

“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 and Daniel M. Brinks, ed., Cambridge University Press, 2008).

Helen Hershkoff*

More than a half century ago the Universal Declaration of Human Rights defined education and physical well-being as human rights to “be protected by the rule of law.”¹ Although a significant number of national constitutions now include language that embraces a right to education, to health, or to both,² disease and illiteracy remain pervasive throughout the world. Almost a billion individuals, a sixth of the international population, cannot read;³ similar numbers lack access to health care or to potable water.⁴ These deprivations cause physical harm,⁵ undermine a person’s sense of autonomy,⁶ and subvert democratic possibilities.⁷ Against this dismal background, skeptics question not only the conceptual foundation of social and economic rights,⁸ but also their strategic value in fostering improvement for the disadvantaged and dispossessed.⁹

The current project examines a specific aspect of this problem: the extent and efficacy of using national courts to enforce constitutionally based claims to health and to education services. Focusing on five nations – Brazil, India, Indonesia, Nigeria, and South Africa – the project offers an ambitious account of institutional practices based on cross-disciplinary, comparative case studies that combine

quantitative with qualitative analysis. The countries under discussion have all codified social and economic rights in their national constitutions and in some places have enacted legislation to effectuate these provisions.¹⁰ The preceding chapters do not revisit the wisdom or legitimacy of extending constitutional protection to health or educational services. Instead, the investigation takes for granted the existence of such rights and focuses on whether and to what extent litigation – taking unmet claims to court – helps secure their enforcement in ways that improve individual lives and enhance social conditions. Working from the ground up, the case studies attempt to trace the particular local processes that influence the judicial and extra-judicial implementation of health and education claims, dealing with issues that range from the availability of money damages to compensate for substandard medical care,¹¹ to the regulation of private school practices affecting student conduct.¹²

From the perspective of a U.S. lawyer, the case studies tell an unexpected and important story – particularly when considered against the usual discussion of the justiciability of social and economic rights. The question of whether federal courts in the United States can and should enforce affirmative constitutional claims tends to focus on the capacity of judges to deal with polycentric, value-laden policy questions in disputes involving the government, and also on the legitimacy of having unelected courts mandate goods and services that are not provided by the democratically elected branches of government.¹³ These arguments, wedded to American doctrine, have spilled over to the jurisprudence of other nations and even to transnational analysis.¹⁴ “[W]hatever the logic and moral force of social and economic rights,”

David M. Beatty states, “their enforcement seems to compromise the democratic character of government and the sovereignty of the people to determine for themselves what the collective, public character of their communities will be.”¹⁵ Implicit in this well trod discussion is a state-centric focus: the assumption that social and economic rights, if justiciable at all, run against the state and the bureaucratic officials who work as its agents, but not against private actors. Moreover, the debate takes a narrow approach to the concept of state duty, so that the government is constitutionally obliged to redress only those deprivations for which it is directly responsible. Although private actors play a vital role in realizing or defeating access to social and economic goods, the conventional account leaves the manufacturer of pharmaceuticals, the manager of a private school, and the doctor who vaccinates a child subject only to the private rules of tort, contract, and property law, and immune from constitutional regulation.¹⁶

The prevailing story of social and economic rights does not capture the complexity of judicial developments abroad. Overall, the case studies provide evidence of constitutional rights affecting the shape and content of private market transactions in ways that seem unusual if public law is limited to state action, particularly in the narrow sense of government responsibility only for the direct consequences of its conduct. The majority of health and education lawsuits filed in the national courts under investigation (with the singular exception of Brazil) involve claims against nongovernmental defendants – doctors, private schools, insurance companies, and hospitals – and not against the state. In India, for example, almost

half of the cases surveyed involve the obligations of private providers, and only 15 percent concern government provision and financing of health care or educational services.¹⁷ Even in countries where the formal legal regime confines social and economic rights to government actors, courts appear to be treating constitutional norms as fundamental principles to be taken seriously in interpreting common law rules (in cases involving private entities as defendants) or in shaping government regulation (in cases involving the state as defendant). Some of the decisions, recognizing the role of private and private–public arrangements in the production and distribution of social and economic goods, take a flexible approach to the public–private divide in seeking to reshape private power in line with public and not simply market goals.¹⁸ At the same time, the decisions attempt to give appropriate respect to autonomy interests, reasonable expectations, and the demand of separation of powers. The result, as Varun Gauri and Daniel Brinks observe in their introduction to this volume, is a situation in which courts are applying “formal economic and social rights to a much wider set of actors, and in so doing have delineated duties and liberties for which a variety of specific actors, and not (or, in some cases, not only) the state, are legally accountable.”¹⁹

The preceding chapters, thus, deviate from the usual account of whether social and economic rights can be judicially enforced against the state.²⁰ Instead, the case studies open a window to a topic variously called the privatization of constitutional rights,²¹ the constitutionalization of the private sphere,²² and the horizontal application of constitutional rights²³ – all of which involve the extent to

which constitutional rights may be enforced, directly or indirectly, against non-state actors in their relations with individuals. As such, the case studies challenge the mechanistic command-and-control conception of the state, which separates public regulation from private initiative and assigns a monopoly for this purpose to the government.²⁴ Consistent with theories of the constitutive and expressive power of law, the case studies illuminate the important interpretive role of constitutional norms in reshaping private orderings to encourage the achievement of public goals.²⁵ Not only do these provisions influence courts in their decision making, but also they produce cognitive effects in individuals. The filing and nature of tort and contract cases suggest that social and economic clauses may motivate individuals to seek judicial protection against mistreatment by private actors whose market behavior blocks access to vital health or education services. From this perspective, the developments set out in the case studies form part of a broader trend involving decentered regulatory processes, the reallocation of authority between administrators and the courts, and interactions between public power and private actors.²⁶

I do not wish to overstate the extent of these developments. Cross-country comparisons are notoriously difficult. Legal traditions, political cultures, and judicial practices differ from country to country and affect court behavior.²⁷ Sample sizes across the case studies vary considerably.²⁸ The number of lawsuits in some nations is unfortunately small. Courts do not always articulate, or articulate clearly, the basis for their decisions. Nor are legal opinions publicly available in all of the countries surveyed.²⁹ Nevertheless, the case studies provide important insight into how courts

actually approach the enforcement of social and economic rights and, thus, are of critical importance to theorists and policy makers interested in whether legalization strategies can affect social improvement.³⁰

Commentators known for their skepticism or even outright hostility toward social and economic rights have altered their views in the light of actual judicial practice: Cass Sunstein and Dennis Davis, for example, two internationally recognized scholars, are said to have undergone “profound conversions on the basis of a single case.”³¹ Whatever their limitations, the case studies raise important questions about the relation between social change and constitutional rights. No longer can analysts confine the influence of social and economic rights to public law cases demanding services from the government; to the contrary, a more abiding influence may flow from their radiating effects in private law cases involving common law rules that reconfigure social relations and destabilize entrenched hierarchy.

This chapter explores the developments described in the case studies in six parts: The first part rehearses the conventional understanding of rights, typical to United States constitutional doctrine, as affording protection only against the government and as playing a very limited role in regulating private actors. Against this background, the second part highlights the critical perspective of the case studies and how their motivating assumptions differ from that of the prevailing thin state-centered approach to constitutional enforcement. The third part considers the different doctrinal avenues through which social and economic rights can be enforced

against private actors, drawing on the existing literature concerning the horizontal enforcement of constitutional rights. The fourth part examines selected court decisions from the case studies to illustrate the influence of health and education constitutional clauses in disputes involving private, and not governmental, activity. The decisions fall into two categories. The first is a familiar, although somewhat unusual, category of constitutional cases seeking government regulation of market behavior. The second is a less familiar category of common law cases involving contract and property disputes between private litigants. The fifth part compares the interpretive practices reflected in these cases with existing academic models of horizontal constitutional enforcement. Finding a gap between theory and practice, I offer an alternative model that focuses on social relationships rather than direct (or even indirect) extension of constitutional duties and obligations. The last part concludes by briefly considering the political economy of constitutional privatization in the countries surveyed. I raise some of the potential criticisms of these developments and set down questions for future research. Even if these cases fall short of a trend, they mark an important development that invites further attention.

CONSTITUTIONAL RIGHTS AND GOVERNMENT ACTION

Commentators typically describe constitutional rights as affording protection against the over reaching actions of government,³² with “the constitution...seen as...delineat[ing] the boundary between the state and the private sphere.”³³ Michael J. Perry takes a characteristic view in referring to “the main sort of human rights that

national constitutions and the international law of human rights protect” as “human rights against government.”³⁴ In a similar vein, commentators describe constitutional rights as trumps that block the exercise of government power and so protect against official abuse.³⁵ Illustrated by United States doctrine interpreting the scope of the Fourteenth Amendment to the federal Constitution, the classical understanding sees constitutional rights as affording protection to individuals in their relations with the state as an all-encompassing Leviathan.³⁶ As Laurence H. Tribe explains, focusing on U.S. law,

With the exception of the Thirteenth Amendment, the Constitution does not directly concern itself with private actors; its self-executing guarantees of individual rights protect individuals only from conduct by the state. That is, the Constitution controls the deployment of governmental power and defines the rules for how such power may be structured and applied. The Constitution, therefore, is not a body of rules about ordinary private actions, but a collection of rules about the rules and uses of law: in a word, *metalew*.³⁷

A corollary of the state-centric approach is the view that constitutional rights function “as individual protections *against* the aggressive state, not as private entitlements *to* protection by the state.”³⁸ The conception of rights as bulwarks against government action is allied with the conventional, although criticized, distinction between negative and positive rights:

A positive right is a claim to something – a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment – while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and

consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation.³⁹

The literature generally associates negative rights with civil and political rights, such as the right to speak freely about political issues without government censorship, and positive rights with economic and social rights, such as a right to government-funded education. It is broadly recognized, however, that negative rights require regulatory action that generates considerable budget expense and, conversely, that economic rights require protection against government intrusion.⁴⁰ Yet, for a long time, the conceptual fault line between negative and positive rights inhibited even the theoretical possibility of constitutionalizing social welfare norms.⁴¹ “To most American lawyers,” Herman Schwartz observed in 1995, “putting economic and social rights in a constitution verges on the unthinkable.”⁴² Indeed, writing five years later, in 2000, Cécile Fabre went even further, saying that the idea of constitutionalized social rights was not seriously considered by “hardly anyone in mainstream Anglo-American contemporary political philosophy.”⁴³

Another basic feature of the classical model is that it extends constitutional protection only against government and not nongovernment action, even though the state authorizes and confirms private power and the private use of resources.⁴⁴ The emphasis, as F. A. Hayek explains, is that of “constructing a suitable legal framework,”⁴⁵ and not the mandating of “particular elements that by themselves appear desirable.”⁴⁶ United States doctrine, thus, draws a line between voluntary

private acts taken by social or market actors and public acts taken by the government.⁴⁷ Although acknowledging that the government sets in place the legal infrastructure within which society and commerce are constituted,⁴⁸ conduct within those realms is considered to be distinct from that of the state and so immune from constitutional regulation.⁴⁹ Private actors do not hold the same duties as government actors and are not held to similar constitutional requirements.⁵⁰ As a result, the framework draws a strict distinction between “inequalities for which the state is directly responsible and those that are said to arise from purely private activities.”⁵¹ The fact that private law fails to generate socially optimal results at best calls for market correction or political oversight, but does not warrant constitutional modification.⁵²

The requirement of state action is subject to some well-known exceptions – famously, the regulation of public utilities, public inns, and aspects of the employment relation.⁵³ But the application of public norms in private settings is exceptional and requires explanation (for example, the fact that the entities are engaged in a public function or are inextricably intertwined with government action).⁵⁴ Overall, federal doctrine in the United States leaves broad areas of private activity constitutionally unregulated; Congress can undertake regulation by enacting statutes or by establishing administrative agencies, but a citizen cannot typically compel the legislature to take such action.⁵⁵

The model, thus, insulates many indirect effects of government conduct from constitutional regulation. For example, an aggrieved individual cannot

constitutionally challenge the decision of a publicly funded hospital to transfer him or her to a less-equipped institution.⁵⁶ Nor does the federal Constitution provide relief for children receiving unequal educational opportunities because of differentials in state funding processes.⁵⁷ And, notoriously, the federal Constitution provides no protection to a child who is brutally assaulted by his father, even where the state arranged, supervised, and permitted the custodial relationship.⁵⁸ Indeed, American constitutional doctrine takes it as a point of intellectual pride that market and social actors are left “unhampered” – with intervention regarded as an intrusion on individual autonomy and overall efficiency.⁵⁹

Admittedly, a felicitous consequence of the vertical application of constitutional rights is the creation of a broad private space in which individuals can enjoy a reasonable degree of autonomy in their everyday lives untouched by direct government supervision.⁶⁰ As Michel Rosenfeld explains, “...in the private sphere, no obligation is owed to anyone unless it has been freely chosen, and, even then, it is only owed to the limited number of individuals to whom the obligor has freely chosen to make a commitment.”⁶¹ Indeed, many commentators argue that the extension of constitutional duties into the private sphere would create a normatively unattractive world; enforcing constitutional rights in private spaces like the family or social club would require an Orwellian bureaucracy, pervasive and intrusive, subversive of the very constitutional order that privatization seeks to achieve.⁶² Justice Rehnquist, thus, famously pointed to the “‘essential dichotomy’ between public and private acts,”⁶³ insisting that “the mere existence” of common law or

statutory law did not turn private activity into public action subject to constitutional constraint.

