STATE ACTION DOCTRINE AND THE LOGIC OF CONSTITUTIONAL CONTAINMENT

*Jud Mathews**

Deriding the state action doctrine is one of the great pastimes of American constitutional law. It has been described as a shamble and "incoherent." On its face, the core concept seems straightforward enough: constitutional rights are rights against the government. But what counts as the "state action" that triggers the protection of rights seems to shift, maddeningly, from case to case in the Supreme Court's state action jurisprudence.

In this Article, I aim to help make some sense of why the state action doctrine has developed as it has by setting it in a comparative and historical frame. It can be useful to think about the state action doctrine as an American response to a generic problem that constitutional systems face: the problem of managing the horizontal effect of rights. If the American response to this problem is distinctive, it reflects the distinctive institutional, normative, and historical features of the context in which it developed.

The choices that a court makes regarding when and how rights apply horizontally play important, and varied, roles in the course of constitutional development within a legal system. A court's horizontal effect doctrine says something more broadly about what constitutional rights are and about the constitutional court's role in enforcing them.

This Article offers an overview of the role the horizontal effect doctrines play in the constitutional development of the United States as well as two other jurisdictions, Germany and Canada. I argue that this analysis highlights how the state action doctrine has functioned as a constitutional containment device in the United States. As applied, the state action doctrine does not extinguish the horizontal effect of rights altogether, but rather ensures that the Supreme Court, rather than litigants, lower courts, or legislators, takes the lead in saying when and how rights apply horizontally. I also argue that the Court uses the state action doctrine to curate the conversation that the Court and litigants have about rights, steering it away from certain difficult

* Assistant Professor, Penn State Law.

and unwelcome questions, such as whether state inaction is ever actionable.

TABLE OF CONTENTS

I. INTRODUCTION 656
II. EMERGENCE OF THE STATE ACTION FRAMEWORK 659
A. *Civil Rights Cases: Background* 659
B. *The Decision* 662
C. *State Action and American Constitutional Development* 664
III. THE HORIZONTAL EFFECT OF RIGHTS IN GERMANY AND CANADA: CRITICAL JUNCTURES AND CONSEQUENCES 667
A. *Germany and the "Radiation" of Rights* 667
1. *The* Lüth *Case in Context* 667
2. *Assessment and Impact* 670
B. *Canada and Charter Rights as Values* 673
1. Dolphin Delivery *in Context* 673
2. *Assessment and Impact* 676
IV. CONCLUSION 678

I. INTRODUCTION

Deriding the state action doctrine is one of the great pastimes of American constitutional law. Charles Black famously named it a "conceptual disaster area" in 1967,[1] but it had already been forcefully critiqued by Robert Hale in the 1920s and 1930s.[2] It has been called a "shamble"[3] and "incoherent."[4] Paul Brest noted its "Whitmanesque capacity to encompass contradictions"—and not as a compliment.[5] On its face, the core concept seems straightforward enough: constitutional rights are rights against the government. But what counts as the "state action" that triggers the protection of rights seems to shift, maddeningly, from case to case in the Supreme Court's state action jurisprudence.

The purpose of this Article is neither to add to the abuse already visited upon the state action doctrine nor to rise to its defense. Rather, I aim to help make some sense of why the state action doctrine has developed as it has by setting it in a comparative and historical frame. It can

1. Charles L. Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

2. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 197–98 (1935).

3. Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982).

4. Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 683 (1984).

5. Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982) ("Whatever its pragmatic virtues, however, this Whitmanesque capacity to encompass contradictions invites manipulation and mystification.").

be useful to think about the state action doctrine as an American response to a generic problem that constitutional systems face: the problem of managing the horizontal effect of rights. If the American response to this problem is distinctive, it reflects the distinctive institutional, normative, and historical features of the context in which it developed.

On the classical liberal view, constitutional rights have *vertical effect*: that is, they regulate the hierarchical relationship between the state and its citizens. But rights may also have *horizontal effect*, insofar as they impact the legal relations between private parties. A horizontal effect can be direct (such that private parties are themselves bound by constitutional rights) or indirect (such that rights impose duties on the government to regulate private-party legal relations in a certain way). Formally, at least, the state action requirement draws a principled line in the sand that sharply limits the horizontal effect of constitutional rights in the U.S. legal system. In practice, though, American constitutional rights do have horizontal effect some of the time.[6]

It should not be surprising that constitutional rights have at least some horizontal effect, some of the time, in most legal systems that recognize such constitutional rights. Philosophically, the idea that a State's duties to its citizens entail protecting them against at least the worst predations of their neighbors has deep roots in social contract theory.[7] What is more, applications of rights that seem principally vertical can have horizontal spillovers, as when a court strikes down a statute that licenses a form of private discrimination: it is state action that is invalidated, but a collateral consequence of the ruling is to limit what private parties can do.[8] And some courts may have instrumental reasons to apply rights horizontally, since constitutional rights can empower courts by placing within their reach outcomes that would otherwise be unavailable to them.[9]

The choices a court makes regarding when and how rights apply horizontally play important and varied roles in the course of constitutional development within a legal system. A court's horizontal effect doctrine says something more broadly about what constitutional rights are, and about the constitutional court's role in enforcing them. How a court gives horizontal effect to rights has implications for rights jurisprudence more broadly—a fact courts must be mindful of when approaching horizontal effect issues. Depending on how a legal system is structured, choices to grant horizontal effect to rights may significantly reshape legal decision-making processes and institutional relationships. For instance,

6. *See infra* Part II.

7. *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 42–48 (2010) (discussing Locke and Hobbes on the state's responsibility to its citizens).

8. *See, e.g.*, Romer v. Evans, 517 U.S. 1620, 1629 (1996).

9. For example, raising a constitutional-rights claim in a German civil-law court requires that court to engage in constitutional reasoning and also brings the case within the appellate jurisdiction of the Federal Constitutional Court. *See* Richard Barnett, *The Protection of Constitutional Rights in Germany*, 45 VA. L. REV. 1139, 1142–43 (1959).

the decision may expand the jurisdiction of constitutionally competent courts into domains previously managed by legislatures and other courts.

This Article offers an overview of the role the horizontal effect doctrine plays in the constitutional development of the United States as well as two other jurisdictions: Germany and Canada. Since space does not permit a thorough treatment of any full history, I focus on critical junctures: early, important cases in each jurisdiction that started the development of the doctrine down a particular path. I offer enough context to make the choices made in those critical junctures intelligible, and then briefly describe how doctrines in each jurisdiction developed from these starting points.

I chose these jurisdictions because they illustrate the variety of roles the horizontal effect doctrine can play in processes of constitutional development. We can better understand the peculiarities of the American case, I submit, when we place it alongside different systems that followed different courses of development. Also, I operate from the premise that, to understand how courts approach issues of horizontal effect in each case, we must be attentive not only to the role of legal reasoning in the development of doctrine, but also to the strategic considerations of courts and other actors, as well as the role of historical contingency.

In the case of the United States, the Supreme Court's initial articulation of the state action rule in the *Civil Rights Cases*[10] is the focal point of the analysis. I seek to explain both why the Court ruled as it did and what role the state action doctrine played in the development of American constitutional law and constitutional history going forward.

