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Conclusion

As horizontal rights seek to bring private individuals into accord with public values, this book has argued that horizontal application constitutes a republican vein in constitutionalism. This republican character is evinced in two specific features of horizontal application. Briefly, the parity that horizontality establishes between public and private law and obligations resembles the republican ideal that the common good should govern a wider expanse of the polity, across public and private spheres. Moreover, out of this parity grow new constitutional duties for private actors, resembling the republican idea that people possess certain duties to one another by virtue of being fellow citizens.

While private law can also yield legal obligations for individual citizens and private entities in the traditional vertical model, these obligations accrue a different status when they come from the same source that yields and entrenches the duties of the state, namely, a constitution. Indeed, when judges cite the constitution, rather than statutory law or the common law, as the source of individuals' duties, those duties become nothing less than demands of fundamental law. Thus, horizontality has, on the one hand, the symbolic or expressive effect of bringing more actors in a polity into the fold of its constitutional commitments. It also has the practical effect of entrenching individual duties as a constitutional matter. Indeed, in the same way that constitutional rights are meant to place certain questions above routine political processes, with horizontal application, individual duties come to exist and be enforced as a constitutional matter. Horizontal application thereby expands the function of a constitution and the scope of constitutional rights by altering the conceptual distinction between public and private on which constitutionalism is traditionally premised. Its novelty and power as a constitutional development should not be understated.

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The Choice of Horizontality through the Republican Lens

Horizontal application may be a relatively new constitutional practice, but adjudicating the competing claims of private actors has long been an object of politics. More than a few recent episodes offer compelling illustrations of such conflicts and the tendency to invoke rights in debating them. These varied discussions reveal an inclination to employ the language of rights and duties across issues in our political (indeed, our moral) debates, regardless of the formal status of rights and duties as a legal matter. The ubiquity of such rights-and-duties talk likewise reveals the broad range of issues to which horizontality could potentially be applied as a formal matter, if it has not been already. In light of such inclinations toward this language in political discourse across the globe, the republican framework of this book offers new concepts to understand and examine the choice of whether to adopt formally a horizontal framework across these same debates.

Take the rise of Big Tech, specifically the role of these companies as gatekeepers of expression. Many users advocate for greater transparency about how social media platforms apply their community standards when monitoring user-generated content; some would even revise these private community standards altogether in favor of free speech and expression. Indeed, politicians and members of the public have sometimes invoked rights to argue that tech companies have duties under the constitution. Thus, rights and duties are clearly at play in some popular understandings of these private relationships.[1] Moreover, the sheer power of Big Tech has led some constitutional actors and scholars to consider whether these companies should, in fact, be treated more like state actors than private actors for certain purposes. In the 2019 *Right to Be Forgotten I* case, the German Constitutional Court explained that sometimes these companies "take on a position that is so dominant as to be similar to the state's position." Under such circumstances, the Court argued, "the binding effect of the fundamental right on private actors can ultimately be close, or even equal to, its binding effect on the state."[2]

Perhaps the example of Big Tech is limited, however, for the very reason that the power of these companies can surpass even that of many nation-states. To call such companies "private" seems to understate

[1] Giovanni De Gregorio, *Digital Constitutionalism in Europe* (Cambridge: Cambridge University Press, 2022).
[2] *Right to Be Forgotten I,* BVerfGE 1 BvR 16/13 (2019), para. 88.

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important elements of their real nature and capacity. Other examples of conflict among private actors arise out of the COVID-19 pandemic. With the spread of this highly contagious disease came questions about what fellow citizens owe each other. Do individuals have a duty to stay home, even foregoing their livelihood in the process? To wear a mask in public? To get vaccinated? How would such duties stack up against rights not to wear a mask and not to get vaccinated? Are such duties contingent on the efficacy of each respective preventative measure? Again, the language of rights and duties suffused the discourse surrounding the pandemic, evincing the appropriateness of using a republican lens to consider such questions. Much controversy arose in choosing how to assign rights and duties to various actors as a practical matter. Not only individuals but also entire political communities have decided these matters differently.

The global experience of COVID-19 shows clearly our interconnectedness and brings home the inescapable need to adjudicate conflicts between private parties. More fundamentally, these examples illustrate the choices political communities must make about whether to "extend rights' reach"[3] to adjudicate disputes in certain corners of the private sphere. Should private spaces perhaps be governed by constitutional norms in some cases but not others? If a private actor might have some duty in upholding a public commitment, such as to a particular constitutional right, then we find ourselves on very different constitutional terrain than that of traditional understandings. Indeed, constitutional rights come to acquire different meanings and engender different relationships.

Horizontality is but one means among many to approach conflicts among private actors. Constitutional actors may seek to govern certain private relationships through antidiscrimination statutes or directive principles and may accomplish as much or more through these mechanisms than they would through horizontal application. The present project does not, however, concern primarily constitutional development or outcomes. Neither is the point to argue that horizontality is generally good or generally bad, or to show that horizontality is effective or ineffective on any particular issue. Instead, the republican lens helps us see how actors adopting and employing horizontal application debate an ever-broadening set of issues, offering a new and arguably fuller view of the theoretical potential of this practice. The hope is that this analysis equips scholars and constitutional actors alike to understand horizontal

[3] Mathews, *Extending Rights Reach.*

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application better on the level of discourse and theory, as a foundation for making coherent and effective decisions.

