LECTURE

THE PRIVATE LIFE OF PUBLIC RIGHTS: STATE CONSTITUTIONS AND THE COMMON LAW

HELEN HERSHKOFF*

OPENING REMARKS

Thank you for the honor of delivering the Inaugural Lecture of the Herbert M. and Svetlana Wachtell Professorship of Constitutional Law and Civil Liberties. I would like to give special thanks to Herbert and Svetlana Wachtell for supporting our law school. They both are extraordinary members of our community.

Few people can build an institution from the ground up or even attempt to do so: Herb Wachtell is one of those rare and remarkable people. Herb is a giant in the law, and his law firm has evolved from distinguished, to preeminent, to iconic. When one thinks about New York law practice, and indeed global law practice, the name "Wachtell" immediately comes to mind. Over the years, some of my students have worked as associates at the Wachtell firm. During their time at the firm, these students exercised talent and gumption; they left the firm exhausted, but also awed and inspired. One Wachtell veteran, now a law professor, said to me: "Herb doesn't just want to win. Herb wants to win in the right way." He added that Herb is creative and tenacious, incredibly smart, strategic, and open minded. He emphasized that Herb listens—an unusual quality in a lawyer—even if the person talking is only a first-year associate. It is very impressive that someone as successful as Herb in the practice of law

 This essay is based on the Inaugural Lecture of the Herbert M. and Svetlana Wachtell Professorship of Constitutional Law and Civil Liberties delivered at New York University School of Law on February 3, 2011. The author gives thanks to the Dean, her colleagues and students, and all those in attendance. Judge Harry T. Edwards provided invaluable advice in the preparation of this lecture. The author expresses particular gratitude to her husband, Stephen Loffredo, and to their son, Benjamin Loffredo. She dedicates this lecture to her mother, Sylvia Hershkoff, and to the memory of her father, Martin Hershkoff.

retains a passion for the intellectual side of law, loves the law, believes in the law, and remains so constant in supporting our law school.

Herbert Wachtell's name constitutes only half of the title of the chair that I am honored to hold. I also give thanks to the extraordinary and gracious Svetlana Stone Wachtell. For more than three decades, Svetlana worked in the field of human rights, and she did so with courage and effectiveness—the highest praise that one can give to a human rights advocate. In 2010, the New York Academy of Sciences honored Svetlana with the prestigious Pagels Award for her lifetime of work helping to protect scientists from censorship and oppression. Accepting the award, Svetlana said, "Keeping silent is not an option." Svetlana spoke of the need to stand "tall against the suppression" of rights, not only in countries far away, but also here in the United States.[1] Her work reminds us that a small group of thoughtful people really can change the world for the better.

INTRODUCTION

Twenty-five years ago, Justice William J. Brennan, Jr. stood on the stage in the New York University School of Law Tisch Auditorium and delivered the Madison Lecture. Justice Brennan called his lecture *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*.[2] The title previewed the argument. At a time when the Supreme Court of the United States increasingly was putting civil rights and civil liberties on a back seat to government power, Justice Brennan urged state court judges to revive their state constitutions as a source of protection for cherished freedoms. That day, I watched Justice Brennan's lecture on a big screen, while I sat as part of an overflow audience in Greenberg Lounge.

Following that lecture and for about the next decade, first as a staff attorney at The Legal Aid Society of New York and then as an associate legal director at the American Civil Liberties Union, I pressed state courts to accept Justice Brennan's invitation. In courts

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[1] *CCS Board Member Svetlana Stone Wachtell Honored*, COMM. CONCERNED SCIENTISTS (Nov. 3, 2010), http://concernedscientists.org/2010/11/ccs-board-member-svetlana-stone-wachtell-honored-with-human-rights-prize-from-the-new-york-academy-of-sciences.

[2] 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, 535 (1986). For a personal reflection on Justice Brennan's Madison Lecture, see Helen Hershkoff, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. REV. 1517, 1554 (2000).

in New York, Montana, Massachusetts, and elsewhere, I litigated or appeared as amicus curiae in cases raising state constitutional claims ranging from a state's treatment of the mentally ill to the provision of integrated and high-quality public schooling.[3]