Ultimately, I argue that this analysis highlights how the state action doctrine has functioned as a constitutional containment device in the United States. As applied, the state action doctrine does not extinguish the horizontal effect of rights altogether, but rather ensures that the Supreme Court, rather than litigants, lower courts, or legislators, takes the lead in saying when and how rights apply horizontally. The Court also uses the state action doctrine to curate the conversation that the Court and litigants have about rights, steering it away from certain difficult and unwelcome questions, such as whether state *inaction* is ever actionable.

Historically, the state action doctrine emerged as an important support for a model of judicial supremacy that the Court developed in the years following Reconstruction, which required the Court to maintain tight control over the scope and meaning of rights. Later on, once a national political consensus against racial injustice gained steam in the mid-twentieth century, the strictures of the state action rule emerged as an impediment to nationalizing anti-discrimination norms, since only constitutional rights could reach those anti-liberal redoubts in state law, beyond the reach of federal legislative powers. As the Supreme Court came to embrace the role of a rights-protecting court, it licensed a series of *ad*

10. The Civil Rights Cases, 109 U.S. 3, 11–13 (1883).

hoc deviations from the state action rule at the same time that it broadened Congress' latitude to legislate under the banner of rights, even while preserving its own supremacy. As the Civil Rights Era drew to a close and the Court's priorities changed, it retrenched from its most expansive state action jurisprudence, complicating an already unruly body of doctrine further.

These developments are described in more detail in Part II. Part III describes the strikingly different roles horizontal effect doctrines play in the constitutional politics of Germany and Canada, and Part IV concludes.

II. Emergence of the State Action Framework

This Part examines a critical juncture in the American experience with the horizontal effect of constitutional rights: the emergence of the state action doctrine in the late nineteenth century. The Supreme Court's decision in the *Civil Rights Cases*[11] is the most consequential, and, accordingly, it is the central focus of attention here.

A. Civil Rights Cases*: Background*

The *Civil Rights Cases* were consolidated challenges brought under the Civil Rights Act of 1875 ("Civil Rights Act") and heard by the Supreme Court in the spring of 1883. The Civil Rights Act, passed pursuant to Congress' Section Five power to enforce the Fourteenth Amendment, declared a right "to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," without regard to race or "previous condition of servitude."[12] The Act made any violation a misdemeanor, punishable by fine and jail time, and it created a private right of action to sue in federal court for a $500 fine. The cases before the Supreme Court involved the exclusion of African Americans from inns, theaters, and the railroad.[13] The defendants challenged the statute as unconstitutional, insofar as it purported to regulate the conduct of private parties. They argued that the Fourteenth Amendment's guarantee of equal protection of the laws was a guarantee against the government, and in enforcing that right Congress could not proscribe private conduct since private conduct was not violative of the right.

Turning back the challenge to the Civil Rights Act would thus require the Supreme Court to recognize that the Fourteenth Amendment could have horizontal effect or else to hold that Congress' authority to enforce that amendment permitted Congress to reach private conduct in its enforcement legislation. Strictly in terms of contemporaneous consti-

11. *See generally id.*
12. The Civil Rights Act of 1875, ch. 114, 18 Stat. 336.
13. *The Civil Rights Cases*, 109 U.S. at 4.

tutional doctrine, were these moves the Court could have plausibly made?

I submit that they were. There was nothing in American constitutional traditions that foreordained the Court's embrace of a strict state action rule. Scholars have convincingly argued that the Equal Protection right of the Fourteenth Amendment was originally understood to not only bar the states from treating persons differently on the basis of race, but also to obligate the states to provide affirmative protection against certain kinds of discriminatory abuses initiated by private actors.[14] According to Pamela Brandwein, the Reconstruction Congresses and the Supreme Court alike spoke a "[l]ost [l]anguage of [s]tate [n]eglect."[15] For politicians and jurists with mainstream views (as opposed to Democrats on one side and radical Republicans on the other), the states were obligated to protect "those rights that a Republican consensus regarded as fundamental:" those "deemed essential for blacks to become 'free laborers' on terms equal with whites."[16] These were civil rights, but not social rights.

There were differences of opinion over which rights counted as fundamental (*i.e.*, civil) rights. Not all would agree, for instance, that rights of equal access to public accommodations were included.[17] But the idea that rights imposed *some* duty on the states to protect was common ground. For instance, in correspondence over a case pending in a circuit court in early 1871, Justice (and eventual author of the *Civil Rights Cases*) Joseph Bradley explained his understanding of the scope of Equal Protection to Judge (and future Justice) William Wood as follows: "[d]enying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection . . . ."[18] Judge Wood reproduced Bradley's language nearly verbatim in his opinion in the case.[19]

What is more, the *Civil Rights Cases* did not squarely ask whether the Supreme Court would hold that the Fourteenth Amendment, of its own force, reached the private discrimination targeted by the Civil

14. *See* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1359 (1964).

15. Pamela Brandwein, The Civil Rights Cases *and the Lost Language of State Neglect*, *in* THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 275 (Ken I. Kersch & Ronald Kahn eds., 2006).

16. *Id.* at 276.

17. Richard Primus cautions modern scholars against taking too seriously the distinctions drawn between civil, social, and political rights in the Reconstruction period. Rather than reflecting a coherent and consistent typology, Primus argues that "particular rights moved about among the categories in a kind of constitutional shell game depending on whether legislators or judges wanted to confer those rights on blacks." RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 128 (Quentin Skinner et al. eds., 1999).

18. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 48 (Maeva Marcus et al. eds., 2011) (quoting Letter from Joseph P. Bradley to William B. Woods (Mar. 12, 1871)).

19. United States v. Hall, 26 F.Cas. 79, 81 (C.C.S.D. Ala. 1871).

Rights Act. Rather, the question was whether *Congress* had the power, under the Enforcement Clause of that amendment, to proscribe such discrimination.[20] The departmentalist view that each branch of government possesses independent authority to interpret the Constitution has deep roots in the American constitutional tradition.[21] While the Supreme Court reserved for itself the authority to interpret the Constitution and, if necessary, to strike down laws as unconstitutional, the other branches insisted on the right to maintain their own constitutional interpretations.[22] Against this backdrop, the vesting in Congress of the power to enforce the Reconstruction Amendments left room for at least some deference to the judgments of that branch.

But if the legal environment furnished conceptual resources to affirm the Act's constitutionality, the political environment imposed significant constraints on the Court's freedom of action. Even a quarter century after its disastrous misstep in *Dred Scott*,[23] the Supreme Court remained a weakened institution.[24] The Court had picked its way through the minefield of Reconstruction politics with great care, sometimes facing threats to its independence from the Republican Congress.[25] As the political will to complete the Reconstruction project began to falter in the 1870s, the Court also took a contractionary turn, offering constructions that limited the reach of the Reconstruction Amendments and enforcement legislation.[26]

The compromise that resolved the disputed 1876 election marked the end of Reconstruction, as the Legislature and Executive both abandoned the national commitment to combat racial inequalities in the political and civic life of the South.[27] Because the Civil Rights Act contained a private right of action and vested the federal courts with exclusive jurisdiction over claims, the courts alone would be left holding the bag for enforcing the statute.[28] But even if legal arguments were available to sustain the Act's constitutionality, as a practical matter, the Court would have a hard time upholding the Civil Rights Act in the face of severe resistance

20. The Civil Rights Cases, 109 U.S. 3, 13–14 (1883).

21. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 201 (2004).

