3

The United States

Equality Along the Public–Private Divide

Scholars frequently treat the United States' constitutional experience as a kind of ideal type when it comes to private actors' duties. In particular, the US Supreme Court has repeatedly affirmed, even against competing interpretations and efforts of Congress, that the Fourteenth Amendment's guarantee of equal protection creates constitutional duties only for state actors. Of course, the Thirteenth Amendment abolished slavery in all sectors of the polity; beyond this provision, however, the Civil War Amendments did not admit of additional guarantees against private action. Nor did they, in the Supreme Court's understanding, permit Congress to pass legislation pursuant to these new constitutional commitments that might generate something like duties of private actors.

This is the official story that was passed down through case law and that, eighty years later, would prompt the Indian constitutional framers to adopt alternate language in their 1950 Constitution, as Chapter 4 will discuss. Key figures involved in drafting India's Constitution understood its ends as largely different from the American counterpart insofar as they aimed to give broad effect to equality and nondiscrimination rights across spheres of life. Through the twentieth and twenty-first centuries, constitutional discourse in the United States would continue to assume some version of the Court's "state action doctrine," the idea that only government action triggers rights protections or, put differently, that only the state maintains constitutional duties. Such arguments insist on maintaining the divide between public and private, and often may be read as embracing an understanding of liberty resembling freedom as noninterference. To this extent, such accounts seem to resist a republican interpretation. It would be problematic, however, to understand such discourses in simply liberal terms. Indeed, initially they were clearly employed to defend or preserve racist and other illiberal strains of American politics and thought. Moreover, while perhaps rights-centric in prioritizing certain rights, such as to property, such arguments did not necessarily emerge from balancing other rights (let alone ends), at least

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not in any meaningful sense. Rather, they often depended on diminishing the rights-bearing status of black persons, in addition to rejecting an understanding of equality as a shared public project.

If the dominant discourse emerging from US constitutional history is so strongly wedded to the state action doctrine, what role does this chapter serve in a book on republican interpretations of horizontality? First, in certain cases, these arguments from American constitutional history serve as a useful foil to such republican concepts as a common good, shared ends, duties of citizens, and the like. Consistent with the typical scholarly consensus of American constitutionalism on these matters, this chapter finds occasion to examine discourses attached to traditional conceptions of constitutionalism that largely persisted even as the political culture shifted over time in favor of, for example, a further-reaching conception of equality. Indeed, the extent to which American constitutional discourse remains linked to traditional accounts of constitutionalism comes into sharper relief as Chapter 4 will turn to the Indian constitutional experience.

On the other hand, this book's interpretive project and general focus on discourses rather than, say, a certain country's dominant schools of thought offer occasion to consider other threads of constitutional argumentation in the American context, some of which may be understood in a republican light. For example, a strong basis for a republican interpretation and even explicit invocation of republican principles exists in dissenting and concurring opinions, such as Justice Harlan's famous dissent in the *Civil Rights Cases* (1883).[1] Moreover, important landmarks outside of case law, such as the sit-in protests and subsequent Civil Rights Act of 1964, show republican resonances in the ends at which they aim, even as they simultaneously show some attachment to vertical conceptions of rights inherited from official precedent. Even while the state action doctrine largely continued to dominate strict legal accounts, these episodes of constitutional politics in the twentieth century occurred against a backdrop of shifting understandings of equality and of the attendant duties of private actors. In the United States, arguments related to understandings of freedom, traditional accounts of constitutionalism, racism, and a combination of these tend to countervail against horizontality, and particularly the horizontal application of equality, in the discourse. On the other hand, some arguments reveal the potential for

[1] *Civil Rights Cases*, 109 U.S. 3 (1883).

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republican readings even in the United States, foregrounding a more extensive project of equality for the polity that engenders not merely rights but duties of citizens as well.

Expanding the scope of study beyond the framework of the state action doctrine, this chapter concludes by examining those episodes in which constitutional commitments were in fact applied to private relationships. In *New York Times v. Sullivan* (1964), for example, the Court applied freedom of speech principles to overturn traditional formulations of the common law of defamation.[2] Moreover, in turning to the states, this chapter draws attention to the important reality of American federalism, and the fact that positive law at the subnational level includes no explicit state action requirement. A version of indirect horizontal application has thus expanded and contracted in various states at various times, with arguments about the duties of private actors under state constitutions sometimes taking on a republican character. While much in the prior sections (those focusing on the state action doctrine) turns specifically on rights related to equality, these latter sections (depicting some practices of indirect horizontal application at the subnational level) engage a broader range of issue areas. Moreover, while the particular issues applied horizontally vary between states, they often evince a turn from rights-centric arguments, couched in terms of noninterference, to greater openness to particular ends of the community articulated in the state constitutions.

In some ways, beginning the contextually based chapters of this book with the United States sets a kind of baseline for traditional understandings of constitutionalism from which horizontal application departs. However, it also illustrates the complexity inherent in constitutional discourse, a theme that recurs in various forms throughout the rest of the book. This chapter draws out complexity in the versions of horizontality and corresponding republican themes that do emerge in the American discourse, despite strong doctrinal ties to a state action requirement. In subsequent chapters, in contrast, complexity emerges more often in the arguments that seem to countervail against horizontality once it has been established. Differently situated institutions and actors continually wrestle with the reach and limits of horizontal application. In the constitutional history that follows, and in putting this American experience loosely into conversation with that of India in Chapter 4, constitutional actors may be read as debating the extent to

[2] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

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which certain constitutional rights are understood as a kind of shared public project, or a common good with the potential to implicate even private actors. Different repertoires[3] of constitutional experience thereby emerge with each of the following chapters as arguments related to constitutional ends, rights, and duties unfold across different circumstances. At the same time, specific themes recur, such that the concepts introduced in Chapter 2 carry over in helpful and revealing ways.

Defining a New Commitment to Equality

In the first session of the Thirty-Ninth Congress, Senator Jacob Howard explained that the purpose of the proposed Fourteenth Amendment to the Constitution was to "[abolish] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[4] In this way the Republicans of the post–Civil War era hoped the forthcoming changes to the Constitution would set the stage for effecting the equality of all people throughout the states. Hence the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified between the years 1865 and 1870. The text of each of these was clear enough. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment extended citizenship to "all persons born or naturalized in the United States," and guaranteed the equal protection of the laws and due process of law to people in every state. The Fifteenth Amendment guaranteed that the right to vote would not be contingent on one's race. Congress quickly moved to exercise the power the amendments granted to enforce the new constitutional commitment to equality. To this extent, Congress, as opposed to the courts, had some preliminary say in determining what the new commitment to equality would require in practice. In the ensuing years, Congress enacted several laws in pursuance of these amendments, including the Civil Rights Act of 1875, which guaranteed, among other things, "'full and equal' enjoyment of inns, public conveyances, and places of public amusement, regardless of race." As justification for this legislation, Congress cited its power to enforce both the Thirteenth Amendment's ban on slavery and the Fourteenth Amendment's guarantee of equal protection.

[3] Kim Lane Scheppele, "Constitutional Ethnography," *Law and Society Review* 38:3 (2004), 389–406.

[4] Congressional Globe, 39th Cong., 1st Sess. 2766 (1866). See also Cass Sunstein, "The Anticaste Principle," *Michigan Law Review* 92:8 (1994), 2436.

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Even at the time the Civil Rights Act of 1875 was passed, Congress was fairly divided on whether legislating on public accommodations exceeded its constitutional powers, to say nothing of what policies might be prudent in a turbulent time.[5] A strong contingent from the southern states sought to limit the progress of Reconstruction as much as possible, and the Republican Party was itself divided on how to understand and interpret the new commitment to equality. While the Radical Republicans were eager to read the new amendments as much more comprehensive in their reach, the Centrist Republicans were content to extend freed persons an equality limited to political and legal spheres more strictly understood.[6] This range of positions with respect to the new amendments were on full display when the Civil Rights and Enforcement Acts were eventually challenged in court. In a series of cases, known collectively as the *Civil Rights Cases* of 1883, the Supreme Court was tasked with offering its own interpretation of the Civil War Amendments and the extent to which Congress did or did not act within its proper limits in its subsequent legislation. In these cases, black plaintiffs sued for being excluded from theaters and transportation facilities, in violation of the Civil Rights Act of 1875. The white owners of those businesses argued that Congress had no authority to regulate their establishments under the Thirteenth and Fourteenth Amendments. In an eight-to-one decision, the Court ruled in favor of the business owners.

In the opinion of the Court, Justice Joseph Bradley addressed the extent of congressional authority in the context of each amendment. The Thirteenth Amendment, he conceded, had no state action requirement. That is, the amendment prohibited slavery with respect to the actions both of the state and of private or nonstate actors. However, the Court did not accept the plaintiffs' argument that their exclusion from such public places as theaters and transit facilities amounted to "badges of slavery."[7] To accept this interpretation, Justice Bradley maintained, would be to "[run] the slavery argument into the ground."[8] On Bradley's telling, black persons had already been granted their "essential freedoms" in their civil and political rights, and calling any act of private

[5] Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (Cambridge: Cambridge University Press, 2011), 342.
[6] Ibid.
[7] *Civil Rights Cases,* para. 21.
[8] Jack Balkin and Sanford Levinson, "The Dangerous Thirteenth Amendment," *Columbia Law Review* 112:7 (2012), 1472.

