

Inaugural Lecture of the Herbert M. and Svetlana Wachtell Professorship of
Constitutional Law and Civil Liberties
New York University School of Law

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Presenter: Helen Hershkoff

The Private Life of Public Rights:
State Constitutions and the Common Law

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1. Opening and Thanks

Thank you, Ricky, for that very warm introduction, and for being such a great Dean. And thanks to my colleagues and students, and to my former Dean, John Sexton, and to my husband and son, and to my friends, old and new, and members of the Wachtell family and to all of you for coming this evening. It means a great deal to me.

And thanks to Herbert and Svetlana Wachtell for supporting our Law School, for giving me the privilege of holding a chair that bears your family's name, and for the opportunity to present this inaugural lecture.

There aren't many people who can build an institution from the ground up or even try. Herb Wachtell is one of those rare and remarkable people.

Herb is a giant in the law, and his firm has evolved from the distinguished to the pre-eminent to the iconic.

When we think about New York law practice and indeed global law practice the name Wachtell immediately comes to mind.

Over the years some of my students have worked at the Wachtell firm. They had talent and gumption, and they came away exhausted but also awed and inspired.

In particular, Herb inspired them as a lawyer and as a mentor.

One Wachtell veteran, now a law professor, told me: "Herb doesn't just want to win; Herb wants to win in the right way."

He added that Herb is creative and tenacious, incredibly smart, strategic, and open minded. And he emphasized that Herb listens—this is an unusual quality in a lawyer—and Herb listens even if the person talking is only a first year associate.

It's very impressive that someone as successful as Herb in the practice of law still has a passion for the intellectual side of law—indeed, that he still loves the law and believes in the law, and that he has been so constant in supporting our law school.

Herbert Wachtell is only half of the name of the chair I now hold.

I also thank the extraordinary and gracious Svetlana Stone Wachtell. For more than three decades Svetlana worked in the field of human rights, and she did so with great courage and effectiveness—the highest praise one can give to a human rights advocate.

Last fall the New York Academy of Sciences honored Svetlana with the prestigious Pagels Award for her lifetime of work helping to protect scientists from censorship and oppression. Accepting the award, Svetlana said, “Keeping silent is not an option.” Svetlana spoke of the need to stand “tall against the suppression” of rights, not only in countries far away, but also here in the United States. Her work reminds us that a small group of thoughtful people really can change the world.

I know that everyone here shares my deep appreciation for Herb and Svetlana's decision to create a professorship at NYU and joins me in thanking them.

As Ricky said, inaugural lectures are wonderful events for our law school. For me, it would be a perfect event if my father and mother were here. My father would have been 90 last month; my mother is 88 and still lives independently, but this is after her bed time.

I learned a lot from my parents. I hope you will indulge me if I take this occasion as an opportunity to thank them. My parents never told me what to do; it was a classic case of teaching by example.

From my father, I learned to keep my head in the clouds with my eyes on the stars.

From my mother, I learned to keep on my toes with my feet on the ground.

If my parents were here they would *kvell* and say a *kein ayin hora*.

I'm the first woman in my family to go to college, and I have never taken my good fortune for granted.

2. Introduction and Thesis

And now the lecture.

Twenty-five years ago, Justice William J. Brennan stood on the stage in the Tisch auditorium and delivered the 1986 Madison Lecture—that's the lecture series organized by the inimitable Norman Dorsen.

Justice Brennan called his lecture “The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights.”¹

The title previewed the argument. At a time when the Supreme Court increasingly was putting civil rights and civil liberties on a back seat to government power, Justice Brennan urged state court judges to use their state constitutions as protection for cherished freedoms.

I watched Justice Brennan’s lecture on a big screen, part of an overflow audience in this room. Following that lecture, and for about the next decade, first at The Legal Aid Society and then at the ACLU, I pressed state courts to accept Justice Brennan’s invitation. In courts in New York and in Alabama, Louisiana, Connecticut, Montana, and elsewhere, I litigated state constitutional claims on issues ranging from the government’s treatment of the mentally ill to the provision of integrated and high quality public schooling.