The boundary between the public and the private, although notoriously contested, thus marks, as Paul Starr observes, “pervasive dualities – or perhaps better said, polarities” that significantly affect constitutional enforcement in the United States.⁶⁴ Increasingly, however, this binary distinction does not map onto governance structures or the reality of power relations.⁶⁵ The last thirty years have witnessed important changes in the nature of sovereignty, the contraction of the state, an increasing reliance on market arrangements to provide social services, and the subtle transformation of citizens into purchasers and clients. Martin Shapiro points out that “the very distinction between governmental and non-governmental has been blurred, since the real decision-making process now continually involves, and combines, public and private actors.”⁶⁶ Similarly, government increasingly depends on private and hybrid public–private arrangements to produce and distribute public goods such as schooling and health services. Alfred C. Aman, Jr. explains: “[D]eregulation and... various other regulatory reforms... have merged the public and the private in various ways, utilizing what were previously primarily private-market means of advancing public-interest goals.”⁶⁷ Despite the threat that unregulated private power poses to democracy, accountability, and egalitarian goals, American constitutional doctrine for the most part has not developed new forms of public regulation.⁶⁸ Jody Freeman observes, “As a practical matter, there appears to be little judicial appetite for eroding the fundamental public/private distinction at the heart of the American

constitutional order, which limits the potential for state action doctrine to be a meaningful limit on private power.”⁶⁹

THE RESEARCH STRATEGY: CONSTITUTIONALIZING A NETWORK OF ENFORCEMENT

The classical approach to constitutional enforcement, typical to the United States, assumes the autonomy of economic activity, a distinct sphere for the social, and a government that is constitutionally responsible only for the direct effects of its conduct. The assumptions motivating the case studies challenge this model in a number of respects. In their Introduction to this volume, Varun Gauri, an economist, and Daniel Brinks, a lawyer and political scientist, take as their legal subject the “‘whole network’ of state agencies and social organizations” needed to realize or defeat social and economic claims. The constitutional network that they explore includes not only the state and its bureaucratic and regional arms, but also the full array of social and market actors who control resources and so affect access to health and education services. As Roderick M. Hills, Jr. explains in an analogous context, non-governmental actors “have the power to influence, or if you prefer a question-begging term, ‘coerce’ individuals by withholding the resources that they control. Private organizations have power: They fire, expel, boycott, strike, and enforce contracts obtained through threats to do the same.”⁷⁰ The case studies, therefore, train their attention on private activity as it relates to the provision or production of health and education services. Within this broadened frame of reference, the research

strategy seeks to explain how social and economic claims are taken to court, examining “demand channels” – usually but not always litigation strategies – that use public as well as private law. In this part, I excavate the motivating assumptions of the case studies and highlight their critical differences from the classical constitutional account.

First, and most obviously, the case studies assume the binding legal status of health and education norms codified in a national constitution. Despite critics who dismiss such language as simply oxymoronic – social and economic rights cannot possibly assume legal form – the case studies take for granted their legitimacy and enforceability. This is so despite broad differences in constitutional language and emphasis. The Nigeria Constitution, for example, uses the language of “social objectives,” mandating that “[t]he State shall direct its policy towards ensuring that...there are adequate medical and health facilities for all persons....”⁷¹ The Brazil Constitution casts health care as a duty of government and a right shared by all: “Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.”⁷² The South Africa Constitution uses the language of rights and affirms that “Everyone has the right to have access to... health care services, including reproductive health care....”⁷³ The Indonesia Constitution likewise treats health care in terms of individual rights: “Every person shall have the right to live in physical and spiritual prosperity...and shall have the right to obtain

medical care.”⁷⁴ Finally, the India Constitution contains a complex of principles that contemplate “[p]rotection of life and personal liberty”; the development policy “securing...that the health and strength of workers...are not abused”; and the “[d]uty of the State...to improve public health.”⁷⁵ Against the classical model that rejects social and economic rights as constitutionally implausible, the case studies accord them vitality and respect. As Amartya Sen explains in a related context:

The rhetoric of human rights is sometimes applied to actual legislation inspired by the idea of human rights. There is clearly no great difficulty in seeing the obvious juridical status of these already legalized entitlements. No matter what they are called (“human rights laws” or whatever), they stand shoulder to shoulder with other established legislations. There is nothing particularly complicated about this bit of understanding.⁷⁶

Second, the research strategy builds on the pragmatic insight that social and economic rights call for the provision of different goods and services and that the production and distribution of these goods depend on the interrelated efforts of diverse actors. These actors include the government and state agencies. But they also are recognized to include nongovernmental actors, such as corporations, individuals, and social organizations. Gauri and Brinks, thus, characterize the effectuation of social and economic rights as involving a set of triangulated relations among three categories of public and private entities: first, the state and its agents; second, private entities running the gamut from civil engineers and landlords to pharmaceutical companies and teachers; and third, recipients, citizens whose rights are realized through the delivery of essential goods and services. The authors focus their attention on the kinds of action needed from public and private providers to support the

effectuation of economic and social rights. For health rights, Gauri and Brinks identify three broad categories: establishing the relative obligations of patients and providers; state regulation of providers (including private health insurance companies); and the expansion of state-provided health-care services. For education rights, the triangle includes three broad categories: choices in education (including school curricula and policies); state regulation of education providers (including private and independent schools); and the expansion of state-provided education services through increased funding or provision. This triangulated network of activity, whether prescribed by the government, privately agreed to in contracts, or negligently inflicted by indifference, is the space within which enforcement of social and economic rights takes place. Their conceptualization of these networks recognizes that private organizations – the pharmaceutical company that manufactures critical medicines, the physician who provides essential medical care, the construction company that builds infrastructure needed for hospitals⁷⁷ – control resources that directly affect the production and distribution of health and educational services and so can defeat or realize important social goals.

Third, the research strategy assumes that all branches of government, including the courts, share responsibility for the enforcement of social and economic rights, whether by developing policy frameworks, enacting legislative regulations, bringing criminal prosecutions, carrying out administrative compliance efforts, or interpreting common law rules of tort, contract, and property. Focusing on the court's role, social and economic rights afford judges interpretive authority through which to

devise and revise terms of accountability for all network participants using legal tools of constitutional enforcement, statutory interpretation, and common law application.

Finally, the case studies ally themselves with theorists who conceptualize constitutional rights as constitutive of social relations and not simply as protective barriers against the overreaching state. Some of the national constitutions explicitly provide that constitutional clauses bind a nongovernmental entity in its relation with other private individuals. The South Africa Constitution, for example, states: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” The Constitution adds that the judiciary “in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and...may develop rules of the common law to limit the right.”⁷⁸ Other constitutions, however, such as that of Nigeria, explicitly limit constitutional obligations to government responsibility: “It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.”⁷⁹ The research strategy assumes that even if constitutional provisions do not apply – or do not apply tout court – to private activity in all situations, they have radiating effects that shape relationships and consciousness. Gauri and Brinks do not explicitly commit themselves to the horizontal application of social and economic rights. Instead, as the authors explain, “In social life, the legally reviewable duties and liberties that arise

from the application of formal rights are always evolving as new technologies interact with new social relationships to create new demands and new rights.”⁸⁰

JUDICIALIZING THE NETWORK ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS

The preceding chapters approach the question of how social and economic rights are enforced from a perspective that may seem counterintuitive. Constitutional rights are conventionally understood as claims against the state; their enforcement requires state policy making, bureaucratic administration, and government funding. Those who study the effectiveness of social and economic rights (or, indeed, of constitutional rights in general), thus, focus on litigation aimed at the government in which the poor or marginalized demand services – such as improved education, available low-cost housing, or needed pharmaceuticals – directly from the state. The research strategy assumes the importance of this demand channel. But it expands the investigation to include the role of market actors in the realization or defeat of social and economic claims. The case studies, thus, assign a place for private law – the rules of contract, tort, and property – in the overall scheme of constitutional enforcement. This is not to say that constitutional rights apply completely or in the same way to private actors as they do in the public sphere. Institutional context matters, as do individual autonomy concerns. Indeed, Gauri and Brinks are fastidious in declining to specify the rights and duties that attach to private entities when their actions implicate health and education goods. Instead, they assume an institutional solution

in which courts will work out the details of these relationships in collaboration with other legal actors.

The framework that informs the case studies is theoretically allied with the idea of having constitutional rights apply not only vertically, to the relation between the state and the individual, but also horizontally, to the relation between one individual and another. A rich and complicated literature, developed largely outside the United States, currently explores whether and how constitutional rights can influence the shape and content of private activity.⁸¹ As Robert Alexy explains, from the perspective of German constitutionalism,

The idea that constitutional rights norms affect the relations between citizens, and in this sense have a third party or horizontal effect, is accepted on all sides today. What is controversial is how and to what extent they do this. The question of *how* constitutional norms influence the relations between citizens is a problem of *construction*. The question of the *extent* to which they do this is a question of substance and indeed a problem of *conflict*.⁸²

In this part, I explore the various doctrinal avenues that are open to courts to carry out the interpretive practice of integrating constitutional norms into private law rules of obligation and responsibility. Admittedly, normative scholarship tends to avoid discussing doctrine – as Barry Friedman puts it, “Legal realism has made us skeptical of doctrine.”⁸³ But the availability of legal channels through which public law values can be applied in contexts that are conventionally understood to be “private” raises important questions about the role of social and economic rights in facilitating social change. Building on important writing by Robert Alexy, Justice

Aharon Barak, and Stephen Clapham (among others)⁸⁴ I map out various legal channels through which health and education constitutional clauses can potentially affect common law relations. Although doctrine does not control the results in particular cases, the availability of these legal channels significantly reframes the question whether legalization strategies hold progressive potential.

As the South African Court observed in *Du Plessis v. De Klerk*, “there is no universal answer to the problem of vertical or horizontal application of a bill of rights.”⁸⁵ The existing literature identifies at least four doctrinal channels through which constitutional rights can affect the scope of private activity. The first, or nonapplication model, assumes that constitutional rights apply only to government acts and not at all to private acts. However, this approach does not foreclose the court from relying on constitutional rights in its interpretation of the legal rules that order and arrange private activity. Just as human rights law imposes on state parties the duty to respect, to protect, and to fulfill, arguably a government that has committed itself to health and education rights has an obligation to shape legal rules – both private and public – to achieve the fulfillment of those guarantees.⁸⁶ As William F. Felice explains:

Economic and social rights create obligations for governments to enact policies and measures that create the proper environment for these rights to flourish. The duty of citizens and governments is to support the policies, institutions, and agencies that meet these social needs. These are legal obligations and not simply altruism. Ensuring the economic and social rights found in human rights law requires that states guarantee that all public and private actors respect these norms.⁸⁷

This understanding of the scope of the government's obligation recognizes the critical role of the state in encouraging and facilitating social and economic relations; market orderings do not arise spontaneously but rather in response to the legal arrangements created by government.⁸⁸ Focusing on the right to food, András Sajó, thus, equates the state obligation with “a guarantee of a sociolegal environment conducive to having access to food.”⁸⁹

In the context of medications, for example, signatory nations to international human rights conventions have an obligation to protect the right to medication through appropriate regulation of private market activities. The United Nations Committee on Economic, Social and Cultural Rights explains that the obligation to protect may be violated by a state's “failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others.”⁹⁰ One commentator offers the following example to illustrate a potential violation of this obligation:

[T]he state is under an obligation to provide anti-competitive remedies against patent abusers so that brand name drug producers are not permitted to price their medications at prices that exponentially exceed generic equivalents. As a general matter, access to lower priced generics would increase the number of previously disadvantaged persons that could access drugs needed to prolong their lives. Strong enforcement of anti-competition rules where patent holders refuse to grant licenses to generic producers and excessively price their products is therefore a measure that can and should be taken “to reduce the inequitable distribution of health facilities, goods and services”....Moreover, such enforcement will also

“promote...[t]he availability in sufficient quantities of pharmaceuticals and medical technologies”.⁹¹

State actors have similar regulatory responsibilities with respect to the right to education. The Committee states: “By way of illustration, a State must...protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school...”⁹²

The second approach, or direct application model, assumes that constitutional rights apply to private actors as they do to public actors.⁹³ As Peter Benson explains, “Such rights, just as they are defined and enshrined in basic laws and constitutions, are to be applied directly both to government–individual relations and to relations between private individuals. The definition and vindication of these rights are fully independent of the doctrines and operation of private law.”⁹⁴ From this perspective, the fact that no right of action exists as a matter of tort or contract law is irrelevant to the court’s application of the constitutional norm. Rather, the right affords the court interpretive space to shape and define relations in the light of constitutional provisions. For example, conceivably a court could apply the constitutional right to education directly to a parent who forbids a child from attending school in order to make time for employment; or to a parent who withholds education opportunities from an adopted or out-of-wedlock child. Similarly, the right to health care could be directly applied to an employer who subjects employees to unsafe workplace conditions or exposes members of the surrounding community to toxic pollutants.

