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Introduction

Facebook's right to monitor its platform conflicts with a user's right to post political opinions. A baker's right to religious liberty runs up against a same-sex couple's right to equal service. A private school administration's right to set health policies on its campus collides with a person's right not to wear a mask. Rights are invoked across a wide range of political disputes by a diverse set of actors – large corporations, small proprietors, and individual people, to name a few. These are all private parties, not state actors, and in a traditional model of constitutional rights, none could claim a constitutional right against the other. The constitution applies only to government action, whereas relationships among private companies or individuals fall under separate areas of law, often defined by ordinary legislative processes relating to antitrust, antidiscrimination, or public health initiatives, for example. The constitution simply is not at issue in these cases.

This traditional understanding of constitutionalism is often understood as a *vertical* model, whereby constitutional rights exist only between the government, above, and private actors, below. In other words, only the government is responsible for protecting, respecting, and fulfilling constitutional rights. In many ways, this conception of rights reflects a classical liberal ideology that would maintain a separate, private sphere of liberty unencumbered by the same constitutional duties that bind public actors. Since the mid twentieth century, however, some countries have adopted a *horizontal* model whereby private actors do have duties – specifically, duties to uphold the constitutional rights of others. Businesses, for-profit hospitals, independent schools, and even private individuals potentially hold some responsibility for constitutional rights, ranging from the freedom of speech to equal protection and nondiscrimination, and even such positive rights as health. In 2017, for example, South Africa's Constitutional Court decided that landlords had a constitutional duty to uphold their tenants' right to dignity in their living conditions. This case was not decided on the basis of housing codes

or other statutory law, as it would be in the United States, but as a matter of constitutional rights. Thus, within this horizontal conception of rights, private actors live under a constitutional standard and have constitutional duties. The horizontal model – variously called horizontal application, horizontal effect, horizontal rights, or simply horizontality – allows people to articulate cases against other private actors using the language and moral weight of constitutional rights.

This book argues that the practice of horizontality deserves fuller treatment in the academy and beyond. This deeper understanding can be found through the lens of republican political theory – that is, the big-tent tradition of political thought from the classical republicanism of ancient Greece and Rome to the more recent instances of neorepublicanism. A republican theory of horizontality draws on concepts of the common good and duty as touchstones, marking horizontality's shift away from conventional liberal accounts of individual rights. Horizontality brings to the fore the necessity of limitations on rights, as private actors take on constitutional duties and as more rights come into conflict. As related to republicanism, horizontality can be understood as attempting a kind of democratization of the private sphere, wherein private actors become subject to the same values adopted by the proverbial "we the people" in the constitution. Political debates are unified under a constitutional rubric, and the republican conception of an encompassing common good supplants the ideal of individual liberties.

Rights-Centrism and the Horizontal Shift

In his philosophic investigation of the American Revolution, Morton White explores a revision that Thomas Jefferson made to one of the most famous lines in the Declaration of Independence. In his "original Rough draught," Jefferson wrote "that to secure these *ends*, Governments are instituted among Men."[1] This phrasing differs, of course, from the final, more familiar claim that governments are instituted to secure *rights*. Arguably, this change is not simply stylistic; instead, Jefferson redefines the very role of government as guardian of rights that people already

[1] Emphasis added. Morton White, *The Philosophy of the American Revolution* (New York: Oxford University Press, 1978), 249. See also Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (New Haven: Yale University Press, 2020), 171, fn. 95.

possess, rather than a means to attain ends not yet realized.[2] Later moments in American constitutional history evince similar understandings of constitutionalism, including interpretations of the Fourteenth Amendment that cemented an understanding of the constitution as governing state action only – not private action and perhaps not even state *in*action.[3] This partitioning of accountability between public and private actors tends to take background rules of private law as neutral; private actors are insulated from the commitments the state undertakes in the constitution. Indeed, government is seen as securing rights already acknowledged, and properly refraining from additional projects that risk running up against these rights.

