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THE “HORIZONTAL EFFECT” OF CONSTITUTIONAL RIGHTS

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# THE “HORIZONTAL EFFECT” OF CONSTITUTIONAL RIGHTS

Stephen Gardbaum\*

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## THE "HORIZONTAL EFFECT" OF CONSTITUTIONAL RIGHTS

### I. INTRODUCTION

Among the most fundamental issues in constitutional law is the scope of application of individual rights provisions and, in particular, their reach into the private sphere. This issue is also currently one of the most important and hotly debated in comparative constitutional law, where it is known as “vertical” versus “horizontal effect.” These alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal). In recent years, the horizontal position has been adopted to varying degrees and after systematic scholarly and judicial debate in, among others, Ireland, Canada, Germany, South Africa, and the European Union.<sup>1</sup> The issue has also been the topic of sustained debate in the United Kingdom following enactment of the Human Rights Act of 1998,<sup>2</sup> for it is an open and arguable question on the basis of the statute’s text whether, and to what extent, the rights it protects will have horizontal and not only vertical effect.

In the United States, by contrast, this fundamental issue has long been deemed fully and definitively resolved by a constitutional axiom: the state action doctrine. With the exception of

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<sup>1</sup> The position in these countries is discussed in detail in *infra* Part II.

the Thirteenth Amendment,<sup>3</sup> both the text and authoritative precedent<sup>4</sup> make clear that with respect to its individual rights provisions, the Constitution binds only governmental actors and not private individuals. End of story.

In fact, this is far from the end of the story. For several of the countries that have accepted some form of horizontal effect of constitutional rights provisions also accept that they impose constitutional duties only on governmental and not on private actors. But how is this possible? Doesn't this statement express a contradiction? The answer is no, and it is a significant cost of the state action shibboleth that it has prevented this answer from being widely and self-consciously appreciated here, as it has elsewhere. The fact that private actors are not bound by constitutional rights in no way entails that such rights do not govern their legal relations with one another,<sup>5</sup> and thereby impact what they can lawfully be authorized to do and which of their interests, choices, and actions may be protected by law. Although to be sure, the state action doctrine forecloses the most direct way in which a constitution might regulate private actors – by imposing constitutional duties on them -- it does not rule out other, indirect ways. To take two famous examples, L.B. Sullivan, the losing plaintiff in *New York Times v. Sullivan*<sup>6</sup> was certainly adversely affected by the First Amendment that was deemed to govern his legal

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<sup>2</sup> For general discussion and analysis of the Human Rights Act, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. OF COMP. L. 707, 732-39 (2001).

<sup>3</sup> “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, s 1.

<sup>4</sup> The standard precedent cited for definitively interpreting the “no state shall...” language of the Fourteenth Amendment’s second clause as imposing constitutional duties only on state governmental and not private actors, is *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>5</sup> See Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 210 (1957) (“[T]here is no inconsistency between the “private”-“state” action distinction of the *Civil Rights Cases* and the often-applied principle that the Fourteenth Amendment imposes limits on the way in which a state can balance legal relations between private persons.”).

relations with the newspaper, even though suing in his private capacity, Sullivan was not bound by its provisions. Similarly, although the private actors seeking to enforce their racially restrictive covenants in *Shelley v. Kraemer*<sup>7</sup> were not bound by the Equal Protection Clause, this did not prevent it from having substantial effect upon them.

Accordingly, the state action doctrine gives only a partial answer to the foundational question of the reach of constitutional rights into the private sphere in the United States, and in this article I attempt to provide the complete one. The full answer, however, can only be appreciated in comparative terms because this supplies the necessary perspective and analytical framework for identifying the true distinctiveness of the U.S position. Ironically, this distinctiveness that comparative materials enable us to see turns out to be almost exactly the opposite of what it is standardly understood to be within the discipline of comparative constitutional law itself. Taking the conventional American answer provided by the state action doctrine at face value, comparativists universally view the United States as the paradigm of the polar, strictly “vertical” approach to constitutional rights on the spectrum of possible positions.<sup>8</sup> By explaining why the U.S. position is in fact far more “horizontal” than supposed, I hope also to sharpen and revise the existing spectrum of positions for the entire topic. In this way, the article seeks to make a contribution to both domestic and comparative constitutional law.

In order to provide the full U.S. position on the scope of constitutional rights and their impact on private actors, it is necessary to bypass the notorious labyrinth of state action jurisprudence altogether and instead focus directly on the following set of fundamental threshold questions that other constitutional systems have self-consciously addressed. (1) Do

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<sup>6</sup> 376 U.S. 254 (1964).

<sup>7</sup> 334 U.S. 1 (1948).

constitutional rights apply to the actions of courts, or only of the legislative and executive branches of government? (2) Is private law subject to the Constitution, or only public law? (3) Is common law subject to the Constitution, or only enacted law? (4) Does the Constitution apply to litigation between private individuals, or only to litigation between a private individual and the state?<sup>9</sup> Even absent private actors being bound by the Constitution, different answers to these four questions result in differing degrees to which their conduct is indirectly subject to constitutional norms.

Although the hegemonic state action issue has rendered these somewhat unfamiliar constitutional questions in the United States, their individual answers are for the most part not controversial and collectively they provide a resolution of the general issue that is quite clear and uncomplicated. All law, including common law and the law at issue in litigation between private individuals, is directly and fully subject to the Constitution. The exclusive focus on the Fourteenth Amendment's "state action" requirement as the source for determining the scope of constitutional rights has concealed this more basic and fundamental proposition,<sup>10</sup> which I will

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<sup>8</sup> I discuss the existing spectrum in *infra* Part II and my revisions to it in *infra* Part IV.

<sup>9</sup> A fifth question is also generally relevant in determining the total indirect impact of constitutional rights on private actors, but less so in the United States: do the constitutional duties placed on government include positive ones to prohibit or penalize certain actions by private individuals that touch on constitutional values? This question is less relevant in the United States because, as is well-known, it is generally answered negatively. *But cf.* Kenneth L. Karst and Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (arguing that the equal protection clause of the Fourteenth Amendment imposes affirmative duties to prevent private racial discrimination in certain areas of vital interest, such as voting and urban housing). By contrast, in Germany and elsewhere, the existence of several important positive duties on the state to promote constitutional values makes this an important part of the total horizontal effect of constitutional rights. For if the state is constitutionally required to promote certain constitutional values (for example, equality between the sexes), its resulting regulation may well cover private actors. For a discussion of the role that commitment to social democratic norms in general, and such positive governmental duties in particular, play in the issue of horizontal effect, *see* Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 I.CON 79, 88-92 (2003). For further discussion of the role that the absence of positive duties plays in the United States, *see infra* Part IV.

<sup>10</sup> This premise -- that the answer to the general issue of the scope of constitutional rights is provided by the state action requirement of the Fourteenth Amendment -- is fully shared by those few commentators who have argued for a broad interpretation of "state action" to include laws regulating relations among private actors. *See* Larry

argue derives not from the Fourteenth Amendment at all but is a straightforward implication of the Supremacy Clause.<sup>11</sup> Moreover, since this clause renders all law fully and equally subject to the Constitution -- including contract, property, employment, trespass, and testamentary law -- there should be no separate threshold issue of “state action,” as currently exists, to be resolved on a case by case basis whenever the constitutionality of a law invoked in litigation between private actors is challenged.<sup>12</sup> The only genuine issue is the substantive one of whether that law violates the Constitution. This straightforwardly and parsimoniously disposes of the controversial state action issue in cases such as *Shelley*.<sup>13</sup> It also explains why it is absurd to distinguish among laws as to the kind or degree of state action involved, as the Court now does, so that some laws are subject to constitutional scrutiny and others are seemingly immune.<sup>14</sup>

This full answer does not render private actors bound by the Constitution but it does mean that individual rights provisions have significant impact on them. By governing their legal relations with each other, such rights limit what private actors can lawfully be empowered to do and which of their interests, preferences, and actions can be protected by law. This indirect

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Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMM. 361 (1993) (“state action” is ubiquitous because exercises of private power take place against a background of laws); Horowitz, *supra* note 5; CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (state acts for Fourteenth Amendment purposes when it enforces “natural” and “neutral” common law baseline of existing distributions). For my further discussion of SUNSTEIN, *see infra* pp. 31-33.

<sup>11</sup> “This Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST., ART. VI. For my argument, *see infra* Part III.B.

<sup>12</sup> There are, however, some procedural limits on such a challenge, as I explain at *infra* pp. 39-40.

<sup>13</sup> As I will show in *infra* Part III.D.

<sup>14</sup> In *Flagg Brother v. Brooks*, 436 U.S. 149 (1978), the Court’s opinion that the plaintiff’s claim failed the threshold state action requirement strongly suggested a categorical immunity from constitutional scrutiny for all laws, including state statutes, that are merely permissive of private conduct. “Our cases state ‘that a state is responsible for the ... act of a private party when the state, by its law, has compelled the act.’ This Court has never held that a state’s mere acquiescence in a private action converts that action to that of the state” (citations omitted). *Id.* at 164. This strongly suggests that even state constitutional provisions of this sort do not necessarily satisfy the threshold inquiry, *see infra* pp. 28-29.

effect of constitutional rights on private actors is actually quite radical by comparative constitutional standards, placing the United States far closer to the horizontal end of the spectrum than the vertical. It means, for example, that in this regard the scope of individual rights provisions is greater than in Germany and Canada, two countries standardly viewed as taking a more horizontal approach than the “purely vertical” United States.<sup>15</sup> For neither Germany nor Canada subjects all private law directly, fully, and equally to the Constitution.<sup>16</sup>

To say that all laws regulating relations between private actors are subject to the Constitution is not, of course, to say which laws of this sort violate it. This, the only genuine constitutional issue in every case, is a matter of substantive constitutional law. The article proceeds to consider which laws regulating relations between private actors in two paradigmatic areas violate the Constitution: laws touching on private race and sex discrimination, and laws regulating speech between individuals. By explaining which types of actual and hypothetical laws potentially relied on by private employers, speech-penalizers, racists, and sexists are and are not unconstitutional under current doctrine, I will be demonstrating when such private actors are effectively regulated by the rights of others. In exploring this issue in the American context, I also look at comparative treatments in some of the same countries discussed earlier in the article on vertical and horizontal effect. This will help to suggest whether the structural issue of the general reach of constitutional rights or the substantive one of their content appears to play a

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<sup>15</sup> See, e.g., Edward J. Eberle, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002) at 29 (“The [German] Basic Law’s influence on civil law is a notable contrast to American law....[I]n comparison to the Basic Law’s “objective” ordering of society, the American Constitution withdraws from the important private sector of society...In this way, the reach of the German Basic Law is broader than its American counterpart...Between the extremes of the Basic Law being limited to government action (as in the United States) and its application to any action, public or private..., the [German] Court split the difference, deciding that the basic law should apply “indirectly,” not directly, to private law.”). See also Murray Hunt, *The ‘Horizontal Effect’ of the Human Rights Act*, 1998 PUBLIC LAW 423, 427 (“The jurisdiction which is closest to the position favoured by the verticalists is the United States.”)

<sup>16</sup> See *supra* Part II.

larger role in terms of their actual impact on private actors in practice. Finally, in support of the proposition that both matter, I demonstrate how, given the substantial indirect effect of constitutional rights on private actors, a much debated change in the interpretation of the Equal Protection Clause would have less debated, far-reaching implications.

The article proceeds in the following way. In Part II, I introduce the existing spectrum of positions on the vertical and horizontal effect of individual rights provisions in comparative constitutional law, and illustrate their practical application in Germany, Canada, South Africa, Ireland, and the United Kingdom. This provides the essential set of analytical tools for transcending the state action axiom in the United States and for illuminating the broader, underlying issues and options it has operated to conceal. In Part III, I utilize these tools to present the full American answer on the subject, an answer that defies comparative conventional wisdom and places domestic practice and principles in a deeper new context. In Part IV, I propose a revised and clarified spectrum of positions on vertical and horizontal effect that incorporates my analysis of the United States and adds several new options to the existing menu. Finally, in Part V, I turn from the now resolved issue of the general scope of constitutional rights to the actual impact of specific ones on private actors by discussing the substantive issue of which laws regulating relations between private actors violate these rights in the areas of free speech and equal protection. This is the only genuine constitutional issue in any case involving such a law.

## II. VERTICAL AND HORIZONTAL EFFECT OF INDIVIDUAL RIGHTS: THE SPECTRUM OF POSITIONS IN COMPARATIVE CONSTITUTIONAL LAW

The issue of the scope of application of constitutional rights and the extent to which they either are, or should be, binding in the private sphere has in recent years been, and remains, a central and extremely important one in comparative constitutional law. Within the last twenty years, the issue has been confronted, debated, and resolved in Canada under the 1982 Charter of Rights and Freedoms, in South Africa first under its Interim Constitution of 1993 and then the Final Constitution of 1996, and in Hong Kong under its Bill of Rights Ordinance 1991.<sup>17</sup> In Germany, the Constitutional Court gave its definitive answer in the late 1950s to what had been an open and controversial question during its first few years of existence,<sup>18</sup> and the European Court of Justice did likewise for the European Union during the 1970s.<sup>19</sup> In the new, post-Communist constitutions of central and eastern Europe, although the question of vertical or horizontal effect has been far less prominent than that of placing positive duties on governments to promote social and economic rights, it has nonetheless typically been addressed.<sup>20</sup> In the

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<sup>17</sup> On Canada, *see infra* pp. 18-21; South Africa, *infra* pp. 21-22. On Hong Kong, see Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, 1998 PUBLIC LAW 423, 427-28 (1998).

<sup>18</sup> *See infra* pp. 14-18.

<sup>19</sup> In the European Union, the two seminal cases were *Walrave v. Union Cycliste Internationale*, Case 36/64, [1974] ECR 1405 (holding that Article 7 of the Treaty of Rome, which prohibits discrimination on the grounds of nationality, applies to the defendant private organization) and *DeFrenne v. Sabena*, case 43/745, [1976] ECR 455 (the principle of "equal pay for male and female workers for equal work," contained in Article 119 of the Treaty, applies to private employers). *See infra* pp. 13-14.

<sup>20</sup> Cass Sunstein reports that "the post-communist constitutions pervasively fail to make this distinction [between the constitutional duties of government and the constitutional duties of the private sphere], and impose their duties on everyone, and create rights which are good against everyone. This step perpetuates, if in a small way, the failure of communist societies to create and protect a civil sphere...." Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION (Andras Sajó ed., 1996).

United Kingdom, the issue is still very much a live one following enactment of the Human Rights Act of 1998, the text of which is ambiguous on the issue.<sup>21</sup> Alongside, and aiding the practical resolutions of the issue in these countries, has been a growing theoretical literature.<sup>22</sup>

Both the theoretical debate and its real world resolution in various jurisdictions posit a spectrum of two polar positions with at least one, and possibly two, intermediate options.<sup>23</sup> The first polar position is that of a purely vertical approach to the issue. This is the familiar position that individual rights bind -- impose constitutional duties on -- only the government and not private actors. They regulate only the conduct of governmental actors in their dealings with private citizens but not relations among private citizens themselves. This contrasts straightforwardly with a situation in which private individuals have constitutional duties, such as the single instance under the U.S. Constitution: the duty not to engage in slavery or involuntary servitude under the Thirteenth Amendment.<sup>24</sup>

The animating idea informing the vertical approach is the perceived desirability of a public-private division in the scope of constitutional rights, leaving the private sphere free from constitutional regulation. The well-known justifications for this division lie in the values of liberty, autonomy, and privacy. A constitution's most critical and distinctive function is to provide law for the lawmaker, not for the citizen, thereby filling what would otherwise be a

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<sup>21</sup> See *infra* pp. 22-24.

<sup>22</sup> See, e.g., Hunt, *supra* note 15; ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993) and *The Privatisation of Human Rights*, 1. E.H.R.L.R. 20 (1996); Andrew Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AMERICAN L.REV. 1 (1993).

<sup>23</sup> Hunt's account of the spectrum of positions, *see supra* note 15, has been influential in Britain, in the context of the debate about the scope of the HRA.

<sup>24</sup> See *supra* note 3.

serious gap in the rule of law.<sup>25</sup> Further, limiting the scope of constitutional rights to the public sphere enhances the autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms.<sup>26</sup>

The opposite polar position is that of the horizontal approach to the issue. Constitutional rights provisions impose constitutional duties on citizens as well as on government, thereby regulating their relations with one another, and private actors may sue each other for violations of these duties. The horizontal position expressly rejects a public-private division in constitutional law and its justifications reflect a well-known critique of the “liberal” vertical position. At least in the modern context, constitutional rights and values are threatened by extremely powerful private actors and institutions as well as governmental ones,<sup>27</sup> and the vertical position automatically privileges the autonomy and privacy of such citizen-threateners over that of their victims.<sup>28</sup> Thus, the autonomy of racists, sexists, and harmful speakers is categorically preferred to that of those harmed or excluded by their actions without any obvious justification in terms of an overall assessment of net gains and losses in autonomy. Moreover, since the vertical position does not prevent private actors from being regulated by statute or

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<sup>25</sup> See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMM. 329, 342-46, 351-53 (1993).

<sup>26</sup> In the United States and other federal systems, there is an additional standard argument for limiting the scope of constitutional rights to the government: the constituent political units should be able to determine through their own constitutions or laws what rights individuals have against fellow citizens.

<sup>27</sup> This critique has been used as the basis for the argument that the First Amendment should be understood as a sword to be used by government and not merely a shield against it, so that regulation of private speakers to promote the interests of citizen-hearers in having access to a broad and rich context debate on public issues should be constitutionally permitted. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). More generally, it has been the basis for an argument that the state action limitation on the scope of constitutional rights should simply be abolished. See Erwin Chemerinsky, *Rethinking State Action*, 80 N.W.L.REV. 503 (1985).

<sup>28</sup> See, e.g., Chemerinsky, *id.* at 536-41.

common law, it is unclear why autonomy is especially or distinctively threatened by constitutional regulation.

Within the emerging model for discussing the issue in comparative constitutional law, the two countries that are generally understood to come closest in practice to the opposite poles of the theoretical spectrum are the United States for the vertical position and Ireland for the horizontal. According to Murray Hunt:

The jurisdiction which is closest to the position favoured by the verticalists is the United States. As is well-known, U.S. constitutional law requires there to be “state action” in order for the constitutional protections to apply. The text of the Constitution itself makes clear that those protections apply only to the activities of either the state or federal governments, and where a constitutional right is relied on in litigation between private parties the Supreme Court has made clear that courts must determine whether the activities of the private party alleged to have infringed the protected right are sufficiently connected to the government to constitute state action to which the Constitution applies.<sup>29</sup>

At the opposite end of the spectrum lies Ireland, whose Supreme Court has interpreted certain of the rights provisions in its Constitution to have horizontal effect; that is, they directly bind private individuals and not only the state. The mechanism for this has been the Court’s development of the constitutional tort action, which lies for breaches of constitutional rights by other private individuals. As Justice Walsh said in the 1973 case of *Meskeil v. Coras Iompair Eireann*, “[I]f a person has suffered damages by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or

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<sup>29</sup> See Hunt, *supra* note 15, at 427.

persons who infringed that right.”<sup>30</sup> And Justice Costello: “Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials.”<sup>31</sup>

In essence, the Court has interpreted provisions of the Irish Constitution such as the one declaring that “the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”<sup>32</sup> to impose a positive obligation on all state actors, including the courts, to protect and enforce the rights of individuals. And this in turn has been taken to require the courts to permit individuals to invoke the constitution directly as a source of a claim against other individuals.<sup>33</sup> Examples of particular constitutional rights that have been given full horizontal effect include freedom of association (violated, for example, by the “closed shop” practice of trade unions<sup>34</sup>), freedom from sex discrimination,<sup>35</sup> the right to earn a livelihood,<sup>36</sup> and the right to due process.<sup>37</sup>

Horizontal effect is also possible in South Africa under its Final Constitution of 1996. Section 8(2) of its Bill of Rights declares that: “A provision of the Bill of Rights binds a natural

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<sup>30</sup> [1973] IR 121 at 132-133.

