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“JUST WORDS”: COMMON LAW AND THE ENFORCEMENT OF STATE CONSTITUTIONAL SOCIAL AND ECONOMIC RIGHTS

Helen Hershkoff

ARTICLES

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INTRODUCTION

Since World War II, a number of countries abroad have adopted constitutions or amended these documents to include social and economic rights. These so-called positive rights embrace guarantees to goods and services such as public schooling, health care, and a clean environment.¹ Even where moored to the text of a constitution, social and economic rights remain controversial.² Among the criticisms, skeptics argue that constitutional provisions of this sort are ineffectual because courts cannot meaningfully enforce them against the government; positive rights are “just words” that can neither end inequality nor prevent poverty,³ and instead perversely hurt those they are intended to benefit.⁴ This Article examines the efficacy of positive

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1. See Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 89-91 (Sujit Choudhry ed., 2006) (discussing the features of a postwar constitutional paradigm that includes “respect for inherent human dignity”); see also Christopher Essert, *Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15*, 19 *CAN. J.L. & JURIS.* 407, 407 (2006) (defining positive rights as “those rights which provide entitlements to large-scale distributive arrangements often involving some degree of economic benefit; typical examples would be rights to things such as a basic level of income or medical care”).

2. See generally Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2001) (criticizing the concept of positive rights). For a defense of positive rights, see CÉCILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* (2000).

3. See JOEL BAKAN, *JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS* 139-40 (1997) (arguing, in the Canadian context, that social and economic rights “will not touch the real causes of poverty and other social ills”).

4. See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 148 (2004) (stating that “the impact of constitutionalization on the creation of meaningful, enduring protection of the lower socioeconomic echelons of capitalist society is often overrated”). Similar arguments pertain to welfare-protective legislation. See Ugo Mattei & Fernanda Nicola, *A “Social Dimension” in European Private Law? The Call for Setting a Progressive Agenda*, 41 *NEW ENG. L. REV.* 1, 35-36 (2006-2007) (noting that legal economists have criticized welfare legislation as

constitutional rights from a different perspective: it considers the relation between the social and economic rights that are set forth in a subnational constitution and the development of private law doctrines of contract, torts, and property. Specifically, the Article examines the positive rights clauses that are included in some state constitutions in the United States and asks whether they can and should influence the state's common law decision making.

Unlike the Federal Constitution, which consistently has been interpreted as excluding affirmative claims to government assistance,⁵ every state constitution in the United States—like many constitutions abroad⁶—contains some explicit commitment to positive rights.⁷ The New York Constitution, for example, provides that “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”⁸ Other state constitutional clauses contemplate provision of public schooling;⁹ others guarantee respect for individual “dignity”¹⁰ or the pursuit of

“necessarily hurting the people it was trying to help”).

5. See William E. Forbath, *The Long Life of Liberal America: Law and State-Building in the U.S. and England*, 24 LAW & HIST. REV. 179, 182-83 (2006) (“Public social provision has remained largely outside the dignifying aura of citizenship, and social citizenship still sounds oxymoronic to American ears.”). *But see* Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 AM. J. JURIS. 159, 173-74 (1997) (referring to the “pointlessness of a mere charter of negative liberties . . . [and] clarifying some of the formal properties of the Constitution as a means to positive benefits”).

6. See Michael J. Horan, *Constitutionalism and Legal Relationships Between Individuals*, 25 INT'L & COMP. L.Q. 848, 849-50 (1976) (observing that “[i]t is difficult to find a constitution drawn up in the post-World War II era which does not build upon the traditional personal freedoms ‘from’ government enjoyed by the citizen by claiming for him a host of what are usually denominated economic and social rights”). *But see* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 449 (2008) (stating that “even among continental western European countries, the extent to which constitutions contain social and economic rights can easily be exaggerated”).

7. *E.g.*, HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR 3-4 & nn. 29-33 (1997) (discussing state constitutional welfare rights); *see* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (“Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.”). Even some conventionally styled state constitutional negative rights embrace socio-economic claims. *See* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1042 (2003) (discussing state constitutional bans on special privileges).

8. N.Y. CONST. art. XVII, § 1.

9. *See* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1641 n.12 & 1661-68 nn.103-27 (1989) (discussing state constitution education clauses).

10. *See, e.g.*, Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana “Dignity” Clause with Possible Applications*, 61 MONT. L. REV. 301 (2000) (discussing the Montana dignity clause). *But cf.* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736 (2008) (observing that “the United States Constitution does not have a dignity clause”).

“happiness,”¹¹ both of which may include a substantive component;¹² still others recognize a worker’s right to unionize¹³ or guarantee a clean environment.¹⁴ State courts have treated some social and economic provisions as justiciable claims against the government,¹⁵ but others only as aspirational statements that cannot be judicially enforced.¹⁶

From the perspective of federal constitutional doctrine, one might assume that state common law exists in an orbit quite apart from a state’s constitutional law, especially those provisions that relate to socio-economic concerns. After all, for more than one hundred years, the U.S. Supreme Court has limited the Federal Constitution to state action, with common law decision making located outside the scope of constitutional regulation.¹⁷ Moreover, American constitutionalism consistently is seen as excluding social and economic rights. Morton J. Horwitz, pointing to this omission from the Federal Constitution, posits that an indifference to material well-being “extends all the way from top to bottom, from constitutional to tort law, as a fundamental expression . . . of rugged individualism and an antipathy to the state.”¹⁸

State courts are not required to follow the federal state action doctrine: they may choose to extend state constitutional rights even to the conduct of nongovernmental actors. Indeed, not all state constitutions include a state action requirement, and in some states—admittedly, only a few—state courts permit an individual to enforce public rights directly against another private actor.¹⁹

11. See, e.g., N.J. CONST. art. I, ¶ 1 (providing for the right “of pursuing and obtaining safety and happiness”).

12. See Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133 (2003); Bert Lockwood, R. Collins Owens, III & Grace A. Severyn, *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL RTS. J. 1 (1993).

13. See, e.g., FLA. CONST. art. I, § 6. Some state constitutions contain right-to-work clauses, see, e.g., ARK. CONST. amend. 34.

14. See, e.g., Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 160 (2003) (stating that “more than a third of all state constitutions now contain environmental policy provisions”).

15. See, e.g., Elizabeth Reilly, *Education and the Constitution: Shaping Each Other & the Next Century*, 34 AKRON L. REV. 1, 6 & n.6 (2000) (discussing representative state constitutional cases enforcing a right to education).

16. See Hershkoff, *supra* note 7, at 1135-36 (discussing arguments that particular state constitutional positive rights provisions are aspirational and so nonjusticiable).

17. The exceptions, of course, are *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *New Times Co. v. Sullivan*, 376 U.S. 254 (1964).

18. Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 106 (2004).

19. See, e.g., *Melvin v. Reid*, 297 P. 91, 93 (Cal. 1931) (enforcing the California “right to happiness” clause in a dispute involving only nongovernmental actors). See generally Martin B. Margulies, Sheff, Moore, and Westfarms: *A Revised Blueprint*, 17 QUINNIPIAC L. REV. 177 (1997) (discussing context specific state action requirements under the Connecticut Constitution).

State constitutions do not, however, explicitly subject common law decision making to state constitutional regulation, and so questions about the application of state constitutional norms in the horizontal position remain open.²⁰ Provisions such as Section 39(2) of the South Africa Constitution, for example, which requires that “[w]hen developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,” are simply absent from state constitutions.²¹

Treating common law as detached from constitutional law may appear to be natural and uncontroversial,²² the separation has deep roots and marks the divide between the public and the private that is critical to liberal theories of constitutionalism.²³ From the federal perspective, the strict compartmentalization reflects the institutional demands of federalism, which are absent at the

20. “Horizontal” refers to the application of constitutional provisions between nongovernmental actors; “vertical” refers to their application between the government and an individual. See generally Johan van der Walt, *Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism*, 2003 J.S. AFR. L. 311, 313 (“Horizontal application is not so much concerned with the simple question of whether fundamental rights apply to private legal subjects. The horizontal application of fundamental rights is . . . concerned with the question of whether a bearer of legal subjectivity is involved in the privatisation of the political process or the public sphere.”).

21. S. AFR. CONST. 1996, § 39(2). Section 8(2) of the South Africa Bill of Rights further provides: “A provision of the Bill of Rights binds a natural or a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” *Id.* § 8. See Jeremy Sarkin, *The Common Law in South Africa: Pro Apartheid or Pro Democracy?*, 23 HASTINGS INT’L & COMP. L. REV. 1, 18 (1999) (explaining that Section 8(2) “will effectively ensure that the common law is developed in line with the Bill of Rights”); see also Christopher J. Roederer, *Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa’s Bill of Rights*, 26 ARIZ. J. INT’L & COMP. L. 427, 472 (2009) (discussing horizontal effect under Section 39(2)). For a discussion of other national constitutions that address common or private law development, see Renáta Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?—An Introduction*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 1, 10-11 & nn.30-33 (András Sajó & Renáta Uitz eds., 2005) (discussing the United Kingdom and Greece).

22. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 11 (1992) (discussing the emergence of the public/private distinction and legal recognition of a “‘natural’ realm of noncoercive and nonpolitical transactions free from the dangers of state interference and redistribution”). But see Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673, 1683 (1993) (“The process of drawing the line between private and public is neither natural nor automatic. The line is drawn differently in different times and different places, and law . . . is one of the major mechanisms by which it is drawn.”).

23. The literature on the public/private distinction is voluminous. See, e.g., Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 L. & SOC’Y REV. 801, 801 (1988) (explaining that “[t]he dichotomy appears necessary for individual autonomy, the maintenance of social institutions, and the conduct of legal action”). For a critical analysis, see Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

state level,²⁴ as well as a desire to protect an autonomous private realm from the intrusion of government regulation.²⁵ Less obviously, the separation of constitutional and common law reflects a particular conception of law that limits the content of a law to its coercive effect: if a nongovernmental actor cannot sue to enforce the Federal Constitution against another nongovernmental actor, it is assumed that the Constitution exerts no influence in disputes between these private parties. The separation of common law from state constitutional positive rights would seem to make special sense: after all, only the government can undertake the financing and allocation of such services as public schooling and welfare support, so, by definition, these constitutional provisions ought to be treated as irrelevant to private disputes—they are “just words” and of no practical significance.²⁶

This Article reconsiders the “just words” thesis and asks whether state constitutional social and economic rights can and should exert influence on a state court’s common law decision making. The basic question is whether positive constitutional rights, even those of an aspirational nature, may serve as legal material from which state courts can construct common law rules of decision. I argue that even if a constitutional provision does not command or control a private litigant’s behavior *ex ante*, and so cannot be enforced directly by one private litigant against another, it nevertheless may serve as grounds for a judge to reach one result rather than another in a case involving nongovernmental actors.²⁷ Moreover, because cases involving contracts, torts, and property typically implicate social and economic concerns, a court’s giving weight to a state constitutional positive right could reorient common law doctrine in ways that appear more egalitarian or even redistributive from the federal constitutional

24. Hershkoff, *supra* note 7, at 1166-69 (discussing the absence of federalism constraints on state court decision making).

25. See Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 45, 51 (Peter Benson ed., 2001) (positing the superiority of private ordering relative to “standardized legal norms or expansive judicial discretion” as the basis for developing individual life plans); see also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1, 16 (1992) (asserting that “the conceded fact that what is private is determined by public norms and laws does not invalidate the presumption of noninterference with private arrangements”).

26. See Halton Cheadle & Dennis Davis, *The Application of the 1996 Constitution in the Private Sphere*, 13 *S. AFR. J. ON HUM. RTS.* 44, 59-60 (1997) (asserting that socio-economic rights under the South Africa Constitution “are not suitable for horizontal application”). But see Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 *CAN. J.L. AND JURIS.* 31, 33 (2004) (discussing the privatization of government functions).

27. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2032 (1996) (“With or without enforcement activity, . . . laws can help reconstruct norms and the social meaning of action”); see also Anton Fagan, *Determining the Stakes: Binding and Non-Binding Bills of Rights*, in *HUMAN RIGHTS IN PRIVATE LAW* 73, 75 (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (explaining that in South Africa “the development of . . . private common law will be constitutionally constrained” whether or not the Bill of Rights is binding or non-binding).

perspective. The effect of the constitutional norm might be expressive, signaling approval or disapproval of particular forms of private behavior²⁸ (for example, an employer's right summarily to fire an employee without the giving of reasons); it might be constitutive, informing the shape and content of the social relation at issue²⁹ (for example, that of a private employer and an uninvited guest to the workplace); or it might entail both forms of effect (for example, the protection of a reliance interest in an employment or tenancy relation).

In previous writing, I have considered the relation between constitutional norms and private law development in two separate contexts. First, drawing from a five-nation empirical study, I examined the effect of national constitutional rights to health and to education on the development of private law doctrines in five developing countries: Brazil, India, Indonesia, Nigeria, and South Africa.³⁰ Here, I found evidence of the indirect effect of constitutional positive rights in contract, tort, and property cases involving only nongovernmental actors: foreign constitutional courts in the nations studied looked to social and economic rights, as well as to conventional "first-generation" rights, as interpretive authority in their construction and application of private law doctrines. Thus, for example, the South Africa Constitutional Court interpreted the scope of a property owner's right to exclude in the light of the national constitution's commitment to the progressive realization of a right to housing.³¹ The India Supreme Court similarly interpreted contract terms, involving insurance and school tuition, in the light of the national constitution's directive principle of protecting socio-economic justice.³² In a second project, I turned to state common law in the United States, and examined whether I could find evidence of "first-generation" state constitutional rights, such as those to due process or to free speech, affecting the scope or content of contract, tort, and property doctrines.³³ Again, in some states, state constitutional provisions

28. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done").

29. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103-16 (1984) (discussing the constitutive effect of law on social relations).

30. See Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 268, 286-97 (Varun Gauri & Daniel M. Brinks eds., 2008) (considering the interpretive effect of national constitutional rights to health care and to education on private law decision making in Brazil, India, Indonesia, Nigeria, and South Africa).

31. See, e.g., *President of the Republic of S. Africa & Another v Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2005/5.html>.

32. See Hershkoff, *supra* note 30, at 290-93 (discussing decisions).

33. See Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in *DUAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS: NEW FRONTIERS OF STATE CONSTITUTIONAL LAW* (James Gardner & Jim Rossi eds., forthcoming 2010) (on file with author) (examining the radiating effects of state constitutional rights to due process,

served as interpretive material from which courts reshaped and reoriented common law doctrines. For example, those states that recognize an implied covenant of good faith in some cases used that common law doctrine as a pathway through which to import due process norms into contractual employment terms that otherwise would be governed by the at-will doctrine.³⁴ The current Article builds on these prior two studies and examines the existing and potential influence of state constitutional social and economic rights on the development of state common law.

The topic is important for a number of related reasons. First, identifying the indirect influence of socio-economic rights on private law decision making may have the benefit of descriptive power. State common law has long served as a modality for the enforcement of public norms: whether through the public law tort or the doctrine of reasonableness, state courts traditionally import constitutional values into areas of private life that are considered to be immune from constitutional regulation under the federal state action doctrine.³⁵ This form of common law constitutionalism—not to be conflated with the federal practice of a similar name³⁶—works through private law pathways to interpret and extend public norms to private activity. Whether a similar practice exists of state courts’ indirectly enforcing social and economic rights through common law portals raises a significant but unanswered question.

Second, the analysis may illuminate convergences between American constitutional practice and interpretive practices abroad. Discussions of the horizontal effect of constitutional rights typically draw from foreign sources and assume that U.S. law, with the possible exceptions of *Shelley v. Kraemer* and *New York Times v. Sullivan*,³⁷ is impervious to the practice.³⁸ Absent from the discussion is any mention of state court practice—what Judith S. Kaye, former Chief Judge of the New York Court of Appeals, has called “a common

free speech, and related “negative” guarantees on common law doctrines involving contracts, torts, and property).

34. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 885 (Mich. 1980).

35. See Hershkoff, *supra* note 7, at 1164-65 (discussing “common law alternatives” to state constitutional rulings). For an example of this “middle ground” in the area of trusts, see Charles E. Rounds, Jr., *The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism*, 43 U. RICH. L. REV. 1185, 1211 (2009) (urging an analysis of common law doctrine that goes beyond the public/private distinction).

36. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (discussing “a constitutional common law subject to amendment, modification, or even reversal by Congress”); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (discussing “the common law approach to constitutional interpretation”).

37. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948); see *infra* note 147.

38. See, e.g., Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Law*, 1 INT’L J. CONST. L. 79, 81 (2003) (stating that “standard U.S. constitutional doctrine is that constitutional provisions do *not* have horizontal effect”).

law infused with constitutional values” in which “constitutional values—especially the values so meticulously set out in our lengthy state charters— . . . enrich the common law.”³⁹ This state court interpretive approach antedates and may be understood as a variant of the foreign practice of indirect constitutional effect. Recognizing its existence raises questions about the presumed exceptionalism of American constitutional doctrine.⁴⁰ Just as analyzing foreign constitutions may influence our understanding of American constitutions, so analyzing state constitutions may influence our understanding of both the Federal Constitution and constitutions abroad.

Third, understanding the pathways through which state constitutional positive norms may influence common law doctrine offers new insight into the relation between law and social change, an area that has generated significant disagreement.⁴¹ Law skeptics often disparage constitutional litigation as a weak mechanism for progressive change.⁴² For those interested in using law to improve conditions for the poor and marginalized, the general conclusions are grim: constitutional rights do little to encourage distributive justice or to uproot entrenched poverty, and the common law is seen as likewise ineffective.⁴³ This

39. Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 738, 743 (1992).

40. See Gardbaum, *supra* note 6, at 391 (questioning the notion of American constitutional exceptionalism).

41. See Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 596 (1998) (“Scholars disagree about the extent to which courts can cause social change.”); see also RICHARD P. APPELBAUM, *THEORIES OF SOCIAL CHANGE* 127-37 (1971) (distinguishing among evolutionary, equilibrium, and conflict theories of social change).

42. The canonical text for this proposition is GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Rosenberg discusses efforts to enforce equal protection and due process, and not enumerated social and economic rights. For a summary of views relating to the efficacy of public interest litigation, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 607-09 (2009) (summarizing three negative critiques of adjudication as an instrument of change). The debate likewise plays out on the international stage in discussions about law and development. See generally Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008).

43. On the effect of positive constitutional rights, see, for example, HIRSCHL, *supra* note 4, at 13 (asserting that positive constitutional rights paradoxically do not achieve progressive socio-economic reform); Matthew Craven, *Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights*, in *THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 27, 35 (John Squires, Malcolm Langford & Bret Thiele eds., 2005) (expressing concern that constitutional litigation “naturalise[s]” conditions of deprivation). On the effect of common law, see, for example, HENRY MATHER, *CONTRACT LAW AND MORALITY* 26 (1999) (stating that contract law is “a relatively ineffective instrument for achieving greater economic equality in our capitalist market society”); Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718 (1982) (“The central theme of this Article is that the intellectual and institutional constraints on common law adjudication require one to be very cautious in attributing major social and economic consequences to common law rules.”).

