Horizontal Rights: A Republican Vein in Liberal Constitutionalism

Christina Noriega Bambrick

A version of this paper has been accepted for publication in the journal* Polity. *Please do not cite or quote without author's permission.

Abstract:

While liberal constitutional theory typically understands constitutions as establishing *vertical* arrangements in which governments protect individual rights, some courts have introduced doctrines of horizontal effect, holding private bodies responsible for the rights of others, as well. This article argues that we can understand such horizontal rights as a republican vein in the tradition of liberal constitutionalism. While the conventional liberal narrative emphasizes the rights of individuals, horizontal effect builds a catalogue of individual duties as well, corresponding to the commitments and aspirations of a given constitutional order. This article draws on classical and contemporary republican political theory, as well as cases from Germany, India, and South Africa, to demonstrate how the structure of and arguments for horizontal rights reflect proclivities and track commitments associated with republicanism. Though the fact of a republican streak in these rights need not make them antithetical to existing understandings of constitutionalism, it does admit the distinctive potential of horizontal rights to alter elements of the conventional narratives, about the nature, purpose, and limits of constitutionalism.

Keywords: Rights, horizontal rights, courts, republicanism, constitutional theory, comparative constitutionalism

INTRODUCTION[1]

The classical liberal tradition has typically understood constitutions as protecting individuals from the encroachments of government. Of course, constitutions empower government, but they also seek to limit that power through checks and balances and, almost always, through enumerating a list of justiciable rights obligating the state.[2] Since the post-World War II era of constitution-making, increasingly more countries have included socio-economic or positive rights in their constitutions in addition to the classical political and civil rights. In either case, however, a constitution establishes a *vertical* relationship according to which government must respect and secure rights on behalf of the people. Ultimately, this vertical relationship leaves space for a separate private sphere in which individuals may pursue their own interests and projects free of government involvement, though admittedly supported by government structures.

Despite this conventional liberal account, constitutional framers and courts in some countries have given horizontal effect to certain constitutional rights, interpreting constitutional commitments to create duties not only of the state but of private entities or non-state actors as well. According to the Indian Supreme Court, for example, the constitutional right to equality creates rights obligations of corporations vis-à-vis workers.[3] According to the South African Constitutional Court, landlords may have positive obligations to ensure their tenants live in conditions consonant with human dignity.[4] Some scholars understand this move to give rights horizontal effect as a natural development given the more ambitious rights objectives of modern

---

[1] I am indebted to [redacted].

[2] Speaking of the purpose of the U.S. Constitution in Federalist 51, for example, Madison explains, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (Madison 319)

[3] *People's Union for Democratic Rights v. Union of India,* 3 SCC 235 AIR [1982] SC 1473.

[4] *Daniels v. Scribante and Another,* CCT50/16 [2017] ZACC 13.

constitutions,[5] and given the larger trends toward making many political questions also constitutional questions.[6] Some further argue that offering constitutional remedies for rights abuses in the private sphere has the potential to bolster democratic commitments.[7] Erwin Chemerinsky thus indicts the classic vertical model embodied in United States constitutionalism as "anachronistic, harmful to the most important personal liberties, completely unnecessary..."[8] Nevertheless, others still worry that the shift to horizontality excessively empowers courts, threatening democratic political processes and the individual liberty people enjoy in private spaces.[9] They maintain that even while horizontal effect may produce positive outcomes, it depends on eroding the very separation between the public and private spheres that has traditionally founded liberal constitutionalism.

This article picks up where these scholars leave off by asking what justification one would need to supply for such a development as horizontal effect. The fact that this phenomenon has generated such debate with respect to the purpose and limits of constitutionalism points

---

[5] Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008.

[6] Mattias Kumm, "Who's Afraid of the Total Constitution?" *German Law Journal,* Vol. 7, No. 4. 2006. For an account of this phenomenon more general than the horizontality debate see, Ran Hirschl, *Toward Juristocracy*, Cambridge, MA: Harvard UP, 2004.

[7] The UK's passing of the Human Rights Act, for example, has led scholars to ask what rights obligations Strasbourg jurisprudence entails for private entities. See Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act," *Public Law*, 1998*;* Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford UP, 2006. See also the three edited volumes on the subject of horizontality published in the years following the HRA: *Human Rights in Private Law*, Ed. Daniel Friedmann and Daphne Barak-Erez, Portland, OR: Hart, 2001; *The Constitution in Private Relations*, Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005; *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

[8] Erwin Chemerinsky, "Rethinking State Action," Nw. U. L. Rev. Vol. 80, 1985, 506.

[9] See Bruno DeWitte, "The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law," *Citizenship Studies* 13.5, 2009, 515-525; Stephen Ellman, "A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors," 45 *New York Law School Law Review*, 2001; Cass Sunstein, "On Property and Constitutionalism," 14 *Cardozo Law Review*, 1992, 921-922.

The consistent decisions of U.S. jurists to circumscribe the guarantees of the Fourteenth Amendment to "state actors" illustrates this line of thinking. See the *Civil Rights Cases* (1883), *DeShaney v. Winnebago County* (1989), *U.S. v. Morrison* (2000). Contrast the accounts of such decisions with Stephen Gardbaum's contention that Article VI's requirement that the Constitution be the "Supreme Law of the Land" effectively establishes indirect horizontal effect insofar as the Constitution must control the content of private law ("The 'Horizontal Effect' of Constitutional Rights," *Michigan Law Review*, Vol. 102, 2003.)

toward the need for explanation beyond what can be offered by the conventional liberal wisdom, that constitutions regulate and limit only state actors. That horizontal effect departs from these liberal foundations thus warrants a search for alternative sources of justification. The scholar or jurist committed to horizontal effect can no longer describe constitutionalism simply as obligating government to certain ends in a way that creates a separate private sphere of individual liberty. How, then, can we understand constitutionalism when constitutional commitments that oblige the state also oblige non-state actors, when the private comes to be governed by the same principles that govern the public? In the republican tradition one finds such a source of justification.

In this article, I identify two features of horizontal effect that garner support from republican principles. First, consider how horizontal effect obligates citizens to abide by public commitments and projects. Indeed, it incorporates private actors into the constitutional project directly in a manner that the vertical model does not. At most, the vertical model could bring private actors closer to public values through ordinary legislation, but this occurs wholly at the discretion of legislators and not as a result of the constitution's requirements. In this obligation to constitutional principles and projects, horizontal effect reflects an affinity with the republican emphasis on "the public thing," best summed up in the commitment to the common good that recurs in republican thought. This is not to say that either horizontal effect or the republican tradition collapses the private into the public, but only that private entities are not cast as existing beyond or strictly separate from the public realm. I describe this orientation of private entities toward public projects in horizontal effect as a kind of *uniformity* in obligation to the constitution across spheres, one that resembles the republican ideal that the common good should move the polity understood as a whole.

In addition to this orientation of private entities toward public projects, horizontal effect gives rise to duties between private individuals. This *solidarity* among people for which horizontality calls resembles the republican idea that people possess individual duties to others by virtue of being equal citizens of a common polity. Of course, other traditions also call for certain dispositions of citizens. William Galston and Stephen Macedo have argued, for example, that liberalism requires particular virtues to ensure a requisite respect and tolerance among citizens.[10] However, these conceptions are more typically couched as individual virtues rather than public *duties* that citizens have toward the polity and toward one another, a formulation more naturally supported by republicanism. In these features of uniformity and solidarity, therefore, horizontal effect departs from certain ideals of liberal constitutionalism but finds grounding in the logic and values commonly associated with republicanism.

I begin by sketching out an overview of the liberal and republican traditions in order to distinguish them and describe each's justificatory core in their respective conceptions of liberty. I then elaborate how the particular principles of the common good and solidarity manifest in republican and neo-republican thought. This discussion sets up the core of the argument, that particular features and the general practice of horizontal effect may find grounding in these republican principles. The final section raises potential republican concerns with the way horizontal effect is a result of judicial action, but also shows how some republicans have defended a role for courts on the very basis of republican liberty.

DISTINGUISHING THE LIBERAL AND REPUBLICAN TRADITIONS

[10] Stephen Macedo, *Liberal Virtues*, Oxford: Oxford UP, 1990; William Galston, "Liberal Virtues and the Formation of Civic Character," in *Seedbeds of Virtue*, Ed. Mary Ann Glendon and David Blankenhorn, Lanham, MD: Madison Books, 1995; see also *Liberal Pluralism*, Cambridge: Cambridge UP, 2002; Iseult Honohan, "Educating citizens: national-building and its republican limits" in Ed. Iseult Honohan and Jennings, 203.