A third approach, or indirect application model, assumes that constitutional rights provisions apply to private orderings, but they are enforced through the rules and doctrines of private, and not public, law. As Justice Aharon Barak explains, “In other words, constitutional human rights do not permeate private law ‘in and of themselves,’ but rather by means of existing or new private law doctrines.”⁹⁵ In some cases, the application of the constitutional norm may be impeded if the private law does not recognize a private cause of action, although it is open to the court to imply such a right and to interpret it in a way that comports with constitutional norms. And as Roger Brownsword has demonstrated, constitutional norms may comfortably be incorporated into the “good reasons” that courts recognize as a constraint on contractual liberty.⁹⁶ So, for example, the existence of a constitutional right to health care could provide the basis for a court ordering a remedy of damages for pain and suffering, in addition to pecuniary injury, where medical care is withheld or inadequately provided.⁹⁷ Similarly, the constitutional right to education could inform a court’s determination that a private school fee is excessive if it serves to bar a child from educational opportunities.

The fourth approach, called the *judiciary application model*, builds on the idea that courts, as institutions of government, are equally subject to constitutional requirements and are constrained from enforcing private arrangements that would undermine, violate, or subvert constitutional duties – “a court is barred from enforcing private law claims that are deemed to impair constitutional rights.”⁹⁸ This model assumes that constitutional rights apply directly only to government but

indirectly regulate private activity through, for example, the withdrawal of judicial remedies for private activity that would offend or subvert public values.⁹⁹ Thus, in *Shelley v. Kraemer*,¹⁰⁰ the United States Supreme Court held that it would be unconstitutional for a state court to enforce a racially restrictive covenant, even though the covenant was itself not unconstitutional, on the ground that “the action of state courts and judicial officers in their official capacities is to be regarded as actions of the State within the meaning of the Fourteenth Amendment.”¹⁰¹ The theory appears to be that the state courts are barred from enforcing even private contractual or property terms that the legislature could not itself enact. However, *Shelley* is virtually unique in United States law; courts not only have limited its holding to the area of racial discrimination, but also have declined to enforce it even within that context.¹⁰² As applied to health or education rights, a hypothetical case would include a court’s refusal to enforce a school’s decision to expel a student for nonpayment of fees or a hospital’s decision to terminate care for lack of health insurance.

JUDICIAL APPLICATION OF HEALTH AND EDUCATION RIGHTS TO PRIVATE ORDERINGS

Each of the case studies provides some evidence of the radiating effect of constitutional norms in influencing the shape and scope of private obligations – a development understood in academic and judicial circles to involve the horizontal application of constitutional rights. It bears emphasis that none of the national courts

surveyed has articulated a systematic approach to this issue; indeed, in some cases (as, for example, the medical malpractice cases discussed by Bivitri Susanti in the chapter on Indonesia¹⁰³) the court never even refers to the existence of the constitutional right. Arguably, however, the judicial decisions, as well as litigant strategies, acquire greater coherence when viewed within a motivating constitutional framework.¹⁰⁴ This part of the chapter focuses on two categories of decisions: first, those involving state regulation (or failure to regulate) private industry; and second, those involving judicial interpretation of private law doctrines in the area of contracts and property.

Reshaping the Regulatory Landscape in Light of Constitutional Norms

I focus in this section on judicial activity in Indonesia and India, where – despite broad differences in docket activity, judicial access, and public interest culture – litigants have pressed constitutional claims that, in effect, seek to reorder market relations by asking the court to integrate constitutional norms into the legislature’s regulatory process. Even in cases in which the courts do not impose direct legal mandates calling for the provision of particular education or health services, the fact that health and education hold a constitutionalized status – whatever that status might be – has influenced the terms of judicial decision making in discrete regulatory contexts.

The Indonesia Constitutional Court and natural resource privatization.

Few issues raise so crisply the distinction between the public and the private as that of privatization, yet the term itself lacks precise definition. Paul Starr explains:

Privatization is a fuzzy concept that evokes sharp political reactions....Yet however varied and at times unclear in its meaning, privatization has unambiguous political origins and objectives. It emerges from the countermovement against the growth of government in the West and represents the most serious conservative effort of our time to formulate a positive alternative.¹⁰⁵

In many industrializing nations, struggles about privatization relate to ownership and control of natural resources – in particular, oil, gas, and water. Efforts to privatize natural resources in Indonesia have brought forth charges of official corruption, self-dealing, and inappropriate pressure by multinational corporations on government policy.¹⁰⁶ At the same time, the state has been unable to meet legitimate demands for basic services – for example, it is estimated that 70 million Indonesians lack access to electricity.¹⁰⁷ Constitutional litigation has focused on how best to develop natural resources and to make them more broadly available.

Following the Indonesia legislature's enactment of Law No. 22 Year 2001 concerning Oil and Natural Gas, a number of nonprofit groups, including the Indonesian Legal and Human Rights Consultants' Association, the Indonesian Legal Aid and Human Rights Association, and Country and National Solidarity, petitioned the Indonesia Supreme Court to review the statute's constitutionality. Among other allegations, petitioners pointed to the predictable and deleterious effect that the statute would have on health and educational rights, emphasizing that its

implementation would “reduce society’s opportunity in improving its local capability such as education, training, information access, nation and character building, etc.”; and also weaken the country’s Human Development Index.¹⁰⁸ The specific question focused on the law’s compatibility with Article 33 of the 1945 Indonesia Constitution, which provides, in part: “The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability and environmental insight, independence and by keeping a balance between progress and unity of the national economy”; and “Land and Water and the natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of the people.”¹⁰⁹ The Court upheld most of the statute, but invalidated those portions that remitted the pricing structure of oil and gas solely to the market, on the view that the government constitutionally could not cede control of basic resources to private, profit-making corporations.¹¹⁰ The Court underscored that the pricing of natural resources could not constitutionally be left to the unregulated private market:

Article 28 Paragraphs (2) and (3) of the *a quo* law prioritizes competition mechanism over the Government’s intervention which is limited to specific community groups, and as such it does not guarantee the meaning of the economic democracy principle as regulated in Article 33 Paragraph (4) of the 1945 Constitution in order to prevent the strong from preying on the weak. According to the Court, the prices of domestic Oil Fuel and Natural Gas should be stipulated by the government by paying attention to specific community groups and considering a fair and reasonable business competition mechanism. Therefore the

aforementioned Article 28 Paragraph (2) and (3) must be declared *contradictory* to the 1945 Constitution (emphasis in original).¹¹¹

One commentator explains the court's approach by emphasizing the overall impact of the government's withdrawing from market oversight: where regulations affect not only "vital production sectors," but also "the livelihood of many people," the government has an important role – amounting to what must be a "dominant feature" in any regulatory scheme – of determining the price structure.¹¹²

The next year, the Indonesia Court was asked to review legislation involving the nation's water resources. The Water Resources Law, enacted in 2004, requires the state to "guarantee everyone's right to obtain water for their minimum daily basic needs," while authorizing decentralization of water management and participation by private, profit-making companies."¹¹³ The Court found the law to be "conditionally constitutional, which means that the law is constitutional, on the condition that it is interpreted or applied in a certain way."¹¹⁴ Jimly Asshiddiqie, the court's president, explained: "Although the law takes into consideration merely some parts of the Article 33 of the Constitution, it doesn't mean the Law is at odds with the Constitution."¹¹⁵ The Court articulated various principles expected to inform future regulatory enactments, including that of "guaranteeing access for everyone to the water source to obtain water" and that regional waterworks "shall not be established with a view of only seeking profit, as an enterprise who performs state functions in materializing Article 5 [of the Indonesia Constitution establishing a right to water]."¹¹⁶ In effect, the court set out a constitutional framework for future action, while not directing the legislature to take any specific steps. The decision left open the possibility of further judicial challenges if, as counsel for the claimants put it, "we

find any flaws in the implementation of the law.”¹¹⁷ In both cases, although petitioners did not seek directly to enforce constitutional provisions relating to health or education, these constitutional clauses nevertheless influenced the Court’s decision making as guiding principles.

The India Supreme Court and market regulation.

The India case study highlights many instances in which the Indian judiciary, famous for its public interest docket,¹¹⁸ has intervened to regulate market transactions, including water quality,¹¹⁹ blood banks,¹²⁰ air pollution,¹²¹ and sugar distribution;¹²² in its decisions, the India Supreme Court has relied on constitutional norms as fundamental principles and effectively extended constitutional rights in the horizontal position.¹²³ The India Court’s approach to the problem of unlicensed medical practitioners, including faith healers, illustrates the ways in which constitutional norms inform the judiciary’s interpretive practice. *Rajesh Kumar Srivastava v. Verma and Others*¹²⁴ concerned contempt proceedings following on earlier actions mandating the state “to stop the menace of the unqualified and unregistered medical practitioners proliferating all over the State.” As a result of these earlier proceedings, more than twenty thousand criminal prosecutions had been commenced against identified “quacks.” In this follow-up miscellaneous application to the High Court of Allahabad, the question focused on whether “faith healers” fell outside this regulation on religious grounds. Although recognizing a guarantee to freedom of conscience under Article 25 of the India Constitution, the court emphasized the importance of the right to health in shaping appropriate relief:

Supreme Court has by a dynamic interpretation of Article 21 expanded the meaning of right to life, to include right to health. This right to health can be guaranteed only if the State provides for adequate measures for treatment and takes care of its citizen by protecting them from persons practicing or professing unauthorized medical practices.¹²⁵ [/EXT]

Thus, as in the Indonesia context, the India judiciary did not directly apply the right to health in its assessment of the government regulation; instead, the right to health served as a guiding principle that shaped the relations at issue.

Reordering Private Contract Relations in Light of Constitutional Norms

The classical constitutional model sees contract doctrine as a set of neutral rules “in which economic actors establish relations in a realm of freedom”; as David M. Trubek and Alvaro Santos explain, the private law of contracts “is contrasted with the sphere of public or ‘regulatory’ law, which is presented as coercive, and an ‘intervention’ in an otherwise level playing field.”¹²⁶ The case studies interrogate this model through judicial decisions that challenge the impartiality of contract doctrine, acknowledge its distributive implications, and try to align contract rules with constitutional goals. Some of these decisions involve the private provision of health and educational services such as insurance coverage or school admission. The case studies indicate a willingness by courts to scrutinize contract terms in the light of constitutional norms; the public policies expressed in the constitutional provisions inform not only the court’s interpretation of the contract term, but also, in some cases, its formulation of the governing common law rule. Although the small number of cases does not constitute a trend, the decisions sketch out a judicial practice of

seeking to reconcile private contract terms with the broader public interest in securing health and education rights. I discuss a few examples from India, Brazil, and South Africa to illustrate the emergent practice.

In *LIC of India*, the India Supreme Court held that private insurance companies have a public duty to offer “just and fair terms and conditions accessible to all the segments of the society” in conformance with various constitutional guarantees, including Article 21 of the Indian Constitution, such that “in issuing a general life insurance policy of any type, public element is inherent in prescription of terms and conditions therein.”¹²⁷ The specific question involved the insurer’s right to limit a special class of coverage to “salaried persons in Government, quasi-Government or reputed commercial firms” on the ground that a private company “is free to incorporate as a part of its business principles, any term of its choice.” Looking at recommendations made in 1980 by the Sezhivan Committee Report “to make available policies to wider Sections of the people,” the Court framed the controversy as one within the principles of “socio-economic” justice expressed in the Preamble Chapter of Fundamental Rights and Directive Principles of the India Constitution, as well as Article 25 of the Universal Declaration of Human Rights. The Court explained that the Fundamental Rights and Directive Principles of the Constitution deem a right to livelihood to be necessary to “a meaningful life.” Just as social security and disability benefits “are integral schemes of socio-economic justice,” life insurance, “within the paying capacity and means of the insured to pay premia,” is an additional security measure “envisaged under the Constitution to make

[the] right to life meaningful, worth living and [the] right to livelihood a means for sustenance.”

