is premised on a specific understanding of law and the work that common law does to balance private relationships. Such new constitutional rights as to dignity, Kentridge argued, could not effectively be balanced against old common law rights and certainly could not be subject to the same sort of balancing that transpired in common law decision-making.[160] In this way, the Constitutional Court's initial formulation of horizontal effect was one that preserved traditional boundaries of law, largely intended to isolate private relationships from constitutional obligations directed to the state.[161]

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[157] Interim Constitution of South Africa, Section 35(3). Chirwa 2006, 38.
[158] Futch 1019.
[159] Robertson 303.
[160] *Du Plessis v. De Klerk* at para. 55; Woolman and Davis 366-367.
[161] Woolman and Davis 383.

Early critics of the *Du Plessis* decision, Stuart Woolman and Dennis Davis, suggest that the Interim Constitution pointed just as easily if not more easily to the opposite conclusion than that which Kentridge reached. They argue that Kentridge's interpretation is by no means required by the constitutional text itself and that, in fact, there is good evidence that the Interim Constitution was designed to govern all aspects of law and life, including the common law, evinced by Section 35(3).[162] The very fact of Justice Albie Sach's concurring opinion and, especially, Justice Kriegler's dissenting opinion illustrate the plausibility of such alternative reads of the Interim Constitution. We see this tension in Justice Sachs's opinion, in particular. On the one hand, he recognizes the capaciousness of the South African constitutional project. He states:

> I have no doubt that given the circumstances in which our Constitution came into being, the principles of freedom and equality which it proclaims are intended to be all-pervasive and transformatory in character….Given the divisions and injustices referred to in the postscript, it would be strange indeed if the massive inequalities in our societies were somehow relegated to the realm of private law, in respect of which government could only intrude if it did not interfere with the vested individual property and privacy rights of the presently privileged classes….I accept that there is no sector where law dwells, that is not reached by the principles and values of the Constitution.[163]

In this way, we see clear recognition that the purpose of the South African Constitution differed from the conventional liberal model that prioritized negative rights and sought only to protect against government interference. Indeed, Sachs cites "the circumstances in which [the] Constitution came into being," rooting its normative commitments in a larger understanding of the history of the South African polity. But this understanding was not

[162] Woolman and Davis 372; Robertson 302.
[163] *Du Plessis v. De Klerk* at para. 177.

enough ultimately for Justice Sachs to depart from the majority, as he saw this consideration of constitutional purpose as "not the issue" of the case at hand.[164] He explains his more immediate concern that the Constitution is not necessarily self-enforcing, and that it does rely on the actions of Parliament and the Supreme Court of Appeal in order to realize all of the commitments to which it aspires.[165] Moreover, following Kentridge, he questions whether the Constitutional Court is even equipped to undertake the sort of "social, political, and economic questions," that would inevitably accompany the horizontal application of rights.[166] In this way, Sachs straddles the line between the concerns to which Kentridge gives voice in the majority opinion, and acknowledging certain normative commitments that would seem to accommodate a larger for the role of the Constitutional Court.

That "the most radical member of the court"[167] could not bring himself to endorse horizontal effect in this instance is revelatory of the sort of crossroad the Court faced in *Du Plessis v. De Klerk*. The tension with which Sachs wrestled, however—of a constitutional vision that clearly implicated the polity as a whole but did not decidedly abandon certain "ghosts" of liberal thinking[168]—was not felt as saliently for dissenting Justice Kriegler. After "castigating the majority,"[169] Kriegler states:

> No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the State can possibly bring those benefits [of democratic

[164] Ibid.
[165] For a similar discussion in the American context, see Lawrence Sager, *Justice in Plainclothes,* New Haven, CT: Yale UP, 2006.
[166] Futch 1019.
[167] Robertson 303.
[168] Michelman 2012, 304.
[169] Robertston 304.

> society and justice]. The fine line drawn by the Canadian Supreme Court in the *Dolphin Delivery* case and by the U.S. Supreme Court in *Shelley v. Kraemer* between private relationships involving organs of the State and those which do not, have no place in our constitutional jurisprudence. ….We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our Constitution aims at establishing freedom and equality in a grossly disparate society. And I am grateful to the drafters of our Constitution for having spared us the jurisprudential gymnastics forced on some courts abroad. [170]

Kriegler thus had little patience for the sorts of distinctions which Kentridge and Sachs imported into their own opinions. Indeed, Section 35(3) and others Kriegler cites suggest that the "spirit, purport, and objects" of the Bill of Rights do govern all law and life in the polity, regardless of the particular institution or court that happens to be acting. Even beyond such specific provisions, however, Kriegler insists on the need to consider the South African constitutional vision conceived as a whole. Due appreciation for the power relationships embedded in South African society and the Constitution's frontal assault on these public and private power structures do not permit the queasiness that Kentridge and others display with respect to the intervention that horizontal effect would entail. Kriegler brings his rejection of liberal presuppositions into sharp relief when he accuses the majority of "preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty."[171] Laissez-faire priors may work for other polities, but it is not the basis of the South African polity, Kriegler argues, and in fact represents much of what the Constitution is combatting.

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[170] *Du Plessis v. De Klerk* at para. 145-147.
[171] *Du Plessis v. De Klerk* at para. 120.

It is not difficult to see how the questions of *Du Plessis* could yield such an array of answers. Indeed, different provisions of the Interim Constitution potentially point in different directions on the question of horizontal effect. Much seemed to hinge on the judges' own presuppositions and the particular provisions they chose to emphasize in interpretation. Kentridge found some grounding for traditional liberal commitments in the Interim Constitution, while Kriegler's more teleological lens of constitutional purpose led to a very different conclusion. And indeed, these disparate readings pointed toward a real choice here—Robertson describes this as a choice between "thin" and "thick" constitutionalism,[172] while Woolman and Davis articulate the same choice in terms of classical and "creole" liberalism.[173] An additional reason for this impasse was the fact that the Interim Constitution maintained separate jurisdictions of the Constitutional Court and the Supreme Court of Appeal. Insofar as the Supreme Court had been the highest court until this time of transition, there was good reason to keep it as supreme in its jurisdiction even after the Constitutional Court was established. Michelman speculates that the continued separation at this stage was either indicative of a general distrust of the extent of the old Supreme Court's loyalty to the new Constitution or, on the other hand, a concession to appease those who worried that the Supreme Court no longer would enjoy primacy in its jurisdiction.[174] Whatever the motive, this separation that the Interim Constitution preserved gave rise to the questions we find in *Du Plessis* concerning the relationship between ordinary law, common law, and constitutional law.

[172] Robertson.
[173] Woolman and Davis.
[174] Michelman 291.

This kind of separation is not all that different from that which informed the German Federal Constitutional Court's decision in *Lüth*. Indeed, underlying *Lüth* was the similar question of how the Federal Labor Court, as well as other private law courts, related to the Constitutional Court. In *Lüth*, the Constitutional Court asserted itself as the primary and final interpreter of the Constitution, however it did not prevent other institutions from also engaging in constitutional interpretation. Neither did the Constitutional Court presume to have final interpretive authority with respect to the Civil Code. Indeed its decision to focus primarily on the general clauses, explained above, shows a kind of self-imposed limit and even deference to other apex courts. Michelman sees all of this as evidence that Germany preserved separate systems of law and courts, even as *Lüth* required that principles of the Basic Law influence the private law. In the South African context, on the other hand, the separation between the jurisdiction of the Supreme Court of Appeal and that of the Constitutional Court Michelman thinks "was always headed for instability."[175] He goes so far as to describe such a system as a "design error" of the Interim Constitution in need of correction,[176] especially given the vast transformation that the South African Constitution sought. And indeed, the Final Constitution of 1996 brought significant change to the structure of the South African courts, making the Constitutional Court the final arbiter in all areas of law, including matters of common law, and introducing direct horizontal effect of the Bill of Rights as a constitutional requirement. "Under pressure from the idea of a socially transformative,

[175] Michelman 2011, 291.
[176] Michelman 2011, 291.

constitutional bill of rights," the Final Constitution could not but unite the South African systems of law and courts under the commitments set by the Constitution itself.[177] With the adoption of the Final Constitution, the institutional structures were more clearly harmonized with the new substantive commitments.

Before moving on to discuss the specific changes of the Final Constitution and subsequent caselaw on horizontal effect, it is worth briefly digressing to flesh out some comparisons between South Africa and Germany, not least because some of the judges writing in *Du Plessis* found occasion to mention explicitly the German case.[178] In particular, Justice Laurie Ackermann's opinion in *Du Plessis* compares the South African situation with post-war Germany, finding in these apparent similarities justification to develop also a similar understanding of horizontal effect. Ackermann maintained that the German Basic law "was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution."[179] Indeed, he continues, that each country's constitution was born of a troubled history sets a similar stage for the development of horizontal effect in each country. If indirect (in contrast with direct) horizontal effect was good enough for Germany, therefore, Ackermann suggests it ought to be good enough for South Africa, too.

Picking up on this discussion from *Du Plessis*, Woolman and Davis insist on recognizing the upshots of important differences between Germany and South Africa that, in their view, Ackermann and other judges papered over. While conceding that the

[177] Michelman 2011, 292.
[178] See Futch 1016, fn. 54, 1019-1020; Michelman 2011, 291-292; Woolman and Davis 375.
[179] *Du Plessis v. De Klerk* at para. 92.

German and South African Constitutions were both responses to serious rights abuses and totalitarian regimes, the state of affairs in each post-conflict situation were vastly different. After World War II, Germany was a "modern, industrialized and relatively egalitarian society. It was into these less than dire circumstances that the GBL was born."[180] On the other hand, they wrote around the time that the Final Constitution was adopted,

> Post-Apartheid South Africa could not be more different than post-WWII Germany. It is not united as a nation. It is not linguistically, culturally or politically homogenous. It is not modern, not industrialized, not egalitarian. Thus while vast inequalities in private power may not have been such a problem in post-WWII Germany—and thus made indirect application of the Basic Law palatable—vast inequalities in private power are an inextricable part of the fabric of post-Apartheid South African society—and make indirect application of our Constitution an anathema for the majority of our country's citizens.[181]

This explanation gives some historical context for Germany's ability continually to cling to old legal structures, even importing directly much from the Weimar years. Whereas *Du Plessis v. De Klerk* initially seemed to put South Africa on that same track of preserving some insulation of private relations from constitutional standards, such expressions as Kiegler's condemnation of laissez-faire structures pick up on a progressive shift. And indeed, the new Constitution would make explicit the expanse of the constitutional project insofar as it expanded the Constitutional Court's jurisdiction and clarified a doctrine of direct horizontal effect. This way, the drafters ensured that future judgements were not so tortured as was Albie Sachs's opinion in *Du Plessis*, as he contended with

[180] Woolman and Davis 375, fn. 45.
[181] Woolman and Davis 375, fn. 45.

institutional structures that did not facilitate full pursuit of South Africa's constitutional commitments. In the Final Constitution, the text and institutions aligned with the project, and that project was one that supported direct horizontal effect.

Though the decision of whether and how to apply horizontal effect came through different fora in Germany and South Africa (through the Constitutional Court and the Constitutional Assembly, respectively), in both cases these decisions were rooted in a commitment to ameliorate histories of violence and abuse. To this extent, Ackermann's comparison in *Du Plessis* is accurate. Furthermore, the introduction of horizontal effect in both countries reflected a belief that to confront successfully their respective histories, constitutional values needed to influence the broader social order (the "constitution" in the Aristotelian sense). In this way, both countries agreed that some degree of uniformity in constitutional governance across public and private spaces was necessary. This goal of uniformity manifested differently in each country, however, corresponding to differences in the content and nature of their respective constitutional visions. As explained with respect to Germany, the fact of its long tradition of civil law and system of specialized courts, as well as the persistence of the principle of *Privatautonomie,* shaped the development of horizontal effect following *Lüth*. Though horizontal effect has continually developed, most cases have developed in the context of such classic rights as freedom of speech and assembly—which is to say, notably less work has been done with respect to equality.[182] And when horizontal effect was applied in the context of equality rights, it was received only with serious pushback. The more conventionally liberal

[182] Stone Sweet, Ackermann.

values that make up the content of the German Basic Law as well as certain structural and doctrinal features aided in the general persistence of a liberal ethos and led horizontal effect to follow suit.

Comparing the German jurisprudential history with the development of horizontal effect in South Africa therefore bears out Woolman and Davis in their desire to lend nuance to Ackermann's account in *Du Plessis*. In particular, the movement on the subject of horizontal effect from the Interim Constitution to the settlement of the Final Constitution, to say nothing of the tension internal to *Du Plessis*, point to a real disconnect between the priors of some framers and judges and the larger constitutional project. This was the problem that *Du Plessis* hit upon, and that a comparison of Germany and South Africa brings into sharper relief. The formulation of horizontal effect in the Interim Constitution was too like that of the German Federal Constitutional Court in *Lüth,* in spite of the fact that the countries actually faced very different problems and set out different projects for themselves. To be sure, the classical liberal rights and freedoms were represented in South African constitutionalism. Indeed, the Constitution founds the polity on "Human dignity, the achievement of equality and the advancement of human rights and freedoms."[183] But these commitments carried unique status and meaning in South Africa. For example, both freedom and equality encompassed more than their formal meanings, in that they encompassed certain material prerequisites as well.[184] Moreover, rather than shy away from equality in the context of horizontal effect

[183] South African Constitution of 1996, Chapter 1, Section 1(a).
[184] Robertson; Ackermann.

as in the German case, the South African Constitution actually singles out equality by name as requiring horizontal effect. Chapter 2, Section 9(4) guaranteeing the right to Equality states:

> No person may unfairly discriminate directly or indirectly against anyone on one or more grounds… [including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth]. National legislation must be enacted to prevent or prohibit unfair discrimination.[185]

Of course, merely providing that the right to equality or right against discrimination has horizontal effect does not entail that a person's right to equality will always prevail against the countervailing right in question. (Section 9(5), for example, suggests that there are instances in which discrimination may be "fair.") Nevertheless, the very fact that the South African Constitution so prioritizes equality to specify its horizontal effect diverges from the German treatment of the same question.

In terms of institutional structures, doctrinal specifics, and constitutional content, therefore, the shift from the Interim to the Final Constitution also entailed a shift away from the German model. In implementing some version of horizontal effect, both sought uniform constitutional standards to govern public and private spaces alike. Nevertheless, this feature of uniformity manifested differently in each country, as the nature of their respective constitutional commitments led to a different range of obligations for private actors. The jurisprudential development discussed in what remains of this chapter evinces how the particularities of the South African history and Constitution raised issues that ultimately resulted in a more extensive understanding of horizontal effect than in

[185] South African Constitution of 1996, Chapter 2, Section 9(4).

Germany. While only a limited number of horizontality cases have come before the Court in the Constitution's short history, the cases that do exist reveal a clear progressive trajectory.

The 1996 Constitution established the Constitutional Court as "the highest court in the republic," with authority to decide constitutional matters as well as any other matter it decides is within its own jurisdiction.[186] It was within this new institutional context that the framers entrenched direct horizontal effect as a legal-constitutional practice.[187] In contrast with the ambiguity of the Interim Constitution, the constitutional drafters established direct horizontal effect of constitutional rights with uncommon clarity, seemingly taking pains to avoid the sort of confusion exhibited in *Du Plessis v. De Klerk* given the finality of the 1996 Constitution. Several provisions across different sections collectively establish horizontal effect. In contrast to the Interim Constitution that obligated only the actions of the legislature and the executive to the Bill of Rights, for example, Chapter 2, Section 8(1) of the 1996 Constitution provides that the Bill of Rights binds the judiciary as well. In addition, several entirely new provisions concerning horizontal effect were added. Among them were Section 9(4) on the right to equality, described above, as well as Sections 8(2):

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[186] South African Constitution of 1996, Chapter 8, Section 167.
[187] Spitz 279.

In stating that the Bill of Rights binds "a natural or a juristic person," Section 8(2) establishes that rights apply horizontally to obligate both private individuals (natural persons) as well as other private entities such as firms and corporations (juristic persons). It goes on to suggest that the nature of the right and the nature of the duty imposed by the right may influence the outcomes of particular cases, as through proportionality analysis that balances one right against another. Although horizontal effect establishes uniformity in applying South African constitutional values across spheres, therefore, Section 8(2) creates some space for variation in the way rights obligations apply to private actors as opposed to state actors.[188]

Also in Section 8, the Constitution explains how specifically a court will apply a right horizontally, stating that a court *must* apply or develop the common law in applying horizontal effect. The provision reads:

> When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
>
> a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

This section seems to take *Du Plessis v. De Klerk* head on, giving all courts, including the Constitutional Court, authority to develop the common law in order to hold private actors accountable for the Bill of Rights. Moreover, as was the case in Section 8 (1), the Constitution acknowledges that some rights will necessarily be limited in the process of

[188] Ackermann 267.

balancing. Taken together, these several additions to the Final Constitution mark a clear departure from foregoing takes on horizontal effect.