How we choose to structure our discourses is itself a substantive moral and political choice, independent of the question of outcomes. Should conversations about the duties we have to each other be rooted in the constitution, as Indian and South African justices have argued?[4] Or ought the concept of constitutional duties be reserved to describe the obligations of state actors as in the United States?[5] Do we want to talk about the constitution as a moral yardstick for the broader polity as Sommeregger speaks of the German experience,[6] or assess the kind of community we are by our willingness to hold private actors to public standards, in keeping with Frantziou?[7] Or should civil society and federal structures enjoy space to operate as sources of value themselves and wrestle with some of these questions independently?[8] The republican lens illuminates which of these concepts and questions most accurately capture what we mean to say in our law and politics. In a word, the republican lens offers scholars and practitioners additional tools of analysis to uncover the theoretical, even moral, implications of horizontality in particular contexts.

Whither Horizontality?

When should constitutional actors consider adopting horizontal application? Of course, all the typical political factors of partisan interests, institutional capacity, and the like figure into the decision. But we might also contemplate this question within the domain of normative theory. Horizontality, understood in republican terms, reveals a shift in the way constitutional actors discuss rights – away from rights as individual claims against state actors toward rights as encompassing certain ends of the community. Constitutional actors might opt to revise the rights-

[4] *People's Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473 (n. 35), 252–253; *Port Elizabeth Municipality v. Various Occupiers*, (CCT 53/03) [2004] ZACC, para. 29.

[5] *Civil Rights Cases*, 109 U.S. 3 (1883); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Bell v. Maryland*, 378 U.S. 226 (1964).

[6] Georg Sommeregger, "The Horizontalization of Equality: The German Attempt to Promote Non-discrimination in the Private Sphere via Legislation," in *The Constitution in Private Relations*, ed. András Sajó and Renáta Uitz (Utrecht: Eleven, 2005), 53.

[7] 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.

[8] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); Van der Walt, *The Horizontal Effect Revolution*.

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centricity of traditional understandings in the context of commitments they deem most constitutive, least negotiable, or somehow more susceptible to private power. Rights then come to exist among a plurality of other constitutional commitments and sometimes even yield to those other commitments. Out of this understanding, the possibility of constitutional duties for more actors, even private actors, emerges naturally. Parity and duty fall more in line with interpretations of the broader constitutional project than traditional understandings. Among transformative constitutions, we should expect fewer limits to horizontality and perhaps even horizontality written into the constitution itself.

Apart from any outcomes constitutional actors seek through horizontality, the rationale for the approach may rest in a kind of symbolic or expressive value in bringing all actors and spheres of society under the same standard.[9] In some cases, constitutional actors truly want to distinguish the sources of obligation in public and private spaces and admit legislative discretion according to a vertical model; they may seek space for autonomy and license over and above any concerns for parity and without the language of duty. In other cases, certain particularities in the historical record or in constitutional aspirations are cause to pursue a tighter connection between private actors and public values.

As the preceding chapters showed, horizontal understandings have emerged as a response (even a corrective) to such major atrocities as those of the twentieth century – from genocide to deep-seated systems of racial violence. To construct a flourishing society in the wake of such social devastation may call for broad and more direct ownership of the good of the community and duties among citizens. Again, different legal structures achieve some of the same results, but the particular way that horizontality derives the duties of citizens from public commitments offers a degree of proximity to the common good in response to historical circumstances. Horizontality is not an expression of collective guilt but rather a tool wielded by actors seeking to confront a kind of diffuse social inheritance in order that their polity may outlive it. Slavery in the United States, caste and religious discrimination in India, genocide in Germany and Europe more generally, Apartheid in South Africa – each society considered here has a past that persists in the present, with which constitutional actors must grapple. As this book has shown, constitutional actors in each place have at least contemplated horizontality in

[9] Hershkoff, "Just Words," 1527; see also Brettschneider, *When the State Speaks*.

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overcoming social disharmony and have invoked republican concepts of rights and duties, fraternity, and the common good in the process. And indeed, this book's republican lens will be continually apposite as long as constitutional actors contemplate horizontality's meaning and appropriateness in their respective contexts.

Making Horizontality More Republican

That horizontality tends to increase the understanding of freedom as nondomination and shift the larger society toward certain public values seems relatively straightforward. Horizontality aims to bring public ends to bear on private spaces. We should ask, however, whether horizontality's kinship with certain republican principles – notably, the common good and duty – calls for more thoroughgoing republican processes to accompany its establishment. Put differently, some might find in these republican aspects of horizontality a call to provide more fully for republican principles, perhaps contemplating the role different, more representative governing institutions should play in shaping horizontality.