22. So for instance, when Andrew Jackson vetoed the charter extension for the Second Bank of the United States in 1832, he did so with a message explaining why he understood the bank to be unconstitutional—notwithstanding the Supreme Court's contrary opinion in *McCulloch v. Maryland*. 17 U.S. 316 (1819); *see also* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASE AND MATERIALS 107–108 (1983).

23. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

24. *See* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 3 (1968).

25. In particular, Congress reduced the number of justices from ten to seven in 1866, and it stripped the Court of *habeas corpus* jurisdiction over military commissions in 1868 so as to deny the Court a chance to rule on the validity of the Reconstruction Acts.

26. *See* United States v. Cruikshank, 92 U.S. 542 (1876); Slaughterhouse Cases, 83 U.S. 36 (1872).

27. Aderson Bellegarde Francois, *To Make Freedom Happen:* Shelby County v. Holder*, the Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. ILL. U. L. REV. 529, 544 (2014).

28. The Civil Rights Act of 1875, ch. 114, 18 Stat. 336.

from the governments of the South and without the support of the political branches.

B. The Decision

And so, as it is well known, the Supreme Court invalidated the Civil Rights Act in the *Civil Rights Cases*. What is especially important here, though, is *how* the Court did so. In deciding the case, the Court inaugurated the state action doctrine.[29] The state action doctrine would function for the Court as a powerful constitutional containment device, helping the Court to consolidate its own position in the American system of government by maintaining tight and exclusive control over rights. The state action doctrine dovetailed with, and reinforced, judicial supremacy, and it also permitted the Court to squelch awkward questions about the reach of rights.

The central question for the Court, wrote Justice Bradley, was whether Congress had the power to pass the law.[30] The statute's defenders relied principally on the Fourteenth Amendment as the source of legislative authority.[31] While acknowledging that Section One's litany of things that "no State shall" do is "prohibitory in its character, and prohibitory upon the States," Justice Bradley noted that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."[32] The contours of the right guaranteed by Section One of the Fourteenth Amendment also circumscribe the scope of Congress's power to enforce the amendment under Section Five:

> [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.[33]

Congress cannot act here, precisely because the requisite state action is lacking:

> [U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity.[34]

---

29. The Civil Rights Cases, 109 U.S. 3, 13 (1883).
30. *Id.* at 8–9.
31. *Id.* at 10.
32. *Id.* at 10–11.
33. *Id.* at 11.
34. *Id.* at 13.

Congress may not use the Fourteenth Amendment to pass legislation that "cover[s] the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society."[35] The Civil Rights Act "does not profess to be corrective of any constitutional wrong committed by the States," but "proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States."[36] Hence, it exceeds the scope of Congress' power under the Fourteenth Amendment.[37]

The *Civil Rights Cases* skillfully frame the issue in a way that makes the state action requirement appear logical and obvious (even if the decision did not expressly reject the state neglect concept). But, in fact, there are hard and important questions at stake in the case, and the Court dodges them.

Start with the term "state action." The natural question to ask is, "state action" as opposed to what—what is the alternative? Logically, there are two: there is *nonstate* action and there is state *inaction*.[38] Statements in the *Civil Rights Cases*, such as "[i]ndividual invasion of individual rights is not the subject matter of the amendment," draw the reader's focus to the first of these oppositions, contrasting *action* of the state to *action* of nonstate actors. In other words, they suggest that the Court must choose between holding that the Constitution may be violated by actions of the state only and holding that the Constitution may be violated by both state action and the acts of nonstate actors. Framed in this way, the Supreme Court's judgment amounts only to a rejection of *direct* horizontal effect and seems uncontroversial.

This framing, however, obscures the second opposition between state action and state *inaction*. In this framing, the question becomes: may the Constitution be violated by state action only, or also by state inaction? Or, to particularize it to the issue in the *Civil Rights Cases*, can the right to equal protection of the laws impose on the state affirmative obligations, for instance, to proscribe or punish certain forms of discriminatory treatment? This question is trickier. As described above, the contemporaneous conventional wisdom seemed to be that the Fourteenth Amendment encompassed state neglect; state inaction could be, in a word, actionable under the Fourteenth Amendment.

The question of just how far a state's obligations ran, however, was more controverted, as discussed above. Justice Bradley, though, framed matters in the *Civil Rights Cases* in a way that permitted the Court to

35. *Id.*

36. *Id.* at 14.

37. The Court went on to hold that the Thirteenth Amendment did not authorize the Civil Rights Act either. *Id.* at 20–25.

38. For further discussion on the point, see Robin West, *Responses to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819 (2003).

sidestep these difficult issues. Nowhere in his opinion does Justice Bradley explicitly repudiate the statement he made to Judge Wood a dozen years earlier: that "denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection."[39] Rather, he changed the conversation, shifting the focus from the role of the State to the proximate source of the injuries for which redress was sought (here, the owners of private establishments who denied entry to African Americans).

C. State Action and American Constitutional Development

The state action rule inaugurated a policy of constitutional containment, erecting a *cordon sanitaire* that kept constitutional rights out of the private law. Strikingly, the policy of constitutional containment, which emerged from the Court's political weakness, in time became a foundation for institutional strength. The state action rule facilitated the Court's construction of what I call the first post-war constitutional settlement, which tied together strong forms of constitutional supremacy and judicial supremacy. The Supreme Court's jurisprudence in the late nineteenth century reinforced the hierarchical relationship between constitutional law and ordinary law, and it stressed the Court's role as the ultimate arbiter of constitutional meaning. In insisting on its exclusive authority to give content to constitutional rights, and in using that authority to define the scope of rights narrowly, the Supreme Court displaced a less court-centered, less univocal set of ideas in the American legal tradition about the character of legal obligation between government and governed.