<sup>31</sup> P. Hosford v. John Murphy & Sons [1987] IR 621 (High Court).

<sup>32</sup> IRISH CONSTITUTION, art. 40.3.1.

<sup>33</sup> See the extensive discussion of the Irish position and case law in Butler, *supra* note 11.

<sup>34</sup> See, e.g., Murtagh Properties v. Cleary [1972] IR 330 (constitutional right to earn a livelihood without discrimination as to sex violated by trade union objecting to employment of women by plaintiff).

<sup>35</sup> See *id.* (injunction against defendant trade union for violating constitutional right to earn a livelihood without sex discrimination by objecting to employment of women by plaintiff publican).

<sup>36</sup> See Lovett v. Gogan [1995] I.L.R.M. 12 and Parson v. Kavanagh [1990] I.L.R.M. 560 (injunction granted against defendant unlicensed transport company found to be interfering with plaintiff licensed transport company’s constitutional right to earn a livelihood). Also discussed in Hunt, *supra* note 10, at 428.

<sup>37</sup> See Glover v. BLN Ltd. [1973] IR 388 (awarding damages to plaintiff for violation by defendant employer of constitutional right to fair procedures implied into contract of employment permitting dismissal for just cause).

or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.” In addition, Section 9(4) imposes a duty on private individuals not to discriminate against others on the same comprehensive set of grounds as applies to the state.<sup>38</sup> Finally, the European Court of Justice has held that at least two of the individual rights contained in the Treaty of Rome, the “Constitution” of the European Community,<sup>39</sup> bind private actors as well as government. These are equal pay for men and women, and nondiscrimination on the grounds of nationality.<sup>40</sup> Moreover, under the doctrine of “direct effect,” national courts are obligated to protect these rights, which includes guaranteeing effective causes of action and remedies if they do not already exist.<sup>41</sup>

In between these two polar positions of vertical and horizontal effect of constitutional rights lies the position that has come to be widely known as “indirect horizontal effect.” In brief, this intermediate position stands for the proposition that although constitutional rights directly

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<sup>38</sup> “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)...” SOUTH AFRICAN CONST. chapter 2, section 9(4).

Subsection (3) states as follows: “The state may not 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.” *Id.* chapter 2, section 9(3).

<sup>39</sup> The Treaty Establishing the European Community, originally signed in Rome in 1957 by the six founding members, is the constitutive document of the European Community, which maintains its legal distinctiveness from the broader European Union, created by the 1992 Treaty on European Union. As a result of the European Court of Justice’s landmark decisions on the supremacy and direct effect (within national legal systems) of European Community law in the 1960s, the Treaty has taken on many of the characteristic features of a domestic federal constitution. For an influential account and analysis of these developments, see Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 403 (1991).

<sup>40</sup> “Each Member State shall ensure that the principle of equal pay for male and female workers for equal; work or work of equal value is applied.” Treaty Establishing the European Community, art. 141 (1) (ex Article 119). Horizontal effect was established in the case of *DeFrenne v. Sabena Airlines*, *supra* note 17.

“Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.” Treaty establishing the European Community, art. 12 (ex Article 6). Horizontal effect was established in *Walrave v. International Union of Cyclists*, *supra* note 17.

<sup>41</sup> The doctrine of “direct effect,” first established in the landmark case of *Van Gend en Loos* (Case 26/62), holds that under certain circumstances provisions of EU law create rights for individuals that must be protected within

bind only government action, nonetheless they have indirect effect on private actors in ways that constrain what they can lawfully do. To get a better sense of both how this position has been articulated and what it means in concrete terms, let us look at the two countries in which it is generally understood to operate in practice (albeit in somewhat different ways): Germany and Canada.

The text of the 1949 Basic Law of the Federal Republic of Germany is somewhat ambiguous on the issue of whether its rights provisions bind only the government or also private individuals, typically being expressed in declaratory and universalistic terms.<sup>42</sup> In addition, in Germany, as in civil law countries generally, there is a much greater distinction between public and private law than is the case in common law jurisdictions.<sup>43</sup> Private law is comprehensively codified in a series of subject-matter codes, and is adjudicated by separate hierarchies of specialized courts that are distinct from the two most important public law courts: the federal administrative court and the federal constitutional court. Moreover, in Germany, the Civil Code of 1896 in particular, had since its inception been viewed as the crowning glory of the legal system, a definitive and authoritative written document with a cultural status and prestige not

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their national legal systems by national courts. This includes the provision by these courts of effective and adequate remedies. *See, e.g.*, Von Colson and Kamann (Case 14/83); Marshall (Case C-271/91).

<sup>42</sup> Thus, unlike the U.S. Constitution's "Congress shall pass no law..." and "No state shall..." language, the Basic Law states that "[E]veryone has the right to the free development of his or her personality... [and] "Everyone has the right to life and to physical integrity." BASIC LAW art.2. "Men and women shall have equal rights" under Article 3. "Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy are inviolable" under Article 4. "Everyone has the right freely to express and disseminate his or her opinion in speech, writing, and pictures... [and] "Art and science, research, and teaching shall be free" under Article 5.

Like the 13th Amendment in the United States, the right contained in Article 9 of the Basic Law to freedom of association in the employment field has been held to bind private actors.

<sup>43</sup> *See, e.g.*, MARY ANN GLENDON, DAVID GORDON, CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 45 (2d. ed., 1994).

dissimilar to that of the Constitution in the United States.<sup>44</sup> In this context, the issue of the scope of constitutional rights was considered through the lens of whether the Basic Law applies to private law at all or is limited to the field of public law, which regulates relations between the individual and the state.

In a series of decisions in the 1950s, first the Federal Labor Court and then the Federal Constitutional Court developed the doctrine that has come to be known as *Drittwirkung* (or third-party effect of constitutional rights), which has remained foundational ever since. In essence, this doctrine holds that although constitutional rights neither bind private actors nor directly apply to private law, the values that they express nonetheless have indirect effect on both. Constitutional rights form “an objective order of values” (*eine objektive Wertordnung*) pervading the entire legal system, meaning in this context that they “influence” even if they do not strictly “govern” private law disputes, so that all courts must give them their proper weight in the outcome of such cases.<sup>45</sup> As the Court stated: "This value system, which centers upon human dignity and the free unfolding of personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private... Thus, basic rights obviously influence civil law too."<sup>46</sup> Accordingly, although private law is not directly subject to constitutional norms, courts must permit constitutional values to “flow” and “radiate” into civil law norms and affect their interpretation and application. Moreover, the concept of “reciprocal effect” (*Wechselwirkung*) of the Constitution on private law means that

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<sup>44</sup> See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 35 (1985).

<sup>45</sup> The concept of “an objective order of values” was first expressed in the Luth decision, 7 BVerfGE 198 (1958), see *infra* p. 16. It contrasts with the concept of constitutional rights as merely "subjective" or "defensive" rights of the individual against the state. It also forms the basis for positive duties on the state to promote these values.

<sup>46</sup> Luth, 7 BVerfGE 205.

just as the constitutional text suggests “general laws” can limit certain constitutional rights,<sup>47</sup> so too does the Constitution affect and limit the “general laws.”

Many instances of *Drittwirkung* in practice have involved the constitutional right to freedom of expression contained in Article 5 of the Basic Law.<sup>48</sup> Two features of this textual right are of particular significance in this regard. First, unlike the First Amendment in the United States, it is not stated negatively as a limitation on legislative power but affirmatively, as a right that “everyone” has. Second, as just mentioned, this is one of the rights stated to be “limited by the provisions of the general laws” to which the concept of reciprocal effect was directed. In the landmark case announcing both this concept and that of the objective order of values, the Constitutional Court overturned an injunction under Section 826 of the Civil Code<sup>49</sup> sought by Veit Harlan, a Nazi-era film director, against the boycott of his new film organized by Eric Lüth, a press official in the City of Hamburg in his private capacity.<sup>50</sup> It did so on the basis that the ordinary court had given insufficient weight to Lüth’s free speech rights. The Court stated that: “The Constitutional Court must determine whether the reach and effect of the basic rights in private law has been correctly ascertained by the regular courts. But this is also the limit of its investigation: it is not for the Constitutional Court to check judgements of civil courts for errors

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<sup>47</sup> For example, the free speech rights contained in Article 5(1) are stated in Article 5(2) to “find their limits in the provisions of general statutes.” See entire text of Article 5 in *infra* note 35.

<sup>48</sup> (1) Everyone has the right freely to express and disseminate his or her opinion in speech, writing, and pictures and freely to inform himself or herself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

(2) These rights find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not release anyone from his or her allegiance to the constitution. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, art.5.

<sup>49</sup> Anyone who intentionally causes harm to another in a manner offensive to good morals shall be liable for compensatory damages." GERMAN CIVIL CODE, Section 826.

<sup>50</sup> *Lüth*, *supra* note 43.

of law in general; the Constitutional Court simply judges the “radiant effect” of the basic rights on private law and implements the values inherent in the precept of constitutional law.”<sup>51</sup>

Similarly, in a 1984 case before the Federal Labor Court, a press operator in a private printing shop who refused on grounds of conscience to print books that he believed glorified war was fired, and then sued for unfair dismissal.<sup>52</sup> Applying the *Drittwirkung* doctrine, the court held that the constitutional value of freedom of conscience contained in Article 4 of the Basic Law<sup>53</sup> exerts a substantial influence on the applicable private employment law so that the employee’s constitutional interest must be taken into account alongside the employer’s interests in running its business protected by that law. Finding that the employer had taken disproportionately severe action, it decided the case in favor of the employee.<sup>54</sup> In these two cases, the two federal courts themselves undertook the constitutionally required balancing between constitutional and private law values that was omitted in error by the lower courts. Where, however, the lower courts have performed their duty to balance, the Constitutional Court

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<sup>51</sup> *Id.*, quoted from Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Act: Lessons from Germany*, 115 LAW QUARTERLY REV. 47, 65 (1999).

<sup>52</sup> BAGE 47, 363 (1984). The relevant private law statute was the Unfair Dismissal Protection Act, 1969 (Kündigungsschutzgesetz), which renders termination with notice legally effective only if it is "socially justified"; i.e., based on reasons relating to the employee's person, the employee's conduct, or compelling business requirements that rule out the possibility of continuing to employ the person. The case is discussed in Peter E. Quint, *Free Speech and German Constitutional Theory*, 48 Maryland L. Re. 247, 274-75, and Markesinis, *id.* at 58.

<sup>53</sup> (1) Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy are inviolable.  
(2) The undisturbed practice of religion is guaranteed.  
(3) No one may be compelled against his or her conscience to render military service involving the use of arms. Details shall be regulated by federal statute. BASIC LAW art.4.

<sup>54</sup> The German Constitutional Court appears also to have adopted direct horizontal effect in some cases, creating constitutional tort actions enabling one private actor to sue another for breach of a constitutional duty. *See Soraya* and *Blinkfüer* cases. *See also* Quint and Markesinis. *But cf.* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 189 (1994) (acknowledging that in *Blinkfüer* “at two points the Court even appeared to embrace [this] far more radical proposition... [but] in light of a number of analogous decisions, it seems more likely [that the Court read] Article 5(1)...to impose an affirmative duty on the state to protect the press against third parties.”).

typically displays substantial deference to the particular weighing achieved, intervening only for arbitrariness or misunderstanding of the basic rights, even where an outside observer might detect bias in favor of the private law values that it is these courts' normal business to protect and uphold.<sup>55</sup>

The analytically clear line between direct and indirect horizontal effect appears, however, to have been breached on occasion by the Constitutional Court, leaving the German constitutional system as a whole in something of a limbo between the two. Thus, in several cases in the 1970s, the Court seemingly went beyond the objective order of values formula of *Lüth* and suggested not merely that the interests protected by private law must be balanced against those protected by a constitutional right, or even that the state has violated a positive duty to protect such a right,<sup>56</sup> but also that the conduct of private actors violates the right.<sup>57</sup> This, of course, implies that private actors owe constitutional duties to each other, the defining characteristic of the direct horizontal position. Similarly, the Court has occasionally appeared to suggest that constitutional tort actions lie by one private actor against another, which is, of

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<sup>55</sup> Eberle generally describes this type of review conducted by the German Constitutional Court as akin to "hard look" rather than "strict scrutiny" in the United States, and as reflecting "deference to the traditional distinction between public and private law." See *supra* note 15, at 211. Examples include *Mephisto*, 30 BVerfGE 173 (1971), *Soraya*, 34 BVerfGE 269 (1973), and *Böll*, BVerfGE 54 (1980). In all three defamation cases, the Constitutional Court upheld lower courts' balancing of defendants' right to artistic expression and plaintiffs' personality and reputational interests in favor of the latter. The Court, however, found the latter interest to be of constitutional status under Article 2.

<sup>56</sup> As mentioned in *supra* note 9, such positive duties are an important component of the total indirect effect of constitutional rights in Germany that has no general counterpart in the United States.

<sup>57</sup> Thus, in each of the three cases mentioned in *id.*, the Court suggested that the defendants had violated the plaintiffs' constitutional rights to personality and reputation protected by Article 2. In *Blinkfüer*, 25 BVerfGE 256 (1969), the Court also suggested that the boycott called for by the defendant newspaper publisher against a small left-wing magazine listing East German television program violated the latter's constitutional right to publish the information. See the discussion of these cases in Quint, *supra* note 49, at 275-81, and Markesinis, *supra* n. 31, at 54-57. *But cf.* DAVID P. CURRIE, *supra* note 40.

course (as in Ireland), the necessary mechanism for enforcing the constitutional duties of private actors.<sup>58</sup>

The Canadian Supreme Court has also effectively adopted “indirect horizontal effect” in its interpretation of the scope of the 1982 Charter of Fundamental Rights and Freedoms.

Drawing a distinction between constitutional rights and constitutional values, it adheres to the vertical position requiring “governmental action” before constitutional *rights* are triggered, but permits some horizontal effect on private individuals through the inherent power of the courts to develop the common law in line with the constitutional *values* contained in the Charter. It will be a useful exercise to follow the Court through the various stages of its reasoning.

In the well-known case of *Dolphin Delivery*,<sup>59</sup> decided in 1986, a private company sought and obtained an injunction under the common law of inducing breach of contract to restrain secondary picketing of their premises by a trade union. The union argued that the picketing was protected by the Charter’s guarantee of freedom of expression. The Supreme Court held that although secondary picketing was indeed within the Charter right, the Charter did not apply to the common law litigation in which the injunction was granted. This conclusion followed from the Court’s interpretation of the two relevant provisions of the Charter: the “Supremacy Clause” of Section 52(1) and the application clause, section 32(1).

Section 52(1) of the Charter provides as follows: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The Court stated that the clear

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<sup>58</sup> Once again, *Blinkfuer* and *Soraya* are the leading candidates, see Quint and Markesinis, *id.*

<sup>59</sup> Retail, Wholesale and Dep’t Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

language of this provision meant “there can be no doubt”<sup>60</sup> that the Charter applies to the common law. On the other hand, according to the Court, the separate question of whether the Charter applies to private litigation was equally clearly answered by Section 32(1), which states as follows:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Court interpreted “government” according to standard usage to mean the executive branch only, with the consequence that the Charter applies neither to private actors nor the courts. This in turn means that it applies to the common law only when it is the basis of some legislative or executive action, such as prosecution reliance on a common law evidentiary rule. In particular, the Charter does not apply to common law litigation between private parties where the only official action is a court order.<sup>61</sup>

At the same time, the opinion for the Court was careful to state that this conclusion did not mean the Charter was entirely irrelevant to such private litigation:

Where...private party A sues private party B relying on the common law and where no act of government is relied on to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary

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<sup>60</sup> *Id.*, at 595.

<sup>61</sup> *Id.*, at 602. By contrast, the Charter applies, according to the Court, in private litigation relying on a statute rather than the common law. It gave the example of *Re Blainey and Ontario Hockey Ass’n*, (1986) 26 D.L.R. (4<sup>th</sup>) 728, in which a twelve year old girl successfully sued the private hockey association that excluded her from playing

ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defenses between individuals.<sup>62</sup>

In this way, Charter rights impose duties only on government, whereas Charter values influence the entire legal system.

In the subsequent case of *Hill v. Church of Scientology of Toronto*,<sup>63</sup> the Supreme Court further elaborated on the differences between Charter rights and values. Where a party alleges that legislative or executive action "violates the Charter, a cause of action has its source in that Charter right. In the context of a legal dispute between private parties, however, in which the compatibility of the common law with the Charter becomes relevant, the Charter creates no new cause of action because private parties owe each other no constitutional duties. The parties must rely on existing common law causes of action and courts must take care "not to expand the application of the Charter beyond that established by s. 32(1) by creating new causes of action..."<sup>64</sup> Moreover, courts must take a cautious approach to amending the common law, "[f]ar-reaching changes...must be left to the legislature."<sup>65</sup> Finally, unlike the case with a

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on a boys' team on the basis that Section 19(2) of the Ontario Human Rights Code relied on by the defendant violated the Charter's sex discrimination provisions.

<sup>62</sup> *Dolphin Delivery*, *supra* note 54, at 605.

<sup>63</sup> [1995] 2 S.C.R. 1130.

<sup>64</sup> *Id.* at 1165.

Charter challenge to governmental action, where once a prima facie violation of a right is proven the onus is on the government to justify its action, “it is up to the party challenging the common law to bear the burden not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified.”<sup>66</sup> It is, in short, no easy task to prevail on a “Charter value” challenge to the common law in the context of private litigation.<sup>67</sup>

A virtually identical result to the Canadian was achieved under South Africa’s Interim Constitution of 1993. In *Du Plessis v. De Klerk*,<sup>68</sup> a defamation action between a company and a newspaper, a majority of the South African Constitutional Court held that although the Constitution’s Bill of Rights neither had “general direct horizontal application” nor applied in private litigation based on the common law, it may and should have an influence on the development of the common law as it governs relations between individuals. The relevant textual provisions contained the following application clause:

“7 (1) This Chapter shall bind all legislative and executive organs of state at all levels of government; (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.”

In addition, an interpretive clause stated: “In the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and object of this Chapter.”<sup>69</sup> The leading judgment of Justice Kentridge relied primarily

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Although a “Charter value” challenge to the common law failed in both *Dolphin Delivery* and *Hill*, it has, however, succeeded in at least one case. See *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (absolute common law psychiatrist-patient privilege qualified in line with Charter values).