As a parenthesis, I add that I did this work with some amazing NYU law graduates. Some of them are here tonight, and I’d like to acknowledge them:

Helaine Barnett, who later became the head of the Legal Services Corporation,

Lynn Kelly, who later became the head of MFY Legal Services,

Janet Sabel, who later became general counsel of The Legal Aid Society and has just become New York’s executive deputy attorney general for social justice, and

Don Shaffer, who, as one of NYU’s oldest JD graduates, became a notable lawyer at the NYCLU following an equally notable career in the insurance industry.

In 1995 I returned to this room—I had just been invited to join the faculty—and this time I listened to Chief Judge Judith Kaye, of course a distinguished graduate of this Law School, offer a beautiful tribute to Justice Brennan in her Brennan Lecture, which has since become a great tradition at our law school.²

In the intervening period, state courts had issued blockbuster state constitutional decisions on issues including forced medication for prisoners and the criminalization of what was still called “deviate sexual intercourse with another person of the same sex.” The cases were controversial, and the courts’ decisions were creating a buzz even in the days before bloggers and tweets.

But in her lecture Judge Kaye drew attention to another trend—a trend that has received less attention than it deserves. That trend concerns the unusual relation of state common law to state constitutions.

Judge Kaye pointed to a practice that is absent from the federal courts: she said that state judges at times rely on common law as an “alternative” ground to state constitutional decisions, and she remarked that state judges “move seamlessly between the common law and state constitutional law, the shifting grounds at times barely perceptible.”

In my lecture tonight, “The Private Life of Public Rights: State Constitutions and the Common Law,” I want to recognize and to make explicit the important but overlooked state court practice of using the common law as a way to enforce state constitutional norms.

We are accustomed to thinking about constitutional law as separate from common law. Constitutional law is public law and regulates the government in its conduct with private individuals. Common law is private law and regulates private individuals in their conduct with other private individuals—for example, when they enter into a contract, or slip and fall on a sidewalk, or raise their children.

Of course, there’s a lot of complexity in talking about what is public and what is private and where to locate the boundary between the two. Contracts are regulated by the government, and the government decides where to put sidewalks, and if the love of your life is a person of the same sex, the government will make it hard for you to raise your children as a family.

Legal Realists are famous for having criticized the distinction between the public and the private, pointing to the ubiquity of government involvement in private affairs, and called the distinction incoherent and arbitrary. Yet the divide between public and private remains a powerful organizing principle in American law and in American attitudes.

Indeed, the separation of public and private, and, in particular, the separation of public law and private law, often seems natural—just the way things are—and is justified as a critical part of the small-L liberal project of protecting individual autonomy against the large-L Leviathan of the state.

The state judicial practice of using the common law as a site for state constitutional enforcement interrogates the conventional distinction between the public and the private and it raises questions about the appropriate relation between private law, rules of contract, tort, and property, and public values.

In this lecture, I plan to make the positive point that some state courts do indeed indirectly enforce state constitutional norms through the common law, in disputes that involve only private actors, and that this practice is analytically distinct from mere policy making. The practice depends on a blending of the private and the public that may not immediately be obvious to see. I will illustrate the practice, and I will point to some of the common law pathways that state courts use in this process.

And then I'll make the normative argument, and try to convince you, or at least to provoke questions, that more state courts should embrace this practice, and I will close by suggesting some of the implications that the practice holds for social improvement.

Thinking back to my earlier career as a practicing lawyer, I was motivated by the belief that law, and especially constitutional law, can improve everyday life. I still hold that view, but the mechanisms of change also must include the slow, molecular pathways of the common law.

3. Establishing the Practice of Indirect Constitutional Enforcement

So, let's turn to state constitutions. Lawyers and legal academics are obsessed with the United States Constitution. To the extent they even think about state constitutions, there's a tendency to see them as just miniature versions of the federal. I assume that very few lawyers in this room actually have read the New York Constitution and, if you are new to New York, the constitution of your home state, either.

So I emphasize at the start that state constitutions differ—and differ significantly—from the federal Constitution, and that state courts have considerable latitude in interpreting those texts. Indeed, this was Justice Brennan's insight in his 1986 Madison Lecture.

One difference concerns the requirement of state action as a predicate to constitutional enforcement.

The Supreme Court of the United States treats most of private law—the doctrines of contracts, tort, and property—as separate, even hermetically sealed, from the commands of the federal Constitution. The Fourteenth Amendment provides that “No state shall . . .,” and with very rare exception, the federal Constitution is interpreted as protecting against only government power, and not private power.

