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Review essay

Where the (state) action is

Stephen Gardbaum*

A review essay on *The Constitution in Private Relations: Expanding Constitutionalism*, edited by András Sajó & Renáta Uitz. Eleven International Publishing, 2005. Pp. viii + 322.

The issue of the horizontal application of constitutional rights has sparked great interest among legal scholars in the last few years.¹ The reasons are, I think, twofold. First, it has become of enormous practical importance in the wake of the spectacular burst of constitution making that has taken place since 1989. Along with such other basic structural choices as whether to include social and economic rights, constitution drafters have had to decide whether, how, and to what extent private individuals are to be subject to new constitutional rights provisions. As part of their contribution to the process, legal scholars have been trying to clarify the somewhat complex and confusing conceptual underpinnings of the issue and to present a coherent and user-friendly menu of options so that informed choices can be made.

Second, the very range of situations with which these new constitutions have been designed to deal—from postapartheid to postcommunism—has challenged and stimulated scholars to think anew about the nature and functions of constitutions. Are they merely law for the lawmakers or normative charters for reborn societies? Hobbesian social contracts between rulers and ruled, or Lockean ones among equal citizens? In this context, the issue of horizontal effect has been a central one, provoking fresh consideration of how constitutional law differs from other types and sources of law.

Accordingly, *The Constitution in Private Relations: Expanding Constitutionalism*, a new volume of essays edited by András Sajó and Renáta Uitz, is not only timely but representative, for it includes among its contributors several

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¹ See, for example, the recent academic works on the subject listed in footnote 6 of the introductory chapter, Renáta Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?—An Introduction*.

scholars and jurists actively engaged in some of the most important and interesting of these constitutional transformations, especially those in Central Europe and South Africa. The volume is also ambitious in both its geographical and methodological scope. The first part of the book focuses on particular countries or regimes, and it includes contributions on horizontality (or its absence) in Germany, South Africa, Hungary, France, the European Convention on Human Rights, and the European Union. The second part contains four essays providing more general comparative perspectives on some of the developments analyzed in the first, considering them, among other things, against the backdrop of an earlier generation of practices in the United States and Canada. The final section of the book contains a very helpful set of excerpts from the leading cases around which much of the scholarly discussion revolves.

It is obviously impossible within the confines of a short review essay to consider all thirteen individual contributions, much less do them justice. Rather, what I will attempt is to identify and comment on certain recurring themes and a few of the more general theses advanced.

One of the major themes to emerge from the book, both explicitly and implicitly, is that despite a common conceptualization of the issue—or at least the promise thereof—the concrete mechanisms and doctrines through which private individuals are impacted by constitutional rights are surprisingly numerous and varied. A related theme is the explanation of this variation—in particular, whether it is best understood (a) by reference to particular and distinctive procedural, institutional, or jurisdictional practices or (b) as the result of different substantive commitments on the proper reach of constitutional rights into the private sphere. Another topic appearing more than once is the role of positive constitutional duties and the somewhat uncertain relationship between this issue and horizontal effect. Finally, a stated or implicit premise of several of the discussions is that the state action doctrine in the United States functions to ensure that constitutional rights have less impact on private individuals than in countries such as Germany and Canada. At the same time, a couple of contributors suggest otherwise. Because this contradictory understanding of the U.S. approach is somewhat endemic to discussions of horizontal effect within comparative constitutional law, it might be useful to try and resolve the issue.

Accordingly, in what follows I will focus on four topics. These are: (1) the best way to conceptualize the issue of horizontal effect and the spectrum of possible positions a constitution may take on it; (2) the relation between horizontal effect and positive obligations placed on the state; (3) the role of substantive law and commitments in assessing the impact of constitutional rights on private actors; and (4) the best understanding of the U.S. position on horizontal effect.

1. Conceptualizing horizontal effect and the spectrum of positions on the scope of constitutional rights

One of the major contributions that legal academics have tried to make to the real-world constitutional transformations of the last fifteen years has been to develop a useful and coherent conceptual framework for the issue of horizontal effect. This became necessary because the original and seemingly straightforward bipolar distinction between vertical and horizontal effect proved too crude to explain many of the ways in which constitutional rights can impact on private actors or to capture the most common types of constitutional practices. At least three of the chapters in the volume present either general conceptualizations of the issue or a general spectrum of positions that countries could or do take on it.² In what follows, the discussion will (no doubt) be informed by my own recent attempt to clarify this topic.³

In the course of a very careful and instructive analysis of horizontality under the final South African Constitution of 1996, Halton Cheadle expresses skepticism about the explanatory value of such general concepts as “vertical,” “horizontal,” or “third party effect” as applied to this text,⁴ but he nonetheless devotes a section of his chapter to the task of elucidating their meanings. As for “verticality,” Cheadle states that this label is applicable when “[t]he primary way in which a constitution operates, particularly in the case of a bill of rights, is to restrain the state in the kinds of laws it passes and in the manner in which it conducts itself.”⁵ He adds that the vertical position regulates the “relation between the private person and the state.”⁶ For him, the consequences that flow from the vertical position are that “only state conduct may be challenged for lack of constitutionality” and that “if the legislature does not give legislative effect to a right contained in a bill of rights, that right may not be relied on in private litigation.”⁷ Cheadle concludes that “there is, of course, no purely vertical constitution” because,

² These are the chapters by Halton Cheadle, *Third Party Effect in the South African Constitution*; Cheryl Saunders, *Constitutional Rights and the Common Law*; and Mark Tushnet, *The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*.

³ Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV., 387 (2003).

⁴ Cheadle states that “continued reliance on the terminology of ‘verticality’ and ‘horizontality’ or ‘third party effect’ only serves to confuse the issue” and that such general concepts “do not serve any useful purpose in understanding the model of constitutional adjudication propounded by Section 8.” See Cheadle, *supra* note 2, at 58 and 65.