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discrimination a badge or incident of slavery would render the actual protection meaningless. In private correspondences, Bradley further worried that capacious interpretations of the Thirteenth Amendment would impose "another kind of slavery" on white proprietors.[9] Moreover, he took issue with Congress's legislative efforts as he did not see (or refused to see) how private gatherings might be distinguished from privately owned businesses in a principled manner. Bradley wrote: "Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party."[10]

In this way, Bradley redrew the lines that Congress had initially drawn as to what equality would mean and require under the US Constitution. Freedom extended only so far as to grant civil and political rights. So long as black persons had such freedoms, the Thirteenth Amendment could not (and, Bradley's argument implies, should not) do more for them. Moreover, although Bradley conceded that the Thirteenth Amendment did not include a requirement for state action, underlying his reasoning on this constitutional provision was a palpable urgency that the Court nonetheless maintain a strict line between public and private, and maintain that line in a particular place. Specifically, the Thirteenth Amendment only required individuals in private spheres not to have slaves. But it did not require anything more of individuals, especially not in private arenas. Anything more, in his words, would make black people the "special favorite of the laws."[11]

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

> *No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process

[9] Ibid., 1472. Levinson and Balkin suggest that, even in 1883, a plausible argument could have been made for reading the Thirteenth Amendment more expansively. Justice Harlan's dissenting opinion exemplifies such a reading. However, the majority of the Court was not keen on adopting such an interpretation given the fact that the Thirteenth Amendment did not have a state action requirement.

[10] Balkin and Levinson, "The Dangerous Thirteenth Amendment," 1472.

[11] *Civil Rights Cases*, para. 25. See also Pamela Brandwein, "A Lost Jurisprudence of the Reconstruction Amendments," *Journal of Supreme Court History* 41 (2016), 330.

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> of law; nor deny to any person within its jurisdiction the equal protection of the laws.[12]

To the extent that the text of the Fourteenth Amendment has a state action requirement, its application depends on some prior understanding of what constitutes state action (or state neglect, as it were[13]) as opposed to purely private action. Looking to draw such a line between public and private, Justice Bradley considered the requirements and content of the right to equality. In making this determination, he relied on the distinction between civil rights and social rights that he had begun to develop in his 1874 Circuit opinion for *United States v. Cruikshank*.[14] Pamela Brandwein explains that, during the framing of the Fourteenth Amendment, "Centrist and Radical Republicans agreed on a core body of *civil rights*: contract, property, suing, testifying, and equal redress for injuries. For centrists, access to public accommodations, schools, intermarriage were typically social rights."[15] Brandwein explains that while the Radical Republicans would have both civil and social rights protected by the Fourteenth Amendment, Centrist Republicans drew this distinction for the very purpose of omitting social rights from the guarantee of equal protection.[16] Bradley pursued this line of argument in the *Civil Rights Cases*, setting the initial limits for the reach of equality in the polity.

Justice Harlan's lone dissent in the *Civil Rights Cases* undertakes a task different from Bradley's line-drawing project and comes to an alternate interpretation of the new amendments. In his dissent, Harlan argued against Bradley's narrow account, explaining that the Thirteenth Amendment protects against more than slavery per se. Indeed, on his telling, the Thirteenth Amendment calls for a more capacious interpretation that includes the abolition of certain corollary "badges and incidents" of slavery. Thus, contrary to Bradley's reading, the Thirteenth Amendment equipped Congress to contend with the many "burdens and disabilities" that freed persons confronted as a direct result of centuries of

[12] US Constitution, Amendment 14, Section 1, emphasis added.
[13] One of Brandwein's primary objects in *Rethinking the Judicial Settlement of Reconstruction* is to reveal how original formulations of state action, even by more centrist actors, were capacious enough to include instances of state neglect (Brandwein, *Rethinking*; see also Brandwein, "Lost Jurisprudence," 334–335).
[14] Brandwein, *Rethinking*, 16.
[15] Brandwein, "Lost Jurisprudence," 341.
[16] Brandwein, *Rethinking*, 60–86.

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enslavement.[17] Full abolition of slavery, full freedom in any meaningful sense, required protection of "those fundamental rights which were the essence of civil freedom" and protection from "all discrimination against [freed persons], because of their race."[18] According to Harlan, "the essence of civil freedom" thus extended further than Bradley conceded to include the very venues that the Civil Rights Act proposed to regulate, namely, "inns, public conveyances, and places of public amusement."

Harlan understood the ability to use inns and public conveyances as part and parcel of a rudimentary conception of freedom and, as such, comprising the freedom the Thirteenth Amendment intended to guarantee. Indeed, services such as these institutions offer are "so far fundamental as to be deemed the essence of civil freedom," no less than those rights the majority of the Court did concede.[19] That the agents of these institutions are technically nonstate actors does not detract from the fact that they maintain public significance and power over the enjoyment of the rights in question. Harlan explains, "[N]o matter who is the agent, or what is the agency, the function performed is *that of the State*."[20] In this account, these agents were executing public functions in offering these services and therefore may be subject to Congress's efforts to give effect to the guarantees of the Thirteenth Amendment. In the Court's decision to rule otherwise, he explained, freed persons are "robbed of some of the most essential means of existence, and all this solely because they belonged to a particular race which the nation has liberated."[21]

Apart from this argument that the regulations of the Civil Rights Act follow from the Thirteenth Amendment's guarantee of freedom, Harlan also explains that access of all-comers to inns and public conveyances is a principle rooted in common law. In this light, the Court's rejection of the Civil Rights Act becomes even more significant as not simply a rejection of one possible interpretation of a constitutional amendment, but a rejection of longstanding common law intended to regulate such private interchange. On this point, Harlan quotes Justice Joseph Story:

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

[17] *Civil Rights Cases,* para. 34.
[18] Ibid., para. 35.
[19] Ibid., paras. 35, 39.
[20] Ibid., para. 38, original emphasis.
[21] Ibid., para. 40.

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> innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor . . .. They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.[22]

On this basis, Harlan highlights the public nature of such institutions as inns and public conveyances. With this "*quasi*-public employment," he explains, comes "certain duties and responsibilities to the public," to serve all guests without distinction as to race or color.[23]

Harlan's opinion goes on to consider the Civil Rights Act's attempt to regulate "places of public amusement." While such places as theaters do not necessarily qualify as "the most essential means of existence," they may still be understood as public in the sense that proprietors devote their property "to a use in which the public has an interest." To this extent, Harlan explains, these institutions operate only under the license of law, and so, the authority to establish and maintain them is public in nature. Harlan concludes on this basis that such institutions must "submit to be controlled by the public *for the common good*."[24]

This line of thinking, that privately owned institutions operating under the law must align with *the common good*, makes explicit a republican significance inhering throughout Harlan's opinion. In the Thirteenth Amendment and Civil War Amendments more generally, Congress rearticulated the polity's *res publica* to include a conception of freedom now comprising racial equality. This project involved not only the abolition of slavery but also the abolition of those badges and incidents that contradicted this new articulation of the common good. Thus, Congress affirmed in the Civil Rights Act that "since the nation has established universal freedom in this country for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of public conveyances, inns, and places of public amusement." In other words, Congress established universal freedom as an end for the broader political community, including sectors of the private sphere, and sought to realize this object in both law and fact.

As Harlan understood the Thirteenth Amendment to be as much about discrimination on a broad scale as about the institution of chattel slavery in particular, so too did he understand the Fourteenth

[22] Ibid.
[23] Ibid., para. 41.
[24] Ibid., para. 42, emphasis added.

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Amendment as transcending a strict understanding of legal or formal equality to include all the "privileges or immunities fundamental in republican citizenship."[25] His more expansive interpretation of equality and citizenship comes through when he explains that the Fourteenth Amendment and, specifically, the citizenship clause of Section 1 guarantee "[e]xemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government."[26] He goes on to read Congress's Section 5 enforcement power in light of this comprehensive understanding of citizenship. Given his broad reading, the new amendments seem to *require* Congress to take positive action to give these new constitutional commitments full effect, as it so attempted in the Civil Rights Act. Harlan explains the rationale undergirding the Fourteenth Amendment accordingly: "To meet this new peril to the black race, that the purposes of the nation might not be doubted or defeated, and by way of further enlargement of the power of Congress, the Fourteenth Amendment was proposed for adoption."[27]

In this way, Harlan relies on the citizenship clause to justify Congress's authority to legislate pursuant to the Fourteenth Amendment. He argues that the Amendment's language is "distinctly affirmative in character,"[28] not simply prohibiting the states from violating the new commitment to equality, but empowering Congress to give effect to the Civil War Amendments. Ought not Congress to have the constitutional authority, he questions, to "do for human liberty and the fundamental rights of American citizenship what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves"?[29] Harlan would thus have Congress pursue a notion of citizenship encompassing much more than a simple checklist of traditional legal criteria.[30] Rather, the Civil War Amendments aimed at more than legal equality in citizenship, on Harlan's telling, to bring equality even into certain private spheres, encompassing even citizens and private actors into this constitutional project. He states:

[25] Ibid., para. 47. See also Christopher R. Green, "The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application," *George Mason University Civil Rights Law Journal* 19 (2009), 260–264.
[26] *Civil Rights Cases,* para. 56.
[27] Ibid., paras. 43–44.
[28] Ibid., para. 46.
[29] Ibid., para. 53.
[30] I am grateful to Gary Jacobsohn for this insight.