The Court also acknowledged that the insurance company possesses broad discretion to set the terms and conditions of insurance policies that it offers to the public for purchase. However, that discretion is subject to constitutional principles of socioeconomic justice:

We make it clear at this juncture that the insurer is free to evolve a policy based on business principles and conditions before floating the policy to the general public offering on insurance of the life of the insured but...insurance being a social security measure, it should be consistent with the constitutional animation and conscience of socio-economic justice adumbrate[d] in the Constitution[.]

To this the Court added:

[I]t should be no answer for the...person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor, do in the field of private law.... The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.

To similar effect are judicial decisions from the state of Bahia in which Brazilian courts intervene in the relation between individual health insurance contract beneficiaries and their private insurers.¹²⁸

Other cases concern the contract obligations of private educational bodies that are deemed to be engaged in the “performing of a public duty [*sic*].”¹²⁹ On this basis, India courts extend certain constitutional requirements, particularly equality concerns, to the activities of private educational institutions. Thus, the High Court of Punjab and Haryana in *Ravneet Kaur v. Christian Medical College*¹³⁰ rejected petitioner’s request for school admission on the merits, but emphasized that private entities serving particular public purposes must be held to the same standards as public institutions, particularly if public funding is involved:

The Constitution cannot be interpreted to mean that there are two sets of rules for the same game. It is only right that every Institution which is charged with a public duty follows the mandate of Article 14 [regarding equal protection of the laws].... [T]here cannot be a dichotomy – a division of the institutions performing public duties into two strongly contrasted classes. The private institutions performing public duties supplement the State’s effort. They are partners with the State [*sic*]. The private and Governmental institutions are the two sides of the same body. The right side cannot smile when the left side is pinched.

The India courts also have used the principle of “congruence” or “parity” to shape contracts involving private school admission or fees. Recognizing that the state regulates public educational institutions, the courts analogize private institutions to public schools based on their shared educational mission, which then becomes the base on which to extend constitutional norms into the private realm. In these cases, India courts affirm the constitutional right of the private entity to establish a private school, but interpret the right in the light of public purpose. For example, considering the question of school admission policy, the High Court of Andhra Pradesh explained

“that private unaided professional colleges have no unbridled power or authority to admit students in their colleges de hors the State law.... They can only do so with regard to certain percentage but the percentage shall have to be determined by the Government having regard to local needs.”¹³¹ This principle of equality was applied to create parity in pay scales for teachers in private schools, even where the school received no state aid:

In view of the long line of decisions of this Court holding that when there is an interest created by the Government in an Institution to impart education, which is a fundamental right of the citizens, the teachers who teach the education...[acquire] an element of public interest in the performance of their duties. As a consequence, the element of public interest requires regulating the conditions of service of those employees on par with Government employees.¹³²

In other cases, the right to education has served as a background norm of “proportionality” that informs the court’s interpretation of the private entity’s contractual obligations.¹³³ Litigation involving the Hindi Vidya Bhavan Society, an “unaided” private school, that is, one not receiving any state financial support, concerned the level of fees appropriately charged to students. Although the school possessed statutory autonomy to determine student admission and fees, the Court deemed it essential to protect against “profiteering by the institution” while ensuring sufficient funds to ensure academic quality. The Court explained:

Proportionality...preserves the balance between the societal interest in ensuring the quality of education and the societal interest in protecting parents and their children from the vice of profiteering.... [There must be a] balance...if rights are not to conflict with rights and rights

are not to be exercised in a manner that would conflict with duties. Education, like many other sectors of our society, is confronted with serious questions about the [manner in] which the content of a fundamental human right will be shaped by private initiative.¹³⁴

The South Africa case study reveals a similar interpretive approach to contract enforcement (although without success for the claimant). In *Afrox Healthcare Bbp v. Styrdom*,¹³⁵ the Supreme Court of Appeal considered whether a private hospital could include in patient contracts an exclusion of liability for damages caused by its nursing staff's negligent conduct. The Pretoria High Court had ruled in favor of the patient, finding, as one commentator explains, "a legitimate expectation that the services to which they have access would be rendered with skill and care by professional and trained health care personnel."¹³⁶ The judgment was reversed on appeal but did not decide whether a minimum level of care is required. The agreement at issue had gone into effect in 1995, two years before adoption of the South Africa Constitution and so involved, at least in part, a question of the retrospective and indirect application of constitutional principles to private parties in their private relations. The court considered the parties' "subjective" expectations and determined that although common law rules generally "had to be changed to promote the spirit, purport and object of the Constitution," in this case the exclusion clause, because "standard" and "expected," was deemed to be binding and not subject to invalidation.

Subsequently, in *Barkhuizen v. Napier*,¹³⁷ the Constitutional Court made explicit the relation of constitutional principles to contract enforcement in a case

involving a time limitation in a short-term insurance policy. Section 34 of the South Africa Constitution provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” Section 36(1) further provides: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable” in the light of principles of dignity, equality and freedom. In this case, the applicant was denied coverage for damage to a motor vehicle on the ground that he “had failed to serve summons within 90 days of being notified of the repudiation of his claim” by the insurer, as required by the contract to which he had freely assented. The Court first set out its methodological approach, recognizing that the dispute raised the question of whether Section 34 “raises the question of horizontality, that is, the direct application of the Bill of Rights to private persons.” However, the Court then avoided this issue, treating the question instead as one of indirect application through the requirement of conformance with public policy, explaining:

[T]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.

Nevertheless, the Court emphasized: “No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional

obligation to develop common law, including the principles of contract, so as to bring it in line with values that underlie our Constitution.” The Court then determined to assess the fairness of the time limitation “by reference to the circumstances of the applicant.”¹³⁸ The Court considered the time limitation from the applicant’s subjective position, taking a fact-specific approach, rather than setting down objective rules for all cases. Faced with a virtually empty record, the Court dismissed the appeal.

Aligning Property Rights with Constitutional Goals

The classical model of constitutional enforcement remits property rights to the private sphere; when invaded – through takings or, occasionally, by other regulatory acts – the property holder is entitled to compensation from the state. As Joseph William Singer explains,

The classical view of property concentrates on protecting those who have property.... The classical view focuses on individual owners and the actions they must take to acquire property rights, which will then be defended by the state. It assumes that the distribution of property is a consequence of the voluntary actions of individuals rather than a decision by the state. Property law does nothing more than protect property rights acquired by individual action. Distributional questions, in this conception, are foreign to property as a system.¹³⁹

By contrast, critical theory places the distributional aspects of property law front and center, emphasizing the role of property rules in shaping social relations and perpetuating or destabilizing hierarchy.¹⁴⁰ The case studies suggest that in some situations, social and economic rights afford courts interpretive space within which to

reconfigure property rights in the light of public aspirations. This is not to say that private property becomes collective or state-owned;¹⁴¹ rather, in some situations, the inclusion of social and economic rights in a national constitution persuades a court to reconfigure the boundaries of the property right to reflect the significance of interests that in other contexts might be given less weight or not included at all in the balance.

Whether property rights could defeat the South African government's provision of emergency shelter to the indigent came to the forefront in the *Kyalami Ridge* case decided by the Constitutional Court.¹⁴² In this case, petitioners challenged the state's authority to create temporary settlements on public land for indigent people made homeless through flooding caused by heavy rains. Budgetary appropriations had been made to deal with the emergency, and the government chose to site a transit camp on a prison farm using land that the government owned. Nearby residents filed suit to enjoin the siting decision. They argued that the government could not site the camp on the farm because it lacked specific legislative authorization to take such action. They also argued that the siting decision violated requirements of administrative legality because the government had failed to secure consents from ministerial functionaries, had failed to meet environmental standards, and had failed to comply with town planning ordinances. Claimants further challenged the government's decision on the ground that "the choice of the prison farm as the site of the transit camp...will affect the character of the neighbourhood and reduce the value of their properties," and that the transit camp "would constitute

a nuisance.” It bears emphasis that the claimants at no point disputed the constitutional right of the flood victims to be afforded access to temporary shelter.

The Court found that the government’s use of its own property was not unreasonable for the intended purpose, and, further, that existing laws neither “excluded nor limited the government’s common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.” In addition, even if claimants were prejudiced because of a reduction in the value of their property or a change in the “character of their neighborhood,” they pointed to no “rights or legitimate expectations” that were “affected or threatened,” as required to secure relief under the principle of procedural fairness. The Court left open the question whether prospective rights (as, for example, asserted by an applicant for a license) would satisfy the requirement, assuming “that procedural fairness may be required for administrative decisions affecting a material interest short of an enforceable or prospective right.” Looking, then, at the competing interests of the adjacent property owners and the homeless flood victims, the Court insisted that one factor not be privileged over the other, but rather that a balance be struck, depending on “the nature of the decision, the ‘rights’ affected by it, the circumstances in which it is made, and the consequence resulting from it”:

The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing.

But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.

The Court left open whether other legal restraints might be interpreted to limit the government's conduct, emphasizing that the state "cannot...on the basis of its rights as owner of the land and a constitutional obligation to provide access to housing, claim the power to develop its land contrary to legislation that is binding on it."¹⁴³

Conversely, whether the burden of the state's housing efforts can be imposed on any single property owner came to issue in the *Modderklip Boerdery* litigation,¹⁴⁴ which raised, but elided, the question of the horizontal application of Section 25 of the South African Constitution ("No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."¹⁴⁵). Over time, the Modderklip farm became the site of informal settlements by residents from an adjacent and overcrowded township in Benoni. In May 2000, four hundred settlers came to live on the farm and resided in fifty dwellings. After discussion with the Benoni City Council, Modderklip tried to evict the settlers, but the head of the local prison requested that the prosecutions not go forward "as the prison would be hard-pressed to find space to accommodate convicted unlawful occupiers should they be sentenced to prison terms." Modderklip continued to try to resolve the matter short of eviction, going so far as offering to sell the occupied portions of the farm to the township. In the meantime, informal settlements continued to develop. By October, eighteen thousand people, in four

thousand dwellings, had come to occupy Modderklip's farm; at the time of decision, the number had mounted to forty thousand, collectively organized into the Gabon Informal Settlement. Unable to evict the settlers, Modderklip filed suit in the Pretoria High Court claiming that the continued occupation of the farm constituted an unconstitutional arbitrary taking of property. In their response, the police "contended that the problem was not a police matter but one of land reform," and asked the court to consider where the settlers would live if they were evicted from the farm. The court ruled largely in favor of Modderklip, finding:

[T]he state had breached its [constitutional] obligations...to take reasonable steps within its available resources to realize the right of the occupiers to have accesses to adequate housing and land...[and that] this failure by the state effectively amounted to the unlawful expropriation of Modderklip's property and also infringed Modderklip's rights to equality...by requiring it to bear the burden of providing accommodation to the occupiers, a function that should have been undertaken by the state.

The Supreme Court of Appeal generally agreed with the lower court, declaring that Modderklip was entitled to damages for the occupation of the land, and that the settlers "are entitled to occupy the land until alternative land has been made available to them by the State or the provincial or local authority." The appeals court further found that Modderklip's rights to fair treatment under Section 25 of the Constitution had been violated by the settler's occupation of the land.

The Supreme Court declined to address whether Section 25 "has horizontal application and if so, under what circumstances." But it found that "it was unreasonable of the state to stand by and do nothing in circumstances where it was

impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.” In crafting relief, the Court balanced Modderklip’s interest in using the farm, with the occupants’ interest in safe and stable dwellings. The occupants were recognized to “have formed themselves into a settled community and built homes” and to “have no other option but to remain on Modderklip’s property.” The Court, thus, held that the occupants’ “investment into their own community on Modderklip’s farm must be weighed against the financial waste that their eviction would represent,” consistent with the overall goal of achieving “the constitutional vision of a caring society based on good neighbourliness and shared concern.”¹⁴⁶

The Supreme Court declined to order eviction of the occupants, pointing to their constitutional right to access to affordable shelter, or to order expropriation of the Modderklip farm, citing separation of powers concerns, despite the owner’s willingness to make the sale. Instead, the Court ordered the state to compensate Modderklip for the occupants’ use of the farm, even though the government had not authorized the residents to settle there. Rather than approaching the question as one of direct or indirect application of constitutional rights to private actors, the Court instead looked at the specific relations at issue and balanced highly contextual factors in the light of the constitutional commitment both to provide judicial access and to secure access to housing.