<sup>68</sup> 1996 (3) S.A. 850.

<sup>69</sup> SOUTH AFRICAN INTERIM CONSTITUTION, section 33(5).

on these textual provisions,<sup>70</sup> but also extensively discussed the Canadian and German solutions of distinguishing between the direct application of constitutional rights against private actors and their indirect application to private litigation. By contrast, South Africa's Final Constitution of 1996, as we have seen, permits direct horizontal application of rights provisions.<sup>71</sup>

In the United Kingdom, the Human Rights Act of 1998 was enacted to incorporate the European Convention on Human Rights into domestic law and amounts to a qualified constitutional revolution. On the basis of the statutory set of rights, the higher courts are empowered for the first time in British constitutional history<sup>72</sup> to call into question the validity of a subsequent Act of Parliament by declaring it "incompatible" with one of the rights, although the courts do not have power to invalidate the statute. Rather, the expectation is that Parliament will amend or repeal it.<sup>73</sup> A major legal question surrounding the Human Rights Act, and one that has spawned a substantial academic literature, is the scope of application of the rights. Which of the three positions on the generally recognized spectrum running from (a) vertical only to (b) indirect and then (c) direct horizontal effect of the Convention rights will be adopted?<sup>74</sup>

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<sup>70</sup> In addition to the two parts of Section 7 being given the same interpretation as Sections 32 and 52 in Canada, the Court argued that the wording of Section 33(5) would be redundant if the common law was directly subject to the bill of rights.

<sup>71</sup> See *supra* p. 13. For an interesting argument that notwithstanding such direct horizontal effect in the text of the final Constitution, the South African Constitutional Court should adopt and apply U.S. state action doctrine, see Stephen Ellmann, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socio-economic Rights Guarantees to Private Actors*, 45 N.Y.L.SCH.L.REV. 21 (2001).

<sup>72</sup> That is, outside the European Union law context. See Gardbaum, *supra* note 2, at n. 20.

<sup>73</sup> See *id.* at 733-4.

<sup>74</sup> This literature includes Hunt, *supra* note 10; Markesinis, *supra* note 15; Ian Leigh, *Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth*, 48 INT. & COMP. L. Q. 57 (1999); Gavin Phillipson, *The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?*, 62 MODERN L. REV. 824 (1999); Sir William Wade, *The United Kingdom's Bill of Rights*, in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES (Hare and Forsyth eds, 1998); Richard Buxton L.J., *The Human Rights Act and Private Law*, 116 L.Q.R. 49 (2000).

The text of the HRA is ambiguous on this issue, and there have been influential adherents of both the vertical and indirect effect positions. Virtually everyone agrees that direct horizontal effect is ruled out by the fact that under section 6(1) of the Act, the obligation to act compatibly with the Convention is limited to “public authorities,” and so excludes private individuals.<sup>75</sup> Moreover, there is no reference in the Act to Convention rights applying to common law, or indeed any mention of the common law at all. Indeed, the duty placed on courts by section 3(1) to employ Convention rights as an interpretive guide applies only to legislation and not to common law.<sup>76</sup> These two arguments, together with the fact that most of the individual rights are specified, as in the United States, to be held against the state, form the basis of the vertical only argument.<sup>77</sup>

On the other hand, the fact that courts are expressly included in the list of “public authorities” obligated to act in accordance with Convention rights under Section 6(1) is the basis of the indirect horizontal effect argument, together with certain ministerial statements in the course of parliamentary debate supporting this position.<sup>78</sup> The argument is that their inclusion

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<sup>75</sup> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." HRA, section 6(1).

<sup>76</sup> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." HRA, section 3(1).

<sup>77</sup> *See, e.g.*, Buxton L.J., *supra* note 68.

<sup>78</sup> The Lord Chancellor, in his speech on Second Reading of the Human Rights Bill, spoke to the issue of the scope of Convention rights. "A provision of this kind [clause 6(1)] should apply only to public authorities, however defined, and not to private individuals...Clause 6 does not impose a liability on organizations which have no public functions at all." H.L. Deb., November 13, 1997, cols 1231-1232. Having rejected direct horizontal effect of the Act, however, he subsequently proceeded to affirm indirect effect: "We...believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding Convention considerations altogether from cases between individuals, which would have to be justified. We do not think that that would be justifiable; nor indeed, do we think it would be practicable." H.L. Deb., November 24, 1997, col. 771.

means that courts have a duty to act compatibly with the Convention at all times, including when they are adjudicating private disputes governed by the common law.<sup>79</sup> Again, this would not mean that Convention rights create new causes of action in private disputes, as they do in public ones, but rather that in adjudicating existing common law causes of action, courts must take Convention rights into account.

Finally, in the South African case of *Du Plessis* discussed above, the dissenting opinion of Justice Kriegler suggested a fourth possible position on the spectrum in between indirect horizontal effect, accepted by the majority and borrowed from Germany and Canada, and direct horizontal effect as in Ireland.<sup>80</sup> This fourth position is that all law -- whether regulating relations between the individual and the state or relations among individuals, whether statute or common law -- is directly subject to the Constitution. Constitutional rights do not impose duties on private actors, who are free to order their relationships as they will, but it does apply to all law, including that regulating such relationships. According to Justice Kriegler:

Unless and until there is resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned... a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club

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Under the decision of the House of Lords in *Pepper v. Hart* [1993] A.C. 593, it is now established, contrary to the traditional UK position, that where legislative provisions are “ambiguous or obscure, or the literal meaning of which leads to an absurdity,” in order to disclose “the mischief aimed at or the legislative intent lying behind the ambiguous or obscure words,” lawyers can refer in court to clear ministerial statements made during the passage of a bill. Accordingly, the Lord Chancellor’s above statements may become admissible evidence of legislative intent on the horizontal effect of the Human Rights Act.

<sup>79</sup> There have been disagreements among those arguing in favor of indirect horizontal effect of the strength of this duty imposed on the courts; in particular whether it is stronger than in Canada and Germany, and how much discretion is left to the courts. See, e.g., Hunt and Phillipson, *supra* note 57.

<sup>80</sup> This suggestion has been noted, among others, by Hunt, *supra* note 15, and Phillipson, *supra* note 68. Kriegler J’s dissenting opinion is also mentioned and excerpted in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1421-22 (1999).

may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.<sup>81</sup>

Whether or not individuals can in fact invoke the law to enforce or protect their bigotry will, of course, depend on the content of the constitutional rights protected in any particular system, but the notion that a constitution may apply to all law, including the kind of private law invoked in the quotation, is an alternative theoretical position on the scope of constitutional norms that is of quite general relevance and importance. Like indirect horizontal effect, it is perfectly compatible with the vertical position that only government actors are bound by the Constitution. It does not subject private individuals to constitutional duties or create new constitutional causes of action against them. But it goes further than indirect horizontal effect towards the horizontal pole in that it directly, fully, and equally subjects all law to the Constitution no matter what its source (statute or common law), type (public or private law), or in what context it is relied upon (public or private litigation). Under this model, the Constitution does not apply directly to one type of law and merely influence, radiate, or impose interpretive duties on another. Within comparative constitutional law, this fourth position remains a novel theoretical possibility only, no country is deemed to have adopted it.<sup>82</sup>

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<sup>81</sup> 1996 (3) S.A. at 914H-915D.

<sup>82</sup> As we have seen, South Africa has moved from indirect to direct horizontal effect between its interim and final constitution. However, under the latter, only some of the bill of rights will have direct horizontal effect under section 8(2) but not necessarily all; the rest may well be treated under this fourth position because section 8(1) expressly states: "The Bill of Rights applies to all law, and binds the legislative, the executive, the judiciary and all organs of state." As far as the UK is concerned, Hunt argues that this fourth position is the "most likely one" to be adopted under the HRA, *see supra* note 15 at 438-42. On the other hand, Phillipson disagrees and argues in favor of what, by contrast, he terms "weak indirect horizontal effect" adopted in Canada and Germany, *see supra* note 68, at 833-43.

### III. RECONCEIVING THE CONSTITUTIONAL POSITION IN THE UNITED STATES

As we have just seen, the issue of the scope of application of constitutional rights is resolved within comparative constitutional law by answering the following series of questions: (1) Are individuals as well as government actors bound by constitutional rights? (2) Do constitutional rights apply to private law or common law? (3) Are courts bound by constitutional rights? (4) Do constitutional rights apply to litigation between private individuals? The answer to the first of these questions resolves only the issue of direct horizontal effect; the remaining ones address the issue of possible indirect horizontal effect. In the United States, however, the only question that is conventionally asked concerning the scope of constitutional rights is the first one, and the answer given, the state action doctrine, is supposed to supply all necessary answers to the general issue. Constitutional rights bind only the state and may be invoked only against action of the state. There is only one way in which constitutional rights apply: either directly and fully because of the state action involved or they do not apply at all.<sup>83</sup> There is no second tier of indirect application. Hence the conventional view of the U.S. as epitomizing the vertical only position on the theoretical spectrum. The notoriously tricky question is how exactly to draw the line between state and private action, which polices the boundary between the application and non-application of the Constitution.

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<sup>83</sup> See Quint, *supra* note 49, arguing that on the rare occasions the Constitution is deemed to apply to private actors under the various strands of the Court's state action doctrine, it does so fully, in the same way that it would bind the

A. *The State Action Doctrine*

As is well-known, few commentators have a kind word to say about the Supreme Court's attempts to draw a principled line between the two.<sup>84</sup> Standard treatments variously identify three or four strands within the labyrinth of the Court's doctrine. The first is the "public function" test, which in its current, restrictive formulation holds that when a private actor exercises functions "traditionally reserved exclusively to the State," its actions will be deemed state action for constitutional purposes.<sup>85</sup> Such functions may now be limited to electoral processes (such as conducting primaries) and running a municipality, for the Court has in recent years refused to find state action under this head in operating a privately-owned public utility,<sup>86</sup> resolving a dispute by exercising a state sanctioned self-help remedy,<sup>87</sup> educating maladjusted high school students,<sup>88</sup> and administering a nursing home.<sup>89</sup>

The second strand is the converse: it asks whether the state is significantly entangled with, or jointly participating in, the actions of a private actor. If such a "nexus" is found, the

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state. In Germany, by contrast, the Basic Law applies far more often to private actors but less fully than when applied to government.

<sup>84</sup> Charles Black famously described the Court's state action doctrine as a "conceptual disaster area." Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967). In 1982, Judge Friendly observed that Black's "statement fifteen years ago... would appear even more apt today." Henry Friendly, *The Public-Private Penumbra – Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982). *But cf.* Laurence Tribe, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, in CONSTITUTIONAL CHOICES 248 (Harvard, 1985) ("[state action] doctrine is, in my view, considerably more consistent and less muddled than many have long supposed."). I discuss Tribe's reconstruction of the Court's case law later in this part, *see infra* pp. 41-46.

<sup>85</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

<sup>86</sup> *Id.*

<sup>87</sup> *Flagg Brothers*, *supra* note 13.

<sup>88</sup> *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>89</sup> *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

actions will be attributable to the state. Thus, the aggregate of contacts and mutual benefits between a privately-owned restaurant and the municipal parking garage in which it rented space were deemed sufficient to make the state constitutionally responsible for the restaurant's racial discrimination.<sup>90</sup> On the other hand, insufficient nexus was found between a private club practicing racial discrimination and the state licensing authority which regulated it,<sup>91</sup> and between a private nursing home and the state whose financial support enabled it to exist.<sup>92</sup>

A third strand makes the state responsible for private action when it "has provided such significant encouragement, either overt or covert, that the choice must in law deemed be that of the state."<sup>93</sup> Sometimes the cases refer to state "authorization" or "approval" of the private action, rather than "encouragement." The basic idea seems to be that while the state's constitutional responsibility for private actions should include, but not be limited to, those it mandates or coerces, it should exclude merely neutral state policy towards the relevant private choices.

Although to be sure, like the first two, this strand suffers from serious application problems (the seeming arbitrariness of whether many actions fall on one side of the line drawn or the other), it also suffers analytically from an identity problem. For the cases sometimes treat this issue not as a threshold one of "state action," but rather as a substantive one of constitutionality. Thus, in the leading "encouragement" case of *Reitman v. Mulkey*,<sup>94</sup> involving a

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<sup>90</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>91</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (except for the regulation requiring clubs to adhere to their constitutions and by-laws, which was held to be unconstitutional state action, though whether under the "nexus" or "encouragement" strand of the doctrine is uncertain).

<sup>92</sup> *Blum*, *supra* note 82; *Rendell-Baker*, *supra* note 83.

<sup>93</sup> *Blum*, *id.*

<sup>94</sup> 387 U.S. 369 (1967).

California constitutional amendment prohibiting governmental interference with the unconditional “right” of any person to refuse to sell or rent real estate to any other person as they choose,<sup>95</sup> the issue dividing the Court by five to four was the substantive one of whether state permission for private racial discrimination in this manner and context violated the equal protection clause. No member of the Court thought there was a state action issue here at all, and only a dissenter bothered to mention it, stating conclusorily that “there is no question that the adoption of [the amendment] constituted ‘state action’ within the meaning of the Fourteenth Amendment.”<sup>96</sup>

Under the final strand, sometimes merged with the previous one, court orders enforcing some voluntary private actions are deemed to be state action triggering constitutional scrutiny, but not others. Thus, a court order enforcing a racially restrictive covenant entered into by white homeowners was deemed state action in *Shelley v. Kraemer*,<sup>97</sup> but in a subsequent case a court order enforcing a racially discriminatory will was not.<sup>98</sup> *Shelley* is easily the Court’s most controversial state action case because to some it appeared to suggest that all private choices and preferences enforced by courts would now be subject to the Constitution, thus violating the basic state action doctrine distinguishing private from governmental conduct. Perhaps for this reason,

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<sup>95</sup> “[The] state shall [not] deny...the right of any person to sell...any part of his real property, to decline to sell...to such person as he, in his absolute discretion, chooses.” CA CONST. art I. Section 26 (Proposition 14).

<sup>96</sup> *Reitman*, at 392 (Harlan, J., dissenting).

<sup>97</sup> 334 U.S. 1 (1948).

<sup>98</sup> *Evans v. Abney*, 396 U.S. 435 (1970) (state’s application of its trust laws to allow testamentary grant of land to revert to the estate when the terms of the bequest -- that the land be used as a park “for whites only”-- could not be implemented, did not amount to state action. As cited by Quint, *supra* n.15, at notes 81 and 82, state courts have failed to find state action in the judicial enforcement of wills discriminating on the ground of religion (*see e.g.*, *Gordon v. Gordon*, 332 Mass. 197, 124 N.E. 2d 228, *cert. denied*, 349 U.S. 947; *Shapira v. Union Nat’l Bank*, 39 Ohio Misc. 28, 315 N.E. 2d 825 (1974)) and of contracts discriminating on the basis of ethnic origin (*see, e.g.*, *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff’d by an equally divided court*, 348 U.S. 880 (1954), *vacated & cert. dismissed as improvidently granted*, 349 U.S. 70 (1955)).

the Court appears to have affirmed the consensus opinion among mainstream commentators that *Shelley* should be confined to its facts.

*B. Transcending the State Action Doctrine*

I want to argue that in all of the above cases, and in virtually all others, the threshold search for state action in order to trigger a constitutional claim is entirely unwarranted and unnecessary. In making this claim, I do not mean merely that finding state action should often be far easier than it is sometimes made out to be, but that the search should usually not take place. That is, I will not be presenting an internal critique -- that the line between state and private action is drawn in the wrong place -- but an external one: namely, that this line is irrelevant wherever constitutional review of a law (as distinct from other forms of government action) is involved.

The reason is that, contrary to the standard view in comparative constitutional law, the U.S. does not in fact adhere to the polar vertical position, or indeed to any of the other positions on the scope of constitutional rights that exclude certain laws from full and direct constitutional review. It adheres instead to the fourth position suggested by Justice Kriegler in *Du Plessis*. All law of whatever type and source -- whether public or private, whether statutory or judge-made, whether relied on in litigation between an individual and the state or between individuals -- is directly and fully subject to the Constitution. Accordingly, whenever a law is invoked or relied on before a court, there is no threshold issue to be resolved before its constitutionality may be assessed. The only genuine issue in every case is whether that law is consistent with, or violates, the Constitution. Although no constitutional duties are thereby placed on private actors,<sup>99</sup>

constitutional rights have substantial impact on what individuals can lawfully be permitted or required to do and which of their interests, preferences, and actions can be protected by law. This position may usefully be termed “strong indirect horizontal effect,”<sup>100</sup> to distinguish it from the weaker version adopted by Germany and Canada. In these two countries, it will be recalled, certain types of law -- private law and common law invoked in private litigation respectively -- are only indirectly and not fully subject to the Constitution.

In presenting my case, it will be helpful to start by considering a recent attack on the Court’s state action doctrine. Among the many topics covered in his book, *The Partial Constitution*,<sup>101</sup> Cass Sunstein provides a brief but powerful internal critique of this doctrine for its bias in favor of “status quo neutrality” and “natural,” i.e., existing, economic distributions. This bias alone, he claims, and not a genuine search for government action, explains the outcomes of the Court’s state action cases in which “protection of interests recognized at common law is not state action, whereas protection of other interests does count as such.”<sup>102</sup> Sunstein argues that only continuing reliance on the pre-New Deal ideology of the common law as the baseline for determining which governmental functions are neutral and natural, and as thus reflecting state *inaction*, has prevented us from grasping this. The reality, of course, is that ratifications of existing distributions through enforcement of common law rights are no more neutral, natural or “inactive” than “partisan” departures from such distributions by legislatures. Accordingly, he continues, a case such as *Shelley v. Kraemer* is a difficult state action case only

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<sup>99</sup> Like indirect horizontal effect, this position is accordingly quite consistent with the vertical approach and the basic state action axiom: constitutional rights bind government actors only.

<sup>100</sup> Phillipson suggests this term to distinguish the position from the “weak indirect horizontal effect” of Canada and Germany that he argues the courts should also adopt for the UK under the Human Rights Act. *See supra* note 68, at 833-43.

<sup>101</sup> Cass R. Sunstein, *THE PARTIAL CONSTITUTION* 74-75, 159-161(1993).

because of the hold of this common law benchmark, which tells us that the court was “acting” only as a neutral umpire to enforce a private agreement. But once the common law baseline of government inaction is rejected as misconceived, “how could the government’s enforcement of a racially restrictive covenant, through its courts, be anything but state action?”<sup>103</sup> The genuinely difficult question is the substantive one: “whether the Constitution forbids the state’s apparently neutral use of its courts to enforce contracts, including racially restrictive property agreements. That is a hard question about the meaning of the equal protection clause. It is not a hard question about state action.”<sup>104</sup>

Because his account is brief and framed by his primary interest in the issue of status quo neutrality, of which the state action doctrine is (for him) but one manifestation among many in modern constitutional law, I am uncertain how similar Sunstein’s position is to the one I have suggested above. He does state that “the law of contract, tort, and property is just that – law [and] should be assessed in the same way as other law is assessed.”<sup>105</sup> On the other hand, Sunstein does not appear to question the appropriateness of the existing threshold state action inquiry, but rather its outcome when dealing with common law and its enforcement. Moreover, his discussion of *Shelley* focuses on the traditional issue of whether the court’s enforcement of a racially restrictive covenant is “state action” (of course it is, he states) and not on the underlying state law being enforced. This is why I describe his critique as internal and not external, unlike the one I have suggested. What I am much more certain of is that Sunstein’s *argument* is far

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<sup>102</sup> *Id.* at 159.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 160.