As more countries adopted constitutions in the twentieth century, some followed the practice, at least initially, of limiting most provisions of their constitutions to bind only the actions of the state. After the adoption of the Basic Law in 1949, however, the German Federal Constitutional Court began to apply rights horizontally in its practice of *Drittwirkung*, or indirect third-party effect,[4] despite some skepticism from some scholars and jurists. The concept of horizontality thus entered onto the scene of global constitutionalism, making it a real option that other courts and constitution-makers might adopt. In turn, legal scholars and practitioners expended much effort to understand horizontality's effects and limits, as well as to justify this shift in constitutionalism.

[2] White, *Philosophy of the American Revolution*, 249. Relatedly, Emily Zackin describes this kind of rights-centrism as inherently conservative in contrast with the more transformative tendencies that come of both positive rights and, this book would add, horizontal rights. She writes:

> Most accounts of rights' creation, both within and outside the United States, hold that dominant political coalitions write new rights into constitutions when (and precisely because) they are worried about losing their dominant positions. On this account, movements for new rights are fundamentally conservative projects, intended to maintain the status quo. However, the origins of positive rights in state constitutions are quite different. . . . [M]any positive-rights' advocates did not intend to crystallize existing political arrangements. Instead, these activists hoped to rewrite the rules of politics and transform their societies.

See Emily Zackin, *Looking for Rights in All the Wrong Places* (Princeton: Princeton University Press, 2013), 3–4, and Jamal Greene, *How Rights Went Wrong* (Boston: Houghton Mifflin Harcourt, 2021), 13.

[3] See cases ranging from the *Civil Rights Cases*, 109 U.S. 3 (1883) to *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

[4] Renáta Uitz, "Introduction," in *The Constitution in Private Relations*, ed. András Sajó and Renáta Uitz (Utrecht: Eleven, 2005).

With the introduction of horizontality, constitutions no longer aimed only to secure rights, but also to secure certain ends through extending the reach of rights. Robert Alexy elaborates a distinction between the kind of subjective rights that create obligations for particular actors, usually states actors, and objective rights that constitute values of the polity.[5] The rights-centrism that dominated previous conceptions of constitutionalism is thus qualified by the contention that, sometimes, the choices that individuals make under the auspices of private life bear on public commitments.[6] Of course, horizontality still operates in the context of liberal constitutionalism and employs the liberal language of rights. At the same time, it also entails an important shift – a kind of reversal of Jefferson's amendment to the Declaration – so that the constitution is no longer simply about protecting individual's rights from state interference, but now articulates public ends common to the polity. Whereas a rights-centric framework, as propounded by many of the social contract theorists of the modern era, tends to comprehend individual obligations merely in terms of what is necessary to secure one's own rights,[7] horizontality attempts to ground duties in the same substantive principles articulated in a constitution. The move from a vertical to horizontal model changes *who* is responsible – that is, the very orientation of rights relationships.

While acknowledging the ways in which horizontality runs up against traditional understandings of constitutionalism, constitutional scholarship (and even practice) in the past couple of decades has generally been sympathetic to horizontality. At the time of writing, no fewer than forty-eight national constitutions explicitly state that rights bind private actors.[8] This number does not include the other constitutions that point toward horizontality but depend on the courts to develop it more fully, such as in Germany, or those that provide it only for particular rights, such as in India. Even in the United States, the historic case *Shelley*

[5] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010).
[6] Prior to this development, the American Legal Realists made similar observations. In a sense, horizontal application thus represents a concrete doctrinal answer to their critique.
[7] Harry Jaffa, *Crisis of the House Divided* (Chicago: University of Chicago, 2009), 325; Pierre Manent, *Natural Law and Human Rights* (Notre Dame, IN: Notre Dame University Press, 2020), 8.
[8] Comparative Constitutions Project, "Binding Effect of Constitutional Rights," accessed September 13, 2023, https://www.constituteproject.org/constitutions?lang=en&key=binding&status=in_force.