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> It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights as citizens was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporation and individuals in the States. And it is to be presumed that it was intended by that section to clothe Congress with power and authority to meet that danger.[31]

In this way, Harlan's account of the amended constitution might be described as embracing a project or, one might say, ends, much more than did Bradley's. Indeed, his opinion reveals how the Civil War Amendments might have marked, in the words of Jacobsohn and Roznai, the beginning of a kind of step-by-step revolution toward more complete racial equality.[32]

From the debate between Radical and Centrist Republicans to the exchange between Justices Bradley and Harlan, a range of interpretations of equality and the Fourteenth Amendment entered the constitutional discourse. Specifically, what the Fourteenth Amendment's guarantee of equal protection meant for public accommodations, and in particular whether access to public accommodations was properly considered a civil right, seemed an open question. According to Charles Calhoun, "For most Republicans ... the good society entailed [civil and] political equality but not social equality."[33] In spite of its more marginal status in early debates, however, the Radical Republican argument illustrated the range of possibilities for the Fourteenth Amendment, including a more republican interpretation of equality that included a social dimension and implicated a wider range of actors. Indeed, other iterations of this general position would recur in the constitutional politics of the twentieth century as the state action doctrine continued to be debated.

Ultimately, the Centrist Republican conception of what equality required triumphed in the *Civil Rights Cases*, along with a particular understanding of a strict line between public and private spheres, with public accommodations located decidedly on the private side. In so prioritizing the rights of proprietors, these interpretations likewise pointed toward a priority of freedom as noninterference. At the same time, while this interpretation in some ways tracks traditional liberal

[31] *Civil Rights Cases,* para. 5.
[32] Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (New Haven: Yale University Press, 2020), 166.
[33] Charles Calhoun, *Conceiving a New Republic* (Lawrence: Kansas University Press, 2006), 13.

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understandings of constitutionalism and the public–private divide, the continually ascriptive character[34] of the era's politics and political discourse defies calling these arguments simply liberal.[35] As the idea that only state action triggered constitutional rights endured in American jurisprudence, some later arguments were attached to liberal commitments of a certain stripe and not (always) adulterated with the same racist overtones. This is arguably true, for example, of such arguments as Herbert Wechsler's famous call for neutral principles, discussed below.

Alternate discourses would also reappear in the ensuing decades, some of which may be read as making equal protection into a larger constitutional project, even a common good, and effectuating duties for at least some citizens in turn. These arguments often approximated or even embraced versions of horizontality, echoing Harlan's dissent and themes this book conceives in terms of republicanism. Specifically, these discourses begin to consider the possibility that private actors may have duties qua private actors to the extent that their actions bear on certain public projects. In other cases, these arguments seem intent on more closely tracking the Court's initial settlement in the *Civil Rights Cases*, perhaps reaching conclusions that are similar to Harlan's, but justifying new duties of citizens more on the basis that certain private actors resembled public institutions and less on the way they bear on public or constitutional ends, such as equality, even as private actors. While both styles of argument might result in duties of private actors, the former depends more on the public–private divide that grounds the state action doctrine. Thus, while both formulations arguably are heirs to Harlan's judgment, instances of the latter may be read in a more republican light.

[34] Rogers Smith, *Civic Ideals* (New Haven: Yale University Press, 1999).

[35] In *Rethinking the Judicial Settlement of Reconstruction*, Pamela Brandwein shows that the *Civil Rights Cases* did not necessarily entail "the rejection of black property, contract, safety, and voting rights." However, these actions would all be justified in the name of the *Civil Rights Cases* in the years of Jim Crow (Brandwein, *Rethinking*, 3; Brandwein, "Lost Jurisprudence," 345). See also Brandwein's recounting of Stephen Breyer's dissent in *United States v. Morrison*, 529 U.S. 598 (2000): "Justice Breyer suggested that the canonical 1883 decision, the *Civil Rights Cases*, never considered the kind of claim advanced by the federal government in the *Morrison* case, namely, that Congress was authorized under the Fourteenth Amendment to remedy the failure of state actors to punish gender-motivated violence" (*Rethinking*, xi). While only so much can actually be attributed to the *Civil Rights Cases* itself on Brandwein's and, indeed, Breyer's accounts, much of the subsequent development of the state action doctrine has still been argued in the name of this early decision.

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Harlan's dissent offered plausible alternative interpretations of the Civil War Amendments that translated the commitment to equality into a more far-reaching project potentially applying to members of civil society. As the sections that follow suggest, however, constitutional actors and legal scholars continually questioned the status of such arguments vis-à-vis American doctrinal history and even liberal constitutionalism in general. The Court's judgments remained largely fixed on keeping intact a version of the state action doctrine, rather than on explicitly implicating private actors in a constitutional project of racial equality. Therefore, with a few notable exceptions, the arguments that tended to prevail in subsequent years remained premised on the public–private divide, even as many constitutional actors and members of the public grew more sympathetic to a broader conception of equality.

Revisiting Equality's Requirements in the Twentieth Century

After decades of an equality defined by "civil not social" and "separate but equal," the Court and American populace in certain ways became receptive to a more capacious understanding of the content and requirements of equality. That the Court might in fact pursue a line of constitutional argument that allowed equality rights to reach private spaces seemed plausible when the Court briefly embraced a broader understanding of state action. In the 1948 case *Shelley v. Kraemer*, homeowners in St. Louis adopted a restrictive racial covenant that prevented African Americans and other minorities from purchasing properties in their neighborhood. The covenant stated that no property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."[36] When one of the homeowners party to this covenant sold his house to an African American family by the name of Shelley, others in the neighborhood asked the courts to uphold the restrictive racial covenant as a private contract to which they had all voluntarily agreed. The Supreme Court of Missouri decided to enforce the covenant on the basis that it was a purely private contract and did not bear on the state's obligation to uphold the Fourteenth Amendment's commitment to equal protection. This was a

[36] *Shelley v. Kraemer,* 334 U.S. 1 (1948), para. 5.

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matter of private action, rather than state action. However, on appeal, the US Supreme Court found that the very act of enforcing the covenant did constitute state action. In the Opinion of the Court, Justice Vinson explained that "the full panoply of state power"[37] was ultimately responsible for preventing the Shelley family from occupying the home they had purchased. To this extent, one could not honestly say that the state had "merely abstained from action, leaving private individuals free to impose such discriminations as they see fit."[38] While the Court could not prevent the drafting of such covenants, neither could it enforce them without directly participating in discriminatory actions, thereby violating the Fourteenth Amendment.

In this way, the Court seemed to locate one path forward from the strictures of Bradley's initial reasoning and subsequent developments that continually left Congress bereft of any power to implement a broader equality. Indeed, in the years leading up to the sit-in protests, some spectators hoped that *Shelley*'s move to recognize the Court's enforcement of private contracts as constituting state action might next lead to the Court's reinterpretation of the Fourteenth Amendment to require equal access to public accommodations.[39] However, others were less optimistic about the impact of this case, whether for reasons of strategy or reasons of principle. Today, legal scholars understand *Shelley* as "a singular case" and as the Court's attempt to "[put] aside doctrinal complexities in order to attack an immoral and socially destructive practice."[40] Indeed, this decision does constitute a kind of high-water mark in the Court's willingness to stretch the bounds of the state action doctrine so as to hold private actors accountable for constitutional principles. No major case after *Shelley* follows similar reasoning. While the Court would in some ways find workarounds to the state action doctrine, it quickly reverted back to a more limited understanding of state action, particularly in those cases that did not raise the issue of racial equality.

That retrospective analyses find *Shelley* to be anomalous in US constitutionalism is not altogether surprising when viewed in the light of early accounts of the case. Some legal scholars, including many who were

[37] Ibid., para. 19.
[38] Ibid.
[39] Christopher Schmidt, "The Sit-Ins and the State Action Doctrine," *William and Mary Bill of Rights Journal* 18 (2010), 785.
[40] Ibid., 784.

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sympathetic to a broader equality, faulted the Court for its reasoning and even the outcome it reached in *Shelley*. Herbert Wechsler, for example, famously criticized the Court for departing from "neutral principles" of the law, explaining:

> That the action of the state court is action of the state . . . is, of course, entirely obvious . . . What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make.[41]

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

That many scholars and jurists objected to the Court's decision at the time is not to say that the issue of state action was settled in constitutional argumentation, however. Indeed, *Shelley* and other cases such as *Marsh v. Alabama* (1946)[42] led some to question the state action doctrine as traditionally understood.[43] Louis Henkin, for example, suggested in a 1962 article that the Court should have decided *Shelley v. Kraemer* by weighing the Shelley family's right to equality against the other homeowners' liberty to enter a contract.[44] He explains, "Under today's

[41] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73:1 (1959), 29.

[42] In this case, the Supreme Court decided that a privately owned company town was required to respect the right to freedom of speech under the First Amendment insofar as the town had certain public features and functions.

[43] Schmidt, "The Sit-Ins," 784.