State courts are not required to follow the federal state-action doctrine; they may decide to extend state constitutional rights even to the activity of private individuals. Not all state constitutions include a state-action requirement and in some states—admittedly only a few—state courts permit an individual to enforce a state constitutional right directly against another private actor.

New Jersey is one of those states, and a decade and a half ago, the New Jersey court held that a private party has a state constitutional right to leaflet at a privately-owned shopping mall. The case is called *New Jersey Coalition against War in the Middle East v. JMB* and it involved someone who wanted to protest the Iraqi invasion of Kuwait.³

Whether a constitutional right to free speech ought to run against a private land owner raises a lot of thorny issues. A commercial shopping center is just that: a place where you are expected to shop until you drop. But shopping malls also function as the new downtown: a place where ordinary people gather and talk.

Can Roosevelt Field in Garden City, or North Park Center in Dallas, or King's Plaza in Brooklyn, three of the better known shopping malls in the United States, bar a person from coming onto the premises and going to a Taco Bell or to a Victoria's Secret because he is a man?

Or because he is a black man?

Or because he is a black man and is holding hands with a white woman?

Or because he is a black man and is holding hands with a white man?

Or because he is a black man and is wearing a yarmulke?

Or because he is a white man and is wearing a T-shirt with crosses and crescents on it?

Or, because our Every Man actually doesn't present as Man or Woman, or is wearing the same jacket that got Paul Cohen into trouble when he entered a Los Angeles courthouse, a place the Supreme Court described as somewhere that "women and children were present."⁴

I could multiply examples, and you'd get a sense of what it's like to interview for the Hays Program.

But the examples matter and they underscore the complexity of the question.

What other constitutional rights should I put into the picture? What if I want to pack a pistol: can Starbucks tell me I can't keep my Smith & Wesson on the carry tray with my latte and muffin?

Let's assume that a state's constitution, like the federal Constitution, does not reach private conduct—in other words, that the state-action doctrine blocks a private individual from enforcing the constitution directly against another private individual.

That means Every Man cannot sue the shopping center and directly enforce the state constitution.

However, that conclusion does not and should not stop a state court from asking a quite separate and analytically distinct question: whether the state's common law permits the shopping mall from excluding a person because he is black, or she is Moslem, or the person prefers not to identify with any gender, or the person is wearing a T-shirt that says "Save the Planet."

The common law offers state courts an alternative way to think about constitutional norms and how they should affect private relations—a middle way, a third way, a Judith-Kaye way.

It is a hallmark of the common law that it is not, as a noted treatise puts it, “absolute, fixed, and immutable.” Rather, the common law is a “flexible body of principles which are ... susceptible to adaptation.”

This flexible body of principles can change, and it can change in the light of state constitutional norms.

When asked to decide whether a private individual can leaflet at a private shopping mall—a private dispute that touches on public concerns—the court can analyze the problem in common law terms, using the balancing approach for which the common law is famous, and it can include state constitutional norms in that balance. The common law thus becomes a site for the indirect enforcement of state constitutional values, such as the protection of free speech.

Do state courts actually take this approach of indirectly enforcing state constitutional norms through the common law? Yes, some of them do.

Consider this case from the Oregon Supreme Court.

In *Lloyd Corp. v. Whiffen*, plaintiffs wanted to solicit signatures for an initiative and referendum process that would allow them to change a law.⁵ The shopping mall barred all solicitation of any kind on the premises. And it publicized that ban in large notices that it posted at all of the center’s twenty-five entrances.

The process of gathering signatures is active, even aggressive. Those who gather signatures are not asking just to sit quietly at the mall. They want to engage—to be in your face.

Now, I had a leadership role at the ACLU for almost a decade, but even I turn the other way when I see someone coming up to me looking really earnest and carrying a clipboard. Just imagine if you have your energetic four-year-old in tow or are racing to do a chore because you need to get back to your office before you are missed.

But this annoyance, this interference, is part of the price we pay for democracy in action. Indeed, we might say that the Oregon Constitution collectively imposes this cost on all state residents by giving them a direct role in law making through the right to solicit signatures for the initiative and referendum process.

The parties in the Whiffen dispute treated the matter as a state constitutional case. They briefed the state constitutional arguments and they focused on whether state action is required to trigger constitutional enforcement. But the Supreme Court of Oregon refused to go down this road.