In 1995, after I had just been invited to join the New York University faculty, I returned to Tisch Auditorium to attend another lecture. This time I listened to Judith Kaye, a distinguished graduate of this law school and at the time Chief Judge of the New York Court of Appeals, deliver a beautiful tribute to Justice Brennan in the first Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, now an annual tradition at our law school.[4] In the near-decade that had elapsed, state courts had issued blockbuster state constitutional decisions on issues including forced medication for prisoners[5] and the criminalization of what was then still called "deviate sexual intercourse with another person of the same sex."[6] The cases were controversial, and the state courts' decisions were creating a buzz, even in the days before blog posts and tweets. Chief Judge Kaye's lecture sought to draw attention to a trend in state judicial decisionmaking—a trend that continues to receive less attention than it deserves. That trend concerns the unusual relationship between state common law and state constitutions. Judge Kaye pointed to an interpretive practice that is thought to be absent from the federal courts and unique to state courts: State judges at times rely on common law as an "alternative" ground for deciding a state constitutional question. Judge Kaye explained that state judges, when they consider constitutional questions, "move seamlessly

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[3] *See, e.g.*, McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 517 (Mass. 1993) (addressing a state constitutional suit by Massachusetts students to secure an adequate education); Ihler v. Chisholm, 855 P.2d 1009, 1010, 1013 (Mont. 1993) (addressing a civil rights action by patients at mental health facilities against the state); Thrower v. Perales, 523 N.Y.S.2d 933, 934–35 (Sup. Ct. 1987) (addressing a state constitutional claim by destitute homeless residents of an emergency shelter to receive cash public assistance and Medicaid benefits).

[4] Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995). Judge Kaye was appointed to the New York Court of Appeals in 1983 and was named Chief Judge in 1993. *See Tributes: Chief Judge Judith S. Kaye*, 84 N.Y.U. L. REV. 647, 647 (2009).

[5] *See* Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (holding that the due process clause of the New York Constitution afforded involuntarily committed mental patients a fundamental right to refuse antipsychotic medication).

[6] Kentucky punished "deviate sexual intercourse with another person of the same sex" as a criminal offense and withheld "consent of the other person" as a defense to the crime. KY. REV. STAT. ANN. § 510.100 (LexisNexis 2008); *see also* Commonwealth v. Wasson, 842 S.W.2d 487, 491–92 (Ky. 1992) (holding that a criminal statute that proscribed consensual homosexual sodomy violated privacy and equal protection guarantees of the Kentucky Constitution).

between the common law and state constitutional law, the shifting ground at times barely perceptible."[7]

In my lecture, *The Private Life of Public Rights: State Constitutions and the Common Law*, I want to recognize and to make explicit the important but overlooked state court practice of using the common law as a way to enforce state constitutional norms. We are accustomed to thinking about constitutional law as separate from common law. Constitutional law is public law and serves to regulate the government in its conduct with private individuals. Common law is private law and serves to regulate private individuals in their conduct with other private individuals—such conduct includes entering into a contract, slipping and falling on a sidewalk, and raising a child. Of course, there is a lot of complexity in talking about what is public and what is private and where to locate the boundary between the two. The government regulates contracts, and the government decides where to put sidewalks. And if the love of your life is a person of the same sex, the government currently makes it difficult for you to raise your children as a family.

Legal realists are famous for criticizing the distinction between the public and the private, pointing to the ubiquity of government involvement in private affairs, and calling the distinction incoherent and arbitrary.[8] Yet the divide between public and private remains a powerful organizing principle in American law and in American attitudes. Indeed, the separation of public and private, and in particular the separation of public law and private law, often seems natural—just the way things are—and is justified as a critical part of the liberal project of protecting individual autonomy against the Leviathan of the state. The state judicial practice of using the common law as a site for state constitutional enforcement interrogates the conventional distinction between the public and the private, and it raises questions about the appropriate relation between private law—rules of contract, tort, and property—and public values that are expressed in and protected by constitutional provisions.

In this lecture, I make the positive point that some state courts do indeed indirectly enforce state constitutional norms through the common law when resolving disputes that involve only private actors, and that this practice is analytically distinct from mere policymaking. The practice allows public law to influence the content of private law

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7 Kaye, *supra* note 4, at 15.