[44] Louis Henkin, "*Shelley v. Kraemer*: Notes for a Revised Opinion," *University of Pennsylvania Law Review* 110:4 (1962), 473–505.

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concepts of due process, we have suggested, the state may not forbid a person to be whimsical or capricious in his social relations or as to whom he will admit to his home."[45] In other words, a certain arbitrariness in private action must be permitted if liberty in a meaningful sense is to endure. But this arbitrariness or whimsy that characterizes social relations (and that amounts to a conception of freedom as noninterference in these spaces) does not extend to all spheres, Henkin argues. His treatment of rights begins to resemble horizontal effect, explaining how the Court should have engaged in a process of balancing to determine which right ought to triumph in this particular instance. More often than not, he thinks, equal protection will triumph, given the commitments of the Constitution. But again, in his telling the Constitution does permit and even protects a certain ability of individuals to act arbitrarily with respect to the company they choose to keep. And so, the Court cannot but account for such freedoms of association as well. To balance these freedoms, Henkin explains, Shelley should have asked that the "state not prefer the old contract over his new one, that it not lend support to organized zoning for an improper purpose, to a discrimination which has no basis but race and serves no purpose but prejudice."[46] Hence, while different rights may have been at stake here, the facts of the case and the commitments of the Constitution favored the Shelleys.

Henkin's heterodox take on state action never gained traction.[47] Indeed, something closer to Wechsler's understanding seemed to stick in American legal discourse and in the Court's own arguments. Just a couple of years after *Shelley*, the Supreme Court actually denied certiorari of a case in which the New York Court of Appeals had "found no state action in a racial discrimination claim against a private housing developer."[48] The Supreme Court opted to deny cert in spite of the fact that "the developer had received extensive state support in the form of land condemnation, street closings, and a twenty-five year tax exemption for a New York case just a couple of years later."[49] In the end, the argument in

[45] Ibid., 498.
[46] Ibid., 496–497.
[47] At least Henkin's approach did not gain traction in the United States. Other countries do practice something very close to what Henkin proposes in their doctrines of horizontal effect. See, for example, Laurie Ackermann's take on South African constitutionalism (*Human Dignity: Lodestar for Equality in South Africa* [Cape Town: Juta, 2012], 271–273).
[48] *Dorsey v. Stuyvesant Town Corp*, 299 N.Y. 512 (1949).
[49] Schmidt, "The Sit-Ins," 783.

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Shelley was the exception that proved the rule, a fact that became even clearer as the Supreme Court began to confront the cases resulting from the sit-in protests. Even as the Court largely ruled in favor of protestors, finding ways to help them evade trespass laws during the sit-ins of the early 1960s, it abided by the discursive status quo of the state action doctrine.[50]

The Civil Rights Act Redux

Around the time that Congress was debating the Civil Rights Act of 1964, the Supreme Court was deciding *Bell v. Maryland*.[51] In this case, twelve African American students were refused service in a Baltimore restaurant and convicted of criminal trespassing. As Christopher Schmidt explains it, "[T]he question came down to which party was the primary law-breaker, the discriminating proprietor or the sit-in demonstrator."[52] Given its favorable rulings in the sit-in cases of the previous terms, the Court might have taken this opportunity finally to overturn or at least revisit the conclusion of the *Civil Rights Cases*. And indeed, Justices Douglas and Goldberg were in favor of doing just this throughout the deliberations. Even in the earlier case of *Garner v. Louisiana* (1961), Douglas wrote in his dissent: "Restaurants, whether in a drugstore, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the State may not enforce a policy of racial segregation." Three years later, and with the Civil Rights Act of 1964 on the cusp of passing in the legislature, court observers speculated whether the time was ripe to reconsider the constitutional question – were private business owners obligated by the equal protection clause?

Even while a majority of the Court was sympathetic to the protesters, other considerations were in play that, scholars argue, led the Court to vacate and remand the decision back to the Maryland Court of Appeals. Schmidt makes much of the fact that Justice Black was disquieted by the methods of the protestors, for example. Eager to maintain law and order and not to stamp civil disobedience with the Court's

[50] McKenzie Webster, "The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations," *Journal of Law and Politics* 17 (2001), 373–408.
[51] *Bell v. Maryland*, 378 U.S. 226 (1964).
[52] Schmidt, "The Sit-Ins," 784.

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endorsement,[53] Justice Black, along with Justices Harlan (II) and White, decided in favor of the restaurant owner. The remaining six justices wavered between considering the constitutional question and taking the intermediate step of vacating and remanding, since Maryland had recently passed laws against discrimination in public accommodations. Led by Justice Brennan, the justices seeking the more moderate line put much weight on the fact that the Civil Rights Act was about to pass Congress. If they could prevent any disruption of this progress by avoiding a (doctrinally) controversial decision, then so much the better.

Members of the public sympathetic to the Civil Rights Movement were largely unconcerned and even unaware of such jurisprudential hurdles, however. In fact, a major impetus behind the sit-in protests was the widespread conviction that the principle of equality advanced in *Brown v. Board of Education* ought to apply to public accommodations as well. Moral and constitutional consistency, they argued, required nothing less. Martin Luther King, Jr. described the demand for equality in access to public accommodations as "the logical extension of the school segregation struggle."[54] This popular understanding, that the constitutional commitment to equality directly bore on private spaces, received the imprimatur of other public figures as well, including Dwight Eisenhower[55] and John F. Kennedy.[56] Almost as if to draw from Justice Harlan I's conception of citizenship in the *Civil Rights Cases,* President Kennedy stated that the "right to be served in facilities which are open to the public" was an "elementary" right and one of "the privileges of being American."[57] In his 1963 message to the American people on civil rights, he said:

[53] Ibid., 798–801.

[54] Ibid., 788.

[55] Martin Luther King, Jr., "A Creative Protest" (February 16, 1960), in *The Papers of Martin Luther King, Jr., Volume V*, ed. Clayborne Carson, Tenisha Hart Armstrong, Adrienne Clay, and Susan Carson (Berkeley: University of California Press, 2006), 368; Dwight D. Eisenhower, "The President's News Conference" (March 16, 1960), in *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1960–1961* (Washington, DC: US Government Printing Office, 1961), 293–302. See also Schmidt, "The Sit-Ins," 788.

[56] John F. Kennedy, "Radio and Television Report to the American People on Civil Rights" (June 11, 1963), in *Public Papers of the Presidents of the United States: John F. Kennedy, 1963* (Washington, DC: US Government Printing Office, 1964), 468–470. See also Schmidt, "The Sit-Ins," 790.

[57] Kennedy, "Radio and Television Report," 468–470; see also Schmidt, "The Sit-Ins," 790.

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> If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?[58]

In this light, at least some constitutional actors and members of the general public viewed equality at lunch counters, restaurants, and the like as no less constitutive of the equality the polity had committed to in the Fourteenth Amendment and clarified in *Brown*. Such arguments seem unconcerned with maintaining a line between public and private, inasmuch as they understood equality as a project that implicated a broad range of actors across the American polity.

Even those who were more aware of the doctrinal complexities of state action and equal protection did not necessarily view these precedents as insurmountable. In a 1960 article, for example, the *Washington Post* described the state action doctrine as "an evolving thing."[59] It stated:

> An assertion that would have been laughed out of court 20 years ago may be an established right today after a long step-by-step process of fashioning a new rule. The courts may not rule today that Negroes have a right to eat beside white persons in private stores. They might so rule three or five or 10 years from now after taking it a piece at a time.[60]

The observation that "a long step-by-step process" might be underway suggests that alternate interpretations of the state action doctrine and equality were, in fact, in play in discourses during those decades, despite the various reiterations of Bradley's early take on the Fourteenth Amendment. The Court might have decided, for example, that African Americans had "a right to eat beside white persons," thereby reinterpreting the state action doctrine to conform to the emerging public understanding and, as it happens, to be closer to Justice Harlan's conception of citizenship in the *Civil Rights Cases*. Even the Chief Justice himself thought it possible that the jurisprudence might unfold in this way. In speaking of the Court's practice of avoiding the merits and instead deciding the sit-in cases on more procedural issues, Earl Warren explained that he had hoped that the Court "could take these cases *step*

[58] Kennedy, "Radio and Television Report," 468–469; see also Schmidt, "The Sit-Ins," 790.
[59] Richard L. Lyons, "Lunch 'Sitdown' a Legal Puzzler," *Washington Post*, March 27, 1960, E5; see also Schmidt, "The Sit-Ins," 785.
[60] Ibid.

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by step, not reaching the final question until much experience had been had."[61] As Warren thus admitted the possibility and even some desire to develop the state action doctrine, in retrospect it was telling that these reflections came within a more general explanation of why the Court had not yet taken such steps.

Various oral and written statements suggest that many of the justices initially considered decoupling Section 1 of the Fourteenth Amendment, establishing the legal principle of equal protection, from Section 5, establishing Congress's enforcement power.[62] This would allow the Court to "*follow* Congress in redefining the meaning of the Equal Protection Clause – that is, the congressional interpretation of equal protection would then be adopted by the Court as a self-enforcing constitutional right."[63] Even Justice Harlan, who ultimately dissented from Brennan's majority opinion in *Bell v. Maryland,* indicated some willingness prior to the decision to consider this rationale, since it would have allowed the Court to tread lightly with respect to the jurisprudential precedent.[64] Members of Congress floated this possibility, too, during deliberations for the Civil Rights Act of 1964. Nevertheless, this decoupling strategy would not control the decision in *Bell v. Maryland*, nor would it serve as the primary authorization for Congress's Act, as discussed below.