Article questions such pessimism. Law does not exclusively determine the shape of private relationships, but neither is it irrelevant. Economic and social relations are created and sustained by common law rules, and common law courts remain open to revise those rules.⁴⁴ I argue that state constitutional socio-economic provisions offer a source of interpretive material from which state judges may reconsider and reform existing doctrine on a case-by-case basis.

Fourth, a better appreciation of the interpretive effects of state constitutional social and economic rights may hold prescriptive possibility as a way to reorient federal constitutional doctrine toward concerns of material well being. It is widely recognized that the Federal Constitution, conceived as a “charter of negative rather than positive liberties,” takes as its starting point common law entitlements which it protects against state action.⁴⁵ A common law baseline informs federal constitutional doctrine, determining such issues as whether something is property for due process protection,⁴⁶ whether a medical decision falls within the protected zone of autonomy,⁴⁷ or whether intimate activity deserves protection as expression or on the basis of privacy.⁴⁸

44. See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 8-9 (2002) (discussing the “conventional nature of property”); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829, 834 (1983) (“The modern law’s response [to classical contract doctrine] is both a frank acceptance of the courts’ role in applying social values in some areas and a retention of the core of contract as founded on private agreement.”).

45. See Hershkoff, *supra* note 7, at 1133 (citing *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983)); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 365-66 & n.41 (1998) (stating that, for the *Lochner* Court, “the market operated as a prepolitical baseline establishing basic entitlements”); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 *U. PA. L. REV.* 1, 46-47 (1992) (observing that “[i]n North America, judges have tended to take traditional common law private entitlements as the essential components of a largely unarticulated normative baseline” for constitutional decision making). Compare Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873, 874 (1987) (referring to a preconstitutional baseline of “[m]arket ordering under the common law”), with David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 *TEX. L. REV.* 1 (2003) (questioning the historical accuracy of Sunstein’s account).

46. As the Court explained in *Board of Regents v. Roth*, “Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law” 408 U.S. 564, 577 (1972).

47. See Siegel, *supra* note 10, at 1755 (explaining that “[t]ort doctrines of informed consent protect patient autonomy” and constrain government power to regulate communications involving reproductive choice).

48. See, e.g., Mary Anne Case, *Community Standards and the Margin of Appreciation*, 25 *HUM. RTS. L.J.* 10, 14 (2004) (discussing the effect of state practice on the Court’s view of the Due Process Clause in *Lawrence v. Texas*, 539 U.S. 558 (2003), concerning private consensual homosexual sex); Martin Guggenheim, *Rediscovering Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 153 (2009) (discussing the common law right to third party visitation and its effect on family relations).

However, common law rules can evolve and change, and as they do, they potentially may reshape federal constitutional doctrine.⁴⁹ A prime example is the common law's treatment of common callings and the contribution of that approach to federal anti-discrimination doctrine.⁵⁰ Over time, the indirect effect of social and economic rights on common law development may create new understandings that "presage" federal constitutional rights.⁵¹ As Bruce Ackerman has explained:

What counts for the common lawyer is not some fancy theory but the patterns of concrete decision built up by courts and other practical decisionmakers over decades, generations, centuries. Slowly, often in a half-conscious and circuitous fashion, these decisions build upon one another to yield the constitutional rights that modern Americans take for granted, just as they slowly generate precedents that the President and Congress may use to claim new grants of constitutional authority.⁵²

Finally, the focus of the Article holds interest in considering expressivism as a theory of law. There are different forms of expressivist theory,⁵³ and a central debate concerns whether expression matters because of its consequences or in and of itself.⁵⁴ A large interdisciplinary literature on norms

49. See John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579, 595 (2009) (discussing barriers to evolution of property rules).

50. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

51. Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989); see also Samuel C. Kaplan, "Grab Bag of Principles" or Principled Grab Bag?: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 469 (1998) (stating that tradition, as reflected in common law practice, "can affect the shape and scope of constitutional rights"); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 720 (2005) (providing examples of the federal constitutionalization of state common law and calling the process a "recursive doctrinal loop"); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 503 (1999) (predicting that "[a]s state common law and constitutional law evolved toward the creation of new rights, federal law would follow"); Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U.L. REV. 165, 176 (2009) (discussing the relation between state common law developments and federal constitutional change). On the significance of time as a variable in processes of change, see ANDREW ABBOT, *TIME MATTERS: ON THEORY AND METHOD* (2001).

52. ACKERMAN, *supra* note 45, at 17.

53. See Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577, 1577 (2000) (stating that there are various forms of "expressive theories of law" reflecting different definitions of "expression"). A leading account appears in Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1526 (2000).

54. See Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 673-74 (2001) (discussing the "debate . . . of whether the expressive content of state action matters

further emphasizes how government can encourage or impede nongovernmental efforts to secure collective aims even if a law is not subject to direct enforcement mechanisms.⁵⁵ Commentators have recognized that the expressivist approach holds a family resemblance to the judicial practice of purposive legal interpretation,⁵⁶ and on this view, the Article extends expressivist theory to the discursive behavior of common law judges.⁵⁷ Those who treat positive constitutional rights as “just words”—no more than “a constitutional sermon”⁵⁸—ignore the expressive potential of these public norms on common law development.

The Article is positive and normative, and proceeds as follows. Part I frames the discussion by identifying the social and economic provisions that appear in the constitutions of some states. Part II, drawing from foreign judicial practice, federalism, and an expressive theory of law, justifies having state courts accord indirect effect to state constitutional positive rights in their common law decision making. Part III illustrates the approach in current practice using doctrinal examples from contracts, torts, and property. I do not claim to be making a causal argument, but the exercise is more than that of discursive redescription. By highlighting the potential of state constitutional

because of its effects . . . or whether it matters irrespective of its effects”).

55. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1743 (1996) (stating that the literature on law and social norms offers insight into “the ways in which the state can support and hinder attempts by people to cooperate for the purpose of producing collective goods”).

56. Anderson & Pildes, *supra* note 53, at 1520 (“The understandings and practices that underwrite conventional purposive interpretation are sufficient to support expressive approaches to law.”).

57. The literature has not ignored the relation of norms to common law styles of decision making. Eric A. Posner writes:

Norms . . . resemble common law doctrines more closely than they resemble statutes. When judges make decisions, they do not strictly apply a preexisting doctrine to the facts of the case; they are guided partly by their sense of justice. If judges or norm-enforcers simply applied preexisting rules, then the rules could not evolve: there must be some element of discretion that allows the decision-maker to revise the rules in light of new situations. But norms are not identical to common law doctrines. Judges are more self-conscious about making their decisions consistent with prior decisions, whereas norm-producers are more likely to be swayed by their sense of justice.

Posner, *supra* note 55, at 1699.

58. The phrase “constitutional sermon” appears in the legislative history to Article I, section 20 of the Illinois Constitution, adopted in 1970: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religion, racial, ethnic, national or regional affiliations are condemned.” ILL. CONST. art. I, § 20. The legislative history further explains: “Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens.” *Id.* art I, § 20 cmt. See Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 878-86 (2002) (discussing the Illinois dignity clause) (citing ILL. CONST. art. I, § 20, & cmt.).

provisions to inform common law decision making, the practice of indirect constitutional effect offers a public law justification for doctrinal change that differs from and is more robust than mere policy analysis. Part IV addresses possible objections to the proposal, concerning the dilution of constitutional rights, democracy, legal indeterminacy, and autonomy. Some of these objections go to the general practice of according indirect effect to constitutional norms in common law decision making; other objections go to the specific practice of according indirect effect to social and economic rights. I then briefly conclude.

I. SOCIAL AND ECONOMIC PROVISIONS IN STATE CONSTITUTIONS

This Part locates the discussion of indirect interpretive effect within the framework of state constitutional social and economic rights. These rights range from the relatively familiar guarantee of free public schooling to more esoteric and recent claims such as the right to a safe environment. The literature on positive rights tends to focus on whether such provisions are individual rights that may be judicially enforced against an indifferent or recalcitrant legislative branch, or whether they are only aspirational statements. Socio-economic rights certainly promote individual interests by securing rights to such things as workplace security or to an adequate education. But they also play a structural role in securing a particular kind of polity and in fostering collective rights of citizenship within a community. In addition, given the plenary theory of state sovereignty, socio-economic rights provide a source of legislative empowerment, in the sense of authorizing or even requiring elected officials to enact particular social policies. The history of some social and economic state constitutional rights reflects an additional and prophylactic purpose: the desire to protect legislatively authorized reforms against the threat of judicial overruling. In these contexts, amending a state constitution to include social and economic rights was designed to impose a constraint on state court decision making by altering what was assumed to be a pre-existing common law baseline that impeded or interfered with legislative activity. The purpose of the amendment was to reorient common law doctrine toward the values and policies instantiated in the particular positive right.

A. *American Constitutionalism and State Social and Economic Rights*

Commentators generally do not associate American constitutionalism with positive rights.⁵⁹ Social and economic rights such as those to education or to

59. See Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 *FORDHAM URB. L.J.* 1239, 1243 (2007) (observing that even liberal constitutional theorists omit from the “constitution in exile” any mention of social and economic rights); see also Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 *FORDHAM L. REV.* 1893, 1893 (2001) (calling the idea of federal constitutional welfare rights “[c]ontentious”).

health care do not appear in the Federal Constitution, and the Supreme Court has refused to locate in the text's penumbra any "affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁶⁰ Limiting the constitution to "negative rights" confines federal courts to the important goal of protecting the individual against government power, but leaves the individual relatively unprotected from private domination in social and economic relationships.

By now it is well acknowledged that contemporary constitutions, at least those post-dating World War II, reflect greater attention to the "social dimension" of rights, in the sense of affording protection against nongovernment power⁶¹—what Ulrich Scheuner has referred to as "the menace to individual liberty [that] comes . . . from the side of social power assembled in the hands of mighty economic units and of professional or social organizations which try to prescribe a certain behaviour and to limit individual independence."⁶² Socio-economic rights thus are justified as serving as an important bulwark against power, whatever its source, and their absence from the Federal Constitution often is attributed simply to the document's eighteenth-century origins.⁶³

By contrast to the Federal Constitution, every state constitution in the U.S. includes some textual commitment to a social or economic right; in addition, more than a dozen state constitutions in their eighteenth-century versions included provisions concerning important public goods such as free public

60. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

61. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525-26 (1992) (referring to "the attitudes of the post-World War II European constitution-makers who supplemented traditional negative liberties with certain affirmative social and economic rights or obligations").

62. Ulrich Scheuner, *Fundamental Rights and the Protection of the Individual Against Social Groups and Powers in the Constitutional System of the Federal Republic of Germany*, in RENÉ CASSIN, *AMICORUM DISCIPULORUMQUE LIBER III JURA HOMINIS AC CIVIS: PROTECTION DES DROITS DE L'HOMME DANS LES RAPPORTS ENTRE PERSONNES PRIVÉES* 250, 255-56 (1971). Gavin W. Anderson explains:

[A] number of developments have moved concerns about private power away from the constitutional margins: first, the deepening implication of the private sphere in the performance of traditional state functions, blurring the state/non-state boundary; second, the unraveling of the Keynesian consensus and the realisation of the material, not just procedural, threats to constitutionalism's goals of protecting freedom and autonomy; and the emergence of a more pragmatic attitude towards constitutionalism on the left, given the failure of legislative politics to withstand the neo-liberal onslaught.

Anderson, *supra* note 26, at 33.

63. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 90, 95 (Michael Ignatieff ed., 2005); see also Dieter Grimm, *The Protective Function of the State*, in *EUROPEAN AND US CONSTITUTIONALISM* 137, 138-43 (Georg Nolte ed., 2005) (discussing the "historical roots" of the Federal Constitution's lack of a "protective" function, but also acknowledging other factors).

schooling or public hospitals for the indigent.⁶⁴ Some state constitutions currently embrace guarantees to decent work and opportunities for livelihood that commentators associate with social citizenship,⁶⁵ some states go even further and authorize or guarantee the provision of a safety net during times of financial distress, emergency housing, and protection of the environment as a way to vouchsafe a communal future.⁶⁶

Among the earliest social and economic clauses contained in state constitutions relate to the provision of free public schooling.⁶⁷ The 1776 Pennsylvania Constitution, for example, mandated that the legislature establish and fund common schools for all of the children in the state: “A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices.”⁶⁸ The Northwest Ordinance of 1785 required the setting aside of land for public schools in each

64. See Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 813 (2002); see also Horst Dippel, *Human Rights in America, 1776-1849: Rediscovering the States' Contribution*, 67 ALB. L. REV. 713, 736 (2004) (reporting “that by 1849, almost half of all economic stipulations in the American rights catalogue (seven out of seventeen) had originated in the nineteenth century”).

65. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1-2 (1999) (associating social citizenship with guarantees of decent work and an opportunity for a livelihood); Frank W. Munger, *Social Citizen as “Guest Worker”: A Comment on Identities of Immigrants and the Working Poor*, 49 N.Y. L. SCH. L. REV. 665, 675 (2004-2005) (“Social citizenship entitles members of our society to a package of legal benefits and responsibilities, from fair labor standards to free public education.”).

66. See generally Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 7, 25 (G. Alan Tarr & Robert F. Williams eds., 2006) (observing that state constitutions deal with “a range of issues, such as health care, shelter, and subsistence income”).

67. See John C. Eastman, *When Did Education Become a Civil Right: An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1, 3 (1998) (stating that twelve of the twenty-five state constitutions adopted or revised between 1776 and 1800 contained education clauses).

68. PA. CONST. of 1776, § 44. The 1780 Massachusetts Constitution similarly included an education clause, drafted by John Adams, that imposed a duty on the legislature to establish policies promoting learning and culture: “Wisdom and knowledge, as well as virtue . . . being necessary for the preservation of . . . rights and liberties . . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth to cherish the interests of literature and the sciences.” MASS. CONST. of 1780, chap. V, § 2. Historians see the Massachusetts and Pennsylvania constitutions from this period as reflecting two alternative conceptions of governance in the early republic. As Donald Lutz has written: “The 1780 Massachusetts Constitution was the most important one written between 1776 and 1789 because it embodied the Whig theory of republican government, which came to dominate state level politics; the 1776 Pennsylvania Constitution was the second most important because it embodied the strongest alternative.” DONALD LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 129 (1980); see also ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 42-62 (2009) (discussing this history).

town within the Northwest Territory,⁶⁹ in addition, provision for free common schools in a state constitution was mandated for the most recent sixteen states as a condition of their admission to the union,⁷⁰ and state constitution education clauses increasingly have clarified the legislature's duty to establish and fund public schools.⁷¹

Almost two dozen state constitutions likewise currently authorize provision of some kind of financial assistance to those who are in economic need. One commentator writes, "Twenty three state constitutions recognize that someone or something in the individual states will provide for those in need. No two constitutional provisions are exactly the same. The duty of providing welfare—or mere recognition of the need for it—is unique in each state."⁷² These clauses reflect diverse origins. Pennsylvania, in 1790, amended its constitution to include protection of debtors, and newly admitted Western states later adopted similar provisions.⁷³ State constitutions providing financial

69. See Carl E. Kaestle, *The Development of Common School Systems in the States of the Old Northwest*, in ". . . SCHOOLS AND THE MEANS OF EDUCATION SHALL FOREVER BE ENCOURAGED": A HISTORY OF EDUCATION IN THE OLD NORTHWEST, 1787-1880, at 32 (Paul H. Mattingly & Edward W. Stevens, Jr. eds., 1987)[hereinafter SCHOOLS AND THE MEANS OF EDUCATION] ("The 1785 ordinance required that one section of land in each town in the territory be set aside for the support of schools, and the 1787 follow-up ordinance stated that 'the means of education shall forever be encouraged.'").

70. See Paul L. Trachtenberg, *Education, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY*, *supra* note 66, at 272 n.2 (citing MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY 34 (2001)); see also David Tyack, *Forming Schools, Forming States: Education in a Nation of Republics*, in SCHOOLS AND THE MEANS OF EDUCATION, *supra* note 69, at 25 ("After the Civil War, Republicans in Congress specified in the enabling acts for the admission of Montana, North Dakota, South Dakota, and Washington that the new states must establish and maintain 'systems of public schools, which shall be open to all the children of the said states and free from sectarian control.'").

71. Tyack, *supra* note 70, at 29 n.32 (discussing the shift from "may" to "shall" in state constitutional language pertinent to education).

72. William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 551-52 & app. A (1998); see also Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 595 (1989) (reporting that "the constitutions of 22 states include in some manner a specific provision relating to the care of the needy or the protection of the health of the people"). The Mississippi Constitution, which adopted a poor-relief provision in the post-Reconstruction period, continues to rely on Elizabethan-era notions of the poor house in its conception of indigent relief:

The board of supervisors shall have power to provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society; and the legislature shall enact suitable laws to prevent abuses by those having the care of such persons.

MISS. CONST. of 1890, art. XIV, § 262. For an account of post-Civil War southern state constitutions, see Richard L. Hume, *Carpetbaggers in the Reconstruction South: A Group Portrait of Outside Whites in the "Black and Tan" Constitutional Conventions*, 64 J. AM. HIST. 313 (1977).

73. PA. CONST. of 1790, art. IX, 16. Dippel reports that the Georgia Constitution of 1798, the Pennsylvania Constitution of 1838, the Rhode Island Constitution of 1842, and the New Jersey Constitution of 1844 likewise included protection for debtors, similar to

assistance to the poor began to appear in Reconstruction constitutions in 1868, and other states adopted welfare assistance clauses during the Great Depression.⁷⁴ Moreover, over the years, state constitutions have been amended to meet different forms of socio-economic distress. The Ohio Constitution of 1802, for example, made explicit that even a pauper's children could attend the public schools;⁷⁵ the state amended its constitution in 1990 to authorize the legislature to provide subsidized housing for low-income individuals.⁷⁶

Since the nineteenth century, some state constitutions have been amended to include clauses that regulate private workplaces. The Declaration of Rights of the Wyoming Constitution was amended in 1889 to provide: "The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state."⁷⁷ More typical are constitutional provisions that treat specific aspects of the workplace relation, such as workplace safety, compensation for occupational injuries, regulation of children's labor, restrictions on the length of the working day, minimum wage levels, the right to join a union, and the right not to join a union.⁷⁸ In 1876, Colorado amended its state constitution to include child labor restrictions, maximum-hours protections, and employer liability for workplace injuries.⁷⁹ State constitutions in the late nineteenth century also were amended to protect a worker's right to unionize, followed by amendments in the twentieth century protecting the right to bargain collectively.⁸⁰ Later in the twentieth century, some state constitutions were

provisions in "seventeen constitutions in the trans-Appalachian West." See Dippel, *supra* note 64, at nn.148 & 149.

74. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 211 (2006) ("Several states, beginning with Alabama, Arkansas, North Carolina, and South Carolina in 1868, have enacted provisions committing state or local governments to address the needs of the poor, disabled, or elderly."). The Alabama Constitution of 1868 provided: "It shall be the duty of the General Assembly to make adequate provisions in each county for the maintenance of the poor of this State." ALA. CONST. of 1867, art. IV, § 34.

75. See Barbara A. Terzian, *Ohio's Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357, 369-70 (2004) (explaining that under the 1802 Constitution, if a white man "fell on hard times, he could not be imprisoned for his debts once he offered his property to his creditors, and the schools remained open to his children, no matter how poor he became" (citing OHIO CONST. of 1802, art. VIII, §§ 15, 25)).

76. OHIO CONST. art. VIII, § 16 ("To enhance the availability of adequate housing in the state and to improve the economic and general well-being of the people of the state, it is determined to be in the public interest and a proper public purpose for the state . . . to provide . . . housing . . .").

77. WYO. CONST., art. I, § 22.

78. See DINAN, *supra* note 74, at 188-204 (summarizing state constitutional provisions relating to workers' rights). An occupational safety clause first appeared in the Illinois Constitution of 1870. See ILL. CONST. of 1870, art. IV, § 29 (creating a legislative duty to enact and enforce laws to protect miners).

79. COLO. CONST. of 1876, art. XV, § 15; *id.* art. XVI, § 2.

80. See DINAN, *supra* note 74, at 195 (explaining that state constitutional amendments "took the form . . . of efforts to prohibit employers from blacklisting union members or

amended to protect a worker from being denied or terminated from employment for refusal to join a union.⁸¹

A number of state constitutions include “dignity” and “safety and happiness” clauses.⁸² The New Hampshire happiness clause dates to the eighteenth century: “All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.”⁸³ The Puerto Rico and Montana constitutions, amended in the twentieth century, incorporate a concept of dignity that draws from international and foreign law.⁸⁴ The Louisiana “individual dignity” clause, which functions as that state’s equal protection provision, traces to different sources.⁸⁵ A happiness and safety clause appears in the constitutions of Ohio, New Jersey, and about a dozen other states,⁸⁶ and some courts and commentators have treated these provisions as support for social and economic claims.⁸⁷ Finally, some state constitutions, even those from the eighteenth

preventing workers from joining unions (yellow-dog contracts”). The New York Constitution, for example, adopted in 1938, provides: “Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” N.Y. CONST. of 1894, art. 1, § 17 (1938).

81. The Florida Constitution was amended in 1944 to include a “right-to-work” provision. See DINAN, *supra* note 74, at 204.

82. See, e.g., IOWA CONST. art. 1, § 1 (“All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”). See Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 63, at 85, 99-107 (noting that the Federal Constitution does not refer to dignity).

83. N.H. CONST. of 1784, pt. I, art. 2.

84. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21-28 (2004) (discussing the diverse origins of these two constitutional dignity provisions). For international approaches to the concept of dignity, see Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008) (offering a comprehensive account of dignity clauses but not referring to state constitutional provisions).

85. See Michael Lester Berry, Jr., Comment, *Equal Protection—The Louisiana Experience in Departing from Generally Accepted Federal Analysis*, 49 LA. L. REV. 903 (1989) (discussing LA. CONST. art I, § 3).

86. See Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 1-5 (1997) (identifying states and suggesting a typology of “happiness and safety” provisions); see also ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 29-20 (rev. ed. 1997) (discussing the New Jersey Constitution).

87. See, e.g., *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400 (Minn. 1944) (finding cognizable claim for damages to remedy forced eviction from home). For the development of such arguments under “right to happiness” clauses, see, for example, Grodin, *supra* note 86, at 30-32 (1997); Lockwood et al., *supra* note 12, at 9-16; under “dignity” clauses, see Klug, *supra* note 13. Eugene Volokh sees in the “right to happiness” clause protection for self-defense and defense of property. See Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399 (2007).

century, include provisions concerning the natural environment, such as guarantees of fishing rights and protection of forest preserves.⁸⁸

B. *Social and Economic Rights as Oversight of Legislative Activity*

Discussions about social and economic rights tend to focus on their democratic legitimacy and on the judiciary's ability to enforce such provisions. Frequently overlooked is the structural significance of positive rights to state legislative power. Arguments about constitutional structure are familiar features of constitutional discourse.⁸⁹ The limited nature of federal power is understood as a significant constraint on each branch's powers, but also affords Congress significant discretion to use its powers as it thinks appropriate; in addition, structural limitations protect the states against overreaching by the centralized government, including by unelected Article III judges.

State constitutions rest on different premises from the federal, but these differing assumptions run in two directions.⁹⁰ As Robert F. Williams has explained, the plenary nature of state legislative power is its central characteristic: unlike federal elected officials, state legislators require no specific authorization to enact laws.⁹¹ But state constitutions are famous for their distrust of elected politics, and they incorporate many formal restrictions on legislative power.⁹² For example, the familiar federal mechanism of judicial review is complemented at the state level by the executive veto and popular referenda, which together assure an oversight role for the governor and the

88. *E.g.*, ALASKA CONST. art. VIII ("Natural Resources"). See Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 28 (1995) ("This article was born out of the realization by those of the 1956 Alaska Constitutional Convention that the state's future would depend on the successful development of all of its natural resources."); see also DINAN, *supra* note 74, at 213 (citing the Vermont Constitution of 1777 and the New York Constitution of 1894).

89. See Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417 (2008) (discussing the importance of constitutional structure to constitutional interpretation).

90. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1892-93 (2001) (discussing differences between state and federal constitutional theories of legislative power).

91. WILLIAMS, *supra* note 68, at 250; see also Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205 (1915) ("[L]egislative power, granted in general terms, must be interpreted as conferring all governmental power, except so far as restricted by constitutional texts, i.e., that all such power inheres in the general grant.").

92. See Hershkoff, *supra* note 90, at 1891-92 ("State constitutions . . . do not reflect the same level of trust in state legislative decisionmaking as does the federal Constitution in congressional decisionmaking."); see also Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 967 (1994) (exploring how "a widespread distrust of legislatures [at western state constitutional conventions]" led delegates to "favor[] incorporation of legislative detail in constitutions").

people.⁹³ State constitutions also contain procedural constraints, such as the single-subject rule, which are intended to prevent log-rolling and to encourage legislative deliberation.⁹⁴

Distrust of legislative activity provides an important window through which to view state constitutional positive rights. From this perspective, socio-economic provisions function as a substantive constraint on legislative power. Because the legislature holds plenary power, it needs no special authorization to enact social or economic reforms, whether involving public schooling or workplace conditions; rather, the constitutional inclusion of material rights signals a preference for a particular policy that the legislature is required to respect.⁹⁵ In this sense, “positive rights not only restrain the government’s exercise of power, but also compel its exercise, constraining the government to use its assigned authority to carry out a specified constitutional purpose.”⁹⁶

The history of some state constitutional amendment processes confirms this theoretical reading of socio-economic provisions. In some states, the decision to include positive rights in a state constitution can be traced to a perceived need to impose substantive constraints on legislative power—the provisions did not simply empower the legislature, but also encouraged and even mandated the legislature to carry out a prescribed social or economic policy. John J. Dinan’s study of state constitutional amendment processes in the nineteenth century reports repeated instances of constitutional delegates seeking to incorporate social and economic rights in a state constitution in order to ensure enactment of protective legislation. In many instances, delegates expressed concern that special interest financial groups, such as railroads or mining companies, had captured the legislative process and were blocking the enactment of social welfare legislation.⁹⁷ As Dinan emphasizes, the

93. See DINAN, *supra* note 74, at 84-85, 99-101 (recounting history of popular initiative, referendum, and executive veto); JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 143-79 (2005) (discussing distinct “patterns of distrust” at the federal and state levels). See generally Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983) (discussing constitutional procedures that constrain legislative authority).

94. See, e.g., Stephanie Hoffer & Travis McDade, *Of Disunity and Logrolling: Ohio’s One-Subject Rule and the Very Evils It Was Designed to Prevent*, 51 CLEV. ST. L. REV. 557 (2004) (discussing the Ohio single subject rule). See generally Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987) (discussing state constitutional provisions that impose procedural constraints on state legislative decision making).

95. See WILLIAMS, *supra* note 68, at 330-33 (discussing the relation between the concept of plenary legislative power and canons of constitutional interpretation).

96. Hershkoff, *supra* note 7, at 1138.

97. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 995 (2007). Christian G. Fritz has offered a similar account of constitutional conventions in western states:

Restraining corporations and limiting governmental debt provided the most dramatic expression of the role of the conventions acting in lieu of legislatures. In the case of controlling corporate power, including the railroad companies, conventions claimed that

amendments “declared that the legislature was empowered to pass a certain reform, with the understanding that this would signal the importance of certain reform measures to the legislature and goad legislators into action.”⁹⁸ As an illustration, Dinan points to debates at the Illinois Convention of 1869-1870 concerning workers’ rights amendments.⁹⁹

Convention debates in other states where a constitution was amended to include social and economic rights reflect a similar desire to ensure the legislature’s enactment of protective legislation.¹⁰⁰ For example, during the floor debates in New York during the 1938 Convention on whether to adopt a welfare rights clause, a delegate-at-large explained: “Here are words which set forth a definite policy of government, a concrete social obligation, which no court may ever misread.” Further, “[t]he Legislature[’s]...hands are untied. What it may not do is...shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.”¹⁰¹ The history of some state education clauses reveals a similar goal of using the amendment process to ensure enactment of majoritarian reforms despite opposition by special interest groups.¹⁰²

C. Social and Economic Rights as Judicial Constraint

The previous Subpart focused on the role of state constitutional

legislatures were institutionally unable to respond. Moreover, many delegates regarded the control of corporations and debt as matters on which the people had given conventions a mandate to act.

Fritz, *supra* note 92, at 968.

98. Dinan, *supra* note 97, at 991.

99. At the 1869-1870 Illinois Convention, Joseph Medill argued as follows to support a miners’-safety amendment:

It is true the Legislature has the power to pass such laws, even though the Constitution may be silent upon the subject; but the Legislature has neglected to perform this duty; session after session has passed, but no law has been enacted to secure the life and health of the miners. . . . I maintain that it is the bounden duty of this Convention to insert a clause making it obligatory upon the Legislature to provide for their protection; for, unless we do, there is very little likelihood that they will take any effectual action whatever.

DINAN, *supra* note 74, at 191-92 (citing 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 271 (Springfield, Ill., E.L. Merritt & Brother 1870)).

100. See Fritz, *supra* note 92, at 968-69 (quoting a delegate to the California Convention of 1878 who announced the need to amend the constitution to protect against “irresponsible corporate management” of banks).

101. REPORT OF THE COMM. ON PRINTING, CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, REVISED RECORD 2126 (1938) (statement of Mr. Corsi), *quoted in* Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1422 (1999).

102. See, e.g., Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 606 (2004) (recounting history of Ohio education clause and explaining that despite legislation establishing free public schools in the state, “[i]t would soon become clear, however, that gains made in one legislative session could easily be lost in another”).

amendments in freeing legislatures from special interest domination. State constitutional amendments also had a separate ambition: to constrain courts from overruling reforms by altering common law understandings. Numerous historians have chronicled how a conceptual partnership developed between common law traditionalism and “laissez-faire constitutionalism,” and the common law’s role in preventing a thick conception of social citizenship from taking root in the United States.¹⁰³ Reformers viewed the common law as an impenetrable barrier to necessary reform. Court reports throughout the nineteenth century describe the effect of common law doctrines on workers’ lives and prospects: the common law cast union members “into semi-outlawry” for violating the liberty of competitive freedom;¹⁰⁴ it barred recovery for workplace accidents through such doctrines as the fellow-servant rule, assumption of risk, and contributory negligence;¹⁰⁵ it foretold that workman’s compensation statutes would ineluctably bring socialism to the United States;¹⁰⁶ and it viewed minimum-wage legislation as thievery that pilfered a business owner’s property.¹⁰⁷ On the other hand, opponents of reform, as

103. See Jack M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1458 (1987) (“The use of common-law categories to define the constitutional rights of contract and property [during the nineteenth and early twentieth centuries] simultaneously foiled majoritarian attempts at economic regulation while preserving the ability of common-law judges to make law without majoritarian interference.”); Forbath, *supra* note 5, at 180-82 (referring to a “court- and common law-dominated institutional order” that defeated the idea of social citizenship). *But see* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985) (challenging the normative and historical critique of laissez faire constitutionalism).

104. See William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 184 (2001). The phrase “semi-outlawry” also appears in William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1179 (1989).

105. See Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937*, 35 AM. J. LEGAL HIST. 70, 83 (1991) (observing that “nineteenth century common law doctrines handicapped workers who hoped to recover damages from their employers after having been injured on the job”); Frank W. Munger, *Social Change and Tort Litigation: Industrialization, Accidents, and Trial Courts in Southern West Virginia, 1872 to 1940*, 36 BUFF. L. REV. 75, 89 (1987) (discussing common law barriers to recovery by employees in workplace tort actions). See generally JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 70* (2004) (discussing “the shortcomings of classical tort law” as protection against workplace accidents).

106. WITT, *supra* note 105, at 400 (quoting opponents of New York’s proposed compensation legislation that such an insurance program was “‘pure socialism’ and ‘communistic’”). For an account of changing notions of redistribution under New York law as they affected labor and other relations, see William E. Nelson, *Government Power as a Tool for Redistributing Wealth in Twentieth-Century New York*, in *LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID* 322 (Hendrik Hartog & William E. Nelson eds., 2000).

107. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 85 (1991) (discussing the common law doctrine of master-servant relationship as the basis for defining the labor of another as property of the owner). As Thomas R. Powell

Michael Les Benedict has written, saw the drive for progressive legislation “as an attack on the American common law heritage itself.”¹⁰⁸

Federal debate about the relation of common law, economic theory, and constitutional interpretation—eventually headlined in the shorthand, “*Lochner*”¹⁰⁹—has remained contentious and ongoing.¹¹⁰ An equally contentious debate took place during the nineteenth century at the state level on whether common law was subordinate to state constitutional law, or subject to it. Thomas Cooley’s leading treatise insisted that a state constitution must be read through the lens of traditional common law precepts. In *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the Union*, first published in 1867, Cooley emphasized that the common law’s “sacred right” to property antedated the adoption of state constitutions, and so limited the power of legislatures to enact “remedial legislation.”¹¹¹ Roscoe Pound’s famous article, *Law in Books and Law in Action*, published in 1910, confronted Cooley’s position and criticized the trend of state judicial overruling of social legislation—a trend Pound attributed to “an over-individualism in our doctrines and rules” that was typical of the regnant common law jurisprudence.¹¹² Pound wrote: “[a]nother example is to be found in those jurisdictions where the common-law doctrines as to employer’s liability still obtain and in those corners of employer’s liability in other

observed critically in 1937:

Suffice it to say that minimum-wage legislation is now unconstitutional, not because the Constitution makes it so, not because its economic results or its economic propensities would move a majority of judges to think so, but because it chanced not to come before a particular Supreme Court bench which could not muster a majority against it and chanced to be presented at the succeeding term when the requisite, but no more than requisite, majority was sitting. In the words of the poet, it was not the Constitution but “a measureless malfeasance which obscurely willed it thus”—the malfeasance of chance and of the calendar.

Thomas R. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 552 (1924).

108. Michael Les Benedict, *Law and Regulation in the Gilded Age and Progressive Era*, in LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID, *supra* note 106, at 227, 228.

109. *Lochner v. New York*, 198 U.S. 45 (1905).

110. For one account of the debate, see Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677 (2005); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861-62 (1992) (referring to *Lochner*’s “fundamental false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare”).

111. 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 745 (8th ed. 1927). For a discussion of the significance of Cooley’s views to the free labor movement, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 792.

112. Roscoe Pound, *Law in Books and Law in Action* (1910), in AMERICAN LEGAL REALISM 39, 39-40 (William W. Fischer III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

jurisdictions where recent legislation has left the common law in force.”¹¹³ The debate remained ongoing. Judge Hutcheson, drawing from Cooley’s analysis, emphasized in a speech delivered in 1937 before the Alabama State Bar Association that “state constitutions . . . must be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still in force.”¹¹⁴

Amending a state constitution to include social and economic rights directly opposed the laissez-faire ideology that came to dominate federal discourse: delegates explicitly sought to protect social welfare reforms from common law doctrines that either blocked the enactment of legislation or threatened its stability.¹¹⁵ As William F. Dodd wrote in an article published in 1913, “the greater number of our state courts are illiberal and, under our present constitutional and judicial organization, are able to block needed social and industrial legislation.”¹¹⁶ Dinan refers to these amendments as “court-constraining provisions” aimed at protecting legislative power against common law curtailment.¹¹⁷

These state constitutional amendments were designed to turn Cooley’s logic on its head: reformers sought to make the common law subject to state constitutional requirements, and not vice versa. A delegate to the 1878 California Constitutional Convention expressed the hope that if the constitution made clear “that the legislature shall have the power to do some certain things . . . no court in the State of California would ever go behind that declaration in the constitution.”¹¹⁸ Amending a constitution often achieved its intended effect: in Utah, where reformers amended the state constitution to include explicit authorization for legislation protective of factory and miner workers, the state’s highest court, and then the U.S. Supreme Court, upheld maximum-hours legislation for mining activities as a valid exercise of the police power; in Colorado, where the state constitution lacked explicit authorization for such protective legislation, a similar law was struck down as

113. *Id.* at 42.

114. Joseph C. Hutcheson, Jr., *The Common Law of the Constitution*, 15 TEX. L. REV. 317, 328 (1937).

115. *See, e.g.*, Terzian, *supra* note 75, at 387 (explaining that the 1912 Ohio Constitution responded in part to concerns by “[r]eformers and labor leaders [who] had criticized the state courts for overturning labor legislation and maintaining common-law doctrines that advantaged employers at the expense of workers”).

116. William F. Dodd, *Social Legislation and the Courts*, 28 POL. SCI. Q. 1, 5 (1913).

117. Dinan, *supra* note 97, at 984 (“Progressive-Era commentators took note at the time of the use of state amendment processes to constrain courts in these areas, but contemporary accounts have not fully integrated these amendments into their analyses.”).