Insofar as this article argues horizontal effect may be supported by a republican logic in contrast with the conventional justifications for liberal constitutionalism, it depends on a comparison between liberalism and republicanism. Many scholars show how these different traditions have manifested in political histories in complex ways.[11] Though I do not engage this debate over the relationship between liberal and republican thought, nor the role of these traditions in broader histories, as of the American founding,[12] my argument does depends on the recognition that these traditions are different and distinguishable. This point is not predicated on any claim that these traditions are irreconcilable either in theory or in practice, but is fully compatible even with subtle accounts arguing that liberalism is nested within republicanism or vice versa. Joseph Postell offers such an account, demonstrating how the republicanism and liberalism equipped Americans in the Early Republic with mutually reinforcing justifications to regulate various industries. Nevertheless, such accounts still depend on understanding liberalism and republicanism as different traditions defined by different concepts and commitments.

How then do these traditions differ? In some ways this may seem a vain effort as the history of political thought has seen many instantiations of each. However, both liberal and republican scholars have largely converged on the proposition that the fundamental and encompassing difference lies in how each tradition understands liberty.[13] It is the definition each

[11] On the liberal tradition in American political-constitutional history, see Louis Hartz, *The Liberal Tradition in America,*1955; Mary Ann Glendon, *Rights Talk,* New York: Free Press, 1991. Thomas Pangle, *The Spirit of Modern Republicanism,* Chicago: Chicago UP, 1990; Herbert Storing, "Slavery and the Moral Foundations of the American Republic," in *Toward a More Perfect Union*, Ed. Joseph Bessette, 1995. On the republican tradition, see Bernard Bailyn, *The Ideological Origins of the American Revolution,* Cambridge, MA: Belknap Press, 1992. Gordon Wood, *The Creation of the American Republic,* Chapel Hill: North Carolina UP, 1998; J. G. A. Pocock, *The Machiavellian Moment*, Princeton: Princeton UP, 2003; Rogers Smith, *Civic Ideals*, New Haven: Yale UP, 1999. See also the concept of a "republican synthesis" in Robert E. Shalhope, "Toward a Republican Synthesis," *William and Mary Quarterly*, Vol. 29, No. 1, 1972, 49-80.

[12] Joseph Postell, "Regulation During the American Founding: Achieving Liberalism and Republicanism," *American Political Thought*, Vol. 5, Winter 2016, 84.

[13] This, however, opens up further debates about how properly to understand republican liberty. Contrast, for example, the accounts of liberal thinker Isaiah Berlin and republican thinker Philip Pettit (Isaiah Berlin, "Two

offers of liberty that is most fundamental and that serves to distinguish one from the other most precisely. The tradition one finds most compelling, therefore, will largely depend on what conception of liberty one thinks is more accurate. Moreover, and more to the point of the present argument, the extent to which one endorses horizontal effect may in part depend on the extent to which one grants something like a republican conception of liberty.

The liberal tradition famously grew out of various wars that plagued Europe in the years leading up to the Enlightenment. Such political philosophers as Thomas Hobbes[14] and John Locke[15] sought a new basis on which to ground government authority, and so developed their theories of the state of nature. In each version, people exist in perfect freedom before the establishment of government, enjoying certain pre-political natural rights. However, the state of nature ultimately proves inconvenient at best and dangerous at worst, as no institutions exist to enforce individual rights. Individuals, thus, contract with one another, ceding some of their natural rights to a governmental authority in exchange for order and protection. It is at this point that Hobbes and Locke crucially part ways. While Hobbes thinks it necessary to empower an absolute sovereign simply to get people to live in relative peace, Locke develops the liberal premise that government can and ought to be limited, acting within certain constitutional powers to protect people's rights but no further. On Locke's telling, government exists for the sole purpose of protecting rights and so may only not act beyond this designated purpose. Out of all this comes the liberal understanding of freedom, variously called negative liberty,[16] freedom as

Concepts of Liberty" (1958), *Four Essays on Liberty*, Oxford: Oxford UP, 1969; Philip Pettit, *Republicanism: A Theory of Freedom and Government,* Oxford: Clarendon Press, 1997; Philip Pettit, *On the People's Terms*, Cambridge: Cambridge UP, 2012).

[14] Thomas Hobbes, *Leviathan*. Ed. Richard Tuck. Cambridge: Cambridge UP, 1996.

[15] John Locke, *Second Treatise of Government,* Ed. C. B. MacPherson, Indianapolis: Hackett, 1980.

[16] Berlin.

non-interference,[17] the right to be let alone.[18] Government exists so that people may be let alone, and not face unwarranted interference in exercising their rights. Moreover, people adopt constitutions to ensure that government operates within these designated limits, thus leaving space for a separate private sphere in which individuals may go about their lives without government interference.

Liberty in republicanism comes from a very different place. Classical republicanism finds its start in the Greco-Roman world with such philosophers as Aristotle, Polybius, and Cicero. In *The Politics*, Aristotle describes man as *zoon politikon*, a being that requires political community in order to flourish. Anyone that can flourish, let alone survive, without community must be either god or beast, he concludes.[19] Therefore politics is natural in a way that it is not for liberal social contract theorists and, indeed, is necessary for authentic freedom. For many republicans, freedom comes in the ability to engage in public life on an equal basis with one's fellow citizens, to debate the requirements of the common good, the laws under which citizens live, and the way forward for the polity.[20] From this common structure of republics, some conclude that republican freedom consists in "mastery over the self" and, by extension, an ability to shape and control the polity's way of life.[21] On the other hand, others insist that there is a more fundamental core to republican freedom in the concept of freedom as non-domination.[22] Laborde and Maynor sum it up: "In the old republican adage, the people want not to be a master, but to have no master."[23] The republican citizen is free, therefore, insofar as he or she is equal among his or her fellow

[17] Pettit 1997, 2012.
[18] Louis Brandeis and Samuel Warren, "The Right to Privacy," *Harvard Law Review*, Vol 4, 1890.

[19] Aristotle, *The Politics,* Ed. Stephen Everson, Cambridge: Cambridge UP, 1996, I.1253a 2-3.
[20] Honohan.
[21] Berlin.
[22] Pettit 1997, 2012. Below I'll illustrate how freedom of nondomination has been understood differently.
[23] Cecile Laborde and John Maynor, *Republicanism and Political Theory*, Hoboken, NJ: Wiley-Blackwell, 2008, 11.

citizens and not subject to arbitrary or alien rule. Moreover, insofar as the goal is non-domination and domination is conceivable in both public and private life (imperium and dominium, respectively),[24] republican liberty requires that law be able to govern all spheres of life. Neo-republican scholarship, as represented by Philip Pettit, follows this more negative cadence of freedom as non-domination. Though he demonstrates that this formulation carves out more space to value a free private sphere, that is, a private sphere free of domination, he also recognizes the need for law to intervene in private life when to prevent domination.

THE COMMON GOOD AND SOLIDARITY IN REPUBLICAN THOUGHT

In order to show how horizontal effect may find support in republicanism and this understanding of freedom as non-domination, it is necessary to exposit the particular principles of republicanism that can do this heavy lifting. This section elaborates the republican concepts of the common good and duty among citizens, showing how they emerge from a foundation of freedom as nondomination. This discussion, thus, lays the groundwork to connect these principles with horizontal effect in the section that follows.

The very purpose of the polity, as Aristotle understands it, is to facilitate people's achievement of their human good of virtuous living.[25] More precisely, the purpose of the polity is to pursue the *common* good, or the good of the community taken as a whole, above any one person's individual good. He states, "For even if the good is the same for a city as for an individual, still the good of the city is apparently a greater and more complete good to acquire and preserve. For while it is satisfactory to acquire and preserve the good even for an individual,

[24] Pettit 1997, 36.
[25] Aristotle, *Politics* I.1252a 1-6.

it is finer and more divine to acquire and preserve it for a people and for cities."[26] Indeed, this concept of the common good is so constitutive of Aristotle's understanding of a well-ordered polity, that he employs it as *the* standard by which to distinguish good regimes from bad regimes, true forms of government from perversions.[27]

In Aristotle we already see core concepts of what would develop into republican political theory. First, Aristotle gives us an initial account of human beings as having a particular good that consists in virtue and in living the political life; second, Aristotle understands the common interest or common good as, in some ways, prior to the individual good. Even as republicanism has evolved, these points have been represented consistently in the various iterations of the tradition. Some even argue that one can only be a republican philosopher or a republican statesman in a limited sense if one does not accept these premises.[28] For others, the republican understanding of the common good is less a matter of teleology and more of a matter of what is necessary to achieve authentic freedom. Daly and Hickey associate the more teleological understanding with Aristotle, and the more liberty-centered interpretation with Roman thought, citing Philip Pettit's conception of freedom as nondomination as an exemplar of this Roman republicanism.[29]

Similarly, Machiavelli did not base his thought on any particular understanding of the human good. However, "the public thing" features prominently in his republicanism, as

[26] Aristotle, *The Nicomachean Ethics*, Trans. Terence Irwin, Indianapolis: Hackett, 1999, I.2. 1094b 7-11; see also *Metaphysics,* Book VIII, 1045a 8-10.