⁵ See *id.* at 58.

⁶ See *id.*

⁷ See *id.* at 58–59.

for example, verticalists will permit a party to challenge the constitutionality of legislation in private litigation.⁸

By contrast, Cheadle defines “horizontal” as describing the “manner in which a bill of rights engages with natural or juristic persons” and “its varying applicability to the conduct of natural and juristic persons.”⁹ He then lists five distinct forms of such engagement, ranging in strength from (1) rights binding private persons and applying to their conduct, in the same way as any other statutory or common law right would, to (5) rights not binding the private person but where the values underlying the rights may be applied in the development of the common law. These five forms, he argues, “have been somewhat rudely cast into a simple bifurcation of direct and indirect [horizontal] application,”¹⁰ a distinction that he thinks “does not do justice to the range of different ways a constitution may affect its legal system.”¹¹ Cheadle reports that there is much confusion about what constitutes the difference between direct and indirect horizontal application of constitutional rights, and, cogently, to my mind, he argues that the source of the confusion “lies in the failure to distinguish between the constitutional regulation of *conduct*, on the one hand, and the regulation of *law* that may regulate that conduct, on the other.” Only the former should be called direct horizontality, while the various forms of the latter constitute the differing forms of indirect horizontality.¹²

As I understand him, Mark Tushnet draws a similar distinction between what he refers to as the “two main components” of the “doctrine of third party effect,”¹³ although he does not employ the terms direct and indirect horizontality. These are: “First, constitutional provisions with third party effect subject nominally private actors directly to the constitutional norms those provisions enact. Second, what I call the background rules of property, contract, and tort law must be consistent with constitutional norms.”¹⁴

Finally, rather than present an overall conceptualization, Cheryl Saunders identifies “four [different] mechanisms in a common law legal system by

⁸ See *id.* at 59.

⁹ See *id.*

¹⁰ See *id.* at 61.

¹¹ See *id.* at n.18.

¹² See *id.* at 58–59.

¹³ See Tushnet, *supra* note 2, at 167.

¹⁴ See *id.*

which the influence of constitutional rights may be extended to the common law governing private legal relations.”¹⁵

As proposed in my own previous work on the subject, I believe that Cheadle and Tushnet are quite correct that the most accurate and useful distinction between direct and indirect horizontal effect is that between subjecting private *actors* to constitutional rights, on the one hand, and subjecting private *laws* to constitutional rights, on the other. The way I have put the point is that there are two different ways in which constitutional rights might regulate private actors, that is, have horizontal effect: (1) directly, by governing their conduct; (2) indirectly, by governing the private laws that structure their legal relations with each other. This second, indirect method of regulation limits what private actors may lawfully be empowered to do and which of their interests, preferences, and actions can be protected by law. *New York Times v. Sullivan*¹⁶ is a good example of how, despite the U.S. state action doctrine's ban on (1), private actors like Sullivan are deeply affected by (2).

This distinction should put to rest a certain lingering confusion about what is “indirect” in the concept of indirect horizontal effect. What is indirect is the effect of constitutional rights on private actors. Unlike the direct effect of constitutional rights resulting from the imposition of constitutional duties on private actors in the fully horizontal position, indirect horizontal effect is achieved via the impact of constitutional rights on the private law that individuals invoke in civil disputes. This impact on private law can, in turn, be either direct (where constitutional rights apply to it fully and equally) or indirect (where courts are required or empowered to take constitutional values into account in interpreting and applying its provisions). Conceptually, however, it does not matter which of these two methods is adopted; it is the indirectness of the effect on private *actors*, not on private *law*, that defines the general position.¹⁷ Yet there has sometimes been a tendency in the literature to assume that indirect

¹⁵ These are: “Constitutional rights may directly affect the rights and obligations of parties under the common law; they may override the common law through a state action doctrine, treating the courts as emanations of the state; they may indirectly influence the common law, under authority of the constitution; they may be used as a source on which courts draw in the parallel development of the common law.” See Saunders, *supra* note 2, at 213.

¹⁶ See Gardhaum, *supra* note 3, at 389–393. 376 U.S. 254 (1964).

¹⁷ Although, conceptually, indirect horizontal effect is thus a single position to be contrasted with both pure verticality and direct horizontal effect, the difference between direct and indirect application of constitutional rights to private law does create an important theoretical and practical subdivision, which I refer to as “strong” (direct) and “weak” (indirect) indirect horizontal effect, employing the terms used by Gavin Phillipson in the context of analyzing the UK Human Rights Act 1998 but giving them slightly different meaning. See Gavin Phillipson, *The Human Rights Act, ‘Horizontal Effect’ and the Common Law: A Bang or a Whimper?*, 62 MOD. L. REV. 824, 830 (1999).

horizontal effect requires the indirect subjection of private law to constitutional rights in order to distinguish this position from direct horizontal effect.¹⁸ This assumption is mistaken.

Although Cheadle and Tushnet have, in my view, correctly distinguished direct from indirect horizontal effect, I believe that Cheadle's employment of the conventional conception of verticality prevents him from fully distinguishing this position from indirect horizontal effect. So while successfully identifying one source of analytical confusion on the topic, he falls partial victim, I fear, to a second standard one.