The state action doctrine was one of many moves that together helped consolidate the Supreme Court's interpretative authority over the Constitution. In particular, the Supreme Court had normalized judicial review of federal statutes in the years immediately after the Civil War. Even as the Supreme Court bobbed and weaved on the most high-profile issues concerning the war and Reconstruction, it struck down ten federal statutes in whole or part between 1865 and 1873 (in contrast to only two previously in *Marbury*[40] and *Dred Scott*[41]). The Court also marked out the borders of its bailiwick by sharpening the hitherto hazy distinction between the law of the U.S. Constitution and what it called "general constitutional law."[42]

The Supreme Court's containment of rights and its assertion of interpretive primacy were mutually reinforcing. It is easier for a court to

39. BRANDWEIN, *supra* note 18, at 48 (quoting Letter from Joseph P. Bradley to William B. Woods (Mar. 12, 1871)).
40. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
41. Dred Scott v. Sandford, 60 U.S. 393 (1857); KUTLER, *supra* note 24, at 114.
42. *Compare* Loan Assoc. v. Topeka, 87 U.S. 655, 662–663 (1874), *with* Davidson v. Louisiana, 96 U.S. 97, 105 (1878).

maintain an effective monopoly over constitutional interpretation when the scope of rights is limited and the border between constitutional and ordinary law is vigorously policed. For the U.S. Supreme Court, building and maintaining a virtual monopoly over constitutional interpretation was a key to its institutional strength, which redounded to the federal judiciary more broadly. The story of the state action doctrine is therefore part of the story of the institution-building of the Supreme Court and federal judiciary, although it has not figured prominently in most accounts of this development.[43]

In the years after World War II, however, the Court's state action framework came under increasing pressure. In the wake of a war against Nazi and fascist enemies, and in the context of a Cold War against a repressive Soviet state, a civil-liberties and equal-rights agenda gained political traction in the United States.[44] Popular opposition mounted against racial discrimination in particular, championed by an active civil-rights movement.[45] The Supreme Court played an important role in pushing forward the national debate on civil rights, most explosively with its 1954 decision in *Brown v. Board of Education*.[46] After the Supreme Court gave up its role as the legislative censor in the social and economic field in the 1930s, it began to define its identity, with increasing clarity, as a rights-protecting court.[47]

In the years that followed, the Court's embrace of this role had a number of implications for its constitutional jurisprudence. Since the threats to rights came primarily from the states, and, in particular, Southern states, it meant nationalizing the protection of rights. The Court did this by formally extending the reach of federal constitutional rights to the states. On eleven occasions, between 1948 and 1969, the Supreme Court used the Due Process Clause of the Fourteenth Amendment to "incorporate" rights contained in the first eight amendments to the Constitution against the states.[48] The Court also strengthened its substantive Fourteenth and Fifteenth Amendment doctrines.[49] Loosening restrictions on Congress's power to legislate,[50] including under the banner of protecting rights,[51] reinforced the conception of the Constitution as a rights-protecting pact and the conception of the Supreme Court as a rights-protecting court.

---

43. *See, e.g.*, JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012).
44. Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 25 (1994).
45. *Id.* at 23–25.
46. 347 U.S. 483 (1954).
47. Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459–61 (2001).
48. *See* PRIMUS, *supra* note 17, at 69.
49. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Brown v. Bd. of Educ., 347 U.S. 483 (1954).
50. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 650–51 (1966).
51. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 325–27 (1966).

Additionally, a series of one-off alterations to the state action requirement were an important complement to this rights-promoting agenda.[52] Softening the state action rule permitted the Court to reach and remedy the increasingly anomalous sectional divergences that otherwise lay beyond the reach of federal powers. Because these alterations were *ad hoc*, the Supreme Court never articulated a theory of exactly what rights citizens were entitled to in their legal relations with other private parties. It is the *ad hoc* quality of the Court's doctrinal excrescences that earned the state action doctrine so much scorn.

But the lack of a general theory explaining when the effects of rights would reach into the private law also permitted the state action norm to continue to function as a constitutional containment device, which reinforced the Court's supremacy. The Court did not hem itself in with a theory; instead, rights would reach into the private law when the Court said they would.

Many of the cases in which the Supreme Court seems to bend the state action rule in order to extend constitutional protections—the white primary cases,[53] *Marsh v. Alabama*,[54] *Shelley v. Kraemer*,[55] *Burton v. Wilmington Parking Authority*,[56] *New York Times v. Sullivan*,[57] and so on—are famous. Most involve race-discrimination or civil-liberties claims, and most date from the Warren Court era.[58] As is well known, the Court variously found the requisite state action in judicial enforcement of private agreements,[59] common-law rules,[60] the private assumption of public functions,[61] or governmental entanglement in private institutions.[62]

After Reconstruction, granting horizontal effect to rights meant taking on a mission the weakened Court could not accomplish: rooting out discrimination in the South without the backing of the other branches of government or a powerful public constituency. After World War II, and especially as the civil-rights movement gained ground, the Supreme Court was in the vanguard of a broader political and social change with respect to civil rights and civil liberties. The cause of robust rights protection attracted significant constituencies inside and outside of government. As the Supreme Court got out of the business of policing economic regulation, it made rights central to its agenda and identity. Among national institutions, only the Supreme Court could reach and rectify local

52. *See infra* text accompanying notes 53–57.
53. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).
54. 326 U.S. 501 (1946).
55. 334 U.S. 1 (1948).
56. 365 U.S. 715 (1961).
57. 376 U.S. 254 (1964).
58. *See e.g.*, *Burton*, 365 U.S. at 720–21; *Sullivan*, 376 U.S. at 256.
59. *Shelley*, 334 U.S. at 13.
60. *Sullivan*, 376 U.S. at 299–300.
61. Marsh v. Alabama, 326 U.S. 501, 509 (1946).
62. *Burton*, 365 U.S. at 725.

discrimination that occurred under the auspices of the private law and only resorting to constitutional rights. When the Court did so, it demonstrated its unique value to American government while advancing its agenda.

III. THE HORIZONTAL EFFECT OF RIGHTS IN GERMANY AND CANADA: CRITICAL JUNCTURES AND CONSEQUENCES

This Part illustrates some of the different roles horizontal effect doctrines can play in constitutional development by analyzing, in slightly less depth than the previous Part, critical junctures in Germany and Canada and their aftermaths.

A. *Germany and the "Radiation" of Rights*

1. *The* Lüth *Case in Context*

Like the U.S. Supreme Court, Germany's Federal Constitutional Court ("GFCC") was in a position of some political vulnerability when first asked in the early 1950s to rule on whether, and how, constitutional rights impacted private law. For the GFCC, though, the path to strengthening its position lay in embracing the horizontal effect of rights rather than restricting it.

Established in 1951, the GFCC came online in a crowded and competitive institutional environment.[63] In addition to the GFCC, Germany's postwar constitution, the Basic Law, recognized five other supreme courts, each with different subject matter jurisdiction and some with deep roots in Germany's legal establishment.[64] In its first years of operation, the GFCC faced potent challenges to its authority from these other courts, as well as from the executive branch, which sought to cabin the GFCC's independence.[65] The Basic Law, however, also contained an extensive roster of rights, some of which seemed to presuppose horizontal effect.[66]

The GFCC's first opportunity to rule on the horizontal effect of rights came in 1952 with the *Lüth* case.[67] Erich Lüth, president of the

---

63. JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001 1 (2015).

64. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. IX at 95 (Ger.) ("The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction.").

65. *See* COLLINGS, *supra* note 63, at 1–61.

66. For instance, Article 6, Section 4 declares that mothers are entitled to the protection and care of the community. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], BGBI. I at 6 (Ger.).