<sup>105</sup> *Id.*

from a complete one in support of the position I have outlined. My immediate aim in what follows is to explain why this is so, and then to provide the missing parts of the argument.

Undoubtedly the dominance in the United States of the ideology that laws protecting market outcomes are natural and neutral, whereas those that depart from them are extraordinary and partisan, makes Sunstein's point a valuable and illuminating one in explaining the outcomes of many of the "state action" cases. However, the comparative materials previously introduced make it clear that it is insufficient to say that because common (or private) law is law, and as such amounts to positive action by the state, the Constitution (a) automatically applies to it and (b) in the same way as other law. The highest courts of Germany, Canada, and South Africa clearly rejected this position.<sup>106</sup> Whatever may be true in the United States, these courts do not fail to subject private and common law directly to the Constitution for the naïve/ideological reason that they mistake the private sphere as law-free, as not constituted by law and therefore state action, but rather because they have affirmative reasons for distinguishing between types of laws for purposes of constitutional scrutiny. Put analytically, to say (1) that all law, including common law, is state action, and (2) that only state action is subject to the Constitution is not to say (3) that all law (or state action) is subject to the Constitution.

There *is* a genuine threshold issue that must be addressed before dealing with the substantive question of a law's compatibility with the Constitution, but it is not the one asked by the state action doctrine. It is rather a global question that once resolved systemically need not be raised in every individual case. Of course, the question is: what is the scope of constitutional norms? And once again, this global question breaks down into the series of smaller ones previously discussed. Do constitutional norms apply to all law and, if so, in the same way? Do

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<sup>106</sup> See *supra* Part II.

they apply only to laws regulating relations between individuals and the state or also to laws regulating relations among private individuals? Do they apply to statute law and common law? Do they apply to laws relied on private litigation? Do they do so directly or indirectly? Why, and on what basis, is the answer in the United States different than that in Canada and Germany? What are the affirmative reasons for one answer rather than another in the United States? We have seen how the courts in Canada and South Africa, and to a lesser degree also in Germany, answered these questions primarily on the basis of the relevant textual provisions in their constitutions. It should be no surprise then, that the same approach, rather than Sunstein's exclusively a priori argument, is helpful in grounding our intuition in the United States.

Moreover, as our brief review of it indicates, the state action doctrine does not function as a threshold issue only as to whether common law is subject to the Constitution, but also as to whether particular statutes and even state constitutional provisions are immune from constitutional review. Thus, in *Flagg Brothers*, the Supreme Court held that a state statute that merely permits, or "acquiesce[s] in," a private action did not constitute state action.<sup>107</sup> And in *Reitman*, according to standard doctrine at least, there was a state action issue regarding a constitutional amendment that merely "encouraged" private racial discrimination.<sup>108</sup>

The genuine threshold question is, I will now argue, answered by the Supremacy Clause of the United States Constitution.<sup>109</sup> Its answer is that all law, no matter what its source or type, is subject to the Constitution. Once resolved in this way for the constitutional system as a whole,

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<sup>107</sup> See *supra* note 13.

<sup>108</sup> See *supra* pp. 28-29.

<sup>109</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. cl. 2.

the only real issue in any particular case is whether the law in question is consistent with, or violates, the Constitution. In the case of law, there is no separate and prior issue of state action. Once again, this is not simply because all law is necessarily or automatically subject to the Constitution, but because this is the most compelling interpretation of the U.S. Constitution's answer to this general issue. Other constitutions have knowingly and without false consciousness about private law and market outcomes given different ones. Whereas the threshold issue is determined once and for all by the Supremacy Clause, the real issue of substantive compatibility of a law regulating relations among private individuals in each case turns on the content and interpretation of the relevant constitutional rights provisions of the Constitution, most often the First Amendment and the Equal Protection Clause.

How does the Supremacy Clause provide the U.S. Constitution's answer to the global threshold question? First, the Supremacy Clause states that the Constitution (as well as Acts of Congress and treaties) is the "supreme law of the land." In a straightforward sense, this would not be true if state common law, or any other type of state law, were not subject to it. As we have seen,<sup>110</sup> the Canadian Supreme Court interpreted the supremacy clause of Section 52(1) of the Charter to mean that its provisions apply to the common law. At the same time, it interpreted the applications clause of Section 32(1) to mean that the Charter did not apply to private litigation relying on the common law unless it was the basis of some legislative or executive action. Whether or not this is a compelling interpretation of Section 32(1), there is nothing equivalent to it in the U.S. Constitution that would require any such qualification of the basic position that its rights provisions apply to the common law.

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<sup>110</sup> See *supra* p. 19.

Second, and more affirmatively, under the Supremacy Clause state courts are expressly bound by the Constitution.<sup>111</sup> As we have seen, the *absence* of such a provision in Canada and South Africa, and the textual application to the legislative and executive branches only, was an important and explicit reason that the common law was held not to be directly subject to the Constitution unless relied on by these branches of government. On the other hand, the inclusion of the courts (though not Parliament) among the “public authorities” bound to act compatibly with the Convention is the central argument in the United Kingdom for the indirect horizontal impact of the Human Rights Act, through the courts’ interpretation and development of the common law.

Third, the Supremacy Clause ends by stating that the Constitution (as well as federal statutes and treaties) trumps “any Thing in the Constitution or Laws of any State.” State common law is part of the “Laws of any State,” as the Court affirmed in *Erie v. Tompkins*.<sup>112</sup> It is true that the clause does not expressly refer to state common law, but it would be a perverse interpretation of “Laws of any State” to exclude state common law, particularly as it is typically subordinate to state statutory and constitutional law. Once again, there is nothing equivalent to the Canadian and South African application clauses to provide an affirmative textual basis for excluding the common law at issue in ordinary private litigation from the scope of fundamental rights. The Constitutional Courts in these countries did not simply read the reference to “laws” in their supremacy clauses as excluding the common law.

Thus, on the important questions of whether the Constitution applies to (a) courts and (b) state common or private law, the relevant text of the U.S. Constitution speaks clearly and

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<sup>111</sup> “... [A]nd the Judges in every State shall be bound thereby,...” U.S. CONST. art. VI, cl. 2.

consistently in answering both in the affirmative. By contrast, it was the tension between the answers given to these two questions in both Canada and South Africa that caused their highest courts to arrive at a less radical and straightforward position than is the case in the United States: all law, no matter what its source or type, is directly and fully subject to the Constitution. Accordingly, comparative materials have helped to explain both why Sunstein's a priori argument is insufficient to justify the proposition that the Constitution applies to all law, and what that sufficient (textual) argument is.

Although as we have seen, the fourth position adopted by the United States is clearly neither formally nor substantively equivalent to direct horizontal effect, as in Ireland, it is closer to this polar position than the indirect horizontality adopted in Canada and Germany. As a matter of constitutional structure, individual rights provisions have a greater impact on private actors in the U.S. because the laws regulating their relations with each other are fully governed, and not merely "influenced" or "affected," by constitutional norms. The common law at issue in private litigation is subject to the Constitution in precisely the same way as statutory law. This is obviously a surprising conclusion that runs counter to the conventional wisdom, in which the state action doctrine casts the United States as the paradigmatic representative of the polar vertical position.<sup>113</sup>

This radical conclusion, and the constitutional irrelevance of the traditional state action enquiry that it entails, should immediately be qualified in the following four ways. First, like the others, the fourth position on the spectrum is still a formal position in that it does not of course tell us whether any particular law regulating relations among private individuals violates the

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<sup>112</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 67 (1938) ("[W]hether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

<sup>113</sup> See *supra* note 15.

Constitution.<sup>114</sup> To answer this, we must continue the analysis to address the substantive issue in Part V. Second, my thesis is that the threshold state action issue is irrelevant wherever a law is challenged as unconstitutional because all laws are subject to the Constitution under the Supremacy Clause. Since, however, the government's constitutional duties are obviously not limited to the content of its laws,<sup>115</sup> the case by case determination of "state action" may still be relevant for other types of governmental conduct. Third, it should be clear that I am arguing for the abolition of the state action doctrine in a different, narrower sense than Erwin Chemerinsky who, in his well-known article, is (in comparative terms) arguing for direct horizontal effect.<sup>116</sup> My position is that the state action doctrine should be abolished because it misstates the current, constitutionally required, position, properly understood. The United States already adheres to a strong version of indirect horizontal effect: all law is subject to the Constitution. Accordingly, there should be no threshold issue in each case of whether the law at issue – be it constitutional, statutory, judge-made, or administrative – amounts to state action. State laws are not subject to the Constitution because they constitute state action under the Fourteenth Amendment but because the Supremacy Clause says they are. Fourth, to say that all laws are subject to the Constitution is not to say that a law is necessarily or automatically challengeable in every actual piece of litigation; there may, and indeed must, be some procedural limitations. Let me spell out what precisely the thesis I am presenting does and does not entail in this regard.

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<sup>114</sup> Although I readily acknowledge that this fourth position, like the purely vertical one, is formal, I hope I have explained why it is not merely "banal" or "a conceptual truth," as Larry Alexander characterizes the related view, which he accepts, that the Fourteenth Amendment's state action requirement is satisfied whenever exercises of private power take place against a background of laws. See Alexander, *supra* note 9, at 364, 377. First, as I have shown, it is far from a universal feature of constitutional systems, and in self-consciously rejecting it, other countries presumably believe something tangible is at stake. Second, as I will argue in Part V, it is quite conceivable that general acknowledgement of the indirect effect of constitutional rights on private actors might affect their substantive interpretation.

<sup>115</sup> See, e.g., Larry S. Alexander and Paul Horton, *WHOM DOES THE CONSTITUTION COMMAND?* (1988).

The Constitution applies to all law, including private and common law. It applies in “purely private litigation” to the law at issue in the particular case. Although private actors are not bound by the Constitution, the laws that they invoke and rely on in actions inter se are so bound. Accordingly, private actors are unable to rely on an unconstitutional law in any ordinary, non-constitutional cause of action: a plaintiff cannot successfully sue or a defendant defend on the basis of an unconstitutional law. Thus, if one private actor sues another under state law A, the defendant may allege the unconstitutionality of that law, as for example the state libel law in *New York Times*. Similarly, if in a private suit the plaintiff sues under state law B and the defendant relies on state law C for a defense, the plaintiff may allege the unconstitutionality of law C. An example of this scenario is *Reitman*, where the rejected tenant plaintiff sued his would-be landlord under the California code provision banning racial discrimination in housing,<sup>117</sup> and the landlord attempted to rely in his defense on Proposition 14, the constitutional amendment purporting to trump that provision which was held to violate the equal protection clause. Thus, in *Flagg Brothers*, had Mrs. Brooks sued the warehouseman for the tort of conversion, the defendant’s reliance on the state U.C.C. as a defense to the action would have put the constitutionality of that state statute squarely and properly at issue.

By contrast, there can be no constitutional cause of action against another private actor for breach of a constitutional duty, because private actors have none. In this sole respect, the result in *Flagg Brothers* was correct, as Mrs. Brooks brought a Section 1983 action for violating her constitutional rights against Flagg Brothers. To be clear, the reason is not that the relevant provision of the U.C.C. fails a threshold test for review on the merits, but that one private actor

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<sup>116</sup> Chemerinsky, *Rethinking State Action*, *supra* note 19.

<sup>117</sup> For the wording of the amendment, *see supra* note 77.

has no cause of action against another for its unconstitutionality.<sup>118</sup> This proposition, which distinguishes the U.S position from direct horizontal effect, is quite different from that which defines strong indirect horizontality: the law relied on in the course of *ordinary* litigation by one private actor against a second is directly and fully subject to the Constitution.

Accordingly, complete immunity from constitutional scrutiny applies only to actions by private actors (a) that do not invoke, or otherwise rely on, any law, or (b) for which the victim has no relevant cause of action. As far as the latter is concerned, there may occasionally be situations where, although a private actor relies on a law, say, to discriminate on the basis of race, there is no relevant, existing non-constitutional cause of action that the victim can employ as plaintiff to challenge the law. So where A, a private club that denies membership to African-Americans, relies on the rules of property law to physically eject B, an African-American, from its premises, B may sue for the tort of assault and allege that the law relied on by A is unconstitutional. But where C relies on the rules of property law to give change only to white beggars and not black, there may be no common law tort or statutory cause of action that would enable a black beggar to challenge the constitutionality of the rules of property law relied on.<sup>119</sup>

### C. *Transcending versus “Refocusing” the State Action Inquiry*

In the concluding chapter of his book, *Constitutional Choices*,<sup>120</sup> entitled “Refocusing the State Action Inquiry: Separating State Acts from State Actors,” Laurence Tribe might be

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<sup>118</sup> Accordingly, my view is that when challenging an underlying law, "constitutional tort" actions under Section 1983 should be understood to lie only against the state and not against private actors.

<sup>119</sup> This threshold question of the requirements for subjecting the rules of property law to constitutional scrutiny is obviously different from the substantive question of the constitutionality of these rules. This latter question is treated in *supra* Part V.

<sup>120</sup> LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985).

understood to suggest that properly reconstrued, what I have just described is in fact the Court's current position in state action cases. If so, then my thesis can be thought of as a systematic and principled justification of this case law, explaining its proper source and why it is constitutionally required. However, it is not so. Even Tribe's highly insightful, "best case" reconstruction of the Court's jurisprudence reveals the continuing hegemony of the traditional two-prong test with a threshold state action inquiry that fails to treat the existence of a challenged state law as sufficient for constitutional review on the merits.

Tribe argues that the Court's prevailing state action doctrine is "considerably more consistent and less muddled than many have long supposed"<sup>121</sup> and he sets himself the task of "simply...develop[ing] the structure of that doctrine – less to defend it than to lay bare its essential logic, the better to expose it so such defense or attack as it may properly invite."<sup>122</sup> His essential claim for my purposes is that the Court's state action jurisprudence does in fact already permit the underlying state law in any case to be subject to substantive constitutional review. The only requirement imposed by the Court is that such litigation be "properly structured" and the state law be "properly called into question."<sup>123</sup> Accordingly, in cases such as *Flagg Brothers*, the Court's refusal to adjudicate the constitutional merits of the state law at issue in litigation between private actors because the threshold issue of state action was held not to have been satisfied, did not amount to an immunity from review. Had the plaintiff "properly structured" her case, she could have challenged the law itself. State action rhetoric notwithstanding, up to this point, Tribe's reconstruction of the case law might be consistent with what I have argued is constitutionally mandated – depending on the requirements for proper

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<sup>121</sup> *Id.* at 248.

<sup>122</sup> *Id.*

structuring. Once we see what these are, however, the inconsistency between the two accounts is apparent.

Tribe suggests the Court employs two different “lenses” in state action cases. The first, “the close-nexus lens,” seeks to determine whether the actor causing injury is a state or private actor. The Court, for example, utilized this lens in *Flagg Brothers* when it initially found the injurer to be a private actor with no sufficient involvement of any state actor.<sup>124</sup> The second, “telephoto lens,” by contrast, focuses not on the identity and status of the injurer but on the underlying law itself as the target of the lawsuit. According to Tribe, in order to place the constitutionality of the background law at issue and to bring this second lens into play, it is necessary for the litigant to adopt the “proper procedural posture.” Tribe describes two. The first is that the injured party may directly sue the relevant state officials who possess the power under the state law at issue to put private actors in a position to inflict injury.<sup>125</sup> This would not, of course, permit a private defendant to challenge the underlying law relied on by a private plaintiff as, for example, in *New York Times*.

The second way to obtain federal adjudication of the constitutional merits of a state law at issue is the more important one for my purposes, and this is where the similarity of Tribe’s

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<sup>123</sup> *Id.* at 253.

<sup>124</sup> This was the Court’s first rationale for denying state action; the second was that state laws merely acquiescing in private action did not amount to state action. My position regarding this first lens is that (a) Tribe is undoubtedly descriptively correct that the Court employs it frequently, and (b) I am not committed to arguing that it is wrong for it to do so. I am committed to the position that such a threshold “state action” nexus is not necessary for triggering constitutional review on the merits and that the Court is wrong when it holds that it is. The “close-nexus lens” will usually function as a second, separate basis for review over and above the underlying state law relied on by one of the private parties.

<sup>125</sup> Under the current Court’s expansion of the Eleventh Amendment and the doctrine of state sovereign immunity, the *ex parte* Young action of suing state officials rather than the state itself is the only way a private individual is able to do so. Erwin Chemerinsky has attacked this expansion as inconsistent with the Supremacy Clause, among other constitutional principles. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1210-1212 (2001).

account of the case law to my thesis ends. This is to sue the injurer, even if a private party, in state court and seek review in the Supreme Court if and when the state court invokes the disputed state law to deny relief. According to Tribe, that invocation by the state court becomes “state action” reviewable on the merits by the Supreme Court.<sup>126</sup> The same analysis would apply where a defendant challenges the constitutionality of the state law relied on by the plaintiff in state court, as in *Shelley* and *New York Times*. With regard to this second way, Tribe reports that the Court has drawn a distinction between state laws that *mandate* a challenged private action and those that merely *permit* or authorize it. Laws mandating private action may be directly challengeable on the merits in federal court; but with permissive laws, filing in state court first is required to trigger state action because “a federal court will hold that the state is not implicated by its mere acquiescence in private behavior.”<sup>127</sup>

I have three comments on this part of Tribe's reconstruction of the Court's case law, although unfortunately, due to the self-imposed limitation on his task, we do not know whether he himself believes the reconstructed position “properly invite[s]” support or critique. First, it is unclear to me whether this second, roundabout way of guaranteeing review on the merits of an underlying state law correctly states the Court's position, particularly regarding “permissive laws.” I am less confident than Tribe that had Mrs. Brooks sued and lost in state court, the majority would then “certainly” have considered the court order to amount to state action and subjected the New York statute to constitutional review on the merits. After all, treating a state court order enforcing a permissive law as state action is precisely what conventionally makes *Shelley* so controversial. To my mind, the footnote in the Court's opinion in *Flagg Brothers* that

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<sup>126</sup> TRIBE, *supra* note 109, at 257.

<sup>127</sup> *Id.*, quoting from Rehnquist J's opinion in *Flagg Brothers*, *supra* note 13, at 164.