If there are two ways in which a constitution might regulate private actors—directly and indirectly—there is only one way to ensure that a constitution will not regulate them at all, that is, have *no* horizontal effect. This is to limit the scope of application of constitutional rights to public law, the law regulating the relations between individuals and the state. Once the concept of indirect horizontal effect enters the picture, it is insufficient to characterize verticality as subjecting only government to constitutional rights provisions—or as regulating laws and state conduct alone. While this characterization remains useful in anchoring and distinguishing the polar horizontal position, it does not distinguish a truly vertical position from indirect horizontal effect. This is because indirect horizontal effect is quite consistent with this restriction—only government has constitutional duties—yet it still permits significant impact on private individuals by subjecting private laws to constitutional rights scrutiny. For example, Canada and Germany each generally adhere to the traditional vertical approach that constitutional rights bind only the government,¹⁹ and yet, as many contributions to the book make clear, in both countries such rights have significant (indirect) impact on private actors. This traditional approach to verticality, in other words, radically underdetermines the true scope of constitutional rights. It is too blunt—that is, consistent with too many relevantly distinct positions on the scope of constitutional rights—to be useful without more refinement. Hence, a better conception of

¹⁸ “This objective order of values... has a so-called ‘radiation effect.’... This means that the system of objective values created by the Basic Law permeates the entire legal system. It influences the interpretation and application of all statutes ranking lower than the Constitution. But how does this ‘radiation effect’ find its way into private law? *Since the private law should not be ‘governed’ by the basic rights (that would lead to a direct effect of basic rights)* another method has to be applied.” Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law*, 6 EUR. HUM. RTS. L. REV. 421, 424 (2001) (emphasis added).

¹⁹ Like the Thirteenth Amendment to the U.S. Constitution, the German Basic Law contains one textual exception to the general principle that constitutional rights only bind the government and not private actors. Art. 9(3) prohibits agreements between private parties aiming to undermine the freedom of workers to organize.

the vertical position is one that distinguishes it from indirect horizontal effect by not permitting any horizontal impact at all. This conception is that the scope of constitutional rights is limited to public law only.²⁰

Accordingly, I continue to believe that, analytically, the spectrum of general positions on the reach of constitutional rights into the private sphere is best understood in the following fourfold way: no horizontal effect at all (strong verticality), two forms of indirect horizontality (weak and strong), and direct horizontality. Starting at the vertical end of the spectrum, the polar position is the one I have just discussed. Constitutional rights exclusively govern public law and apply only where government itself is relying on such law to burden an individual. Only this position ensures that constitutional rights do not “leak” into the private sphere.

The second and third positions on the spectrum are the two different instantiations of the concept of indirect horizontal effect that I referred to above. The second position, which I refer to as the “weak indirect effect,” means that (at least some type of) private law is only *indirectly* subject to constitutional rights and not directly governed or controlled by it. Typically, this indirect impact on private law occurs via the power or duty of the courts to take constitutional values into account in interpreting, applying, and developing this law in line with constitutional values.²¹ As Cheryl Saunders’s chapter points out, as a matter of doctrine this remains true of the common law at issue in private litigation in Canada.

The third position, what I term “strong indirect effect,” means that all law—including, of course, all private law—is directly and fully subject to constitutional rights and may be challenged in private litigation. This, in turn, means that constitutional rights fully protect the individual whether it is another individual or the government that seeks to rely on an unconstitutional law. Finally—now all the way at the opposite pole—direct horizontal effect imposes constitutional duties on private actors to respect rights. This distinguishes it from both forms of indirect horizontal effect (and, of course, from strong verticality) and means that constitutional rights protect not only against all laws—and other actions of, or attributable to, the government—but against all conduct, regardless of who performs it or whether a private actor is relying on a law to do so.

²⁰ Georg Sommeregger makes a similar point in defining “a purely vertical position” in his chapter of the book, *The Horizontality of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere via Legislation*.

²¹ As Saunders and Cheadle both point out, the difference between a power and a duty on the courts amounts to slightly different mechanisms by which constitutional rights affect the common law. In my terminology, they amount to different versions of the general position of weak indirect horizontal effect.

This very last point does, I think, identify a real and practical difference between direct and indirect horizontal effect.²² Imagine if, in the U.S. case of *Shelley v. Kraemer*,²³ the original homeowners had entered into what were explicitly acknowledged to be purely voluntary, non-legally binding agreements not to sell their houses to African-Americans, enforceable exclusively through social sanction and shaming. Then, because there would be no reliance on either the underlying common law of contracts/restrictive covenants or on a state court order to enforce that law, not even under the most liberal understanding of indirect horizontal effect would this conduct be subject to constitutional rights scrutiny.²⁴ It would, however, and quite straightforwardly, be so subject under direct horizontal effect. That is, under my alternate *Shelley* scenario, the purchaser would not get his case into court.²⁵ This strikes me as an important theoretical and practical difference between direct and indirect horizontal effect. This remains so even if one factors in Tushnet's well-taken point that in the modern regulatory state, this type of "purely" private conduct is likely to be regulated by statute.²⁶

2. Positive obligations and horizontal effect

Two chapters in the book, written by sitting judges, discuss or make substantial reference to constitutions imposing positive obligations on the state, rather than only the classical liberal negative ones. South African Constitutional Court Justice Albie Sachs provides a wonderfully illuminating and poignant "insider's view" into the landmark *Grootboom* case,²⁷ in

²²In their thoughtful and stimulating chapter, Mattias Kumm and Victor Ferreres Comella argue that in Germany there is absolutely nothing at stake between direct and indirect horizontal effect—that, possible procedural differences aside, not a single case would turn out differently under one position rather than the other. Mattias Kumm & Victor Ferreres Comella, *What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*. Although Kumm and Ferreres Comella explicitly limit this claim to Germany and do not consider it in a comparative context, it is not entirely clear why, as a general matter, this would be so; that is, what differentiates Germany from other countries adopting indirect horizontal effect in this respect.

²³ 334 U.S. 1 (1948).

²⁴The Supreme Court indirectly affirmed this point by holding that the creation of the restrictive covenants in *Shelley* did not amount to "state action." This would appear to be even more obviously true of non-legally binding covenants.