Despite the potential doctrinal workaround of decoupling Sections 1 and 5, to say nothing of the favorable state of public opinion, the majority opinion in *Bell* ultimately avoided the constitutional question altogether. Scholars suggest a variety of factors contributing to the Court's anemic judgment, from Justice Black's fears of endorsing civil disobedience, to the strategic calculation of how their decision might

[61] Del Dickson, ed., *The Supreme Court in Conference (1940–1985): The Private Discussions behind Nearly 300 Supreme Court Decisions* (Oxford: Oxford University Press, 2001), 718, emphasis added; see also Schmidt, "The Sit-Ins," 791.

[62] Leon Friedman, ed., *Argument: The Complete Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952–1955* (New York: Chelsea House, 1969), 94–103; Robert H. Jackson, Memorandum 11 (March 15, 1954) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 184); see also Schmidt, "The Sit-Ins," 805.

[63] Schmidt, "The Sit-Ins," 805.

[64] Dickson, *The Supreme Court in Conference,* 720, n211; Transcript of Oral Argument, *Heart of Atlanta*, 379 U.S. 241 (no. 515), reprinted in Philip B. Kurland and Gehard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, Volume 60* (Arlington: University Publications of America, 1975), 573; see also Schmidt, "The Sit-Ins," 806–807, 818–819.

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affect the contemporaneous efforts of Congress.[65] Moreover, some cost is generally attached to the process of revisiting and revising precedent – perhaps particularly as the precedent was itself understood as protecting rights. In dissent, Justice Black seemed to echo Justice Bradley's argument in the *Civil Rights Cases*: "[The Fourteenth Amendment] does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise."[66] The underlying argument here was that the Fourteenth Amendment maintained a particular distinction between public and private, and the regulation of public accommodations fell decidedly on the side of private, nonstate action. So while the states were free to root any antidiscrimination law in their own commitments to equality, the US Supreme Court at least had to abide by the line-drawing project defined decades earlier in the *Civil Rights Cases*, as well as respect the particular place at which Bradley had located this line, which prevented the application of equality in public accommodations.

Even the majority opinion shows concern on the part of Justice Brennan and those justices joining him not to depart too quickly or drastically from what they took to be the requirements of doctrine. Perhaps their concerns were primarily strategic or prudential; however, even this suggests that these distinctions between public and private and state action and nonstate action were rooted in legal discourse to such a degree that caution was warranted. That the general public's understanding of equality's requirements had shifted enormously by this period only throws the point into sharper relief. In the end, even the activist Warren Court was not up to the task of redefining equality as a constitutional matter, to uproot the conceptions of public and private that had developed around equality in the form of the state action doctrine.

Contemporaneous with the Court's deliberations in *Bell v. Maryland*, Congress held debates similar in both subject matter and intensity. In working to pass the Civil Rights Act of 1964, members of Congress

[65] Schmidt, "The Sit-Ins," 791–792.

[66] *Bell v. Maryland*, 378 U.S. 226 (1964). It is interesting that Black joined the majority in both *Marsh v. Alabama* and *Shelley v. Kraemer*. These cases blurred the lines between public and private but also granted the premises of state action and so maintained some semblance of this distinction. Nevertheless, this does not by itself explain why Black did not join Brennan's conciliatory opinion. Christopher Schmidt offers a compelling explanation in that Black was deeply concerned about the impact the sit-in protests would have on the rule of law more generally. See Schmidt, "The Sit-Ins," 798–802.

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considered whether they might rely on their enforcement powers under Section 5 of the Fourteenth Amendment. This basis was clearly more germane to the questions at issue than, say, the alternative basis of Congress's power to regulate commerce. Moreover, a few of the Court's recent decisions (some concerning the sit-ins and others state action) served to suggest that at least some of the justices might welcome the shift in constitutional understanding this would inevitably entail. On the other hand, relying on the power to regulate commerce likely provided a safer basis on which to ensure this new Civil Rights Act withstood lawsuits. Indeed, even if less clearly connected to issues of discrimination and equality, the Commerce Clause would not pose the same challenge to the regnant precedent and might consequently be more successful at achieving the legislators' intended ends.

Even despite the high stakes of the issue of civil rights, Congress did not seem to accept its position "as a coequal branch on matters of constitutional interpretation" and deferred instead to the Court's 1883 precedent.[67] Schmidt's account points to a painful irony in Congress's deferential attitude. In his telling, the Court was actually looking to Congress to act on the constitutional issue. As described above, the Court had in its deliberations considered decoupling the first and fifth sections of the Fourteenth Amendment, which would have allowed Congress to advance its own understanding of equality rights in law under its enforcement power.[68] Nevertheless, the Court's "evolving position on this question was largely hidden from view," leaving members of Congress ignorant of these developments among the judges.[69] Ultimately Congress cited its power to regulate commerce as the primary constitutional basis on which it passed the Civil Rights Act. While it also cited its enforcement power under the Fourteenth Amendment, this provision was clearly auxiliary.

Not long after the Civil Rights Act became law in 1964, proprietors began to challenge Title II's requirement that people not be denied access to public accommodations on the basis of race. In such cases as

[67] Schmidt, "The Sit-Ins," 773.

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

[69] Schmidt, "The Sit-Ins," 808–809.

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Katzenbach v. McClung[70] and *Heart of Atlanta Motel v. United States*,[71] the Court confronted the question of whether Congress acted within its constitutional powers in its recent legislation. Moreover, the Court considered what part of the Constitution gave Congress this authority. Although Congress had relied primarily on the Commerce Clause, that the law mentioned the Fourteenth Amendment at all kept Section 5 in play as a possibility. Even at this stage, however, when the Court was in such a position that it could defer to Congress, it upheld Title II on the basis of the Commerce Clause alone, "refusing to evaluate the alternative Fourteenth Amendment rationale to which most of the Justices felt Congress had not committed itself."[72] The justices considered the possibility in conference, but in the end only Douglas and Goldberg wanted to address Congress's Section 5 enforcement powers.[73] And so, what broad sectors of the country had come to understand as a requirement of constitutional morality – an end for the polity to pursue – remained cordoned off from the perspective of constitutional law, to be regulated simply as a matter of commerce and not implicating competing constitutional rights. Neither Congress nor the Court disrupted or modified what they took to be the original settlement of this constitutional question from the nineteenth century.

By prioritizing a vertical logic, the arguments predominating in American constitutional discourse may be read as rejecting, at least as a theoretical matter, a particular understanding of racial equality as a shared project and as creating duties beyond a fairly narrowly defined public space. One might cite such developments as the Civil Rights Act as a counterpoint. And indeed, many horizontal initiatives often do occur in the form of statutory law. The Civil Rights Act has itself become quasi-constitutional in nature,[74] and many states have done much to combat

[70] *Katzenbach v. McClung*, 379 U.S. 294 (1964). This case concerned a restaurant – within close proximity of state and interstate highways – that refused access to African American customers. Against the arguments of the restaurant proprietors, the Court upheld the 1964 Civil Rights Act that drew upon Congress's power over interstate commerce to outlaw discrimination in public accommodations.

[71] *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Similar to *Katzenbach v. McClung* and decided on the same day, this case involved a motel that refused access to African American customers. Again, the Court upheld the 1964 Civil Rights Act outlawing discrimination in this context.

[72] Schmidt, "The Sit-Ins," 772.

[73] Ibid., 819–820.

[74] See William N. Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven: Yale University Press, 2010).

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discrimination in their own antidiscrimination laws even prior to 1964.[75] However, from a theoretic perspective, that the Civil Rights Act continues to be grounded in Congress's commerce power, rather than the principle of equality, seems to demote its status in the constitutional landscape from the start. Even as the law requires private actors not to discriminate on the basis of race, it would not seem to be for the sake of any duty to fellow citizens nor any constitutional goal or project.[76] Whether this lower constitutional status carries consequences with respect to actual outcomes or impact is beyond the scope of the present book.[77] What this book aims to do is reveal and clarify the republican concepts undergirding the theoretical situation of this constitutional discourse.

Law Along the Public–Private Divide

The sit-in protests may have posed the question of whether to rethink concepts of public and private with respect to the particular issue of racial equality. Yet, constitutional discourse, particularly from the Court, illustrates how the precedent in the *Civil Rights Cases* persisted in constitutional thinking concerning the public–private divide. Key actors continued to adhere to the state action doctrine in some form, rejecting the chance to recast the line between public and private spaces, or even to approximate a republican logic that conceived a role in the broader constitutional project for private actors as such, not unlike Justice Harlan's dissent. Although certain circumstances seemed to favor such a decision, the state action framework still rose above these alternative understandings as a matter of constitutional law – probably owing to precedent, institutional interests, and doubtless other political and attitudinal factors, as scholars have variously suggested.

[75] Some scholars lament the dearth of antidiscrimination legislation in India as a conspicuous gap in legal efforts to achieve greater equality. See Tarunabh Khaitan, "Reading *Swaraj* into Article 15: A New Deal for All Minorities," *NUJS Law Review* 2:3 (2009), 420–432.