Tribe cites as support for his claim does not obviously bear his interpretation; it seems to suggest only that she is not necessarily without judicial remedy under state law.<sup>128</sup> If so, this would be on a par with the Chief Justice's statement in *DeShaney v. Winnebago County Dep't of Social Services* to the effect that although state inaction in the face of private violence against an individual does not give rise to a federal constitutional claim, it may result in liability under state tort law.<sup>129</sup> In any event, Tribe does not present a case that clearly and unequivocally stands for the proposition he suggests.<sup>130</sup>

Second, even if we accept as descriptively accurate the private litigation method of bringing the "second lens" to bear on the underlying state law, the Court would not be treating the state *law* allegedly violating one individual's constitutional rights and relied on by the other as itself sufficient to trigger review as my thesis requires. Rather, it requires a state court order enforcing the law before an individual's constitutional rights may be adjudicated in federal court.<sup>131</sup> The absurdity of this *Shelley*-style requirement of two sets of "state action" (or, more

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<sup>128</sup> *Id.*, at 161-2, fn 11 ("...There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the "surrenders of property" to which [Justice Stevens' dissent] refers, and that the compliance of Flagg Brothers with applicable New York property law would be reviewed after customary notice and hearing in such a proceeding.").

<sup>129</sup> 489 U.S. 189, 194 (1989).

<sup>130</sup> The case that Tribe cites as "perhaps the strongest direct authority for the efficacy of this approach," *Martinez v. California*, 444 U.S. 277 (1980), *supra* note 90, at 162, does not even appear to be an example of the second way to obtain federal adjudication of the constitutional merits of a permissive state law. First, the plaintiffs sued the state of California, not a private defendant, for its own alleged violation of their murdered daughter's rights under the Fourteenth Amendment. Second, the underlying state law at issue, which conferred absolute immunity on state parole boards for injuries caused by parolees, was not a law permitting private actors to do anything. Rather, it prohibited them from holding the state liable.

<sup>131</sup> Tribe's description is quite accurate. On this point, Chief Justice Rehnquist was quite explicit in *Flagg Brothers*: "It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a state, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law." (*Flagg Brothers*, at 160, fn. 10, Rehnquist J.).

accurately, both a law and a state actor relying on it) appears to be appreciated by Tribe in his following comment, although again he says nothing explicit by way of critique:

The real “state action” in Shelley was Missouri’s facially discriminatory body of common and statutory law – the quintessence of a racist state policy. The state court’s refusal to invalidate the racist covenant before it was simply the overt state act necessary to bring the state’s legal order to the bar of the United States Supreme Court.<sup>132</sup>

Why isn’t the state law at issue the “necessary overt state act,” particularly if it is the “real” state action here? Of course, the simple and parsimonious answer is that the Supremacy Clause requires the state law to be directly challengeable by an injured individual without the unnecessary and roundabout route of first having to obtain a state court order, indeed without having to identify anything that counts as “state action” at all. *It is the law itself* that is subject to constitutional review in the first place and not only a state court order enforcing it, although to be sure, a constitutional law may also and independently be unconstitutionally enforced.<sup>133</sup>

Third, the distinction between mandatory and permissive state laws that Tribe reports as determining whether this roundabout route is necessary in private litigation, should be constitutionally irrelevant. All state laws, permissive and mandatory alike, are equally and directly subject to the Constitution under the Supremacy Clause. Accordingly, this distinction

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<sup>132</sup> *Id.* at 260.

<sup>133</sup> In *infra* Part V, I distinguish between two separate ways in which a constitutional law may be unconstitutionally enforced: (1) where the action of the state enforcer is independently and contingently unconstitutional, such as a judge discriminating on the basis of race in administering the death penalty; and (2) where application of a generally permissible law to specific circumstances necessarily involves unconstitutional conduct. In this category, I give the example of enforcing a racially restrictive covenant

There is also the issue of standing to take into account. In general, laws are only challengeable when they have actually harmed or threaten to harm a specific individual; that is, typically, when they are enforced or are likely to be enforced. This procedural point about when a law can be challenged does not, however, mean that it is the enforcement of the law and not the law itself that is subject to the Constitution; it is the occasion and neither the cause nor the subject of the constitutional review. Cf. Rehnquist CJ, *supra* note 100.

cannot determine whether a law is directly challengeable on the merits in federal court.<sup>134</sup> The Court's explanation for its distinction, that "the state is not implicated by its mere acquiescence in private behavior," suggests that the state is not "implicated" in its own laws, another constitutionally absurd proposition. Accordingly, neither the "overt state act" nor the "merely permissive state law" rationale identified by Tribe in the Court's case law for denying immediate and direct adjudication on the constitutional merits of state laws alleged to violate an individual's constitutional rights in the context of private litigation is consistent with the strong indirect horizontal effect required by Article VI. They are both creatures of the misguided, case by case, threshold issue that must be resolved before a law can be subject to constitutional scrutiny, and may well result in some challenges failing to be heard without justification.

In fact, the distinction between mandatory and permissive laws that the Court employed to determine whether there was state action in *Flagg Brothers* was an invention of Chief Justice Rehnquist in that case.<sup>135</sup> The distinction had been relied on previously only for (a) decisions of a state agency or official<sup>136</sup> (i.e., not for laws) and (b) the *substantive* issue of whether a law permitting private racial discrimination violated the equal protection clause, as in *Reitman v. Mulkey* in which both majority and dissent agreed that the threshold issue of state action had been satisfied. In *Flagg Brothers* itself, Justice Stevens' dissent rejected Rehnquist's distinction

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<sup>134</sup> Assuming they otherwise have jurisdiction of the case. Recall, there must be a non-constitutional cause of action available to a plaintiff challenging a state law relied on by the defendant, although this is as true in a state as a federal court. *See infra* pp. 47-48.

<sup>135</sup> *See supra* note 99.

<sup>136</sup> For example, in support of his position, Rehnquist quoted from the Court's opinion in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which involved a due process challenge to termination of services for non-payment by a private-owned utility company. ("Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of a proposed practice *by ordering it*, does not transmute a practice initiated by the utility and approved by the commissioners into state action." *Flagg Brothers*, at 164.).

and strongly suggested the position presented in this article, citing no less an authority for it than *The Civil Rights Cases* of 1883.<sup>137</sup> According to Stevens:

The question is whether a state statute which authorizes a private individual to deprive a person of property without his consent must meet the requirements of the due process clause of the Fourteenth Amendment. The focus is not on the private deprivation but on the state authorization. “[W]hat is always vital to remember is that it is the state’s conduct, whether action or inaction, that gives rise to constitutional attack.” [citation omitted.] The state’s conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged. “Civil rights guaranteed by the Constitution cannot be impaired by the wrongful acts of individuals, *unsupported by state authority in the shape of laws*.... The wrongful act of an individual *unsupported by any such authority* is simply a private wrong. *The Civil Rights Cases* [emphases added].”<sup>138</sup>

Justice Stevens’ is not a lone voice in modern state action cases. Although no member of the Court has either identified the Supremacy Clause as the straightforward source for this position or presented the position itself in a systematic and general way as the one required by the Constitution, it has been repeatedly relied on in particular cases by both majorities and dissenters. Thus, in *Reitman*, even though the law at issue permitted but did not mandate private racial discrimination in housing and was challenged in the context of private litigation, the majority did not even acknowledge a threshold state action issue before adjudicating the constitutional merits under equal protection. Justice Harlan’s dissent from the substantive finding of unconstitutionality, however, did take the trouble of pointing out that “there is no

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<sup>137</sup> 109 U.S. 3 (1883).

<sup>138</sup> *Flagg Brothers*, *supra* note 13 at 176 (Stevens, J., dissenting).

question that the adoption of Section 26...constituted “state action” within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws.”<sup>139</sup> Similarly, whereas the majority in *Burton v. Wilmington Parking Authority*<sup>140</sup> famously analyzed the private racial discrimination of the restaurant to be attributable to the state because of its involvement as landlord, Justice Stewart’s concurrence reached the same result for the plaintiff “by a route much more direct than the one traveled by the Court.”<sup>141</sup> This was to subject to constitutional review (and invalidate) the state statute relied on by the state Supreme Court that permitted racially discriminatory refusals of service.<sup>142</sup>

Most on point and decisive of all, however, is *New York Times v. Sullivan*, more typically thought of as a seminal free speech rather than state action case. At the very beginning of his opinion for the Court, Justice Brennan briefly disposed of the state action issue relied upon by the state supreme court to insulate the trial court’s damage award from constitutional review. Just in case this issue is not obvious, recall that the case involved common law litigation between private parties in which the only “state action” was the court order against the New York Times. This, of course, places the case in the very same category as *Shelley v. Kraemer*, and as the type

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<sup>139</sup> See *Reitman*, 387 U.S., at 392 (Harlan, J., dissenting).

<sup>140</sup> 365 U.S. 715 (1961).

<sup>141</sup> *Id.*, at 726 (Stewart, J., concurring).

<sup>142</sup> *Id.* at 726-7. The state statute permitted the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers... 24 Del. Code, section 1501. Stewart J. argued that: "[There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." In dissent, Justices Frankfurter and Harlan disagreed that the Delaware state supreme court had in fact so interpreted the statute, though not with Stewart's conclusion if it had, and voted to remand the case to the state court for clarification of its interpretation.

of case *not* subject to Charter rights in Canada.<sup>143</sup> Accordingly, the state supreme court's rejection of the *New York Times*' constitutional claim on the basis that "the Fourteenth Amendment is directed against state not private action,"<sup>144</sup> might well have been thought sound. And yet, the U.S. Supreme Court swatted away this proposition as having "no application here" in a mere three sentences:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which the appellant claims to impose invalid restrictions on their constitutional freedoms of speech and the press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>145</sup>

Thus, the critical threshold proposition for which *New York Times* stands is that a state rule of law at issue in private litigation, whether common law or statute, is always an exercise of state power subject to constitutional review. As such, it clearly affirms the U.S. position on the issue, while rejecting that of Canada, Germany, and South Africa under its interim constitution.

#### *D. Application to the Leading Cases*

Although this article has struggled to transcend rather than engage the state action labyrinth, it might nonetheless be helpful to illustrate briefly how some of the leading state action cases would be analyzed under the alternative approach here prescribed, taking them in chronological order.

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<sup>143</sup> As we shall see in looking at the Canadian case of *Manning v. Hill*, *infra* 67-8.

<sup>144</sup> *New York Times*, 376 U.S., at 256

In *Shelley v. Kraemer*, the common law of (racially) restrictive covenants relied on by the plaintiffs was directly subject to constitutional review, just like the common law of defamation relied on by the plaintiff in *New York Times*. No possible distinction between the two common law rules – mandatory versus permissive, policy completely formulated by the state versus incorporation of private will<sup>146</sup> -- alters the simple fact that all laws are subject to the Constitution.<sup>147</sup>

In *Marsh v. Alabama*,<sup>148</sup> the well-known “company town” case, the issue should not have been whether a company town is to be deemed a private or a state actor, but whether the state criminal trespass law applied to Marsh, the Jehovah's Witness, was unconstitutional. The town was relying on the state law, not its own rules, to punish Marsh, so there was no need to determine whether the town had a constitutional duty as a state actor. The issue was rather whether the state violated its own constitutional duty by having a law of this sort. Similarly, in *Burton v. Wilmington Parking Authority*, under the Court’s analysis the issue was whether the restaurant’s racial discrimination should be attributable to the state because of the nexus between the two. I have already mentioned Justice Stewart’s alternative and more direct approach: subjecting the state law permitting restaurants to refuse service “based exclusively on color” to constitutional review.<sup>149</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> This distinction, offered as explaining the different outcomes of state action cases involving court orders, is suggested by Peter Quint, *supra* note 49, at 268-272.

<sup>147</sup> Like *TRIBE*, *supra* p. 44, *SUNSTEIN*, *supra* p. 35, relies on the state court order enforcing the common law of restrictive covenants and not the law itself as the “state action” triggering review on the merits.

<sup>148</sup> 326 U.S. 501 (1946).

<sup>149</sup> As pointed out at *supra* note 141, dissenting Justices Frankfurter and Harlan disagreed that the state supreme court had in fact interpreted the statute in this way.

As detailed above, *New York Times* and *Reitman* correctly and quickly disposed of their respective “state action” issues: both the common law at issue between private litigants and enacted law that is merely permissive of private decision-making are subject to constitutional review on the merits. In *Moose Lodge No. 107 v. Irvis*,<sup>150</sup> as in *Burton*, the issue for the majority was whether the private establishment's racially discriminatory policies amounted to "state action" due to the degree of nexus between it and the government agency. It held that *Irvis's* constitutional claim failed this threshold inquiry and so did not reach the merits. The alternative, one-step approach asks whether the state's liquor licensing laws unconstitutionally authorized, encouraged, or enforced private racial discrimination.<sup>151</sup> Finally, as I have discussed, in *Flagg Brothers*, it is mistaken to suggest that a law authorizing private actors to deprive persons of property without their consent is immune from constitutional review, although the proper procedural posture for challenging the state statute at issue required suing either the state directly or *Flagg Brothers* under a non-constitutional cause of action.

#### *E. Towards a Normative Defense*

The remaining task in this section is to explain in more detail why the strong version of indirect horizontal effect that I have argued is mandated by the Supremacy Clause is not only analytically but also normatively consistent with the basic principle that private individuals are not bound by the Constitution. Both in response to *Shelley* and in the Court's opinions in *Flagg*

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<sup>150</sup> 407 U.S. 163 (1972).

<sup>151</sup> This was in fact the analysis of that part of the Court's opinion striking down the liquor board's regulation requiring every club to adhere to its constitution and by-laws.

*Brothers and Lugar v. Edmonson Oil Co.*,<sup>152</sup> concerns were raised that finding state action in these situations would mean that henceforth all “purely private litigation” would be subjected to constitutional review, even where private actors seek legal enforcement of entirely voluntary transactions (contracts, wills) or private property rights (trespass laws). Indeed, this concern expresses why *Shelley* was and remains so controversial a case, and why subsequent courts and commentators have restricted *Shelley* to its facts to ensure the concern does not become a reality.<sup>153</sup> Since the position I am arguing for requires precisely what *Shelley*’s critics fear by subjecting these laws, and all others relied on in purely private litigation, to the Constitution, how do I address what I take to be the underlying normative objection that this destroys individual autonomy by constitutionalizing private choices?

Before responding directly to this challenge, let me first address a couple of points that are helpfully clarified by it. First, contrary to the majority in both *Shelley* and *Flagg Brothers*<sup>154</sup> (and also to both Tribe and Sunstein), from the perspective of review on the merits, whether a state court order does or does not constitute state action is a non-issue, not merely an easy one. The relevant (easy) issue is whether the court-made law relied on by one private actor against another is subject to the Constitution, to which the clear answer under the Supremacy Clause is “yes.”<sup>155</sup> This is not to say, however, that a state court’s enforcement of a law may not be

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<sup>152</sup> 457 U.S. 922, 935 (1982) (“The party charged with the deprivation [of a right] must be a person who may be fairly said to be a state actor. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.” Rehnquist, CJ).

<sup>153</sup> See *supra* note 78.

<sup>154</sup> “It would intolerably broaden, beyond the scope of our previous cases, the notion of state action under the Fourteenth Amendment to hold that *the mere existence* of a body of property law in a state, whether decisional or statutory, itself amounted to “state action” even though no state process or state officials were ever involved in enforcing that body of law.” *Flagg Brothers*, at 160, fn. 10 (emphasis added).

independently unconstitutional as, for example, where it only enforces racially restrictive covenants against African-Americans.

Second, unlike in Canada and the United Kingdom, the issue of horizontal effect does not peculiarly revolve around the status of the common law. In fact, the common law issue is essentially a red herring. Just as it is irrelevant for current purposes whether a plaintiff suing a *state* alleges the unconstitutionality of a common law rule or a statute, the distinction is no more relevant in “private” litigation where one individual alleges the law relied on by the other violates his or her constitutional rights. So-called “purely private litigation” is no less private if the law at issue is a statute; and no more if it is judge-made. Here, *New York Times* should have been our guide and not *Shelley*, which has been a massive distraction. As we have seen, in *New York Times*, the state action issue was barely present and the case properly focused on the substantive issue of whether the First Amendment places limits on state libel law.<sup>156</sup> Nothing in the case turned, nor should have turned, on whether the state libel law at issue happened to be statutory or common law.<sup>157</sup> *Shelley* distracted us not only by asking where is the state action when “law” is all that is necessary to trigger substantive review, but also by suggesting that the common law source of the law enforced by the court made the case particularly troubling and difficult. But nothing relevant about the case would have been any different had the restrictive covenant law at issue been statutory. Accordingly, as my thesis requires and *New York Times*

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<sup>155</sup> Once again, the language of *The Civil Rights Cases* is apposite here: “Civil rights guaranteed by the Constitution cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws....The wrongful act of an individual, unsupported by any such authority is simply a private wrong.” *See supra* note 105.

<sup>156</sup> *See supra* pp.48-49.

<sup>157</sup> In fact, as the Court noted, it was partially both. The common law of defamation was “supplemented” by an Alabama statute requiring a public officer to make a demand for retraction before he or she can sue. AL Code, title 7, section 914.

once again illustrates, neither the source of the law at issue (public or private, statute or common law) nor the identity of the parties to the litigation (private individual versus the state, or two private individuals) has any bearing on whether the Constitution applies. This brings us back to the one legitimate concern about my thesis: why is not subjecting all law and so all private litigation to the Constitution inconsistent with the principle that the latter binds only government actors? Doesn't it sacrifice individual autonomy and private choice?

The full answer has both a formal and a substantive component. Formally, subjecting all state law to the Constitution, as the Supremacy Clause does, imposes a duty only on state actors (including courts) not to make, or permit reliance on, laws that violate it. Subjecting the law at issue in private litigation to the Constitution means only that a private actor will not be able to rely on an unconstitutional law since it will be invalidated or unenforceable. To be sure, this may adversely affect private actors compared to the alternative, and can result in the legal liability of a defendant attempting to employ an unconstitutional law as a shield, which means the losing party is burdened by a constitutional right.<sup>158</sup> In most cases, however, the losing party will likely be the plaintiff seeking to rely on and enforce the unconstitutional state law, as in *New York Times* and *Shelley*, which means he or she simply fails to recover.

Moreover, even though a private actor is not able to rely on an unconstitutional law against another individual, there are still many other actions the individual may take that would be unconstitutional if performed by the government. This again points to a key difference between (a) the strong form of indirect horizontal effect and (b) direct horizontal effect, as in Ireland: the former subjects all *law* to the constitution, the latter all *action*. Thus, as Justice

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<sup>158</sup> This occurred, for example, in *Reitman*, where the successful plaintiff obtained damages and an injunction against the defendant landlord who in refusing to rent to Mulkey relied on the California constitutional amendment, Proposition 14, permitting private racial discrimination in housing, which was held to violate the equal protection clause.

Krieglger pointed out in his dissenting opinion in *DuPlessis*, as far as the *constitution* is concerned, private actors are free to engage in acts of race and sex discrimination, abridgment of free speech, and preference for religion. This is, of course, no less the case because some or all of these acts may in fact be proscribed by statutory or common law.<sup>159</sup>

The substantive part of the answer to the challenge is that the strong form of indirect horizontal effect simply reflects and expresses the American conception of an individual constitutional right. That is, it is a right not to be subjected to, harmed or burdened by a law that violates the Constitution, no matter who relies on the law to do the harming. Its protection is not limited to situations and contexts where the government seeks to rely on its own law, as in a criminal prosecution or a civil suit filed by state or federal officials. The New York Times' First Amendment freedoms are not protected only where the government is directly seeking to limit its speech but also where a private individual can achieve the same result by relying on a law permitting him or her to do so. In practice, the weak form of indirect horizontal effect as practiced in Canada does draw this distinction and limits the full protective scope of Charter rights to where the government itself relies on its laws, at least with respect to common law rules.