²⁵Even if one were to argue that the homeowners were still relying on the underlying law of property so that the constitutionality of that law could be challenged, there is little doubt, I think, that the outcome of the case would be different than in the real *Shelley*; whereas under direct horizontal effect it would likely not.

²⁶See Tushnet, *supra* note 2, at 169–170.

²⁷*Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

particular, and the judicial enforcement of socioeconomic rights, in general.²⁸ Judge Lech Garlicki of the European Court of Human Rights charts the ways in which his court while, officially rejecting any doctrine of horizontal effect—direct or indirect, nonetheless has interpreted some of the Convention rights as impacting on private actors through the doctrine of positive obligations on the state.²⁹ For example, the right to life under article 2 imposes an affirmative duty on the state to render murder unlawful, to impose appropriate criminal sanctions, to assure an effective investigation in every case, and, when necessary, to take preventive measures to protect human life. Similarly, the right to private and family life under article 8 has been interpreted to create several affirmative duties on the state. This contrasts, famously, with the axiomatic charter of negative rights in the United States under which constitutional rights impose no positive duties on the state, exemplified by *Deshaney v. Winnebago*³⁰ in which the Supreme Court found no constitutional duty to protect a child against serious risks known to the state of lethal violence at the hands of his father.

Judge Garlicki ends his chapter by stating that “the concept of ‘positive obligations’ resembles, to some extent, the concept of the ‘indirect third party effect,’ but the Court has never been willing to adhere clearly to the *Drittwirkung* approach” (emphasis added).³¹ On the other hand, he also cites “the recent observation of Hofstötter . . . that the case law on ‘positive obligations’ cannot be regarded as ‘an instance of horizontal effect or *Drittwirkung*.’”³² I think it might be a useful exercise briefly to take up where Judge Garlicki leaves off by analyzing the extent of the “resemblance” between the two concepts.

Analytically, there is no overlap between direct horizontal effect and imposing positive constitutional obligations on the state. The former places constitutional duties on private actors; the latter does not but, rather, defines the duties placed exclusively on the state. The two concepts, therefore, involve different constitutional wrongdoers or defendants—the individual and the state respectively—and a private individual can bear no constitutional liability for a state’s violation of its positive obligation to act, even where the content of that obligation is to try and prevent the private individual from doing what he did. So, for example, if, in the particular context, the state violates its positive constitutional duty to take reasonably available measures to prevent X from physically abusing his son, X incurs no liability as a result of this violation. By contrast,

²⁸ Albie Sachs, *The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case*.

²⁹ Lech Garlicki, *Relations between Private Actors and the European Convention on Human Rights*.

³⁰ 489 U.S. 189 (1989).

³¹ See Garlicki, *supra* note 29, at 143.

³² See *id.* at n. 37.

under direct horizontality, X may have a constitutional duty not to abuse his son and, of course, can be liable for violating it. In other words, direct horizontal effect and positive state obligations may cover the very same course of conduct (X's physical abuse of his son) but do so by imposing quite different constitutional duties and consequent liabilities.

This final observation suggests that there is a significant analytical and practical overlap between positive obligations and *indirect* horizontal effect. More precisely, positive obligations are a *source* of indirect horizontal effect, that is, of the indirect constitutional regulation of private actors. Moreover, this is a *different* source of indirect horizontal effect than the one considered thus far, namely, subjecting private laws to constitutional rights scrutiny. If, for example, the state has a positive constitutional duty to regulate private actors in order to secure the right to life, then private actors will be affected and regulated by the required measures to fulfill that duty—the criminal (public?) law of homicide, criminal punishments, preventive steps, and investigations. And if, to take the previous example, the state has a positive obligation to take reasonably available measures to prevent X from physically abusing his son, then X will be regulated by the resulting measures. Indeed, such positive obligations are, therefore, one source for the phenomenon described by Mark Tushnet as the “residual nature” of direct horizontal effect, given the scope of statutory regulation of private actors in the modern state.³³

Accordingly, there are two separate structural features of constitutional rights that may create indirect horizontal effect: (1) subjecting private laws to constitutional rights scrutiny; and (2) imposing positive constitutional duties on states to enact certain laws and to take certain actions regulating private individuals. Constitutional systems that generally reject the latter, like the United States, are thereby rejecting an important source of indirect horizontal effect.

3. The role of substance in horizontal effect

The central theses of two of the chapters in the second section of the book, presenting more general comparative perspectives, concern the role of substantive constitutional norms or commitments in horizontal effect issues—but, at least superficially, they come to opposite conclusions. Whereas Mark Tushnet argues that “all the work of the third party effect doctrine...is done by the substance of constitutional norms,”³⁴ Mattias Kumm and Victor Ferreres Comella argue that substantive concerns play

³³ See Tushnet, *supra* note 2, at 180. Although not in the U.S., of course, where there are generally no such positive obligations. Here such statutory regulation of private actors is exclusively the result of exercising discretionary legislative power.

³⁴ See *id.* at 180.

no role in the choice of which position on the vertical-horizontal spectrum to occupy.³⁵ Although most of the apparent contradiction between these two conclusions disappears under only slightly closer scrutiny, the common theme of the role of substantive issues in assessing the impact of constitutional rights on private actors is an interesting and important one.