8 For a collection of important and provocative essays on the public-private distinction, see Symposium, 130 U. PA. L. REV. 1289 (1982).

in ways that may not immediately be obvious to see. I illustrate the practice, and I point to some of the common law pathways that state courts use in this process. I then make the normative argument, and try to convince you, that more state courts should embrace this practice. I close by suggesting some of the implications this practice holds for social improvement. Thinking back to my earlier career as a public interest lawyer, I was motivated by the belief that law, and especially constitutional law, can improve everyday life. I still hold that view, but I have come to see that the mechanisms of change also must include the slow, molecular motions of the common law.[9]

I

So, let us turn our attention to the too-often neglected subject of state constitutions. Lawyers and legal academics are obsessed with the U.S. Constitution. To the extent they even think about state constitutions, there is a tendency to see them as miniature replicas of the federal or as something worse—as bloated statutory-like codes filled with trivial concerns unworthy of constitutional status.[10] I assume that very few lawyers in this room have read the New York Constitution and, if they are new to New York, the constitution of their home states. I emphasize at the start that state constitutions differ—and differ significantly—from the Federal Constitution.[11] Moreover, state courts have considerable latitude in interpreting these texts in ways that depart from conventional understandings of federal constitutional law.[12] Indeed, this was Justice Brennan's insight, developed in a series of lectures, when he urged state courts to "step into the breach" caused by the federal judiciary's narrowing of remedies and to revive state constitutions as a source of protection for rights and liberties.[13]

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[9] *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("[R]ecognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

[10] *See* G. Alan Tarr, *State Constitutional Interpretation*, 8 TEX. REV. L. & POL. 357, 357–59 (2004) (discussing distinctions between the Federal Constitution and state constitutions).

[11] For a discussion of one area of difference, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135–36, 1144–52 (1999), in which the author comments on socioeconomic provisions in state constitutions.

[12] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing institutional differences between state and federal courts that create interpretive space for state judges).

[13] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); *see also* Brennan, *supra* note 2, at 548–53.

One difference between the Federal Constitution and those of some states concerns the requirement of state action as a predicate to constitutional enforcement. The Supreme Court treats most of private law—the doctrines of contracts, tort, and property—as separate, even hermetically sealed, from the commands of the Federal Constitution. The Fourteenth Amendment provides that "[n]o state shall . . . ,"[14] and with very rare exception, the rights-bearing provisions of the Federal Constitution are interpreted as running against only government, and not private, power.[15] State courts are not required to follow the federal state action doctrine; they may decide to extend state constitutional rights even to the activity of private individuals. Not all state constitutions include a state action requirement, and in some states—admittedly only a few—state courts permit an individual to enforce a state constitutional right directly against another private actor.[16]

New Jersey is one of those states, and a decade and a half ago, the New Jersey Supreme Court held that a private party has a state constitutional right to leaflet at a privately owned shopping mall. The case is called *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, and it involved someone who wanted to protest the Iraqi invasion of Kuwait.[17] Whether a constitutional right to free speech ought to run against a private mall owner raises a lot of thorny issues. After all, a commercial shopping center is just that: a place where you are expected to shop until you drop. But shopping malls also function as the new downtown: a place where ordinary people can gather and talk about private affairs and public concerns.[18] Can Roosevelt Field in Garden City, or North Park Center in Dallas, or

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14 U.S. CONST. amend. XIV, § 2.

15 The famous exceptions include *Shelley v. Kraemer*, 334 U.S. 1, 19–20, 23 (1948), and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964). *See also* U.S. CONST. amend. XIII.

16 *See* John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 822–24 (1990) (discussing the "mixed" record of state courts in applying state constitutional provisions against private entities); *see also* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 444 & nn.253–54 (2008) (noting that "there are several exceptions under state constitutional law" to the requirement of state action).

17 650 A.2d 757 (N.J. 1994), *discussed in* Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property: Where Won't We Have the Freedom To Speak Next?*, 33 RUTGERS L.J. 589, 599–600, 602 (2002).

18 *See* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1229 (1999) (discussing the evolving importance of suburban shopping malls as the new "downtown").

King's Plaza in Brooklyn, three of the better known shopping malls in the United States, bar a person from coming onto the premises and entering a Taco Bell or a Victoria's Secret because he is a man? Or because he is a black man? Or because he is a black man and is holding hands with a white woman? Or because he is a black man and is holding hands with a white man? Or because he is a black man and is wearing a yarmulke? Or because he is a white man and is wearing a T-shirt with crosses and crescents on it? Or because he is a man wearing the same jacket that got Paul Cohen into trouble when he entered a Los Angeles courthouse—a place the Supreme Court described in its famous First Amendment opinion as somewhere that "women and children were present"?[19] Or because our Every Man actually does not present as man or woman? The examples underscore the complexity of the question. What other constitutional rights should I put into the picture? What if I want to pack a pistol: Can Starbucks tell me I cannot keep my Smith & Wesson on the carry tray with my latte and muffin?[20] In *New Jersey Coalition*, the New Jersey Supreme Court took the bold step of holding that a commercial shopping center is obliged under the state constitution to permit leafleting on societal issues, subject to reasonable conditions.[21]