[27] Aristotle, *Politics* III.1279a 29-33

[28] Stephen Gardbaum, "Law, Politics, and the Claims of Community," *Michigan Law Review, Vol. 90, No. 4* 1992, 685-760.

[29] Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution,* Manchester: Manchester UP, 2015, 42-44).

Machiavelli considers citizens' ability to debate vigorously the common good of the polity an essential feature of republican freedom.[30] S. M. Shumer explains:

> People have different values and different perspectives rooted in their individual lives, and, too, they compete for the same scarce values. To destroy that conflict, even to seek to destroy it, is to destroy politics. Machiavelli takes this a significant step further: it is active (even passionate) conflict that is the life force of public liberty, civic virtue, and even military courage. [31]

Amid this inevitable (and desirable) disagreement in public discourse, however, Machiavelli's ideal citizen will remain intent on pursuing the common good. Individual ambition and expression becomes "fused within the breast of each citizen" with the public good and liberty.[32] What made the Romans truly free, on Machiavelli's telling was that, even after tempestuous debate, they pursued with unequivocal and united commitment the common good as dictated by the results of those debates.[33]

In one of republicanism's later iterations, Jean-Jacques Rousseau represents the republican tradition in his concepts of the social contract and the general will. Individuals can only be truly free, Rousseau argues, if they are not subject to alien and arbitrary rule, if each individual is self-governing. Given that we are bound, as a practical matter, to operate within the confines of civil society, however, the best chance we have of achieving the authentic freedom that comes with self-government is to enter into a social contract with others.[34] In this social contract, we surrender our rights and agree to comply with the general will. Since each individual has consented and so vested his or her own will in the general will, individuals are obeying themselves in obeying the general will—they are, in actual fact, self-governing and free.

---

[30] Niccolo Machiavelli, *Discourses on Livy*, Trans. Harvey C. Mansfield and Nathan Tarcov, Chicago: Chicago UP, 1996.

[31] S. M. Shumer, "Machiavelli: Republican Politics and Its Corruption," *Political Theory*, Vol. 7. No. 1. 1979, 15

[32] Shumer 16.

[33] Shumer 14-15.

[34] Jean-Jacques Rousseau, *The Social Contract*, Trans. Donald A. Cress, Indianapolis: Hackett, 2011, Book I, Ch. 6.

Moreover, a community may "force to be free" those who would not comply with the decisions of the general will.[35] Thus, Rousseau's requirements for freedom lead to some relegation of the individual, and a republican understanding of human freedom as consisting in the political life. Though this goes further than most other versions of republican thought, Rousseau's emphasis on the public is characteristic of republicanism in general.[36]

From ancient republicanism to modern republicanism, therefore, we see the privileged status of the common good and prioritization of the "public thing." As Cicero explains in *On Duties*, "But when you have surveyed everything with reason and spirit, of all fellowships none is more serious, and none dearer, than that of each of us with the republic. Parents are dear, and children, relatives and acquaintances are dear, but our county has on its own embraced all the affections of all of us."[37] The *politeia* or *res publica* and its governing principles are all-encompassing and therefore, require the citizen's devotion, perhaps even at some cost to private interests, but always with the ultimate result of securing one's freedom understood as non-domination. Rousseau serves to illustrate this idea most radically, as in his chapter on Civil Religion where he argues that religion must conform to and even serve the ends of the polity.[38] Even if citizens differ in their perspectives, responsibilities, and particular roles in the polity, all institutions and citizens are ultimately accountable to the promoting the good of the polity, and the laws that sustain their freedom. Like liberals, republicans from Cicero to Pettit have maintained space for private interests and rights, as to property. However, in contrast with the liberal position, a republican of most any stripe would ultimately understand their freedom as

[35] Rousseau, *Social Contract*, Book I Ch. 7.
[36] Pettit further distinguishes Rousseau from other strands of republicanism (Pettit 1997, 30).
[37] Cicero, *On Duties*, Ed. M. T. Griffin and E. M. Atikins, Cambridge: Cambridge UP, 1991, I.57.
[38] Rousseau, *Social Contract*, Book IV Ch. 8.

contingent on, rather than infringed by, pursuing the larger commitment of the polity understood as the common good.

In this idea of devotion to the common good, we begin to see the outlines of republican solidarity, as well. Many republican philosophers and statesmen have discussed the importance of inculcating shared beliefs through civic education, for example.[39] Aristotle explains that the young must be "trained by habit and education in the spirit of the constitution."[40] He seems to suggest that a constitution engenders more than mere law or even values of a particular regime. Rather, inhering in a constitution is a kind of ethos, a particular shared life, in which people must be educated if the polis is to persist.[41] In her own account of education as a vehicle toward republican solidarity, Iseault Honohan worries that "fostering solidarity has often been associated too closely with promoting cultural identity without taking sufficient account of the pluralist conditions of modern societies."[42] Honohan thus recognizes a common life to uphold in a republic, but insists that the solidarity that education should foster is better understood in "willingness to acknowledge and assume the responsibilities entailed by interdependence; self-restraint in pursuing individual or sectional interests rather than the common good; and the inclination to engage open-mindedly with viewpoints of others in the public realm."[43] This in contrast with promoting a particular cultural identity. Aristotle, Cicero,[44] Rousseau,[45] the

[39] Iseult Honohan, "Educating citizens: Nation-building and its republican limits," in *Republicanism in Theory and Practice,* Ed. Iseult Honohan and Jeremy Jennings, Oxfordshire, OX: Routledge/ECPR Studies in European Political Science, 2006. Old vs. pluralist

[40] Aristotle, *Politics* V.1310a 17.

[41] For a more contemporary application of this idea, see Walter Murphy, *Constitutional Democracy*, Baltimore: Johns Hopkins UP, 2007, 13. Moreover, Maurizio Viroli explains how such local particulars as "memories, places, heroes, hymns" serve as vehicles for cultivating a love of a common liberty (Maurizio Viroli, *Which Patriotism for Europe?* Eutopia Magazine, 5 August 2014)

[42] Honohan 199.

[43] Honohan 204.

[44] Cicero, *On Duties*, Ed. M. T. Griffin and E. M. Atikins, Cambridge: Cambridge UP, 1991.

[45] Jean-Jacques Rousseau, *Emile*, Trans. Allan Bloom, New York: Basic Books, 1979.

American Founders,[46] and contemporary theorists such as Honohan[47] all emphasize, albeit in different ways, the role of education to cultivate in a people a kind of civic-mindedness and devotion to republican values and virtues. As Richard Bellamy states, "No constitution will itself survive long unless citizens identify with it."[48]

On this understanding, devotion to one's constitution entails devotion to one's *patria*, and by extension, a certain solidarity with the people in one's *patria*. Maurizio Viroli explains how people only come to love liberty and virtue through the cultivation of such local bonds. [49] Again, we see this idea as early in the republican tradition as Aristotle, who describes civic friendship as "the greatest good of states and what best preserves them against revolutions..."[50] Later in *The Politics*, Aristotle further explains the value of such friendship or solidarity:

> Such a community can only be established among those who live in the same place and intermarry. Hence there arise in cities family connexions, brotherhoods, common sacrifices, amusements which draw men together. But these are created by friendship, for to choose to live together is friendship. The end of the state is the good life, and these are the means towards it. And the state is the union of families and villages in a perfect and self-sufficing life, by which we mean a happy and honourable life.[51]

Thus, on Aristotle's understanding, friendship is requisite to community. This includes the sort of affection for one's neighbor which we might expect, but also a sort of proximity and sameness—shared blood to reinforce those affections. "To choose to live together," he states, "is friendship." Cicero further develops this idea of civic friendship in his account of duties. He states, "We are not born of ourselves alone,"[52] and suggests in his account of justice that we