For Tushnet, the actual implications of both “components” of the doctrine of third party effect—(1) direct subjection of private actors to constitutional norms, and (2) consistency of background rules of property, contract, and tort law with constitutional norms—depend wholly on the substance of those constitutional norms. Accordingly, “[s]ome specifications [of substantive constitutional norms]—such as an interpretation of equality provisions to require only formal equality—might have relatively small [horizontal] effects in some nations.”³⁶

I believe that Tushnet is absolutely and importantly correct—indeed, I have argued this point myself³⁷—but only *after* the threshold issue of which position on the vertical-horizontal spectrum a particular constitutional system occupies has already been resolved. In other words, I consider that the total actual impact of constitutional rights on private actors in a given system is a function of *both* (1) the threshold issue and (2) its substantive constitutional norms.³⁸ The threshold choice—among the four general options of strong verticality, weak indirect horizontality, strong indirect horizontality, and direct horizontality—can have independent practical impact on whether and to what extent constitutional rights affect private individuals. If a particular constitutional system selects strong verticality or direct horizontality, or if it decides that its common law is not subject to constitutional rights scrutiny, then I do not think it can be said that the total impact on private actors turns wholly on the substance of its constitutional norms. But once a general threshold choice has been made—at least if that choice is not for strong verticality—then the *remaining* extent to which constitutional norms impact private actors will depend wholly on the substantive interpretation of those norms. To be fair, it is not at all clear that Tushnet does or would deny this proviso. In fact, in presenting his thesis about the all-important role of substance, he does not say whether this is intended to be a comparative claim at all and, if it is, in comparison to what—for example, this threshold issue or procedural/institutional factors.

³⁵ See Kumm & Ferreres Comella, *supra* note 22.

³⁶ See Tushnet, *supra* note 2, at 180.

³⁷ See Gardbaum, *supra* note 3, at 414–415, and at various other points throughout the article.

³⁸ In addition, as I have argued in section 2, a third factor determining the total impact of constitutional rights on private actors within a particular system is the existence or nonexistence of positive constitutional duties.

By contrast, the chapter by Kumm and Ferreres Comella is centrally about the choice of threshold position on the vertical-horizontal spectrum. The authors challenge what they refer to as the standard view in which a country's choice of one position over another is driven by substantive commitments concerning the proper balance between the effectiveness of constitutional rights and individual autonomy. Instead, they argue, the choice is "primarily about institutional and procedural questions."³⁹ These questions involve such contingent and more general features of a legal system as the structure of the court system, the jurisdiction of the constitutional court, and the structure of its rights analysis. Cheryl Saunders also argues somewhat along these lines, carefully explaining how the choices of mechanism by which constitutional rights affect the common law in Canada, South Africa, and Australia reflect different conceptions of the roles of both the constitution and the judiciary.⁴⁰

In the course of a subtle and incisive analysis, Kumm and Ferreres Comella argue that, in Germany, the definitive choice made in the late 1950s by the Constitutional Court between direct and indirect horizontal effect in favor of the latter was primarily the result of a successful "turf battle" fought by private law jurists against their public law rivals to prevent their subject matter from being downgraded to applied constitutional law and to retain the vestiges of their nineteenth-century prestige. Part of this battle was to maintain the status of the civil law courts in the face of a claim by the Constitutional Court to become the final arbiter of all civil law claims.⁴¹

Similarly, to the extent that in Canada the common law at issue in private litigation was partially immunized from direct constitutional rights scrutiny in the case of *RWDSU v. Dolphin Delivery Ltd.*⁴² Kumm and Ferreres Comella ingeniously argue that this is best explained by the need to promote interinstitutional dialogue between legislatures and courts.⁴³ Unlike in Germany, where intercourt relations between the civil law courts and a specialized, single-function Constitutional Court were an important factor

³⁹ See Kumm & Ferreres Comella, *supra* note 22, at 244.

⁴⁰ See Saunders, *supra* note 2, at 185–213.

⁴¹ It is in this context that Kumm and Ferreres Comella make the argument mentioned above, see *supra* note 22, that, substantively, there is no difference between direct and indirect horizontal effect in Germany—the only differences are institutional and jurisdictional.

⁴² [1986] 2 S.C.R. 573.

⁴³ See Kumm & Ferreres Comella, *supra* note 22, at 261. Although Kumm and Ferreres Comella acknowledge this difference and then seek to explain it in institutional rather than substantive terms, they also appear to argue that this difference has few practical implications and, in particular, does not amount to some lesser form of indirect horizontal effect in Canada than in Germany.

in the choice of indirect horizontality, special deference to the common law was prompted by the Canadian Supreme Court's position as both the highest constitutional *and* common law court. Deciding cases on (partially immunized) common law rather than constitutional grounds permits a healthy dialogue with legislatures, which may exercise their ordinary statutory powers to overrule the former but not the latter.

Finally, in the U.S., the authors argue that the state action doctrine, which "generally functions as a far more effective shield against substantive constitutional rights scrutiny . . . than the doctrines of indirect effect in Germany or Canada," is best explained by the "more categorical structure of constitutional rights" in the U.S.⁴⁴ Given this structure, the recognition of indirect effect "would raise problems [of inflexibility] that do not arise where constitutional rights reasoning is understood to involve contextually focused proportionality analysis."⁴⁵ This latter analysis permits Germany and Canada to take into account possible differences in the application of rights to public and private actors.

Putting to one side, for the moment, the issue of whether the U.S. does take a less horizontal approach than Canada and Germany, which I discuss in the next section, I find the authors' overarching thesis highly persuasive. If I am not completely and fully persuaded by their arguments, it is for two reasons. Before explaining these, let me first note that I do not understand Kumm and Ferreres Comella to be claiming that there are *never* substantive implications in the choice between one threshold position and another but, rather, that (a) the choices in Germany, Canada, and the U.S. were not made *for this reason*, and that (b) there are no substantive implications in the choice between direct and indirect effect in the particular case of Germany.⁴⁶

The first of my two reasons is that although I think Kumm and Ferreres Comella successfully explain that the particular choice facing each country was made for institutional/procedural/structural and not for substantive reasons, they do not truly explain why each faced a slightly different choice. That is, why was the choice between direct and indirect horizontal effect in Germany, but only between weak and strong indirect horizontal effect in Canada, and (according to them) between the more vertical position they ascribe to the state action doctrine and, presumably, weak, indirect horizontal effect in the U.S.? It is arguably not coincidental that these particular sets of choices, which appear to have been quite constrained,

⁴⁴ See *id.* at 245.