118. Fritz, *supra* note 92, at 971 (quoting 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 815 (Sacramento, State Office 1880-1881)).

violating the common law right of freedom of contract.¹¹⁹ Possibly the most famous example of this trend was New York's state constitutional response to *Ives v. South Buffalo Railway Co.*,¹²⁰ involving workers' compensation.¹²¹ Theodore Roosevelt, among others, condemned the *Ives* decision as treating "the rights of property ... [as] supreme over the rights of humanity";¹²² the New York court reversed itself only after reformers amended the state constitution.¹²³ Similar amendments were adopted in California, Ohio, Vermont, and Wyoming.¹²⁴ In other states, amendment campaigns preemptively aimed at foreclosing state courts from overruling progressive

119. Compare *Holden v. Hardy*, 46 P. 756 (Utah 1896), *aff'd*, 169 U.S. 366 (1898), and *State v. Holden*, 46 P. 1105 (Utah 1896), with *In re Morgan*, 58 P. 1071 (Colo. 1899). Melvin I. Urofsky writes:

Only the Colorado court refused to go along [with courts in Utah and several other states in approving protective legislation for miners and factory workers] and struck down that state's eight-hour law for miners as class legislation that violated freedom to contract. The court deemed [the Supreme Court's ruling in] *Holden v. Hardy* inapplicable because Colorado lacked the constitutional provision for such legislation found in Utah, although both the Utah and the United States supreme courts had emphasized that the authority for such legislation lay in the police power.

Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 78 (1985). Urofsky posits that state courts were more receptive to upholding social and economic legislation than earlier historians have recognized; he mentions but does not fully address the role that state constitutional amendment processes played in preemptively controlling judicial outcomes.

120. 94 N.E. 431 (N.Y. 1911).

121. See *Ritchie v. People*, 40 N.E. 454 (Ill. 1895) (overturning hours legislation); *People ex rel. Rodgers v. Coler*, 59 N.E. 716 (N.Y. 1901) (overturning minimum wage legislation on public works); *In re Jacobs*, 98 N.Y. 98 (Crim. Ct. 1885) (overturning statute banning manufacture of cigars in tenements). For a discussion of these cases, see Dinan, *supra* note 97, at 989-90.

122. Theodore Roosevelt, *Workman's Compensation*, 98 OUTLOOK 49, 53 (1911), quoted in Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 934 n.140 (1997) (citing FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 194 n.37 (1927)).

123. N.Y. CONST. art. I, § 19 (adopted Nov. 4, 1913) (current version at N.Y. CONST. art. I, § 18); see also Urofsky, *supra* note 119, at 87 (discussing that after striking down the New York workman's compensation statute, the New York court "reversed itself, again because it had to in the light of a constitutional amendment an angry electorate passed after the *Ives* decision").

124. See WITT, *supra* note 105, at 180. Similarly, in Ohio, delegates to the 1912 Constitutional Convention secured a broad range of constitutional amendments that sought to protect social and economic legislation from common law assault. See Terzian, *supra* note 75, at 389 ("In addition to its success in restricting the supreme court's power of judicial review, organized labor also obtained seven amendments embodying much of its constitutional reform program: a maximum eight-hour day on public works; the abolition of prison contract labor; a 'welfare of employees' amendment authorizing the legislature to pass laws regulating hours, wages, and safety and health conditions; damages for wrongful death; limits on contempt proceedings and injunctions; workers' compensation; and mechanics' liens.").

legislation.¹²⁵

The strategy of adopting social and economic rights to constrain common law courts continued from the Progressive era into the twentieth century—the battleground moving from industrial safety to welfare and the provision of indigent assistance such as food, emergency cash payments, and other necessities.¹²⁶ In Massachusetts, where the state constitution lacked explicit authorization for legislative assistance to the poor, the Supreme Judicial Court was asked in a series of advisory opinions to confirm the constitutionality of such measures, but in each case found the laws to be invalid. In 1917, the people of Massachusetts responded by amending the state constitution to deem provision for the poor to be a public function within the legislative power.¹²⁷

By amending a state constitution to include socio-economic rights, reformers created a political space that traditional common law principles otherwise blocked. Three generations after Illinois revised its state constitution to overcome common law barriers that inhibited the enactment of mining safety laws, President Franklin Delano Roosevelt, talking to the nation in a Fireside Chat, called for a new “economic constitutional order” unmoored from the “old and sacred possessive rights” of the common law.¹²⁸ State constitutional amendment processes in the preceding century formed the political vanguard of this effort, as the people and their delegates struggled to reorient common law doctrine in the light of social and economic reforms.

125. See John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1190 (2005) (“[I]n the wake of cases like *Ives*, a number of states around the country adopted constitutional amendments expressly authorizing compensation legislation, either to reverse adverse state decisions (as in New York), or to ward off such decisions.” (citations omitted)). For a list of court-constraining amendments concerning worker’s rights and welfare rights from the Progressive Era through the twentieth century, see Dinan, *supra* note 97, at 991-1000.

126. Dinan, *supra* note 97, at 998 (reporting that the “Massachusetts Convention of 1917-1919 was the first to adopt a court-constraining amendment empowering legislative action” regarding care for the economically needy).

127. *Id.* at 999. The amendment, art. XLVII, provided:

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

MASS. CONST. art. XLVII. See generally Susan Sterett, *Serving the State: Constitutionalism and Social Spending, 1860s-1920s*, 22 LAW & SOC. INQUIRY 311 (1997) (discussing state constitutional taxing and spending limits and social programs).

128. See William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV. 1965, 1976-81 (2003) (quoting FDR’s addresses and recounting efforts to amend the Federal Constitution to include social rights).

II. SOCIAL AND ECONOMIC RIGHTS AND INDIRECT CONSTITUTIONAL EFFECT

Commentators typically assume that American constitutionalism does not incorporate the practice of indirect constitutional effect. Mark Tushnet puts the matter simply: “standard U.S. constitutional doctrine is that constitutional provisions do *not* have horizontal effect.”¹²⁹ The absence of horizontal effect from American constitutionalism often is explained by the federal state action doctrine and the Court’s view that federal constitutional rights bind only government actors. However, the fact that a law lacks direct coercive effect does not foreclose it from having influence in other dimensions. As Stephen Gardbaum observes:

[T]hat private actors are not bound by constitutional rights in no way entails that such rights do not govern their legal relations with one another, and thereby impact what they can lawfully be authorized to do and which of their interests, choices, and actions may be protected by law. Although to be sure, the state action doctrine forecloses the most direct way in which a constitution might regulate private actors—by imposing constitutional duties on them—it does not rule out other, indirect ways.¹³⁰

In addition, the federal system’s adherence to the state action doctrine does not bind the states in their state law decision making; indeed, federalism and the distinct institutional position of the states tilt in favor of a different interpretive approach. This Part examines the practice of indirect constitutional effect as recognized by foreign judicial systems; it explains why state courts have interpretive latitude to embrace a theory of indirect interpretive effect notwithstanding the Article III system’s apparent rejection of that approach; and it justifies the state practice of according indirect effect to constitutional norms, even socio-economic norms, in an expressive theory of law that emphasizes constitutional rights as both structural and individual protections.

A. *Indirect Constitutional Effect and Interpretive Practice Abroad*

Discussions about the horizontal effect of constitutional rights typically turn to foreign courts for illustration. Even in countries where private relations are immune from constitutional oversight, some national courts nevertheless recognize the indirect effect of constitutional norms on the interpretation and application of private law duties and relations.¹³¹ This form of indirect effect is not limited to conventional civil liberties—so-called negative rights—but also

129. See Tushnet, *supra* note 38, at 81 (emphasis in original).

130. Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 388-89 (2003) (citation omitted).

131. For an overview of these developments, see, for example, Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218 (1996) (discussing international judicial approaches to the effect of constitutional rights on private law).

extends to positive and third-generation social and economic rights.¹³²

Examples from abroad usually draw from Germany, where the principle of *Drittwirkung* has been applied to accord the Basic Law—which, among other rights, protects as “inviolable” the “dignity of man”¹³³—an “impact on third parties” in a court’s interpretation of private law doctrine.¹³⁴ The adjective “radiating” often is used to describe the interpretive effect of the Basic Law,¹³⁵ which is said to provide “a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication,” such that “[e]very provision of private law must be compatible with the system of values, and every such provision must be interpreted in this spirit.”¹³⁶

Many commentators associate the German practice of indirect effect with the jurisprudence of Robert Alexy.¹³⁷ According to Alexy, constitutional rights function as principles, which he characterizes as a norm that is not subject to binary enforcement—“either fulfilled or not,” as with the case of a rule—but rather is to be “realized to the greatest extent possible given . . . legal and factual possibilities.”¹³⁸ Alexy uses the term “optimization requirements” to describe the ways in which constitutional norms “can be satisfied to varying

132. See Hershkoff, *supra* note 30, at 286-97 (considering the interpretive effect of national constitutional rights to health care and to education on private law decision making in Brazil, India, Indonesia, Nigeria, and South Africa); see also MARTIJN W. HESSELINK, *The Horizontal Effect of Social Rights in European Contractual Law*, in *THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW IN EUROPE* 177, 184-86 (2002) (referring to the judicial practice of indirectly enforcing solidarity values in private employment decisions).

133. GERMAN BASIC LAW, art. 1, § 1 & art. 2, § 1.

134. See Kenneth W. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT’L & COMP. L.Q. 571, 572 (1968) (“German jurists are in agreement today that the fundamental-rights clauses are ‘significant’ for private law. The majority of them prefer ‘indirect application’ and reject the direct approach.”).

135. See Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341, 350 (2006) (“Constitutional rights norms ‘radiate’ into all areas of the legal system.”); Johan van der Walt, *Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence*, 17 S. AFR. J. ON HUM. RTS. 341, 351-52 (2001) (“‘Indirect horizontal application’ is generally understood to imply the following: the values and principles of the Bill of Rights have a radiation effect on common law that is principally reflected in the interpretation and application of the broad and open-ended principles of the law.”).

136. Matej Avbelj, *Is There Drittwirkung in EU Law?*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM*, *supra* note 21, at 145, 147 (quoting the *Lüth* case as translated in D.P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 363 (1997)).

137. See, e.g., *id.* at 146 (“[T]he German Constitutional Court constructed the so-called ‘radiating effect,’ according to which constitutional rights norms pervade the entire legal system by appealing to the concept of an objective order of values.” (citing ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 352 (Julian Rivers trans., 2002))).

138. ALEXY, *supra* note 137, at 47.

degrees,” a process that depends on the principle of proportionality in its application¹³⁹ and that typically works through doctrinal portals internal to private law, such as a general clause that calls for reasonableness of application. Although Alexy emphasizes that constitutional norms “can be applied . . . in the interpretation of every private law norm,” private law remains distinct from public law: “the norms of private law remain private law norms and the rights and duties they establish remain private law rights and duties.” For the judge, “radiating effect establishes a duty to take account of the influence of constitutional rights on private law norms when interpreting them.”¹⁴⁰

The judicial practice of according indirect effect to public norms is present even in some countries that have adopted an explicit doctrine of “non-application” that formally insulates private law from the direct application of constitutional doctrine.¹⁴¹ In Canada, for example, the Charter of Rights and Freedoms, adopted in 1982, together with the Canada Constitution, serves as “supreme law,” so that “any law that is inconsistent” with either document is “of no effect.”¹⁴² The Supreme Court of Canada has made it clear, however, that the Charter applies to common law decision making only where state action is present, and that “the order of a court” is not “governmental action” for these purposes. Nevertheless, even in a private law matter, a judge deciding a case is “bound by the Charter”¹⁴³ so that “the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.”¹⁴⁴ As the Canada court explained in the famous *Dolphin Delivery* decision,

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

139. *Id.* at 47-48. For an excellent discussion of Alexy’s radiation thesis, see Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574, 584-85 (2004); see also Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT’L J. CONST. L. 44, 50-54 (2007); Mattias Kumm & Víctor Ferreres Comella, *What Is So Special About Constitutional Rights in Private Litigation?: A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM, *supra* note 21, at 241; Odilon Castello Borges Neto, *Is the State Action Requirement Really Necessary?: A Comparative Study Between the American and the Brazilian Systems of Fundamental Rights Protection*, 75 REV. JUR. U.P.R. 805, 835-40 (2006).

140. See ALEXY, *supra* note 137, at 355-56.

141. For a list of countries that adhere to a nonapplication doctrine and those that recognize some indirect effect, see Stephen Ellmann, *A Constitutional Confluence: American “State Action” Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors*, 45 N.Y. L. SCH. L. REV. 21, 37-40 & n.52 (2001).

142. Cheryl Saunders, *Constitutional Rights and the Common Law*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM, *supra* note 21, at 183, 195 & n.56 (quoting Constitution Act, 1982, § 52 (U.K.)).

143. *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, 600 (Can.); see Saunders, *supra* note 142, at 198 (discussing this case).

144. *Dolphin Delivery*, 2 S.C.R. at 603.

Charter will not apply. . . . [T]his is a distinct issue from the question whether 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. The answer to this question must be in the affirmative. . . . But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences [sic] between individuals.¹⁴⁵

In both Germany and Canada, public norms thus influence the direction of private law decision making, and courts are obliged to take these norms into account even where state action is absent. As commentators put it, “[t]he Canadian and German approaches differ only in the source of the obligation to consider the constitutional values. Under the German approach that obligation arises out of the constitution itself; whereas under the Canadian approach it arises from the inherent jurisdiction of common law courts to develop private law.”¹⁴⁶

The question of whether the doctrine of indirect constitutional effect applies in the federal courts of the United States has engaged significant analysis.¹⁴⁷ Mattias Kumm and Víctor Ferreres Comella provocatively ask, “What is so special about constitutional rights in private litigation?” but they concede that the United States “presents special difficulties for accommodating the kinds of concerns that are central to rights analysis in the context of private litigation.”¹⁴⁸ For Mark Tushnet, indirect constitutional effect entails a residual category, “to deal with those aspects of the private economy left untouched by the relatively thick regime of statutory regulation applicable to most private actors.”¹⁴⁹ Stephen Gardbaum takes a different approach and argues that the

145. *Id.*

146. Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in HUMAN RIGHTS IN PRIVATE LAW, *supra* note 27, at 43, 44.

147. *Shelley v. Kraemer*, 334 U.S. 1 (1947), is understood to instantiate the vertical approach to constitutional rights in the sense that the state, in judicially enforcing the racially restrictive covenant, had itself withheld equal protection of the laws from petitioners. However, the case could be read to support a horizontal theory of constitutional rights. In *Bell v. Maryland*, Justice Black explained that

[t]he reason judicial enforcement of the restrictive covenants in *Shelley* was deemed state action was not merely the fact that a state court had acted, but rather . . . that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed rights to own, occupy, enjoy, and use their property without regard to race or color.

378 U.S. 226, 330 (1964) (Black, J., dissenting). Building on Justice Black’s reading, Halton Cheadle and Dennis Davis maintain that “*Shelley* would appear to support the contention that once a party relies upon a law to enforce a claim or a cause of action, a court is entitled to examine whether the law is in keeping with the constitutional commitments contained in the Bill of Rights.” Cheadle & Davis, *supra* note 26, at 47.

148. Kumm & Comella, *supra* note 139, at 241, 276.

149. Mark Tushnet, *The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM, *supra* note 21, at 167, 169-70.

effect of the Federal Constitution on common law development “is a straightforward implication of the Supremacy Clause.”¹⁵⁰ These arguments, whether or not compelling, remain maverick.

B. Indirect Constitutional Effect and Federalism

The fact that the Article III system has not embraced the theory of indirect constitutional effect does not foreclose state judicial systems from adopting a different interpretive approach.¹⁵¹ Indeed, some commentators see it as an interpretive “failure” for state judiciaries to proceed in lockstep with the federal.¹⁵² State courts are not required to conform to Article III judicial practice, and the institutional context of their decision making differs significantly from that of the U.S. Supreme Court in overseeing state court judgments.¹⁵³ Unlike the Article III courts, which lack general authority to develop common law applicable in the states, state courts have plenary authority to do so,¹⁵⁴ and they explicitly engage in a form of interest balancing that sits comfortably with European-style proportionality analysis.¹⁵⁵ Moreover, concerns of federalism which constrain decision making by unelected federal judges, lack applicability at the state level, where many judges are elected or appointed for fixed terms, and their decisions are localized, conditional, and not burdened by the presumptive finality accorded to

150. See Gardbaum, *supra* note 130, at 391.

151. The Supreme Court’s willingness to use the Due Process Clause as “a check on undue jury discretion” in tort actions, compare *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989), with *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 11-23 (1991), may facilitate a constitutionalization of tort law which, although consistent with a vertical theory of *Shelley v. Kraemer*, see Richard A. Epstein, *Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet*, 3 CHI. J. INT’L L. 455, 460 (2002) (“Judicial administration is surely state action caught by both the due process and equal protection guarantees.”), indirectly could affect nongovernmental action. Cf. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1094 (2005) (assuming that “[i]f the Court adopts a reform that depends upon the wrong substantive conception of tort law, the states retain the power to adopt a different substantive objective for the tort practice”).

152. For an articulation of the “failure” thesis in the context of Ohio state court interpretation, see Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984); see also Richard B. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 444-45 (2004) (updating the Porter & Tarr failure thesis).

153. Hershkoff, *supra* note 90, at 1879-81 (discussing weight to be given to absence of “case” or “controversy” requirement from judicial article of state constitutions).

154. See *id.* at 1889 (discussing state court common law law-making authority); see also Tushnet, *supra* note 38, at 87 (discussing different institutional judicial features that affect indirect effect).

155. See Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 63, at 49, 66 (discussing the U.S. Supreme Court’s “aversion to case-by-case proportionality or balancing analysis”).

Supreme Court decisions relative to the political branches.¹⁵⁶

The presence of explicit socio-economic rights in a state constitution further differentiates the context of state judicial decisions from their federal counterparts. Although the history and motivation of state constitutional reform differs from state to state, in significant instances reformers amended their state documents in order to regulate private interests that appeared to be impeding or obstructing liberty and well being. Similar concerns lay behind the post-World War II inclusion of socio-economic rights in national constitutions, and it is in these nations that commentators have found a relaxed state action requirement to be more prevalent.¹⁵⁷ Moreover, to the extent that Article III courts hesitate to enforce social and economic rights because of institutional concerns related to unelected judges' mandating their policy views for all times and for all states, this problem is avoided by the minimalist approach of the common law, which favors—to borrow from Cass R. Sunstein—“a long series of case-by-case judgments, highly sensitive to particulars.”¹⁵⁸

C. *Indirect Constitutional Effect and Expressivism*

Finally, a state court's engagement with the indirect effect of constitutional positive rights is consistent with the structural nature of social and economic norms understood through an expressive theory of law. The expressivist

156. See Hershkoff, *supra* note 90, at 1898-1905 (discussing federalism and state courts); Hershkoff, *supra* note 7, at 1157-61 (discussion electoral accountability and state judicial decision making).