In their very different manner of argument in the case *Carmichele v. Minister of Safety and Security*,[189] Albie Sachs and several other justices who had concurred with Kentridge's *Du Plessis* opinion acknowledged that a sea change had occurred under this new Constitution. *Carmichele* (2001) established that the courts had an obligation to develop the common law in the light of the Constitution. The facts of the case concerned a man, convicted and jailed for assault, who committed another assault after law enforcement had released him on bail. The victim of the subsequent attack argued that police and public prosecutors had "negligently failed to comply with a legal duty" to protect her from a known aggressor.[190] The High Court and Supreme Court of Appeal decided there was no evidence that law enforcement had "acted wrongfully." And so, the applicant appealed to the Constitutional Court. The Constitutional Court, in contrast, rejected tendencies to distinguish between action and inaction on which, for example, the U.S. Supreme Court had relied in *DeShaney v. Winnebago County Department of Social Services*.[191] Rather, a provision similar (though, importantly, not identical) to Section 35(3) of the Interim Constitution, provided the basis for the Constitutional Court's decision. Section 39(2) of the Final Constitution states, "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal

[189] *Carmichele v. Minister of Safety and Security.*
[190] Para. 2.
[191] Para. 45.

or forum must promote the spirit, purport and objects of the Bill of Rights."[192] In contrast with the counterpart provision in the Interim Constitution, Section 39(2) explicitly obligates *every* court to attend to the constitutional commitments. And so, in a unanimous opinion, the Constitutional Court recognized that it had an obligation to ensure that the common law developed according to such constitutional standards that inhered in the rights as to life, human dignity, freedom, and security.[193] Citing the German Basic Law once again, the Constitutional Court argued that the South African Constitution also encompassed an "objective, normative value system," and that it was within this value system that the common law needed be developed. Conceding that the common law admitted of different possible modifications to accord with constitutional values and that the particular approach chosen largely depended on the facts of a given case, the Constitutional Court referred the case back to the initial High Court, but charged them to account for the relevant constitutional values.[194]

Some question just how radical a break *Carmichele* really was from *Du Plessis.* Michelman, for example, argues that the case reveals that the Constitutional Court "internalized some separation," as between systems of law and courts, according to the same liberal paradigm on display in *Du Plessis*. Though all South African law had to conform to the Constitution, he explains, the common law was still developed within its own framework, evinced by the fact that the Constitutional Court sent the case back to the High Court. This, Michelman argues, is not all that different from the system of

[192] South African Constitution of 1996, Section 39 (2)
[193] Para. 44.
[194] Para. 56

separate courts and, by extension, the indirect horizontal effect that Germany maintains.[195] Chirwa, on the other hand, points out that the duty to protect that emerges from *Carmichele* is a step removed from a liberal framework, and particularly from the requirement that state action be present in order to enforce constitutional rights. He highlights how in the South African context the state is "liable for an infringement of a constitutional right by a non-state actor if it fails to take 'reasonable and appropriate measures' to prevent it."[196]

Considering the Constitution's full treatment of rights in private spaces as in Section 8, moreover, the South African model proves to go far beyond German *Drittwirkung* insofar as private actors can be charged with rights violations themselves, and not simply through the distillation of private law.[197] Though such doctrinal differences are important, more important to the present project are shifts in the terms of debate and how such differences reflect understandings of the constitution's role in the larger society. Does it provide a standard for the polity as a whole, and how does this society ultimately look given the particular commitments of the Constitution? Looking at longer trajectories is a more valuable exercise for this purpose. And indeed, on this standard, it does seem *Carmichele* set the stage for future, more ambitious cases discussed below. Robertson explains how "a stream of cases" followed *Carmichele* in

[195] Michelman 2011, 292.
[196] Chirwa 2006, 44.
[197] Chirwa 2006, 43. See also Friedman 66.

2001, all taking as granted that "nothing should stand in the way of the instantiation of constitutional values in the working of the law."[198]

Only the year after *Carmichele*, the Court decided *Khumalo v. Holomisa*[199] which dealt specifically with the Constitution's provision for horizontal effect in Section 8. Like *Du Plessis* and so many other horizontality cases, *Khumalo* concerned a defamation action. A South African newspaper accused prominent politician Bantu Holomisa of involvement in criminal activities and he, in turn, sued for damages of defamation. The case came down to the newspaper's right to freedom of expression (Section 16) against Holomisa's right to dignity (Section 10). The newspaper (the applicant) argued that the common law rule of defamation needed to be developed further in order to comply with the constitutional right to freedom of expression. In particular, the newspaper argued that, under a proper understanding of freedom of expression, plaintiffs ought never to succeed in defamation cases "unless they can establish that a defamatory statement was false."[200] Writing for the Constitutional Court, Justice O'Regan acknowledged that the freedom of expression had horizontal effect, "given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State."[201] Nevertheless, this right had to be

[198] Robertson 313.

[199] *Khumalo and Others v. Holomisa,* (CCT53/01) [2002] ZACC 12.

[200] *Khumalo v. Holomisa*, para. 44. The applicants cite *New York Times v. Sullivan* insofar as the U.S. Supreme Court also required that public figures demonstrate the falsity of a statement. Unlike in *New York Times v. Sullivan*, however, the plaintiffs in *Khumalo* did not argue for an "actual malice" standard. In the Judgment of the Court, Justice O'Regan describes this American case as "the high-water mark of foreign jurisprudence protecting freedom of speech" and that many other countries had "declined to follow it" (para. 40).

[201] *Khumalo v. Holomisa*, para. 33.

balanced against the right to dignity, as it also had horizontal effect. Weighing these two against each other, O'Regan concluded that the common law rules of defamation, in their current state, struck a balance that was, in fact, compliant with both of these constitutional rights commitments. She explained that newspapers and other media would only be charged for defamation when they could not establish that "the statement was true and its publication in the public interest, nor that the publication was reasonable in all the circumstances."[202] However, she also drew attention to the great limitation that shifting the burden of proof to the plaintiff would entail for the right to dignity since it was sometimes impossible to demonstrate the falsity of a claim. Since the newspaper could establish neither the truth nor the reasonableness of the accusations, the Court decided that the common law rules were sound and favored the right to dignity on balance in this particular case.

On Robertson's telling, the earlier *Carmichele* decision had been necessary "to bring the jurisprudence on the development of the common law into line with the much firmer stand taken by the final Constitution after the weakness of the court's decision in *Du Plessis*."[203] *Khumalo* thus fortified and built on this earlier decision by extending its logic also to apply to relations between private actors. Indeed, with *Khumalo* constitutional commitments came to comprise the very content of those common law rules governing private relations. Moreover, and perhaps more importantly, the concepts of constitutional rights and duties are not excised as they enter private spaces. Rather,

[202] *Khumalo v. Holomisa*, para. 44.
[203] Robertson 313.

individuals are faced with the prospect that they, too, are accountable for such constitutional rights commitments as to freedom of expression or dignity. Justice O'Regan does stipulate the need to consider the intensity and nature of the right before applying it horizontally,[204] and other of the judges have been at pains to emphasize that the processes of determining constitutional duties of state and nonstate actors are not equivalent.[205] Even with these caveats, however, the process of balancing and ultimate judgment in *Khumalo* still rest on the understanding that the constitution is source to both rights and duties of private actors.

Questions of dignity, free speech, and defamation are by no means novel to law in general or horizontal effect jurisprudence in particular. Nevertheless, in securing the Final Constitution's provision for horizontal effect of these rights, *Khumalo* paved the way for other, more distinctive rights of the South African constitutional order also to obligate private actors. Indeed, as far as rights go in the Constitution, so too might horizontal effect go. We see this theoretical potential as early as *Du Plessis*, in the way interpreters understood horizontal effect to augment South Africa's larger constitutional project. Moreover, we see the potential for expansion in practice, as cases related to housing have already emerged despite the relatively short history of horizontality jurisprudence.

Housing is a salient and complex issue in South African history. From the onset of European colonialism in the mid seventeenth century through the Apartheid regime of

[204] *Khumalo v. Holomisa,* para. 31-33.
[205] Ackermann 267.

the twentieth century, racially-based laws and evictions displaced indigenous peoples leading to widespread impoverishment of black populations.[206] Thus, the South African Constitution provided "Everyone has the right to have access to adequate housing."[207] The issue of housing is complicated, however, in that it necessarily raises separation of powers issues and questions of property rights. In recounting his experience in deciding the important *Grootboom* case,[208] Justice Albie Sachs acknowledges the unique difficulties that come with enforcing something such as a right to housing, when so much depends on the actions of and resources of legislatures and even private proprietors.[209] In the end, the Court decided that Mrs. Grootboom was not entitled to emergency housing, but charged Parliament with taking positive action on the issue of housing in general. In the words of Justice Yakoob, "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream."[210] The right to housing is, therefore, aspirational in the fullest sense. It exists at the very core of the South African constitutional vision, and yet involves such balancing of interests and capacities as to prevent full and immediate realization.

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[206] Gaopalelwe Lesley Mathiba, "Evictions and Tenure Security in South Africa," *ESR Review*, Vol. 19, No. 2, 2018, 13.

[207] Section 26 on Housing reads:

"1. Everyone has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[208] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.

[209] Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights: The *Grootboom* Case," in *The Constitution in Private Relations*, Ed. András Sajó and Renáta Uitz, Ultrecht: Eleven, 2005, 79-98.

[210] *Government of the Republic of South Africa and Others v Grootboom*, para. 2

While the Constitution specifies that the duty to provide adequate housing falls on the state, the very nature of housing is such that cases frequently involve private relationships. Even in *Grootboom* the Court recognized that a "right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing."[211] And indeed, a series of judgments on housing have raised or explicitly addressed the question of horizontal effect. In 2005, for example, the Court handed down the *Modderklip* decision.[212] When thousands of squatters occupied land on the Modderklip company's farm, the owners offered to sell the land to local authorities to accommodate the new occupants. However, the authorities refused to purchase and local police refused to enforce the eviction order Modderklip obtained from a court. [213] In the Supreme Court, Justice Harms acknowledged that the right to housing could be enforced horizontally in theory, but decided that it could not in the present case.[214] On appeal, the Constitutional Court did not technically rely on horizontal effect, but instead ruled that the state had failed both in protecting the Modderklip company's property rights and in securing the occupants' right to housing. [215] Although the Court chose not to apply horizontal effect, the Court's remedy still involved balancing rights against each other and, to this extent, necessarily involved cooperation of the parties in securing the rights in question. In particular, the

[211] *Grootboom*, para. 35.
[212] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5.
[213] Robertson 315.
[214] *Modderklip Boerdery (Pty) Ltd. v. Modder East Squatters & Anor.* 2001 (4) SA 385 (W), para. 31.
[215] Nolan 82-83.

Court argued that eviction was at that point impossible given that, over five years, 40,000 people had come to settle on the farm and form their own community.[216] As a remedy, therefore, the Court ordered that the state compensate Modderklip for the use of the land.

Although Modderklip was not responsible for the occupants' right to housing per se, the owners were, ultimately, still responsible in some sense for their housing. Moreover, although the occupants were not ultimately understood as trespassing, Modderklip was still entitled to compensation. One could argue that the practical logistics and financial cost of relocating 40,000 people were prohibitive of any other solution than that which the Court reached. Nevertheless, such consideration of financial costs was not the final word in the judgment of the Court.[217] Rather, quoting Albie Sachs in a prior decision, Justice Langa recounts the need "to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern."[218] In the context of the *Modderklip* case, the difficulty of the immediate circumstances, to say nothing of the longer history that occasioned these circumstances, asks of the parties these same characteristics of neighbourliness and shared concern. Put differently, the Court seems to presuppose that the actors involved identify with and share in the values of the constitutional project. Indeed, the very fact that the Court avoided the language of rights in discussing the relationship between the owners and the occupants brings this point into sharper relief.

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[216] Helen Hershkoff, "Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings" in *Courting Social Rights,* Ed. Varun Gauri and Daniel Brinks, Cambridge: Cambridge UP, 2008, 296.

[217] Para. 53.

[218] Para 54. Quoting Albie Sachs's opinion in P*ort Elizabeth Municipality v Various Occupiers.*

With this choice, "[t]he Court looked to social and economic norms as reflecting a constitutional vision of solidarity that altered the relation of the property owner to the settlers."[219] Thus, the whole case actually takes on a more republican cadence.

From an analytical perspective, moreover, attention to the larger constitutional vision articulated in *Modderklip* rather than the fact that the Court does not understand itself as applying horizontal effect per se allows the observer to appreciate the extent to which the actors do retain responsibility here and participate in the constitutional project in the ultimate resolution. Indeed, the articulation of the Constitution's commitments in terms of rights is only one possible articulation of these commitments, seeing as the South African Constitution itself understands the Republic as founded on the more general values of human dignity, equality, freedom, nonracialism, nonsexism, etc.[220] Helen Hershkoff finds this approach of avoiding rights language in other contexts too.[221] This is worth acknowledging for the aforementioned analytical reasons as well as more substantive reasons to which Hershkoff draws attention. Speaking specifically of *Modderklip*, she explains,

> In the classical conception, common law powers can be used in the holder's discretion to maximize self-utility; the egoistic exercise of power is assumed to conduce toward the general welfare. The presence of social welfare norms in a constitution alters this background assumption. From a constitutive theory of law, the powers assigned to individuals must now be interpreted and applied within the orbit of constitutional commitment and not simply within that of self-regarding concern….The South Africa Court, thus, made clear that Modderklip's power to control access to the farm could not be extended in a way that would unduly burden the occupants' background right to housing, notwithstanding the fact that the

[219] Hershkoff 299.
[220] South African Constitution of 1996, Chapter 1, Section 1.
[221] Hershkoff 298.

> farm owner does not owe a duty of shelter to the settlers. By constraining the exercise of the common law power, the court effectively altered the occupants' legal relation in the sense that they now possessed shelter. But, rather than prescribing rights directly owed from one individual to another, the court instead reshaped a power relationship in a specific context in the light of different facts and circumstances.[222]

While *Modderklip* does not technically employ language of rights and duties between the private actors, therefore, the Court does "reshape a power relationship," as Hershkoff puts it, to balance their conflicting interests against each other. Whereas in most countries, Modderklip's right to property likely would have controlled the outcome of the case, here the owners' rights were subject to the broader framework of social welfare norms or, in republican terms, to a particular conception of the common good. This broader normative context does not negate Modderklip's property rights entirely; nevertheless, it does require a general compliance with the constitutional vision. As these norms thus apply uniformly, private actors such as Modderklip are brought into the fold of the larger constitutional project.[223]

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[222] Herskhoff 299.

[223] In some ways, the facts and judgment in *Modderklip* are comparable to those of the United States case *Home Building and Loan Association v. Blaisdell* (1934). In *Blaisdell*, the Court upheld a Minnesota law that issued a moratorium on creditors' remedies at the height of the Great Depression. In particular, Justice Hughes appealed to a broader understanding of the common good to justify what, prima facie, seemed to be a departure from the Constitution's contract clause. He writes in the Opinion of the Court: "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." On Hughes's telling, therefore, this apparent deviation from the letter of the Constitution's contract clause actually was necessary to uphold the fundamental aim of the clause itself to "promote conditions of economic stability" (Jacobsohn 1977, 188). In much the same way the South African Court was careful not to say that Modderklip was responsible for the occupants' housing rights, the *Blaisdell* Court similarly argued that it did nothing to damage the principles of contract and property. Rather, it permitted the Minnesota legislation for the very reason that it did further the principle of the contract clause amid economic exigencies. See also Jacobsohn 1977, 183-193.