67. BUNDESVERFASSUNGSGERICHT [Federal Constitutional Court] Jan. 15, 1958, 7 BVERFGE 198 (Ger.).

Hamburg Press Association, had called for a boycott of filmmaker Viet Harlan's new release *Immortal Beloved*, on account of Harlan's anti-Semitic films of the Nazi era.[68] Harlan sought to enjoin Lüth, alleging an interference with trade in violation of provisions of the German Civil Code, the great codification of private law.[69] Lüth defended himself by arguing, *inter alia*, that his call for the boycott was protected by the constitutional right to free expression.[70] Lüth lost in the lower courts before appealing to the GFCC.[71]

The GFCC took until 1958 to hand down its decision, but it was hugely significant, offering nothing less than a new understanding of constitutional rights.[72] The Court rejected a view previously propounded by the Federal Labor Court, that constitutional rights applied directly to private legal persons, as "go[ing] too far."[73] Instead, the Court offered a different conception of constitutional rights, one that drew on the important distinction in German law between subjective and objective legal norms. Elaborated most famously by *fin de siècle* legal theorist Georg Jellinek, a subjective public right entitles an individual to some action or omission in his or her interest on the part of the State.[74] Objective norms of public law are also binding on the State, but they are not personal to any individual, and, as a result, cannot usually be vindicated by an individual suit against the state.[75]

Lüth offered a kind of quantum theory of constitutional rights, in which rights simultaneously exist on the planes of subjective and objective law. The Court first confirmed the conventional view that constitutional rights are primarily subjective rights, noting that "[w]ithout a doubt, the constitutional rights are in the first instance intended to secure the individual's sphere of freedom against infringements by public authorities: they are defensive rights of the citizen against the state."[76] At the same time, the Court made clear, the Basic Law does not establish a

---

68. *Id.*; Peter E. Quint, *A Return to Lüth*, 16 ROGER WILLIAMS U. L. REV. 73, 75 (2011) [hereinafter Quint, *A Return*].

69. Preliminary Injunction Against Erich Lüth, *reprinted in* DAS LÜTH-URTEIL AUS (RECHTS-) HISTORISCHER SICHT: DIE KONFLIKTE UM VEIT HARLAN UND DIE GRUNDRECHTSJUDIKATUR DES BUNDESVERFASSUNGSGERICHTS 459 (Thomas Henne & Arne Riedlinger eds., 2006).

70. Quint, *A Return*, *supra* note 68, at 75–76.

71. *Id.*

72. While the ideas were new to the jurisprudence, they had antecedents in legal scholarship, most notably the work of a young professor from Tübingen named Günter Dürig. *See* Günter Dürig, *Der Grundsatz der Menschenwürde. Entwurf eines Praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art, 19 Abs. II des Grundgesetzes*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS 117–57 (1956) (meaning translated from German by author).

73. 7 BVerfGE 198 (Ger.).

74. GEORG JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE (1892) (meaning translated from German by author).

75. A terminological difficulty arises because in German, the word "*Recht*" translates as both "right" and "law." I refer not to "subjective public rights" but "objective norms of public law," because in English, it sounds odd to refer to a "right" where there is no rights-holder. *See* MICHAELA HALLIBRONNER, TRADITIONS AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM 46 (2015).

76. 7 BVerfGE 198 (Ger.).

value-neutral order. Rather, the Basic Law's charter of rights sets up "an objective order of values" (*objektive Wertordnung*) that finds expression in an enhanced role for constitutional rights.[77] At the core of this order of values, according to the Court, lies human dignity (as recognized in Article One) and personality rights (as guaranteed in Article Two), and this "system of values" must serve "as a foundational constitutional commitment for all spheres of law."[78]

This also has profound implications for private-law disputes. The value system "naturally influences the civil law as well; no provision of the civil law can stand in contradiction to it, and each must be interpreted in its spirit."[79] But, even as the Court asserted the relevance of constitutional rights to adjudication under the Code, the Court was careful to circumscribe its own role in the review of civil courts' decisions. A dispute between private parties over rights and duties under the civil law "remains materially and procedurally a civil law dispute";[80] only, the content of the civil law must be interpreted to reflect the influence of constitutional values. The principal "portals" through which constitutional values enter the civil law are the general clauses, such as Section 826 of the Civil Code, which themselves make appeals to values outside of the civil law (such as good morals).[81] A civil judge must interpret and apply these clauses with an eye to the constitutional values embodied in the constitutional rights. This is precisely what it means for civil judges to be bound by the constitutional rights, as provided for under Article One, Section Three of the Basic Law.[82]

The Constitutional Court does not sit over the civil courts as a court of revision or "superrevision" to correct errors in the application of law. Rather, the Court's role is only to judge the "radiation effect" (*Ausstrahlungswirkung*) of the constitutional rights on the civil law and to bring to effect the content of the constitutional provision.[83]

At the same time, the Court made clear that the fact the Basic Law contains an explicit reservation clause for the free-expression right does not mean that *any* limit on expression imposed by a provision of the Civil Code will pass muster.[84] Rather, general laws must themselves be interpreted in light of the constitutional values they limit. The right and the law limiting the right, therefore have a reciprocal effect (*Wechselwirkung*) on each other in that the law not only limits the right, but the right also sets limits on how far the law can go. In other words, the civil court has to balance the values protected by the constitutional right and the in-

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*; *see also* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, § 826 (Ger.).
82. 7 BVerfGE 198 (Ger.); *see also* GRUNDGESETZ [GG] [BASIC LAW], Art., 1, § 3 (Ger.).
83. 7 BVerfGE 198 (Ger.).
84. *Id.*; *see also* GRUNDGESETZ [GG] [BASIC LAW], Art., 5, § 2 (Ger.) (stating that the right to freedom of expression is limited by the provisions of general laws).

terests advanced by the civil-law provision. The decision must be based on a comprehensive consideration of the relevant factors in the case at hand, and "an incorrect weighing can create a constitutional injury and ground a constitutional complaint to the Constitutional Court."[85]

The rest of the Court's opinion carefully considered the legally protected interests at stake on both sides of the dispute between the film companies and Lüth, as well as the analysis by the lower courts. The Court concluded that the trial court failed to recognize Lüth's constitutionally protected interest in free expression where it came into conflict with the private interests of the plaintiffs.[86] The lower court's ruling, therefore, violated Lüth's constitutional right and was void.[87]

2. *Assessment and Impact*

For the GFCC of the 1950s, beset from all sides with challenges to its authority, pushing for a more expansive conception of the horizontal effect of rights made sense. Owing to the limits of its subject matter jurisdiction, the GFCC was relevant only to the extent that the constitution was. On this view, the Court's embrace of horizontal effect is of a piece with other efforts that it made to fight against marginalization by the political branches and the rest of the judiciary in the first decade of its existence. The Court's moves in *Lüth* and later cases were also responsive to an emergent demand for the protection of liberal values, including freedom of speech, that were not being met by the ordinary private-law establishment, which retained strong ties to Germany's anti-liberal past.

It was significant that the GFCC gave horizontal effect to rights, but just as important was *how* the Court did so. A defining feature of the Constitutional Court's doctrine was its insistence that constitutional rights apply to private parties only indirectly. Rights were conceptualized as values that influence the whole of law. This theory fit neatly within a broader, normative narrative in which the Court associated rights with the fundamental normativity of the constitutional order, self-identified as the defender of that order, and, at the same time, respected the autonomy of the coordinate court systems.