Instead, the Oregon court announced that it would decide the case on “nonconstitutional” grounds that it called “subconstitutional.” And the court housed these subconstitutional grounds, doctrinally, in the common law.

Explaining its approach, the Oregon court emphasized that as a common-law court it is required to “observe constitutional principles as much as a legislative or administrative body.” But in observing these principles, the Oregon court did not ask whether state action is required as a predicate for constitutional enforcement, or whether the private land owner is the functional equivalent of a state actor, and it did not issue a constitutional ruling.

Instead, the Whiffen court regarded the right to gather signatures for the law-making process as both an individual right and as a collective right—as a structural feature of the state constitution that constitutes political life in Oregon.

The right to gather signatures forms part of the background understanding, the implicit dimension, a foundational value on which all state laws—public and private—are based.

A property owner’s right to control his property is created and protected by common law, and the scope and content of the common law must account in some way for the state’s commitment to direct citizen democracy as set out in the state constitution.

The state constitution did not command and control the result in Whiffen. It did not create a cause of action that the signature-gatherer could enforce against the mall owner.

Rather, the state constitution provided the Oregon court with grounds of decision that could be used to shape and to give content to the common law relation of two private parties.

The state constitution thus offered reasons for the court to act—it expanded the range of interests that the court can assess and measure in the traditional balancing approach of the common law.

The Oregon court saw an advantage in using the common law as an alternative to a state constitutional decision. A common law decision avoids entrenching a constitutional rule prematurely; it allows the legislature time to consider the problem; and it creates space for the parties to develop rules of self-

governance. In that spirit, the Oregon Supreme Court remanded the case to the trial court for consideration of reasonable time, place, and manner restrictions.

Whiffen is not an isolated example of a state court's relying on common law as an "alternative" ground of decision in a case that implicates public norms.

Through such actions as the public policy tort or the implied covenant of good faith, state courts transport and adapt state constitutional values into areas of private life that are outside the reach of federal constitutional protection and usually are considered to be beyond constitutional influence of any sort.⁶

In this light, consider the public policy tort.

Imagine you are a sales clerk in a relatively small company and you are fired after having complained of sexual harassment. The employer will say that he is not a state actor and so the federal Constitution does not apply.

Let's assume that the state constitution likewise contains a state-action requirement. The employer will argue that at common law he has a right to fire you for no reason or any reason and without having to give reasons—indeed, he will insist that the at-will doctrine also protects your autonomy by allowing you the symmetrical right to quit at any time.

For at least the last half century, some state courts have adapted the at-will rule through a "public policy tort" that looks to constitutional norms in determining whether the common law doctrine ought to be reconfigured as new problems are presented, new issues emerge, and new understandings develop.

The earliest cases adapted the at-will doctrine to bar an employer from firing a worker who was absent for jury duty. Preventing an employer from running his business in a way that interferes with the government's sound functioning could hardly be said to be an interference with any liberty interest worth protecting.

As with the right to gather signatures in the Oregon case, these courts recognized that the jury right is an individual right, but it also is a collective right—a structural feature of the state constitution that is constitutive of a state's political life, and in this sense informs all rights, whether statutory or common law, that come within its orbit.

The state court's taking account of the jury right reflects another insight as well: that private conduct is not hermetically sealed from what happens in the public sphere. Rather, in some settings, private conduct can burden public life. Private conduct can spill over into public life and interferes with our collective well-being.

Economists might call the public effects of private activity negative externalities, and would recognize the need for regulation.

Constitutional law offers a blunt instrument for regulating these externalities by lifting the state action requirement and treating the private actor as a state actor. But in many situations that approach seems intuitively wrong.

The genius of the common law is that it allows the state court to regulate these externalities indirectly, by redrawing the appropriate boundaries of the relation, using a balancing approach that is sensitive to context and detail.

4. Indirect Constitutional Effect as an Interpretive Practice Distinct from Policy Analysis

So far I have tried to convince you that there indeed is a state judicial practice of indirectly enforcing state constitutional norms in private disputes through common law pathways.

The practice differs from that of directly enforcing constitutional rights in disputes where state action is present or where the court lifts the requirement of state action as a condition of constitutional enforcement.

The practice also differs from that of common law courts creating policy, as common law courts do when they look at changed circumstances, or concepts of reasonableness, or new social concerns that generate new expectations.