[46] George Thomas, *The Founders and the Idea of a National University*, Cambridge: Cambridge UP, 2014.
[47] Honohan.
[48] Richard Bellamy, *Political Constitutionalism*, Cambridge: Cambridge UP, 2007, 219.
[49] Maurizio Viroli, *For Love of Country*, Oxford: Oxford UP, 1995.
[50] Aristotle, *The Politics*, 1262b 7-8.
[51] Aristotle, *Politics,* 1280b 35-1281a 2.
[52] Cicero, *On Duties*, I.22.

actually *owe* something to our country and fellow citizens. Not to give to our patria what we are able is nothing less than an injustice.[53]

In addition to the existential requirements of a polity and necessities of justice that Aristotle and Cicero respectively offer in support of civic friendship, republican thought values solidarity insofar as citizens must see one another as co-equals if they are to govern together in pursuit of the common good. This need for meaningful and acknowledged equality among citizens has been present even when republics were not so egalitarian, as in Greece, Rome, and the United States through Jim Crow.[54] Jack Balkin explains how "The historical tradition of republicanism... insisted that economic self-sufficiency was central to participation in republican government," that one had to have the requisite leisure time and financial security in order to participate in politics, both as practical matter and as a matter of being acknowledged as an equal. "This demand," Balkin continues, "produced both conservative and egalitarian versions of republicanism."[55] It produced the conservatism of those republics that only allowed propertied or noble members of society to be voting citizens. However, this same demand of economic self-sufficiency would later give rise to more contemporary versions of republicanism that have sought either to raise individuals up to a certain level of independence and self-sufficiency, or to make material wealth less important so that a broader population may participate as equal members in politics and society.

In a way, both the conservative and egalitarian versions of republicanism operate on the same premise, that a certain equality is necessary for felt solidarity, which is, in turn, necessary for republican citizenship and collective self-government. The difference is that the conservative

[53] Cicero, *On Duties*, I.23.
[54] Gordon Wood, Empire of Liberty, Oxford: Oxford UP, 2011, 8.
[55] Jack Balkin, "Which Republican Constitution," *Constitutional Commentary*, Vol. 32, 2017, 33.

version identifies citizens from pre-existing castes, whereas the latter more egalitarian version makes a positive effort to equalize people and so bring them more fully into the fold of citizenship.[56] In either case, we see the necessity of shared responsibility and solidarity toward fellow citizens in a republican framework.

THE NEO-REPUBLICAN INTERVENTION

From the conservative versions of republicanism Balkin discusses to the populist bent we find in Rousseau, some scholars have worried about the broader implications and tendencies of republicanism. For example, Isaiah Berlin's famous characterization of the ancients' positive liberty is less than attractive in its potential to legitimate an oppressive communitarianism and even authoritarianism as a function of the rights and privileges that come with self-rule.[57] Against such apprehension, Philip Pettit argues that a consistent understanding of republicanism—that is, "freedom as non-domination," properly understood—is not so susceptible to these authoritarian perils, but actually serves to critique certain instantiations of republicanism as classist and homogenizing.[58] Daly and Hickey similarly explain how republicanism comes in different versions, some of which are more moderate than others:

> The term [republicanism] is associated with the unitary and indivisible State advocated by Jean-Jacques Rousseau, but also the federalism and checks and balances promoted by Madison....Some republicans have assumed that civic virtue can be realized only in a cohesive, austere and disciplined society, whereas more liberal-minded thinkers have argued that republican citizenship can occupy a more minimal domain and accommodate a range of co-existing private identities.[59]

[56] Pettit 2012; Frank Michelman, "Law's Republic," *Yale Law Journal*, Vol. 97, No. 8, 1988.
[57] Isaiah Berlin, "Two Concepts of Liberty" (1958), *Four Essays on Liberty*, Oxford: Oxford UP, 1969; Pettit 2012.
[58] Pettit 2012.
[59] Daly and Hickey 9-10.

Pettit does just this: argue for "a minimal domain" of republican citizenship, that can "accommodate a range of co-existing private identities." Pettit juxtaposes republican freedom as nondomination with both the liberal conception of freedom as non-interference[60] and perversions of republican freedom manifest in more communitarian theories.[61] He follows Quentin Skinner in arguing that republican freedom is properly understood "not as the positive benefit of participation in sovereign self-rule, but as a negative good that such participation might instrumentally serve: the good of escaping the imposition of others."[62] In this way, Pettit's theory may require the addition of another category in Berlin's framework, namely, freedom as nondomination negatively conceived.[63]

How, then, does Pettit's take on freedom as non-domination comport with a republican commitment to the common good and solidarity among citizens? Though Pettit tends not to employ such language as "the common good" in the same way as classical republicans, the heart of his theory still reveals an essential kinship. First, he is very clear that nondomination *is* a common good, that is, a good that is good for all and can only be fully realized in common. He explains,

> ...[T]here can be no hope of advancing the cause of freedom as non-domination among individuals who do not readily embrace both the prospect of substantial equality and the condition of communal solidarity. To want republican liberty, you have to want republican equality; to realize republican liberty, you have to realize republican community.[64]

[60] Pettit 2012, 8-11.

[61] Pettit 2012, 11-18. See also Jose Marti and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain*, Princeton: Princeton UP, 2012, 32, 45-46.

[62] Marti and Pettit 32.

[63] Pettit 1997, Ch. 1.

[64] Pettit 1997, 125-126.

In short, even republican liberty in its negative form of freedom as non-domination, as opposed to the more positive freedom as self-mastery, depends on a "republican community" dedicated to this conception of freedom and to its fruition for all members of the community. For Pettit, therefore, freedom is necessarily tied up with some understanding of a common good.

In the same way that freedom as non-domination requires republican community, so too might it be jeopardized by any sector of the community, by private and public entities alike. Pettit warns against all the ways in which domination can occur in the private realm—one might think of the power of an employer over his or her employees, or of big money in politics. For this reason, true freedom requires the cooperation of all spheres with respect to this public principle of freedom as non-domination. Hence, Pettit follows his republican predecessors in maintaining that both public and private spheres remain obligated to this common good, even as a matter of law. The fundamental requirement for preserving freedom is that interventions in private life occur "on the people's terms."[65] In other words, the public principle of non-domination may warrant interference in the private sphere so long as the people maintain meaningful control over the governing institutions that make these decisions.

Pettit also accounts for republican solidarity. In *On the People's Terms*, he introduces the "eyeball test," the idea that freedom requires that an individual "should be able to look others in the eye without reason for fear or deference."[66] This is because the ability to evoke the kind of fear that leads one to avert his or her eyes in deference amounts to domination. This kind of domination, or arbitrary power, Pettit believes, can be avoided if everyone enjoys a comparable standard of living. He explains, "Social justice, so interpreted, would require each citizen to enjoy the same free status, objective and subjective, as others. It would mandate *a substantive*

[65] Pettit 2012.
[66] Pettit 2012, 298. Emphasis added.

form of status equality."[67] According to Pettit, the securing of material factors, often controlled by the private realm, are necessary to achieving nondomination in a meaningful sense. Therefore, a polity must secure a requisite material wellbeing in order for citizens to be able to "look others in the eye," and so view one another as co-equals governing together. This concern with requisite material equality, to which the "eyeball test" draws attention, echoes the emphasis of classical republicanism on material equality and self-sufficiency as pre-requisites for participation in politics and society. And so, Pettit justifies intervention in the private both to secure such social and economic rights, as well as to prevent more direct forms of domination.

While republican thought is united by an understanding of freedom as non-domination, Pettit's theory admittedly focuses on the more negative concern of not being subject to the arbitrary power of others, in contrast with others that focus on the positive of self-rule. In some ways, this distinction is important to the task at hand, insofar as horizontal effect does find strong ground in the concept of non-domination in particular. Nevertheless, we can only give effect to non-domination through some version of those principles of the common good and solidarity that recur throughout republican thought. For true freedom as non-domination requires that all spheres be held to this standard, and that individuals be able to look their compatriots in the eye as true equals.

REPUBLICANISM AND HORIZONTALITY

What, then, is the connection between these principles of republican thought and horizontal effect? More specifically, how do the principles of the common good and solidarity serve to ground this emerging practice in constitutionalism?

[67] Pettit 2012, 298. Emphasis added.

Uniformity in Horizontal Effect

As republican thought holds up the common good as a standard for both public and private entities, so too does the horizontal effect implicate public and private actors with promoting constitutional values. This uniformity in the constitution's applicability to public and private entities can be justified by republicanism and, more fundamentally, by the common good that serves a republican conception of freedom.