In recognizing that rights shape but do not displace the rules of private law, the Court showed itself willing to share interpretive authority over constitutional norms to a degree unimaginable in the United States. As the GFCC elaborated in future decisions, other courts largely discharged their obligation to take account of constitutional values by giving

85. 7 BVerfGE 198 (Ger.).

86. *Id.* Whereas the Court was receptive to the constitutional interests that Lüth pleaded, it was fairly dismissive of Harlan's. Harlan claimed his own right to the free development of his personality was infringed by a boycott that made it harder for him to work as a director. The Court avoided having to balance this interest against Lüth's by ruling that Harlan's Article 2 rights would be implicated only if he was excluded from his profession entirely. *See* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 297 (1989) [hereinafter Quint, *Free Speech*].

87. 7 BVerfGE 198 (Ger.); Quint, *Free Speech*, *supra* note 86, at 254, 286.

consideration to those values in their decision-making, independent of the specific content of their decisions.[88] This approach permitted a substantial degree of constitutional pluralism, while leaving the GFCC ultimately in a position to evaluate other courts' handling of constitutional values.[89]

What is more, *Lüth* offered a foundation for future cases that amplified the power of rights to impact Germany's legal order. *Lüth* itself involved the defensive use of a right and the interpretation of open-ended general clauses. A series of cases in the 1960s and 1970s successively built up rights' capacity to preempt processes of nonconstitutional decision-making by creating causes of actions, justifying new remedies, and demanding results in contravention of the clear text of statutes.[90]

Based on the downstream consequences of the Court's horizontal effect jurisprudence, on both litigation in nonconstitutional courts and the legislative process, it is fair to say that the Court unleashed a constitutional cascade.

The *Lüth* regime gave litigants a strong reason to articulate constitutional-rights claims whenever they could plausibly be pleaded.[91] Constitutional-rights claims gave litigants another potential ground for relief, but they did more than that: they also opened up the possibility of access to another forum to hear their claims—the Constitutional Court. The constitutional complaint was the only procedural device litigants could use to escape the subject-specific silos of the German court systems.

Lüth imposed on all courts a duty of "*verfassungskonforme Auslegung*"—interpreting the ordinary law to comport with fundamental rights—on all courts, a task that the GFCC gave them every incentive to perform.[92] While other courts were required to consider the Basic Law in their rulings, they themselves were not issuing constitutional holdings, but rather interpreting other norms in light of constitutional rights.

The approach simultaneously obligated all courts to engage in constitutional reasoning, and it retained the Constitutional Court's monopoly position as the ultimate authority on constitutional meaning.[93] Even if,

88. Under the so-called "Heck Formula," the Court would overturn judicial decisions interpreting ordinary law only when they rely on a fundamentally incorrect perception of the meaning of a constitutional right or the failure to take account of it altogether.

89. Further, the GFCC later qualified the deference owed to ordinary courts in the *Deutschland-Magazin* decision. 42 BVerfGE 143 (Ger.).

90. *See, e.g.*, 34 BVerfGE 269 (Ger.) (establishing the possibility of a damages remedy for intangible harms to personality rights, notwithstanding the Civil Code's exclusion of such remedies); 25 BVerfGE 256 (Ger.) (implying a new cause of action against private conduct infringing press freedom rights).

91. *See* Matthias Jestaedt, *Phänomen Bundesverfassungsgericht. Was das Gericht zu dem Macht, was es ist*, *in* DAS ENTGRENZTE GERICHT: EINE KRITISCHE BILANZ NACH SECHZIG JAHREN BUNDESVERFASSUNGSGERICHT 78, 119 (Christoph Möllers et al. eds., 2011).

92. *Id.* at 137–39.

93. Thomas Henne, *Die Neue Wertordnung in Zivilrecht—Speziell Familien- und Arbeitsrecht*, *in* DAS BONNER GRUNDGESETZ: ALTES RECHT UND NEUE VERFASSUNG IN DEN ERNSTEN JAHRZEHNTEN DER BUNDESREPUBLIK DEUTSCHLAND (1949–1969) 24 (Michael Stolleis ed., 2006).

as noted above, the GFCC did sometimes act as a court of revision, non-constitutional courts certainly still improved their chances of escaping complaint to—and reversal by—the Constitutional Court by making good-faith efforts to take account of constitutional values in the course of adjudication.

The constitutional cascade engulfed lawmakers as well as courts, and yoked legislatures, ordinary courts, and the Constitutional Courts together in interactive and iterative processes of constitutional construction. The gradual extension of key constitutional values, such as equality through German law, was largely accomplished by the national parliament, under occasional prodding from the courts.[94]

In part, legislatures' incentives to take constitutional rights seriously were derivative of courts' incentives. Horizontal effect jurisprudence empowered courts—all courts—to undertake a form of constitutional review of the whole body of ordinary law. *Lüth* and the cases that followed invited the entirety of the judiciary, from the humblest court of first instance to the apex courts, to partake of the supremacy of the constitution and to sit in judgment of legislative and executive choices on that basis. But, in addition, the Constitutional Court has been explicit about recognizing legislatures as having the power and responsibility in the first instance to give concrete form to constitutional guarantees. Notably, in its abortion jurisprudence, the GFCC created a conceptual space for legislative constitutionalism by recognizing the state's affirmative obligation to protect constitutional rights (here, rights of the unborn) against threats from private parties.[95] This obligation would be discharged, in most cases, through legislation, to which courts would give very wide discretion. Like the ordinary courts, the legislatures would be rewarded with a measure of deference just for trying to take constitutional rights into account.

While the U.S. Supreme Court moved to contain the horizontal effect of constitutional rights in the *Civil Rights Cases*,[96] Germany's Federal Constitutional Court set them loose in the private law in the *Lüth* decision.[97] As different as these decisions were, each helped the court to consolidate its role in its constitutional system, and each shaped the course of constitutional development in the decades to come.

94. *See* Joachim Wiemann, *Obligation to Contract and the German Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)*, 11 GERMAN L.J. 1131, 1131–46 (2010).

95. *See* Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, 18 LOY. L.A. INT'L & COMP. L. REV. 571, 571, 583 (1996).

96. The Civil Rights Cases, 109 U.S. 3 (1883).

97. 7 BVerfGE 198 (Ger.).

B. Canada and Charter Rights as Values

1. Dolphin Delivery *in Context*

The situation in Canada lies in some respects between the outcomes in the United States, where the Supreme Court maintains sharp limits on the influence of rights on private law, and Germany, where the GFCC presided over a constitutional cascade in which rights have come to touch the whole of law. Canada was a latecomer to constitutional rights, with the Charter of Rights and Freedoms taking effect only in 1982,[98] at a time when legislative action and common-law evolution had already satisfied the most pressing demands for equality and civil liberties. The Supreme Court of Canada ("SCC") was already Canada's court of final appeals in all cases, so bringing Charter rights to bear had limited concrete impact on what cases came before the Court.