In the years following *Modderklip*, the Court had other opportunities to develop further its jurisprudence on horizontality. In *Juma Musjid* (2011), it considered whether a socio-economic right imposed an obligation on a private actor when a private Trust took steps to evict a public school that convened on its property. The Constitutional Court decided that the Trust had "no primary positive obligation"[224] to provide an education for the students, nor an obligation to make available its property for public use as a school. Nevertheless, the Court found that the Trust *did* have "a negative constitutional obligation not to impair the learners' right to a basic education,"[225] pursuant to Section 29 of the Constitution. The Court concluded that the Trust had every right to seek an eviction order, but that the courts were not obliged to grant one. Indeed, in evaluating the eviction request, the lower courts were required to consider "the best interest of the learners"[226] and their right to a basic education. Thus, the particular question at issue in *Juma Musjid* was how to balance the right to a basic education and the right to property.[227]

Following the reasoning in *Khumalo*, the Court explained that this horizontal application of rights, including such socio-economic rights as to education, depended in part on "the intensity of the constitutional right in question."[228] In the context of South African history, the basic right to education did rise to such a level of intensity as to call

[224] Para. 57
[225] Para. 60
[226] Para. 66. See also Nolan 83.
[227] Para. 7.
[228] Para. 58.

for a more uniform application to public and private actors alike. The Court explains the particular significance of the right to education in light of the history:

> The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.[229]

Thus, the decision to apply horizontally this basic right to education was grounded in the fundamental purpose of the South African Constitution itself. The crucial nature of the issue of education, the Court held, warranted summoning private actors also to participate in its remediation (or at least not to foreclose the possibility of their participation). Indeed, both the nature of past abuses and the unique position of many private actors to exercise influence in education were cause to involve such institutions as the Juma Musjid Trust in the constitutional project. As property rights had been formulated to disadvantage the black population during apartheid,[230] putting other rights, as to education, on equal footing ensured that claims to private property did not have undue weight and were calibrated to constitutional ends.[231] Moreover, as this decision of the Court to balance these as competing rights departed from the pre-constitutional status quo, so too did the decision to cast the issue in terms of the duties of private actors. Aoife Nolan observes how, in *Juma Musjid*, the Court had the option to employ strategies

[229] Para. 42.

[230] The Court states: "Traditionally, because of the clear distinction between public law and private law realms, a private owner could evict any tenant provided that the requirements of *rei vindicatio* were satisfied. Private entities were held to be free to engage in their economic and social interests without state interference. As a result, over emphasis on the differences between the exercise of private and public power often sheltered private power used for public purposes." (Para. 55)

[231] Nolan 85.

similar to those in *Carmichele* and *Modderklip* that did not invoke constitutional duties of private actors. Instead, however, the Court did speak of duties and found the source of these private obligations in the Constitution itself.[232]

Some amici in *Juma Musjid* expressed concern that the Court would be wary to apply horizontality any further as, for example, to give horizontal effect to positive rights.[233] Nevertheless, the Court did just this in the 2017 case *Daniels v. Scribante.* As explained in Chapter I, the Constitutional Court in *Daniels* decided that a landlord had a constitutional obligation to ensure that his tenant lived in conditions consonant with human dignity. This was not simply a negative duty as in *Juma Musjid,* but a positive duty that, the Court recognized, could require positive steps on the part of a landlord. That the Court ought to consider the "nature of a right" before applying rights obligations to private actors, according to the earlier *Khumalo* decision, did not foreclose the possibility that a socio-economic right could create such an obligation. And the majority in *Daniels* decided just this.

Just a few months after the Court handed down its judgment in *Daniels v. Scribante,* it decided *Baron v. Claytile Ltd*[234] which again raised questions of horizontal effect in the context of housing and eviction. *Baron* followed *Modderklip* in the sense that the Court was hesitant to assign a private actor the duty to guarantee the right to housing. In particular, the Court decided that an employer did not have an obligation to

[232] Nolan explains, "It is notable that in the Juma Musjid case, the Court was also invited by the applicants to develop the common law of contract and trust in accordance with § 39(2) of the Constitution and the Court did not do so even though such an approach might have enabled it to avoid addressing § 8(2)." (88, fn 145)

[233] Nolan 83.

[234] *Barron and Others v. Claytile (Pty) Ltd and Another* [2017] ZACC 24.

continue providing former employees with housing, insofar as the Constitution designated this duty as belonging specifically to the state. To be sure, realizing a right to housing as a matter of fact is a major endeavor. While the primary obligation rested with the state, however, even after *Baron* it is conceivable that private actors be asked to cooperate in much the same way as in *Modderklip*. Indeed, courts still retained the ability to decide whether a particular eviction was "just and equitable." While the duty to provide adequate housing was technically the state's, therefore, a private actor could functionally assume responsibility for the right to housing.

The proximate decisions of *Daniels* and *Baron* in the 2017 term of the Constitutional Court demonstrate how horizontal effect is as much a live issue as it is a complicated one. *Baron* in particular shows that the Court maintains some limits on the extent to which private actors have constitutional rights obligations. Nevertheless, in *Baron* as in other horizontality cases, the Court still operates on the presumption that private actors may have rights obligations, insofar as it accounts in every case for "the nature of the right and the nature of any duty imposed by the right," per Section 8 (2). Moreover, from a bird's-eye view, the general trajectory of horizontal effect is clearly one of expansion in South Africa. Indeed, as such foundational cases as *Du Plessis*, *Carmichele,* and *Khumalo* grounded horizontal effect in the larger constitutional project, so too do we see later developments as growing directly out of South Africa's troubled past and constitutional aspirations.

Conclusion

Both Germany and South Africa introduced doctrines of horizontal effect in an effort to break from their respective pasts and set a course for a future governed by new constitutional commitments. In their jurisprudential histories, we see that a common objective of this move to horizontality was a certain uniformity of governing principles across spheres. Nevertheless, the different content of their respective constitutional projects related differently to the expansion of horizontal effect as a legal-constitutional practice. Germany's continued attachment to such liberal values as *Privatautonomie* and structures of its civil law tradition supported only a more limited scope of horizontal effect. While German *Drittwirkung* still effected uniformity, this uniformity only extended so far into private spaces before actors began to resist. On the other hand, the South African constitutional vision explicitly aims to upset certain background assumptions that the liberal tradition tends to take for granted, and upset these assumptions for the very purpose of effecting broad change across spheres. To this extent South Africa's "constitutional priors" were more receptive to a uniformity of private spaces and public values, therefore permitting horizontal effect to expand basically from the outset of the new constitutional project. And indeed, even in recent years we see a continued move in South Africa toward charging private actors with duties corresponding to the aspirations of the Constitution.

In terms of the larger project, South Africa's propensity to expand horizontal effect is unsurprising given the way its constitutional vision accords with republican ideas. Put differently, the essential object of the South African project is to transform society as a whole according to constitutional principles. Thus, a quorum of jurists and

political actors likely would be comfortable with the uniformity that horizontal effect engendered. On the other hand, although the German vision first articulated in *Lüth* also entails application of constitutional principles across spheres, the republican tendency to conceive of the polity as a whole, without distinguishing public and private, meets resistance in the principles of the Basic Law itself as well as those inherited from the civil law tradition. Thus, the uniformity horizontal effect engenders is stunted in this context for the very reason that certain German priors are in tension with republican principles.

IV. Horizontality in the European Union: Republicanism in Supranational Context

As national courts have considered the horizontal application of rights obligations to private actors, so too has the Court of Justice of the European Union considered the extent to which European Union law creates obligations for private or non-state actors. EU law is typically understood as binding Member States,[1] requiring national institutions to adopt specific legislation or policies. Nevertheless, certain instances of EU law have been interpreted to obligate private actors, as well. That EU "regulations" apply to private actors is more or less analogous to national statutes doing the same, and thus, not an issue of serious debate given the legislative function of the European Commission and Council. On the other hand, that such a foundational document as the Charter of Fundamental Rights might have horizontal effect has been a source of controversy. Indeed, the constitutional nature of this document raises all of the same objections that jurists and scholars have leveled against horizontal effect in national contexts, and a host of others stemming from the fact that the EU is a supranational body.

Prior chapters discussed some of the common objections regarding the horizontal application of constitutional rights to non-state actors in general. Such issues only become more complicated in the context of the European Union. Indeed, whereas prior chapters demonstrated how republican political theory may explain and ground horizontal

[1] See, for example, Article 51 of the Charter of Fundamental Rights.

effect in spite of some of the common objections, further explanation is necessary to consider whether the republican framework works equally well for the fundamental law of a supranational union like the EU—that is, where one cannot so easily take for granted identification with shared commitments, bonds of citizenship, etc. Indeed, the ability of republican political theory to ground horizontal effect in the EU hinges on larger questions concerning integration and the extent to which the Union itself approximates a republic. The way the debate over horizontal effect in the EU has unfolded, both in scholarship and in cases of the European Court of Justice (ECJ) tracks these large questions about the character and aspirations of European unity. Put differently, it is because the status of the EU as a political community and European citizenship are contested that we have seen scholars and jurists arguing about horizontal effect in the particular ways that they do. This chapter thus demonstrates how the republican framework is informative beyond national contexts, as it reveals the connection between the horizontal effect of the EU Charter and the larger foundational questions of a European *res publica*.

The first section of this chapter will briefly recapitulate some of the theoretical background of prior chapters to lay out more fully the question of republican horizontal effect in the context of the European Union. The second section will then turn to scholarship on the EU, rehearsing debates concerning republican politics and citizenship, and drawing out the implications of European unity to the more specific subject of horizontal effect. Ultimately, this section will identify how particular republican resources in and aspirations of the EU would also serve to ground horizontal effect. The

final section will take a closer look at ECJ decisions and scholarly literature on horizontal effect. I demonstrate how my particular understanding of horizontal effect as republican makes sense of the debates in these fora.

Theoretical Background

As horizontal rights seek to bring private individuals into accord with public values, I have argued that horizontal effect constitutes a republican vein in constitutionalism. I identify this republican character in two specific features of horizontal effect. Briefly, the uniformity that horizontality creates between public and private obligations resembles the republican ideal that the common good should govern the polity as a whole, without great concern to distinguish between public and private spheres or public law and private law. Moreover, what one might call the solidarity of horizontality resembles the republican idea that people possess certain individual duties vis-à-vis others by virtue of being citizens of a common polity.

While private law can also yield legal obligations for individual citizens and private entities in the traditional vertical model, these obligations accrue a different status when they come from the same source that yields and entrenches the duties of the state, namely a constitution. Indeed, when judges cite the constitution rather than statutory law or the common law as the source of individuals' duties, those duties become nothing less than demands of fundamental law. Thus, horizontality has, on the one hand, the symbolic effect of bringing an entire polity into the fold of the same (constitutional) commitments. It also has a practical effect, namely, to entrench individual duties as a constitutional

matter. Indeed, in the same way that constitutional rights are meant to place certain questions above the political process, with horizontal effect individual duties come to exist and be enforced beyond the political process. Horizontal effect thus expands the function of a constitution and the scope of constitutional rights by altering the conceptual distinction between public and private on which constitutionalism was premised.

This republican framework may go further than the conventional liberal logic to help us understand and ground horizontal effect in national contexts. But can republican theory also explain horizontal effect in such supranational contexts as the European Union? Much in republican thought presupposes a common sense of polity and citizenship, concepts which many take for granted in national contexts,[2] but which people question in the European Union. Thus, it seems scholars and jurists arguing for the horizontal effect of the Charter of Fundamental Rights may not as easily appeal to a shared sense of purpose to justify horizontality's uniformity, nor a sense of common membership to justify solidarity.

To this extent, it is possible that neither horizontality's aforementioned symbolic effect of encompassing private actors into constitutional projects, nor its practical effect of entrenching individual duties may find sufficient republican resources for justification at the continental level. Indeed, at this high level, horizontality would effectively entail the reshaping of all of European society, applying the values of the Charter uniformly to individuals across Member States. Moreover, this step would yield the additional result of

[2] This is debatable in itself, as Willem Maas (2017) explains. Nevertheless, as a practical matter, it is safe to say that the European Union still faces more objections as to legitimacy than do national authorities.

admitting rights claims of individuals within one Member State against individuals of a separate Member State. But could citizens of two different countries, albeit in the same global region, truly share solidarity with one another? Such suggestions are not beyond imagination and are certainly possible as a technical legal matter. Still, horizontal effect in the EU poses a unique set of challenges, prompting additional explanation to determine how the republican framework may apply in this context.

Republican Aspirations and Resources in the European Union

Scholars have debated at length whether the European Union is compatible with a republican conception of politics and citizenship. This broad, seemingly theoretical question speaks to the more practical issue of building and sustaining the EU as a genuine political community rather than just another international alliance. Moreover, the answer to this question directly bears on whether a republican explanation of horizontal effect is possible in this context or if, instead, the case of the EU constitutes a limitation to this argument. Scholars consider the republican credentials of the EU by asking two more specific questions. First, to what kind and degree of integration does the European project actually aspire? Second, to what extent does (or can) a European identity permeate the popular imaginary? If, per the first question, the ultimate goal is to establish a full-blown political community characterized by common rights and values rather than simply a close-knit international alliance revolving around economics and security,[3] then the

[3] Aristotle, *The Politics,* Book III Part 9. Michel Rosenfeld describes a similar distinction in his discussion of contract as an external relationship, and custom and tradition as pertaining to internal constitution (Rosenfeld 320).

ability to foster commitment to something like republican politics and citizenship, per the second question, becomes nothing less than an existential concern for the European Union. Indeed, the success of the European project comes to hinge on a widespread identification with, as well as some responsibility toward Europe and toward one's fellow Europeans. I take up these two questions in turn, reviewing important debates concerning republicanism in the European Union in order to lay groundwork for ensuing discussion of horizontal effect.

What is the nature of the European project? Did it originally or does it now include what we might characterize as republican aspirations, as to establishing a distinct "public thing" or a European citizenry? Initially, political actors, including judges serving on the European Court of Justice, proceeded as if Europe were primarily an alliance centered around free movement and economics.[4] This mindset is manifested in the phenomenon that EU law sometimes is not effective unless a case involves some crossing of national borders, a fact that can prevent citizens' residing within a country's borders from invoking EU protections, so leading to the phenomenon of reverse discrimination.[5] The ability of law to touch individual citizens seems to be a crucial feature of political community in the full sense of the term.[6] If, then, this sort of crossing of borders is necessary to trigger EU law, Europe would seem to be still more of an international community than a federal-supranational one. Indeed, in such case the practical reality of

[4] Frantziou 2015. Van der Walt 2012 also discusses seminal cases, but with a different gloss.

[5] Maas 2014.

[6] For a Tocquevillian account of what governmental authority entails, see Christina Bambrick, "'Neither Precisely National Nor Precisely Federal': Governmental and Administrative Authority in Tocqueville's Democracy in America," *Publius: The Journal of Federalism*, Vol. 48, No. 4, 2018. See also Madison's *Federalist* 39.

the European project could not but fall short of a republican standard of the polis and civic feeling, even if Europeans aspired to something more.

Through a lengthy process of development punctuated by numerous treaties, the European project now more explicitly aims at securing a shared set of rights and recognition of some sort of constitution.[7] Some more reticent scholars have termed this expansion of the European project "competence creep."[8] Others maintain that this commitment to a common European identity has been the aim of the project from the very beginning.[9] Wherever one falls on these issues, it is difficult to deny the capaciousness of the European project at least since the Treaty of Lisbon. Therefore, in response to the first question about the degree of integration intended, at least now it is clear that Europe aspires to something beyond mere economic alliance. To this extent, it must concern itself with questions of political community and citizenship, even if integration remains a somewhat stilted process evinced by such disruptions as Brexit. While the European project is one unity and integration, however, scholars and political actors still interpret differently what this means as a theoretical and practical matter. Some put greater weight on the limits of Lisbon and, previously, Maastricht, arguing that a robust national sovereignty remains a part of the larger plan.[10] Others, in contrast, more

[7] Even if the formal Constitution of Europe failed to garner the necessary support, the content and express purpose of the Treaty Lisbon is similar enough that one can say that a constitution of Europe remains the goal.

[8] In a similar vein, Johan van der Walt follows Dieter Grimm (2005) in distinguishing between *de facto* and *de jure* sovereignty assumed by EU institutions (Van der Walt 242).

[9] Maas 2014.

[10] Besselink 41.

readily concede European primacy.[11] However, even those who admit of a larger role for Union governance debate what this means for the Member States. Michel Rosenfeld, for example, understands integration as entailing some prior negation of national identity,[12] while others, such as Willem Maas, emphasize the possibility and practical reality of multilevel citizenship.[13] In some ways, these arguments may appear to be different in emphasis rather than in substance. Nevertheless, these different positions do entail real consequences for the status of the EU vis-à-vis Member States with respect to sovereignty and governing authority.

Of course, such debates are not restricted to academic fora. In the *Lisbon Treaty Case* the Federal Constitutional Court of Germany sought to protect democratic legitimacy and national-constitutional identity for Germany while remaining open to the EU project of unity.[14] Essentially the Court was willing to cooperate with EU legislation and ECJ decisions, but not at the cost of Germany's sovereignty. Accordingly, the FCC decided that it maintained competence to rule on whether the Treaty of Lisbon was compatible with Germany's identity and fundamental commitments. While Germany would concede the "primacy of application of European law," the fundamental principles of the Basic Law could not be annulled. In Rosenfeld's terms, Germany would only participate in negation to a point. Nevertheless, this attempt by the German FCC to stake its ground in ongoing disputes over competence and jurisdiction came only after other

[11] Frantziou 2015. Also see DeMol's (2011) discussion of this question and its upshots in horizontal effect.