v. Kraemer (1948)[9] marks a decision approximating horizontality. In the context of the European Union, Eleni Frantziou maintains that the question of whether to apply rights horizontally ultimately speaks to what "kind of society the EU is setting itself out to be and the values that lie in its core."[10] Since the UK's passing of the Human Rights Act (HRA), scholars have increasingly asked what rights obligations EU law entails for private entities, culminating in judgments by the European Court of Justice.[11]

Scholars have also argued that horizontality is not a particularly novel innovation in constitutionalism. As Stephen Gardbaum observes, the statement in Article VI that the United States Constitution is the "Supreme Law of the Land" effectively establishes indirect horizontality insofar as the constitution must control the content of private law.[12] Moreover, in his book *Weak Courts, Strong Rights*, Mark Tushnet points out that countries maintain certain "background rules" of private law that necessarily confront – and so already answer – substantive questions about the limits of private action and how public law bears on private relations.[13] In the German context, Mattias Kumm argues that horizontality is just another development in the larger move toward "total constitutionalism" in contemporary law and politics. Denying that horizontality is particularly novel, Kumm sees it almost as inevitable as countries adopt more ambitious socioeconomic rights in their constitutions.[14] In light of the questions that horizontality raises for traditional

[9] In this case, the US Supreme Court decided it could not enforce a racially restrictive covenant because of the requirements of the Equal Protection Clause of the Fourteenth Amendment.

[10] 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.

[11] See, for example, Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act," *Public Law*, 1998; Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006). See also the three edited volumes on the subject of horizontality published in the years following the HRA: Daniel Friedmann and Daphne Barak-Erez, eds., *Human Rights in Private Law* (Portland, OR: Hart, 2001); András Sajó and Renáta Uitz, eds., *The Constitution in Private Relations* (Utrecht: Eleven, 2005); Dawn Oliver and Jorg Fedtke, eds., *Human Rights in the Private Sphere* (Abingdon: Routledge-Cavendish, 2007).

[12] Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review* 102 (2003), 387–459.

[13] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008).

[14] Mattias Kumm, "Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law," *German Law Journal* 7:4 (2006), 341–369.

understandings, legal scholars have invested much energy in trying to explain how this phenomenon does or does not comport with the tradition of constitutionalism.

I argue that horizontality should be understood within the republican tradition, which expands the logic of rights to encompass ends and a broader set of citizens' duties. The constitutional ends that result from horizontality are *shared* ends – directed toward the common good, with both public and private actors beholden to certain duties. Constitutional actors may still use the language of rights, but horizontality calls for concepts beyond what conventional accounts of liberal constitutionalism typically provide. Indeed, as Kalyvas and Katznelson document, the development of liberalism in the eighteenth century was a reaction to the excesses of republicanism.[15] We can, in turn, think of horizontality as a kind of retrospective reaction to traditional accounts of constitutionalism, challenging the neutrality of the background rules of private law and reordering those rules according to public values.

Liberalism serves as a useful theoretical foil to elaborate a republican understanding of horizontality. Horizontality has, however, often been employed as an ameliorative mechanism in nonliberal circumstances – from postbellum America to post-Apartheid South Africa. Something like horizontality might sometimes seem provocative in a largely rights-respecting society that fears limiting rights unnecessarily, but applying constitutional duties to private actors may seem less controversial in an illiberal or more severely hierarchical society. In either case, by applying constitutional principles to create duties for private entities, constitutional agents aim to disrupt existing arrangements and narratives with the republican sensibility that private spaces or actors might somehow be corrected by public values.

Why Republicanism?