⁴⁵ See *id.*

⁴⁶ Of course, if my interpretation of their position is wrong on this point, then what I wrote above about the choice of threshold position having some independent force in the total impact of constitutional rights on private actors would make this a third reason for remaining not quite persuaded.

occupy different parts of the vertical-horizontal spectrum. In other words, the choice of answers may not have reflected substantive commitments about the proper balance between effective protection of constitutional rights and individual autonomy, but the choice of questions may well have done so.

The second reason also concerns the background context in which the choices were made. Kumm and Ferreres Comella argue that the choices of indirect effect in Germany and Canada were facilitated by a mode of constitutional rights reasoning that employs contextually focused proportionality analysis. By the same token, indirect effect was rejected in the U.S. because of its commitment to a more categorical mode of rights reasoning. Kumm and Ferreres Comella tend to treat these two modes of rights reasoning as independent variables or structural givens but do not consider whether they are themselves the product of relevant substantive commitments. It seems to me quite plausible to think that they are, that the choice of categorical versus proportionality analysis reflects different substantive positions on the proper scope of constitutional rights and the protection of individual autonomy, the very same substantive commitments Kumm and Ferreres Comella argue the conventional wisdom ascribes to the choice of threshold position regarding horizontal effect.

4. The U.S. position

Finally, several chapters in *The Constitution in Private Relations* illustrate and exemplify a somewhat contradictory understanding of the actual position of the United States on horizontal effect that is quite common in comparative discussions. Thus, on the one hand, the two chapters by Gábor Halmai and Kumm and Ferreres Comella express what I think is the dominant view of the United States within comparative constitutional law as rejecting or limiting indirect horizontal effect and so being closer to the vertical end of the spectrum than many other constitutional systems, including Germany and Canada.⁴⁷ On the other, focusing on *New York Times v. Sullivan* and *Shelley v. Kraemer*, the introductory essay by Renáta Uitz and the chapter by Cheryl Saunders both suggest that the United States is no less horizontal in

⁴⁷ Halmai states that “in German legal theory fundamental rights have a more significant influence in private relations than in the American case-law.” Gábor Halmai, *The Third Party Effect in Hungarian Constitutional Adjudication*, at 100. For Kumm & Ferreres Comella, see *supra* note 44. More generally within comparative constitutional law, see, e.g., Murray Hunt, *The ‘Horizontal Effect’ of the Human Rights Act*, 1998 PUB. L. 423, 427 (1998): “The jurisdiction which is closest to the position favoured by the verticalists is the United States.” See also Basil Markesinis, *Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L. Q. REV. 47, 82 (1999): “[Compared to the United States], German law has a more over-arching effect that touches private law in a wider but, as already stated, balanced manner.”

its approach than most countries and, indeed, more so than Canada.⁴⁸ Because this contradictory understanding remains quite general and representative, it will perhaps be a useful contribution to the debate on horizontal effect to try and clarify the U.S. position. As I wrote an article three years ago attempting to do just this,⁴⁹ I shall be drawing, in what follows, on this previous work to explain why I believe that Uitz and Saunders are essentially correct.

Far from rejecting or limiting indirect horizontal effect, the United States actually adheres to its strong form. That is, all law—including private law statutes and court-made common law at issue in private litigation—is fully, equally, and directly subject to the Constitution.⁵⁰ This fundamental and quite general proposition does not derive from the particularities of the Fourteenth Amendment's "no state shall..." language but is, rather, a general and straightforward mandate of the supremacy clause of article VI. The supremacy clause means that all law—state and federal, public and private, statute and common law—is governed by and subject to the Constitution. The clause itself makes clear that state court judges are bound by the Constitution, which removes any possible ambiguity about whether the common law made by such judges is also so bound.⁵¹ This fundamental

⁴⁸ Uitz contrasts the decisions of the U.S. and Canadian Supreme Courts in the two cases of *New York Times* and *Dolphin Delivery*, which raised "a largely similar issue: the constitutionality of common law rules in litigation between private parties. See Uitz, *supra* note 1, at 8. Cheryl Saunders attributes a "more cautious" approach to the Canadian courts and the courts of other common law countries than to the U.S. Supreme Court on the issue of equating the actions of courts with the actions of the states for purposes of whether this triggers constitutional rights scrutiny. See Saunders, *supra* note 2, at 183–184.

⁴⁹ See Gardbaum, *supra* note 3.

⁵⁰ To say that all laws are subject to the Constitution in the U.S. is not to say that a law is necessarily or automatically challengeable in every actual piece of litigation; there are, in fact, some procedural limitations. I have explained these at length in my article, *supra* note 3, at 421–422. In sum, private actors are unable to rely—as either plaintiff or defendant—on an unconstitutional law in any ordinary, nonconstitutional cause of action. 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. This distinguishes indirect horizontal from direct horizontal effect. Accordingly, complete immunity from constitutional scrutiny in the U.S. 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 nonconstitutional cause of action.

⁵¹ The absence of such a provision in Canada, and the textual application to the legislative and executive branches only, was an important and explicit reason that the common law was held in *Dolphin Delivery* not to be directly subject to the Constitution unless relied on by these branches of government. By contrast, the inclusion of the courts among the "public authorities" bound to act compatibly with the convention is the central argument for the indirect horizontal effect of the Human Rights Act in the U.K.

principle of U.S. constitutional law was simply applied, and not created, in the two landmark cases of *Erie Railroad v. Tompkins*,⁵² which held that state common law is state law for constitutional purposes, and *New York Times v. Sullivan*, which held that the state common law of libel at issue in private litigation is directly subject to the Constitution.