[12] Rosenfeld 325-326.

[13] Maas 2017.

[14] 123 BVerfGE 267 (2009). Jacobsohn and Roznai 121-136.

decisions that went a long way to assert EU primacy, including *Van Gend en Loos* and *Costa* discussed below.[15]

Given the foregoing, it is patently difficult, even impossible, to give a definitive account of the nature and aspirations of the EU. Though there are certainly legal articulations of the European project, this is ultimately a political question (albeit a question of high, constitutional politics) that remains to be worked out. Still, how one understands the demands of European unity directly bears on whether one could properly call it now or in the future a political community of its own. Is there something akin to a European polis and common good? Is there, in any meaningful sense, European values or European citizens? Or are the Member States to remain the primary loci of politics and citizenship? Of course, the answers to these questions may exist along a continuum rather than as an either-or formulation. As Besselink says, this is not a zero-sum game.[16] While one would not want to force the case of the EU to fit this lexicon of republican theory, these terms do shed light on some common concerns about how we understand Europe and understand it in relation to the Member States. In terms of the nature and aspirations of the European project, therefore, we can conclude (if somewhat tentatively) that a significant degree of integration remains the goal and that, at least in the minds of some, such integration will come to resemble something like political community as understood in the republican tradition.

[15] *Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen,* ECJ 26/62, *ECR* (1963); *Flaminio Costa v. E.N.E.L.*, ECJ 6/64, *ECR* (1964).

[16] Besselink 44; also Maas 2017.

Given this take on the nature of the European project, then, what can we say about the second question raised above, concerning the readiness or capacity of Europeans to, in fact, understand themselves as citizens of the European Union. In classical republican thought, one's status as a citizen meant everything—it defined one's rights, duties, and very way of life. It was with one's fellow citizens that a person engaged in political deliberation and so determined the fate of the polity. What, then, does it take to have people identify as fellow citizens of a place? More specifically, can European identity plausibly constitute some degree of individuals' understanding of self and duties? David Miller addresses this issue, explaining the need to have "something that can hold people together despite differences of class, religion, ethnicity, and so forth, and allow them to cooperate politically." [17] He continues to explain that "The mere fact of being subject to the same political system is not sufficient."[18] However, the resources available to classical republics, such as a cultural identity manifested in a common nationality, language, religion, are not available to Europe. Moreover, cultural identity cannot be manufactured insofar as such an imposition of culture would violate the rights of minorities according to our contemporary standards.[19] If Europe cannot turn to these characteristics to cultivate a sense of peoplehood in Europe, therefore, might it look elsewhere?

Jürgen Habermas argues that a kind of "constitutional patriotism" may offer sufficient basis on which to found and cultivate a sense of peoplehood. Europeans include

[17] Miller 147.
[18] Miller 147.
[19] Miller 145.

individuals of various ethnicities, native languages, and even nationalities. However, one thing they may share and that may serve as a foundation for a common identity is devotion to a European constitution. Taking this idea to heart, EU institutions and Member States moved to adopt a European Constitution in the Constitution Treaty of 2004. However, this effort failed when the treaty did not garner necessary support for ratification in the national referenda of France and the Netherlands. One arguing for Habermas's constitutional patriotism post-2004 would have to contend with this mixed history, as a result. Perhaps one may argue more generally on the basis of certain common values or a shared commitment to such foundational principles as those articulated in the Charter of Fundamental Rights. If Europe could, in fact, cultivate and sustain a politics centered on such principles, then the prospect of a European identity may not be out of reach.

Writing just a few years after the failure of the European Constitution, however, Miller maintains that these efforts toward constitutional patriotism still come up short. He highlights Habermas's own articulation of the objection that constitutional patriotism is "too weak a bond to hold together complex societies."[20] Miller raises several issues on this point. For one thing, he questions whether the rights articulated in such treaty documents as the Charter are so different from national constitutions that they would, in fact, inspire the requisite devotion to what is distinctly European. After all, do not many countries express commitments as to a right of human dignity[21] and of equality before the

[20] Habermas 1999, 118.
[21] Article 1, Charter of Fundamental Rights of the European Union.

law[22]? And how might unity emerge if different people, different Member States, interpret provisions in conflicting ways? In response to such objections, Habermas explains that the focus of loyalty need not be on any definitive account of the Treaties, but on the "common *horizon* of interpretation" that a constitution provides for a people.[23] In other words, it is the very debate about these principles that binds the people,[24] an idea not unlike the contestatory politics that figures prominently in republican thought. Habermas similarly explains in other places that "what unites a nation of citizens as opposed to a Volksnation, is not some primordial substrate but rather an intersubjectively shared context of possible mutual understanding."[25] Miller remains unconvinced, however, maintaining that formulations such as this seem "tantamount to admitting defeat" since "*possible* mutual understanding is surely something that exists between people everywhere."[26] This point is well taken, but Miller seems to give short shrift to the prospect that what is "*possible* mutual understanding" may ultimately become *actual* and, moreover, develop a distinctly European character.

To the extent that Miller does entertain the possibility of identifying a European common good, he is ultimately skeptical that this could have any meaning for or inspire devotion in the common EU citizen. He joins many in arguing that EU politics suffer from a democratic deficit and do not create sufficient space for popular participation,[27]

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[22] Article 20, Charter of Fundamental Rights of the European Union.

[23] Habermas 1999, 225.

[24] Perhaps, to use Dworkinian language, it is the concepts as understood against a particular historical backdrop that binds a people together, rather than any particular conception of those principles. (Ronald Dworkin, *Law's Empire,* Cambridge: Belknap Press, 1986)

[25] Habermas 1999, 159.

[26] Miller 150. Emphasis in original.

[27] Miller 153.

what should be a staple in any republican political community. In a way, Habermas recognizes these deficiencies, too. The difference, again, is that Habermas sees a way forward notwithstanding. In particular he advocates the development of a European public sphere, "created on the one hand by a European-wide civil society of voluntary groups and on the other by a European party system whose members would address European rather than national issues."[28] He accepts that European politics and citizenship will remain perfunctory and merely legal in the absence of such a public sphere. Perhaps it is this exchange that reveals the real impasse on the question of cultivating a European people. Indeed, it is at this point that we begin to see how Miller's objections are rooted in basic beliefs about the scale on which republican politics may be conducted.[29] Miller states,

> Large conglomerates such as the EU are unsuited to republican politics not just because of their size, and the physical gap that separates the central institutions from most citizens, but because they are divided in such a way that citizens' primary loyalties are inevitably directed toward their compatriots, as many empirical studies have shown.[30]

On Miller's telling, there does not seem to be much that anyone can do to foster republican politics and citizenship on the broad scale of the EU. Indeed, interests inevitably remain diverse[31] and, it would seem, centered around state, regional, and municipal divisions so that individuals simply do not have a reason to invest in politics on a continental level.

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[28] Habermas 2001, 102-103; Habermas 1999, 153.

[29] This is not unlike the famous debates between the American Federalists and Anti-Federalists about the possibility of maintaining an extended republic. See, for example, Madison's *Federalist* 10.

[30] Miller 154.

[31] See also van der Walt 2014, Chapter 1 on this point.

Of course, European politics can develop in any number of ways in the coming years. And although the possibility of realizing republican politics on the broad scale that is Europe is an empirical question, it also depends on how we understand republican politics at all. Again, Maas shows us in his account of multilevel citizenship that these issues of national and supranational identity need not be either-or questions.[32] Moreover, we learn that these questions are not unique to the European community but confront virtually all federal systems and even unitary countries that are diverse. On this understanding, it seems that Europe might have more resources at its disposal to cultivate a republican politics than some scholars concede. Time alone can shed further light on these questions where the theoretical and the practical intersect.

What do these musings on the possibility of republican politics in the EU offer us on the more specific question of horizontal effect in the EU? Johan Van der Walt begins to answer this question when he demonstrates how the issue of horizontal effect, perhaps more than any other doctrinal issue courts confront, prompts questions about sovereignty. He points to the logic of the *Lüth* case to make this point.[33] In this case, discussed previously in Chapters I and III, the German Federal Constitution Court (FCC) argued that the Basic Law included an "order of objective moral and legal principles" that "radiate" to affect public and private spheres alike. This sets up an understanding of the Basic Law as potentially speaking to all issues of law and life in Germany.[34] Even though

[32] See Maas 2017; Besselink 44. In a way, republican thinkers like Montesquieu might be interpreted as laying the groundwork for this kind of argument, too.

[33] Van der Walt 2014.

[34] Kumm 2006; Stone Sweet 2007.

Van der Walt ultimately takes issue with other aspects of *Lüth*[35] he acknowledges that this kind of power to govern all spheres of life in a polity is definitive of sovereignty. When the FCC declared that values of the Basic Law radiated to all spheres, therefore, the Court both presupposed and accrued a certain sovereignty on behalf of the constitution and the institutions that give it effect—not least the Court itself which exercised its ability to regulate private spaces in *Lüth.*[36] This connection between the regulation of private entities that comes of horizontal effect and the concept of sovereignty goes a long way in explaining the widespread reservations surrounding the horizontal effect of EU law.[37] Indeed, the inevitable upshot of applying EU law horizontally is that the ECJ accumulates some measure of sovereignty to the EU, probably at the expense of Member States.[38] It is for this reason that Van der Walt describes *Lüth* as having a dual destiny in Europe—while its initial instantiation in the case the FCC decided in 1958 presupposed and bolstered sovereignty of the German state, its subsequent applications in ECJ case law appropriate this same conception of sovereignty to the EU.[39]

How, then, does republicanism figure into this account of horizontal effect and sovereignty? Though republican political theory employs different language, it may convey something similar to Van der Walt's discussion of sovereignty. Moreover, the

[35] In particular, he identifies a kind of substantive due process in the FCC's reasoning that, he maintains, ought to be left to institutions better equipped to account for majority-minority relations and, it follows, multiple possible orders of value rather than a single object order.

[36] Mathews 2018.

[37] See for example, Van der Walt 2014, De Mol 2011, DeWitt 2009, Stone Sweet 2007.

[38] *Dirk Rüffert v Land Niedersachsen.* ECJ 346/06, *ECR* (2008)

[39] Van der Walt 338-339.

republican framework does additional work to distinguish the phenomenon of horizontal effect from other claims of the ECJ to sovereignty, as in such earlier cases as *Van Gend en Loos* and *Costa*.[40] Put differently, republican theory and, specifically, the republican features conceptualized as uniformity and solidarity, move us beyond the language of sovereignty to offer a thicker, more detailed account of what is at stake in the horizontal application of EU law.

First, Chapter I demonstrated how the fact of a uniform law governing both public and private spheres is a distinctive feature of horizontal effect. Indeed, the alternative to horizontal effect would be to maintain separate public and private laws as an effort to preserve a private sphere separate from the public. As horizontal effect necessarily rejects this separation in favor of uniformity, it may find grounding in the republican idea that there is a common good that encompasses and obliges the polity taken as a whole. Though government will always be in the business of regulating the private, instances of horizontal effect are distinct in that individual duties and duties of the state share a common origin in the principles of fundamental law. This common source of governance, of authority, is an implicit recognition of a distinct "public thing," an accepted common good, that governs a particular area and a particular people understood as its own body politic. In other words, the horizontal application of rights both presupposes and reinforces borders of place and people. When the ECJ applies EU law horizontally,

[40] Van der Walt's account does not clearly distinguish why horizontal effect constitutes a different consideration in the larger issue of sovereignty. In other words, horizontal effect simply seems to be another step in the accumulation of sovereignty that began with *Van Gend en Loos* and *Costa*. My republican framework does more to distinguish these.

therefore, it is akin to declaring a European "public thing" and a European people, perhaps even prior to those of the Member States.

Secondly, and relatedly, we may consider the concept of solidarity introduced in Chapter I. Horizontal effect, by definition, deduces from public commitments that individuals also have duties vis-à-vis their fellow citizens. This presumes a particular "public thing," as stated above, but also a particular people, charged with duties toward one another insofar as they all recognize and live under the same fundamental law. One can understand this in formal terms concerning people's legal obligations in a particular place, or in the more functional terms of what people actually recognize as their duties. In either case, horizontal effect depends on a discernable citizenry that recognizes the authority of a particular fundamental law giving rise to its duties. In order for this republican logic to have purchase with respect to the EU's doctrine of horizontal effect, therefore, one would have to recognize a European "public thing" with which people identified as a legal and a practical matter.

The value of employing the language of republicanism here comes into sharper relief when we consider how horizontal effect has developed and is debated differently in the context of the European Court of Human Rights (ECtHR).[41] The ECJ is one body among many others in the panoply of EU institutions. Indeed, the EU includes institutions that correspond to the classic three branches of government and, in this sense, mirrors the form and function of the national governments of the various Member States. While the scope of EU governance may be limited, therefore, its institutions comprise a

[41] Garlicki 2005.

fully operative government and its project, ultimately, is one of unity. In theory, the EU could begin to conceive of itself as a republic or, in Van der Walt's terms, begin to assume a measure of sovereignty. On the other hand, the ECtHR is an *international* court, belonging to no particular government and maintaining no project beyond that of addressing violations of those rights in the European Convention of Human Rights. There is no associated legislative function, nor any encompassing project of unity. To this extent, the role of the ECtHR does not rival its Member States in the same sense as does the EU.

Given these differences in institutional character, it is unsurprising that horizontal effect has figured into accounts of the ECtHR differently than in scholarship on and decisions of the ECJ. The question of horizontal effect would seem to be less salient for the ECtHR as the Convention constitutes an agreement among states without any aspiration to govern the people within individual countries. And indeed, the question of horizontal effect was not even raised when the Convention was drafted in 1950.[42] While some provisions of the Convention do amount to a charge for national governments to protect their citizens from private harms, these ultimately remain charges to the national governments and do not obligate individual citizens.[43] To the extent that horizontal effect has republican qualities, therefore, we would expect it to figure more prominently in the EU than in an international court lacking the same potential for republican depth. Moreover, for these same reasons, we see more resistance to the ECJ's efforts to apply

[42] *Theory and Practice of the European Convention of Human Rights*, 5th ed. Ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, Cambridge: Intersentia, 2018, 26-30.

[43] Ibid. One could categorize this as a version of indirect horizontal effect.

horizontal effect, as national entities are wary of the implications of uniformity and solidarity at the EU level for the individual Member States.

Even while horizontality in Europe might effect republican ends as of creating a uniform law and duties of citizens, it is not clear that Europe can yet count on republican resources, such as an acknowledged common good and a self-identifying citizenry, requisite to grounding horizontal effect. On the other hand, as Van der Walt and I both propose, a certain endogeneity seems plausible here, as the ECJ's increasing application of horizontal effect may itself work to cultivate greater republican resources in the EU. As the very status of Europe as a political community continues to be debated,[44] therefore, so too does the possibility of a republican foundation for horizontal effect remain a live question. Notwithstanding these lingering theoretical issues, the ECJ has moved gradually to develop its doctrine of horizontality as the next section will explain.

The Horizontal Effect of European Union Law

How, then, have judges of the ECJ developed the concept of horizontal effect, and how have scholars understood this practice in the EU? In the foregoing sections, I explained some of the theoretical questions that arise from a republican understanding of horizontal effect in the context of the EU, including how the EU itself measures up against republican principles and the unique challenges it faces in grounding horizontal

[44] Those who study and reside in national contexts largely take for granted the authority of national institutions, national borders, national citizenship. This is not to say that such credit is always warranted. Indeed, Willem Maas raises important issues with respect to assuming the Westphalian paradigm without question or qualification (Maas 2017). However, as a practical matter, scholars do not debate these issues in the context of most nation states in the same way they do in the context of Europe.

effect in a republican logic. In contrast, this section examines jurists' and commentators' express concerns and the resources they recognize as available to them in developing horizontal effect in EU law. I gauge how EU jurists and commentators articulate the issues surrounding horizontality and how they propose to develop horizontal effect accordingly. While the perspectives articulated in some ECJ decisions and some scholarship are more ambitious, viewing horizontal effect as something which can be expanded, others prove more hesitant and aim to find some limits to this legal doctrine.

The initial jurisprudential development that set the stage for the debate over horizontal effect came in the important *Van Gend en Loos* case (1963).[45] Following the early treaties establishing the European Community, the relationship between European and domestic law was a real question and one that could not be avoided for long. In *Van Gend*, the European Court of Justice declared its understanding of the kind of integrated community it would have Europe become, even while, on some accounts, the Member States envisioned a future wherein there remained greater differentiation between states within the Community.[46] In particular, the Court articulated the principle of direct effect, what scholars and jurists today describe as "the capacity of a provision of EU law to be invoked before a national court."[47] With the establishment of direct effect, litigants in domestic courts could rely on provisions of EU law against national governments. The upshot of this, then and now, is that European law could be introduced into what

[45] *Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen,* ECJ 26/62, *ECR* (1963), 1.