In contrast with the conventional vertical model of constitutionalism which requires some distance between the principles that bind each of the public and private spheres, horizontality brings private entities into conformity with public values as a function of what the constitution itself is understood to require. What is known as *direct* horizontal effect occurs when judges apply constitutional rights directly to private actors, creating duties somehow to respect, uphold, or promote the constitutional rights of other citizens. On the other hand, horizontality sometimes operates through ordinary legislation or through judges' development of common law. This *indirect* horizontal effect occurs when judges require legislatures to hold private actors to account for rights obligations in the way they legislate and regulate private spaces. [68] Despite these doctrinal minutiae, the function of horizontal effect remains the same: private entities accrue duties as a direct result of a constitution's commitments to certain rights. Legislatures may have some discretion in how they execute these constitutional requirements in law, but they do not have discretion in the core fact that the constitution's commitments must bear on private entities.[69]

[68] Gardbaum 2002.

[69] Speaking to the distinction between direct and indirect horizontal effect, Mattias Kumm suggests the results of these doctrines ultimately are not so different. (Mattias Kumm, Who is Afraid of the Total Constitution? Constitutional Rights and the Constitutionalization of Private Law," 7 *German Law Journal* 341 (2006).352).

Though these horizontal rights obligations may be mediated by private law, therefore, the fundamental point remains that public values or constitutional commitments become the source of duties of private individuals and entities. Hence, as in the republican tradition, individuals become responsible for and accountable to the larger projects of the polity. In this way, we can say that horizontality constitutes something of an innovation of liberal constitutionalism in changing *who* is responsible for constitutional commitments, and in designating the constitution as the source by which individuals are made responsible. Moreover, this innovation may be justified to the extent that we find compelling a republican conception of freedom as non-domination. Whereas one subscribing to the liberal conception of freedom as non-interference may be troubled by the degree and nature of interference in private relations that horizontality entails, one who maintains a republican conception of freedom as non-domination will be more inclined to recognize this as leveraging the same constitutional principles that protect people from the domination of public entities (imperium) to protect them also from domination of private entities (dominium).

For an example of how uniformity manifests in an actual instance of horizontal effect and may be justified by republican principles, we need look no further than Germany's famous *Lüth* case. In 1951, German filmmaker Veit Harlan filed suit against Erich Lüth, arguing that Lüth had defamed him in publicly calling for a boycott of his pro-Nazi film. While the district court initially granted Harlan's injunction, the Federal Constitutional Court (FCC) reversed the ruling seven years later, arguing that the German Basic Law commits the polity to an "order of objective moral and legal principles." Such principles have a "radiating effect," bearing on all areas of German law and life. For this reason, the Court argued that it would be remiss to pretend that Lüth's right to freedom of expression, guaranteed by the Basic Law, was irrelevant to the

case. Indeed, the Court ultimately sent the case back to the lower court with the instruction that it consider how such principles of the Basic Law inform German civil law.

In *Lüth*, the FCC states explicitly the importance of uniformity on certain foundational questions and constitutional commitments in public and private venues alike. In the same way that the constitutional framers felt a sense of urgency to entrench in the Basic Law commitments to human dignity and the inviolability of human personality just a few years after the conclusion of WWII, one senses a similar urgency in the FCC's *Lüth* decision, to ensure that these defining constitutional commitments actually be constitutive of the polity as a whole. In speaking of the German constitutional tradition, and the seminal *Lüth* case in particular, Ulrich Preuss explains:

> [T]he right to free speech or to freedom of religion is not only a kind of concession of the society to individuals and their self-interest, but it equally serves the benefit of the society at large; a society in which each individual enjoys the fundamental rights of the Bill of Rights is *different and morally more advanced* than one in which these rights are lacking. Hence, it is in the interest of society itself to establish and sustain these rights. If this is so, *it cannot be tolerated that there are spheres of social life in which the spirit or the values of the fundamental rights are absent*.[70]

This interpretation of German constitutionalism suggests that the horizontal application of rights is motivated by more than the sheer convenience of enlisting the private sphere, or even by the goal of protecting individual rights. Rather, Preuss describes an ethos of the polity, a moral position which may permit some degree of difference, but ultimately begs for a united front in the commitment to certain governing principles. Thus, the horizontal application of rights can serve to infuse the life of the polity with the "spirit or the values of the fundamental rights," in the same way that citizens of a republican polity are equally held to pursue the common good of

[70] Ulrich Preuss, "The German *Drittwirkung* Doctrine and Its Socio-Political Background," *The Constitution in Private Relations,* Ed. Andras Sajo and Renata Uitz, Utrecht, The Netherlands: Eleven, 2005, 26 (emphasis added).

the polity as their own. In this way, constitutional rights commitments may be just as much "about" that private entity charged with promoting rights as they are about the rights-bearer.

One might object that the uniform commitment of public and private spheres that horizontality requires is different in some important ways from the principle of the common good which I identify with republicanism. Indeed, horizontality operates within the larger framework of rights which, on certain formulations, may exist in tension with the sort of civic-mindedness that republicanism requires.[71] The objection might continue that with horizontal effect we employ the language of rights and so frame the issue as a conflict of rights, an essentially liberal formulation that does not leave as much space for considerations of the common good.[72] Nevertheless, horizontal effect still entails a privileging of the public thing above one's immediate private interests, and not simply as a result of the sort of refereeing or policing that virtually all political philosophers have understood as being part of the role of government.[73] Rather, horizontality requires the suspension of private interests in the explicit service of public ends, a notion that one would be hard-pressed to find in the work of classical liberals. Indeed, horizontality will require that one yield his or her rights claims to other, perhaps more constitutive commitments of the polity, even if those simply be commitments to other rights. Hence, the German Federal Constitutional Court ruled that the radiating effect of the right

[71] Gordon Wood explains: "In a republic...each man must somehow be persuaded to submerge his personal wants into the greater good of the whole. This willingness of the individual to sacrifice his private interests for the good of the community—such patriotism or love of country—the eighteenth century termed 'public virtue.' A republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people." (Wood 1998, 68)

[72] Duncan Ivison, "Republican Human Rights?" *European Journal of Political Theory,* Vol. 9, No. 1, 31-47.

[73] This point, that humankind requires systems of government and policing, is particularly emphasized in such state of nature theories as those advanced by Hobbes and Locke. The obvious exception to this broad claim is anarchical theory.

to freedom of expression in some cases necessitates the concession or sacrifice of he who suffers the harm of defamation as a result.[74]

Of course, courts do account for the burden that horizontal effect puts on private agents, concluding that the obligations of state and non-state actors may differ in intensity. Take for example, South African case *Daniels v. Scribante and Another*. Living in conditions of utter disrepair, Yolanda Daniels began to improve at her own expense the dwelling she rented on Chardonne Farm. The property manager, Theo Scribante, argued that the relevant statutory law and constitutional provisions granted her no right to change the property without his or the owner's consent. Moreover, they had no positive duty to pay for any modifications she made to improve her living conditions. Tending to the social and historical context surrounding the case, the South African Constitutional Court ultimately decided that Daniels did, in fact, have a right to live in conditions that were up to standard and, more specifically, that this was required by her right to human dignity. Moreover, Scribante and the property owners were not necessarily exempt from covering these costs. Still, the Court acknowledged certain limits to the duties that Daniels's right demanded of Scribante. In the majority opinion, the Court observes that private persons can only rely on "their own pockets" or private funds as opposed to public sources of revenue. Justice Madlanga explains, "It would be unreasonable, therefore, to require private persons to bear the exact same obligations under the Bill of Rights as does the State."[75] Because the capacities, resources, and status of private and public institutions are not identical, therefore, neither are their constitutional duties equal.

[74] For cases with facts and outcomes similar to *Lüth*, see also, the South African case *Khumalo v. Holomisa* and the American case *New York Times v. Sullivan*.

[75] *Daniels v. Scribante*, pargraph 40.

Nevertheless, the capacities of or burden on private entities is neither the only nor the most important consideration in determining whether rights should be given horizontal effect. In *Daniels*, the Court develops criteria introduced in earlier cases,[76] explaining the considerations upon which the horizontal application of rights depends:

> Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state"; and, would letting private persons off the net not negate the essential content of the right?[77]

This explanation of the South African Court's decision suggests that much more enters the calculation than the relative burden horizontal effect may create for private entities. Rather, the Court puts much weight on such factors as the importance or status of a given right, that is, how constitutive a right is in the context of the larger constitutional project, as well as what the right's realization will require. We see this in the Court's consideration of "the nature of the right," and "the history behind the right." In such criteria, the Court considers not the burden on private individuals, but the status of particular rights against standards of justice and the meanings that arise out of particular historical and cultural contexts. Some rights are so important and important to a particular place,[78] one might say, that they must govern the polity uniformly, regardless of those projects and commitments existing in what we might otherwise understand to be a private space.