Analytically, the policy model of common law decision making differs from the indirect-constitutional enforcement model, and the differences actually do matter.

When courts engage in policy making, the claimant is asking the court to review a common law relation in light of values that the judge thinks are important or that a legislature might assess, all things considered.

When courts engage in the indirect enforcement of constitutional norms, the claimant is asking the court to review a common law relation in the light of a norm or value that exists under a state constitution and that the judge then considers and weighs in resolving a particular dispute. Indeed, the indirect enforcement model insists that the court at a minimum take account of state constitutional norms as a source of interpretive material in shaping the common law relation.

In this process, the common law court is not committed to any particular result. But it ought not ignore the state constitution or refuse to take its normative content into account.

Thus, we might say that the practice of indirect constitutional enforcement affects judicial decision making in three ways.

First, it legitimates the court's interpretive process by locating what otherwise might be understood as free-floating preferences in the values embraced by the state constitution.

Second, it justifies the court's policy making by providing grounds for decision that are allied with public values as expressed in the state constitution.

And third, it constrains the court's policy making by requiring that its analysis consider not only the individual property or liberty interests that traditionally are weighed and assessed in common law balancing, and also those new interests and collective interests that find expression in state constitutional texts. The court may choose to give little or no weight to these new or collective interests, but it will have to explain why—it cannot not simply ignore them.

5. Differences between State Constitutions and the Federal Constitution

The practice of according indirect effect to constitutional norms in private disputes could affect, and affect significantly, the shape and direction of common law doctrine. And I think this would be an attractive development.

Rather than an example, let's consider a counter-example—what I view as a missed opportunity for relying on the common law as an alternative to a state constitutional decision.

Think back to March 2003, shortly before our country's invasion of Iraq. The country was quite divided on the subject; there were many demonstrations around the world raising questions about the President's policy. Stephen Downs and his son Roger were two New Yorkers who had questions about the invasion—and not just questions, they were opposed to the war. Early in March, the father and son went to the Crossgates Mall, which is just outside Albany. Stephen wore a T-shirt that said "Give Peace a Chance" on the front and "Peace on Earth" on the back. Roger's T-shirt read "Let Inspections Work" and "No War with Iraq."

In what has become an American tradition, Stephen and Roger went to the food court and sat at a table. While there, something happened—something apparently loud and unpleasant—between Stephen and Roger and two other customers in the food court. A mall security guard responded to the commotion and offered this solution: he asked Stephen and Roger to remove their T-shirts or to leave the mall.

Apparently, the son took off the shirt, but the father refused. One thing led to another and the police were summoned, and they arrested Stephen for trespassing and put him in handcuffs. In the next few days, about 150 people showed up at the mall wearing peace T-shirts; they were not arrested and eventually the mall decided it would be best to drop the trespassing charges against Stephen Downs.

But in another American tradition, Stephen sued the shopping mall for a violation of his constitutional right to free speech: he sued in state court and he sued under the New York State Constitution. The NYCLU represented Stephen in that case, and lost, and at the end of 2010 the intermediate appeals court affirmed the dismissal of the complaint. The NYCLU website lists the Downs matter as closed.

The New York court rejected the constitutional claim for reasons that are highly relevant to understanding the importance of the common law as an alternative site for constitutional enforcement.

The court's explanation was simple and clear. The "constitutional guarantee of free speech," the court wrote, "protects against governmental infringement and, thus, restrictions regarding expression on private property, including malls, do not typically implicate the constitutional right to free speech."⁷

For support, the court said that it was following consistent federal case law on the subject—even though federal courts do not interpret state constitutions—and added that most state courts follow the federal approach, too.

We've seen that the New York court does not have to follow federal law, and the New York court certainly does not have to follow New Jersey law—it was not bound by the New Jersey decision that I earlier mentioned, *New Jersey Coalition against War in the Middle East*.

But the Crossgates Mall case could have been a candidate for the practice of elaborating state constitutional norms through the common law. The New York appellate division may be correct that the New York Constitution is limited by a state action requirement. But that view does not and should not prevent a court from asking whether the state's common law of property, read in the light of the state constitution, permitted the mall owner to bar Stephen Downs from wearing his peace T-shirt as he sat with his son in the food court back in March 2003 in the weeks before the invasion of Iraq.