157. Twenty years ago, Peter E. Quint noted the relationship between the state action limitation on constitutional enforcement and the presence or absence of affirmative constitutional duties. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 346-47 (1989). Commentators have developed this connection further in their analyses of horizontal application. See, e.g., Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 (2006); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002).

158. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 272 (2008) (discussing a minimalist approach to constitutional interpretation in the Second Amendment context); see also Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 823 (1967) (referring to the “evolutionary movement” of the common law approach, which is “incremental and gradual, rather than sudden or revolutionary”). Richard A. Epstein captures the benefits and risks of the common law approach in his discussion of recent cases having to do with the law of takings:

There is much to be said in praise of incremental decisionmaking that treats each case on its own merits. Small steps often mean that judges make fewer mistakes than they would if they sought to develop some grand theory on the basis of a limited set of facts drawn from a particular case. But there are also serious difficulties associated with that cautious approach precisely because it ignores the synergistic effects that arise from the interplay of different doctrines . . . Judges should be aware of these effects because their decisions rarely take place on a blank slate.

Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 612 (2008).

approach, as leading exponents put it, focuses on ensuring that government actors take account of “particular goals or purposes as reasons for particular actions.”¹⁵⁹ The expressive theory builds on a large interdisciplinary literature about norms that helps to explain the important, noncoercive function of law in creating incentives, influencing attitudes, shaping relations, and conveying the importance of particular values over others despite the absence of a direct method of enforcement.¹⁶⁰ Although “norm” lacks a consistent definition, overall it loosely signifies an appreciation for law as “a guide to conduct that somehow, in some way, transcends the purely optional.”¹⁶¹ Constitutional socio-economic provisions encompass this norm-like status, in the sense of articulating “a desired set of social outcomes.”¹⁶²

Liberal theory tends to treat constitutional rights as individual protections against the state: the theory of expressivism provides an alternative description of rights as collective protections that work not only against the state, but also through the state in a dynamic process that creates the conditions of everyday life. One branch of expressivism emphasizes the structural role that constitutional rights play in constituting a democratic society.¹⁶³ As forcefully explicated by Richard H. Pildes, who draws on the writing of Joseph Raz, constitutional rights, redescribed from an expressivist perspective, are a “means of realizing certain collective interests,” with the “particular kind of collective interest” defined as “the preservation of ‘common or public goods’ (in the sense economists have long used the terms).”¹⁶⁴ One can include in this category of interests material nonexcludable goods, such as clean air, as well as conventional liberal rights, such as the right to free speech or to vote, that together serve to constitute a collective political culture.¹⁶⁵

State constitutional socio-economic rights fit comfortably within this conception of rights as constitutive of a shared polity. They aim not only to secure the material improvement of a single claimant, but also to protect a

159. Anderson & Pildes, *supra* note 53, at 1520.

160. See Sunstein, *supra* note 27, at 2024 (defining the expressive function of law as “the function of law in ‘making statements’ as opposed to controlling behavior directly”).

161. Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663, 666 (2008).

162. *Id.* at 667.

163. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998) (“The structural conception focuses on questions more external to the self-interests of those asserting rights, for it focuses on the legitimate scope of state authority in the specific structural arena at issue.”).

164. *Id.* (quoting JOSEPH RAZ, *Rights and Individual Well-Being*, in ETHICS IN THE PUBLIC DOMAIN 44, 52 (1995)); see also Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 353 (2003) (referring to aspects of governmental order as political and moral goods, “on the understanding that everyone shares in the increase to them that results from any decent practice of government by law”).

165. See Pildes, *supra* note 163, at 731.

particular kind of political culture that values a shared interest in specified public goods such as free public schooling or safe workplaces.¹⁶⁶ Discussions of positive rights often overlook their structural significance and instead focus solely on the material benefit that such rights confer upon an individual claimant. Thus, for example, Charles Fried, in his frequently quoted distinction between positive and negative rights, relies on an atomistic conception of the claimant's right, which, given conditions of scarcity, inevitably will come into conflict with the claims of others:

A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim.¹⁶⁷

Expressivism reframes social and economic rights in ways that illuminate their structural significance to the collective polity. Consider, for example, a state constitutional right to work. A right of this sort can take a number of forms: a right to job security, to join a union, to decide not to join a union, to enjoy workplace safety, or to be guaranteed a fair minimum wage. Certainly the right sustains an individual's well being, and supports the claimant's efforts to secure a good life. But the right to work—and the security of knowing that one cannot be fired for “speaking out”—also sustains a collective interest in a political culture that encourages a plurality of public views and respects the dignity of all members of the polity.¹⁶⁸

The emphasis on the expressive nature of socio-economic rights, and thus their structural importance, should not obscure the individual interests that are at stake whenever such a right is invoked.¹⁶⁹ Admittedly, the structural aspect

166. As James Gordley explains in a related context, “[m]aterial goods are of value to the extent they can contribute to . . . a life” where “all of one’s human potential was realized.” James Gordley, *Takings*, 82 TUL. L. REV. 1505, 1517 (2008).

167. CHARLES FRIED, *RIGHT AND WRONG* 110 (1978).

168. This structural understanding of workplace rights informs current advocacy efforts to secure a “living wage” on the view that the common law at-will doctrine not only depresses an individual employee’s salary scale, but also inhibits a collective interest in democratic participation. See Larry S. Bush, *State Law and the Struggle for a Living Wage at the University of Mississippi*, 70 MISS. L.J. 945, 970 (2001) (stating that “[t]he employment-at-will rule and the culture in which it exists make it extremely difficult for workers [in Mississippi] to freely and openly participate in efforts to improve their working conditions”); see also Munger, *supra* note 65, at 668-71 (2004) (discussing the effect of reduced wages and lost benefits on the social citizenship of workers). A democratic justification also is put forward for whistleblower protection. See Courtney J. Anderson DaCosta, *Stitching Together the Patchwork: Burlington Northern’s Lessons for State Whistleblower Law*, 96 GEO. L.J. 951, 977 (2008) (defending whistleblower protection on the ground that such laws “enable those with little bargaining power to speak out against those with a great deal of it”).

169. Cf. Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 171 (2009) (“The trouble with locating all the objections at the social level is the trouble with any aggregative approach to the general good: the

of a right may run counter to the individual's interest, just as an individual may press an interest that runs counter to that of another individual. The principle of indirect effect attempts to mediate this conflict, first, by according legal weight to the claimant's demand, rather than treating it only as a need or a desire, and then by balancing the dueling interests using the traditional balancing test that is indigenous to common law reasoning.¹⁷⁰

III. ACHIEVING INDIRECT CONSTITUTIONAL EFFECT THROUGH COMMON LAW PATHWAYS

In this Part, I discuss how the indirect effect of state constitutional positive norms currently influences common law doctrines. First, I explain why characterizing the process as one of indirect constitutional effect, and not as the court's taking public policy into account, matters to legal development. Second, I show the ways in which state courts already take state constitutional rights, both negative and positive, into account in their determination of public policy. I focus here on tort, contract, and property doctrines as they relate to private employment. In my view, this interpretive practice ought to be made explicit and its state constitutional foundation ought to be recognized. Finally, I raise concerns about whether state constitutions are sufficiently robust to support a doctrine of indirect interpretive effect.

A. *Indirect Constitutional Effect as an Interpretive Practice Distinct from Policy Analysis*

In some sense, suggesting that state courts give indirect interpretive effect to state constitutional socio-economic rights does no more than recognize the existing state judicial practice of taking public policy into account in common law decision making.¹⁷¹ A number of doctrinal modalities facilitate the migration of public norms into private law decision making. Contract doctrine, for example, recognizes a public policy defense to the enforcement of an

particularity of individual predicaments disappears from view.”).

170. See Oliver Gerstenberg, *What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law*, 17 CAN. J. L. & JURIS. 61, 68 (2004) (explaining that “indirect application is a strategy or method of *avoiding* the first-order conflict between constitutional values through emphasis on the normative coherence of the private law program and on the ‘autopoietic’ character of the private law system”).

171. See WILLIAMS, *supra* note 68, at 354 (discussing the indirect effect of state constitutional socio-economic provisions on common law development) (citing Helen Hershkoff, *supra* note 33); see also Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990) (“[J]udicial instrumentalism, understood as judges formulating, modifying, and changing legal rules to achieve public policy goals, was characteristic of the common law for centuries. It was not new to the nineteenth century, as legal historians generally believe.”).

agreement where a bargain seeks to achieve an illegal goal, such as a restraint of trade, or includes a term that may seem inappropriate or somehow overreaching, such as the waiver of a constitutional right.¹⁷² In cases where a court finds a public policy defense, it may create an immutable rule that the parties cannot alter or impose a default rule that allows for waiver under specified conditions.¹⁷³ Tort doctrine likewise takes account of public policy by creating a cause of action in favor of an individual whose interest, encompassed within the protected policy, is violated by another nongovernmental actor. Open-textured clauses looking to reasonableness and fairness provide another common law pathway through which public norms become integrated into private law doctrines.

Viewing this accepted judicial practice through the lens of indirect constitutional effect carries analytic bite that goes beyond mere redescription: acknowledging that state constitutions provide the source of the policy affects the legitimacy of the court's interpretive process as well as the nature of the court's justifications. On a policy model, the claimant asks the court to review a common law rule in light of values that the judge thinks important or that a legislature might consider. On an indirect effect model, the claimant asks the court to protect a right that already exists under a state constitution and that the common law is being asked to weigh in resolving a particular claim.¹⁷⁴ The existence of a positive right may affect the court's judgment in a number of different ways: I previously have written that such rights may form a part of the background "interpretive regime" for common law decision making; they may constitute a piece of the "implicit dimension" of private law and enlarge the focus of factors to be considered; or they may establish, or change, an interpretive "default rule" that pushes the court in one direction rather than another.¹⁷⁵

The practice of indirect constitutional effect assumes that a court can marshal interpretive resources in uncovering the constitution's meaning and in discerning its influence. Of course, it may not be possible to ascribe a fixed or singular meaning to the various and diverse positive rights provisions that appear in the constitutions of the fifty states. Potentially they embrace "solidarity" values;¹⁷⁶ or they ensure a "protective function";¹⁷⁷ or they

172. See G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 441-42 (1993).

173. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91-93 (1989) (using the terms "majoritarian," "tailored," and "penalty defaults").

174. Cf. JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 45 (rev. ed. 1990) (comparing models of strong and weak discretion).

175. See Hershkoff, *supra* note 33.

176. Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 424 (2006).

177. See Frank I. Michelman, *The Protective Function of the State in the United States*

demand “care and concern”;¹⁷⁸ or they promote “human dignity”;¹⁷⁹ or they nourish “flourishing and development”;¹⁸⁰ or they insist on the collective “[s]haring [of] responsibility for the problems and consequences of poverty equally”;¹⁸¹ or they mandate the “hearing [of] sad and sentimental stories.”¹⁸² The common law court need not commit itself to a particular interpretive approach. But what it may not do is ignore the constitutional provision or refuse to take its range of meanings into account. The constitutional provision thus constrains the court’s decision making and does not provide merely a policy perspective that is unmoored from positive law.¹⁸³ Etienne Mureinik, in characterizing the likely effect of the South Africa Constitution’s socio-

and Europe: The Constitutional Question, in EUROPEAN AND US CONSTITUTIONALISM, supra note 63, at 156, 175-77 (discussing protective function “as an under-enforced constitutional right”).

178. *Government of the Republic of South Africa v. Grootboom and Others* 2000 (11) BCLR 1 (CC) at ¶ 44 (S. Afr.); see also Hershkoff, *supra* note 30, at 297 (quoting *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.* 2005 (20) SA 1 (CC) at ¶ 55 (S. Afr.) (referring to “the constitutional vision of a caring society based on . . . shared concern”), available at <http://www.saflii.org/za/cases/ZACC/toc-P.html>.

179. Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 1 (2005).

180. David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 490 (2002).

181. *Khosa v. Minister of Social Development* 2004 (12) BCLR 1 (CC) at ¶ 74 (S. Afr.). For a discussion of this decision of the South African Constitutional Court, see Sandra Liebenberg, *Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review*, in *THE ROAD TO REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, supra* note 43, at 73, 87-88.

182. Ian Ward, *Universal Jurisprudence and the Case for Legal Humanism*, 38 ALBERTA L. REV. 941, 944 (2001) (quoting Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 118-19 (S. Shute & S. Hurley eds., 1993)).

183. Cf. Posner, *supra* note 55, at 1720 (pointing out “that legislators and judges face constraints against allowing their own moral feelings to influence their law-making; norm-producers face no such constraints”). According indirect effect to state constitutional material rights is closely allied with Lawrence Gene Sager’s influential theory of constitutional underenforcement. Like many federal constitutional theorists, Sager posits that the federal courts are incapable of directly enforcing positive rights against the government. Yet he refuses to disclaim the existence of positive federal constitutional rights. Rather, these rights operate directly on legislative officials and indirectly on judges; the radiating effects of positive rights helps to make sense of judicial decisions involving the Due Process Clause and the right to travel. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985). See generally LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004). For a discussion of Sager’s thesis, see Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question, in EUROPEAN AND US CONSTITUTIONALISM, supra* note 63, at 156, 175-77 (insisting “that American law confirms the [state’s protective function or] duty principle’s force in our system of legal norms by visibly under-enforcing it”).

economic rights on judicial practice, thus spoke of the “culture of justification” that he expected to develop as courts in that country interpret positive rights provisions and explain whether and why they apply to specific private law relations.¹⁸⁴ The principle of indirect effect thus can be expected to contribute to a state constitutional interpretive process in which all legal actors may participate and to which all may contribute.¹⁸⁵

B. *Indirect Constitutional Effect and Existing Common Law Practice*

Some state courts currently apply and extend state constitutional provisions even where a lack of state action would bar constitutional enforcement of the right. In these cases, the court explicitly looks to the state constitution as a source of public policy to inform its common law decision making—whether to support the creation of a cause of action in tort; to interpret or imply a contract term, such as reasonableness or good faith; or to raise an affirmative defense. In this Part, I illustrate this practice drawing examples from contract, tort, and property cases involving aspects of the employment relation.¹⁸⁶

The background common law principle for employment relations in the United States is considered to be at will: the employer may terminate the worker for any or no reason, and the employee likewise may leave without notice.¹⁸⁷ The doctrine, which in the United States traces back to the nineteenth century,¹⁸⁸ has been subject to a great deal of academic controversy,¹⁸⁹ but continues to describe employment practices in a majority of states: eighty-five percent of private workplaces surveyed in 1995 adhered to the at-will rule, and

184. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM RTS. 31, 31-32 (1994).

185. See Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 310-13 (2007) (discussing the advocacy community’s role in developing state constitutional meaning); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 46 (2006) (discussing “the special role of lawyers” in developing state constitutional discourse).

186. David J. Walsh has studied wrongful discharge cases from a network analytic perspective, finding that courts use citations for legitimation and justification. See David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC’Y REV. 337 (1997). Walsh did not consider whether similarity of state constitutional provisions influences a court’s decision to use citations from a different jurisdiction.

187. See J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837.

188. For a brief history of the rule, see *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 444 n.4 (N.Y. 1982) (discussing shift in doctrine from requirement of “reasonable cause” to no cause). For a brief period, the U.S. Supreme Court appeared to have constitutionalized the at-will rule. *Compare Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

189. See Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 (2004) (reporting that in the period 1985-2004 at least 200 law review articles were published discussing aspects of the at-will relationship).

only a very small number of states operated within a “just cause” statutory regime.¹⁹⁰ Those who oppose the at-will doctrine emphasize the individual and social costs that attach to a lack of job security, including reduced productivity and diminished democratic participation.¹⁹¹ Defenders point to the increased costs that employers bear when courts require the employer to justify hiring and firing decisions.¹⁹²

1. *The tort for wrongful discharge*

Courts in some states recognize an exception to the at-will doctrine and allow the employee to bring a wrongful-discharge action where the firing is said to violate public policy. In these cases the state constitution may serve as the source of a policy that the court enforces through the tort system; the court does not purport to be weakening state action requirements in those states where they exist, and it does not allow the worker to enforce the constitution directly against the employer.¹⁹³ But the court looks to the state constitution in

190. See, e.g., MONT. CODE ANN. §§ 39-2-901 to -915 (2005). Title 29, section 185(a) of the laws of Puerto Rico [known as Law 80] provides the exclusive remedy for a worker who is terminated without just cause. P.R. Laws Ann. tit 29, § 185(a) (2006). In *Arroyo v. Rattan Specialties, Inc.*, 117 D.P.R. 35, 1986 WL 376812 (P.R. 1986), the Supreme Court of Puerto Rico held that Law 80 does not bar remedies for constitutional violations. In that case, the court relied on the Dignity Clause of the Puerto Rico Constitution to find a statutory exclusion on behalf of a worker terminated for refusing to take an employment-mandated polygraph test. In *Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666 (1st Cir. 2000), the Court of Appeals for the First Circuit found that a worker who was terminated for refusing to falsify lab reports likewise could invoke the statutory exception to redress a violation of privacy and dignity rights that are protected by the Puerto Rico Constitution.

191. See, e.g., Jack M. Beerman & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 918 (1989) (arguing that “when workers are more secure, and when they have a greater voice in the operation of the company, they tend to view the company as ‘theirs’ and they may devote more energy and care to the success of what they see as a common enterprise”).

192. See Robert C. Bird & John D. Knopf, *Do Wrongful-Discharge Laws Impair Firm Performance?*, 52 J.L. & ECON. 197, 219 (2009) (discussing “potential negative economic consequences to employers” of implied-contract exceptions, but emphasizing that “the adoption of wrongful-discharge laws does not appear to impose long-term firm effects”); see also John B. Dudley, *Damage Control: Two Proposals to Limit the Reach and Effect of Oregon’s Wrongful Discharge Tort*, 12 LEWIS & CLARK L. REV. 205 (2008) (criticizing the Oregon wrongful discharge tort, although urging its retention on limited conditions).

193. See, e.g., *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983). The court explained:

Public policy is a broad concept embodying the community common sense and common conscience. . . . The provisions of the Wisconsin Constitution initially declared the public policies of this state. Each time the constitution is amended, that also is an expression of public policy. . . . A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The public policy must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate the constitution or a statute.

Id. at 840 (citations omitted).

identifying whether a public policy exists and whether it merits enforcement through the private law. As the Washington Supreme Court has explained, “In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.”¹⁹⁴ Courts that recognize a tort for wrongful discharge often emphasize the structural significance of the constitutional provision and the public’s shared interest in upholding the identified right or duty.¹⁹⁵ Thus, for example, the Oregon courts have recognized “that the discharge of an employe [sic] for fulfilling an important societal obligation, the denial of which would thwart an important public policy, constitutes the tort of wrongful discharge,” citing “the obligation of a citizen . . . to serve on jury duty.”¹⁹⁶ In recognizing a tort of this sort,

194. *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984).