RECONCEPTUALIZING CONSTITUTIONAL ENFORCEMENT IN THE LIGHT OF JUDICIAL PRACTICE

The case studies tell a story of constitutional enforcement that plainly does not map on to the classical approach. Courts in the countries surveyed do not adhere, or at least do not consistently adhere, to a binary distinction between the public and the private. Instead, constitutional norms radiate into the world of common law doctrine and reshape private rules in specific contexts reflecting constitutional aspirations. But these judicial practices likewise do not cleanly trace the alternative horizontal models set out in the academic literature. Courts seem reluctant to decide whether constitutional rights are violated by non-state actors and, conversely, whether non-state actors owe constitutional duties to other private individuals. It is not only that courts avoid what Craig Scott has called the “stark either/or division of the applicability of rights into the categories of ‘horizontal’ versus ‘vertical.’”¹⁴⁷ More than that, courts appear to avoid even the language of rights and duties when analyzing the application of constitutional provisions to non-state actors. Yet, the constitutional provisions clearly are influencing their interpretive practice.

Consider the *Modderklip* litigation. Here, the South Africa Court did not characterize the private farm owner as owing a duty to provide access to shelter to the settlers occupying the land; neither did the Court deem the settlers responsible for a “taking” of the Modderklip farm when they used it to construct an alternative community. The duty – to provide shelter or to compensate for the use of land – at all times remained with the government. But the court also recognized that Modderklip

could not simply evict the settlers and leave them to the hazards of homelessness. The Court looked to social and economic norms as reflecting a constitutional vision of solidarity that altered the relation of the property owner to the settlers. The Court did not use the language of rights and duties to describe this influence. Instead, the constitutional provisions afforded the Court interpretive authority to modify powers typically associated with common law entitlements – in this situation, the common law power of a property owner to exclude uninvited guests.¹⁴⁸

One way to conceptualize the court's approach is to see it as a shift from the language of rights and duties to that of power and liability in discrete relations.¹⁴⁹

In the classical conception, common law powers can be used in the holder's discretion to maximize self-utility; the egoistic exercise of power is assumed to conduce toward the general welfare. The presence of social welfare norms in a constitution alters this background assumption. From a constitutive theory of law, the powers assigned to individuals must now be interpreted and applied within the orbit of constitutional commitment and not simply within that of self-regarding concern. In some situations, the individual's private power – to extend medical services, to produce pharmaceuticals, to ensure workplace safety – will be channeled so that it is exercised beneficially for claimants who otherwise would be adversely affected in their social position. In this sense, the constitutional norm exercises a radiating effect on a legal relation and in some settings the court must recalibrate the balance of interests guiding the private entity's exercise of power.¹⁵⁰

The South Africa Court, thus, made clear that Modderklip's power to control access to the farm could not be exercised in a way that would unduly burden the occupants' background right to housing, notwithstanding the fact that the farm owner does not owe a duty of shelter to the settlers. By constraining the exercise of the common law power, the court effectively altered the occupants' legal relation in the sense that they now possessed shelter. But, rather than prescribing rights directly owed from one individual to another, the court instead reshaped a power relationship in a specific context in the light of different facts and circumstances. By declining to set down a hard and fast rule for future claimants, the court's approach may introduce unpredictability into its decision making. However, it also has the benefit of avoiding ossification, a significant attribute when dealing with social welfare norms and other complex areas that raise broad policy questions. The court's approach may be likened to forms of provisional review used by American courts, both state and federal, in structural reform litigation involving social welfare claims.¹⁵¹

CONCLUSION: CONSIDERING THE POLITICAL ECONOMY OF CONSTITUTIONAL PRIVATIZATION

"In framing an ideal," Aristotle warned, "we may assume what we wish, but should avoid impossibilities."¹⁵² One criticism of social and economic rights is that they rest on the utopian fantasy of unlimited resources, unimpeded distribution, and unfettered access. Their provision to all comers demands a strong state that is rich in national productivity, strong in administrative capacity, and devoted in its political will –

otherwise constitutional claims will far surpass supply and breed distrust in the law.

As Mark Tushnet puts it,

Protecting private law rights and first- and second-generation constitutional rights is cheap, though not free. Protecting social welfare rights is expensive. Constitutional rights with large fiscal consequences require someone to raise the funds, either through taxation or through the redirection of existing taxes, to ensure that the constitutional rights are effectively realized. But courts lack the power to raise money through taxes. Only legislatures can do that.¹⁵³

Reacting to this criticism, national constitutions that include positive obligations often temper these guarantees with the realism of disclaimers that speak of “available resources” and “progressive realization.”¹⁵⁴ In turn, courts, presented with claims for relief, respond by demanding – if demanding any thing at all – that the defendant state take only reasonable steps toward realization of the claimed right. In *Soobramoney v. Minister of Health, KwaZulu-Natal*,¹⁵⁵ for example, the South Africa Supreme Court denied the claimant’s request for emergency dialysis treatment, expressing concern that “[i]f everyone in the same condition as the appellant were to be admitted the carefully tailored programme would collapse and no one would benefit....” Efforts to bolster this approach typically are found in arguments about institutional competence, separation of powers, and democratic accountability.¹⁵⁶

Aristotle’s warning on avoiding impossibilities could invite an alternative, or at least a complementary, response – as political economists would put it, “not simply to accept constraints on choice, but rather to acknowledge and study these constraints in order to change them in desired directions.”¹⁵⁷ At least some of the

judicial decisions surveyed in the preceding chapters seem to take this other road. Faced with weak state infrastructure, limited resources, and extensive poverty, courts rely on social and economic rights in ways that allow them to leverage private resources on behalf of public norms. Private law no longer is treated only as an instrument of corrective justice, but rather understood to be relevant to distributive goals consonant with social and economic rights. Against those critics who see private law as upholding status quo distributions of property and social resources, the courts in some cases recalibrate doctrinal rules to take account of unjust background regimes.¹⁵⁸

That rules of contract, tort, and property can be designed to serve distributive goals is a controversial but familiar idea. As to contracts, Anthony T. Kronman explains that once it is agreed that the state can redistribute wealth, then the choice of methods as between taxation and regulation of contracts “ought to be made on the basis of contextual considerations that are likely to vary from one situation to the next.”¹⁵⁹ Kevin A. Kordana and David H. Tabachnick, writing from a Rawlsian perspective, add:

It...is not clear why contract and tort law cannot be leveraged to help in meeting the demands of the difference principle. Political and legal institutions have complex and dynamic effects on one another. It thus seems unlikely that an economic scheme that maximizes the position of the least well-off would rely exclusively on tax and transfer for distribution.¹⁶⁰

This is not to say that the states under investigation are collectivizing private resources, expropriating industry, or treating capital and resources as if they are

owned by government and not by individual entrepreneurs. Rather, they are recognizing that the laws that regulate market and social relations must be consonant with constitutional norms, which include provisions, even if weak or aspirational, to health and education services. By reinterpreting contract clauses, recalibrating tort liability, reconfiguring property relations, or otherwise regulating market activity, courts in some cases help progressively realize constitutional goals by aligning the responsibilities of private actors who control access to essential health and educational services with public goals. In India, the courts tried to improve health conditions by reducing air pollution caused by taxis, a process that involved adapting regulatory frameworks.¹⁶¹ In South Africa, the Constitutional Court upheld the provision of temporary shelter despite arguments that surrounding property values would diminish.¹⁶² In Brazil, the courts in Bahia adapted contract terms, on an individual case-by-case basis, thereby extending insurance coverage to needy patients.¹⁶³ Rather than imposing essentially unfunded mandates on governments that are unable – or unwilling – to front the political and budgetary costs, the case studies reveal that courts, in some cases, use constitutional norms to relocate financial obligations onto market actors, relying on individual claimants to monitor enforcement. Jonathan Berger, thus, states in his chapter on South Africa, “The interpretation and development of the common and statutory law – insofar as the private sector is concerned – have become the new sites of struggle.” At the same time, however, courts are mindful that they cannot simply externalize constitutional enforcement onto the backs of market actors. Concepts of proportionality and reason

inform their interpretive practice; so, too, does consideration of reasonable expectation and predictability.

Some commentators criticize legalization strategies as unequivocally supporting hegemonic elites.¹⁶⁴ The case studies question that view, suggesting that positive rights in some contexts exert a force field on the private infrastructure of common law rules. Changing private law rules in the light of constitutional norms will likely produce strong reactions from market players. Sophisticated actors will try to contract around judicial decisions; they will seek new and less risky incentives for investment; they will lobby politicians to rein in the courts. If courts continue on the path identified in this chapter, we might expect new forms of political blockage to emerge that will require different strategic approaches to constitutional enforcement. At the same time, changes in tort and contract rules, as they become publicized and known, will affect individual aspirations and alter political expectations. Looking forward, we cannot predict how constitutional social welfare norms will reshape common law baselines that are so critical in perpetuating historic inequities.

But all of this is getting ahead of the story. Thirty years ago, Morton Horwitz, in a critical review of E. P. Thompson's now-classic history, *Whigs and Hunters: The Origin of the Black Act*, challenged the view that the rule of law is "an unqualified human good." To be sure, Horwitz emphasized, the rule of law "undoubtedly restrains power...but it *promotes* substantive inequality," he added, "by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.... [W]e should never forget," Horwitz warned, "that a 'legalist'

consciousness that excludes ‘result-oriented’ jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice.”¹⁶⁵ The case studies challenge us to think that the rule of law can aspire to a vision of substantive justice that includes schooling, health care, and the material conditions of a decent, autonomous life. At a minimum, they raise important questions about the short- and long-term effects of constitutionalizing social and economic rights. By focusing attention on the relation of private law to social justice, the case studies point to exciting issues for future research.

Footnotes

* The author is the Joel S. and Anne B. Ehrenkranz Professor of Law and Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. Research assistance from Deepika Bansal, Márcia Bento, Adan Canizales, Patrick P. Garlinger, Faiza S. Issa, Natalie Y. Morris, Alexander Moulter, Sarah Parady, Tali Reisenberger, Elizabeth Seidlin-Bernstein, Joanna L. Shulman, Anisa Aro Susanto, and Megan Thomas is gratefully acknowledged. I thank John Easterbrook for support in preparing the manuscript for publication. Acknowledgment is given to the World Bank Law Library for access to Manupatra, and to Linda Ramsingh and Mirela Roznovski of New York University School of Law for exemplary library assistance. I thank Menaka Guruswamy for discussion and Siddarth Narrain for materials concerning India tort law. Finally, appreciation is expressed to Dan Brinks, Varun Gauri, and Stephen Loffredo for comments and encouragement.

-
- ¹ Preamble to the Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of December 10, 1948, available at <http://www.un.org/Overview/rights.html> (accessed June 21, 2006).
- ² See Varun Gauri 2005. Social rights and economics: Claims to health care and education in developing countries. In P. Alston and M. Robinson (eds.), *Human rights and development: Towards mutual reinforcement* (pp. 65–66). Oxford: Oxford University Press. (Of 165 countries surveyed, 116 refer to a right to education and 73 refer to a right to health care.) In addition, about one hundred national constitutions guarantee a right to a healthy environment. See Dinah Shelton 2007. Human rights, health and environmental protection. *Hum. Rts. & Int'l Legal Discourse* 1: 9, 56. See also David M. Beatty 2004. *The ultimate rule of law*. Oxford: Oxford University Press: 119. (“Most of the constitutions that were written after the Second World War make some mention of social and economic rights, although they vary greatly both in substance and style.”).
- ³ See Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/1999/96, 2000. In H. J. Steiner and P. Alston (eds.), *International human rights in context: Law, politics, morals text and materials*. Oxford: Oxford University Press: 239. Educational deficits reflect a gendered pattern. See V. Muñoz Villalobos 2006. Economic, social and cultural rights: Girls’ right to education. In *Commission on Human Rights, Report submitted by the Special Rapporteur on the right to education*, E/CN.4/2006/45: 9. (“According to the most conservative estimates, 55 million girls still do not attend school and at least 23 countries risk failing to achieve universal primary education by the year 2015, as proposed in the Millennium Development Goals.”).
- ⁴ Susannah Sirkin et al. 1999. The role of health professionals in protecting and promoting human rights: A paradigm for professional responsibility. In Y.