6. Indirect Constitutional Effect and Socio-Economic Constitutional Norms

So far we have looked at the ways in which civil rights and civil liberties—such as rights to the jury or rights to free speech—might affect the scope and direction of common law doctrine.

Let me point to another possible consequence of according indirect effect to state constitutional norms—a consequence that stems from the range of social and economic provisions that state constitutions include and which are absent from the federal Constitution.

The federal Constitution often is said to be neutral with respect to substantive policy. It is a lean document—just 4400 words. It sets out the machinery of governance and a

few individual rights. But it leaves to politics such questions as whether to provide health insurance, or public schooling, or income support during old age.

In this context, recall FDR's famous Fireside Chat in which he called for a new "economic constitutional order" unmoored from the "old and sacred possessive rights" of the common law.⁸

We have a word for this view of the common law—*Lochner*—and it conjures the image of a common law that is a bulwark against change, a matrix that sustains and supports traditional patterns of behavior, and of inequity, that have built up, slowly, over time.

To overcome the inertial even regressive force of the common law, FDR called for a "second Bill of Rights" that would guarantee the right to a job, to a decent home, to adequate medical care, to a good education.⁹

We tend to associate rights of this sort with human rights developments that emerged in the post-World War II period. So it may surprise you that state constitutions as far back as the eighteenth century addressed collective public goods such as free public schools and public hospitals.¹⁰

Of course, there are 50 state constitutions, and they differ one from the other. But some generalizations are possible about how state constitutional socio-economic provisions could influence the direction of common law analysis,

Let's remember that a state constitution is not simply a miniature version of the federal Constitution—far from it. The shortest state constitution—that of Vermont—runs to 8,295 words, while the longest state constitution—that of Alabama—runs to 357,157 words.

State constitutions are long because they address social and economic concerns that simply are absent from the text of the federal Constitution.

Every state constitution refers to public education. Some state constitutions regulate occupational safety and welfare payments, the right to join a union or not to join a union, child labor, and conditions in mines and other dangerous occupations.

It may be that state constitutions reflect interest-group politics run amok. But what should be clear is that state constitutions are in the thick of articulating policy, and in some cases these provisions are relevant to the policy-laden process of elaborating common law rules for contracts, torts, and property relations.

Indeed, some state constitutional provisions explicitly run against private parties, and not the government.

Still other state constitutional provision clarify that the common law is subject to the state constitution—reversing the view that the state constitution is subject to the common law. For example, New York’s earliest attempt to establish a program of workman’s compensation was invalidated as an invasion of common law property rights.¹¹ Following the Court of Appeals’ decision, the New York Constitution was amended to make clear that tax dollars could be used for this important, public purpose. A constitutional provision about workman’s compensation might seem like statutory clutter. In fact, the provision was intended to constrain judicial discretion and to redefine, indirectly, the content of common law property rights.

7. Reorienting Common Law: Lessons from Abroad

A court that is taking account of these distinct socio-economic provisions will have to decide whether a particular norm matters and how much weight it deserves.

This is not an easy interpretive task, especially given the range of state constitutional socio-economic provisions. Just to give you a taste, the Alabama Constitution addresses bingo, the promotion of catfish, dueling, and prostitution.

But as in any common law decision, a state court is equipped to weigh the different interests that are at stake and to measure them in the appropriate way.

We might anticipate that in some cases, the court’s weighing of a state constitutional socio-economic norm, will reorient common law doctrine in a new direction.

We actually can point to a trend of this sort among national courts on the Continent and in the Commonwealth that engage in a an interpretive practice that is similar to the one Judge Kaye ascribed to state common law judging.

These foreign courts refer to their practice as horizontality—the application of constitutional norms in disputes involving just private actors. There’s another term, in German, but horizontality seems abstruse enough. The point is that foreign courts, like state courts, indirectly apply constitutional norms when deciding private disputes and they do so through contract, tort and property doctrine.

My evidence of this practice comes from a consultancy I did with lawyers, economists from the World Bank, and others—the first of its kind, five-nation study of judicial enforcement of national constitutional rights to health and education.

We thought we were studying how courts enforce social and economic rights directly against the government. Instead, we found ourselves studying how courts indirectly enforce social and economic rights in contract, tort, and property cases involving only private actors.