The Court first faced the question of Charter rights' horizontal effect in *Retail, Wholesale, and Department Store Union, Local 580 v. Dolphin Delivery Ltd*. in 1986.[99] The case grew out of a labor dispute that on one side implicated commercial interests protected by the common law and on the other expressive freedom protected by the Charter.[100] An Ontario-based courier company, Purolator, locked out its employees after failing to reach an agreement with the union that represented them.[101] The union responded by controversially announcing its intention to picket Dolphin Delivery, a Vancouver-based courier and alleged ally of Purolator.[102] Dolphin Delivery denied it was an ally, in which case the boycott would be tortious under the governing common law.[103] Dolphin Delivery sought and received an injunction against the picketing from the Superior Court, sustained by the Court of Appeal for British Columbia, and the union appealed on the basis of the Charter right to free expression.[104]

Justice McIntyre's decision for the SCC very much had the feel of a court groping its way through unfamiliar and potentially dangerous territory. Justice McIntyre seemed to go out of his way at the start of the opinion to suggest that the pleaded Charter values were only minimally impinged on the facts—in other words, that no expressive interests were seriously harmed in the production of this decision.[105] He first concluded, on the basis of the trial court's somewhat ambiguous decision, that Dol-

98. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (UK).
99. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] S.C.R. 573 (Can.).
100. *Id.* at 578–79.
101. *See id.* at 578.
102. *See id.*
103. *Id.* at 580.
104. *See id.* at 581.
105. *Id.* at 582.

phin Delivery was a third party to the labor dispute, and that "the dominant purpose [of the proposed picketing] was to injure the plaintiff rather than the dissemination of information and protection of the defendant's interest."[106] Justice McIntyre did acknowledge that the union's expressive interests fell within the scope of the Section Two[107] right to freedom of expression, noting that "[i]t is not necessary, in view of the disposition of this appeal that I propose, to deal with the application of s. 1 of the *Charter*" (the limitations clause).[108] Nonetheless, the Court went ahead and dealt with Section One, concluding "that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable [and hence, constitutional] limit in the facts of this case."[109] Although this conclusion is *dicta*, it lowers the stakes for the main question, which is whether the Charter even applies to this common-law ruling in private litigation.

The Court broke the issue down into two questions—1) whether the Charter applies to the common law and 2) whether the Charter applies to private litigation—but its answers were not models of clarity. The Court answered the first question in the affirmative, pointing to the Section Fifty-Two Supremacy Clause: "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[110] Working from the plain text of the Charter, the Court reasoned that "any law" meant "any law," including the common law.[111]

The next question for the Court was whether the Charter applied to private litigation, and here, its answer was more complicated. In its discussion, the Court toggled back and forth between two different, but related, questions: whether the Charter applied to private litigation and whether it applied to private parties. The questions were different because a Charter right could apply to a legal rule that decides the outcome of private litigation, even if private parties themselves were not subject to obligations under the Charter. The Court's conflation of the Charter's applicability to private litigation and to private parties blurred the issues at stake and rendered its analysis unnecessarily confusing.

After canvassing relevant scholarship, Justice McIntyre concluded with the broad statement that, "I am in agreement with the view that the

106. *Id.* at 588.
107. *Id.*
108. *Id.* The Section One limitations clause provides that rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
109. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] S.C.R. 592 (Can.).
110. *Id.* at 592–93 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, pt. VII § 52 (UK)).
111. *Id.* at 593.

Charter does not apply to private litigation,"[112] before proceeding almost immediately to undercut it. Switching from the *proceedings* in which the Charter applies to the *actors* to whom it applies, the decision cited Section Thirty-two of the Charter for the proposition that the Charter applies to the legislative, executive, and administrative branches of government,[113] and "[i]t will apply to those branches of government whether or not their action is invoked in public or private litigation."[114]

The Charter did not, however, apply to the instant case. Although the injunction against the union was based on the common-law rule against secondary picketing, the case lacked "[t]he element of governmental intervention necessary to make the *Charter* applicable."[115] This is so because the Court did not regard a court order as government action. Although courts are bound by the Charter, they are acting only as "neutral arbiters, not as contending parties involved in a dispute."[116] If the content of court orders were attributed to the courts and counted as governmental action that triggered the Charter, it would "widen the scope of *Charter* application to virtually all private litigation."[117] Before applying the Charter, the Court required "[a] more direct and a more precisely-defined connection between the element of government action and the claim advanced."[118] But where "private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply."[119]

Significantly, though, if the common law flies beneath the radar of full Charter scrutiny in ordinary private litigation, that does not mean it is "irrelevant to private litigants whose disputes fall to be decided at common law."[120] Rather, the Court made clear that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[121]

The set of questions the Court announced at the outset to guide its analysis ended up being a distraction because the applicability of the Charter ultimately did not turn on whether the common law or a statute was at issue, or whether litigation was public or private.[122] The critical question for understanding the doctrine turned out to be, "whose conduct must be justified in terms of the Charter?" The Court's answer was the conduct of the legislative, executive, and administrative branches of

112. *Id.* at 597.
113. *Id.* at 598 (analyzing Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, pt. I § 32 (UK)).
114. *Id.* at 598–99.
115. *Id.* at 599.
116. *Id.* at 600.
117. *Id.*
118. *Id.* at 601.
119. *Id.* at 603.
120. *Id.*
121. *Id.*
122. *Id.* at 582.

government, not the conduct of private actors nor the conduct of courts.[123] Courts should develop the common law to be consistent with Charter values, but their application of common-law norms does not trigger Charter scrutiny.

The Court's approach—and in particular its (not entirely accurate) statement that the Charter does not apply to private litigation—spared it the charges of judicial overreach that would have followed a more aggressive assertion of the Charter's applicability. Private litigation in Canada occurred mostly under the auspices of provincial law, and an assertion of Charter rights in this context would have played into some provincial concerns that the Charter project represented a centralization of power.[124] Nor did the SCC give up much jurisdiction by declaring a part of private litigation off-limits to Charter scrutiny. *Dolphin Delivery* acknowledged legislative, executive, and administrative action as triggers for Charter scrutiny.[125] So, after *Dolphin Delivery*, as before, the Court retained the power to review policy choices made by legislatures, whether federal or provincial, including policy choices relating to relations among private parties. *Dolphin Delivery* merely carved out an exception to Charter scrutiny for common-law rules as applied by judges. But the SCC already *had* the authority to review judges' applications of the common law, and the decision did not change that.

And—crucially—*Dolphin Delivery* quietly left open the possibility that the Charter *could* change the common law. As mentioned above, the SCC noted, almost in passing, that courts should "apply and develop the principles of the common law in a manner consistent with [constitutional] values."[126] This would come to be an important channel for what amounts to the horizontal application of constitutional rights. Indeed, Professor Hogg has suggested that the SCC's cases made the exclusion of the common law from Charter review relatively insignificant.[127]

2. *Assessment and Impact*

On its face, *Dolphin Delivery* charted a course somewhere between the ostensible vertical effect absolutism of the *Civil Rights Cases* and *Lüth*'s headlong embrace of horizontal effect. While rejecting the application of the Charter *rights* to private litigation under the common law, the Supreme Court of Canada left open the possibility that Charter *values* could shape the common law, including how it applied to relations among private parties. If this resembles the GFCC's recognition of the

---

123. *Id.* at 598–603. The Court would later qualify its exclusion of judicial acts from Charter scrutiny in R. v. Rahey, [1987] 1 S.C.R. 588, 594–95 (Can.).