The republican interpretation offered here serves as a new lens through which to read and understand the discourses surrounding horizontality. As some of the most telling exchanges and arguments surrounding this topic have occurred in court cases, the main constitutional agents featured here are courts. Nevertheless, this is not primarily a doctrinal account of horizontality, but a theoretical account that builds on

[15] Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge: Cambridge University Press, 2008).

constitutional histories. Put differently, the republican framework moves beyond the more common readings that, for example, emphasize doctrine, to uncover the profound questions of political theory that emerge from debates over horizontality: What is the relationship between the individual and the community? What is the nature of freedom? Answers often invoke republican themes that are explored in depth here.

While the argument itself is not normative, criteria and strategies for normative assessments emerge. Considering the history of race in the United States or South Africa, for example, it is not difficult to see the good that might come of applying some rights horizontally when such abuse occurs in private spaces. In such cases, the republican lens highlights more specifically how horizontality transcends rights-centrism in favor of ends of the community. At the same time, the republican lens may reveal a potential for the abuse of horizontality, as well. Authoritarian regimes have frequently invoked such concepts as the common good and civic duty in pursuit of centralized power. The possibility that horizontality might be employed in authoritarian contexts, or even to pass blame for society's ills onto nonstate actors, is corroborated in legal scholarship.[16]

Although horizontality reconceives the divide between public and private spheres, this practice generally has not amounted to a complete collapse of public and private, or a total turn to civic republicanism. Horizontality may be conceived as "a republican vein in liberal constitutionalism" in light of the way it operates in constitutional contexts and employs the classically liberal language of rights. Moreover, courts and other constitutional actors generally seek out limiting principles and preserve elements of conventional narratives in debates. In this way, arguments in favor of horizontality run up against other countervailing factors across time, place, and topic. Nevertheless, republican concepts travel in meaningful ways across very different contexts. Indeed, the arguments that diverse constitutional actors across time and place make in favor of horizontality reveal conceptions of community, duty, and freedom akin to those in republican political thought.

[16] See Ernest Caldwell, "Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes," *Chicago-Kent Law Review* 88:1 (2012), 63–92; Ravi Nair, "Confronting the Violence Committed by Armed Opposition Groups," *Yale Human Rights and Development Law Journal* 1:1 (1998), 13–14; Nigel Rodley, "Can Armed Opposition Groups Violate Human Rights?" in *Human Rights in the Twenty-First Century: A Global Challenge*, ed. K. Mahoney and P. Mahoney (Dordrecht: Martinus Nijhoff, 1993), 297–318.

Theory and Practice: Plan for the Book

This book's republican account of horizontality begins first with a theoretical chapter, highlighting the distinction between the traditional vertical model of constitutionalism and the newer horizontal model. Typically, in constitutional theory, the vertical model is understood as rooted in an older liberalism, including stronger commitment to a separate private sphere. On the other hand, the horizontal model possesses affinities with republican thought, including a conception of the polity that is less tied to maintaining strict separation between spheres of life. The chapter connects constitutional practice with some of the core concepts and texts in the history of political thought. Even beyond the relationship between spheres, conversations in political theory about the nature of liberty and the relationship between the individual and community map onto debates about horizontality and its alternatives.

On the horizontal understanding, rights take on a new significance as they become more than mere limitations on government, but also posit prescriptive ends that implicate the polity as a whole. Two key concepts emerge from these observations. Specifically, horizontality gives rise to new calls for *parity* of public and private spaces according to constitutional values. This, in turn, amounts to a new source of *duties* for private actors in relation to their fellow citizens. Such concepts as the common good and duty, integral to republican thought, offer a baseline for conceptualizing the parity and duties to which horizontality gives rise.

Subsequent chapters illustrate how these concepts travel in meaningful ways and do similar work across different kinds of contexts, namely the United States, India, Germany, South Africa, and the European Union. Examining constitutional debates, founding documents, and political histories (including case law and statutory law), as well as interviews with practitioners and legal academics reveals how constitutional actors have discussed horizontality in diverse contexts and various areas of rights. While these contexts are different in myriad ways, constitutional actors in each of them have deliberated whether and how to adopt a horizontal model of rights. These deliberations occur across diverse histories and aspirations, institutions and interests, in these constitutional orders and display equally diverse positions in terms of horizontality.