To be clear, this is *not* an argument about what should be the case in the United States; it is a description of the existing constitutional position properly understood—even if there are some, including American judges,⁵³ who are confused about it. Moreover, it is also obviously true that although *all* laws are subject to the Constitution, it is not *only* laws that are so subject but also other forms of governmental conduct, such as executive acts and the conduct of courts in adjudicating and enforcing the laws. Accordingly, in adopting strong indirect horizontal effect, the United States shares the same general threshold position on the spectrum as Germany, in which all private law must conform to the Basic Law.⁵⁴ As Uitz and Saunders remind us, however, Canada does not share this position. *Dolphin Delivery* explicitly rejected the U.S. position in *New York Times* and took the “more cautious”⁵⁵ position (that is, the weak indirect horizontal effect) of excluding the common law at issue in private litigation from full and direct constitutional rights scrutiny. Instead, Canadian courts “ought” to apply and develop the common law in a manner consistent with

⁵² 304 U.S. 64, 78 (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.”

⁵³ Those U.S. judges who have mistaken the structure of the U.S. position include the late Chief Justice Rehnquist, who, in the case of *Flagg Brothers v. Brooks*, 436 U.S. 149, 164 (1978) strongly suggested a categorical immunity from constitutional scrutiny for all laws, including state statutes and even state constitutional provisions, 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.” Under the supremacy clause, this simply cannot be true. Technically, under my analysis, the result in *Flagg Brothers* was correct but only because the plaintiff sued the private defendant for a violation of her constitutional rights under a constitutional cause of action (Section 1983). This violates the procedural limitation on indirect horizontal effect discussed in *supra* note 28. Had she sued the warehouseman for the tort of conversion, the defendant’s reliance on the state Uniform Commercial Code as a defense to the action would have put the constitutionality of that statute squarely and properly at issue.

⁵⁴ “This value system [of the Basic Law] . . . must be looked upon as a fundamental constitutional decision affecting the entire legal system. . . . It naturally influences private law as well; *no rule of private law may conflict with it*, and all such rules must be construed in accordance with its spirit.” Lüth, BVerfGE 7, 198 (205) (emphasis added). See also Greg Taylor, *The Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common Law Jurisdictions*, 13 KING’S COLL. L.J., 187, 196 (2002): “[I]t is, indeed, the almost unanimous view among German commentators . . . that statutory private law is subject directly to basic rights.”

⁵⁵ See Saunders, *supra* note 2, at 183.

“constitutional values.”⁵⁶ Whatever the best explanation of this difference⁵⁷ and whatever narrowing of the gap may have occurred in practice between the two positions,⁵⁸ it has not completely closed and reflects, at least formally, a less horizontal position on the spectrum.

So, in the U.S. the common law at issue in private litigation is always directly and fully subject to the Constitution.⁵⁹ The problem, and much of the confusion, is caused by the fact that, as a matter of existing substantive constitutional norms, the vast majority of the common law is perfectly constitutional. In this sense, *New York Times* is an outlier, *not* because the common law of libel was subjected to constitutional rights scrutiny—common law always is—but because it *failed* that scrutiny. Given, for example, the substantive interpretation of the equal protection clause as presumptively prohibiting only facial discrimination or disparate impact resulting from discriminatory intent, the common law of property, contract, and tort will almost always pass constitutional rights scrutiny. As a result, the fact that it is always subject to such scrutiny tends to drop out of the picture in favor of more promising substantive constitutional arguments. Here, Mark Tushnet's point about the all-important role of substance is exactly right. Were the Court to adopt a more extensive substantive equality norm, such as unconscious racism or disparate impact, the existing choice of strong indirect horizontal effect—under which the common law is always fully and directly subject to the Constitution—would have a vastly greater actual impact on private actors.⁶⁰

Thus far, I have managed to describe the general constitutional position in the U.S. without even mentioning the notorious state action doctrine, but here is where it comes in. In most cases involving the common law—again, *New York Times* is the outlier—in order to present a plausible claim of unconstitutionality, given substantive constitutional norms, it is necessary to come up with something more than simply subjecting the background law to constitutional scrutiny. That something more may take at least two forms. The first is employing the state action doctrine to create *direct* horizontal effect on a private actor, so that the particular conduct complained of, and not merely the background law authorizing it, is subject to constitutional scrutiny. The public function and entanglement cases, such

⁵⁶ *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 605.

⁵⁷ See Kumm & Ferreres Comella, *supra* note 22, at 261–262.

⁵⁸ See Tushnet, *supra* note 2, at 175–176.

⁵⁹ Again, subject to the procedural limits explained in *supra* note 28.