[76] See Helen Hershkoff on the expressive value underlying these questions ("'Just Words': Common Law and the Enforcement of State Constitutional Social and Economic Rights," *Stanford Law Review* 62 [2010], 1527). See also Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton: Princeton University Press, 2012).

[77] On the other hand, recent cases show the fragility of statutes for the very reason that they do not enjoy the same entrenched status as constitutional law. One need not look further than *NFIB v. Sebelius* 567 U.S. 519 (2012) to see that the Court has periodically reined in Congress's commerce power, or *Shelby County v. Holder* 570 U.S. 529 (2013) to see that even such a milestone as the Voting Rights Act is not beyond incursion.

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While legal scholars have long recognized the state action doctrine as a "conceptual disaster area,"[78] the Court has continued to work within and around this framework. Particularly in the realm of civil rights, the Court has decided that privately owned institutions that are somehow "entangled" with the state or that serve what are traditionally thought of as "public functions" can, in fact, be regulated as state actors. Though these workarounds may bring the Court to the outcomes it desires, they reach such conclusions only by expanding the definition of the state, arguably preserving the core of Justice Bradley's legacy, rather than obligating private actors to constitutional commitments to equality. Perhaps it is not surprising that the Court has employed these doctrines of "entanglement" and "public function" in the area of civil rights more than any other.[79] Indeed, this is a realm in which the country has patently shifted its thinking as evinced in the sit-ins and the public's constitutional understanding of these and later protests, as described earlier. In other words, these workarounds to the state action doctrine have occurred precisely where the polity has changed its position on a clear set of issues in fairly decisive fashion.

While, historically, the state action doctrine was often employed to nefarious ends, scholars and constitutional actors acknowledge the value of preserving some private sphere beyond the reach of public values and in distinguishing between state and nonstate action.[80] Sometimes the Court has preserved this doctrine even when reaching outcomes that are unpalatable or worse. The staying power of this framework is on full display in the infamous *DeShaney v. Winnebago County* case,[81] when the majority of the Court persisted in a strict conviction that constitutional rights obligated only state actors, arguably in spite of alternative interpretations that might have mitigated tragic circumstances.

A small child by the name of Joshua DeShaney suffered serious abuse at the hands of his father. Wisconsin Social Services reported to the

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

[79] See, for example, *Reitman v. Mulkey* 387 U.S. 369 (1967) and *Moose Lodge v. Irvis* 407 U.S. 163 (1972). See also Jud Mathews, *Extending Rights' Reach* (Oxford: Oxford University Press, 2018), 9.

[80] See Louis Seidman and Mark Tushnet, "The State Action Paradox," in *Remnants of Belief: Contemporary Constitutional Issues* (Oxford: Oxford University Press, 1996), 49–71. Indeed, even those arguing in favor of horizontality hardly prescribe abandoning these concepts altogether.

[81] *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

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residence several times on suspicions of abuse but did nothing to remove the child permanently from his father's custody. The abuse continued until the boy suffered irreversible brain damage with which he would live for the rest of his life. Learning what had happened only after it was too late, the boy's mother argued that the state was culpable insofar as it knew about the situation but did nothing to protect her son's positive right to liberty under the Fourteenth Amendment. In a 1989 opinion by Chief Justice Rehnquist, however, the Supreme Court ruled that the Fourteenth Amendment did not establish an affirmative duty of the state to protect against *private* abuse. Because Joshua's injuries were inflicted by a private party, the harm at issue could not properly be described as state action. Moreover, neither did any negligence on the part of the social worker constitute a harm insofar as this was an instance of state *in*action as opposed to state action. Thus, the Constitution did not offer any rights protections to Joshua. His only remedy was found in the fact that the father had been convicted of child abuse.

The state action doctrine thus persists, and persists in rigid form, even in the face of tragedy. Perhaps the idea that "state neglect" be counted as state action might have led to a different outcome in *DeShaney*.[82] While this understanding of state neglect was widely accepted in equality-based claims in the nineteenth century, Brandwein explains how it fell away from the jurisprudence after a few decades.[83] Even without the concept of state neglect, however, the Court might have reached a different outcome, according to Justice Brennan's dissent. He argues that the state *had* acted from the very moment that it established the Department of Social Services, taking upon itself a duty to protect vulnerable citizens even in their private homes.

Gary Jacobsohn offers a framework to evaluate this alternative outcome in *DeShaney* against the decision the Court actually reached. Specifically, he analogizes constitutional interpretation with the classic dramatic genres of comedy and tragedy. In much the same way that comedies conclude with happy endings, typically only after some manipulation and absurd turns of events, so too can we imagine "judges exercising creativity in the pursuit of acceptable outcomes."[84] On the

[82] Brandwein, *Rethinking*, 242–243.
[83] Ibid.
[84] Gary Jacobsohn, "Dramatic Jurisprudence," in *Constitutional Stupidities, Constitutional Tragedies*, ed. William Eskridge and Sanford Levinson (New York: New York University Press, 1998), 115.

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other hand, in contrast to comedic figures, the tragic hero inevitably is "unable to escape the necessary consequences of his actions," try as he may.[85] Likewise, constitutional interpretation can have a tragic character, as when judges insist on "rigorous judicial adherence to norms of objectivity derived from neutral principles,"[86] even when alternative plausible interpretations might have been available. In *DeShaney*, one might say that Brennan's and Blackmun's opinions tend toward the comedic while Rehnquist's errs on the side of the tragic.[87]

Both approaches have their problems, however. Of the comedic approach, Jacobsohn explains that some "will find in these efforts an unfortunate subversion of the liberal constitutionalism of the Founding Fathers."[88] Even if a person were convinced that a particular outcome was morally superior, it may not follow that the Constitution could support that outcome without unacceptable levels of twisting or manipulation. Meanwhile, practitioners of the tragic approach are vulnerable to the different tendency of subscribing to an "exaggerated sense of law's determinacy."[89] Jacobsohn ultimately comes to the sober conclusion that constitutional interpretation is best understood in *tragicomic* terms, in which judges "strive for an accommodation between necessity and manipulation, between the obligation to find the law and the temptation to make it."[90] While this conclusion resists easy categorization and certainly calls upon judges to exercise their discerning capacities, it seems that neither tragedy nor comedy can by itself encompass a full account of the constitutional project.

Jacobsohn concludes that *DeShaney* seems to "represent a failure of judicial imagination,"[91] suggesting that the Court might have reached a more favorable outcome, perhaps along the lines of Brennan's opinion, without doing damage to constitutional structures. In support of this diagnosis, that the judges did have more latitude to reach a different conclusion than Rehnquist maintained, Jacobsohn points to the "degree of interpretive freedom manifest in the ambiguities surrounding the state

[85] Ibid.
[86] Ibid., 116.
[87] One might also say that Herbert Wechsler's account of *Shelley v. Kraemer* was more tragic in the conclusions it reached.
[88] Jacobsohn, "Dramatic Jurisprudence," 115.
[89] Ibid., 116.
[90] Ibid.
[91] Ibid., 117.

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action doctrine."[92] Notwithstanding this possible interpretive freedom, much argumentation in the history of state action jurisprudence seems to be characterized by similarly tragic interpretations when the Court and other actors might have understood the Constitution otherwise – perhaps acknowledging, in more instances, the way certain private spaces hold public significance and, therefore, bear on constitutional projects, permitting Congress to act on this basis.[93] This stops short of a republican logic that would understand new constitutional commitments as generating ends for the polity and therefore duties of citizens. In admitting such plausible alternative interpretations, however, the Court might have also permitted the kind of step-by-step transformation of which Earl Warren later spoke, all while preserving more traditional understandings of the public–private divide and constitutionalism. Interestingly, other sectors of American constitutional discourse have shown greater openness to pursuing such lines of argumentation, and even departing from traditional understandings in favor of something like horizontal application.

Beyond the Public–Private Divide: Speech and the States

As this history of discrimination-related moments in constitutional politics has shown, the state action doctrine and accompanying interpretations of individual rights have long been a feature of American constitutional politics. Even actors arguably sympathetic to republican-esque broad ends regarding equality or antidiscrimination measures show attachment to discourses characterized by a kind of rights-centrism and the public–private divide. These cases do not constitute the only format in which constitutional duties of private actors have been considered (and, perhaps, dismissed), however. Indeed, certain exceptional cases follow a logic that could easily be understood as a version of indirect horizontal application,[94] such as reforming the common law according to constitutional standards. Most notable among these is the

[92] Ibid.

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

[94] *Shelley v. Kraemer* certainly matches this description of approximating indirect horizontality, as well. However, the rationale of the decision in this case does also depend on a conception of state action.

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1964 case *New York Times Co. v. Sullivan*.[95] This famous decision involved the police commissioner for the city of Montgomery, Alabama, suing for defamation after the *New York Times* published a full-page advertisement criticizing the sheriff and Alabama police for their mistreatment of civil rights demonstrators. While the broader criticism itself was not in question, the advertisement did include some inaccuracies about the specific circumstances and actions taken against the protestors, forming the basis for the defamation suit.