195. *See, e.g., Hall v. Farmers Ins. Exch.*, 713 P.2d 1027, 1029 (Okla. 1985) (commenting that the at-will doctrine is “not absolute however, and the interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace”).

For example, in *Dunwoody v. Handskill Corp.*, 60 P.3d 1135 (Or. Ct. App. 2003), the Oregon Court of Appeals recognized a tort of wrongful discharge, even on behalf of a contractual employee, where the employer terminated plaintiff for taking days off “to assist the state in prosecuting her husband’s murderers,” finding that “compliance with a subpoena in a criminal case” is a protected public duty, and that failure to protect the public policy “would adversely affect not only the victim in an individual case, but the public generally because the prosecution of such crimes, although solved, could be frustrated and the criminal could go unpunished.” *Id.* at 1137, 1142. As support, the Oregon court referenced an earlier version of article I, section 15 of the Oregon Constitution, and noted approvingly that “the protection and safety of the people of the state [is] a principle [that] does not have to be expressed in the constitution as it is the reason for criminal law.” *Id.* at 1142 (quoting *Tuel v. Gladden*, 379 P.2d 553 (Or. 1963)).

Similarly, in *Danny v. Laidlaw Transit Servs., Inc.*, 193 P.3d 128 (Wash. 2008), the Washington Supreme Court held that the state had a clear policy of protecting domestic-violence victims, which indirectly could be redressed through a tort of wrongful discharge, and emphasized the “truly public” social cost of domestic violence on individuals, employers, and communities. *Id.* at 135. The court located the policy both in state legislation and in the state constitution’s crime victim amendment, which encourages victims to cooperate with prosecutors in enforcing criminal sanctions against those who engage in domestic abuse. *Id.* at 136 (citing WASH. CONST. art. I, § 35).

However, some courts will recognize a tort action even where the constitutional right affects only an individual and not the broader public. *See, e.g., Gerald J. Russello, The New Jersey Supreme Court: New Directions?*, 16 ST. JOHN’S J. LEGAL COMMENT. 655, 687 (2002) (noting that New Jersey recognizes a wrongful-termination tort even where the employer’s acts do not necessarily impact public policy). The Virginia courts allow a common law wrongful discharge claim even where laws “do not explicitly state a public policy, but instead are designed to protect the ‘property rights, personal freedoms, health, safety, or welfare of the people in general.’” *City of Virginia Beach v. Harris*, 523 S.E.2d 239, 245 (Va. 2000) (citing *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987)).

196. *Sieverson v. Allied Stores Corp.*, 776 P.2d 38, 40 (Or. Ct. App. 1989) (citing *Nees v. Hocks*, 536 P.2d 512 (Or. 1975)). The Oregon court subsequently has emphasized that the public policy must require “the kinds of acts that allegedly triggered” the worker’s discharge. *See Babick v. Or. Arena Corp.*, 40 P.3d 1059, 1063 (Or. 2002).

courts do not purport to apply the constitutional norm in the same way or to the same extent as they would against a government actor, but instead attempt a balance “to accommodate the competing interests of society, the employee and the employer.”¹⁹⁷

Thus, for example, in *Rojo v. Kliger*,¹⁹⁸ the California Supreme Court held that sexual harassment in the workplace could be redressed through a cause of action for wrongful discharge, finding a public policy against sex discrimination in the California Constitution equality clause.¹⁹⁹ In looking to the constitution as a source of public policy, the California court emphasized that the policy, to be enforced through the common law in a dispute between private parties, must be public in the sense of “one which inures to the benefit of the public at large rather than to a particular employer or employee.”²⁰⁰ As the court explained, “No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.”²⁰¹ The court rejected arguments that statutory antidiscrimination law provided an exclusive remedy, and dismissed as irrelevant the question of whether the constitution’s equal protection clause applies only to governmental actors:

Contrary to defendant’s assertion, we have previously assumed that article I, section 8 covers private as well as state action . . . , an assumption the Legislature evidently shares (see Bus. & Prof.Code, § 16721 [recognizing that certain business practices denigrate the “fundamental constitutional principles” against discrimination]). For our purposes here, however, whether article I, section 8 applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental *public policy* against discrimination in employment—public or private—on account of sex.²⁰²

State constitutional socio-economic norms likewise have provided interpretive material for state courts in determining whether a public policy

197. *Burk v. K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989); *see also Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), describing the balancing test as follows:

In all employment contracts, whether at will or for a definite term, the employer’s interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public’s interest in maintaining a proper balance between the two. . . . We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract. . . . Such a rule affords the employee a certain stability of employment and does not interfere with the employer’s normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.

Id. at 551-52 (citations omitted).

198. 801 P.2d 373 (Cal. 1990).

199. *Id.* at 388 (“A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.” (quoting CAL. CONST. art. I, § 8)).

200. *Id.* at 388 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373 (1988)).

201. *Id.* at 389 (emphasis in original).

202. *Id.* at 388-89 (internal citations omitted) (emphasis in original).

exists; whether private conduct has violated the policy; and whether the injury ought to be redressed through a common law tort action. In *Griess v. Consolidated Freightways Corp. of Delaware*,²⁰³ the Wyoming Supreme Court recognized a limited cause of action, holding that “a person whose employment is terminated for exercising rights under the worker’s compensation statutes and who is not covered by the terms of a collective bargaining agreement has a cause of action in tort against the employer for damages.”²⁰⁴ The court explained that “another remedy is not available, and recognition of an action in tort will protect the exercise of statutory rights and vindicate the public policy expressed in Wyoming’s constitution and statutes.”²⁰⁵ The Supreme Court explicitly based its decision on state constitutional provisions concerning workplace injuries.²⁰⁶ Although the court cautioned against broadly recognizing tort actions that could subvert the at-will rule, it emphasized the importance of this particular public policy given its constitutional foundation.²⁰⁷

In some cases, the state court has invoked a positive statutory norm that historically traces back to a constitutional amendment that the state had adopted to foreclose judicial overruling of protective legislation. Common law enforcement of workman’s compensation statutes illustrates this practice.²⁰⁸ Thus, for example, the North Dakota Supreme Court has recognized a tort of wrongful discharge on behalf of a worker fired for seeking workman’s compensation, explaining that this right “would be largely illusory . . . if the

203. 776 P.2d 752 (Wyo. 1989).

204. *Id.* at 754.

205. *Id.* at 753.

206. The court relied on two provisions. Article 19, section 7 of the Wyoming Constitution provides:

It shall be unlawful for any person, company or corporation, to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company or corporation shall be released or discharged from liability or responsibility, on account of personal injuries received by such servants or employees

WYO. CONST. 19, § 7. Article 10, section 4(c) provides, in pertinent part:

Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void. As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation The right of each employee to compensation from the fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to the fund in favor of any person or persons by reason of the injuries or death.

WYO. CONST. 10, § 4(c).

207. The Wyoming court subsequently gave a narrowing construction to the wrongful-discharge tort. *See* McGarvey v. Key Prop. Mgmt. LLC, 211 P.3d 503, 507 (Wyo. 2009).

208. *See* F.F., Book Note, 28 HARV. L. REV. 218, 219 (1914) (reviewing ROME G. BROWN, *THE MINIMUM WAGE* (1914)) (“The Workman’s Compensation Law has become practically an accepted commonplace of our legislation, either through necessary state constitutional amendments or through a temper of interpretation different from that of the New York Court of Appeals.”).

price were loss of his immediate livelihood”.²⁰⁹

We agree that the retaliatory discharge of an employee for seeking workmen’s compensation violates public policy in North Dakota. That public policy was expressed by our legislature in the Workmen’s Compensation Act at NDCC 65-01-01: “The state of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, hence, for workmen injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided”²¹⁰

Although the North Dakota court did not cite explicitly to the state constitution, workman’s compensation programs in that state owe their source to article X, section 189 of the North Dakota Constitution, which was adopted in 1889, amended in 1939, and currently authorizes legislative appropriations on behalf of such programs.²¹¹ Similarly, the North Carolina Court has implied a wrongful-discharge tort to enforce the statutory right to a minimum wage.²¹² In these cases, the tort action deputizes an injured worker to enforce the public’s interest in a constitutionally grounded policy that is not ancillary to the employment relation, but rather is constitutive of a balance of power within it.

2. *The covenant of good faith*

The indirect effect of state constitutional norms also may be seen in the decision of some state courts to imply a covenant of good faith in private employment contracts notwithstanding the at-will doctrine. Robert C. Bird has emphasized that “the precise scope and obligation of good faith in employment remains unclear,” and that it is “one of employment law’s most nebulous

209. *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 794 (N.D. 1987).

210. *Id.* Indiana was the first state to recognize a tort for wrongful discharge based on the worker seeking workman’s compensation benefits. *See Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973); *accord Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978); *Murphy v. City of Topeka-Shawnee County Dep’t of Labor Servs.*, 630 P.2d 186, 192 (Kan. Ct. App. 1981).

211. N.D. CONST. art. X, § 12 (adopted 1939).

212. In *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 173 (N.C. 1992), the North Carolina Supreme Court recognized a wrongful-discharge tort on behalf of a worker who was fired for refusing to work for less than the statutory minimum wage. However, the court did not refer to the state constitution, which provides that the “[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state.” N.C. CONST. art. XI, § 4. North Carolina’s minimum wage legislation postdates enactment of the federal Fair Labor Standards Act of 1938. *See Oakdale Knitting*, 416 S.E.2d at 169; *see also* Keith B. Leffler, *Minimum Wages, Welfare, and Wealth Transfers to the Poor*, 21 J.L. & ECON. 345, 348 tbl.1 (1978) (listing the twenty-five states that had minimum wage regulation at the time of the enactment of FLSA); Michael D. Moberly, *Fair Labor Standards Act Preemption of “Public Policy” Wrongful Discharge Claims*, 42 DRAKE L. REV. 525, 536-47 (1993) (arguing for preemption of the common law tort under federal law). For a history of the federal constitutional debate about minimum wage legislation, see K.R. Willoughby, *Mothering Labor: Difference as a Device Towards Protective Labor Legislation for Men, 1830-1938*, 10 J.L. & POL. 445, 472-88 (1994).

concepts.”²¹³ Although the state analogue to the Due Process Clause typically does not apply in the horizontal position, the constitution’s notion of procedural regularity informs some court decisions. The basic notion is that even an at-will employee may develop a legitimate reliance interest in continued job security when his or her behavior conforms to an employer’s personnel policies. Fewer states have endorsed this approach than those that accept the tort of wrongful discharge.²¹⁴ In both situations, however, the court acts on a twin rationale that looks to the private and public interest: to secure the individual worker’s reasonable expectations, and to protect the public’s interest in “an orderly, cooperative and loyal work force.”²¹⁵

Montana, one of the handful of states to imply a covenant of good faith in employment contracts, contains in its state constitution a number of unusual provisions that relate to material well being, to the importance of livelihood, and to the reciprocal relations of state citizens to care for each other. Article II, section 3 of the Montana Constitution, which sets out “inalienable rights,” recognizes a right “of pursuing life’s basic necessities,” and, in enjoying this right, the individual’s “corresponding responsibilities.”²¹⁶ Article II, section 4 further recognizes that “[t]he dignity of the human being is inviolable,” and that this liberty interest, distinct from “the equal protection of the laws,” implicates, not only on “the state,” but also “any person, firm, corporation, or institution.”²¹⁷ The Montana Constitution also contains a specific section, denominated “Labor,” that addresses the rights of working people in the private workplace and limits the workday to eight hours.²¹⁸ In addition, the Montana Constitution commits the state to provide “economic assistance” to those who “by reason of . . . misfortune are determined by the legislature to be in need.”²¹⁹ The court has interpreted this provision as requiring the state “not [to] act arbitrarily between classes of entitled persons”:²²⁰ “The legislature, in

213. Robert C. Bird, *An Employment Contract “Instinct with an Obligation”: Good Faith Costs and Contexts*, 28 PACE L. REV. 409, 413 (2008).

214. See Brent Appel & Gayla Harrison, *Employment At Will in Iowa: A Journey Forward*, 39 DRAKE L. REV. 67, 83 (1989).

215. *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982); see also *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) (stating rationale of protecting an individual worker’s “security” as well as the public interest in a “cooperative and loyal work force”).

216. MONT. CONST. art. II, § 3.

217. *Id.* at art. II, § 4. The Montana provision is based on a similar provision in the Puerto Rico Constitution, which “follows a history of international and foreign constitution-making and human rights declarations at the end of World War II” *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 458 (Mont. 2004) (Nelson, J., concurring); see THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY 25 (2008 ed.).

218. MONT. CONST. art. XII, § 2(2).

219. *Id.* at art. XII § 3(3), as amended by Constitutional Amend. No. 18 (1988)..

220. *Butte Comm. Union v. Lewis*, 745 P.2d 1128, 1133 (Mont. 1987); see Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a “Kinder and Gentler” America*, 19

determining where sacrifices are necessary [when reducing budget expenditures], should regard ‘welfare benefits grounded in the constitution itself . . . [as] deserving of great protection.’”²²¹ The Montana court has not explicitly acknowledged these provisions in its decision to imply a covenant of good faith into the employment relation; the principle of indirect constitutional effect argues that the Montana court ought explicitly to consider these norms as interpretive material in its common law analysis.

3. *The owner’s right to exclude*

Finally, the indirect effect of constitutional norms arguably is present in the handful of cases in which courts recognize affirmative defenses on behalf of uninvited guests who seek access to private property. A core element of traditional property doctrine is the right of the owner to exclude those he does not wish to extend access:²²² whether property is understood as ownership, as expectation, or as control, this feature of property dominates conventional analysis.²²³ Absent state action, the private owner has no obligation to open up his property to those wanting to leaflet, to petition, or to persuade others to join a political cause or to listen to opposing views.²²⁴ State courts have grappled with the scope of the property owner’s right to exclude in cases involving privately-owned shopping malls, universities, and private employment sites; a few courts have maintained the state action requirement for state constitutional enforcement, but nevertheless have acknowledged the weight of constitutional

HASTINGS CONST. L.Q. 783, 816-17 & nn.182-86 (1992) (discussing this decision). The decision in *Butte Comm. Union* precipitated an amendment to the welfare clause. See *supra* note 219.

221. *Butte Comm. Union*, 745 P.2d at 1133 (citation omitted). In a 2004 decision, the Montana Supreme Court found that the state’s policy of denying dental assistance to same-sex partners of employees of the Montana University violated equal protection. In a concurrence, Judge Nelson relied on the Dignity Clause of the Montana Constitution which, he explained, “reflects the international community’s focus on human dignity as a fundamental value.” *Snetsinger*, 104 P.3d at 458 (Nelson, J., concurring).

222. See Elizabeth M. Glazer, *Rule of (Out)law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. PENNUMBRA 331, 332 (2008) (“The right to exclude has long been considered the centerpiece of property law.”).

223. William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 633 (2008) (associating property with a range of meanings including “‘ownership’ interest, . . . individual control of the possession, use, and disposition of resources, . . . and physical control of material possessions” (citing Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000); Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 22-23 (1985); D. Benjamin Barros, *Defining “Property” in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1854 (1995); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995)).

224. See *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972) (stating that the Court “has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only”).

norms in redrawing the boundaries of the private owner's property right as a matter of common law doctrine.²²⁵

Probably the most famous of these cases is *State v. Shack*,²²⁶ a decision of the New Jersey Court overturning the trespass conviction of a legal services lawyer who sought to consult with migrant laborers at a privately owned campsite run by the farmer who employed the laborers. Commentators treat *Shack* as germinal to the "social relations" theory of property.²²⁷ The case holds iconic status in theories of property rooted in conceptions of human flourishing,²²⁸ virtue,²²⁹ and democracy.²³⁰ For some teachers of property, the decision further provides the core of a curriculum that focuses on "human values."²³¹ Doctrinally, Joseph William Singer has argued that *Shack* stands for the proposition that "non-owners have a right of access to property based on need or on some other important public policy."²³²

The court in *Shack* expressed concern that migrant workers would be isolated from society if denied access to visitors where they lived and worked.²³³ The court could find no federal constitutional basis for treating the farmer-employer as a state actor or under a public duty to maintain the campsite as a public forum. The court instead crafted a decision in "nonconstitutional terms,"²³⁴ announcing as its goal "a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility," but again emphasizing that it could identify no "conventional category" in contract, tort,

225. See Hershkoff, *supra* note 157, at 556 (discussing examples drawn from New Jersey law).

226. *State v. Shack*, 277 A.2d 369 (N.J. 1971).

227. See Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 257 (2006) (tracing the "social relations" theory of property to the decision).

228. See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 149-55 (2009). The authors state that the decision is "difficult to reconcile with classical liberal conceptions of property rights as well as with utilitarian methodology favored by law and economics," but "makes good sense . . . from the perspective of an account of human flourishing . . ." *Id.* at 154.

229. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 884 (2009) (discussing the property owner's "moral obligation to his workers").

230. See Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009) (discussing a democratic theory of property that builds on obligation).

231. See Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students that "Property Rights Serve Human Values,"* 5 N.Y. CITY L. REV. 35 (2002) (discussing *Shack* and the first-year property course).

232. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988).

233. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) ("The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. . . . [T]hey are unorganized and without economic or political power.").

234. *Id.* at 372.

or property in which to resolve the interests at stake.²³⁵ Instead, the court announced a conception of property rights that it grounded in “human values”:

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.²³⁶

The *Shack* court did not consider whether its conception of “human values” could be justified by norms implicit in positive rights provisions of the New Jersey Constitution. At the time of the decision, Justice Brennan’s call-to-arms for a renaissance of state constitutional analysis was more than a dozen years in the future.²³⁷ However, even at this early date, New Jersey already had assumed a leadership role in looking to its state constitution as an alternative, or at least as a complementary, basis for public law decisions. Indeed, the New Jersey court had located one of the public policies at stake in *Shack*—protection of marginalized groups from social exclusion—in article I of the New Jersey Constitution, the so-called Happiness Clause.²³⁸ In *Jones v. Haridor*,²³⁹ the New Jersey Court held that article I, section 1 of the state constitution protects “the right to acquire, own and dispose of real property . . . subject to the reasonable exercise of the police power,” and that the anti-segregation provisions of article I, section 5 limit a private property owner’s right to exclude on the basis of race.²⁴⁰ Four years after *Shack*, in its *Mount Laurel*

235. *Id.* at 374.

236. *Id.* at 372.

237. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Helen Hershkoff, *Seventy-fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. REV. 1554 (2000) (discussing Justice Brennan’s articles and the revival of state constitutional decision making); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (referring to Justice Brennan’s Harvard Law Review essay as the “Magna Carta of state constitutional law”).