[76] See *Khumalo v. Holomisa*, in which the South African Court decided that the horizontal application of Section 8(2) of the South African Constitution depends in part on the potential of private entities to impinge rights, but also, importantly, on the "intensity of the constitutional right in question" (paragraph 33).

[77] *Daniels v. Scribante and Another*, paragraph 39

[78] *Daniels v. Scribante and Another*, paragraph 51

Solidarity in Horizontal Effect

In addition to uniformity, the horizontal application of rights also engenders a certain solidarity, akin to republican solidarity or civic duty. Specifically, in obligating private entities to promote the constitutional commitments of a polity, horizontal effect holds individuals accountable for the rights of fellow citizens, directing them toward some sense of solidarity and recognition of equal status. Of course, liberal political thought also depends on a belief in human equality. But again, one who subscribes to the liberal conception of freedom as non-interference will dispute the way horizontality seeks equality through enlisting private entities to public projects. On the other hand, the idea of solidarity or duty with respect to one's fellow citizens is part and parcel of the republican community to which Pettit refers.[79] That one would have obligations to one's fellow citizens as an extension of pursuing the good of the polity is beyond dispute in most any version of the republican tradition. Though not palatable to the typical liberal, therefore, this solidarity is a natural result of the republican conception of freedom as non-domination.

This connection between horizontality and solidarity is apparent in various scenarios, as when courts apply rights horizontally to achieve an outcome that might have been attainable through the conventional vertical model as well. For example, in the case *Society for Mohini Jain v. State of Karnatakawhen*, the Indian Supreme Court decided that private universities could not be allowed to charge certain application fees as a constitutional matter, insofar as such fees would obstruct Article 14's guarantee of equality and Article 21's right to education.[80] These rights to equality and to education plausibly could have been secured through alternative means,

[79] Pettit 1997, 125-126.

[80] *Society for Mohini Jain v. State of Karnatakawhen* (1992) 3 SCC 666. Gardbaum, "Horizontality in the Indian Constitution," *The Oxford Handbook of the Indian Constitution*, Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016, 608.

however, perhaps through government subsidies to offset the cost of applying to private universities, or through making public universities more accessible.[81] When a court applies horizontally a right that government might have secured through state action, it seems to assume the distinct goal of bringing private entities to respect and guarantee the rights of others. Horizontal rights thus become just as much "about" those private entities charged with protecting rights and the disposition of those entities toward the rights-bearer.

A similar motivation might underlie those instances in which a court imposes a penalty on private actors, on top of whatever steps are necessary to ensure that the rights-bearers' rights are protected. Consider, for example, the case of *M.C. Mehta v. State of Tamil Nadu* in which the Indian Supreme Court held that employing children younger than fourteen in the matchmaking industry violated Article 24. The offending employers were required to pay a fine to the "Child Labour Rehabilitation-cum-Welfare Fund" in order to provide for children who might otherwise be compelled to seek employment.[82] While a penalty might promote the deterrence of future violations of rights, it might also be motivated by the desire to reform private individuals and, specifically, to reform private individuals to participate in the project of promoting particular rights.

On the subject of solidarity, we might also revisit the case *Daniels v. Scribante and Another*.[83] In deciding that landlords must permit tenants to live in accommodations up to requisite standards of dignity, the South African Constitutional Court did more than simply hold private entities to account for public values. Rather, the Court decided that economic and social

[81] For similar reasoning with respect to horizontal effect, see Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law," *I.CON*, Vol. 1, No. 1, 2003, 79-98

[82] *M.C. Mehta v. State of Tamil Nadu* (1996) 6 SCC 756. Gardbaum, "Horizontality in the Indian Constitution," 605.

[83] CCT50/16 [2017] ZACC 13.

rights could directly create obligations of private individuals and non-state actors.[84] This entails the much broader conclusion that constitutional commitments may create *positive* obligations for private individuals and non-state actors. In other words, individuals against whom a right is applied horizontally may not simply have to refrain from acting in a particular way, but may have to take positive action in pursuit of the commitments of the polity.[85] On this understanding, horizontal rights have the capacity to achieve an equality akin to Pettit's status equality.[86] Insofar as it holds private individuals to acknowledge and actively secure the rights of others, horizontality makes possible an equality that transcends the typical negative and positive rights, but rather encompasses the mutual cooperation and recognition that would enable one to look others in the eye, according to Pettit's republican "eyeball test."

One might object that while instances of horizontal effect may seek solidarity among citizens, it attempts to do so by judicial decree in contrast with the more typically republican emphasis on contestation and a robust civic culture.[87] To this point, that horizontality yields a sort of top-down republicanism, one might argue that the courts offer people something akin to an education in republican virtues when they apply rights horizontally. In the words of Eugene Rostow, "The Supreme Court is, among other things, an educational body, and the Justices are

[84] See also Aoife Nolan, "Daniels v. Scribante: South Africa Pushes the Boundaries of Horizontality and Social Rights," *I-CONnect: Blog of the International Journal of Constitutional Law*, 20 Dec. 2017, http://www.iconnectblog.com/2017/06/daniels-v-scribante-south-africa-pushes-the-boundaries-of-horizontality-and-social-rights/.

[85] See also Gardbaum, "Horizontality in the Indian Constitution," *The Oxford Handbook of the Indian Constitution*, Oxford, Oxford UP, 2016; Colm O'Cinnede, "Irish Constitutional Law and Direct Horizontal Effect—A Successful Experiment?" *Human Rights in the Private Sphere*, Ed. Dawn Oliver and Jorg Fedtke, Abingdon, UK: Routledge-Cavendish, 2007.

[86] Pettit 2012, 37.

[87] Jacobsohn addresses this very point in the Indian context: "[T]he very explicitness of the constitutional recognition (especially in Article 25) that meaningful social reform required attention to the critical role of religion in Indian life might suggest the futility of judicial intervention. Problems of such complicated scope and intricacy would very likely defy Court-mandated solution" (Jacobsohn, *The Wheel of Law*, Princeton: Princeton UP, 2009, 92).

inevitably teachers in a vital national seminar."[88] Rostow goes on to cite the situation of African Americans in 1950s America, and argue for the great good the Court accomplished in advancing equality in both public and private venues.[89] In a similar vein, one could argue that doctrines and applications of horizontality offer people something of a civics lesson, and even promise a remedy for what some see as the dearth of republican-esque virtue and solidarity, and other ill effects of a pervading liberalism in modern constitutionalism.[90] It is to these concerns about the role of courts that I turn in the final section.

HORIZONTALITY AND THE REPUBLICAN CREDENTIALS OF COURTS

Despite the features of horizontal effect that can be justified in republican terms, the expansive role for courts that horizontality potentially entails may give some republican scholars pause.[91] As one scholar explains, "courts lack the fundamental democratic quality of allowing an equal input from all affected citizens—their 'right' to author their rights."[92] Such a tension emerges in one strand of republican thought not yet discussed, namely the Republican Revival in the legal literature. Interestingly, some republican revivalists, such as Frank Michelman and Mark Tushnet, have also written on horizontality.[93] However, these scholars never make the

[88] Eugene Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review*, Vol. 66, No. 2, Dec. 1952, 208.

[89] Rostow.

[90] For example, Mary Ann Glendon argues that the great emphasis on individual rights in the American "dialect" of rights talk has led to a forgetting of the language of responsibility (Mary Ann Glendon, *Rights Talk*, New York: Free Press, 1991). See also Honohan 202. Eoin Daly has directly alluded to the potential of horizontality to advance republican ends, though he has not developed the connection in any great depth. See Eoin Daly, "Freedom as Nondomination in the Jurisprudence of Constitutional Rights," *Canadian Journal of Law and Jurisprudence,* Vol. 28 No. 2, July 2015, 306; and Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, Manchester: Manchester UP, 2015, 77-78.

[91] Daly and Hickey.

[92] Richard Bellamy, "Democracy as Public Law: The Case of Constitutional Rights," *German Law Journal*, Vol. 14, No. 08, 2013, 1030.