In a unanimous decision, the Court argued that the common law rule of defamation governing private actors had to show sufficient parity with the rights commitments of the US Constitution. However, the application of the law of defamation in the lower courts did not give due weight to the commitment to freedom of speech under the First Amendment. On this basis, the Court introduced its "actual malice" standard, arguing that criticisms of public officials, such as the police commissioner, enjoyed broader First Amendment protections than, say, potentially defamatory speech against private individuals. Insofar as criticism of government and public officials was an essential justification for protecting the freedoms of speech and of the press at all, the defamed had to demonstrate that the defendant made the defamatory statement with actual malice, rather than simply demonstrate that the statement was false. In short, constitutional values (in this instance, free speech) required a higher standard than that traditionally set by the common law on matters of defamation.

New York Times v. Sullivan thus constitutes a clear, albeit rare, instance of horizontal application in the United States.[96] Unsurprisingly, the Court did not acknowledge it in these terms in the same way as have apex courts of other countries. However, simply considering the logic of the decision, this US case may even create stronger horizontal protections for speech than do analogous cases in such countries as Germany[97] and South Africa.[98] Specifically, *Sullivan* concludes with more than a simple call for lower courts to consider the influence of constitutional commitments on private law, or for the Supreme Court to do so in future cases. Instead, under the aegis of the

[95] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[96] Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review* 102 (2003), 387–459.
[97] See the discussions of the *Lüth* case in Chapters 2 and 5.
[98] See the discussion of *Du Plessis v. De Klerk* and *Khumalo v. Holomisa* in Chapter 6.

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freedom of speech, the Supreme Court actually strikes down the state common law at issue. The strength of First Amendment commitments in the United States, therefore, translates to comparatively strong duties of individuals, even if indirectly.[99]

In an important article, Stephen Gardbaum argues that *Sullivan* sheds light on a larger potential logic latent in the US Constitution, and particularly in the Supremacy Clause of Article 6, paragraph 2.[100] He argues that this clause establishing the supremacy over the states of all federal law, including the Constitution, effectively calls for a broader practice of indirect horizontal application.[101] While the arguments it employs have appeared only rarely in case law of the US Supreme Court, *New York Times v. Sullivan* nonetheless maps out a potential avenue for additional constitutional duties of private actors in the American context. Put differently, the state action doctrine turns out not to be the only doctrinal pathway for understanding private actors' duties – both their history and their future. Indeed, in a post-*Sullivan* constitutional landscape, rights commitments may be said to have a broader reach, so that the freedom of speech is more than a right one may claim against government, but a source of constraint and obligation in private law and relationships as well. In sum, the requirements of freedom of speech come to impact private actors and thereby narrow, somewhat, the public–private divide.

A complete picture of virtually any question of constitutional politics in the United States warrants some consideration of American

[99] In this case and others across contexts concerning the right to free expression, the duty often involves yielding to another's right and perhaps suffering some harm that might result from another exercising that right. In human rights scholarship, this might be considered as a duty to respect, as opposed to protect or fulfill, a right.

[100] Gardbaum, "'Horizontal Effect' of Constitutional Rights."

[101] On the other hand, Mark Tushnet describes how the jurisprudential particularities arising from the United States' federal structure limit the Supreme Court's ability to develop something like a doctrine of indirect horizontality in certain ways. Insofar as the states have "final authority for developing the nonconstitutional law applicable within their jurisdictions," the Supreme Court cannot readily force them to abandon such laws that may run counter to the national constitution. Tushnet describes a hypothetical scenario in which an employer, operating in a state with an employment-at-will rule, fires an employee for being a member of a disfavored political party. The fact that the national constitution protects a right to free speech or association does not impel any change to the employment-at-will doctrine or this application of it (Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law," *International Journal of Constitutional Law* 1 [2003], 79–98, at 87).

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federalism.[102] And indeed, when it comes to the relationship between public and private spheres and the question of horizontal application, the experience of several states complicates the picture scholars have typically painted in focusing exclusively on the national constitution. Scholars such as Helen Hershkoff, John Dinan, and Emily Zackin have documented well the way in which state constitutions enrich our understanding of the American rights tradition.[103] Specifically, they challenge the conventional wisdom that American constitutionalism is preoccupied with negative rights, and with what government may not do. Instead, these scholars illustrate how state constitutions provide for positive rights, and even how state governments are charged with securing certain ends. Dinan goes so far as to suggest that positive rights provisions in state constitutions "can give expression to the fundamental goals and values of a polity."[104]

In this same spirit, consideration of the constitutional traditions and case law of the states demonstrates that the state action doctrine does not by itself govern the question of constitutional duties of private actors in the United States. While *New York Times v. Sullivan* may be an exceptional case at the national level of constitutional politics, this manner of applying constitutional commitments to common law norms has happened with greater frequency, and less doctrinal restraint, across the several states.[105] Indeed, this book's republican framework offers a helpful lens to analyze the issues that emerge at this subnational level of constitutionalism. While much of this chapter has recounted arguments about how private actors within the states ought to relate to the national constitution's commitment to equality, the chapter now concludes by considering how the states themselves have understood how private actors relate to the states' constitutional ends. In the terms of this book, one might say that rights in the states have sometimes been interpreted as more than mere rights for which to hold government accountable, but as

[102] See Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize American Politics* (New Haven: Yale University Press, 2021); Emily Zackin, *Looking for Rights in All the Wrong Places* (Princeton: Princeton University Press, 2013); John Dinan, *The American State Constitutional Tradition* (Lawrence: University of Kansas Press, 2006).

[103] See Helen Hershkoff, "The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action," *Albany Law Review* 69 (2006), 553–559; Hershkoff, "Just Words"; Dinan, *State Constitutional Tradition*; Zackin, *Looking for Rights*.

[104] Dinan, *State Constitutional Tradition*, 221.

[105] Hershkoff, "Just Words," 1524–1525.

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larger ends, perhaps a kind of *res publica* at a subnational level, sometimes implicating private actors as well. In these instances, the strict division between public and private has proven less entrenched, such that courts apply state constitutional values to common law rules, giving further "expression to the fundamental goals and values of a polity."[106]

In the important case of *Pruneyard Shopping Center v. Robins* (1980),[107] the Supreme Court suggested that the state constitutions may be interpreted to protect rights against private actors. The case involved high school students soliciting signatures at a local shopping center. The center's security guards asked the students to leave, as they had not attained a permit from the owners. The students sued the center for violating both their right to freedom of speech under the US Constitution and their right to petition the government under the California State Constitution. When the US Supreme Court ruled in favor of the students, several state governments and, more specifically, state courts began to evaluate a state action requirement for constitutional rights in their subnational contexts. State constitutions do not explicitly prescribe developing common law in line with constitutional commitments in the same way as, say, the South African Constitution does.[108] However, *Pruneyard* seemed to constitute an invitation to apply state constitutional rights on a broader scale than the state action doctrine permitted for rights in the national constitution.[109] In the wake of *Pruneyard,* several state courts expanded (and, in some cases, later contracted) the application of constitutional norms to such entities as "shopping centers, universities, insurance companies, banks, utilities, private clubs, and possessory lienors."[110] Hershkoff explains how interpretive practices of state courts can resemble "those of jurisdictions abroad, such as India and South Africa, in which courts achieve the horizontal application of constitutional norms in disputes involving nongovernmental actors using the pathways of private law doctrine."[111]

[106] Dinan, *State Constitutional Tradition*, 221.
[107] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).
[108] Hershkoff, "Just Words," 1525.
[109] John Devlin, "Constructing an Alternative to 'State Action' as a Limit on State Constitutional Rights Guarantees: A Survey, Critique, and Proposal," *Rutgers Law Journal* 21 (1990), 819–902.
[110] Ibid., 823–824.
[111] Helen Hershkoff, "State Common Law and the Dual Enforcement of Constitutional Norms," in *New Frontiers of State Constitutional Law: Dual Enforcement of Norms*, ed. James A. Gardner and Jim Rossi (Oxford: Oxford University Press, 2011), 154.

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While *Pruneyard* remains controversial and different states continue to decide these questions in varied ways,[112] the fundamental point is that state constitutions maintain greater interpretive space, less concretized precedent, and perhaps lower stakes in terms of scope and ability to revise – in short, fewer obstacles from pursuing a version of indirect horizontality.[113] Likewise, constitutional politics within the states may be interpreted through this book's republican lens. With greater latitude as to structuring the duties of – or at least relations between – private actors, constitutional discourses within the states might more easily transcend the kind of rights-centrism on display in many accounts of the national constitution, and may be more likely to articulate ends that involve the cooperation of private actors.

In an article examining the relationship between socioeconomic rights and indirect horizontality in the states, Hershkoff argues:

> [S]tate constitutional socio-economic rights fit comfortably within this conception of rights as constitutive of a shared polity. They aim not only to secure the material improvement of a single claimant, but also to protect a particular kind of political culture that values a shared interest in specified public goods such as free public schooling or safe workplaces.[114]

Her description of a conception of "a shared polity" and of a "political culture that values a shared interest" typifies the kind of republican tone this book locates in discourses surrounding horizontal application. It is this language of shared public ends that many public figures and protestors employed in the Civil Rights Movement. While this manner of argumentation did not gain much traction as a doctrinal matter at the national level, scholarship suggests that constitutional actors may more easily speak, and have spoken, in these terms at the state level.[115] Indeed, Hershkoff elsewhere explains how the New Jersey Supreme Court has enforced "social and economic rights as a matter of state constitutional law" and likewise has "refused to enforce common law entitlements when they interfere with activities that are vital to democratic life – speech, association, privacy, and the stability of adequate

[112] Devlin, "Constructing an Alternative," 823.
[113] Helen Hershkoff, "The Private Life of Public Rights: State Constitutions and the Common Law," *New York University Law Review Online* 88:1 (2013), 1–23.
[114] Hershkoff, "Just Words," 1553–1554.
[115] Dinan, *State Consitutional Tradition*; Zackin, *Looking for Rights*; Hershkoff, "New Jersey Constitution."