124. *See* FLORIAN SAUVAGEAU ET AL., LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA 24–25 (2006).

125. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] S.C.R. 592, 598–99 (Can.).

126. *Id.* at 603.

127. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 845–47 (1992).

rights-as-values' radiation effect, it did not go quite so far. As the SCC later explained, interpreting the common law in a manner consistent with the Charter is not itself a constitutional imperative, but "simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[128] And, according to the Court, the Charter licensed only "incremental changes" to the common law[129]—although it must be noted that the SCC has not always honored this precept.[130]

In the three decades since *Dolphin Delivery* was handed down, the SCC has, in fact, shaped the common law to bring Charter values to bear in private-party legal relations. Indeed, comparing case outcomes over time suggests that the Court may have become more willing to do so, at least in some areas.[131] Relevant rights become part of a well-pleaded claim or defense, such that "[e]very properly advised litigant must now understand that even rules with a long history must accommodate the significance of Charter values."[132] Even so, rights have not proved as disruptive to the private law as in Germany, in part because the SCC has not licensed free-standing, Charter-based causes of action in private litigation under the auspices of the common law.

Paralleling, in some respects, their impact on the common law, Charter rights have also worked important changes in private-law legislation. The SCC has recognized anti-discrimination statutes as *quasi*-constitutional in character, and has consequently treated the legislatures that write them and the commissions that administer them as coventurers in the process of giving meaning to the Charter's equality guarantee. Still, the courts have at times stepped in, generally to close gaps in protection already provided legislatively. This has happened most conspicuously in recent years in the area of family law, where courts have prodded legislative changes to bring legal norms into alignment with social norms. The SCC found fault with private-law legislation's differential treatment:first, of married and unmarried opposite-sex couples[133] and then, of unmarried opposite-sex and same-sex couples.[134] The courts' incremental interventions ultimately triggered the history-making redefini-

128. Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 1169 (Can.).

129. *See* R. v. Salituro, [1991] 3 S.C.R. 654, 670 (Can.).

130. *See infra* text accompanying note 131.

131. *Compare* Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Dep't Store Union, [2002] 1 S.C.R. 156, 157 (Can.) (modifying the common-law rule against secondary picketing to bring it into alignment with Charter values), *with* Retail, Wholesale and Dep't Store Union v. Dolphin Delivery, [1986] 2 S.C.R. 573, 574 (Can.) (declining to alter the common-law rule against secondary picketing); *compare also* Grant v. Torstar Corp., [2009] 3 S.C.R. 640, 642 (Can.) (altering the common law of libel, in light of Charter values, to recognize a defense of responsible communication in the public interest), *with* Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 1169 (Can.) (declining to alter the common law of libel).

132. Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, *in* HUMAN RIGHTS IN PRIVATE LAW 43, 71 (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

133. Miron v. Trudel, [1995] 2 S.C.R. 418, 420 (Can.).

134. M. v. H., [1999] 2 S.C.R. 3, 6 (Can.).

tion of marriage by Canada's Parliament.[135] Even so, when it comes to defining the social meaning of equality rights, the SCC has preserved a space for legislative choice, as illustrated by a recent decision upholding Quebec's differential treatment of legal marriage and common law marriage.[136]

The Supreme Court of Canada's approach to the horizontal effect of Charter rights is of a piece with Canada's particular brand of constitutionalism more broadly. The Charter is an enumeration of judicially enforceable rights against the state, but it is also a reference point for legal decision-making in Canada more broadly. Instead of embracing super strong, American-style judicial supremacy, the SCC has characteristically afforded a measure of deference to the constitutional deliberations of the legislatures.[137] Especially when it comes to the horizontal effect of Charter rights, the Court has tended to operate with a fairly light touch, only occasionally inserting itself to alter common-law rules or private-law statutes.

IV. CONCLUSION

The state action doctrine is a distinctly American solution to a generic problem faced by all constitutional orders with judicially enforceable constitutional rights: the problem of managing those rights' impact on the legal relations of private parties. A historical and comparative perspective can showcase the range of approaches that courts take to the problem and, perhaps, illuminate why different courts make the choices they do, as well as the effects that these choices have on processes of constitutional governance over time. This Article has highlighted critical junctures in the development of horizontal effect doctrine in three jurisdictions, the United States, Germany, and Canada, and it sketched the context for the judicial decisions, as well as their downstream consequences.

In the United States, the political branches abandoned the Reconstruction project little more than a decade after the Civil War's end, but some of the promises made to the freedmen were still embodied in the 1875 Civil Rights Act. In devising the state action rule and invalidating that statute in the *Civil Rights Cases*, the Supreme Court foreclosed difficult, uncomfortable questions about what the government's promises to the freedmen really meant (and, on a deeper level, about what the nation owed the victims of chattel slavery). The Supreme Court ruled from a

135. *See* Civil Marriage Act, S.C. 2005, c. 33, s. 3.1 (Can.); Reference *re* Same-Sex Marriage [2004] 3 S.C.R. 698, 699 (Can.).

136. Quebec (Att'y Gen.) v. A., [2013] 1 S.C.R. 61, 69 (Can.).

137. *See, e.g.*, Canada (Att'y Gen.) v. JTI-MacDonald Corp., [2007] 2 S.C.R. 610, 631 (Can.) (upholding, against a freedom-of-expression challenge, broad restrictions on tobacco advertisements, largely in deference to the Parliament's demonstrated consideration of the interests at stake and tailoring of the law).

position of weakness—the justices would have been hard-pressed to give meaningful protection to civil rights with no support from the political branches, even if they had wanted to—but the state action rule became a pillar of an emerging model of judicial supremacy, in which the Court asserted tight control over the meaning of rights. Decades later, in significantly changed circumstances, the Court would license numerous *ad hoc* deviations from the state action requirement when necessary to give meaning to a set of preferred rights in the face of local recalcitrance.[138] But the "state action" framing spares the Court from having to address, in a more straightforward fashion, when and why rights have a horizontal effect.

The stories were very different in Germany and Canada. In the German Federal Constitutional Court's *Lüth* decision, the Court announced that constitutional rights, as values, radiated through the whole of law and had to be taken into account even in disputes between private parties.[139] The decision, and others that followed it, transformed German law such that all legal decision-making takes place in the shadow of the Basic Law—and the Constitutional Court. The Supreme Court of Canada's *Dolphin Delivery* decision exudes restraint—the Court stresses the limits on the applicability of Charter rights—but also notes that judges should develop the common law in a manner consistent with Charter values.[140] Under this banner, the SCC has brought Charter rights to bear in private litigation, though not so aggressively as Germany's Constitutional Court.

Horizontal effect doctrines play important, if complicated, roles in processes of constitutional development. The choices courts make in constructing these doctrines are shaped by an array of factors—political and normative context, jurisdictional structures, and case facts—and the doctrines then shape how individuals, courts, and other institutions interact prospectively. This Article has sought to show how a historical and comparative perspective can help us understand the choices courts make in this area and their consequences that unfold over time.

138. *See supra* text accompanying notes 52–62.
139. *See supra* Part III.A.2.
140. *See supra* Part III.B.2.