Danieli, E. Stamatopoulou, and C. J. Dias (eds.), *The universal declaration of human rights: Fifty years and beyond* (pp. 357–358). New York: Baywood. See also Ramin Pejan 2004. The right to water: The road to justiciability. *Geo. Wash. Int'l L. Rev.* 36: 1181. (Reporting that at least 1.1 billion people lack “access to sufficient and clean drinking water”; citing World Health Organization 2003. *The right to water*. Geneva: World Health Organization, p. 7).

- ⁵ See, e.g., Alicia Ely Yamin 2003. Not just a tragedy: Access to medications as a right under international law. *B.U. Int'l L. J.* 21: 325 (Referring to “Sub-Saharan Africa where an estimated 29.4 million adults and children are living with HIV/AIDS...[and] dying simply because they lack access to life-saving sustaining medications”).
- ⁶ For an autonomy justification of social rights, see Cécile Fabre 2000. *Social rights under the constitution: Government and the decent life*. Oxford: Clarendon Press.
- ⁷ K. D. Ewing 2003. The case for social rights. In T. Campbell, J. Goldsworthy, and A. Stone (eds.), *Protecting human rights: Instruments and institutions* (pp. 323, 326). Oxford: Oxford University Press (acknowledging social rights as “a precondition of democratic government”).
- ⁸ See Dwight G. Newman 2003. Institutional monitoring of social and economic rights: A South African case study and a new research agenda. *S. Afr. J. on Hum. Rts.* 19: 189 (stating that “social and economic rights are still often considered a separate category from civil and political rights”).
- ⁹ See, e.g., Parmanand Singh 2006. Social rights and good governance: The Indian perspective. In C. Raj. Kumar and D. K. Srivastava (eds.), *Human rights and development: Law, policy and governance* (p. 437). Hong Kong: LexisNexis (arguing “that social rights, such as the rights to adequate nutrition, health care, housing, education and work cannot be realized just by judicial

enunciation of these rights as aspects of human rights, but by a set of public policies, political planning, and participation of civil society to enhance the capabilities of the poor and disadvantaged people”). See also Ran Hirschl, 2004. *Towards juristocracy: The origins and consequences of the new constitutionalism*. Cambridge, MA: Harvard University Press. (p. 13, associating constitutional review with the decline in “progressive concepts of distributive justice”). But see Leslie Friedman Goldstein 2004. From democracy to juristocracy. *Law & Society Rev.* 38: 611, 626. (criticizing Hirschl’s account of the relation between constitutional entrenchment and socioeconomic redistribution as “unconvincing”).

- ¹⁰ See William F. Felice 2003. *The global new deal: Economic and social human rights in world politics*. New York: Rowman & Littlefield. (pp.7, 51–53, defining economic and social rights.)
- ¹¹ *Indian Medical Association v. V. P. Shantha and Others* (1995) 6 SC 651 (India), available at [Manu/SC/0836/1995](#) (accessed Jan.3, 2008).
- ¹² *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), August 18, 2000 (South Africa).
- ¹³ See, e.g., Lawrence G. Sager 2001. Thin constitutions and the good society. *Fordham L. Rev.* 69: 1989–90. (stating that “affirmative rights come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy”).
- ¹⁴ See, e.g., John Smillie 2006. Who wants juristocracy? *Otago L. Rev.* 11:183, 183–184. (making the case against constitutional review on the grounds that it is “undemocratic” and that courts are “ill-suited” to decide disputes involving complex policy questions); Marius Pieterse 2004. Coming to terms with judicial enforcement of socio-economic rights. *S. Afr. J. Hum. Rts.* 20: 383, 384. (explaining that many “South African legal scholars...mechanically (and

almost ritualistically) regurgit[ate]” the legitimacy debate, despite the codification of such rights in the national constitution).

¹⁵ Beatty, *Ultimate rule of law*, 117.

¹⁶ Jonathan M. Mann et al. 1999. Health and human rights. In Jonathan M. Mann et al. (eds.), *Health and human rights: A reader* (p. 10). New York: Routledge, (“while human rights law primarily focuses on the relationship between individuals and states, awareness is increasing that other societal institutions and systems, such as transnational business, may strongly influence the capacity for realization of rights, yet they may elude state control”).

¹⁷ Chapter 4, this volume.

¹⁸ See J. M. Balkin 1995. Populism and progressivism as constitutional categories. *Yale L. J.* 104: 1935, 1968–69 (book review) (calling for a “more flexible” approach to the public/private distinction).

¹⁹ Chapter 1, this volume.

²⁰ See, e.g., Kristen Boon 2007. The role of courts in enforcing economic and social rights. *Geo. Wash. Int’l L. Rev.* 39: 449, 456. (Reviewing R. Gargarella, P. Domino, and T. Roux (eds.), *Courts and social transformation in new democracies: An institutional voice for the poor?* Aldershot, U.K.: Ashgate. (commenting that the editors do not consider “the extent to which courts can intervene to protect [economic and social rights] where traditional government activities have been transferred to the private sector or international financial institutions”). For a discussion of the role of non-state actors in the enforcement of international human rights, see Manisuli Ssenyonjo 2007. Non-state actors and economic, social, and cultural rights. In M. A. Baderin and R. McCorquodale (eds.), *Economic, social and cultural rights in action*. Oxford: Oxford University Press.

²¹ Andrew Clapham 1995. The privatisation of human rights. *Eur. Hum. Rts. L. Rev.*: 20.

-
- ²² Murray Hunt 1998. The “horizontal effect” of the Human Rights Act. *P. L.*: 423–424. (referring to the extent to which “U. K. courts will be required to ensure that all law which they apply accords with the [European] Convention [on Human Rights], and to that extent the law which governs private relations will have been ‘constitutionalised’ by the passage of the Human Rights Act”).
- ²³ See Stephen Gardbaum 2003–2004. The “horizontal effect” of constitutional rights. *Mich. L. Rev.* 102: 387.
- ²⁴ See generally Georg Nolte 2005. European and U.S. Constitutionalism: Comparing essential elements. In Georg Nolte (ed.), *European and U.S. constitutionalism* (pp. 3–20). Cambridge: Cambridge University Press.
- ²⁵ See Fabrizio Cafaggi and Horatia Muir Watt 2006. The making of European private law: Regulation and governance design. Available at <http://ssrn.com/abstract=946284> (accessed May 12, 2008). (emphasizing the public regulatory role of torts and contract law).
- ²⁶ For a summary of these developments, see Fabrizio Cafaggi 2006. Rethinking private regulation in the European regulatory space. In F. Cafaggi (ed.), *Reframing self-regulation in European private law* (pp. 3–76). Leiden, The Netherlands: Kluwer Law International.
- ²⁷ See generally Barry Friedman 2005. The politics of judicial review. *Tex. L. Rev.* 4: 257, 336. (explaining that “the scope of constitutional remedies, the question of negative and positive rights, and the force of *stare decisis* can all be understood as pragmatic reactions to the political environment of judicial review”).
- ²⁸ By way of example, consider the number of health cases surveyed in each country in the following table:

Country	Number of Health Cases Surveyed
---------	---------------------------------

Brazil	7682
India	315
South Africa	22
Indonesia	12
Nigeria	27

Source: Brinks and Gauri calculations on the basis of data presented in this volume.

- ²⁹ The inaccessibility of legal decisions in Indonesia is discussed in Sebastian Pompe 2005. *Access to court decisions and the problem of lawmaking. The Indonesian Supreme Court: A study of institutional collapse*. Ithaca, NY: Cornell University, Southeast Asia Program Publications, pp. 435–455.
- ³⁰ See, e.g., Orly Lobel 2007. The paradox of extralegal activism: Critical legal consciousness and transformative politics. *Harv. L. Rev.* 120: 937, 939. (“An argument that has become increasingly prevalent in legal scholarship states that the law often brings more harm than good to social movements that rely on legal strategies to advance their goals”).
- ³¹ Beatty, *Ultimate Rule of Law*, 126.
- ³² See Paul Kauper 1962. *Civil liberties and the constitution*. Ann Arbor: University of Michigan Press, p. 129. (stating that “the Constitution is concerned with constitutional liberties in the classic sense of the Western world; i.e. as liberties of the individual to be safeguarded against the power of the state”).
- ³³ Aileen McHarg 2006. The constitutional dimension of self-regulation. In Cafaggi, *Reframing self-regulation in European private law*, 80.
- ³⁴ Michael J. Perry 2003. Protecting human rights in a democracy: What role for the courts? *Wake Forest L. Rev.* 38: 635, 644.
- ³⁵ Ronald Dworkin 1977. *Taking Rights Seriously* (pp. 90-4 and 364-68), London: Duckworth (setting forth this view).

-
- ³⁶ See Richard S. Kay 1993. The state action doctrine, the public–private distinction, and the independence of constitutional law. *Const. Commentary* 10: 329, 349–358. (discussing this conception).
- ³⁷ Laurence H. Tribe 1985. *Constitutional choices*. Cambridge, MA: Harvard University Press, p. 246.
- ³⁸ Cass R. Sunstein 2001. *Designing democracy: What constitutions do*. Oxford: Oxford University Press, p. 222.
- ³⁹ Charles Fried 1978. *Right and wrong*. Cambridge, MA: Harvard University Press, p. 110.
- ⁴⁰ See John C. P. Goldberg 2005. The constitutional status of tort law: Due process and the right to a law for the redress of wrongs. *Yale L. J.* 115: 524. As John C. P. Goldberg explains:
- The slogan that the [United States] Constitution is exclusively a ‘charter of negative ... liberties’ is just that – a slogan. Constitutional rights sometimes do generate duties to act. If a guard is aware that a prisoner is choking to death, his failure to provide aid deprives the prisoner of life without due process.... The point...is not to reason from these cases to a general right of assistance. Rather, it is to establish the falsity of the broad claim that the Constitution never requires government to act for the benefit of an individual.
- Id.* at 592–593 (citation omitted). See also Cass R. Sunstein 2005. Why does the American Constitution lack social and economic guarantees? *Syracuse L. Rev.* 56: 1, 6. (“most of the so-called negative rights require governmental assistance, not governmental abstinence”).
- ⁴¹ See Helen Hershkoff 1999. Positive rights and state constitutions: The Limits of federal rationality review. *Harv. L. Rev.* 112: 1131, 1133. (acknowledging this argument).
- ⁴² Herman Schwartz 1995. Do economic and social rights belong in a constitution? *Am. U. J. Int’l L. & Pol’y* 10: 1233, 1235.

-
- ⁴³ Fabre, *Social rights under the Constitution*, p. 4.
- ⁴⁴ For an overview, see Andrew Clapham 1993. *Human rights in the private sphere*. Oxford: Oxford University Press, pp. 150–162.
- ⁴⁵ F. A. Hayek 1948. *Individualism and economic order*. Chicago: University of Chicago Press, p. 22.
- ⁴⁶ F. A. Hayek 1973. *Law, legislation and liberty*. Chicago: University of Chicago Press, p. 56.
- ⁴⁷ See, e.g., Michael K. Addo 2005. Human rights perspectives of corporate groups. *Conn. L. Rev.* 37: 667, 675 (referring to “the enduring belief in the separation between the private domain [to which economic affairs belong] and the public domain”). See also Jody Freeman 2000. The private role in public governance. *N.Y.U. L. Rev.* 75: 543, 551. (“‘private’ refers to organizations that we associate with the pursuit of profit, such as firms, or ideological goals, such as environmental organizations”).
- ⁴⁸ See Jean Braucher 2007. New frontiers in private ordering – An introduction. *Ariz. L. Rev.* 49: 577, 577. (“Contract law itself is a mixture of the public and the private, a means by which the state supports private ordering with remedies for breach of some promises”).
- ⁴⁹ See Paul Schiff Berman 2000. Cyberspace and the state action debate: The cultural value of applying constitutional norms to “private” regulation. *U. Colo. L. Rev.* 71: 1263, 1279. (criticizing the state action doctrine on the ground that “[a]ll private actions take place against a background of laws”).
- ⁵⁰ See Larry Alexander 1993. The public/private distinction and constitutional limits on private power. *Const. Comment.* 10: 361, 365. (noting that “even if there is always state action, it does not follow that the [private] defendant is a state actor subject to constitutional duties” or “that private choices...are held to the same standards as the Constitution imposes on, say, the state police or welfare department”).