#### IV. A REVISED SPECTRUM ON THE SCOPE OF CONSTITUTIONAL RIGHTS

As a result of the above work, we are now in a position to clarify and revise the theoretical spectrum on the possible scope of constitutional rights. In a sense, I will be making

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<sup>159</sup> Once again, it would not be the case that, as far as the constitution is concerned, private actors are free to engage in these acts if the state had positive duties to prohibit them. See *supra* note 59.

explicit the analytical shortcomings of the existing spectrum that have formed a sub-text of the previous analysis.

As we have seen, the United States, Canadian, and German positions are each compatible with the vertical approach that constitutional rights bind only the government, and yet in each, these rights have significant impact on private actors, albeit a structurally greater impact in the United States. This obviously suggests that in itself, the vertical approach does not specify the full scope of constitutional rights into the private sphere. In other words, there is not a single vertical position but several, some of which are more "horizontal" than others.

In addition to the traditional vertical issue of who is subject to constitutional duties, there are three separate and independent issues that in combination determine the full -- direct and indirect -- scope of rights. First, which laws are subject to constitutional rights claims (public law, private law, enacted law, common law), and how (fully or partially)? Second, in which types of litigation may claims be made that a law violates constitutional rights: litigation between an individual and the state only or also litigation between private actors where at least one of them invokes or relies on such a law? Third, do the duties placed on the government by individual rights provisions include positive ones to promote constitutional values? If so, private actors may well be the objects of such constitutionally required regulation.

All permutations of these three issues are perfectly compatible with the basic vertical constraint, and yet they result in greater or lesser degrees of indirect horizontality. Accordingly, although the distinction between vertical and horizontal effect -- who is bound by the Constitution -- is a useful one in terms of anchoring and distinguishing the polar horizontal position, it does not carve out or distinguish a single opposite vertical one. The proposition that constitutional duties apply only to the state is by itself too blunt, is consistent with too many

relevantly distinct positions on the scope of constitutional rights, to be useful without more. If the vertical approach as a whole attempts to draw a line between the public and private, there are a range of different positions consistent with its basic notion, each of which draws the boundaries of the public and private spheres in subtly, but importantly, different ways.

The failure to see that these various dimensions of scope are separate and independent -- that imposing duties only on the state does not determine whether or not constitutional rights govern legal relations between private actors, and that neither dictates their role in "purely private litigation"-- is responsible for much of the characteristic vagueness and ambiguity in the literature about vertical and horizontal effect. In presenting his account, for example, Hunt tends to switch from one issue to the other, employing them virtually interchangeably as statements -- or alternative formulations -- of the differences between the two polar positions.<sup>160</sup> In fact, the various possible answers to the independent issues create several distinct positions on the vertical-horizontal spectrum between the two poles.

Specifically, there are at least four "vertical" positions and not one, each more "horizontal" than the next and corresponding to different permutations of answers to the first and second issues. These four may be termed "strong" and "weak" vertical effect, and "weak" and "strong" indirect horizontal effect.<sup>161</sup> Once again, all four are compatible with the basic notion that only government is bound by a constitution, which is why this notion is essentially useless

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<sup>160</sup> Thus, Hunt appears to restate the horizontal position to involve constitutional duties on private actors, to regulate legal relations between private actors, and to render constitutional rights relevant in "purely private litigation" all in the space of two pages without acknowledging that these are three different issues involving different degrees of horizontality. See Hunt, *supra* note 15, at 424-426.

<sup>161</sup> Phillipson uses the terms "weak" and "strong" indirect horizontal effect to distinguish the Canadian and German position from the "fourth" position suggested by Kriegler J. in *DuPlessis*, and to argue contra Hunt that the former is the better interpretation of the UK's position under the Human Rights Act. See Phillipson, *supra* note 58, at 830.

for identifying which of the variations a particular system adopts: it radically underdetermines the true scope of constitutional rights

Starting from the vertical pole of the spectrum, “strong vertical effect” means that constitutional rights apply only to public and not to private law; that is, they regulate legal relations between the state and the individual (such as criminal, administrative, and tax laws), but not legal relations between private individuals.<sup>162</sup>

Moving slightly away from this pole, “weak vertical effect” means that constitutional rights apply to (some or all) private law but can only be asserted in litigation in which one party is the state and the other is a private actor. This would permit an individual to challenge as unconstitutional a provision of private law that arises in a suit between them, for example a provision of property or employment law where the government is a landlord or employer. In such situations, constitutional rights protect only where the government itself is relying on its laws to burden the individual. This position, however, might also be interpreted to permit an individual to sue the state alleging the unconstitutionality of one of its (covered) private laws relied on by a private actor.<sup>163</sup>

Further along the spectrum toward the horizontal pole, “weak indirect horizontal effect,” as in operation in Canada and (generally in<sup>164</sup>) Germany, means that only certain types of laws are directly subject to constitutional rights -- public law in Germany, all law except common law in Canada -- with the remainder only indirectly subject to the Constitution through the power of the courts to interpret, develop, and balance this law in line with constitutional values.

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<sup>162</sup> If it is not inherently the case that public laws may only be challenged in the context of public litigation (i.e., an individual versus the state), then the polar position may be further refined to include this requirement.

<sup>163</sup> An example would be if Mrs. Brooks had sued the state of New York challenging its UCC statute relied on by Flagg Brothers.

<sup>164</sup> For the explanation of the qualification, *see supra* pp. 17-18.

Constitutional rights may, however, be asserted in litigation between private actors, unlike the two more vertical positions. Overall, this means that the individual's constitutional rights are only partially (or indirectly) protected where another private individual relies on the omitted type of law (private or common law respectively) to burden him or her.

By contrast, the fourth position of “strong indirect horizontal effect,” as I have argued is the position in the United States, means that *all* laws regardless of type or source are directly subject to the Constitution and may be challenged in private litigation. This in turn means that constitutional rights fully protect the individual whether it is the government or another individual which seeks to rely on an unconstitutional law. Superimposed on these four positions is the distinct issue of positive governmental duties, which may indirectly subject private actors to fundamental rights in a different way: not through litigation but constitutionally required governmental regulation.

Finally now all the way at the other pole, direct horizontal effect means that constitutional rights do not protect only against *laws* (and other actions of, or attributable to, the government) but subject all *actions* to constitutional review, regardless of who performs them or whether a private actor performing the action is relying on a law to do so. Of course, the fact that either all actions or all laws are subject to a constitution does not remotely mean that all actions or laws violate it. This quite separate issue depends on the substantive content of the rights granted by any given constitution. Having completed my analysis of the structural issue of scope, which is the primary focus of this Article, I now turn for its remainder to what the U.S. Constitution has to say on this substantive issue regarding laws regulating private conduct.

V. WHICH LAWS REGULATING RELATIONS BETWEEN PRIVATE ACTORS ARE UNCONSTITUTIONAL?

A. *The Basic Test*

The previous sections of this article have attempted to establish the basic structural proposition that in the United States all laws are directly, fully, and equally subject to the Constitution. This is the position I have referred to as strong indirect horizontal effect. Under the Supremacy Clause, there is no subset of laws immune from constitutional review because they fail some threshold test of state action. Laws are not subject to the Constitution because they (do or do not) amount to “state action” under the Fourteenth Amendment but because the Supremacy Clause says they are. Every state constitutional provision, statute, and common law rule is equally and fully subject to the Constitution, regardless of whether (a) it regulates public or private actors, (b) regulates relations between individuals and the state or relations between individuals, (c) mandates or permits private action, or (d) is at issue in public or private litigation. This position does not mean that constitutional duties are imposed on private actors, but because such duties govern the laws that regulate their relations, the Constitution does indirectly affect them, sometimes adversely, by placing limits on their interests, preferences, and actions that can be protected by law. If, for example, the Constitution prohibits laws making racially restrictive covenants valid contracts, then private individuals otherwise wishing to enter or enforce them are indirectly regulated by the Constitution.

That all laws are subject to constitutional review does not, of course, tell us whether any particular law passes or fails such review. It fails if and only if it conflicts with a substantive provision of the Constitution. But the previous work does mean that, at a minimum, the First

Amendment (as interpreted to apply to the states) and the Fourteenth, read in conjunction with the Supremacy Clause, mean that no state *law* shall do any of the things prohibited in these provisions. With respect to substantive review, the basic thesis I shall propose is that precisely the same constitutional tests apply to laws regulating relations between private actors that apply to any other type of law or government action. Thus, if all laws are subject to constitutional review, they are in addition subject to the very same tests of constitutional review. In applying these tests, I will focus on two paradigmatic types of private laws: laws regulating speech between private actors, and laws regulating private race and sex discrimination. In both cases, the general constitutional tests of the First and Fourteenth Amendment apply to limit what private actors can be required or permitted to do by law.

Under current doctrine, there is a similar test under both the free speech clause (and free exercise clause<sup>165</sup>) of the First Amendment and the equal protection clause of the Fourteenth. Very broadly speaking, this test distinguishes between laws that facially or intentionally burden the protected right (free speech, free exercise of religion, or racial and sexual equality) and laws that unintentionally and incidentally burden them. The former are subject to heightened judicial scrutiny, which renders them presumptively unconstitutional; the latter to lesser scrutiny and presumptive constitutionality.

The particular expressions of this general test in each of the areas are briefly as follows. Under the free speech clause, the Court distinguishes between (a) content-based speech regulations, (b) content-neutral speech regulations (“time, manner, and place regulations”), and (c) non-speech regulations with minor incidental effects on speech. The first are subject to strict scrutiny, meaning the government has the burden of proving the law necessary, in the sense of

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<sup>165</sup> “Congress shall make no law...prohibiting the free exercise [of religion].” U.S. CONST. amend. I.

the least restrictive means, to promote a compelling state interest. The second are subject to intermediate scrutiny (unless deemed content-based despite facial neutrality because the “manifest purpose of the law is to regulate speech because of the message it conveys”<sup>166</sup>), meaning the government must prove a law substantially relates to an important state interest. The third are subject only to a rational basis test, generally meaning that the law bear some rational relationship to a conceivable governmental purpose. Under equal protection, race-conscious laws are subject to strict scrutiny, and gender-conscious ones intermediate. Race and gender-neutral laws with disparate impact on a racial minority or on women are subject only to a rational basis test, unless the plaintiff can prove discriminatory intent on the part of the government.

I now aim to dispel the notion, deriving from confusion attributable to the state action doctrine, that certain distinctions are relevant to the constitutional test to which they are subject. First, at least with respect to equal protection, whether a law regulates public or private actors is irrelevant to the substance of the constitutional review that applies to it.<sup>167</sup> (This is what it means for private laws to be equally and fully subject to the Constitution, unlike the situation in Canada and Germany where this is not always so.) Thus, in the cases of *Plessy v. Ferguson*<sup>168</sup> and *Brown v. Board of Education*,<sup>169</sup> no one to the best of my knowledge has ever suggested that different constitutional tests apply because in the first, the state was regulating the conduct of *private* actors (requiring private railroads to practice racial segregation) and in the second, it was

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<sup>166</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, (1994).

<sup>167</sup> It is relevant under the First Amendment whether the government is regulating its own speech (and in the case of the federal government that of non-federal government actors), or that of private actors.

<sup>168</sup> 163 U.S. 537 (1896).

<sup>169</sup> 347 U.S. 483 (1954).

regulating *public* actors (requiring public elementary schools to segregate).<sup>170</sup> Both are clearly subject to the same constitutional test under the equal protection clause, and both would equally clearly fail it.

Second, the same constitutional test applies whether the law in question is mandatory or permissive. As we have seen, this issue is standardly taken to be important, even conclusive, with respect to the (false) threshold issue of state action.<sup>171</sup> I have argued above that this distinction should play no role whatsoever in whether a law is subject to constitutional review on the merits in the first place, since both are clearly laws of the state. It is equally irrelevant, however, with respect to the substantive standard to be applied: both mandatory and permissive laws are subject to the same constitutional test, and both may violate it. Thus, a state law expressly *permitting* racial segregation in public schools is undoubtedly unconstitutional under the Equal Protection Clause just as the state law *requiring* such segregation invalidated in *Brown*. And just as the overruled decision in *Plessy* concerned a state law requiring racial segregation by private railroad corporations, a state law expressly permitting private railroads to segregate on the basis of race would undoubtedly also be unconstitutional. In all four cases (public and private actors, mandatory and permissive laws), the laws are subject to the same constitutional test: they are race-conscious and are therefore subject to strict scrutiny. By contrast, a law that on its face is race-neutral but has the effect of creating or promoting racial segregation will be subject to strict scrutiny only if such result was the intention of the law,

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<sup>170</sup> This distinction between regulating public and private actors does not track that between “social” and “political” equality employed by the Court to justify its decision in *Plessy*, even if (as seems highly unlikely) this latter distinction survives as constitutionally relevant.

<sup>171</sup> This view was expressed by Rehnquist CJ’s claim in *Flagg Brothers*, *supra* note 13, at 164, that laws merely acquiescing in private conduct do not constitute state action. *See also supra* p. 45-46.

regardless of whether the law is mandatory or permissive, or applies to public or private actors.<sup>172</sup>

This is emphatically not to say, however, that the *application* of this same test will necessarily result in identical outcomes for mandatory and permissive laws. Indeed, as I will argue, some of the hardest substantive questions in all of constitutional law concern the extent to which state laws may permit private actors to do what the government itself clearly cannot. By contrast, mandatory or coercive laws of this sort generally represent easy constitutional questions.

In the next subsection, I will explain how the single test of free speech and equal protection applies to a series of concrete cases and hypotheticals raising the issue of the indirect impact of constitutional norms on private actors. In the final section of this part, I shall explain how this impact under existing case law could be vastly expanded by a much debated change in the interpretation of the relevant constitutional provisions.

#### *B. The Impact of Specific Constitutional Rights on Private Actors*

Let us see how the basic test applies under current doctrine to some of the thorniest cases and hypotheticals involving laws regulating private actors, and whether their resolution in the United States under the strong form of indirect horizontal effect differs in particular from that in countries, such as Canada and Germany, adopting the weaker form. This comparison will also suggest whether the structural issue of the general scope of constitutional norms, or the substantive issue of their content, appears to make the greater difference to the outcomes in practice.

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<sup>172</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

## 1. *Free Speech*

First, the issue of defamation, which has been a leading vehicle for courts to address the issue of indirect horizontal effect not only in the United States but also in Germany, Canada, and South Africa. In *New York Times v. Sullivan*, the direct application of the Constitution to the common law at issue in private litigation meant that the state libel law was a content regulation of protected speech and thus subject to strict scrutiny, although the Court did not explicitly apply this now standard test.<sup>173</sup> With respect to public officials like Sullivan, albeit suing in his private capacity, in effect the compelling governmental interest was limited to protecting their reputation only against actual malice; with respect to other individuals, the interest is greater and traditional defamation laws are deemed “necessary.”<sup>174</sup> Accordingly, although public officials are not bound by the Constitution in their private capacity, the Constitution significantly constrains the legal protection their reputations can be given.

In the Canadian case of *Church of Scientology of Toronto v. Hill*,<sup>175</sup> decided in 1995, the relevant facts were identical to those in *New York Times*. A public official brought suit in his private capacity under the common law of defamation against those he alleged to have libeled him concerning actions performed in the course of his employment.<sup>176</sup> Affirming, and refining,

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<sup>173</sup> The Court implicitly balanced the competing claims in crafting the constitutional rule of actual malice (“injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision.” *New York Times*, at 272-3).

<sup>174</sup> In subsequent cases, the actual malice test was extended to all public figures, not necessarily public officials. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>175</sup> [1995] 2 S.C.R. 1130. *See supra* notes 46-49 on indirect horizontal effect.

<sup>176</sup> The fuller facts were that the plaintiff, a Crown attorney, sued the defendants for statements contained in a press conference on the steps of Osgoode Hall, Toronto made in connection with the defendant’s commencement of

the distinction set out in *Dolphin Delivery*,<sup>177</sup> the Court held that although Charter rights did not directly apply to the common law at issue in private litigation, nonetheless the common law must be interpreted and developed consistently with Charter values as part of the inherent jurisdiction of the courts to modify or extend the common law in line with evolving social norms.

The result of this indirect application, however, was that the existing common law of defamation was held to comply with Charter values as it struck an appropriate balance between the competing values of reputation and freedom of expression. After lengthy consideration of varying critiques of the rule in *New York Times*, including Justice Byron White's subsequently stated view that it created perverse incentives for "polluting" public affairs with false information and undervaluing reputation,<sup>178</sup> the Court concluded that its actual malice test, as sought by the defendants, should not be adopted. The Court left little doubt, however, that its rejection of *New York Times* had nothing to do with the lesser impact of the Charter on the common law than on statute or executive action. It would equally have rejected the actual malice test under the direct application of Charter rights, for "the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States."<sup>179</sup>

In the two leading German libel cases of *Mephisto* and *Böll*, the plaintiffs were both public figures though not public officials (who in the United States would fall within the

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criminal contempt proceedings against the plaintiff, alleging that he had misled a judge and breached orders sealing documents. At the contempt proceedings, the allegations against the plaintiff were found to be untrue and without foundation.

<sup>177</sup> See *supra* pp. 18-20.

<sup>178</sup> Quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767-69 (1985) (White, J., dissenting).

<sup>179</sup> Hill, *supra* note 108, at 1155 (quoting Australian High Court).

subsequent extension of *New York Times*<sup>180</sup>): the estate of Nazi-era actor, Gustaf Grundgens and the Nobel Prize-winning novelist Heinrich Böll. In both cases, the Constitutional Court held that the “influence” of the Basic Law’s objective order of values on private law required the competing values of (a) reputation/personality, protected under both the Civil Code and under Article 2 of the Basic Law,<sup>181</sup> and (b) freedom of expression, protected under Article 5, to be balanced against each other and did so in favor of the former. Once again, as in Canada, there is nothing to suggest that this rejection of the free speech claim was the result of the distinction between direct and indirect applicability of constitutional rights; rather it was the result of differences between the content of these rights. In both countries, the right of reputation or personality is afforded greater weight in the balance with free speech than is the case in the United States.<sup>182</sup> In more recent cases, the German Constitutional Court has somewhat recalibrated the relative weights of free expression and reputation in favor of the former, but still not to the extent required for acceptance of the actual malice rule.<sup>183</sup>

*DuPlessis* also involved a common law defamation suit, by a private actor against a newspaper. As we have seen, the South African Constitutional Court used this case as a vehicle

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<sup>180</sup> See *supra* note 133.

<sup>181</sup> “Everyone has the right to the free development of his or her personality insofar as he or she does not violate the rights of others or offend against the constitutional order or the moral law.” BASIC LAW, art. 2, section 1.