[46] Craig and De Búrca 189.

[47] Craig and De Búrca 185.

previously might have been a purely domestic legal-political situation. Moreover, the principle necessarily enlists domestic courts to the task of enforcing Treaty provisions and directives.

Insofar as Member States did not explicitly assent to this kind of direct effect, Alec Stone Sweet goes so far as to describe *Van Gend en Loos* as a "juridical *coup d'état*,"[48] On the other hand, the "teleological methodology" that the Court employs in its judgment assumes an alternative account of the European vision. Speaking of the European Economic Community Treaty, the Court explains that this was more than an agreement of obligations between contracting states, citing as evidence the Treaty's preamble which refers not only to governments but to peoples. Indeed, the Court argues, the Treaty establishes EU institutions endowed with sovereign rights, the exercise of which affects both the Member States and their citizens.[49] On this telling, the European Community was intended to be a political community in the full sense. "[M]ore than an agreement" between states, European institutions were "endowed with sovereign rights" of the kind that permitted it to act as a government of people as well.[50] In this way, the Court seized upon the opportunity to entrench a more Euro-centric vision, later cemented in the *Costa* case that declared the primacy of European law.[51]

The establishment of the direct effect of EU law was debated alongside the additional question of *horizontal* direct effect—whether EU law could be invoked by

[48] Stone Sweet 2007, 918. Stone Sweet's criticisms in this essay are sharp. He proceeds to state, "In Europe, a great deal of judicial governance proceeds on this absence of coercive authority, because it proceeds in the absence of normative authority" (926).

[49] *Van Gend en Loos,* ECJ 26/62, *ECR* (1963). Craig and De Búrca 188.

[50] See Bambrick 2018 on "governmental authority."

[51] *Flaminio Costa v. E.N.E.L.*, ECJ 6/64, *ECR* (1964), 585. Stone Sweet 2007, 918.

litigants in national courts against private individuals or non-state actors. This was, in fact, a separate question and one that needed to be answered. However, even at this high level of abstraction, it became complicated very quickly for a couple of reasons. Despite instances in European law that reference the actual people living in Europe, as the *Van Gend en Loos* Court finds in the EEC preamble, foundational documents of Europe are by and large addressed to the states. The 2009 Charter of Fundamental Rights, for example, specifically states in Article 51 that it obligates the Member States. While this is not necessarily the last word on the question, it has factored into the Court's reasoning on horizontal direct effect.[52]

The issue of *whom* treaties and the Charter address, moreover, speaks directly to the questions elaborated in the previous section—namely, whether these foundational documents establish a European "public thing" so as to hold the individuals within Member States accountable for EU commitments. Perhaps *Van Gend* and later *Costa* gesture toward an affirmative answer here in that they are premised on the contention that European law is relevant and supreme even in the context of domestic questions.[53] Nevertheless, one would still have to make the argument that private entities are immediate participants in the European project and, therefore, that this law is equally binding on their actions. If this be the case, then it is not so surprising that European commitments and values should have a "radiating effect" through all spheres of life, to use the language of *Lüth*.[54]

[52] *Association de Médiation Sociale v. Hichem Laboubi,* Case C-176/12 (2014).
[53] Van der Walt 334.
[54] BVerfGE 7, 198.

The Court first took up the issue of horizontal direct effect of EU law in *Defrenne v. Sabena* (1976).[55] This case identified the principle of equal pay for equal work[56] of the Treaty of the European Economic Community (now the Treaty on the Functioning of the European Union) as having direct horizontal effect despite the fact that certain provisions of the Treaty formally addressed Member States. In this case, a woman named Gabrielle Defrenne was forced to retire from her job as an airline attendant since, under Belgian law, female flight attendants were required to retire upon turning forty. This policy, Defrenne argued, prevented her from collecting a pension equal to that of her male colleagues in retirement. The Court of Justice decided the case on the basis that the Treaty required equal treatment on grounds of gender. In particular, it argued that the prohibition of discrimination was "mandatory in nature"[57] and so applied both to state actors and private actors. *Defrenne* thus ushered in a broad discussion about horizontal effect. Though the decision itself only established the possibility of horizontal effect for treaty law, and only "mandatory" treaty provisions for that matter, this decision was enormously consequential. Indeed, those treaties comprising the fundamental commitments of the EU would now apply to private individuals within Member States. The significance of this step is made clear in the words of the Court. Speaking of Article 119, the Court states:

> [T]his provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended,

[55] *Defrenne v. Societe Anonyme Belge de Navigation Aerienne,* ECJ 43/75, *ECR* (1976), 455.

[56] Then articulated in Article 119 of the Treaty of the European Economic Community, and now in Article 157 of the Treaty of the Functioning of the European Union.

[57] *Defrenne* 476.

> by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples…[58]

Thus, the Court in *Defrenne* understands the project of the European Community as being to propagate a particular kind of society. More to the point, its "social objectives" are of such a nature that they necessarily impact entities beyond the state. While the Court does identify the limiting principle only to apply horizontal effect for mandatory provisions, it ultimately acknowledges that the primary law of the EU has the power to create obligations for private actors within the Member States.

That European law comes in so many forms raised the question of what kinds of law may be applied horizontally to nonstate actors following *Defrenne*. EU law includes regulations, directives, treaty articles, and the Charter of Fundamental Rights. Such distinctions have loomed large in debates over horizontal effect, as scholars and jurists argue the significance of these differences—whether to limit the ECJ's extension of horizontal effect or to argue the ultimate arbitrariness of these distinctions and thereby extend its reach. As mentioned previously, EU regulations are akin to ordinary law, and so do not necessarily raise difficult questions with respect to horizontal effect. Similarly, directives are legal acts of the EU that bind Member States. Whereas regulations are self-executing, however, directives require implementation, a fact which has resulted in their further debate. Traditionally directives do not have horizontal effect since Article 228 of the Treaty of the Functioning of the European Union states that Member States are bound by a directive, and bound only to the extent that the directive specifies a particular

[58] *Defrenne* 472.

obligation.[59] Nevertheless, the ECJ has found ways to carve out exceptions to apply directives horizontally. For example, it has broadened the very concept of "the state" to incorporate what otherwise would be categorized as private actors[60] and allowed private individuals to hold Member States accountable when they fail to implement directions.

The fact of such distinctions points toward a general hesitance with respect to horizontal effect.[61] Indeed, beginning with *Defrenne*'s distinction between "mandatory" and other provisions, we see a similar tendency to limit the reach of horizontal effect in treaty law and the Charter of Fundamental Rights, areas in which the stakes are arguably even higher. As explained previously, these two areas of EU law are effectively constitutional in nature. In contrast with regulations and directives, applying treaty law and the Charter horizontally would be a clearer expression of movement (both symbolic and practical) toward increased integration and the primacy of EU commitments. It is unsurprising, therefore, that *Defrenne*'s establishment of horizontal effect of treaty law was considered so groundbreaking. Indeed, even decades later, such scholars as Johann Van der Walt continue to worry about the horizontal effect of treaty law.

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[59] See *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching),* ECJ 152/84, *ECR* (1986). Scholars have been quick to point out that the way in which this provision obliges state actors need not preclude application to individuals and other non-state actors (Craig and De Búrca 204-205.). Moreover, scholars have persuasively demonstrated that similar textual provisions have not stopped the Court from asserting possibility of horizontal direct effect in the case of the Charter of Fundamental Rights (Frantziou 2015.). With such cases as *Mangold v. Rüdiger Helm* (ECJ 144/04, *ECR* (2005)), the Court seems to be moving away from the position that directives cannot have horizontal effect. Nevertheless, the *Mangold* met with much push back from the Member States and many continue to argue for this different treatment of primary law and directives (Craig and De Búrca 205.). The Court seems to have an interest in treading lightly, therefore, as it still relies on the Member States for implementation.

[60] Craig and De Búrca 206-209. Additionally, it has insisted on a principle of "harmonious interpretation," that requires domestic courts to interpret national law "in the light of" directives (Craig and De Búrca 209-216.).

[61] Frantziou 2015, 663, 675.

While debates unfold in courts in terms of doctrinal technicalities, scholarship treats horizontal effect as raising deeper questions, as well. Indeed, even after *Defrenne*, the scholarly literature reveals real disagreement about the constitutional implications of horizontal effect, including the ability of the ECJ to define values and priorities for Europe and the ability of Europe to define value and priorities for the Member States. Johan Van der Walt, for example, worries that the original formulation of horizontal effect in the German FCC's *Lüth* case, overlooks the possibility for disagreement over values and their ordering. When this logic was appropriated from German jurisprudence by the ECJ, therefore, not only was there reason for concern about which institutions were making these decisions (courts or legislatures), but the very government determining these values (individual countries or the EU).

Van der Walt's book focuses on the "*Laval* quartet," of cases, including the *Viking* (2007) case which determined that labor unions violated treaty provisions on freedom of establishment when they prevented the Viking shipping company from moving their legal base from Finland to Estonia.[62] Following the reasoning in *Defrenne*, we see the horizontal effect of a treaty provision as it controls the actions of the labor union in relation to the shipping company. Though in earlier cases the Court established criteria requiring treaty provisions to be clear and precise if they were to be applied horizontally, Van der Walt sees *Viking* as based fundamentally on judicial fiat. In the ECJ rhetoric of "balancing" and "harmonizing" the opposing social and economic concerns

[62] *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti,* ECJ 438/05, *ECR* (2007); Craig and De Búrca 193.

we find in *Viking*, Van der Walt finds the Court making crucial and constitutive decisions that, he argues, ought to be beyond its jurisdiction as a court and, more specifically as a court for Europe.[63] He explains that the ECJ had no way to balance the right of the unions against that of the shipping company in a principled way. However, insofar as it did decide in favor of the shipping company, it yielded a "case specific prioritizing of market freedom" over bargaining rights.[64] Not only is this result not desirable policy, as far as Van der Walt is concerned, but it is not a necessary interpretation of the Treaty. In deciding *Viking,* therefore, the Court improperly assumed authority to make such a constitutional decision. He thus describes the case as a "crucial moment in the federalization"[65] of Europe, insofar as the ECJ, an EU institution, made this decision for Member States who may have chosen, and in fact had chosen, to order these values differently in governing private individuals.

The *Viking* case faced severe criticism of legal scholars when it was decided, many worrying about its apparent derogation of certain principles of labor law. However, the general practice of applying treaty law horizontally, Van der Walt's primary concern, is basically settled in ECJ jurisprudence. In Van der Walt's assessment of *Viking*, we find a Court that is making claims about the kind of community the EU is as well as its status in relation to Member States. And indeed, the ECJ judgment follows what was a common line of thinking, especially early on in the Community's history, that prioritized matters

[63] Van der Walt 340-341.
[64] Van der Walt 344.
[65] Van der Walt 338.

of economics and trans-national exchange insofar as the EU's original purpose had been to facilitate freedom of movement and economic cooperation.[66]

Initially, one may take this prioritization of the economic as a sign of humility and restraint since the European Union, as represented by the Court, was not trying to be anything more than a union committed to economic cooperation. Nevertheless, Van der Walt argues that *Viking* did more than simply prioritize the economic as a matter of EU law. Rather, with the development of direct effect, the Court subverted the right of collective bargaining to the right of establishment within Member States.[67] Moreover, and more specifically, with the development of *horizontal* direct effect, the Court created duties of unions (albeit negative duties) not to oppose companies' choices to relocate, even if such choices came at the expense of those whom unions were obliged to protect. This latter result not only intervenes to limit the actions of a state, but assumes the role of government of the people within states. In establishing certain public values for Europe and arguing the uniform relevance of these values across spheres, therefore, the Court asserts a European *res publica* or "public thing," to use the language of earlier sections, claiming itself as a locus of the most constitutive political decisions.

Van der Walt's solution to these concerns is simple in theory though more complicated in practice. He thinks that courts in general and the ECJ in particular should refrain from weighing in on these kinds of substantive value judgments. He suggests, instead, an emphasis on the procedural so that courts leave fundamentally political

[66] See Maas 2014 also on freedom of movement.
[67] Van der Walt 346.

questions to legislatures and, moreover, to national institutions that may better appreciate deep social and political division in a place.[68] The key for Van der Walt, in other words, is that we continue to recognize difference, including different political communities between Member States, where it still exists. Van der Walt argues for this devolution back to national governance as helping mitigate the feeling among political losers that they are subject to rules "foreign" to them and rules that they cannot identify as "their own,"[69] an admittedly republican rationale.

While Van der Walt wrote before the entry into force of the Charter of Fundamental Rights in 2009, his misgivings about the horizontal effect of treaty provisions are largely applicable to the Charter, as well, insofar as both documents are considered primary law and constitutive for the European Union. Eleni Frantziou, on the other hand, does focus on the implications of the horizontal effect of the Charter specifically, and follows Van der Walt in emphasizing the weightiness of the question of horizontal effect for Europe. She states explicitly that "discussion of the horizontal effect of rights involves a deeper inquiry into the kind of society the EU is setting itself out to be and the values that lie in its core…."[70] Moreover, Frantziou shares Van der Walt's assessment of the particular choices the Court has confronted in cases concerning horizontal effect. Noting the *Viking* case in particular, she describes the confrontation between the values of a "*laissez-faire* market economy," on the one hand, and the "radical, inclusionary impact" of collective bargaining and equal pay (as in *Defrenne*), on

[68] Van der Walt 347.
[69] Van der Walt 348. For a different gloss on this question of uniform law, see Frantziou 2015, 665-678.
[70] Frantziou 2015, 675.

the other.[71] Frantziou worries that in continuing to develop its doctrine of horizontal effect, the ECJ will prioritize *laissez-faire* economic values at the cost of the EU's more inclusionary project concerned with substantive equality.[72] Nevertheless, Franziou's solution is not to recoil from horizontal effect, pace Van der Walt. Rather, with the adoption of the Charter, Franziou would have the ECJ take up more fully these defining questions for Europe.

Frantziou's amenability to horizontal effect is rooted in a broader understanding of Europe as a community. Whereas Van der Walt continues to emphasize the Member States as the locus of politics and governance, Frantziou describes the EU as its own "polity" with its own common good.[73] Her qualms concern not the practice of horizontal effect itself, therefore, but the prospect of the Court reducing it to a technical question and thus ignoring its normative (one might say, republican) potential. And indeed, the Court's early decision on the question of horizontal effect of the Charter in the *AMS* case tended toward the technical.[74] This case concerned whether Article 27 of the Charter, guaranteeing the rights of workers to information and timely consultation, could be applied horizontally. The Court considered but ultimately did not apply horizontal effect to this Charter provision, reasoning that the provision was not specific enough to ground a rights claim. Put differently, it was not so specific as to keep Member States from making their own exceptions with respect to the information and consultation workers

[71] Frantziou 2015, 675.

[72] Frantziou 2015, 663-675. This possibility Frantziou views as symptomatic of the Court's tendency to resort to mechanical approaches in making decisions.

[73] Frantziou 2015, 666, 668.

[74] *Association de Médiation Sociale v. Hichem Laboubi,* Case C-176/12 (2014).

receive in their places of employment. Thus, the Court decided against horizontal effect in this instance, while leaving open the possibility that a Charter provision might apply horizontally, if sufficiently specific and precise.[75]

Although, like treaty law, the Charter rises to the level of primary or fundamental law of the EU, the *AMS* case revealed continued insecurity on the part of the Court in giving these rights horizontal effect. Scholars such as Frantziou criticized the mechanical distinctions that the Court adopted from prior decisions, such as the requirement that a provision be "mandatory" or sufficiently specific. Rather than subjecting these cases to mechanical, what she views as arbitrary, limiting principles Frantziou would have the Court engage the substance of these questions, accounting for "what these claims can mean for people's lives"—for example, "seeing one's child, being able to work free from discrimination and receiving a pension."[76] A meaningful answer to cases of horizontal effect, she continues, will account for such things and determine "how much a particular society values them."[77]

Frantziou therefore argues that the ECJ should decide cases of horizontal effect in the light of these substantive issues for the very reason that they do implicate "the kind of society the EU is setting itself out to be." To do anything else would be to give the important issues short shrift or even blindly decide against inclusionary rights

[75] Interestingly, the Advocates General in this and other Charter cases were more willing to extend horizontal effect, even to provisions like Article 27 that the Court deemed to be vague, if legislation such as an EU directive further narrowed and specified the principle in question. In the later case, *Kücükdeveci,* the ECJ seemed to accept this approach in the context of such rights as equality that it deemed fundamental or a "general principle" of EU law. See *Kücükdeveci v* Swedex GmbH & Co KG, ECJ 555/07, *ECR* (2010); also *Mangold v. Rüdiger Helm,* ECJ 144/04, *ECR* (2005). Craig and De Búrca 193-195.