[93] Frank Michelman, "Constitutions and the Public/Private Divide," *Oxford Handbook of Comparative Constitutional Law*, Ed. Michel Rosenfeld and Andras Sajo Oxford: Oxford UP, 2012; Frank Michelman, "The

connection that horizontality has a republican logic. A reason for this may lie in the nature of their endorsement of republicanism. Tushnet, for example, emphasizes such republican principles as self-government, dialogue, and deliberation,[94] principles that may not easily coexist in an increasingly court-centric world. Indeed, Tushnet has in other places argued that we must "take the Constitution away from the courts."[95]

Frank Michelman does find a role for courts in his republicanism, albeit his argument is premised on the very fact that there is a deep tension between, what he frames as, "rule of the people" and "rule of law." In *Law's Republic* Michelman states, "Republican thought thus demands some way of understanding how laws and rights can be both the recreations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law."[96] In other words, it is not immediately clear how citizens can be both self-governing and governed by law. As a solution, Michelman argues that courts are distinctly situated to assist the marginalized of society to join the governing body of citizens. For if a polity, taken as a whole, is to be truly self-governing, then its citizens must possess the requisite agency to govern. According to Michelman, courts can help widen the boundaries to encompass more people as citizens, and thus facilitate more perfect self-government. Nevertheless, a tension remains in Michelman's thought as he elsewhere concedes that the role of the court ought to remain fairly modest.[97]

Interplay of Constitutional and Ordinary Jurisdiction," *Comparative Constitutional Law*, Ed. Tom Ginsburg and Rosalind Dixon, Cheltenham, UK: Edward Elgar, 2011; Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008.

[94] Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law,* Lawrence, KS: Kansas UP, 2015.

[95] Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton: Princeton UP, 2000.

[96] Frank Michelman "Law's Republic," *Yale Law Journal*, Vol. 97, No. 8, 1988, 798.

[97] See the analyses of Michelman's thought in Jeff King, "Social Rights in Comparative Constitutional Theory," in *Comparative Constitutional Theory*, Ed. Gary Jacobsohn and Miguel Schor, Cheltenham, UK: Edward Elgar, 2018 and William Forbath, "Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present," 39 *Tulsa Law Review*, 2004, 631-636.

Richard Bellamy tries to strike a similar balance in his own work.[98] Drawing on a distinction first employed by Philip Pettit,[99] Bellamy concedes the usefulness of courts for their "editorial" capacity, that is, their ability to force legislatures to reconsider laws that may not have accounted for the interests of every group in the polity.[100] However, he worries that with judicial finality, courts instead begin to exercise an "authorial" role. This is the function of *making* law that, on a republican understanding of freedom as non-domination, ought to be retained by institutions accountable to and, therefore, controlled by the people, rather than unelected judges. Bellamy explains that if a court is allowed "to strike down legislation or to read into it its own reading of its fit with constitutional norms, then it is in effect usurping the authorial function of electoral democracy."[101] And indeed, insofar as people disagree so vastly in their views of the "sources and substance," the "subjects and scope" of rights, we have little reason to entrust judges with answering these inherently political questions about rights, much less their horizontal application. He states, "At the level of principle, these disputes have not proved any more resolvable in seminar rooms of philosophy departments than they have among policy makers and citizens."[102] In light of the inevitability of reasonable disagreement, therefore, the republican committed to freedom as non-domination may not view courts as proper venues to convene Eugene Rostow's national seminar. Rather, on Bellamy's telling, the authorial implications of rights questions make their resolution a matter for "real democracy."[103]

[98] Bellamy 2013.
[99] Philip Pettit, "Democracy, Electoral and Contestatory," in *Designing Democratic Institutions*, Ed. Ian Shapiro and Stephen Macedo, 2000, 105.
[100] Bellamy 2013, 1030.
[101] Bellamy 2013, 1036.
[102] Bellamy 2013, 1021.
[103] Bellamy 2013, 1030.

In his own article "The republican core of the case of judicial review," Tom Hickey addresses these same concerns.[104] Like Bellamy, Hickey is a political constitutionalist in that he views the source, substance, and scope of rights as political questions, rather than questions with set legal answers to be revealed by judges and lawyers.[105] In this spirit, Hickey joins Bellamy in arguing that judicial review cannot be justified in terms of judges' "epistemic" capacities, their ability to reach right answers, if we are operating on a republican conception of freedom as non-domination. However, Hickey departs from Bellamy in the extent to which he thinks judicial review can be justified in terms of judges' "legitimating" capacity without necessarily usurping the authorial function. This is because courts may actually support those processes by which the people retain control over governing institutions and so bolster their republican liberty. In particular, Hickey cites the ability of judicial review to "smoke out" dubious motives of legislators, draw attention to missed opportunities to accommodate minorities, and allow individuals whose rights may have been violated to raise their grievances.[106] Insofar as these features and capacities work toward legitimating law-making processes rather than seeking right answers, they become not only compatible with but instrumental toward a republican understanding of freedom as non-domination. In this way, Hickey argues, even strong judicial review may remain editorial without infringing on the authorial function more properly located in those electoral institutions over which people have more control.

The question underlying Hickey's and Bellamy's arguments about judicial review is the same question one would need to answer to quell any worries about horizontal effect as implemented by courts. Specifically, one must ask whether horizontal effect manifests primarily

[104] Tom Hickey, "The republican core of the case for judicial review," *International Journal of Constitutional Law*, forthcoming, https://papers.ssrn.com/ abstract=3137157.

[105] Hickey 5.

[106] Hickey 12-21.

as an editorial or an authorial function. One persuaded by Bellamy would almost necessarily conclude that while horizontal effect comports with such republican principles as the common good and solidarity, it does not do so through republican means. On the other hand, insofar as Hickey understands republican politics to accommodate and actually benefit from fairly robust judicial review, so too might he admit of horizontal effect. One only need show that horizontal effect serves the legitimating purposes Hickey describes to conclude that it does not usurp the authorial function. In other words, one must determine whether horizontal effect contributes to the court's ability legitimate those processes that engender republican freedom, or instead raises wholly new political questions that must be left to more democratic institutions. How one assesses these issues will directly bear on whether the republican principle of self-governance joins the principles of the common good and solidarity in supporting horizontal effect, or whether, in the words of Alec Stone Sweet, this aspect of horizontal effect instead constitutes a *"juridical coup d'état.*"[107]

CONCLUSION

The claim here is that horizontal effect constitutes a republican vein *within* the tradition of liberal constitutionalism. As explained above, the introduction of horizontal effect depends on the continued use of the liberal language of rights.[108] In understanding this innovation in constitutionalism through the lens of republican theory, therefore, this article does not intend to cast republicanism and liberalism as dichotomous, nor horizontal effect as wholly incompatible with liberal constitutionalism. Rather, it aims to draw attention to how particular features of

[107] Alec Stone Sweet, "The Juridical Coup d'état and the Problem of Authority," *German Law Journal*, Vol. 8, No. 10, 2007.

[108] Ivison.

horizontality reflect and finding grounding in republican principles, even as this intervention occurs within a larger liberal framework. To the extent that these traditions are different, however, we can ask where we find the best grounding for horizontal effect. Though previous scholarship understands horizontality in liberal contexts,[109] the republican tradition comfortably justifies such crucial features as the uniformity of private and public spheres' obligations and the solidarity that horizontal effect prompts.

At the same time, republican principles may also serve to caution courts that would give rights horizontal effect. For example, though horizontal effect finds justification in the republican principles of the common good and solidarity, the crucial role of the courts in applying rights horizontally may exist in some tension with republicanism's emphasis on self-government. As horizontal effect is still an emerging phenomenon, it remains to be seen how it will continue to be employed. Perhaps attention to these republican principles and distinctions will better equip scholars and jurists to consider horizontal effect only as it does conduce to republican freedom.

A version of this paper has been accepted for publication in the journal* Polity. *Please do not cite or quote without author's permission.

[109] Scholars have understood horizontality in the context of social democracy (Mark Tushnet, *Weak Courts, Strong Rights*, Princeton: Princeton UP, 2008) and Rawlsian thought (Sonu Bedi, "The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution," *Political Theory*, Vol. 42, No. 6, 2014, 716-738). One article departs from liberalism to make a Marxist and feminist argument for horizontality (Danwood Mzikenge Chirwa, "In search of philosophical justifications and theoretical models for the horizontal application of human rights," *African Human Rights Law Journal*, Vol. 8, 2008, 294).

Works Cited

Aristotle. *The Politics,* Ed. Stephen Everson. Cambridge: Cambridge UP, 1996.