<sup>182</sup> Indeed, although it need not have done this, as it found Article 5 not to protect misquotations by the press at all, the German Court in *Böll* strongly suggested that the author’s constitutional right to personality was violated by the defendant commentator, a suggestion that appears to place constitutional duties on private actors and so come closer to direct horizontal effect than the *Lüth* formula. See *supra* pp. 16-18.

Although formally the courts in both Canada and Germany ascribed constitutional status to the competing privacy/reputational claims of the plaintiffs, whereas in the U.S. this claim would merely be a state interest to be asserted against the individual’s constitutional right to free speech, in itself this difference does not account for the different outcomes. In the U.S., the same status attaches to the two claims in the context of a libel action brought by a non-public figure and here the Court would permit state libel law to trump the free speech claim of the defendant.

to determine the issue of the vertical/horizontal scope of the bill of rights contained in the interim Constitution of 1994, opting for a similar answer as Canada. The Court held the rights did not directly apply to common law involved in private litigation but affirmed the duty of the other courts to develop the common law consistently with the bill of rights. However, it held that "the application and development of the common law" was not a matter within its jurisdiction under Section 98, but that of the ordinary courts, so that it did not apply the indirect approach to the facts of the case.<sup>184</sup>

A second category of cases involves the extent to which laws protecting private actors from economic loss caused by organized campaigns against them (such as boycotts and picketing) are limited by the constitutional free speech rights of those campaigning. In *Claiborne Hardware*,<sup>185</sup> the state conspiracy law under which the plaintiff sued and was awarded damages for economic loss caused by the boycott of segregated shops organized by the NAACP was held to violate the First Amendment. The Supreme Court held that the boycott was not essentially economic in nature but protected political expression, which accordingly limits the ability of states to impose civil liability.<sup>186</sup> Again, while not directly subjecting the shop owners, but the state law, to the First Amendment, the latter clearly affected them in a very tangible way, making it difficult -- if not impossible -- to obtain legal protection of their economic interests.

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<sup>183</sup> See the Stern-Strauss Interview Case, 82 BVerfGE 272 (1990) and the two Soldiers Are Murderers Cases, 45 NJW 2943 (1994) and 22 EuGRZ 443 (1995), in which the Court upheld free speech claims against private law defamation and criminal defamation claims respectively. See Eberle, *supra* note 15, at 209-220.

<sup>184</sup> *DuPlessis*, *supra* note 52, at 876.

<sup>185</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1992).

<sup>186</sup> *But cf.* *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982) (secondary boycotts not protected, even if based on political rather than economic grounds).

In Germany, once the *Lüth* court adopted the seminal threshold concept of the objective order of values whereby fundamental rights “influence” private law,<sup>187</sup> its analysis was essentially similar. Lüth’s free speech rights were held to outweigh Harlan’s purely economic interests protected by the private law.<sup>188</sup> The Court did not suggest, as it was later to do in both *Mephisto* and *Böll*, that the interests protected by private law might not only be of constitutional status themselves but also impaired by the defendant’s exercise of free speech rights. By contrast with *Lüth*, in *Blinkfüer*, the Court held a boycott organized by the powerful Springer newspaper group against news dealers selling a small, left-wing magazine that published East German television schedules, to be coercive in nature and thus outside the protection of Article 5.<sup>189</sup> Indeed, the Court held that the state had a positive duty to protect the magazine’s freedom of the press against such coercion requiring the lower court to award damages. It even suggested that Springer had violated the magazine’s constitutional rights and that the courts must recognize a constitutional cause of action against such violation. Once again, these latter two points take us from indirect to direct horizontal effect.<sup>190</sup>

In the slightly different context of secondary picketing in the Canadian case of *Dolphin Delivery*,<sup>191</sup> the defendant union argued (analogously to the NAACP and Lüth) that the plaintiff corporation’s reliance on the common law of inducing breach of contract violated its Charter guarantee of free expression. As we have seen, the Court determined that this Charter right does not apply to common law private litigation and dismissed the appeal against the lower court’s

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<sup>187</sup> See *supra* pp. 14-18.

<sup>188</sup> See *supra* p. 16.

<sup>189</sup> 25 BverfGE 256 (1969).

<sup>190</sup> See *supra* note 42.

injunction. It did not bother to apply the indirect analysis as to whether this common law tort was consistent with Charter values, having already stated in dicta that even if the Charter applied directly to the case, the limitation of free speech rights would have been justified under s.1 of the Charter.<sup>192</sup> As with *Hill*, this again suggests there is likely to be little real difference in outcome under the two modes of analysis.

A third important type of free speech case involves the firing of employees for political views or for actions expressing those views. Such a hypothetical appears to raise a paradigmatic instance of vertical versus horizontal effect: is an employer bound by the constitutional free speech rights of its employees? The conventional answer for all countries rejecting direct horizontal effect is in the negative. Free speech rights are held against the government and impose no constitutional duties on private employers. And yet, the doctrine of indirect horizontal effect is relevant wherever an employer relies on law to exercise a right to fire, which is to say practically always. Such private law may be either directly governed or indirectly influenced by the Constitution. In Germany, where subjection is indirect under the *Lüth* doctrine, the Federal Labor Court held in a situation where a printing employee was fired for refusing to print material which, in his view, glorified war that the constitutional values of freedom of speech and conscience must have some influence on the private law value of employer autonomy, required the two to be balanced and decided the balance in favor of the employee.<sup>193</sup> To be sure, the private law of employment was not employment at will, as

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<sup>191</sup> See *supra* p. 19-22.

<sup>192</sup> “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS, section 1.

<sup>193</sup> See *supra* p. 17.

generally in the U.S., but termination for cause.<sup>194</sup> In this legal context, the Court held that acts of conscience could not form the basis of a "socially justified" cause of dismissal and that private employment law must be so understood.

By contrast, in the United States, the relevant employment law relied on by an employer is directly and fully subject to the Constitution, assuming a plaintiff employee sues under an available non-constitutional cause of action, such as breach of contract.<sup>195</sup> Most likely this employment law will be the typical common law or statutory rule of employment at will. The basic analysis under the Court's First Amendment jurisprudence is that, unlike state libel and conspiracy laws, employment at will is a non-speech regulation with only incidental burdens on freedom of expression. Although the law authorizes the firing of an employee for any reason, including political views or positions, it is not targeted at speech.

On the other hand, a state law that explicitly permitted an employer to fire an employee for political views, or for holding or voicing certain political views, would be analyzed differently, as a law targeting speech and would almost certainly be unconstitutional. This would be equally true in the context of a law permitting firing only for cause, where political views were specified as one of the causes. Imagine a cold-war era law stating that employers can fire anyone expressing sympathy for Communism. Thus, two laws (one speech neutral and the other non-neutral) both permitting employers to fire for political views may have different outcomes.<sup>196</sup> The constitutional value of free speech in the United States is expressed by not

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<sup>194</sup> The Unfair Dismissal Protection Act, 1969. *See supra* note 37.

<sup>195</sup> Of course, in practice, given the likely outcome of the substantive review described in the next sentence, such a plaintiff is unlikely to have the incentive to be forthcoming, but this does not affect the analysis.

<sup>196</sup> This is an example of the general feature of constitutional rights as rights against specific governmental rules and not general immunities to act. *See* Matthew D. Adler, *Rights against Rules: the Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

permitting laws relied on in private litigation, including employment laws, to target it; in Germany the value is protected also against laws imposing incidental burdens. This difference is one in the content of free speech, not in horizontal effect or the scope of constitutional norms. Were the Court to expand the substantive scope of free speech in the United States, to protect against incidental burdens imposed by general laws, this would directly impact employment law and the permissible grounds on which employers could exercise the right to fire.

In sum, the constitutional right to free speech in the United States has a greater regulative impact on private actors in the realms of defamation and boycotts than it does in Germany or Canada. This is not, however, primarily because of the difference between direct and indirect application of this constitutional right to private law, but because greater weight is given in the United States to the substantive right in the balance with competing interests. In the realm of employment law, by contrast, free speech rights in the United States have lesser impact on private actors than in Germany, despite strong indirect horizontal effect. Again, this is due to the substantive difference that in Germany, but not in the United States, these rights are deemed to be implicated when general laws incidentally burden them.<sup>197</sup>

## 2. *Equal Protection*

Turning from the First Amendment to the equal protection clause, one famously problematic area is racial discrimination in the context of private choices that are enforceable by

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<sup>197</sup> The same difference exists between the two countries in the area of free exercise of religion, following the U.S. Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The German Constitutional Court has held in several cases that under Article 4(2) of the Basic Law ("The undisturbed practice of religion is guaranteed"), religious individuals and institutions are entitled to special exemptions from generally applicable laws burdening religious freedom and not only from laws targeting it. See e.g., *Rumpelkammer*, 24 BVerfGE 236 (1968) (Catholic youth organization entitled to exemption from "unethical competition" law); *Blood Transfusion case*, 32 BVerfGE 98 (1971) (conviction set aside of husband who on religious grounds had refused to urge his dying wife to submit to a blood transfusion).

law, such as contracts, testamentary dispositions, and the exercise of property rights. Once again, this appears to involve a paradigmatic instance of vertical effect: private individuals have no constitutional duty to refrain from racial discrimination in choosing what contracts to enter into and with whom, or in disposing of their property, or against whom to assert and exercise property rights. And once again, this point, though certainly true, does not address the separate question of the extent to which the Constitution impacts private actors by regulating the laws on which they may rely in these areas. This is, of course, the easy question: all such laws, like any other, are subject to the Constitution. The more difficult one is which laws violate it.

As a very general proposition of constitutional law under current doctrine, a state may through its laws permit private actors to do what it itself clearly cannot. This is because of the interaction of the state action doctrine and a second traditional axiom of American constitutional law: in the area of individual rights, the constitutional duties exclusively placed on government actors are negative and not positive.<sup>198</sup> Thus, as is well-known, the Constitution has been held to neither itself protect individuals from deprivation of life, liberty, or property by other individuals (state action doctrine),<sup>199</sup> nor require the state to do so (no positive duties). If the state's only constitutional duty is the negative one of not itself depriving individuals of their constitutional rights, laws protecting against murder by non-state actors are, formally speaking, discretionary. Moreover, if the state has no constitutional duty to prohibit murder or private "takings" or

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<sup>198</sup> See *DeShaney v. Winnebago County Dep't. of Social Services*, 489 U.S. 189, 192 (1989) ("Our Constitution is a charter of negative liberties"). See also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). But cf. Karst & Horowitz, *supra* note 8 (arguing that Court has implicitly acknowledged equal protection clause imposes affirmative duty to prohibit private racial discrimination in areas such as voting and urban housing). See also David Sklansky, *Quasi-Positive Duties in Constitutional Criminal Procedure*, 47 MISS. L. REV. 295 (2002).

Outside the area of individual rights, however, this is clearly not true. The Constitution imposes positive duties on Congress to "assemble at least once in every Year" (U.S. CONST. art. I, sec. 4, cl. 2), and on the President to "from time to time give to the Congress Information of the State of the Union...[and] take Care that the Laws be faithfully executed (U.S. CONST. Art. III. Sec. 3).

deprivations of property, it also has no constitutional duty not to permit them and accordingly may do so.<sup>200</sup> Thus, for example, it would seem that other things being equal, a state may permit private individuals to deprive another person of property without due process of law (this is the substantive question the Court avoided answering in *Flagg Brothers* because of its state action holding). As I have discussed above, the existence of positive rights is a second way in which constitutional rights may have indirect effect on private actors that is perfectly consistent with the basic vertical position.<sup>201</sup>

Although, then, as a general proposition under current constitutional interpretations, states may permit private actors to do what they themselves cannot, this does not mean that all forms of such permission are constitutionally permissible. Returning specifically to the issue of racially discriminatory private choices, the Court's current equal protection doctrine (analogously to its free speech case law) makes the constitutionality of any law permitting or enforcing such choices turn on whether on its face it is (a) race-conscious or (b) race-neutral with effects on racial minorities that cannot be said to be intentional.<sup>202</sup> Since ordinary contract, testamentary, and property laws – whether statutory or common law -- are typically race-neutral on their face and are not consciously designed or intended to have any disproportionately burdensome effect that they might have in fact on racial minorities as a result of private discrimination, they will normally pass constitutional muster and do not amount to a violation by

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<sup>199</sup> *DeShaney, id.*

<sup>200</sup> Of course, under the case or controversy requirement, Supreme Court precedent for such propositions is typically lacking because of the almost complete absence of laws of this sort in practice. Although not *only* under the case or controversy requirement of U.S.-style “concrete” judicial review. Even the leading alternative form of judicial review, namely “abstract” judicial review (in which enactments are challengeable only by certain specified political actors), still only assesses the constitutionality of laws actually enacted. On the difference between “abstract” and “concrete” judicial review, *see, e.g.*, Gardbaum, *supra* n.2, at 717-8; MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1979).

<sup>201</sup> See *supra* note 9.

the government of the equal protection clause. Although such laws therefore permit private actors to employ the coercive power of the state to execute their racial discriminatory choices, the reason they survive constitutional review is neither because such court orders or permissive laws do not amount to “state action” in the first place (it is the law itself, and any law, that triggers the Constitution) nor because on the merits permissive private laws automatically pass constitutional muster. A law *expressly* permitting private actors to practice racial discrimination in contracts, wills, or the assertion of property rights would likely be unconstitutional as violating the current majority’s color-blind norm.<sup>203</sup> And any law mandating rather than permitting private racial discrimination in these areas would necessarily be race-conscious, as in *Plessy*.

Although typical race-neutral private laws will generally be upheld under current doctrine, I want to suggest that the distinction between facial and as-applied constitutional challenges, though generally unfamiliar in the equal protection context,<sup>204</sup> is highly relevant here. Some facially race-neutral laws will have unconstitutional applications in particular circumstances because enforcement of that law in a specific context inherently involves the state in impermissible race-conscious conduct. Thus, a general common law rule making all validly entered contracts legally enforceable is likely to be constitutionally unproblematic notwithstanding racially disparate impact. However, where this general rule is applied in the specific context of racially restrictive covenants, the relevant issue is not disparate effects of this

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<sup>202</sup> The critical nature of this distinction dates from *Washington v Davis*, *supra* note 129, decided in 1976.

<sup>203</sup> In *Evans v. Newton*, 382 U.S. 296 (1966), a subsequently repealed state statute expressly permitting testators to include racial restrictions in their wills was one factor in the Court's holding that a city could not continue to operate a park on a racially discriminatory basis, left to it under such a will. The Court suggested that such a statute would be unconstitutional.

<sup>204</sup> See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998), at N. 144 (“As-applied challenges virtually never arise under the Equal Protection Clause. For the exception that proves the rule, see *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)”). In *Cleburne*, the Court held unconstitutional the application of a city ordinance requiring a special use permit for the

law but that such application necessarily requires an enforcing court to engage in race-conscious conduct insofar as one of the facts the plaintiff must prove is the race of the willing purchaser. This point is also quite distinct from independent, racially discriminatory enforcement of the law by a court, such as only enforcing such covenants against a single racial group or never enforcing other types of covenants. It is the very point of the underlying law that contracts are enforceable in a court, and yet some particular applications of this facially race-neutral law require race-conscious conduct by a court. Such applications are presumptively unconstitutional as violating the current Court's color-blind norm. This principle would also be relevant to certain specific applications of race-neutral state testamentary law but not others: for example, court enforcement of a will leaving property to "my white children," where the testator had children with white and Native American wives.<sup>205</sup> By contrast, where (facially race-neutral) property law is applied in the context of a homeowner seeking to eject someone on racially discriminatory grounds, an enforcing court is not inherently required to determine or take into account the race of the ejected person, which is not part of the reason for its order.

Application of this analysis to *Shelley* confirms the difficulty of the substantive, equal protection issue in the case. As discussed above, the state law invoked by the plaintiff is directly subject to the Constitution in the first place, in addition to any other, additional government action here, such as arguably the state court order. Under current doctrine, at least as standardly conceived, the constitutionality of the state law would likely depend on how it is characterized.

If the law invoked by the plaintiff is that all validly entered contracts, or restrictive covenants,

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construction of hospitals for, inter alia, the feeble-minded to a home for the mentally retarded without deciding its facial invalidity.

<sup>205</sup> But not enforcement of all wills with a racial element. Thus, in *Evans v. Abner*, 396 U.S. (1970), the follow-up case to *Evans v. Newton*, supra note 210, the Supreme Court upheld the state court's determination that under the relevant (race-neutral) state law, the trust should be deemed to have failed and the city park revert to the testator's

will be enforced, this would be a facially race-neutral law which, notwithstanding any disparate racial impact, would not attract strict scrutiny unless discriminatory intent or discriminatory application were shown. If, on the other hand, the law is that racially restrictive covenants are enforceable contracts as an exception to the general public policy rule favoring free alienability of land, then no less than the “equal impact” anti-miscegenation statute struck down in *Loving v. Virginia*,<sup>206</sup> this is a race-conscious law making strict scrutiny the appropriate substantive standard. As several have suggested, there is strong evidence that this was the case in *Shelley*.<sup>207</sup> Moreover, *Shelley* itself predated the rigid modern rule for race-neutral laws and, as in *Reitman* to be discussed in the next section, the Court may well have been influenced by the obvious disparate effects of the law.

Even under the race-neutral version of the law and the modern test, however as I suggested above, application of the general law to the specific context of racially restrictive covenants involves inherently race-conscious conduct on the part of the state in a way that, for example, enforcing trespass laws on behalf of a racially prejudiced landowner does not. Wouldn't the Equal Protection Clause forbid a state from enforcing slave contracts under its general rules of offer, acceptance, and consideration absent the Thirteenth Amendment? Of course, apart from the underlying law itself, a state court order might be independently unconstitutional if it in fact enforces the law in a blatantly discriminatory way, such as never enforcing other types of restrictive covenants or racial covenants against certain groups.

In sum, although generally speaking a state may permit private actors to do what it cannot, any particular permissive law is still subject to the same constitutional test as all other

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heirs rather than order it racial integration. Absent proof of independent racial animus by the court, application of the state law in this context did not inherently require race-conscious conduct on its part.

<sup>206</sup> 388 U.S. 1 (1967).

laws and may fail it. Thus, implied or "residual" permission resulting from the absence of any law prohibiting an action, as well as express permission to act cast in race-neutral terms, will typically pass constitutional muster at present; race-conscious permissive laws will not.<sup>208</sup>

In between laws permitting and mandating private racial discrimination are those that may be said to encourage or endorse it. Do such laws violate equal protection? Of course, once again, the non-issue here is whether such laws are subject to the Constitution in the first place, as was explicitly recognized by all members of the divided Court in *Reitman v. Mulkey*.<sup>209</sup> On the substantive issue of constitutionality, Justice Harlan's dissent in *Reitman* answered the question in the negative by relying in effect on a permission/coercion dichotomy for equal protection purposes: "a state enactment, particularly one that is simply permissive of private decision-making rather than coercive..., should not be struck down by the judiciary under the equal protection clause without persuasive evidence of an invidious purpose or effect."<sup>210</sup> By contrast, the majority applied a stricter test invalidating laws that fall between permission and coercion. According to the majority, it may be one thing for a state not to prohibit private discrimination in the first place, but it is quite another for a state to repeal by constitutional amendment its existing laws outlawing such discrimination.<sup>211</sup> In so doing, the state was not merely taking a neutral

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<sup>207</sup> See, e.g., Tribe, *supra* note 114, at 260 (quoted *infra* at page 45).