238. Article I, section 1 of the New Jersey Constitution provides: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” See April Land, *Children in Poverty: In Search of State and Federal Constitutional Protections in the Wake of Welfare “Reforms,”* 2000 UTAH L. REV. 779, 825-26 (discussing the New Jersey Happiness Clause as a source of substantive protection for the poor); see also Connie M. Pascale, *Homeless People Have Rights Too*, 156 N.J. LAW. 18 (1993) (discussing the happiness clause as a source of a right to shelter, to privacy, and to household inviolability).

239. *Jones v. Haridor Realty Corp.*, 181 A.2d 481 (N.J. 1962).

240. Article I, section 5 provides: “No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles,

decision, the New Jersey Supreme Court likewise relied on the state constitution's Happiness Clause, which it found embraced notions of due process and equal protection, to invalidate municipal zoning laws that excluded low- and moderate-income families, caused isolation, and failed to promote the "general welfare"²⁴¹:

There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. . . . It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.²⁴²

As later explained in the *Cherry Hill Township* case,²⁴³ dealing with the eviction of recovering substance abusers who lived together in a single-family residence:

In the 1960's exclusion was based on race. Our courts did not allow this. In the 1970's exclusion was based on the fact that the residents were unrelated by blood or marriage. Our courts did not allow this. In the 1980s exclusion was based on income and distribution of wealth. Our courts did not allow this. Now, in the 1990's, if exclusion is based solely on the disability or handicap or recovery from prior drug or alcohol abuse and addiction, we cannot allow this.²⁴⁴

Shack is justly famous for articulating "human values" as the basis for its decision.²⁴⁵ But we should not overlook the conceptual relation between property law and constitutional law, even if the two are not causally or doctrinally linked.²⁴⁶ The practice of indirect constitutional effect makes this conceptual relation explicit, and suggests that the *Shack* court ought to have

race, color, ancestry or national origin." N.J. CONST. art I, § 5.

241. *S. Burlington County N.A.A.C.P. v. Twp. of Mt. Laurel*, 336 A.2d 713, 725 (N.J. 1975); see also *State v. Baker*, 405 A.2d 368, 369 (N.J. 1979) (invalidating on state constitutional grounds local zoning ordinance that utilized "criteria based upon biological or legal relationships in order to limit the types of groups that may live within its borders").

242. *N.A.A.C.P.*, 336 A.2d at 727-28.

243. *Cherry Hill Twp. v. Oxford House, Inc.*, 621 A.2d 952 (N.J. Super. Ct. App. Div. 1993) (internal citations omitted).

244. *Id.* at 968. See Stacy Alison Fols, *Clear, Manageable Limitations on Governmental Excess: Judge King's Opinions on Individual Liberty and Privacy*, 35 RUTGERS L.J. at xxxv, xliii (2004) (discussing the *Cherry Hill* case).

245. Cf. Bruce D. Greenberg, *New Jersey's "Fairness and Rightness" Doctrine*, 15 RUTGERS L.J. 927 (1983-1984) (discussing state "extra-constitutional" doctrine that looks to "fairness and rightness").

246. Cf. Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751, 758-61 (2004) (discussing but rejecting criticisms of the "'property-as-constitution' syllogism" and arguing that property rules are conceptually linked to constitutional traditions).

looked to the state constitution as interpretive material in devising the property rule that it announced. By aligning “human values” with article 1 of the New Jersey Constitution, the *Shack* court—in the best tradition of “a common law infused with constitutional values”²⁴⁷—could have contributed to the further elaboration of state constitutional norms while retaining the independence of private law doctrine.²⁴⁸

247. See Kaye, *supra* note 39, at 738.

248. The *Shack* court instead relied on common law decisions involving the unconscionability doctrine in which the court declined to enforce contractual terms because of the parties’ disparity in bargaining power. *State v. Shack*, 277 A.2d 369, 375 (N.J. 1971) (citing, for example, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)). This use of the unconscionability doctrine has puzzled commentators, for it overrides the parties’ stated preference for pricing and other terms even where there is no duress or fraud or any evidence of pricing disparity. Eric A. Posner writes: these “‘restrictive contract rules,’ have generally resisted efforts to rationalize them on economic grounds, and they in fact are criticized on the ground that they interfere with wealth-generating transactions and are inefficient means for redistributing wealth.” Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285 (1995). The typical case for Posner is illustrated by the famous District of Columbia Court of Appeals decision in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), which involves an indigent consumer’s default on an installment contract for household goods that contains a harsh statutory penalty or high interest rate on amounts due. Posner, *supra*, at 304-05. In *Walker-Thomas Furniture*, the consumer’s default triggered a cross-collateralization clause that the furniture company invoked in an effort to repossess all goods previously purchased on credit by the customer. *Id.* at 447.

Posner has attempted to explain this application of the unconscionability doctrine through a theory of minimum welfare; on this view, unconscionability curbs welfare opportunism by raising the cost of credit where the purchase would otherwise be “inconsistent with maintaining the minimum welfare level.” Posner, *supra*, at 293. Whether the minimum welfare theory better explains this use of unconscionability doctrine than do competing theories of libertarianism, liberalism, or paternalism, which Posner rejects, I leave to others. See, e.g., Eben Colby, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625 (2002) (reporting the effects of the tightening of credit on the company’s customers); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (urging limits on the doctrine); Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 441 (2004); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1057 (1977) (examining the problem in terms of the poor person’s “ability to buy away disfavored terms” and “poverty as a possible limitation upon a consumer’s competence”).

What is significant to the present argument is that Posner provides a positive account of minimum welfare theory that he locates in the history of the Poor Law in England and the contemporary “complicated patchwork of programs” that make up the welfare system in the United States. Posner, *supra*, at 298-99, 309-10. Without staking out a causal argument, it seems useful to consider whether state constitutional positive norms are doing any work in the handful of common law cases that Posner cites as endorsing this use of the doctrine. The decisions cited are drawn from the District of Columbia and from three states: New York, New Jersey, and New Hampshire. The District of Columbia implicates no state constitutional provisions. See Courts Oulahan, *The Proposed New Columbia Constitution, Creating a “Manacled State,”* 32 AM. U. L. REV. 635 (1983) (discussing a proposed constitution should

C. Indirect Effect and Problems of State Constitutional Discourse

Some may argue that state constitutions are insufficiently robust to provide the normative materials that the practice of indirect constitutional effect requires. Commentators certainly have questioned whether state constitutions deserve to be called constitutions in the conventional sense. James A. Gardner, the most potent critic of state constitutions, has argued that state constitutional discourse is not even conceptually possible: “Typically, state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance,” Gardner writes, “or to express the fundamental values or unique character of distinct polities. Lacking these qualities, state constitutions, to put it bluntly, are not ‘constitutions’ as we understand the term.”²⁴⁹

As the contributions to this Symposium indicate, commentators do not embrace a single theory of state constitutions, nor do they endorse a particular approach in interpreting state documents. But as this Symposium itself reflects, commentators overall have come to accept state constitutions as a source of public norms that state courts may develop over time. The social and economic provisions that appear in almost all state constitutions should not be excluded from this developing interpretive practice. Nor can they be dismissed as lacking a deliberative foundation. To the contrary, their history, to the extent it has been mined in the academic literature, reflects a considered effort to recalibrate

the district be admitted into statehood). The other states, however, are notable for recognizing in their state constitutions positive norms to assistance or to educational adequacy, and also in recognizing either the tort of wrongful discharge or implying a covenant of good faith in the employment relation. Although their state constitutions differ in significant respects, arguably they provide interpretive material that could be reorienting common law doctrine. For a discussion of New York constitutional positive norms, see, for example, Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 *FORDHAM L. REV.* 1403 (1999). For a discussion of New Jersey provisions, see generally Hershkoff, *supra* note 157, at 554 (discussing the New Jersey Constitution’s education and social welfare provisions). For a discussion of New Hampshire provisions, see, for example, Bird, *supra* note 213, at 414-15 (discussing the New Hampshire Supreme Court’s landmark decision in *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), which implied a covenant of good faith into all employment contracts); Nina L. Pickering, *Local Control vs. Poor Patrol: Can Discriminatory Police Protection Be Remedied Through the Education Finance Litigation Model?*, 86 *B.U. L. REV.* 741, 759-60 (2006) (discussing New Hampshire’s reliance on a state constitutional tax provision as the basis for finding a right to adequate education); Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 *N.C. L. REV.* 817, 827 (2008) (discussing New Hampshire Supreme Court’s holding that expiration of a lease does not provide grounds for eviction).

249. James A. Gardner, *What is a State Constitution?*, 24 *RUTGERS L.J.* 1025, 1025-26 (1993). Gardner’s critique initially appeared in James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 *MICH. L. REV.* 761 (1992). He since has developed a functional approach to state constitutional interpretation. See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 274 (2005) (explaining that a functional approach to state constitutional interpretation “focuses on what it is we do when we engage in self-government, not collectively as a nation, but within our respective subnational units”).

power in the private domain through the revision of traditional common law categories. The principle of indirect constitutional effect calls on state courts to attend to these distinct state texts as interpretive resources—even if they diverge from federal understandings—in their private law analysis.

IV. ANSWERING OBJECTIONS TO INDIRECT POSITIVE RIGHTS ENFORCEMENT

Suggesting that state courts extend positive constitutional norms into the private sphere may make some readers uneasy.²⁵⁰ Some critics might object to the concept of indirect constitutional effect itself: public norms, on this view, ought to be kept separate and distinct from private law; the risks to autonomy and to privacy are too great if public norms are permitted to infiltrate private domains. As Frank Michelman puts it, “Full-blast exposure of the common law to bill of rights scrutiny . . . could prove to be a mixed bag from the standpoint of any given observer’s conception of human rights and human freedom.”²⁵¹ In addition, some critics might accept the concept of indirect effect, yet object to using social and economic rights as material from which the judge may draw interpretive resources. After all, giving explicit attention to state positive rights could affect, and affect dramatically, the content and direction of many common law categories. Doctrines concerning adverse possession, contract waivers, security of tenancy, and at-will employment that persist doctrinally might be opened up to reconsideration. Market behavior that previously was experienced as free from government oversight now could be regulated through private law rules of contract, tort, or property that would be recast in the light of public values. This Part considers four potential objections relating to the dilution of rights; disrespect for democracy; the indeterminacy of positive norms; and the need to preserve individual autonomy. These issues have different salience depending on whether the objection is to indirect effect itself, or to using positive rights to achieve indirect effect.

A. The Dilution Objection

Objections to according horizontal effect to state constitutional positive rights might draw from the arsenal of arguments aimed at eliminating the state action requirement from federal constitutional doctrine. One persistent objection is that the creation of “private constitutional law” will dilute constitutional protection either because courts will balance one constitutional right against another, or they will take a categorical approach that cuts back on

250. See, e.g., William P. Marshall, *Diluting Constitutional Rights: Rethinking Rethinking State Action*, 80 NW. U. L. REV. 558, 559 (1986) (arguing that the extension of constitutional rights into the private domain through a relaxation of the federal state action doctrine will undermine “the exercise of individual freedom”).

251. Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 429 (2004).

the content of constitutional rights rather than extend them full force to private actors.²⁵² Because the U.S. Supreme Court's ruling is final and applicable to all states, the process is said to create an inevitable downward pressure on the definition and scope of rights overall. William P. Marshall has argued,

Even more critical than the dangers of balancing itself is that the balancing . . . will create a class of constitutional "losers." If one constitutional right is embattled against another, the protection accorded one liberty is going to be diminished. The courts would be forced to articulate priorities in constitutional liberties, with the result that certain liberties eventually might be found to possess only secondary constitutional significance.²⁵³

Arguments of this sort also are voiced abroad when national courts extend constitutional rights indirectly in private law disputes. Again, the concern focuses on the balancing away of one party's constitutional right against another's.²⁵⁴ Martijn W. Hesselink thus observes: "it has been argued that, whereas in vertical relationships only one party may have a fundamental right (since the State has no rights against citizens), in horizontal situations both parties frequently have conflicting rights, and that these rights must be balanced."²⁵⁵

The dilution objection has far less bite when transported into the state context of sub-national adjudication. State common law decisions lack the finality of Supreme Court judgments; they do not bind the nation; they need not embrace an all-or-nothing approach; and they are not obliged to enforce a constitutional norm in the same way and to the same extent in every case and for every party.²⁵⁶ As with all common law decisions, context matters. Indeed, the very concept of indirect effect depends on a nuanced balancing of interests that is typical of common law decision making. This process does not seek as its end the laying down of a hard-and-fast rule for all time and for all states. Rather, in classic common law style, the court strives to "make haste slowly" through a long and incremental process that adapts the public norm in the light of particular circumstances.²⁵⁷

252. The literature on constitutional balancing tests is large. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (explaining that "[t]he metaphor of balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests"). On categorical interpretation as an alternative to balancing, see Kathleen M. Sullivan, *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

253. Marshall, *supra* note 250, at 564.

254. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73, 76 (2009).

255. HESSELINK, *supra* note 132, 180-81 (reporting objections that courts will "balance rights away").

256. See, e.g., Ellmann, *supra* note 141, at 45 (discussing the Court's *Miranda* rule as an example of constitutional common law that inhibits legislative flexibility).

257. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 592 (1986); see also Friedman, *supra* note 158, at 823-24

B. *The Democracy Objection*

A second objection questions the democratic legitimacy of having courts subject private law doctrines of contract, tort, or property to the pressures of constitutional influence. The democratic objection posits that the legislature is best situated to abrogate or revise common law rules. This is so for two reasons. The first is that private constitutional law immunizes private law from majoritarian process; the second is that the legislature has superior capacity to devise legal rules involving socio-economic matters.

The first form of this argument figures significantly in discussions of whether to eliminate the state action requirement from federal constitutional doctrine. Boiled down, commentators argue that subjecting private law to constitutional review has the effect of circumventing and freezing out the political process. One commentator warns: “Under existing doctrine, if legislative or common-law rules prove unsatisfactory, they can be changed. On the other hand, a doctrine of constitutional law that imposes judicially created parameters on private conduct places serious constraints on the ability of both the common law and legislatures to respond to social issues.”²⁵⁸

Whatever force this argument may hold in the Article III context,²⁵⁹ it carries significantly less weight—if any—in the state arena.²⁶⁰ Most importantly, when a state court relies on a constitutional norm for interpretive guidance in a common law dispute, the court is not making a constitutional decision: the court explicitly is refraining from making a constitutional decision, and instead is relying on a common law approach that is open to legislative revision. Although a court’s decision may generate opposition²⁶¹ (and criticism perhaps will be most vehement from those who oppose

(referring to the “evolutionary movement” of the common law approach which is “incremental and gradual, rather than sudden or revolutionary”).

258. Marshall, *supra* note 250, at 566.

259. Or abroad. See e.g., Derek van der Merwe, *Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity*, 2000 J.S. AFR. L. 12, 31 (according horizontal effect “will tend to reduce the rights guaranteed in the constitution to mere static loci for private disputes and to subject them to a stale exercise in strategic privileging of one right over other rights,” rather than encouraging “an ongoing ‘reflexive’ narrative”); Gerstenberg, *supra* note 170, at 62 (acknowledging the argument that constitutionalization of the common law will insulate private law from politics).

260. Hans Linde of Oregon has written: “When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in contracts of adhesion, its action is rarely attacked as ‘undemocratic.’” Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1973); see also Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 79-81 (2006) (discussing the effect of the state judiciary’s distinct institutional position in state governance on democratic concerns).

261. For a discussion of current legislative battles over common law doctrine, see JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (2004) (discussing efforts to return common law to a “classical” period).

constitutionalizing socio-economic rights²⁶²) the legislature retains authority to override the court's ruling. The common law court's word on the subject lacks the finality accorded decisions of the U.S. Supreme Court.²⁶³ Far from undermining democracy, the practice of indirect constitutional effect can be expected to energize politics, by creating space for popular dialogue and legislative consideration. The judge thus plays a role similar to that of a court engaged in "weak-form" judicial review.²⁶⁴ Finally, those who do not wish to conform to the resulting rules may opt for the law of a different jurisdiction; state common law rules are jurisdiction-specific, and, unlike federal constitutional norms, do not bind the nation as a whole.²⁶⁵

The second form of the democratic objection focuses on the presumed institutional incapacity of courts to enforce positive norms. This argument may be seen as a reprise of objections more generally to the justiciability of socio-economic rights.²⁶⁶ The argument here is that socio-economic rights involve complicated questions of policy that legislatures are better equipped to resolve

262. See Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 389 (2004) ("Legitimacy-based objections to the constitutionalisation of socio-economic rights typically relate to broader ideological concerns on redistribution of wealth and state intervention in market economies.").

263. Indeed, even state constitutional decisions are subject to this form of legislative veto. See Hershkoff, *supra* note 7, at 1161-66 (discussing the revisibility of even state constitutional decisions by a legislature or by popular majorities).

264. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2002); Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 2 (2006). "Weak-form review" is illustrated by the South Africa Court's enforcement of a right to housing, see, e.g., *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) (enforcing a right to housing under the South Africa Constitution), and by a state court's enforcement of state constitutional positive rights, see, e.g., Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY (Marilyn J. Gittell ed., 1998). In the state-court welfare-rights context, I have identified a form of "consequentialist" review, similar to weak-form review, that assesses "whether a state action is likely to achieve a mandated policy," through a process that provides "a set of institutional arrangements enabling other legal actors—the legislature, social service departments, welfare recipients themselves—to develop and share information about workable alternatives that might reasonably carry out the state constitutional welfare mandate." Hershkoff, *supra* note 90, at 1183-86. This approach is consistent with what Gerstenberg describes as a "non-court-centric multi-level process of public discussion." Gerstenberg, *supra* note 170, at 63.

265. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 904-05 (1992) (arguing that the public-policy defense is a consensual doctrine because the parties can negotiate a choice-of-law provision); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356 (1969-1970) (predicting that even if courts decline to enforce contracts on grounds of unconscionability, the seller will just "start up again with new parties in a new jurisdiction").