[76] Frantziou 2015, 676.

[77] Frantziou 2015, 676.

protections. In this way, she argues that the Court should engage the very questions van der Walt wants to avoid. Frantziou recognizes the political nature of these questions and does think there should be some limit to the scope of horizontal rights.[78] Nevertheless, she takes as given a post-national context, referring to Europe as its own society.[79] To take up such constitutive questions as the horizontal effect of Charter rights is necessary to the building up of a European society, à la Habermas, rather than a breach of national prerogatives. Not only is Frantziou more optimistic than van der Walt with respect to what horizontal effect can accomplish, therefore, but she is also comfortable with what horizontal effect may accomplish in its mere application. Indeed, she understands horizontal effect as itself a key question, offering answers in the larger debate about the hierarchy of EU values. For Frantziou, the outlines of political community, of *res publica,* have already been drawn and what remains to be debated is exactly how Europe understands its common good.

In November 2018, nearly a decade after the adoption of the Charter, the ECJ took the decisive step to give virtually all of the Charter horizontal effect.[80] The judgment *Bauer, et al* actually concerned two separate cases, both involving women seeking compensation from their late husbands' employers in lieu of annual leave not taken before their deaths. In support of their case, they cited Article 31(2) of the Charter which states, "every worker has the right to limitation of maximum working hours, to daily and

[78] Frantziou 2015, 676-677.

[79] Frantziou 2015, 675, 678.

[80] Eleni Frantziou, **"**Joined Cases C-569/16 and C-570/16 Bauer Et Al: (Most Of) the Charter of Fundamental Rights Is Horizontally Applicable," *European Law Blog,* Nov. 19, 2018, Accessed Mar. 2019, <https:// europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/>.

weekly rest periods and to an annual period of paid leave."[81] In line with Frantziou's own criticisms of the Court's jurisprudence on horizontal effect, the Advocate General invited the Court to "reconsider previous categorisations based on general principles or 'particularly important principles of EU social law'…and to confirm, once and for all, that the social rights enshrined in the Charter are equally individual and fundamental as its other provisions."[82] In this way, the Advocate General encouraged the Court to move beyond the privileging of economic and property rights over social rights and, more to the point, recognize the complete range of the Charter as fundamental. Upon putting aside such distinctions, the Court affirmed that the Charter was "sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual."[83] In other words, there was no longer any need to render provisions more specific with additional legislation before considering their horizontal application; the Charter provisions could in themselves be applied horizontally.

Conclusion

This chapter has considered whether and how a republican understanding of horizontal effect applies in the European Union. In this supranational context, a republican understanding of horizontality calls for some European "public thing" or common good to justify the step of holding private entities within Member States accountable to these values. Whereas one may understand horizontal effect in national

[81] Charter of Fundamental Rights, Article 31(2)
[82] Ibid.
[83] Bauer, et al.

contexts as fortifying pre-existing relationships among compatriots, some would say that horizontality in the EU portends the creation of new relationships and even individual duties across a supranational political community. Additionally, this chapter has demonstrated how the application of horizontal effect itself offers answers to larger questions about the European project. Indeed, in taking the step of applying public values to private entities at the continental level, the ECJ actually assumes a European common good and the priority of this European good to national commitments. While one should resist treating the nature of the European project as a zero-sum question, as between Member States and the EU, the practice of horizontal effect does seem to require some recognition of the values of a place. To the extent that the values of the EU may supersede those of member states in individual cases, so too may we see a European public thing taking precedence in legal, if not yet political, life with the horizontal application of rights.

Conclusion

In trying to understand, justify, and critique horizontal effect, legal scholars tend to presuppose liberal constitutionalism as a backdrop. The present project argues that we can instead conceptualize horizontal effect as a republican vein within liberal constitutionalism, that republican theory offers both normative and analytic value in understanding this legal-constitutional development. In particular, republicanism describes well the underlying moral logic that animates horizontality in general, and elucidates the politics animating the application of horizontal effect in particular cases. The republican framework thus serves a twofold purpose. First, it introduces new conceptual space for understanding horizontal effect, the ways in which it differs from more traditional models of constitutionalism as well as the different kinds of rationales (specifically, the republican rationales) that may justify horizontality as a normative matter. Chapter I does the most work to advance these initial theoretical arguments. Second, the republican framework makes clear and makes sense of the politics that drive the development of horizontal effect in actual constitutional orders. In this vein, the subsequent comparative chapters show how the republican logic of horizontal effect in fact shapes the development of constitutional politics.

Chapter I makes the theoretical argument that the practice of horizontal effect amounts to a republican vein in liberal constitutionalism. This chapter highlights two key features of horizontal effect, namely uniformity and solidarity, as departing from liberal narratives and approximating certain republican ideas. The concepts of uniformity and

solidarity bear strong kinship to the respective republican ideas that the polity as a whole is obliged to a common good and that citizens have duties to one another. Chapter I's analysis of these concepts thus shows how republicanism makes sense of horizontal effect and how it bears on normative assumptions of constitutionalism—for example, that the polity as a whole is governed according to the same standards and aimed at the same common good, as well as the need for a requisite solidarity among citizens. This compatibility of horizontal effect with republican theory may, by extension, offer sympathetic scholars and jurists normative grounding on which to argue for horizontality in constitutionalism.

On the other hand, the fact that this republican account entails that horizontal effect departs from prior understandings may give some reason for consternation, particularly those that have reservations about republican political theory in general.[1] Gary Jacobsohn recounts a common argument made against the Republican Revivalists, for example:

> [T]he tradition of classical republicanism with which the founders were intimately acquainted was a fundamentally illiberal tradition that can serve as a model for contemporary republicans only if its problematic features are conveniently ignored....What these critics have in mind are the exclusivist, discriminatory tendencies of republican communalism, tendencies that liberal constitutional arrangements were largely designed to overcome.[2]

[1] The potential for such hesitance is evinced in the fact that neo-republicans, such as Philip Pettit, have sought to distance themselves from classical instantiations of this tradition. It seems one may therefore find compelling the case for understanding horizontal effect as republican, but still maintain reservations about this legal-constitutional practice. See also, Beau Breslin, *The Communitarian Constitution*, Baltimore: Johns Hopkins UP, 2006, Chapter 1.

[2] Gary Jacobsohn, *Apple of Gold,* Princeton: Princeton UP, 1993, 46-47. See also, Isaiah Berlin, "Two Concepts of Liberty" (1958), *Four Essays on Liberty*, Oxford: Oxford UP, 1969; Linda K. Kerber, "Making Republicanism Useful," *Yale Law Journal*, Vol. 97, 1998, 1663.

In light of this, a natural question is whether horizontality's similarity with republicanism stops short of these problematic features, insofar as horizontality still occurs in a liberal context. Though this chapter primarily concerns horizontality in the abstract, its conceptual work brings into sharp relief the weight of these theoretical questions, including the relevant motivations and hesitations, thus laying groundwork to consider the constitutional politics of actual cases in the chapters that follow.

Beyond the conceptual-theoretical reward it offers, the republican framework also helps explain the development of horizontal effect in actual countries. Chapters II through IV demonstrate how the republican logic of horizontal effect has animated specific debates in a variety of cases. In particular, these case comparisons show that the way the republican logic of horizontality corresponds (or does not correspond) to the larger constitutional project of each place goes a long way to explain the politics surrounding horizontal effect. Constitution-makers, jurists, and political actors show greater openness to introducing and applying horizontal effect to the extent that the constitutional vision itself accords with republican aims.

In contrast with Chapter I's theoretical argument, this move to examine actual cases in subsequent chapters relies on comparison in order to gain traction amid the inevitable complexity of constitutional politics. That is to say, while we may not find ideal types in the real world, we can observe *relative* tendencies and therefore make claims in comparing one constitutional context to another. In observing Germany and South Africa individually, for example, one may conclude that both countries maintain ambitious practices of horizontal effect. By contrast, comparing these two countries

brings into sharp relief those features that do distinguish their respective jurisprudences. This comparative approach also corroborates an insight that the legal realists pointed out a century ago, namely that the outcome of cases depends largely on prior assumptions about social meanings, government's responsibilities, the requirements of rights. Indeed, we see how different courts may reach similar outcomes although operating with different doctrinal structures. Even with the state action doctrine, for example, the United States Supreme Court has been able to expand and contract what constitutes "state action" depending on its intent to reach certain parties in private spaces. It is for this reason that, on some accounts, the decision in *Shelley v. Kraemer* seems to approach something like horizontal effect.[3]

While granting this legal realist insight that doctrine is not determinative of outcomes, this project demonstrates the very real normative implications that do accompany doctrinal choices. Constitution-makers and jurists introduce and subsequently develop horizontal effect to the extent that its presuppositions[4] comport with the constitutional project. While a state action requirement presupposes that separate public

[3] Shelley v. Kraemer 334 US 1 (1948).

[4] In some ways this idea is reminiscent of Lon Fuller's concept of the "internal morality of law." In *The Morality of Law* (1964), Fuller argues that basic principles of legality necessarily entail particular moral standards. Put differently, flowing from the very concept of law (and government of laws) are certain expectations as of fairness, clarity, stability. This is not to say that every legal order will live up to these standards. Rather, they are automatically subject to and, in theory, strive toward such standards insofar as they purport to govern according to the rule of law. Indeed, such principles are built-in to the very concept of law. In similar, albeit narrower, fashion, I argue that certain expectations flow from the embrace of a state action requirement, and that qualitatively different expectations flow from the embrace of horizontal effect. In particular, a liberal morality is inherent to state action, entailing principles and expectations that understand public and private spaces as distinct. On the other hand, the present project demonstrates how a kind of republican morality inheres in horizontal effect, entailing instead principles and expectations for solidarity among citizens and a polity governed by a uniform standard.

and private spheres exist and ought to be preserved, horizontal effect presupposes that, at least sometimes, society ought to be governed according to a uniform standard and that individuals ought to be responsible for one another. To be sure, these differences carry with them symbolic weight. As Ulrich Preuss suggests, how a polity comes down on these questions signifies in a fundamental way the sort of society it is.[5] Beyond this symbolic import, however, the comparisons of Chapters II and III show how these choices also set the terms of the debate and so shape the way rights develop. Therefore, though doctrine is not determinative, per the legal realists, doctrine does contain certain moral content in itself which this project conceptualizes as either liberal or republican in nature. Hence, the choice of whether to adopt a vertical or a horizontal model of rights as well as the ensuing judicial politics that comprise courts' individual decisions involve fundamentally moral, political choices that ultimately do push constitutional development in either a liberal or republican direction over the long term.

Chapter II's comparison of the United States and India focuses on horizontality's republican logic in the particular feature of solidarity. This chapter demonstrates how dominant views in each country regarding solidarity as a constitutional goal shaped subsequent decisions of whether or not to apply equality rights horizontally to private actors. Early rejection of something like solidarity as part of the United States' constitutional project put the polity on course to maintain a state action doctrine even amid changes in public opinion. On the other hand, the Indian framers' self-conscious aim to propagate solidarity furnished a stronger foundation for the continued

[5] Preuss 26.

development of horizontal effect in the decades since its constitution was adopted. In the comparison between *Shelley v. Kraemer*[6] and *Zoroastrian Cooperative Housing Society v. District Registrar*,[7] we see precisely how the liberal logic of state action and republican logic of horizontality operate in the larger story of these two countries. Moreover, we see how attending to the moral logics of doctrine, and particularly the republican logic of horizontal effect, enriches our understanding of the constitutional story beyond the traditional narratives of constitutionalism.

As explained in Chapter II, both *Shelley* and *Zoroastrian Cooperative* may be cast as unlikely judgments in their respective contexts insofar as their outcomes seem to cut against the larger legal narrative of the place. It is not for no reason that Herbert Wechsler so fervidly criticized what he perceived as *Shelley*'s lack of neutrality.[8] Focusing only on the proximate outcomes, however, misses important aspects of the larger constitutional story. Indeed, the reasoning in *Shelley* betrays a crucial consistency with the traditional liberal logic. Wechsler may have disapproved of *Shelley*, but neither was Louis Henkin satisfied with the Court's persistent reliance on categories of state and non-state action,[9] categories that presupposed the liberal moral logic of distinct public and private spheres. While the U.S. Court may have expanded traditional notions of state action in *Shelley*, its judgment still reinforced the liberal logic in the sheer act of employing these categories.

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[6] Shelley v. Kraemer 334 US 1 (1948).

[7] Zoroastrian Cooperative Housing Society v. District Registrar (2005) 5 SCC 632.

[8] Herbert Wechsler "Toward Neutral Principles of Constitutional Law," Harvard Law Review, Vol. 73 No. 1, 1959, 29.

[9] Louis Henkin, "*Shelley v. Kraemer*: Notes for a Revised Opinion," *University of Pennsylvania Law Review*, Vol. 110, No. 4, Feb. 1962, 498.

We notice this and, indeed, notice it as part of a larger jurisprudential trajectory only in noting the liberal logic of the state action doctrine itself.

In bringing to the fore this alternate level of analysis beyond proximate outcomes of cases, understanding horizontal effect in the light of republicanism and state action in terms of liberalism offers a more complete account of constitutional development. The more republican reasoning Henkin proposes in his alternate opinion would not have changed the outcome in *Shelley*—even in this alternate world, the Shelley family still would have been able to purchase their home contra the restrictive housing covenant. Nevertheless, Henkin's proposal would define the question at issue in terms very different from Vinson's majority opinion. Indeed, Henkin would have had the Court abandon altogether the project of drawing a line between public and private spaces, to recognize instead that both parties had rights at stake and, potentially, would have to yield to the right of the other.

This admission, that a private individual might have a role in upholding a public commitment to a particular right, puts us on very different constitutional terrain than that involved in distinguishing public from private spaces. Indeed, this exercise imbues constitutional rights with fundamentally different meanings and different relationships. Moreover, this alternative reasoning ultimately could have consequences for the outcomes of future cases, insofar as the Court would confront instead fundamentally different questions that involved balancing rights against each other. But, as it stands, *Shelley* and other cases like it in the United States preserved the liberal logic, the practical

upshots of which we see in such later cases as the anticlimactic *Bell v. Maryland*.[10] Even with the shifting popular opinion during the Civil Rights Movement that would understand desegregation as part of the public commitment to equality, the liberal logic persisted in the Court's constitutional understanding and continually set the terms of the debate. In this light, the disappointment of *Bell v. Maryland* is not such a surprise, not even after *Shelley.*

Contrast this trajectory with that of the Indian Constitution. As *Shelley* reveals in United States jurisprudence a persistent liberalism, even amid a shifting cultural tide, *Zoroastrian Cooperative Housing Society*[11] offers a window into a republican logic in Indian constitutionalism. Indeed, this case is useful for its similarities to *Shelley*, both with respect to the facts of the case as well as the fact that it seems to be a comparably unlikely outcome. As explained in Chapter II, *Zoroastrian Cooperative* can be difficult to assess due to its opaque opinion. In particular, the judgment seems to allow for two different rationales, either that the cooperative was responsible to comply only with Indian statutory law which ostensibly permitted its exclusionary policy, or that it was in fact obligated to comply with the constitutional right to equality but that the cooperative's right to cultural preservation prevailed on balance.[12] These different possibilities bring into sharp relief a distinction between the doctrinal logic and the particular outcome. As Louis Henkin demonstrated the possibility of an alternate opinion reaching the same outcome in *Shelley*, the indeterminacy of the opinion in *Zoroastrian Cooperative*

[10] Bell v. Maryland 378 U.S. 226 (1964).
[11] Zoroastrian Cooperative Housing Society v. District Registrar (2005) 5 SCC 632.
[12] Gardbaum 2016, 612.

demonstrates the same point in the Indian context. In particular, we see how the Court might have reached the outcome either through the liberal logic that would have the cooperative accountable only to statutory law, or the republican logic maintaining that it was ultimately subject to the public morality of the Constitution.