Consider this phenomenon in India. The India Supreme Court is well known for its public interest docket. But the private law docket of courts in India also shows that constitutional norms, and socio-economic norms, are affecting common law decisions.

For example, some Indian courts interpret contracts in the light of the India Constitution's directive principle of socio-economic justice.

Thus, one court held that a contract of insurance must be interpreted in the light of "the constitutional animation and conscience of socio-economic justice adumbrate[d] in the Constitution."

The specific issue concerned an insurance company's right to limit a class of coverage to "salaried persons." The court acknowledged that the insurer has discretion in deciding how to run its company; but it emphasized that the company's discretion must be exercised in the light of a constitutional commitment to social security.¹²

Trans-national comparisons are difficult to make, and I don't wish to place too much predictive weight on foreign practice. But international examples are suggestive of the ways which a state constitutional norm potentially could influence private disputes.

7. Objections to the Practice

Every proposal for change has to answer whether it will cause more problems than it will cure. So let's consider some problems that might result from extending the practice of indirect-constitutional effect in the ways that I have described.

The biggest problem comes from the danger of effectively eliminating the state action requirement for enforcing a constitution.

Over the years many commentators have criticized the state-action doctrine, and called for its demise. Yet the state-action doctrine remains fixed in the constitutional landscape.

Perhaps its persistence reflects inertia. But perhaps the doctrine survives and even flourishes because it serves an important function: it prevents the government from overreaching into activities and into affairs that private individuals wish to keep private.

Dismantling the boundary between private life and public life removes an important buffer zone against the government. It exposes us to the heavy hand of the state. It could turn us into apparatchiks.

Boiled down, critics might say that the practice of according indirect constitutional enforcement through the common law will dilute constitutional protection, will undermine democracy, will introduce uncertainty, and will subvert personal autonomy.

All of these arguments have been mounted, in some form, to a relaxation of the state-action doctrine in the Article III system. I think they have considerably less bite in the state court context and when the site of enforcement is that of the common law and not constitutional law.¹³

On the federal side, the costs of interpretive error are extremely high. Supreme Court judges have the benefit of life-time tenure, their decisions are national in scope, these decisions are treated as the ultimate interpretation of constitutional norms, and they narrow democratic activity by preempting legislative, local, and popular authority. Moreover, once a decision is in place, the amendment process favors the status quo by erecting tall barriers to change: we had to go through a Civil War to undo the Court's error in *Dred Scott*.

On the state side, the costs of interpretive error are, to put it mildly, less high. In almost every state at least some judges lack life tenure and they can be voted out of office. Their constitutional decisions are state specific, and their common law decisions are similarly bounded. Moreover, state law is open to change through constitutional amendment and the initiative and referendum process: the Alabama Constitution has gone through more than 800 amendments. State common law can be changed through legislative revision or simply through the next common law decision when a dispute between different parties arises in a somewhat different context.

The concern that indirectly enforcing constitutional rights in private disputes will dilute rights may have force when the Supreme Court of the United States is asked to lift the state action doctrine. Possibly the Court will be reluctant to enforce constitutional rights to their full measure knowing that they will run against private actors as well as the government. But the common law, to borrow language from Justice Souter, traditionally has avoided an "all-or-nothing analysis," it attends to context; in addition, state constitutional protections can never go below the federal constitutional floor.

Similarly, the concern that indirectly enforcing constitutional rights will undermine democracy takes on a different cast in a state, rather than the federal, system. In the federal system, the conventional wisdom looks to Congress as the branch of government that institutionally is best equipped to devise policy. But common law rules have their genesis in state court decisions, and there is no reason to think that courts are incapable of revising rules in light of constitutional values. Moreover, a common law decision does not foreclose democratic overruling: the legislature remains unfettered in its ability to change the court's substantive rule.

For this reason, I also see the concern about indeterminacy as overblown. This objection points to the predictable difficulties that a court will face in identifying the values and norms that are candidates for indirect constitutional enforcement. A similar objection has been raised in South Africa, where the constitution uses the open-ended term "dignity" and courts have attempted to enforce that norm horizontally in private disputes. This objection, I think, proves too much, for the same concerns about

predictability and consistency can be raised whenever a state court is engaged in the policy making that we traditionally associate with common law decision making.