266. See, e.g., Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 360 (1988) (criticizing the concept of positive rights on the ground that "the debated matter seems a choice among instrumental social policies rather than a matter of adjudicating relatively fixed law and rights").

than are courts. On this ground, many influential commentators insist that courts are institutionally disabled from resolving positive claims; as Lawrence G. Sager puts it, such cases involve “questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy.”²⁶⁷ In the foreign context, Stephen Ellmann has raised similar concerns as to whether the South Africa courts would be competent to apply socio-economic commitments in disputes involving contract or tort, pressing a now often repeated example involving a private investment contract.²⁶⁸

Putting to the side whether this contention accurately describes Article III capacity, arguments about institutional incapacity must always be understood as contextual, and so require an assessment of the available institutional alternatives. In the Article III system, the principle of separation of powers presumes Congress’s superior policy making ability relative to the federal courts.²⁶⁹ Whether state legislatures share this superiority relative to state common law courts is, at best, an empirical question²⁷⁰ and turns on such factors as staffing levels, budget appropriations, legislative committee structures, agenda rules, and whether judges are elected or appointed.²⁷¹

In the states, however, common law courts have taken the lead in devising common law rules for contract, tort, and property cases, demonstrating a strong ability to marshal necessary information, assess competing interests, and work out manageable standards despite the complexity of the industry or the technical nature of the issue. The warranty of habitability in landlord-tenant

267. Lawrence G. Sager, *The Constitution Outside the Courts and the Pursuit of a Good Society: Thin Constitutions and the Good Society*, 69 *FORDHAM L. REV.* 1989, 1990 (2001); see also Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523, 529 (1997) (“American courts lack the capacity to enforce a constitutional right to stable, adequately compensated work—or even to define the contours of such a right with a serviceable particularity.”). But see Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 *OHIO ST. L.J.* 731 (1997) (questioning the premise of judicial incapacity).

268. Ellmann, *supra* note 141, at 43 (“If every builder of low-income housing were deemed subject to constitutional duties, would the courts have to spell out a code of minimally adequate housing, as part of ruling that a builder of less than minimally adequate housing was in breach of constitutional duties?”); see, e.g., Tushnet, *supra* note 38, at 96 (discussing Ellmann’s hypothetical).

269. See Hershkoff, *supra* note 90, at 1891 (“Congress is said to enjoy an advantage in some areas relative to the Article III courts because it can control its agenda, research issues, and compare alternatives.”).

270. *Id.* at 1892 (discussing state institutional capacity as an empirical question). But see Epstein, *supra* note 43, at 1730 (referring to the “structural limitations of the common law system” and insisting that “courts have recognized for centuries that only legislative bodies possess the means to devise effective and comprehensive solutions to many of the most serious issues in the field of land use”).

271. See, e.g., BRENNAN CTR. FOR JUSTICE, *STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM: 2008 UPDATE* (Andrew Stengel et al. eds., 2008) (calling the New York State Legislature “dysfunctional”).

cases is a judicial creation,²⁷² as is the at-will doctrine for employment contracts.²⁷³ Jack M. Beerman and Joseph William Singer pointedly ask why common law courts are presumed to have had capacity to devise “the at-will rule in the first place” but now should be considered incapable of revising the rule to meet current conditions.²⁷⁴ In any event, even if the common law approach provides only a second-best solution to legislative reform, judicial decisions may fill an important remedial gap, offering an initial and conditional solution as the legislature considers alternatives.²⁷⁵

C. *The Indeterminacy Objection*

In addition, one might object to the practice of indirect constitutional effect on grounds of indeterminacy. The expressive theory of law assumes that laws signal respect for specified values and attitudes²⁷⁶ and that the judge and other lawmakers will strive to develop law in a harmonious and coherent way.²⁷⁷ Thus, in an example widely used in the literature, pooper-scooper laws guide pet owners to uphold various sanitary norms and also encourage respect, civility, and cooperation among pedestrians.²⁷⁸ Whether viewed from an internal or an external perspective, the expressive and constitutive purposes of the pooper-scooper law are relatively unambiguous; one might disagree with

272. See Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444 (1974) (describing the California Supreme Court’s development of the implied warranty of habitability); see also Helen Hershkoff, *Justiciability and the Horizontal Effect of Social and Economic Rights: Observations from Sub-National Practice in the United States*, Lecture at the University of Florence Department of Comparative Law (unpublished manuscript, on file with author) (explaining how the New York State Court of Appeals relied on the common law warranty of habitability in developing a state constitutional right to adequate shelter).

273. See Beerman & Singer, *supra* note 191, at 986-87.

274. *Id.* at 986-87; see *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 842 (Wis. 1983) (justifying recognition of an action for wrongful discharge on the ground that “the at will doctrine is a common law principle” and that “[t]he common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions” (internal citation removed) (citing *Schwanke v. Garlt*, 263 N.W. 176 (Wis. 1935))).

275. See, e.g., Jean Braucher, *Response to Eric Posner*, 7 FORDHAM J. CORP. & FIN. L. 463, n.21 (2002) (stating that “contract rules are a crude, temporary and puny way to redistribute wealth; taxes and transfer payments are a more precise, sustained and significant means of redistribution” but that “when we fail to create an adequate safety net, the legal system is forced to cope”).

276. See Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 212 (2002) (stating that legal actions signal commitments).

277. Elizabeth A. Anderson and Richard H. Pildes explain that legal interpretation consists of “the external attribution of meaning,” emphasizing “[t]hat attribution will reflect the purposes . . . of the legal order as a whole,” with norms exerting an effect that helps to ensure that new law is “integrated harmoniously” with existing law. See Anderson & Pildes, *supra* note 53, at 1526.

278. See, e.g., Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603 (2000).

the law's purpose, but its substantive content has fairly clear parameters. Socio-economic provisions lack this determinate quality;²⁷⁹ according an expressive effect to an unclear or ambiguous constitutional term might make common law development seem unpredictable and arbitrary. A concern of this sort can be seen in worries about the justiciability of positive rights against the government, where commentators point to the range of policy concerns that must be identified, assessed, and balanced before a court can determine whether a program or law meets constitutional requirements.²⁸⁰ Similar questions have been raised in South Africa, as to whether the open-ended term "dignity" is sufficiently determinate to allow it horizontal (or any) interpretive effect.²⁸¹

The problem of indeterminacy no doubt is significant: certainty and predictability are critical to any plausible account of judicial decision making,²⁸² and the absence of formal criteria could undermine the legitimacy of state constitutionalism.²⁸³ However, the inconstancy of language makes these difficulties endemic to any interpretive regime; they do not seem to be of a different order in this context than those of a court's assessing what is meant by typical common law terms such as reasonableness or good faith, or its attempting to give content to such porous public law concepts as equality, liberty, or cruel.²⁸⁴ Indeed, the problem is not only that of language. Like many

279. See Asbjorn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 35 (1989) (noting that "the precise content of a number of economic, social and cultural rights . . . remains extremely vague").

280. See Michelman, *supra* note 161, at 668-69 (questioning whether courts can enforce socio-economic rights "by any process possessed of a modicum of sincerity and prudence").

281. See Hugh Corder, *Comment*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 63, at 128, 128-33 (observing that "it is clear that dignity is the single most significant value, but its meaning remains deliberately vague in the South African constitutional jurisprudence").

282. See Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 695 (1935) (stating that too strong use of the public policy defense would result in "too much uncertainty . . . [in] contractual relationships"). See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD*, at xii (1995) (positing that "permanence and stability are the cardinal virtues of the legal rules that make private innovation and public progress possible").

283. See generally Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1448 (1990) ("The indeterminacy critique seeks to unmask legal doctrine for the social construction that it is. The critique assumes that, in the absence of a formalist view of language as an acontextual reference to objective reality, law can only function as a cover for politics."). The literature on this subject is large and contested. See generally J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993) (discussing different approaches to legal coherence).

284. See Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 794 (2002) (stating that "all judicial activity contains the incubus of instability").

open-ended concepts, socio-economic rights are plural in content;²⁸⁵ they reflect what Thomas Nagel in a different context has referred to as a fragmentation of value.²⁸⁶ A right to free public schooling, which appears in some form in every state constitution, might embrace at different times a range of meanings: a concern for human capabilities; a notion of social citizenship; an instrumental principle of information-access; a desire for socialization; a commitment to the provision of a core of goods and services; the promise of opportunity—or a combination of these and other values given the particulars of the situation and a liberal democracy’s overall preference for value pluralism.²⁸⁷

Common law courts have overcome similar difficulties in identifying and weighing public policy considerations, and these policies, as Allan Farnsworth has said, “vary over time.”²⁸⁸ The proposal merely suggests that courts look to state constitutional social and economic rights as interpretive material from which to discern and balance these policies in private disputes. This approach allows a common law court to develop the meaning of a socio-economic norm in a slow and incremental manner that is context-specific and attentive to the particular case. The court can proceed at a high level of generality, and in a manner that comports with interpretive rules that may be unique to a state’s constitutional structure.²⁸⁹

D. *The Autonomy Objection*

Finally, allowing state courts to transport constitutional norms into common law decision making may be criticized as subversive of personal

285. See generally Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113 (2008) (discussing the different possible normative concepts of a minimum core of social and economic rights).

286. Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128 (1979); see also Winter, *supra* note 283, at 1522 (stating that “the elaboration of constitutional meaning is unavoidably affected by contemporary assumptions, beliefs, crises, and events”).

287. See Singer, *supra* note 230, at 1054 (referring to value pluralism in a liberal democracy).

288. E. ALLAN FARNSWORTH, CONTRACTS § 5.2, n.11 (2d ed. 1990). G. Richard Shell similarly observes:

It is important to note that public policy doctrines are, by their nature, subject to change. Rights that were once subject to immutable rules may become subject to special or even ordinary default rules as time passes. . . . [T]he settled appearance of the public policy doctrine masks a host of changes in the application of the law made possible by the judicial power to reinterpret the public policy doctrine at different points in history.

Shell, *supra* note 172, at 445-46.

289. For example, some states give explicit consideration to a constitutional provision’s function, including whether the drafters intended to constrain judicial decision making by overruling or in some other way attempting to “overcome” earlier judicial interpretations. See WILLIAMS, *supra* note 68, at 335. Other states emphasize the importance of searching for the “the voice of the people” within a constitutional term. See, e.g., *Vreeland v. Byrne*, 370 A.2d 825, 830 (N.J. 1977).

autonomy and its requirements of self-control, self-ownership, and voluntary exchange. In addition, the autonomy objection, when rooted in efficiency rather than libertarian values, might predict perverse effects from the project, either because the court's approach will increase transaction costs or hurt those who are its intended beneficiaries through misconceived efforts at redistribution.²⁹⁰

The autonomy objection stems from a conception of political liberalism that demands government neutrality with respect to the choices that individuals make in planning and carrying out their lives. As Jeremy Waldron has explained, "The idea that the law should be neutral between different views in society about what makes life worth living has become a prominent theme in modern liberal thought."²⁹¹ The requirement of neutrality assumes that it is impossible and even immoral for government to compare the preferences of one individual to another or to favor one set of preferences over another. Instead, government should permit individuals to decide for themselves what preferences to choose and how to carry them out.²⁹² Neutrality thus imposes on government a singular role: once markets, courts, and police forces have been established, government must step aside and permit individuals to order their affairs as they think best. Nonintervention is the order of the day: short of violence, an individual's choices may impose considerable negative externalities and still be tolerated. The autonomy objection requires government to ensure that each individual can enjoy relatively unfettered liberty;²⁹³ it is allied with a negative-rights conception of constitutional rights that protects common law entitlements—presumed to be permanent and prepolitical—from the coercive effects of government regulation.²⁹⁴

The neutrality approach to autonomy has been criticized as "implausible," "incoherent," "slippery," and "paradoxical."²⁹⁵ Whether the demand of

290. For a libertarian discussion of autonomy, see Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 698-99. See also David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 453 (2003) ("Legal rules should not be used to redistribute income."). But see Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (arguing that the work incentives of those burdened by and those who benefit from redistribution are less likely to be distorted by legal rules than by taxes).

291. Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1098 (1989).

292. See Epstein, *supra* note 290, at 687-700 (explaining and distinguishing subjectivity from incommensurability, and the relation of the two to attitudes toward government intervention).

293. See David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1685-86 (2009) ("Liberal-individualistic theories revolve around the value of autonomy. . . . Not only are the parties the best judge of what they stand to gain or lose from a transaction, but second-guessing their decisions would be inimical to free will—the very attribute that the edifice of contract exists to serve.").

294. Richard A. Epstein refrains from calling common law rules natural, but posits that they embody enduring features of "human choice." See Epstein, *supra* note 290, at 698-99.

295. Waldron, *supra* note 291, at 1099 (reciting these criticisms, but urging that the neutrality approach not be dismissed "out of hand").

neutrality is essential to liberal political theory or to federal constitutionalism, I leave to others to defend.²⁹⁶ Among the most significant criticisms of the neutrality approach is its inattention to material well being and to the conditions that sustain autonomy. Alternative conceptions of autonomy, as explicated by Joseph Raz, Jeremy Waldron, and Amartya Sen, counter the neutrality approach, and, I suggest, better fit a state constitution's commitment to social and economic rights. At a minimum, they suggest that state constitutional positive rights offer interpretive material from which attractive notions of autonomy can be developed through common law decisions. Some scholars have urged attention to these theories in the reform of common law rules; I suggest that a state's own regime of social and economic rights provides a pathway to this revision.²⁹⁷

Raz forcefully has demonstrated the relation between material well being and autonomy and has developed a significant explanation of how material deprivation is subversive of autonomy. For Raz, "The ruling idea behind the ideal of personal autonomy is that people should make their own lives," and autonomy is to be contrasted "with a life of no choices."²⁹⁸ "The autonomous agent," Raz posits, "is one who is not always struggling to maintain the minimum conditions of a worthwhile life."²⁹⁹ The provision of some of an individual's material needs thus is "a precondition of one's ability rationally to adopt new goals and pursuits, and abandon existing ones."³⁰⁰ Governments can encourage autonomy "by creating the conditions for autonomous life, that is, primarily by guaranteeing that an adequate range of diverse and valuable options shall be available to all."³⁰¹ Indeed, "[o]ne is autonomous," Raz states, "only if one lives in an environment rich with possibilities."³⁰²

Waldron, who has questioned Raz's version of liberal perfectionism,

296. See, e.g., Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385 (1996) (criticizing the neutrality of liberalism and of autonomy); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 22 (1998) (arguing for a "formative project" of government's fostering of its citizens' capacities for self-governance).

297. See, e.g., Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1585-94 (1997) (applying a version of capability theory to tort doctrine); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 276 (2008) (applying Sen's capability theory to just compensation doctrine).

298. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369, 371 (1986).

299. *Id.* at 155.

300. *Id.* at 297.

301. Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 782 (1989).

302. *Id.* at 782. Waldron raises the objection that if an "environment for autonomy . . . exists already, the government may not use coercively raised funds to subsidize existing or additional options purely on the grounds of their goodness," and a similar concern might be raised about according indirect effect to material rights in common law principles, if we were to agree, counterfactually, that such an environment exists. Waldron, *supra* note 291, at 1148.

nevertheless also has recognized the damage that material deprivation does to individual liberty: “When a person is needy,” Waldron writes, “he does not cease to be preoccupied with freedom; rather, his preoccupation tends to focus on freedom to perform certain actions in particular.”³⁰³ Waldron emphasizes that the definition of freedom on which he relies is negative; property rules limit the freedom of those who have no homes. This aspect of property rules does not make them “eo ipso wrong,”³⁰⁴ but it “precludes” relying on a concept of freedom to defend an existing regime of property relations.³⁰⁵ On this view, abject deprivation impedes and even forecloses an individual from engaging in actions—physical and elemental—that are “a precondition for all other aspects of life and activity.” These activities, such as eating, sleeping, washing, and tending to one’s physical security, are “a precondition for the sort of autonomous life that is celebrated and affirmed when Bills of Rights are proclaimed.” Waldron cautions:

I am not making the crude mistake of saying that if we value autonomy, we must value its preconditions in exactly the same way. But if we value autonomy we should regard the satisfaction of its preconditions as a matter of importance; otherwise, our values simply ring hollow so far as real people are concerned.³⁰⁶

Finally, Amartya Sen’s theory of capabilities offers an approach to autonomy that recognizes the importance of material well being to a plausible understanding of human liberty. “Capability,” Sen explains, “reflects a person’s freedom to choose between alternative lives....”³⁰⁷ The carrying out of capabilities requires “functionings,” which Sen describes as the structure and framework within which human flourishing may be achieved.³⁰⁸ Pointing to the “circumstantial contingency of desires,” Sen has emphasized the ways in which social context may diminish and impede an individual’s autonomous capacity to develop preferences.³⁰⁹ Property theorists draw inspiration from Sen’s capability approach, and its conception of autonomy fits comfortably with the

303. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 303 (1991).

304. *Id.* at 307.

305. *Id.* at 308.

306. *Id.* at 320. Consistent with this view Daphna Lewinsohn-Zamir has written that the autonomy needed to “determine one’s own course” requires “adequate levels of nutrition, health and sanitation; freedom from anxiety and pain; certain levels of self-respect, self-esteem and aspiration; and sufficient material goods, such as a home and household property.” Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 346 (2006).

307. Amartya Sen, *Justice: Means Versus Freedoms*, 19 PHIL. & PUB. AFF. 111, 118 (1990).

308. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 70-86 (1999).

309. Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 191 (1985). Sen writes: “Our reading of what is feasible in our situation and station may be crucial to the intensities of our desires, and may even affect what we dare to desire. . . . In some lives small mercies have to count big.” *Id.* at 191.

positive rights provisions of many state constitutions.³¹⁰

CONCLUSION

Justice Aharon Barak of the Israel Supreme Court has described the practice of indirect constitutional effect as one in which “[p]rotected human rights do not directly permeate private law,” but rather do so “by means of private law doctrines (either through existing doctrines or through new doctrines created for the purpose of public law ‘absorption’).”³¹¹ The common law does not become constitutionalized, nor do common law interpretations of public norms become fixed, final, and binding on the other branches of government. Instead, consistent with private law traditions, public norms remain conditional, dynamic, and contingent on ongoing politics.³¹² The judiciary’s interpretive choices, unlike those of the U.S. Supreme Court, continue to enjoy no superior position relative to democratic outcomes for they remain open to revision by the elected branches and by the electors. In this spirit, I have suggested that state common law courts recognize state constitutional socio-economic provisions as interpretive material that is critical to the future development of private law principles. The principle of indirect constitutional effect has the advantage of fitting comfortably with the common law’s practice of looking to policy in its decision making processes. Recognizing the public law source of a policy would alter the context of common law analysis: policies that previously seemed unmoored from public values now would find roots in the constitutional text, and their legitimacy made more articulate and explicit. The common law would remain distinct but could no longer be treated as discontinuous from constitutional law; private decision making would be acknowledged as a site for the articulation and development of public norms, but its rules and contents would remain independent and separate. I hope that the approach suggested generates discussion of how law evolves in response to norms and of the complicated relation that exists between state and federal constitutional law. Above all, I hope it encourages appreciation of the power that “just words” may have on social and economic life.

310. See, e.g., Alexander and Peñalver, *supra* note 228, at 136 (drawing from the capabilities approach in reconceptualizing property).

311. Barak, *supra* note 131, at 226.

312. See Bruce Porter, *The Crisis of ESC Rights and Strategies for Addressing It*, in *THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 43, at 47 (referring to the judicial elaboration of positive rights “as a collaborative project linking social and economic policy to human rights norms and values, grounded in the act of rights claiming, rather than in predefined legal constructs”).