Though legal scholars find the reasoning in *Zoroastrian Cooperative* ambiguous,[13] the judgment does allow for an understanding of the public significances of private institutions and spaces in the very fact that it raises the constitutional values of equality and cultural preservation at all. Although the two-person panel deciding this case ruled in favor of the cooperative, the judges could not but acknowledge the relevance of certain constitutional values. Given India's history of exclusion and constitutional vision of broad solidarity among citizens, these questions were basically unavoidable given the question at issue. And indeed, the step-by-step revolution Nehru envisioned for India necessarily involved private actors in the constitutional project insofar as the injustices the Constitution aimed to ameliorate largely afflicted private spaces.[14] Contrast this position with Justice Bradley's fear that broad interpretations of the United States Constitution's Thirteenth Amendment risked creating "another kind of slavery."[15] India's Constitution instead pointed toward a longer trajectory, the ends of which were consistent with both the relational and moral implications of horizontality, that is, with its

[13] Gautam Bhatia, "Exclusionary Covenants and the Constitution-II: The Zoroastrian Co-op Case," 12 Jan. 2014, *Indian Constitutional Law and Philosophy*. indconlawphil.wordpress.com/2014/01/12/exclusionary-covenants-and-the-constitution-ii-the-zoroastrian-co-op-case, 25 Jan. 2019, 2.

[14] Jacobsohn and Roznai 166.

[15] Sanford Levinson and Jack Balkin, "The Dangerous Thirteenth Amendment," Columbia Law Review, Vol. 112.7, 2012, 1472.

republican logic. One might say that horizontal effect is both an instrument to realize solidarity and itself *constitutive* of solidarity, insofar as it necessarily entails relationships between private citizens, indeed, the very relationships rejected in the United States context. The republican framework thus makes clear the role of horizontal effect in the larger constitutional project and, conversely, how constitutional ends are connected to the development of horizontality.

Chapter III's comparison of Germany and South Africa focuses on horizontality's republican logic in the particular feature of uniformity. This chapter demonstrates how different understandings of the relationship between public and private spaces translates into different limits to horizontal effect. Germany's commitment to its civil law tradition manifested in some preservation of a public-private divide even amid the German Constitutional Court's adoption of indirect horizonal effect in *Lüth*.[16] We see the upshots of this persistent liberalism in the fact that, for several decades, horizontality was never applied to equality rights. On the other hand, we see horizontal effect continually expanding in South Africa, where comprehensive change across public and private spaces is integral to the constitutional vision. After the Constitutional Court initially acted to preserve conventional liberal conceptions of public and private in the early case *Du Plessis v. De Klerk*,[17] the Court took a cue from the revised Final Constitution that shored up a more ambitious vision for South Africa. Again, in this chapter, the republican logic

[16] Lüth, BVerfGE 7, 198 (1958).
[17] Du Plessis v. De Klerk and Another (CCT8/95) [1996] ZACC 10.

of horizontality makes sense of these different constitutional stories and, more specifically, the different limits each country places on horizontal effect.

Following much debate, the German Federal Constitutional Court introduced a practice of *Drittwirkung,* or indirect horizontal effect, that both acknowledged the sea change of the new Basic Law and maintained Germany's system of separate public and private laws. The courts thus applied horizontal effect in the years that followed without much debate as the substantive focus of horizontality remained on traditional liberty rights to which the larger populace readily subscribed.[18] While public and private actors shared some of the same obligations, the uniformity resulting from horizontal effect occurred within certain practical limits. Controversy ensued only with the proposal to expand private obligations beyond these limits so as also to incorporate equality rights against private entities. The EU directives responsible for the change[19] thus upset a kind of liberal accommodation of German *Drittwirkung*, pushing toward a more uniform public morality, at least in the particular area of nondiscrimination, and arguably requiring more of some private entities than had been previously asked.

Accounting for the proximate outcomes of cases in German constitutionalism reveals that the Court applied some version of horizontal effect through the latter half of the twentieth century. Indeed, *Lüth* seemed to achieve a certain modus vivendi that, by itself, would not necessarily lead observers to predict the outcry that followed the EU's antidiscrimination directives. Nevertheless, the ADG and AGG did spark pushback for

[18] Fedtke 137.
[19] Mathews 82-84.

the very reason that the German constitutional imaginary still held fast to certain liberal predilections. Thus, many understood this move to expand the substance of private actors' rights obligations as going too far to bring private entities into the constitutional project. The legal realist tradition might explain this sequence of events as the natural result of a new disjuncture in societal standards or, more precisely, a difference in the standards of a portion of the German polity in contrast with those held up by the European Union. In short, the relevant actors wished to move law along according to certain standards of nondiscrimination, an initiative that clashed with individuals' priors, interests, and prejudices.

While this account is not wrong, neither does it capture the full constitutional story, namely, that the EU directives ran up against a persistent liberalism, long engrained and even accommodated in the German constitutional milieu. On this understanding, the new laws presented not simply a conflict of preferences or a mere modification of the status quo, but the introduction of a new logic that implicated private entities further into the public project. In other words, the legislation pushed in the direction of a republican logic after Germany had straddled a more liberal line for so long. An appreciation for the republican logic of horizontal effect thus sheds light on the various stages of German constitutionalism as well as different reactions to them. When we see the logic of horizontal effect in a larger context, as for example the context of the civil law system, we see in the shift that came with the EU directives not only a clash of interests and standards, but also a larger departure from a kind of comfortable liberalism in favor of something more demanding.

In the drafting of its Constitution, South Africa also confronted the question of whether rights would apply horizontally to private actors. Indeed, South Africa had its own moment of constitutional reckoning when it rejected a version of indirect horizontal effect, not unlike that in Germany, in favor of a more robust conception of horizontality in its Final Constitution. After contemplating this more limited approach in initial decisions,[20] constitutional framers and jurists agreed that the South African constitutional project required a more robust practice of horizontality, and so adopted the republican position that the Constitution necessarily obligated all sectors of society[21]. This more extensive reach of rights obligations to private actors was essential to the constitutional vision itself. Similar to the Indian context, then, horizontal effect was both instrumental and constitutive to the South African Constitution, necessary to achieve the vast transformation of the polity and itself part of the transformation.

The more republican proposition that a uniform standard governed all people was made explicit in the final text and arguably inherent to the essence of the South African constitutional project. Moreover, the judgments of subsequent cases that refer, for example, to the need for "neighbourliness"[22] mark a clear break from the liberal sentiment that private spaces remain insulated from public values and even a more basic reliance on rights claims at all. Though the development of horizontal effect has been incremental, the South African Court has continually proceeded in a manner consistent with the republican idea that public values may govern the polity as whole, deciding most

[20] Du Plessis v. De Klerk and Another (CCT8/95) [1996] ZACC 10.
[21] Friedman 67.
[22] *Modderklip Boerdery (Pty) Ltd. v. Modder East Squatters & Anor.* 2001 (4) SA 385 (W), para. 54.

recently that private actors are potentially responsible for positive constitutional rights in *Daniels v. Scribante*.[23]

At first blush, we see that both Germany and South Africa have applied rights horizontally against private actors. However, Chapter III argues that, on balance, this practice has been more limited in Germany than in South Africa's comparatively short constitutional history. This argument is made clear in looking beyond individual decisions to apply horizontality to appreciate the logics in play at different periods in each place. Germany may not have had an American style state action requirement but still remained tied to the separation between public and private as a defining feature of its legal order. The German Constitutional Court accommodated these liberal predilections accordingly by adopting indirect horizontal effect and subsequently restricting its application only to those more conventional liberal rights. In short, horizontal effect was bounded in Germany, so that even a step toward broader uniformity between the obligations of state and nonstate actors was met with resistance in the 2000s. On the other hand, the ends of the South African Constitution aligned much better with horizontal effect's logic of uniformity. Consequently, the South African Constitutional Court has been more audacious in pushing horizontality to the full extent of its republican logic, such that it encompasses a range of rights commitments across spheres of society. In contrast with Germany, the goal here is, in fact, widespread congruence of society with constitutional values. Attention to the republican logic of horizontality thus reveals a

[23] Daniels v. Scribante, CCT50/16 [2017] ZACC 13.

doctrine and practice of horizontal effect less wary of uniformity, insofar as it aligns with the aspirations of the South African constitutional project.

An appreciation for the significance of this doctrinal choice goes some way to explain the debate over the horizontal effect of the Charter of Fundamental Rights in the European Union. Understanding horizontal effect as republican brings into sharp relief the weightiness of this legal-constitutional practice for a country let alone for a union of individual countries. Indeed, the decision to govern all spheres according to a uniform standard and to hold individual citizens accountable for each other seems to presume the prior existence of a community. On this understanding, accepting horizontal effect may be analogous to accepting something closer to the status of "polity" for Europe. Hence, those comfortable with the general proposition that Europe constitutes its own political community, even maintaining primacy over the traditional nation-states, find in horizontality a likely tool by which to realize this greater consolidation as a practical and a moral matter.[24] On the other hand, the same people who are concerned about "competence creep" see in the ECJ's application of horizontal effect a decisive step toward encroaching on the prerogatives of the Member States and how they choose to govern their respective private institutions.[25] As in national contexts so too in this supranational context, the application of horizonal effect has moral, political implications, which can be summed up in what this project understands as its republican nature.

[24] Frantziou 2015, 663-675.
[25] Van der Walt 338-341.

The benefit of viewing horizontal effect through the lens of republicanism comes in the occasion to understand this constitutional innovation on its own terms, both in theory and in practice, rather than simply assuming the conventional liberal wisdom. That horizontality entails a republican logic instead of the same liberalism as in traditional narratives, however, is not to say that the specific outcomes of cases will necessarily hinge on whether judges employ horizontal effect or not. Indeed, one of the core insights of judicial politics scholarship is that judges often rationalize rulings according to their own preferences. Nevertheless, it need not follow from this insight of political science that legal-constitutional choices are devoid of any meaning or moral content, nor that these choices are incapable of prompting downstream effects. These chapters show how the logic, or moral content, of horizontal effect has in fact influenced both initial decisions to adopt the doctrinal practice at all and later downstream applications. Horizontal effect rejects sharp divisions between public and private in favor of solidarity and uniformity. Moreover, the choice to adopt horizontal effect and so to take up questions of citizens' duties, for example, influences long-term trajectories of constitutional development (and sometimes even the outcomes of particular cases). In this way, the case studies herein illustrate the upshots of the republican logic of horizontal effect as situated in larger constitutional projects. Law may not be all-constraining but viewing horizontal effect through the lens of republicanism reveals how legal structures can and do shape larger debates about constitutional politics in crucial ways.

In the mere act of adopting a constitution, a polity commits to certain principles and, to this extent, cannot pretend to be neutral. Although these norms may be applied in

private spaces in both a vertical and a horizontal model of rights, these two models engender different narratives about the relationship between citizens and the public thing that is the constitution. The liberalism of the traditional vertical model permits a level of detachment, so that even if legislation regulates private actors, these actors need not themselves assume constitutional duties. On the other hand, polities with horizontal effect do not rest content with the "light touch"[26] of the vertical model in maintaining and applying constitutional commitments. This is not to say that such polities will apply horizontal effect in every possible instance. Indeed, the present project demonstrates how countries often distinguish those commitments that are more constitutive to the larger constitutional vision in applying rights horizontally. The Indian Constitution singles out equality as having horizontal effect, for example, whereas in Germany equality rights were long understood to be a bridge too far to apply horizontally to private actors. Thus much depends, and much ought to depend, on the particularities of each country in the decisions to adopt and apply horizontal effect. Indeed, what model a polity adopts is a fundamentally political choice and, in turn, engenders different constitutional discourses, whether more liberal or more republican.

[26] Gary Jacobsohn, "A Lighter Touch: American Constitutional Principles in Comparative Perspective," *The Cambridge Companion to the United States Constitution,* Ed. Karen Orren and John W. Compton, Cambridge: Cambridge UP, 2018.

Bibliography

Ackermann, Laurie. *Human Dignity: Lodestar for Equality in South Africa*. Cape Town: Juta, 2012.

Alexy, Robert. *A Theory of Constitutional Rights*. Oxford: Oxford UP, 2010.

Aristotle. *The Politics*. Ed. Stephen Everson. Cambridge: Cambridge UP, 1996.

Aristotle. *The Nicomachean Ethics*. Trans. Terence Irwin. Indianapolis: Hackett, 1999.

Austin, Granville. *Working a Democratic Constitution*. Oxford: Oxford UP, 1999.

Bailyn, Bernard. *The Ideological Origins of the American Revolution.* Cambridge, MA: Belknap Press, 1992.

Balkin, Jack. *Constitutional Redemption.* Cambridge, MA: Harvard UP, 2011.

Balkin, Jack. "Which Republican Constitution." *Constitutional Commentary*. Vol. 32, 2017.

Bambrick, Christina. "'Neither Precisely National Nor Precisely Federal': Governmental and Administrative Authority in Tocqueville's Democracy in America." *Publius: The Journal of Federalism*. Vol. 48, No. 4. 2018.

Barak, Aharon. "Human Dignity in South African Constitutional Law," in *Human Dignity: The Constitutional Value and the Constitutional Right*. Cambridge: Cambridge UP, 2015.

Barak, Aharon. "Human Dignity in German Constitutional Law," in *Human Dignity: The Constitutional Value and the Constitutional Right*. Cambridge: Cambridge UP, 2015.

Bedi, Sonu. “The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution.” *Political Theory*. Vol. 42, No. 6, 2014.

Bellamy, Richard. *Political Constitutionalism*. Cambridge: Cambridge UP, 2007.

Bellamy, Richard. “Democracy as Public Law: The Case of Constitutional Rights.” *German Law Journal*. Vol. 14, No. 08. 2013.

Bellamy, Richard. *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU*. Cambridge: Cambridge UP, 2019.

Berlin, Isaiah. “Two Concepts of Liberty” (1958). *Four Essays on Liberty*. Oxford: Oxford UP, 1969.

Besselink, Leonard F.M. “National and constitutional identity before and after Lisbon.” *Utrecht Law Review*. Vol. 6, No. 3. 2010.

Bhatia, Gautam. “Exclusionary Covenants and the Constitution-II: The Zoroastrian Co-op Case.” 12 Jan. 2014. *Indian Constitutional Law and Philosophy*. indconlawphil.wordpress.com/2014/01/12/exclusionary-covenants-and-the-constitution-ii-the-zoroastrian-co-op-case. 25 Jan. 2019.

Bhatia, Gautam. “Exclusionary Covenants and the Constitution-III: Zoroastrian Cooperative and Political Liberalism.” 13 Jan. 2014. *Indian Constitutional Law and Philosophy*. indconlawphil.wordpress.com/ 2014/01/13/exclusionary-covenants-and-the-constitution-iii-zoroastrian-cooperative-and-political-liberalism. 25 Jan. 2019.

Bhatia, Gautam. "Exclusionary Covenants and the Constitution – IV: Article 15(2), IMA v. UoI, and the Constitutional Case Against Racially/Religiously Restrictive Covenants." 14 Jan. 2014. *Indian Constitutional Law and Philosophy*. indconlawphil.wordpress.com/ 2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants. 25 Jan. 2019.

Black, Charles L. Jr. "The Supreme Court, 1966 Term—Foreword: 'State Action,' Equal Protection, and California's Proposition 14." *Harvard Law Review*. Vol. 81, 1967.

Brandeis, Louis and Samuel Warren. "The Right to Privacy." *Harvard Law Review*. Vol 4. 1890.

Brandwein, Pamela. *Rethinking the Judicial Settlement of Reconstruction.* Cambridge: Cambridge UP, 2011.

Brandwein, Pamela. "A Lost Jurisprudence of the Reconstruction Amendments." *Journal of Supreme Court History.* 2016.

Breslin, Beau. *The Communitarian Constitution*. Baltimore: Johns Hopkins UP, 2006.

Chemerinsky, Erwin. "Rethinking State Action." Nw. U. L. Rev. Vol. 80. 1985

Chirwa, Danwood Mikenge. "The horizontal application of constitutional rights in comparative perspective." *Law, Democracy, and Development*. Vol. 10. No. 2. 2006.

Chirwa, Danwood Mzikenge. "In search of philosophical justifications and theoretical models for the horizontal application of human rights." *African Human Rights Law Journal.* Vol. 8. 2008.

Cicero. *On Duties.* Ed. M. T. Griffin and E. M. Atikins. Cambridge: Cambridge UP, 1991.

Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford UP, 2006.

Craig, Paul and de Búrca. Gráinne. *EU Law: Text, Cases, and Materials*. 6th ed. Oxford: Oxford UP, 2015.

Daly, Eoin. "Freedom as Nondomination in the Jurisprudence of Constitutional Rights." *Canadian Journal of Law and Jurisprudence.* Vol. 28, No. 2. July 2015.

Daly, Eoin and Tom Hickey. *The Political Theory of the Irish Constitution: Republicanism and the Basic Law.* Manchester: Manchester UP, 2015.

DeMol, Mirjam. "The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?" *Maastricht Journal of European and Comparative Law.* 2011.

DeWitt, Bruno. "The crumbling public/private divide: horizontality in European anti-discrimination law." *Citizenship Studies.* Vol. 13, No. 5. 2009.

Dworkin, Ronald. *Law's Empire*. Cambridge: Belknap Press, 1986.