These region-specific chapters are not meant to be "case studies" in the traditional sense of the term. Put differently, they are not included as countries "most different" from each other or "most similar" to each

other, so as to control for particular factors in the analysis. These contextual chapters do not explain why courts decide questions of horizontality as they do, or why constitutionalism develops as it does in different countries. Rather, appropriate to this book as a work of constitutional theory, these chapters are illustrative in showing the variety of ends for which and ways in which horizontality has been employed. Likewise, these regions of study cover a range of political and legal circumstances that bolster or obstruct the practice of horizontality in each place. To borrow a turn of phrase from Kim Lane Scheppele, these chapters begin to construct different repertoires[17] for horizontality understood through a republican lens, as these diverse contexts are in different ways considered paradigmatic for the question of horizontality. Through these different paradigms, the book traces threads of republican discourses growing out of debates over horizontality. Republican themes take different forms and occur, to a greater or lesser extent, across issues and constitutional orders, so each context reveals something different about the republican potential of horizontality and the discourses surrounding this practice.

The first four examples may be understood as loose pairings, with the United States and India constituting one pair, and Germany and South Africa another. First, the constitutional experiences of the United States and India are brought into dialogue over the big question of *whether* their respective constitutions may be applied horizontally. As these countries have grappled with histories of racism and caste, the question of horizontality coheres around questions of equality and antidiscrimination. Republican themes relating to citizenship, fraternity, and the like emerge in arguments from those actors that would prefer something like a horizontal model of rights. In contrast, the experiences of Germany and South Africa are framed as centering around the question of *how far* the constitution applies horizontally. In particular, the common goal of societal transformation that both these constitutions undertake in one way or another raises questions about how far into private spaces, and to what kinds of issues, constitutional values ought to extend. Republican themes such as obligation to a common good or common morality, and even neighborliness, grow out of these debates.

The framers of the Indian Constitution pursued their practice of horizontality explicitly to avoid the discrimination black persons endured

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

in the United States even after the ratification of the Fourteenth Amendment and its equal protection clause. Likewise, the South African framers pursued their more ambitious version of horizontality to transcend the traditional legal distinctions to which German jurists largely remained committed. Each of these countries had occasion to consider horizontality, and distinct approaches emerged out of the respective constitutional conversations. Taken together, these pairings tell a story of constitutional actors choosing (or not choosing) to transcend the traditional logic of constitutionalism in favor of something different, something more republican. This is not to argue that these entire constitutional orders are or are not republican, only that republicanism describes how people employ and discuss horizontality in what are otherwise complex, multifaceted constitutional contexts.[18] In this vein, the European Union serves as an important bookend to these chapters, offering an opportunity to consider horizontality in a supranational context where republican fundaments pertaining to community and citizenship are themselves in question.

The concluding chapter takes up contemporary issues such as the COVID-19 pandemic and Big Tech to consider the status of private actors in constitutional politics and the value of the republican framework in understanding these issues. The conclusion offers preliminary thoughts on the republican framework as a possible guide to determining when horizontality might be applied and how it may be supported, as both a practical and a normative matter. Specifically, constitution-makers and courts might make this constitutional practice more coherent by making it even more republican, perhaps through renewed emphasis on contestation or the legislative function in constitutional politics.[19]

The Clarity of the Republican Lens

Analyzing crucial constitutional moments – often founding moments when the question of horizontality was debated and, at least initially, decided – lays the groundwork to explore the relationships between these

[18] Rogers Smith's thesis that the United States' civic order develops out of "multiple traditions" could likely be applied in modified form to any of the contexts this book examines. See Rogers Smith, *Civic Ideals* (New Haven: Yale University Press, 1999).

[19] The chapter considers such arrangements as the "new commonwealth model," which Stephen Gardbaum describes in *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013).