<sup>208</sup> Obviously there is a great deal more that could be said on the merits of these difficult substantive issues. My aim here is simply to describe the likely outcomes applying existing doctrine. Since few of these types of cases have been considered in recent years, it is of course quite possible that the application of current doctrine will result in different outcomes than those I suggest. It is also possible that current doctrine might be changed in order to answer them.

<sup>209</sup> See *supra* p. 29.

<sup>210</sup> *Reitman*, at 391 (Harlan, J., dissenting). Note that Harlan expressly disagrees with Rehnquist's view in *Flagg Brothers* that such permissive laws do not amount to "state action."

<sup>211</sup> For Justice Harlan, this was a distinction without a difference: repeal by constitutional amendment no more violated equal protection than a failure to pass any antidiscrimination laws in the first place. If a state is not

position on the issue but in context was actively encouraging and authorizing a culture of private racial discrimination; in short, the state was itself discriminating.<sup>212</sup>

As the reasons for the split on the Court indicate, the substantive constitutional question (unlike any threshold issue) in *Reitman* was a difficult and close one. It has not specifically been addressed or reconsidered since then, although the disagreement in *Reitman* can perhaps be considered duplicated in the different context of the establishment clause of the First Amendment.<sup>213</sup> Thus, several members of the Court subscribe to the position that the states are prohibited from “endorsing” religion, which involves something more than taking a neutral permissive posture but less than a coercive one, such as holding religious prayers at public school graduations.<sup>214</sup> Other justices adhere to the permission/coercion dichotomy and consider only the latter proscribed.<sup>215</sup>

Although the specific issue of the constitutionality of laws “encouraging” private racial discrimination has not been addressed since *Reitman*, the Court’s general post-*Reitman* equal protection clause jurisprudence has nonetheless clarified, and perhaps even resolved, the issue as a matter of doctrine, albeit by implication. The California constitutional amendment at issue was

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constitutionally required to outlaw private discrimination in the first place, it may equally repeal any of its laws that do. *Id.* at 394 (Harlan, J., dissenting).

<sup>212</sup> As Karst & Horowitz point out, *supra* note 8, the majority opinion was particularly incoherent in setting out its reasoning in support of this proposition, attempting to defer to a non-existent state supreme court finding. The authors argue that the unstated reasoning of the Court was less that the state violated its negative duty not to discriminate but its positive duty to prevent racial discrimination in urban housing.

<sup>213</sup> “Congress shall make no law respecting an establishment of religion,…” U.S. CONST. amend. I.

<sup>214</sup> Justice O’Connor is the most prominent. Her test is whether a reasonable observer would view the challenged act as an official endorsement of a religion or religion in general. *See Allegheny County v. ACLU*, 492 U.S. 573 (1989) (O’Connor, J., concurring).

<sup>215</sup> Thus, for example, Justices Kennedy and Scalia both adhered to the “coercion” standard in *Lee v. Weisman*, 505 U.S. 577 (1992), although they disagreed on whether that standard had been violated on the facts of the case.

on its face racially neutral,<sup>216</sup> so that it would now be subject only to rational basis scrutiny unless the plaintiff, Mulkey, could prove its disproportionate impact on racial minorities was intentional.<sup>217</sup> As is well-known, the Court has provided several guidelines for discharging this burden of proof so that (a) discriminatory intent need only be a motivating factor, not the sole, or even primary, one;<sup>218</sup> (b) even if the plaintiff meets this burden, strict scrutiny will still not apply if the defendant can show the law would have been enacted even without the discriminatory motive;<sup>219</sup> and (c) the law must have been enacted not merely “in spite of” but “because of” its discriminatory effect.<sup>220</sup> As a matter of doctrine, this test would likely replace the Court’s search for active state “encouragement” of private racial discrimination, although it is less clear which way this would cut in terms of outcome. On the other hand, had the constitutional amendment *explicitly*, rather than only tacitly, permitted private racial discrimination in housing, the Court’s actual analysis in *Reitman* would probably have remained unchanged, since it ignored the fig leaf of neutral language and focused squarely and candidly on what lay underneath: may a state endorse or encourage private racial discrimination? Today, the race-conscious version would immediately and without further ado trigger strict scrutiny.

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<sup>216</sup> See *supra* note 66.

<sup>217</sup> In *Reitman*, the Court did not discuss the law within the race-specific/race-neutral paradigm established two years later in *Washington v. Davis*, but disagreed whether the amendment could be said to amount to prohibited state encouragement of private racial discrimination. In his dissent, Justice Harlan stated the test he applied as follows: “A state enactment, particularly one that is simply permissive of private decision-making rather than coercive..., should not be struck down...under the equal protection clause without evidence of an invidious purpose or effect.” (emphasis added). *Reitman*, at 391 (Harlan, J., dissenting). As so stated, this test is easier to satisfy than the one in *Davis* because it makes proof of discriminatory *effect* sufficient to invalidate, although there did appear to strong evidence of such an effect. In fact, Harlan appeared to require more active involvement of the state in specific acts of discrimination for it to amount to encouragement.

<sup>218</sup> *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

<sup>219</sup> *Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274 (1977).

<sup>220</sup> *Personnel Adm. of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

A second key topic under equal protection analysis is private sex discrimination, which once again illustrates the basic thesis of this article that the constitutional duties imposed exclusively on government may have substantial impact on private actors in all the ways previously discussed. First, there can be no doubt that traditional common law rules (no less than statutes) discriminating on the basis of sex are both directly subject to the Constitution and presumptively violate it.<sup>221</sup> Second, this is so where such state laws are relied on in private litigation as well as public.<sup>222</sup> Thus, many of the Court's pioneering cases in the field resulted in its striking down state laws at issue in the most "private" of litigation possible, that between family members. Important examples include *Reed v. Reed*,<sup>223</sup> *Orr v. Orr*,<sup>224</sup> and *Stanton v. Stanton*.<sup>225</sup> Third, the types of laws invalidated as unconstitutional sex discrimination include both private laws, such as laws concerning the disposition of property,<sup>226</sup> and public laws, such as laws setting the levels of social security benefits from the state.<sup>227</sup> Fourth, laws concerning, regulating, or permitting sex discrimination by private actors are subject to the Constitution, and

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<sup>221</sup> Thus, for example, the traditional common law rule giving a husband absolute control of his wife's property would undoubtedly be unconstitutional if still in existence. See *Kirchberg v. Feenstra*, *infra* note 172, in which the Supreme Court invalidated a statutory version of this traditional rule.

<sup>222</sup> As we have seen, in Canada, only statutes and not common law at issue in private litigation are directly subject to the Constitution.

<sup>223</sup> 404 U.S. 71 (1971) (striking down state law giving men preference as administrators of estates).

<sup>224</sup> 440 U.S. 268 (1979) (striking down state law authorizing alimony awards to wives but not husbands).

<sup>225</sup> 421 U.S. 7 (1975) (striking down statute providing that females reached majority at 18 and males at 21). *Craig v. Boren*, Governor of Oklahoma, 429 U.S. 190 (1976), is an example of public litigation in this area, an individual suing the state.

<sup>226</sup> See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating Louisiana law giving every husband as "head and master of the household" unilateral power to dispose of property jointly owned with his wife).

<sup>227</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating provision of the Social Security Act awarding federal survivor's benefits to widows, but not widowers, responsible for dependent children).

by the very same tests, as those constituting or expressing discrimination by the government itself.

As with racial discrimination, the Court's current doctrine distinguishes between facially gender-conscious laws, subject to intermediate scrutiny, and gender-blind laws with disparate impact on women, subject to rational basis review unless the plaintiff can prove discriminatory intent. Accordingly, heightened scrutiny attaches to any law either requiring or expressly permitting sex discrimination, whether by government or private actors. By contrast, laws impliedly permitting private sex discrimination will, assuming they are otherwise written in gender-neutral language, be subject to rational basis absent proof of discriminatory intent. Thus, for example, the California constitutional amendment at issue in *Reitman* equally permitted property owners to refuse to sell or rent to women.<sup>228</sup> A woman suing the owner in place of Reginald Mulkey would now have to prove the amendment was enacted "because of" and not merely "in spite of" this consequence, as Brenda Feeney failed to do in challenging the veterans' preference law that cost her the promotion she had so clearly earned on the merits.<sup>229</sup>

Turning briefly to comparative materials, sex rather than race discrimination has been the central issue in the evolution of constitutional equality in both Canada and Germany. Under Section 15 of the Charter,<sup>230</sup> the general equality provision, the Canadian Supreme Court has clearly adopted the position that where a law is discriminatory either on its face or in its effect, it will be invalid; there is no requirement of discriminatory intent. Section 15 is thus understood to

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<sup>228</sup> See *supra* note 88.

<sup>229</sup> *Feeney*, *supra* note 176.

<sup>230</sup> "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

prohibit not only "direct discrimination," but what is known as "indirect" or "systemic discrimination." As Peter Hogg explains:

Systemic discrimination is caused by a law that does not expressly employ any of the categories prohibited by s.15, if the law nevertheless has a disproportionately adverse effect on persons defined by any of the prohibited categories. In other words, a law that is neutral (non-discriminatory) on its face may operate in a discriminatory fashion; if it does, the discrimination is systemic...The mere fact that the law has the effect of discriminating against persons defined by a prohibited category is enough to establish the breach of s.15.<sup>231</sup>

As a result, s.15 has a substantively greater impact on private actors than does the Equal Protection Clause in the U.S., tempered structurally by the lesser impact of s.15 on common law rules at issue in private litigation under weak indirect horizontal effect.

In Germany, by contrast, such "indirect" discrimination has not been subject to strict review which, as in the United States, has been reserved for laws expressly discriminating on one of the "suspect" categories contained in Article 3 (3) of the Basic Law.<sup>232</sup> Once again, however, the existence of positive governmental duties in the area of sex equality is (at least potentially) an alternative structural mechanism that results in constitutional norms having substantial impact on private actors.<sup>233</sup>

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(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>231</sup> Peter W. Hogg, *CONSTITUTIONAL LAW OF CANADA* 1270-1 (4th. Ed., 1997).

<sup>232</sup> "No one may be prejudiced or favored because of his sex, parentage, race, language, homeland and origin, faith, religious or political opinions. Persons may not be discriminated against because of their disability." *BASIC LAW*, Article 3(3).

3. *How the Impact of the Equal Protection Clause on Private Actors might be Substantially Increased*

The analysis in the previous section has illustrated in detail one of the major points of this article: the actual impact of specific constitutional norms on private actors is a function of *both* the governing general threshold principle -- which of the five positions on the spectrum is adopted --and the substantive content and interpretation of particular individual rights. In the United States, it is mistaken, for example, to believe that private employers may not in principle be adversely affected by the constitutional free speech rights of their employees, and the actual impact is a function of the substantive weight and scope accorded to this right. Likewise, given the application of the Constitution to all law relied on in private litigation under the threshold principle, it is only because of the Court's substantive interpretation of the equal protection clause in *Washington v. Davis* that the clause does not have greater regulatory impact on private actors by rendering more of the laws they may seek to rely on unconstitutional. Were that interpretation to change and that of the Canadian Supreme Court adopted,<sup>234</sup> there would be many more actions that private actors could not be permitted to take, and interests that could not be protected, under color of state law.<sup>235</sup>

A number of the leading "state action cases" considered above were decided prior to the landmark case of *Washington v. Davis* in 1976. *Davis*, of course, made the distinction between

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<sup>233</sup> Article 3(2) of the Basic Law, as amended in 1994, reads as follows: "Men and women shall have equal rights. The state shall seek to ensure equal treatment of men and women and to remove existing disadvantages between them." Thus far, resulting measures -- including affirmative action programs -- have been limited to public sector employment.

<sup>234</sup> See supra note 230.

facially race-conscious and race-neutral laws critical in terms of constitutional scrutiny under the equal protection clause: the former automatically trigger strict scrutiny while the latter only rational basis unless the plaintiff can prove discriminatory intent on the part of the lawmaker. Prior to *Davis*, this distinction was not so obviously relevant and a number of facially neutral laws disproportionately burdening racial minorities were invalidated because of their effects without any search for the type of discriminatory intent now required. Thus, in *Reitman*, the majority held that the facially neutral Proposition 14 unconstitutionally encouraged private discrimination without engaging in the type of search for specific discriminatory motive that it would now.<sup>236</sup> Similarly, in *Moose Lodge v. Irvis*, decided a year before *Davis*, although the majority rejected most of the plaintiff's claims on the traditional threshold ground of state action, it did reach the merits and rule in the plaintiff's favor regarding the state liquor licensing board's regulation requiring every licensed club to adhere to its constitution and by-laws. The *effect* of applying this facially neutral rule, according to the majority, was unconstitutionally "to invoke the sanctions of the State to enforce a concededly discriminatory private rule,"<sup>237</sup> even though this undoubtedly was not its intent. Indeed, in citing *Shelley* as authority for this proposition,<sup>238</sup> the Court perhaps suggested that the common law rule in that case might still have been unconstitutional even if it not deemed race-conscious on its face, for its racially disproportionate impact was obvious. Post-*Davis*, it is less clear that these two facially neutral laws would be

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<sup>235</sup> The same greater impact on private actors would occur if the Court were to accept the doctrine of "substantive equal protection" associated with Ken Karst, see *supra* note 8 (the equal protection clause imposes affirmative duty on state to prevent private racial discrimination in important areas, such as voting and urban housing).

<sup>236</sup> Even Harlan's dissent stated the applicable test to be "evidence of an invidious purpose or *effect*" (emphasis added). See *supra* note 129.

<sup>237</sup> *Moose Lodge*, 407 U.S., at 179.

<sup>238</sup> *Id.*

held unconstitutional: the one in *Moose Lodge* would almost certainly not; the one in *Reitman* would depend on the available evidence of intent.

Accordingly, if (as many have argued) *Davis*'s strong presumption of constitutionality for facially neutral laws with discriminatory effects were to be replaced by a rule that such laws are constitutionally suspect, at least, say, where the disproportionate burden is entirely foreseeable or imposed because of "racially selective indifference,"<sup>239</sup> the indirect effect of constitutional norms on private actors would be dramatically increased. Thus, not only might the plaintiffs in *Davis* have successfully sued the Washington D.C. police department, but private actors relying on a range of neutral permissive laws whose conduct predictably creates the discriminatory effects would no longer be able to do so. Indeed, the private discrimination becomes the disproportionate effects that the state is constitutionally responsible for.

In rejecting the disparate impact rule in *Davis*, at the end of his opinion for the Court, Justice White said its acceptance would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."<sup>240</sup> In conspicuously limiting the implications of the disparate impact rule to such *public* statutes, Justice White seriously understated his own case, for if the equal protection clause were reinterpreted to incorporate this rule, it would apply fully and directly to *all* facially neutral laws,

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<sup>239</sup> This concept, and the related one of "unconscious racism," is associated with Paul Brest and Charles Lawrence. The idea is that certain governmental decision may be race-dependent, in the sense that they would have been different but for the race of those disadvantaged by them. See Paul Brest, In *Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976); Charles Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>240</sup> *Davis*, 426 U.S., at 248.

public and private, statutory and common law. It would thereby, of course, very substantially increase the impact of this constitutional right on private actors.<sup>241</sup>

## V. CONCLUSION

This Article has argued that although private actors are not bound by individual constitutional rights in the United States, they are indirectly subject to (and may be adversely affected by) them because such rights govern the laws that private actors invoke and rely on against each other. As a result, constitutional rights may either prevent such laws from protecting certain interests, choices, and actions of one private actor against another altogether, or place significant limits on their ability to do so. For example, the First Amendment prevents the economic interests of employers from being legally protected against picketing by its employees, and of shopkeepers from being legally protected against politically-inspired boycotts. The equal protection clause imposes constitutional limits on the ability of private actors to gain legal protection for their choices to engage in race or sex discrimination. For this reason, it is not true that private choices and conduct are categorically outside the reach of constitutional rights provisions.

The extent of this reach of individual rights into the private sphere defies the standard understanding of the United States as creating a rigid public-private distinction in constitutional law and so as epitomizing the vertical approach to this issue. It also distinguishes the United States from countries such as Canada and Germany, where constitutional rights do not always directly govern such private laws. In fact, only in those few countries, such as Ireland, where

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constitutional rights directly bind private actors do they reach further into the private sphere than in the United States along this structural dimension.

In making this argument, the Article has attempted to clarify and simplify what is widely understood to be a perplexing and complex area of constitutional law. Since all law is subject to the Constitution, the only issue in each case in which a law is challenged as unconstitutional is the substantive one of whether that law violates the Constitution. There is no separate, threshold issue of whether the state has been sufficiently implicated in private action to trigger constitutional review where a private actor relies on one of the state's laws. These laws are not subject to the Constitution because they do or do not embody the requisite amount of "state action," but because the Supremacy Clause makes them so. Accordingly, the threshold issue in a case such *Shelley* is no more complicated than that in *New York Times*: is one private party to a lawsuit relying on a provision of state law that the other private party challenges as unconstitutional? This simple, factual issue must be distinguished from the only genuine issue of constitutional law in such a case, the substantive question of whether the challenged law violates the Constitution: in the case of *Shelley*, whether the common law rule making racially restrictive covenants enforceable contracts violates the equal protection clause. Private choices are always indirectly subject to the Constitution whenever an individual relies on the law to protect or enforce them, because the Constitution applies directly to that law. Disputes over the proper interpretation of particular constitutional rights and duties, which will determine whether such laws survive constitutional scrutiny, must be heard and resolved rather than avoided by transposing them onto a false threshold issue, as in *Flagg Brothers*.

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<sup>241</sup> Whether acknowledgment of this point would likely, or should, either decrease or increase resistance to overturning the rule in *Davis* are interesting and important questions beyond the scope of this article.

This Article also recasts the debate about individual autonomy and the state action doctrine.<sup>242</sup> Rejecting the vertical position as an inaccurate understanding of the reach of constitutional rights into the private sphere means that autonomy is not a one-way street in favor of the private actor, permitting him or her to do without legal consequence what it would be unconstitutional for the government to do. The autonomy interests of the private individual acted upon are taken into account under strong indirect horizontal effect, albeit only partially. This autonomy interest is expressed by not permitting a private actor to invoke or rely on an unconstitutional law in defense of their action, as for example in *Reitman* and *Shelley*.

Finally, the actual impact of constitutional rights on private actors is not fixed but will vary with changes in their substantive interpretation. Thus, as discussed, many more laws relied on by private actors against each other would violate free speech and free exercise rights under an incidental burden rule than under the current one, and would violate equal protection under a disparate impact rule. The extent to which each of these particular individual rights impacts the private sphere in practice is thus a matter of constitutional interpretation, and this overlooked dimension of the interpretive task may legitimately be added to the other factors employed. No doubt doing so will only add to the disagreements that already exist. What should no longer be subject to general constitutional consensus, however, is the position that the reach of constitutional rights into the private sphere is definitively resolved and fixed by the state action doctrine.

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<sup>242</sup> See *supra* pp. 9-10.