Aristotle. *The Nicomachean Ethics*. Trans. Terence Irwin. Indianapolis: Hackett, 1999.

Bailyn, Bernard. *The Ideological Origins of the American Revolution.* Cambridge, MA: Belknap Press, 1992.

Balkin, Jack. *Constitutional Redemption.* Cambridge, MA: Harvard UP, 2011.

Balkin, Jack. "Which Republican Constitution." *Constitutional Commentary*. Vol. 32, 2017.

Bedi, Sonu. "The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution." *Political Theory*. Vol. 42, No. 6, 2014.

Bellamy, Richard. *Political Constitutionalism*. Cambridge: Cambridge UP, 2007.

Bellamy, Richard. "Democracy as Public Law: The Case of Constitutional Rights." *German Law Journal*. Vol. 14, No. 08. 2013.

Berlin, Isaiah. "Two Concepts of Liberty" (1958). *Four Essays on Liberty*. Oxford: Oxford UP, 1969.

Brandeis, Louis and Samuel Warren. "The Right to Privacy." *Harvard Law Review*. Vol 4. 1890.

Chirwa, Danwood Mzikenge. "In search of philosophical justifications and theoretical models for the horizontal application of human rights." *African Human Rights Law Journal.* Vol. 8. 2008.

Cicero. *On Duties.* Ed. M. T. Griffin and E. M. Atikins. Cambridge: Cambridge UP, 1991.

Daly, Eoin. "Freedom as Nondomination in the Jurisprudence of Constitutional Rights." *Canadian Journal of Law and Jurisprudence.* Vol. 28, No. 2. July 2015.

Daly, Eoin and Tom Hickey. *The Political Theory of the Irish Constitution: Republicanism and the Basic Law.* Manchester: Manchester UP, 2015.

DeWitte, Bruno. "The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law." *Citizenship Studies.* Vol. 13, No. 5. 2009.

Ellman, Stephen. "A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors." 45 *New York Law School Law Review*. 2001.

Ferreres Comella, Victor. "Do Constitutional Rights Bind Private Individuals?" Unpublished Manuscript.

Forbath, William. "Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present." 39 *Tulsa Law Review*. 2004.

Gardbaum, Stephen. "Law, Politics, and the Claims of Community." *Michigan Law Review.* Vol. 90, No. 4. 1992. 685-760.

Gardbaum, Stephen. "The 'Horizontal Effect' of Constitutional Rights." *Michigan Law Review*. Vol. 102. 2003.

Gardbaum, Stephen. "Horizontality in the Indian Constitution." *The Oxford Handbook of the Indian Constitution*. Ed. Sujit Choudhry, et al. Oxford: Oxford UP, 2016.

Glendon, Mary Ann. *Rights Talk.* New York: Free Press, 1991.

Hartz, Louis. *The Liberal Tradition in America,* Harvest Books, 1991.

Hickey, Tom. "The republican core of the case for judicial review." *International Journal of Constitutional Law*. Forthcoming. Https://papers.ssrn.com/ abstract=3137157.

Hobbes, Thomas. *Leviathan*. Ed. Richard Tuck. Cambridge: Cambridge UP, 1996.

Honohan, Iseult. "Educating citizens: Nation-building and its republican limits." Republicanism in Theory and Practice. Ed. Iseult Honohan and Jeremy Jennings. Oxfordshire, OX: Routledge/ECPR Studies in European Political Science, 2006. 199-213.

Ivison, Duncan. "Republican Human Rights?" *European Journal of Political Theory.* Vol. 9, No. 1. 2010.

Jacobsohn, Gary. *The Wheel of Law*, Princeton: Princeton UP, 2009.

Kerber, Linda K. "Making Republicanism Useful." *Yale Law Journal.* Vol. 97. 1998.

King, Jeff. "Social Rights in Comparative Constitutional Theory." *Comparative Constitutional Theory*, Ed. Gary Jacobsohn and Miguel Schor. Cheltenham, UK: Edward Elgar, 2018.

Kumm, Mattias. "Who's Afraid of the Total Constitution?" *German Law Journal*. Vol. 7, No. 4. 2006.

Laborde, Cecile and John Maynor. *Republicanism and Political Theory.* Hoboken, NJ: Wiley-Blackwell, 2008.

Locke, John. *Second Treatise of Government*. Ed. C. B. MacPherson. Indianapolis: Hackett, 1980.

Machiavelli, Niccolo. *Discourses on Livy*. Trans. Harvey C. Mansfield and Nathan Tarcov. Chicago: Chicago UP, 1996.

Marti, Jose and Philip Pettit. *A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain*. Princeton: Princeton UP, 2012.

Michelman, Frank. "Law's Republic." *Yale Law Journal*. Vol. 97, No. 8. 1988.

Murphy, Walter. *Constitutional Democracy*. Baltimore: Johns Hopkins UP, 2007.

Nolan, Aoife. "Daniels v. Scribante: South Africa Pushes the Boundaries of Horizontality and Social Rights." *I-CONnect: Blog of the International Journal of Constitutional Law*. 20 Dec. 2017. http://www.iconnectblog.com/2017/06/daniels-v-scribante-south-africa-pushes-the-boundaries-of-horizontality-and-social-rights/

O'Cinnede, Colm. "Irish Constitutional Law and Direct Horizontal Effect—A Successful Experiment?" *Human Rights in the Private Sphere.* Ed. Dawn Oliver and Jorg Fedtke. Abingdon, UK: Routledge-Cavendish, 2007.

Pangle, Thomas. *The Spirit of Modern Republicanism,* Chicago: Chicago UP, 1990.

Pettit, Philip. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press, 1997.

Pettit, Philip. *On the People's Terms*. Cambridge: Cambridge UP, 2012.

Pildes, Richard. "The Structural Conception of Rights and Judicial Balancing." *Review of Constitutional Studies.* Vol. VI, No. 2. 2002.

Pocock, J. G. A. *The Machiavellian Moment*. Princeton: Princeton UP, 2003.

Preuss, Ulrich. "The German *Drittwirkung* Doctrine and Its Socio-Political Background." *The Constitution in Private Relations.* Ed. Andras Sajo and Renata Uitz. Utrecht, The Netherlands: Eleven, 2005.

Rostow, Eugene. "The Democratic Character of Judicial Review." *Harvard Law Review*. Vol. 66, No. 2. Dec. 1952.

Rousseau, Jean-Jacques. *The Social Contract.* Trans. Donald A. Cress. Indianapolis: Hackett, 2011

Rousseau, Jean-Jacques. *Emile*. Trans. Allan Bloom. New York: Basic Books, 1979.

Shalhope, Robert E. "Toward a Republican Synthesis." *William and Mary Quarterly.* Vol. 29, No. 1. 1972.

Shumer, S. M. "Machiavelli: Republican Politics and Its Corruption." *Political Theory*. Vol. 7. No. 1. 1979.

Smith, Rogers. *Civic Ideals.* New Haven: Yale UP, 1999.

Storing, Herbert. "Slavery and the Moral Foundations of the American Republic." *Toward a More Perfect Union*. Ed. Joseph Bessette. Washington, DC: AEI, 1995.

Stone Sweet, Alec. "The Juridical Coup d'état and the Problem of Authority." *German Law Journal*. Vol. 8, No. 10. 2007.

Sunstein, Cass. "Beyond the Republican Revival." *Yale Law Journal*. Vol. 97, No. 8. 1988.

Sunstein, Cass. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard UP, 2001.

Thomas, George. *The Founders and the Idea of a National University.* Cambridge: Cambridge UP, 2014.

Tomkins, Adam. *Our Republican Constitution.* Portland, OR: Hart, 2005.

Tushnet, Mark. *Taking the Constitution Away from the Courts*. Princeton: Princeton UP, 2000.

Tushnet, Mark. *Weak Courts, Strong Rights*. Princeton: Princeton UP, 2008.

Tushnet, Mark. *Red, White, and Blue: A Critical Analysis of Constitutional Law.* Lawrence, KS: Kansas UP, 2015.

Viroli, Maurizio. *For Love of Country*. Oxford: Oxford UP, 1995.

Viroli, Maurizio. *Which Patriotism for Europe?* Eutopia Magazine. 5 August 2014.

Wood, Gordon. *The Creation of the American Republic.* Chapel Hill: North Carolina UP, 1998.

Wood, Gordon. *Empire of Liberty.* Oxford: Oxford UP, 2011.

Zuckert, Michael. *Natural Rights and the New Republicanism.* Princeton: Princeton UP, 1994.