Eoin Daly and Tom Hickey structure their book on republican constitutionalism in the Irish context around three themes: a republican understanding of freedom, republican institutions, and the cultivation of a broader republican society, as through education.[10] And indeed, we may locate horizontality among these broad strokes of republican constitutionalism. Moreover, considering how horizontality fits within these elements of republican constitutionalism uncovers possibilities for making this practice *more* republican. How to square horizontality with democratic articulations of republican freedom and representative institutions, for example, may be confounding. While horizontality might be understood as a democratizing effort in the sense that it brings the entire legal system under the will of the people as articulated in the constitution, it also tends to leave less to the jurisdiction of ordinary law and lawmaking. The very purpose of horizontality may be described as to constitutionalize duties in the same way rights are typically constitutionalized. Some might conclude on this basis that courts will necessarily play an outsized role.

This need not be the case. Although horizontality *constitutionalizes* the private sphere, legislative powers and even the general public may – and arguably must – participate in constitutional conversations. In the words

[10] Daly and Hickey, *Political Theory.*

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of US Chief Justice John Marshall, "[W]e must never forget that it is a constitution we are expounding,"[11] which is to say that constitutions are always subject to interpretation and always involve some element of politics, albeit politics of a higher order. For these other realms to participate more actively in debates concerning the obligations of private actors may well elevate the discourse. Perhaps the new commonwealth model that Stephen Gardbaum identifies in many countries provides an answer by carving out space for both legislatures and courts.[12] Even while courts would inevitably maintain some special role in adjudicating individual cases, to have more institutions and more people participating in these constitutional conversations would certainly make this practice more consistently republican, balancing the resulting parity and duties with new levels of self-government in the practice of horizontality.

Buttressing the participation of plural government bodies and the general public in these conversations may also go some way to assuage the fears of those who worry about the "crumbling public/private divide" and the ways in which something like horizontality might be abused.[13] Indeed, as worries about homogenization have sometimes been leveled against republicanism, so such worries also rear their head in debates over horizontality. As Gary Jacobsohn explains:

> [T]he tradition of classical republicanism with which the founders were intimately acquainted was a fundamentally illiberal tradition that can serve as a model for contemporary republicans only if its problematic features are conveniently ignored . . . What these critics have in mind are the exclusivist, discriminatory tendencies of republican communalism, tendencies that liberal constitutional arrangements were largely designed to overcome.[14]

While critics do not often go so far as to call horizontal application "exclusivist, discriminatory, or communalistic," their assessments track similar concerns about the homogenization of private and public, as well

[11] *McCulloch v. Maryland*, 17 U.S. 316 (1819), para. 62.

[12] Stephen Gardbaum, "The Case for the New Commonwealth Model of Constitutionalism," *German Law Journal* 14:12 (2013), 2229–2248; *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2012).

[13] See, for example, DeWitt, "The Crumbling Public/Private Divide"; Van der Walt, *The Horizontal Effect Revolution*; DeMol, "The Novel Approach of the CJEU"; Stone Sweet, "The Juridical Coup d'État."

[14] Gary Jacobsohn, *Apple of Gold* (Princeton: Princeton University Press, 1993), 46–47; see also Isaiah Berlin, "Two Concepts of Liberty" (1958), in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118–172. Linda K. Kerber, "Making Republicanism Useful," *Yale Law Journal* 97 (1998), 1663.

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as the prioritization of public commitments at the expense of the individual. Incorporating more voices, especially voices that republican theory typically identifies as more connected with the people, might better ensure that these decisions are carried out on the people's terms[15] and thus hedge against these darker possibilities.

In the mere act of adopting a constitution, a polity commits to certain principles and, to this extent, cannot pretend to be neutral. Although these norms may be applied in private spaces in both a vertical and a horizontal model of rights, these two models engender different narratives about the relationship between citizens and the "public thing" that is created by the constitution. The traditional vertical model permits a level of detachment so that even if legislation regulates private actors, these actors need not themselves assume constitutional duties. On the other hand, polities who pursue horizontal application do not rest content with the "light touch"[16] of the vertical model in maintaining and applying constitutional commitments. Ultimately, this comes down to prudential questions of constitutional design in meeting the goals a polity sets out for itself. How to conceive of the relationship between public and private actors – whether in more traditional or republican terms – rises to a level of high constitutional politics. In some instances, what Sommeregger calls "value monism" might be unnecessary or imprudent. In other cases, conventional understandings of rights may come up short, making necessary something like the republican logic of horizontality to enable the discourses to continue in a way that benefits each polity. Whatever the case, constitutional actors and scholars would do well to engage in such discourses with a historical and theoretical knowledge of republicanism and its echoes in the issues of their day.

[15] Pettit, *People's Terms*.

[16] Gary Jacobsohn, "A Lighter Touch: American Constitutional Principles in Comparative Perspective," in *Cambridge Companion to the United States Constitution,* ed. Karen Orren and John W. Compton (Cambridge: Cambridge University Press, 2018), 13–44.

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