Dyzenhaus, David. "Critical notice of *On the people's terms: a Republican theory and model of democracy,* by Philip Pettit, Cambridge University Press, 2012, xii + 333pp." *Canadian Journal of Philosophy*. Vol. 43, No. 4. 494-513.

Ellmann, Stephen. "A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors." 45 *New York Law School Law Review*. 2001.

Eskridge, William N. and John Ferejohn. *A Republic of Statutes: The New American Constitution.* New Haven: Yale UP, 2010.

Fedtke, Jorg. "*Drittwirkung* in Germany." In *Human Rights and the Private Sphere,* Ed. Dawn Oliver and Jorg Fedtke. Oxford: Rutledge-Cavendish, 2007.

Ferreira, Nuno. *Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children.* New York: Routledge, 2011.

Ferreres Comella, Victor. "Do Constitutional Rights Bind Private Individuals?" Unpublished Manuscript.

Forbath, William. "Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present." 39 *Tulsa Law Review*. 2004

Frantziou, Eleni. "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality." *European Law Journal.* Vol. 21, No. 5. 2015.

Frantziou, Eleni. "Joined Cases C-569/16 and C-570/16 Bauer et al: (Most Of) the Charter of Fundamental Rights Is Horizontally Applicable." *European Law Blog.* Nov. 19, 2018. Accessed Mar. 2019. <https://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/>.

Frantzoiu, Eleni. *The Horizontal Effect of Fundamental Rights in the European Union*. Oxford: Oxford UP, 2019.

Friedman, Nick. "The South African Common Law and the Constitution: Revisiting Horizontality." *South African Journal on Human Rights*. Vol. 30. No. 1. 2014.

Futch, Delisa. "*Du Plessis v. De Klerk*: South Africa's Bill of Rights and the Issue of Horizontal Application." *North Carolina Journal of International Law and Commercial Regulation.* Vol. 22. No. 3. Summer 1997.

Galanter, Marc. *Competing Equalities: Law and the Backward Classes in India*. Berkeley: University of California Press, 1984.

Galston, William. "Liberal Virtues and the Formation of Civic Character," in *Seedbeds of Virtue*. Ed. Mary Ann Glendon and David Blankenhorn. Lanham, MD: Madison Books, 1995.

Galston, William. *Liberal Pluralism*. Cambridge: Cambridge UP, 2002.

Gardbaum, Stephen. "Law, Politics, and the Claims of Community." *Michigan Law Review.* Vol. 90, No. 4. 1992. 685-760.

Gardbaum, Stephen. "The 'Horizontal Effect' of Constitutional Rights." *Michigan Law Review*. Vol. 102. 2003.

Gardbaum, Stephen. "Horizontality in the Indian Constitution." *The Oxford Handbook of the Indian Constitution*. Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016.

Garlicki. Lech. "Relations between Private Actors and the European Convention on Human Rights" in *The Constitution in Private Relations*, Ed. András Sajó and Renáta Uitz. Ultrecht: Eleven, 2005. 129-144.

Glendon, Mary Ann. *Rights Talk.* New York: Free Press, 1991.

Grimm, Dieter. "Integration by Constitution." 3 *International Journal of Constitutional Law*. 2005.

Habermas, Jürgen. *The Inclusion of the Other: Studies in Political Theory*, Ed. Ciaran Cronin and Pablo de Greiff. Cambridge: Polity Press, 1999.

Habermas, Jürgen. *The Postnational Constellation*. Ed. Max Pensky. Boston: MIT UP, 2001.

Habermas, Jurgen. "The Concept of Human Dignity and the Realistic Utopia of Human Rights." *Metaphilosophy*. 41.4. 2010.

Hale, Robert L. "Coercion and Distribution in a Supposedly Non-Coercive State." 38 *Political Science Quarterly* 470. 1923.

Hamilton, Alexander, et al. *The Federalist Papers.* Ed. Clinton Rossiter. New York: Signet, 2003.

Hartz, Louis. *The Liberal Tradition in America,* Harvest Books, 1991.

Henkin, Louis. "*Shelley v. Kraemer*: Notes for a Revised Opinion." *University of Pennsylvania Law Review*. Vol. 110, No. 4. Feb. 1962.

Hershkoff, Helen. "Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings" in *Courting Social Rights.* Ed. Varun Gauri and Daniel Brinks. Cambridge: Cambridge UP, 2008.

Hickey, Tom. "The republican core of the case for judicial review." *International Journal of Constitutional Law*. Forthcoming. Https://papers.ssrn.com/ abstract=3137157.

Hirschl, Ran. *Toward Juristocracy*. Cambridge, MA: Harvard UP, 2004.

Hobbes, Thomas. *Leviathan*. Ed. Richard Tuck. Cambridge: Cambridge UP, 1996.

Honohan, Iseult. "Educating citizens: Nation-building and its republican limits." Republicanism in Theory and Practice. Ed. Iseult Honohan and Jeremy Jennings. Oxfordshire, OX: Routledge/ECPR Studies in European Political Science, 2006.

Horowitz, Harold W. "The Misleading Search for 'State Action' Under the Fourteenth Amendment." 30 Southern California Law Review. 1957.

Ivison, Duncan. "Republican Human Rights?" *European Journal of Political Theory.* Vol. 9, No. 1. 2010.

Jacobsohn, Gary and Yaniv Roznai. *Constitutional Revolution*. Unpublished Manuscript. Forthcoming: New Haven: Yale UP, 2019.

Jacobsohn, Gary. "A Lighter Touch: American Constitutional Principles in Comparative Perspective." *The Cambridge Companion to the United States Constitution.* Ed. Karen Orren and John W. Compton. Cambridge: Cambridge UP, 2018.

Jacobsohn, Gary. *Constitutional Identity*. Cambridge: Harvard UP, 2010.

Jacobsohn, Gary. *The Wheel of Law*, Princeton: Princeton UP, 2009.

Jacobsohn, Gary. "Dramatic Jurisprudence," in *Constitutional Stupidities, Constitutional Tragedies*. Ed. William Eskridge and Sanford Levinson. New York: New York UP, 1998.

Jacobsohn, Gary. *Pragmatism, Statesmanship, and the Supreme Court*. Ithaca: Cornell UP, 1977.

Kerber, Linda K. "Making Republicanism Useful." *Yale Law Journal.* Vol. 97. 1998.

Khaitan, Tarunabh. "Reading *Swaraj* into Article 15: A New Deal for All Minorities." *NUJS Law Review*. No. 2. 2009.

King, Jeff. “Social Rights in Comparative Constitutional Theory.” *Comparative Constitutional Theory*, Ed. Gary Jacobsohn and Miguel Schor. Cheltenham, UK: Edward Elgar, 2018.

Kommers, Donald and Russell Miller. Constitutional Jurisprudence of the Federal Republic of Germany. 3rd ed. Durham, NC: Duke UP, 2012.

Krishnaswamy, Sudhir. “Horizontal Application of Fundamental Rights and State Action in India.” *Human Rights, Justice, & Constitutional Empowerment.* Ed. C. Raj Kumar and K. Chockalingam. Oxford: Oxford UP, 2007.

Kumm, Mattias and Victor Ferreres Comella. “What is So Special about Constitutional Rights in Private Litigation?” in *The Constitution in Private Relations*. Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005.

Kumm, Mattias. “Who’s Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law.” *German Law Journal*. 7.4. 2006.

Laborde, Cecile and John Maynor. *Republicanism and Political Theory.* Hoboken, NJ: Wiley-Blackwell, 2008.

Levinson, Sanford and Jack Balkin, “The Dangerous Thirteenth Amendment.” Columbia Law Review. Vol. 112.7. 2012.

Locke, John. *Second Treatise of Government*. Ed. C. B. MacPherson. Indianapolis: Hackett, 1980.

Maas, Willem. “The Origins, Evolution, and Political Objectives of EU Citizenship.” *German Law Journal*. Vol. 15 No. 5. 2014.

Maas, Willem. “Multilevel Citizenship,” in *Oxford Handbook of Citizenship*. Ed. Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, Maarten Vink. Oxford: Oxford UP, 2017.

Macedo, Stephen. *Liberal Virtues*. Oxford: Oxford UP, 1990.

Machiavelli, Niccolo. *Discourses on Livy*. Trans. Harvey C. Mansfield and Nathan Tarcov. Chicago: Chicago UP, 1996.

Manent, Pierre. *An Intellectual History of Liberalism.* Princeton: Princeton UP,1996.

Marti, Jose and Philip Pettit. *A Political Philosophy in Public Life: Civic Republicanism in Zapatero’s Spain*. Princeton: Princeton UP, 2012.

Mathews, Jud. *Extending Rights’ Reach*. Oxford: Oxford UP. 2018.

Mathiba, Gaopalelwe Lesley. “Evictions and Tenure Security in South Africa.” *ESR Review*. Vol. 19, No. 2. 2018.

Michelman, Frank. “Law’s Republic.” *Yale Law Journal*. Vol. 97, No. 8. 1988.

Michelman, Frank. “The Interplay of Constitutional and Ordinary Jurisdiction” in *Comparative Constitutional Law.* Ed. Tom Ginsburg and Rosalind Dixon. Cheltenham, UK: Edward Elgar, 2011.

Michelman, Frank. “Constitutions and the Public/Private Divide” in *Oxford Handbook of Comparative Constitutional Law*. Ed. Michel Rosenfeld and András Sajó. Oxford: Oxford UP, 2012.

Miller, David. “Republicanism, National Identity, and Europe,” in *Republicanism and Political Theory*. Ed. Cécile Laborde and John Maynor. Oxford: Wiley & Blackwell, 2008.

Murphy, Walter. *Constitutional Democracy*. Baltimore: Johns Hopkins UP, 2007.

Nolan, Aoife. "Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland." *International Journal of Constitutional Law.* Vol. 12. No. 1. 2014.

Nolan, Aoife. "Daniels v. Scribante: South Africa Pushes the Boundaries of Horizontality and Social Rights." *I-CONnect: Blog of the International Journal of Constitutional Law*. 27 Jun. 2017. www.iconnectblog.com/2017/06/daniels-v-scribante-south-africa-pushes-the-boundaries-of-horizontality-and-social-rights. 20 Dec. 2017.

O'Cinnede, Colm. "Irish Constitutional Law and Direct Horizontal Effect—A Successful Experiment?" *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

Pangle, Thomas. *The Spirit of Modern Republicanism,* Chicago: Chicago UP, 1990.

Pettit, Philip. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press, 1997.

Pettit, Philip. *On the People's Terms*. Cambridge: Cambridge UP, 2012.

Pildes, Richard. "The Structural Conception of Rights and Judicial Balancing." *Review of Constitutional Studies.* Vol. VI, No. 2. 2002.

Pocock, J. G. A. *The Machiavellian Moment*. Princeton: Princeton UP, 2003.

Postell, Joseph. "Regulation During the American Founding: Achieving Liberalism and Republicanism." *American Political Thought*. Vol. 5. Winter 2016.

Preuss, Ulrich. "The German *Drittwirkung* Doctrine and Its Socio-Political Background." *The Constitution in Private Relations.* Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005.

Quint, Peter. "Free Speech and Private Law in German Constitutional Theory." *Maryland Law Review*. 48.2. 1989.

Ramgotra, Manjeet. "India's Republican Moment." *The Indian Constituent Assembly: Deliberations on Democracy*. New York: Routledge, 2018.

Rao, Shiva *The Framing of India's Constitution: Selected Documents*, Vols. II and V. Indian Institute of Public Administration. Bombay: N. M. Tripathi, 1966.

Robertson, David. "Thick Constitutional Readings: When Classical Distinctions are Irrelevant." *Georgia Journal of International and Comparative Law*. Vol. 35. 2007.

Robinson, Nick. "Expanding Judiciaries: India and the Rise of the Good Governance Court." *Washington University Global Studies Law Review*, Vol. 8 No. 1. 2009.

Rosenfeld, Michel. "The European treaty—constitution and constitutional identity: A view from America." 3 *International Journal of Constitutional Law*. 2005.

Rostow, Eugene. "The Democratic Character of Judicial Review." *Harvard Law Review*. Vol. 66, No. 2. Dec. 1952.

Rousseau, Jean-Jacques. *The Social Contract.* Trans. Donald A. Cress. Indianapolis: Hackett, 2011

Rousseau, Jean-Jacques. *Emile*. Trans. Allan Bloom. New York: Basic Books, 1979.

Sachs, Albie. “The Judicial Enforcement of Socio-Economic Rights: The *Grootboom* Case.” In *The Constitution in Private Relations*. Ed. András Sajó and Renáta Uitz. Ultrecht: Eleven, 2005. 79-98.

Schmidt, Christopher. “The Sit-Ins and the State Action Doctrine.” *William and Mary Bill of Rights Journal.* Vol. 18. 2010.

Schmidt, Christopher. “On Doctrinal Confusion: The Case of the State Action Doctrine. *BYU Law Review.* 2016.

Schmidt, Christopher. *The Sit-Ins: Protest and Legal Change in the Civil Rights Era*. Chicago: Chicago UP, 2018.

Seidman, Louis and Mark Tushnet. “The State Action Paradox,” in *Remnants of Belief: Contemporary Constitutional Issues.* Oxford: Oxford UP, 1996.

Shalhope, Robert E. “Toward a Republican Synthesis.” *William and Mary Quarterly.* Vol. 29, No. 1. 1972.

Shumer, S. M. “Machiavelli: Republican Politics and Its Corruption.” *Political Theory*. Vol. 7. No. 1. 1979.

Singh, Mahendra. “India: Protection of Human Rights Against State and Non-State Action.” *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

Smith, Rogers. *Civic Ideals.* New Haven: Yale UP, 1999.

Sommeregger, Georg. “The Horizontalization of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere *via* Legislation.” *The*

Constitution in Private Relations, Ed. Andras Sajo and Renata Uitz. Utrecht, the Netherlands: Eleven, 2005.

Spitz, Richard and Matthews Chaskalson. *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*. Oxford: Hart, 2000.

Stone Sweet, Alec and Kathleen Stranz. "Rights Adjudication and Constitutional Pluralism in Germany and Europe. Journal of European Public Policy. 19.1. 2012.

Stone Sweet, Alec. "The Juridical Coup d'État and the Problem of Authority." *German Law Journal*. Vol. 8. No. 10. 2007.

Storing, Herbert. "Slavery and the Moral Foundations of the American Republic." *Toward a More Perfect Union*. Ed. Joseph Bessette. Washington, DC: AEI, 1995.

Sunstein, Cass. "Beyond the Republican Revival." *Yale Law Journal*. Vol. 97, No. 8. 1988.

Sunstein, Cass. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard UP, 2001.

Sunstein, Cass. "The Anticaste Principle." *Michigan Law Review* 92.8. 1994.

Theory and Practice of the European Convention of Human Rights, 5th ed. Ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak. Cambridge: Intersentia, 2018

Thomas, George. *The Founders and the Idea of a National University.* Cambridge: Cambridge UP, 2014.

Tomkins, Adam. *Our Republican Constitution.* Portland, OR: Hart, 2005.

Tripathi, P. K. "Perspectives on the American Constitutional Influence on the Constitution of India." *Constitutionalism in Asia: Asian Views of the American Influence.* Ed. Lawrence Beer. University of Maryland School of Law. 1988.

Tushnet, Mark. *Taking the Constitution Away from the Courts*. Princeton: Princeton UP, 2000.

Tushnet, Mark. *Weak Courts, Strong Rights*. Princeton: Princeton UP, 2008.

Tushnet, Mark. *Red, White, and Blue: A Critical Analysis of Constitutional Law.* Lawrence, KS: Kansas UP, 2015.

Uitz, Renata. "Introduction." *The Constitution in Private Relations*. Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005.

Van der Walt, Johan. *The Horizontal Effect Revolution and the Question of Sovereignty.* Berlin: De Gruyter, 2014.

Vanberg, Georg. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge UP, 2005.

Viroli, Maurizio. *For Love of Country*. Oxford: Oxford UP, 1995.

Viroli, Maurizio. *Which Patriotism for Europe?* Eutopia Magazine. 5 August 2014.

Webster, McKenzie. "Note: The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations." *Journal of Law and Politics*. Vol. 17. 2001.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review*. Vol. 73 No. 1 1959

Wood, Gordon. *The Creation of the American Republic.* Chapel Hill: North Carolina UP, 1998.

Wood, Gordon. *Empire of Liberty.* Oxford: Oxford UP, 2011.

Woolman, Stuart and Dennis Davis. "The Last Laugh: *Du Plessis v. De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions." *South African Journal on Human Rights.* Vol 12. 1996.

Zuckert, Michael. *Natural Rights and the New Republicanism.* Princeton: Princeton UP, 1994.