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housing."[116] In this way, the possibility of prioritizing what is constitutional in both public and private spaces, a kind of public morality or common good in the terms of this book, emerges clearly in the states.

Of course, the US federal structure has permitted some of the great evils of American history. However, it has also permitted broader rights protections tailored to the particular needs, interests, and commitments of actors and citizens in a given state. Zackin argues this to great effect, opening her book with an example of grassroots efforts advocating for coal miners' rights that resulted in detailed protections in the 1870 Illinois Constitution.[117] Indeed, a range of examples of horizontal application, and more liberal understandings of state action at the subnational level, illustrate how states may pursue different priorities or ends, as they choose to apply some rights expansively and not others. John Devlin describes how New York courts have maintained a state action requirement for speech rights,[118] but have understood due process rights to apply more broadly.[119] Hershkoff also offers several examples, including cases about enforcing equality norms in places of work in Washington,[120] modifying "at will" employment policies in Michigan,[121] and balancing property and speech rights in Oregon[122] – each of which resulted from invoking state constitutional rights commitments, admittedly to varying degrees, in private interactions.

In *McCulloch v. Maryland*, Justice John Marshall argued that the ability of the national government to speak directly to American citizens, as opposed to speaking to them only through the state governments, was an essential characteristic of sovereignty.[123] In a somewhat similar vein, the ability to speak to citizens on matters both public and private seems

[116] Hershkoff, "New Jersey Constitution," 558.
[117] Zackin, *Looking for Rights*, 1–2.
[118] Devlin, "Constructing an Alternative," 823fn11, 824fn22.
[119] See *Sharrock v. Dell Buick-Cadillac, Inc.* (45 N.Y. 2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 [1978]) involving a state lien law that permitted private garages to auction property without the opportunity to be heard in advance. The New York Court of Appeals decided that the state lien law was unconstitutional, in contrast with the national precedent in a similar case decided in the same year, *Flagg Bros. v. Brooks* (Devlin, "Constructing an Alternative," 854–857).
[120] *Roberts v. Dudley*, 993 P.2d 901, 911 (Wash. 2000). See Hershkoff, "State Common Law and the Dual Enforcement," 157–158.
[121] *Toussaint v. Blue Cross & Blue Shield of Michigan,* 292 N.W.2d 880, 885 (Mich. 1980). See Hershkoff, "State Common Law and Dual Enforcement," 159–160.
[122] *Lloyd Corp. v. Whiffen*, 773 P.2d 1294 (Or. 1989). See Hershkoff, "State Common Law and Dual Enforcement," 162.
[123] *McCulloch v. Maryland*, 17 U.S. 316 (1819), 404–405.

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to be yet another important aspect of sovereignty. Hershkoff explains, "State common law, as an aspect of state sovereignty, helps to publicize issues, transcend boundaries, and test the constitutional waters by offering case-by-case elaborations of constitutional norms in discrete situations."[124] That the states in some ways retain greater ability than the national government to apply constitutional commitments in private spaces is important. It harkens back to early debates between the Federalists and Antifederalists about the nature and locus of American political community, and even anticipates future debates in such quasi-federalist arrangements as the European Union. Indeed, as Chapter 7 will show, the question of horizontality in the European Union is theoretically tied to larger questions of political community and integration, as individual Member States reckon with potentially conflicting commitments coming from the top, that is, from EU institutions. Echoing debates over federalism in the United States, some political actors and observers worry about what horizontal application at a supranational level could mean for the sovereignty of Member States.[125] On the other hand, some are ready to have the European Court of Justice exercise horizontality in a more robust form, as it would serve to confront more directly the question of what kind of a moral community the European Union will be.[126]

In this understanding, the question of horizontality relates to the question of where moral or political community exists and the particular commitments comprising that community. In republican terms, the discourses surrounding these issues in such places as the United States and the European Union may be read as articulating a kind of common good with the potential to shape even private relationships. Indeed, in addition to what material outcomes these questions and decisions might engender, they also have an important expressive element, that is, the "effect of the constitutional norm might be ... [to signal] approval or disapproval of particular forms of private behavior."[127] The question, then, becomes whether these discussions ought to take place among the subunits or in more centralized fora. The answer to this question varies

[124] Hershkoff, "State Common Law and Dual Enforcement," 165.
[125] Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin: De Gruyter, 2014).
[126] Eleni Frantziou, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality," *European Law Journal* 21:5 (2015), 675.
[127] Hershkoff, "Just Words," 1527; see also Brettschneider, *When the State Speaks*.

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both within the United States and across other federal systems.[128] While the US federal structure proves important to a wide range of constitutional questions, including the possibility of horizontal application, it is less important as a consideration in, say, India, where an understanding of state citizenship does not exist to the same degree that it does in the United States, and a transformative constitutional project arguably permits less deference to state governments than that found in American federalism.[129]

Relative to the US national government, and even the state governments of many other countries, the American states have fewer barriers to debating questions of constitutional ends and citizens' duties. This is not to deny the good reasons that may exist for maintaining a state action doctrine, say, in some desire to preserve a sphere of autonomy in private life.[130] Hershkoff acknowledges how this desire "goes to the heart of the liberal project and to the importance of constitutional values" and that it "raises fundamental questions about private life and its relation to collective goals."[131] Perhaps the tendency of state constitutions to consider material concerns more than federal constitutions warrants greater emphasis on "collective goals," an emphasis that necessarily "constrains our private sense of possibility" more than is generally true at the national level.[132] Such normative considerations are beyond the scope of the present book. However, this book's republican framework offers a richer lexicon and an analytic lens through which to understand more fully the implications of these constitutional questions, even across levels of government.

Conclusion

Various factors – political, legal, historical – have undoubtedly contributed to the constitutional history of state action and horizontal

[128] For a similar discussion, see Christina Bambrick, "'Neither Precisely National Nor Precisely Federal': Governmental and Administrative Authority in Tocqueville's Democracy in America," *Publius: The Journal of Federalism* 48:4 (2018), 586–606.

[129] Granville Austin, *Working a Democratic Constitution* (Oxford: Oxford University Press, 1999); Nicholas Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court," *Washington University Global Studies Law Review* 8:1 (2009), 1–69; *S. R. Bommai v. Union of India* 1994 AIR 1918 (1998).

[130] Hershkoff, "The Private Life of Public Rights," 20–22.

[131] Ibid., 22.

[132] Ibid.

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application in the United States. The purpose of this chapter is not to provide a causal explanation of the outcomes. Rather, this chapter offers one setting, with others to follow, in which to examine discourses surrounding the question of horizontality according to the analytic concepts developed in Chapter 2. For those familiar with American constitutionalism, the emphasis on individual rights and the public–private divide will be unsurprising. However, this book's interpretive lens facilitates the specific work of analyzing the language and arguments surrounding these developments. Ultimately, this interpretive lens helps to illuminate threads with republican undertones, even in American constitutional discourses. We see these republican threads in concurrences, dissents, other constitutional dynamics not strictly part of court-driven doctrinal development, and in state courts and constitutions. Republican themes fit comfortably, and sometimes are explicitly invoked, in such statements as Harlan's famous dissent in the *Civil Rights Cases*,[133] and in his successors' concurrences and dissents in the sit-in cases. To think of the United States strictly as a kind of ideal type for doctrines of state action, as is common, thus misses much that is potentially important from a political theoretic standpoint.

That the United States would have had some version of a state action doctrine seems inevitable given the text of the Fourteenth Amendment and the conventional liberal understandings of constitutionalism. Indeed, even Harlan I's dissent appreciates some distinction between public and private spaces. At the same time, Harlan and successors such as Douglas were ready to acknowledge the significance certain private spaces carried for citizenship and racial equality, as the Radical Republicans had envisioned when they championed the Civil Rights Act of 1875. While a kind of rights-centrism prevails in the predominant doctrinal story, even the archetypal case of state action that is the United States reveals discourses pointing toward certain ends of the community – ends that some constitutional actors came to understand as too constitutive to justify preserving a wholly insulated private sphere. These debates gradually grew out of the transformative constitutional moment embodied in the Civil War Amendments; in contrast, Chapter 4, which is on India, will show how an entire constitutional project, at least on many accounts, was oriented toward transforming both public and private spheres from the beginning. In many ways, the question of horizontal application still

[133] *Civil Rights Cases*, 109 U.S. 3 (1883).

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has had to be worked out; indeed, it is still being worked out. In another sense, however, it is a question inhering in the Indian Constitution itself. Some of the most influential Indian framers defined their goals in explicit contrast with the rights-centrism that American constitutionalism has come to represent, favoring instead a dynamic constitution centered on equality and nondiscrimination as collective ends.

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