-
- ⁵¹ Stephen Loffredo 1993. Poverty, democracy and constitutional law. *U. Pa. L. Rev.* 141: 1277, 1361.
- ⁵² This paragraph draws from Viktor J. Vanberg 2005. Market and state: The perspective of constitutional political economy. *J. of Institutional Economics* 1: 23–49.
- ⁵³ See Michael Taggart 1997. The province of administrative law. In M. Taggart (ed.), *The province of administrative law* (pp. 1–21). Oxford: Hart.
- ⁵⁴ See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U. S. (1974): 345 (public function exception); *Shelley v. Kraemer*, 334 U. S. (1948): 1 (attribution theory).
- ⁵⁵ See, e.g., *Smith v. Illinois Bell Tel. Co.*, 270 U. S. (1926): 587. For an early discussion, see Jerre S. Williams 1963. The twilight of state action. *Texas L. Rev.* 41: 347.
- ⁵⁶ See *Blum v. Yaretsky*, 457 U. S. (1992): 991.
- ⁵⁷ *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. (1973): 1.
- ⁵⁸ *DeShaney v. Winnebago Co.*, 489 U. S. (1989) 189.
- ⁵⁹ Viktor J. Vanberg 1999. Markets and regulation: On the contrast between free-market liberalism and constitutional liberalism. *Constitutional Political Economy* 10: 219, 220. (quoting Ludwig von Mises’ concept of the “unhampered market economy”). For a similar view of British constitutionalism, see Murray Hunt, *Constitutionalism and the contractualisation of government in the United Kingdom*. In Taggart 1997, *The province of administrative law*, p. 24. (stating “that, for Dicey, the rule of law was nothing short of the encapsulation of his particular Whig conception of societal ordering, according to which the individual’s private rights, of property, personal liberty, and freedom of discussion and association ought to be sacrosanct from interference by the state”).
- ⁶⁰ On protection of individual autonomy, see Paul Brest 1982. State action and liberal theory: A casenote on *Flagg Brothers v. Brooks*. *U. Pa. L. Rev.* 130: 1296,

1323. (referring to “our psychological and ideological need to believe that there are essentially private realms, albeit circumscribed by state and society, in which actions are autonomous”). On protection of social institutions, see, *Moose Lodge, No. 107 v. Irvis*, U. S. 407 (1972): 163, 179–180 (Black, J., dissenting), (“My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy with precludes government from interfering with private clubs or groups.... The individual can be as selective as he desires.”).

- ⁶¹ Michel Rosenfeld 1985. Contract and justice: The relation between classical contract law and social contract theory. *Iowa L. Rev.* 70: 769, 772.
- ⁶² See Boris I. Bittker and Kenneth M. Kaufman 1972. Taxes and civil rights: ‘Constitutionalizing’ the Internal Revenue Code. *Yale L. J.* 82: 51, 86. (arguing that “a governmental program to discover and eradicate...[invidious discrimination exercised by private fraternal orders] necessarily imposes social costs; a society that tries to punish every instance of man’s inhumanity to man may lose its humanity while crusading against the enemy”).
- ⁶³ *Flagg Brothers v. Brooks*, 436 U. S. (1978): 149, 165 (quoting *Jackson v. Metropolitan Edison co.*, 419 U. S. (1974): 345, 349). See Brest, *State action and liberal theory*, p. 1296.
- ⁶⁴ Paul Starr 1988. The meaning of privatization. *Yale L. & Pol’y Rev.* 6: 6, available at <http://www.princeton.edu/~starr/meaning/html> (accessed Jan. 10, 2008).
- ⁶⁵ See Orly Lobel 2004. The renew deal: The fall of regulation and the rise of governance in contemporary legal thought. *Minn. L. Rev.* 89: 342, 344. (“governance signifies the range of activities, functions, and exercise of control by both public and private actors in the promotion of social, political, and economic ends”).
- ⁶⁶ Martin Shapiro 2001. Administrative law unbounded: Reflections on government and governance. *Indiana J. of Global Leg. Studies* 8: 369, quoted in Carol

Harlow 2005. Deconstructing government? In T. Ginsburg and R. A. Kagan (eds.), *Institutions & public law: Comparative approaches* (p. 141). New York: Pete Lang.

- ⁶⁷ Alfred C. Aman, Jr. 2004. *The democracy deficit: Taming globalization through law reform*. New York: New York University Press, p. 93.
- ⁶⁸ See, e.g., Matthew Ellman 2006. *Does privatising public service provision reduce accountability?* Available at <http://ssrn.com/abstract=1002830> (accessed Jan. 4, 2008).
- ⁶⁹ Jody Freeman 2000. The private role in public governance. *N.Y.U. L. Rev.* 75: 543, 591.
- ⁷⁰ Roderick M. Hills, Jr. 2003. The constitutional rights of private governments. *N.Y.U. L. Rev.* 78: 144, 149–150.
- ⁷¹ Nigeria Constitution, Art 17(3)(d) (1999), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).
- ⁷² Constituição Federal [C. F.] [Constitution] art. 196 (Brazil), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).
- ⁷³ S. Afr. Const. 1996 § 27(a)(a) (South Africa), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).
- ⁷⁴ Undang-Undang Dasar 1945 [Constitution] Art. 28 H (Indonesia), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).
- ⁷⁵ India Const. Art. 21; Art. 39(e); Art. 47 (India), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).

⁷⁶ Amartya Sen 2006. Human rights and the limits of law. *Cardozo L. Rev.* 27: 2913, 2915.

⁷⁷ Thomas Pogge offers the example of patent protection:

[P]atent protections are more problematic, morally, than copyrights, especially when they confer property rights in biological organisms (such as seeds used in food production), in molecules used in medicines, or in pharmaceutical research tools needed in the development of new pharmaceuticals. Patents of these kinds are morally problematic insofar as they, directly or indirectly, impede access by the global poor to basic foodstuffs and essential medicines.

Thomas Pogge 2007. Montréal statement on the human right to essential medicines. *Cambridge Q. of Healthcare Ethics* 16: 97–108.

⁷⁸ S. Afr. Const. 1996 § 8 (South Africa), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 12, 2007).

⁷⁹ Nigeria Constitution, Art. 13 (1999), in *Constitutions of the countries of the world*, available at <http://www.oceanalaw.com/gateway> (accessed Dec. 7, 2007).

⁸⁰ Chapter 1, this volume.

⁸¹ American scholars who have joined the discussion include: Gardbaum, The “horizontal effect” of constitutional rights; Mark Tushnet 2003. The issue of state action/horizontal effect in comparative constitutional law. *Int’l J. Const. L.* 1: 79; Mark Tushnet 2002. Comparative constitutionalism: State action, social welfare rights, and the judicial role: Some comparative observations. *Chi. J. Int’l L.* 3: 435; Helen Hershkoff 2006. The New Jersey Constitution: Positive rights, common law entitlements, and state action. *Alb. L. Rev.* 69:553.

⁸² Robert Alexy 2002. *A theory of constitutional rights*, trans. J. Rivers (New York: Oxford University Press), p. 355.

⁸³ Cf. Barry Friedman 2001. The counter-majoritarian problem and the pathology of constitutional scholarship. *Nw. U. L. Rev.* 95: 933, 953.

⁸⁴ This part draws on the literature identified in Notes 21–25, 81–82, and also Daniel Friedmann & Daphne Barak-Erez (eds.). 2001. *Human rights in private law*. Oxford: Hart, especially Aharon Barak, Constitutional human rights and private law,” *id.*, 13–42.

⁸⁵ *Du Plessis v. DeKlerk*, 1996 (3) S. A. 850 at 871D-E (Kentridge A. J.), available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/ArSEGDOFM/MAIN/156340014/503/1781> (accessed Jan. 11, 2008). For a discussion of this case, see Anton Fagan 2001. Determining the stakes: Binding and non-binding bills of rights. In Friedman and Barak-Erez (eds.), *Human rights in private law* (p. 73), Oxford: Hart.

⁸⁶ See Report on the Right to Food as a Human Right, U. N. ESCOR Comm’n on H.R., 39th Sess. Agenda Item 11, U.S. Doc. E/CN.4/Sub.2/1987/23 (1987); see also Committee on Economic, Social and Cultural Rights, General Comment No. 12, 1999, U.N. Doc. E/C.12/1999/5 (1995).

⁸⁷ Felice, *The global new deal: Economic and social human rights in world politics*, p. 29. Similarly, Cécile Fabre identifies three kinds of duties the state might be under:

1. A duty to provide the resources warranted by social rights;
2. A duty not to deprive people of these resources if they already have them; and
3. A duty to ensure that other people such as employers fulfil their duties to give resources to people, were it to decide not to fulfill all or part of its duty specified in (1) and (2).

Fabre, *Social rights under the constitution*, p. 57.

⁸⁸ Cf. Cosmo Graham and Tony Prosser 1991. *Privatizing public enterprises: Constitutions, the state and regulation in comparative perspective*. Oxford: Clarendon Press, p. 2. (on the need for “bringing the state back in” to deal with the privatization process).

-
- ⁸⁹ András Sajó 2002. Socioeconomic rights and the international economic order. *N.Y.U. J. of International L. & Politics* 35: 221, 232.
- ⁹⁰ General Comment 14: The Right to the Highest Attainable Standard of Health, U.N. Comm. on Econ., Soc. & Cultural Rts., 20th Sess., ¶ 51, U.N. Doc. E/C.12/2000/4 (2000), quoted in Yamin, *Not Just a Tragedy*, 355 n. 129.
- ⁹¹ Yamin, *Not Just a Tragedy*, 355–356.
- ⁹² Committee on Economic, Social and Cultural Rights, General Comment No. 13, 1999, U.N. Doc. E/2000/22, quoted in Klaus Dieter Beiter 2006. *The protection of the right to education by international law*. (Leiden, The Netherlands: Martinus Nijhoff), p. 569.
- ⁹³ The term is neither accurate nor felicitous, but is used in the literature. See Christian Starck 2001. Human rights and private law in German constitutional development and in the jurisdiction of the Federal Constitutional Court. In Friedmann and Barak-Erez (eds.), *Human rights in private law* (p. 97). Oxford: Hart. (“The terms ‘direct’ and ‘indirect’ do not describe different types of effects particularly accurately, yet they are commonly used in the literature on third-party effect”).
- ⁹⁴ Peter Benson 2001. Equality of opportunity and private law. In Friedman and Barak-Erez (eds.), *Human rights in private law* (p. 205). Oxford: Hart.
- ⁹⁵ Daphne Barak-Erez 2001. Constitutional human rights and private laws. In Friedmann and Barak-Erez (eds.), *Human rights in private law* (p.21). Oxford: Hart.
- ⁹⁶ See Roger Brownsword 2001. Freedom of contract, human rights and human dignity. In Friedmann and Barak-Erez (eds.), *Human rights in private law* (pp. 181–183). Oxford: Hart.
- ⁹⁷ Cf. Barak, *Constitutional human rights and private law*, p. 24. (referring to Italian case law as an example of courts’ interpreting constitutional provisions in ordering private law damage remedies).

⁹⁸ Benson, *Equality of opportunity and private law*, p. 205.

⁹⁹ See William Wade 2000. Horizons of horizontality. *L. Quarterly Rev.* 116: 217; see also Sudhir Krishnaswamy 2007. Horizontal application of fundamental rights and state action in India. In Raj Kumar & K. Chockalingam (eds.), *Human rights, justice, and constitutional empowerment* (p. 65). Oxford: Oxford University Press.

¹⁰⁰ 334 U. S. (1948): 1.

¹⁰¹ *Id.*, 14.

¹⁰² See Mark D. Rosen 2007. Was *Shelley v. Kraemer* incorrectly decided? Some new answers. *Cal. L. Rev.* 95: 451, 469. (stating that “*Shelley’s* attribution rationale has not fared well”).

¹⁰³ Chapter 6, this volume.

¹⁰⁴ An analogy can be drawn to Dean Lawrence Gene Sager’s approach to constitutional decisions in the United States that appear to protect a right to minimum welfare, despite the absence of such a right in the written constitution. The assumption of such a right, even if beyond enforcement of a court, seems to influence judicial interpretive practice regarding subsidiary matters such as due process procedural protection. See Lawrence G. Sager 2004. The why of constitutional essentials. *Fordham L. Rev.* 72:1425–1426. (explaining that certain United States constitutional decisions can be best explained by “the tacit existence of a right to minimum welfare”).

¹⁰⁵ Starr, *The meaning of privatization*.

¹⁰⁶ See Public Citizen’s Water for All Program 2003. *Water privatization fiascos: Broken promises and social turmoil*. Available at www.wateractivist.org (accessed Dec. 26, 2007). (“Water privatization in Indonesia is a story of how the interests of global water corporations, corrupt dictatorships and World Bank loans pushing privatization worked together to rob the public resources and assets of Indonesian citizens”).