⁶⁰ See Gardbaum, *supra* note 3, at 455–457; Kumm & Ferreres Comella, *supra* note 22, at 283. This assumes that the Court does not follow Mark Tushnet's intriguing suggestion of applying *different* substantive tests under the same constitutional provision to public and private actors. See Tushnet, *supra* note 2, at 180.

as *Burton v. Wilmington Parking Authority*,⁶¹ fall into this category. But note, this use of the state action doctrine does not “shield” civil litigation from indirect horizontal effect—this always exists—rather, it *pushes it into direct horizontal effect*; it subjects the private actor/conduct itself to constitutional duties. This, of course, is quite unusual by comparative standards, so it is, perhaps, not surprising that the Supreme Court should permit this employment somewhat sparingly.⁶²

The second form of “something more” is to treat a court order enforcing a common law rule as a distinct, second instance of state conduct, above and beyond the underlying common law that it is enforcing. This, again, permits the more specific conduct involved—here of the state court—rather than the background law, to be subject to constitutional scrutiny. This, of course, was the route employed in *Shelley v. Kraemer* because, as usual, the common law the court was enforcing by granting an injunction passed constitutional muster.⁶³ Now, I happen to think that the simpler and more coherent way of analyzing *Shelley* and many other common law cases is through the normal U.S. constitutional doctrine of “as applied” (as distinct from facial) challenges.⁶⁴ That is, although the common law on its face may pass constitutional muster under existing substantive norms, it may fail these same norms as applied to certain situations or persons. The very notion of “as applied” challenges to common law (as distinct from statute) does not appear to exist, and yet there seems to be no good reason for this.⁶⁵ Thus, applying the race-neutral common law of contracts or restrictive covenants⁶⁶ to situations where exclusion is based on race might well fail under existing substantive norms. This is because it necessarily requires race-conscious action by the state insofar as one of the facts the plaintiff must prove to establish a breach of the covenant is the race of

⁶¹ 365 U.S. 715 (1961).

⁶² Perhaps in slight tension with their general thesis about how the state action doctrine functions, Kumm and Ferreres Comella note at 282–283 that it may sometimes operate to expand the scope of constitutional rights in this situation.

⁶³ Of course, the state court injunction in *Shelley* was no less a simple enforcement of the underlying common law involved in the case than the state court damage award in *New York Times*. And yet, no one in the latter case asked whether a damage award was state action, the Court simply subjected the common law the court was enforcing to First Amendment scrutiny.

⁶⁴ This argument derives from, and is more fully developed in Gardbaum, *supra* note 3, at 448–450.

⁶⁵ Again, this would avoid the contortions involved in deciding which state court orders amount to “state action” and which do not.

⁶⁶ Assuming for the moment that the common law was race-neutral. Of course, as is well-known, this is harder to assume for the common law of racially restrictive covenants as an exception to the general common law presumption in favor of the free alienability of land.

the willing purchaser.⁶⁷ Such unconstitutional application would be quite different from independent, racially discriminatory enforcement of the law by a court, for example, where it enforces restrictive covenants against some but not other racial groups.

In sum, if constitutional rights do have less impact on private actors in the U.S. than in other countries rejecting strong horizontality, it is neither because of a more vertical threshold position nor because of the functioning of the state action doctrine. It is exclusively because of substantive differences in the rights themselves and their interpretation.

5. Conclusion

First, there are three very general positions a constitutional system can take regarding the effect of constitutional rights on private actors, with an important and, practically speaking, significant subdivision within the second position. These are: (1) no effect at all, direct or indirect, because constitutional rights only govern public law—regulating the relations between the individual and the state; (2) indirect effect, because although private actors are not bound by constitutional rights, such rights govern the laws that private actors invoke and rely on in their relations with each other; and (3) direct effect, because constitutional rights do bind the actions of private actors. The important subdivision within indirect effect is between weak indirect effect, in which (some or all) private laws regulating relations among private actors are influenced by constitutional rights but are not fully subject to them; and strong indirect effect, in which all private laws are fully, equally, and directly governed by constitutional rights.

Second, within any given system, the total impact of constitutional rights on private actors in practice will be a function of three variables: (1) which of the four above-mentioned threshold positions it takes; (2) the substance of the constitutional norms unless it opts for the first position of strong verticality that directly or indirectly govern private actors; and (3) the existence and content of any positive constitutional duties placed on the state to regulate private conduct.

Accordingly, given the choice of threshold position, all of the remaining impact of constitutional rights on private actors will depend on the content of those rights and will vary with them. For example, once a country has opted for strong indirect effect by subjecting all private law to constitutional rights scrutiny (as I have argued is true in the United States), then the only

⁶⁷ This would not necessarily be true, for example, in the standard hypothetical in which the police assist a white homeowner to eject a black person from her property for trespassing. The application of property law to this situation does not inherently involve the state in race-conscious conduct because the race of the trespasser is legally irrelevant, unlike with racially restrictive covenants.

issue in each case in which a private law is challenged as unconstitutional is the substantive one of whether that law violates a constitutional right. This issue, of course, turns exclusively on the content of the relevant right: the broader the right, the greater impact it will have on private actors, and vice versa. Similarly, once a country opts for direct effect, the actual impact of constitutional rights on private actors will depend entirely on the content of the duties thereby placed on them. And yet, between these two choices, it is highly likely that direct effect will result in greater impact on private actors. If both systems had precisely the same substantive set of constitutional norms, they would have a greater impact on private actors under direct than indirect effect.⁶⁸ The same is also true of the choice between weak and strong indirect effect. Finally, as the impact of positive state obligations concerning constitutional rights is independent of the threshold choice (again, unless the choice is for strong verticality), the existence and content of such obligations will independently contribute to a system's total effect on private actors.

Although the volume helps to clarify the above two issues by simplifying them, one of its other major contributions is to complicate, helpfully, a third: What determines the choice of threshold position itself? A major theme of several of the chapters is to explain that this choice is driven more by the distinctive institutional, procedural, and jurisdictional practices of each system than by substantive commitments on the proper balance between securing the values underlying constitutional rights and individual autonomy. The value of this lesson transcends the topic and serves as a useful reminder of the importance of context, as the exciting enterprise of comparative constitutional law continues to gather, if no longer steam, new bright sparks of electricity.

⁶⁸ A possible but unlikely scenario is that if the differences between substantive constitutional norms were so great (far broader in the system choosing indirect effect and far narrower in the system choosing direct effect), indirect effect would result in a greater impact of constitutional rights on private actors than direct effect.