Finally, allowing state courts to transport constitutional norms into areas that are understood as “private” may be criticized as subversive of personal autonomy and its requirements of self-control, self-ownership, and voluntary exchange. The autonomy objection assumes that government, including courts, should take a hands-off approach to private relations. It is impossible for the government to discern individual preferences and thus should leave decisions to individual actors. Again, if our concern is entrenching error, repair is much easier at the state level for reasons that I’ve already underscored.

But the autonomy objection is of a different order than the other objections—it goes to the heart of the liberal project and why we attach such importance to constitutional values in the first place.

To my mind, the autonomy objection raises fundamental questions about our collective goals and their relation to private life. State constitutions are deeply concerned about collective well-being, indeed collective material well-being, and they form the foundation on which common law is based.

8. Conclusion

Common law rules of contracts, torts, and property constitute and sustain economic and social relations, they shape our aspirations, and they constrain our sense of possibility. They determine whether a family gets to keep the family farm when they can’t meet a mortgage payment, and whether a working Joe gets to keep working or at least to know why he’s gotten the axe.

State constitutions, in some states, in some provisions, in some contexts, offer state judges interpretive resources to reconsider common law rules, and to reorient private-law doctrine one case at a time. Over time, patterns of common law decision might create new understandings and expectations; new interests might take shape; those interests might even be understood as deserving of federal constitutional protection.

But I am getting ahead of the story and to the end of my time.

In drawing attention to state constitutions, and to the relation of private law to public values and ultimately the relation of private law to questions of social justice, this lecture has built on an intellectual tradition that has deep roots at our Law School.

And so I return to Justice Brennan’s Madison lecture. That night back in 1986, Justice Brennan urged state judges to see state constitutions as a source of possibility – as a way to secure “[j]ustice, equal and practical ... for all ... who do not partake of the abundance of American life.”¹⁴

To achieve that goal, state courts may need to cross the boundary between the public and the private. They may need to protect the private life of public rights, and to consider carefully the relation of common law to human dignity.

I cannot be certain that you agree with everything that I have said tonight, but I hope I have encouraged discussion of difficult and contested constitutional ideas.

I would be happy to answer questions at the reception—but now it is time for food and drink.

I thank you all for coming, and I thank Herb and Svetlana Wachtell for the opportunity to talk to you tonight.

Thank you, and good night.

¹ William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986). For a personal reflection on Justice Brennan's Madison Lecture, see Helen Hershkoff, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. Rev. 1517, 1554 (2000).

² Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 15 (1995).

³ See *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation*, 138 N.J. 326, 650 A.2d 757 (1994).

⁴ *Cohen v. California*, 403 U.S. 15 (1971).

⁵ *Lloyd Corp. v. Whiffen*, 773 P.2d 1294 (Or. 1989), discussed in Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in *New Frontiers of State Constitutional Law: Dual Enforcement of Norms* (James A. Gardner & Jim Rossi eds. Oxford Univ. Press 2011)

⁶ 15A C.J.S., *Common Law*, § 2.

⁷ *Downs v. Town of Guilderland*, N.Y. Civ. No. 507428 (App. Div. 3d Dep't) (slip op. Feb. 18, 2010).

⁸ Quoted in William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 Tex. L. Rev. 1965, 1976-81 (2003).

⁹ Quoted in Helen Hershkoff & Stephen Loffredo, *The Rights of the Poor: The Authoritative ACLU Guide to Poor People's Rights* xv (1997).

¹⁰ For a discussion of welfare provisions in state constitutions, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harvard L. Rev. 1131 (1999).

¹¹ See *Ives v. South Buffalo Railway Co.*, 94 N.E. 431 (N.Y. 1911), discussed in Helen Hershkoff, “Just Words”: Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 *Stanford L. Rev.* 1521 (2010).

¹² *LIC of India v. Consumer Education & Research Centre and Others*, Manu/SC/0772/1995, available at www.manupatra.com (accessed May 1, 2006), discussed in Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Varun Gauri & Daniel M. Brinks ed. Cambridge Univ. Press 2008).

¹³ For a discussion of institutional differences between state and federal systems, see Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 *Harvard L. Rev.* 1833 (2001).

¹⁴ *Id.* at 553 (quoting William J. Brennan, Jr., *Landmarks of Legal Liberty*, in *The Fourteenth Amendment* 1, 10 (Bernard Schwartz ed. 1970)) (internal quotation marks omitted).