-
- ¹⁰⁷ See The World Bank, Energy and Mining Sector Unit, Infrastructure Department, East Asia and Pacific Region 2005. *Energizing the Economy: Strategic Priorities for the Power Sector in Indonesia*. Available at <http://web.worldbank.org> (accessed May 13, 2008). (“Over 70 million Indonesians are estimated to be unconnected to electricity”).
- ¹⁰⁸ Judicial Review of Law of the Republic of Indonesia No. 22 Year 2001 regarding Oil and Natural Gas, (Law No. 22 Year 2001) against the 1945 Constitution of the State of the Republic of Indonesia, Constitutional Court of the Republic of Indonesia, Decision No. 002/PUU-I/2003 of December 15, 2004, available in English translation at http://www.mahkamahkonstitusi.go.id/eng/putusan_sidang.php?pg=6 (accessed Jan. 11, 2008).
- ¹⁰⁹ Quoted in *Id.*
- ¹¹⁰ Judicial Review of Law of the Republic of Indonesia No. 22 Year 2001.
- ¹¹¹ Quoted in *Id.*
- ¹¹² Mohamad Mova Al’ Afghani 2007. Safeguarding water contracts in Indonesia. *Law Environment and Development Journal* 3(2): 152, available at <http://www.lead-journal.org/content/07148.pdf> (accessed Dec. 26, 2007).
- ¹¹³ Water Resources Law (No. 7/2004), art. 5 (Indonesia).
- ¹¹⁴ Mohamad Mova Al’ Afghani 2006. Constitutional Court’s review and the future of water law in Indonesia. *Law Environment and Development Journal* 2(1): 1, available at <http://www.lead-journal.org/content/06001.pdf> (accessed Dec. 26, 2007).
- ¹¹⁵ Quoted in English in WALHI [Wahana Lingkungan Hidup Indonesia – Friends of the Earth Indonesia], Court rejection makes people’s access to water more difficult. *Campaign Update* (July 29, 2005), available at http://www.eng.walhi.or.id/kampanye/air/privatisasi/050729_waterpriv_cu/ (accessed Dec. 26, 2007).

-
- ¹¹⁶ Quoted in English in Al' Afghani, Safeguarding water contracts in Indonesia, pp. 152–153.
- ¹¹⁷ Statement, available at http://www.vannbevegelsen.no/inter/2005-07-20_court_reject_indonesia.txt (accessed Dec. 26, 2007).
- ¹¹⁸ For a summary of social justice cases through 2000, see Atul M. Setalvad 2000. The Supreme Court on human rights and social justice: Changing perspectives. In B. N. Kirpal, A. H. Desai, G. Subramaniam, R. Dhvan, and R. Ramachandran (eds.), *Supreme but not infallible: Essays in honour of the Supreme Court of India* (pp. 232–255). Oxford: Oxford University Press.
- ¹¹⁹ See e.g., Prasanta Kumar Rout v. Government of Orissa (Or HC PIL, 1994), Manu/OR/0203/1994, available at www.manupatra.com (accessed April 28, 2006).
- ¹²⁰ Common Cause v. Union of India and Others, SC, 1996, Manu/SC/0362/1997, available at www.manupatra.com (accessed Jan. 3, 2008). See also M. Vijaya v. Chairman and Managing Director, Sinareni Collieries, Co., Manu/AP/0574/2001, available at www.manupatra.com (accessed April 28, 2006). (holding hospital negligent in tort for violating Article 21 of the India Constitution for failure to test a blood transfusion for HIV).
- ¹²¹ See Kamlawai v. Kotwala, Manu/UP/0785/2000, available at www.manupatra.com (accessed April 28, 2006) (requiring government to order cessation of pollution by brick kilns).
- ¹²² See R. Ramanujam Chettiar v. The Commissioner and Secretary to the Government of Tamil Nadu, Food and Co-operative Dept. Madras (Mad HC, 1981), Manu/TN/0250/1982, available at www.manupatra.com (accessed Jan. 3, 2008).
- ¹²³ For further examples, see Krishnaswamy, Horizontal application of fundamental rights and state action in India, pp. 47–73; Fabre, *Social Rights under the Constitution*, p. 160 (discussing regulation of rickshaw driver loan and

employment contracts in *Azad Rickshaw Pullers Union v. Punjab* (1981) 1 SCR 366).

¹²⁴ Manu/UP/0452/2005, available at www.manupatra.com (accessed May 1, 2006).

¹²⁵ *Id.*

¹²⁶ David M. Trubek and Alvaro Santos 2006. Introduction: The third moment in law and development theory and the emergence of a new critical practice. In D. M. Trubek and A. Santos (eds.), *The new law and economic development: A critical appraisal* (p. 14). Cambridge: Cambridge University Press.

¹²⁷ LIC of India v. Consumer Education & Research Centre and Others, Manu/SC/0772/1995, available at www.manupatra.com (accessed May 1, 2006).

¹²⁸ Chapter 3, this volume.

¹²⁹ *Miss Ravneet Kaur v. The Christian Medical College and Another*. Manu/PH/0075/1997, available at www.manupatra.com (accessed May 1, 2006).

¹³⁰ *Id.*

¹³¹ *Vignana Educational Foundation v. NTR University of Health Sciences and Another*, Manu/AP/0078/2003, available at www.manupatra.com (accessed May 1, 2006).

¹³² *K. Krishnamacharyulu and Others v. Sri Venkateswara Hindu College of Engineering and Another*, Manu/SC/113/1997, available at www.manupatra.com (accessed May 1, 2006).

¹³³ *Hindi Vidya Bhavan Society and Another v. State of Maharashtra and Others*, Manu/MH/0530/2005, available at www.manupatra.com (accessed Jan. 3, 2008).

¹³⁴ *Id.*

¹³⁵ SA 21 (SCA) – 31 May 2002, available at <http://products.jutalaw.co.za> (accessed Nov. 2, 2007).

-
- ¹³⁶ Marius Pieterse 2006. Resuscitating socio-economic rights: Constitutional entitlements to health care services. *S. Afr. J. Hum. Rts.* 22: 495 (citing *Styrdom v. Afrox Healthcare* [2001] 4 All SA 618 (T) 626b-h; 627f-g).
- ¹³⁷ *Barkhuizen v. Napier*, Unreported Decision of the South African Constitutional Court, Case No. CCT 72/05 (April 4, 2007) (South Africa), available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/o0j5uwm5vx/MAIN/156340014/503/4040> (accessed Jan. 3, 2008).
- ¹³⁸ Excerpts from the court's opinion appear in *id.* at ¶¶ 3, 23, 30, 35, and 94.
- ¹³⁹ William Joseph Singer 1996. No right to exclude: Public accommodations and private property. *Nw. U. L. Rev.* 90: 1283, 1466–1467.
- ¹⁴⁰ *Id.* at 1474. (“Property law helps to structure and shape the contours of social relationships. Choices of property rules ineluctably entail choices about the quality and character of human relationships”).
- ¹⁴¹ Cf. Liam Murphy & Thomas Nagel 2002. *The myth of ownership: Taxes and justice*. Oxford: Oxford University Press, pp. 175–176. (referring to the “conventionality of property,” but emphasizing the fact that the “state does not own its citizens, nor do they own each other collectively. But individual citizens don't own anything except through laws that are enacted and enforced by the state”).
- ¹⁴² *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC) (South Africa), available at <http://www.saflii.org/za/cases/ZACC/2001/19.rtf> (accessed May 20, 2008).
- ¹⁴³ Excerpts from the court's opinion appear in *id.* at ¶¶ 92, 24, 96, 48, 92, 101, 108, and 115.
- ¹⁴⁴ *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd*, 2005 (CCT 20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC) (13 May 2005) (South Africa), available at <http://www.saflii.org/za/cases/ZACC/toc-P.html> (accessed May 20, 2008).

¹⁴⁵ Quoted in *Id.*

¹⁴⁶ Excerpts from the court’s opinion appear in *id.* at ¶¶ 5, 14, 15, 21, 26, 48, 54, and 55.

¹⁴⁷ Craig Scott 1999. Reaching beyond (without abandoning) the category of “economic, social and cultural rights.” *Hum Rts. Q.* 21: 633, 646.

¹⁴⁸ Joseph William Singer explains:

If “property is a set of social relations among human beings,” the legal definition of those relationships confers – or withholds – power over others. The grant of a property right to one person leaves others vulnerable to the will of the owner. Conversely, the refusal to grant a property right leaves the claimant vulnerable to the will of others, who may with impunity infringe on the interests which have been denied protection.

Singer, *Sovereignty and property*, p. 41.

¹⁴⁹ According to Peter Jaffey, the formal distinction is as follows:

Y has a duty to X, which means Y is required to act or refrain from acting in a certain way (for the benefit of X), and X has a correlative right to the performance of the duty.... In a power-liability relation, by acting in the way prescribed for the exercise of the power, X can alter Y’s legal relations. X’s power is correlated with a liability on the part of Y to the alteration of Y’s legal relations.

Peter Jaffey 2004. Hohfeld’s power-liability/right-duty distinction in the law of restitution. *Can. J. L. & Juris* 17: 295, 295. See also Walter Wheeler Cook 1919. Hohfeld’s contributions to the science of law. *Yale L. J.* 28: 721, 725. (explaining that in “Hohfeld’s terminology any human being who can by his acts produce changes in legal relations has a legal *power* or powers” [emphasis in original]).

¹⁵⁰ Alexy, *A theory of constitutional rights*, p. 352.

-
- ¹⁵¹ See Hershkoff, Positive rights and state constitutions, p. 1158 (developing the argument that state courts in the U.S. approach state constitutional decision making with an eye toward “provisional solutions”); Michael C. Dorf & Charles F. Sabel 1998. A constitution of democratic experimentalism. *Colum. L. Rev.* 98: 267.
- ¹⁵² Aristotle, 2000, *Politics*, trans. Benjamin Jowett. Mineola, NY: Dover Publications, p. 68.
- ¹⁵³ Mark Tushnet 2004. Social welfare rights and the forms of judicial review. *Tex. L. Rev.* 82: 1895, 1896–1897.
- ¹⁵⁴ See Eric C. Christiansen 2007. Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court. *Colum. Hum. Rts. L. Rev.* 38: 321, 341.
- ¹⁵⁵ 1998 (1) SA 765 (CC), available at <http://www.constitutionalcourt.org.za> (accessed Dec. 26, 2007).
- ¹⁵⁶ See, e.g., Albie Sachs 2000. Social and economic rights: Can they be made justiciable? *SMU* 3: 1388–1389.
- ¹⁵⁷ Ilchman and Uphoff 1998. *The political economy of change*, p. 27. New Brunswick, NJ: Transaction Publishers.
- ¹⁵⁸ For a discussion of corrective and distributive theories of private law, and in particular of tort law, see Peter Cane 2005. Anatomy of private law theory: A 25th anniversary essay. *Oxford J. Legal Stud.* 25: 203–217.
- ¹⁵⁹ Anthony T. Kronman 1980. Contract law and distributive justice. *Yale L. J.* 89: 472.
- ¹⁶⁰ Kevin A. Kordana and David H. Tabachnick 2005. Rawls and contract law. *Geo. Wash. L. Rev.* 73: 598, 652.
- ¹⁶¹ See *Smoke Affected Residents Forum v. Municipal Corporation of Greater Mumbai and Others* (Bom HC 2002), available at Manu/MH/0139/2002 (accessed Jan. 3, 2008); *M. C. Mehta v. Union of India and Others* (SC, Writ

Petition (C) No. 13029 of 1985), available at Manu/SC/0276/1991 (accessed Jan. 3, 2008). In *M. C. Mehta*, the Supreme Court of India directed the Ministry of Environment to “carry out appropriate experiments” with anti-pollution devices and to take steps to require appropriate devices in vehicles. *Id.*

¹⁶² See *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC) (South Africa), available at <http://www.constitutionalcourt.org.za/uhtbin/cgiirsi/nyWciuPTgE/MAIN/156340014/503/625> (accessed Jan.3, 2008). For a discussion of the Kyalami Ridge decision, see Richard J. Goldstone 2006. South African perspective on social and economic rights. *Hum. Rts.* 13(2), Brief 4.

¹⁶³ See Chapter 2, this volume.

¹⁶⁴ See, e.g., Linda C. McClain and James E. Fleming 2005–2006. Constitutionalism, judicial review, and progressive change. *Tex. L. Rev.* 84: 433–438. (recounting this debate)

¹⁶⁵ Morton Horwitz 1976–1977. The rule of law: An unqualified human good? *Yale L. J.* 86: 561, 566. (reviewing E. P. Thompson 1975. *Whigs and hunters: The origin of the Black Act*. New York: Pantheon Books).