Let us assume, however, that a state's constitution, like the Federal Constitution, does not reach private conduct—in other words, that a state law version of the state action doctrine blocks a private individual from enforcing the state constitution directly against another private individual. As a result, when Every Man is barred from entering the mall, he cannot sue the owner of the shopping center and directly enforce rights to equality or free speech that the state constitution guarantees. The *New Jersey Coalition* approach in this situation is not a remedial option. That conclusion, however, does not and should not foreclose a state court from asking a separate and analytically distinct question: whether the state's common law permits the owner of a shopping mall from excluding a

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19 Cohen v. California, 403 U.S. 15, 16 (1971) (quoting People v. Cohen, 81 Cal. Rptr. 503, 505 (1969)).

20 *See* Kim Murphy, *Starbucks Boycott Is Fought*, L.A. TIMES, Feb. 19, 2012, at A24 (documenting the public response to Starbucks's gun policy).

21 *See* 650 A.2d at 760 (finding a constitutional obligation to permit free speech at commercial shopping centers). In a prior decision, the New Jersey Supreme Court held that the state constitution confers an affirmative right to free speech that is protected against public restraint and restraint by private property owners. *See* State v. Schmid, 423 A.2d 615, 628 (N.J. 1980); *see also* Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 (2006) (discussing New Jersey state constitution decisions involving state action and common law entitlements).

person because he is black, or she is Muslim, or the person prefers not to identify with any gender, or is wearing a T-shirt that says "Save the Planet."

The common law offers state courts an alternative way to think about the relation between public norms set out in a state constitution and private activity—think of it as a middle way, a third way, a Judith-Kaye way to secure constitutional protection. When asked to decide whether a private individual can leaflet at a private shopping mall—a private dispute that touches on public concerns—the court can analyze the problem in common law terms, using the balancing approach for which the common law is famous, and it can include state constitutional norms in that balance. The genius of the common law, as a noted treatise puts it, is that it is not "absolute, fixed, and inflexible."[22] The common law is not immutable, but rather "develops to adapt to the changing needs of society."[23] This flexible body of principles can change, and it can change in the light of a state's constitution. By taking account of the public norms implicated in a private dispute, the common law thus can serve as a pathway for the indirect enforcement of constitutional values in disputes that do not involve a government actor.

Do state courts actually take this approach of indirectly enforcing state constitutional norms through the common law? Yes, some of them do, and their decisions may seem to differ considerably from conventional understandings of federal constitutional enforcement. Consider a case from the Oregon Supreme Court, *Lloyd Corp. v. Whiffen*, again concerning individuals who wanted to enter a shopping mall for political purposes—to gather signatures to initiate legal change.[24] The shopping mall barred solicitation of any kind on the premises, and it publicized the ban in large notices that it posted at all of the mall's twenty-five entrances. So, in refusing to permit solicitation by political activists, the property owner was applying an across-the-board ban that applied to beggars, religious mendicants, and dissidents alike—anyone who did not intend to shop but rather planned to divert others, however briefly, from shopping. I acknowledge that the process of soliciting signatures is active and energetic. Those who seek to obtain signatures are not asking just to

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22 15A C.J.S. *Common Law* § 15 (2012).

23 *Id.* §1.

24 773 P.2d 1294 (Or. 1989), *discussed in* Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 151, 162 (James A. Gardner & Jim Rossi eds., 2011) (arguing that the Oregon Supreme Court declined to treat the dispute as a constitutional issue).

sit quietly at the mall; they want to engage with other individuals, and their actions can be intrusive, even annoying. But this interference, I suggest, is part of the price we pay for democracy in action. Indeed, we might say that the Oregon Constitution collectively imposes this annoyance as a political cost on all residents by reserving to the people the right to gather signatures needed to propose laws through the petition process.[25]

The parties in *Whiffen* treated their dispute as a matter of state constitutional law.[26] They briefed the state constitutional arguments, and they focused on whether Oregon law requires a showing of state action as a condition for constitutional enforcement.[27] The Supreme Court of Oregon, however, declined to go down the constitutional path. Instead, the court announced that it would decide the case on nonconstitutional grounds that it called "subconstitutional,"[28] and the court housed these subconstitutional grounds in the common law. Explaining its approach, the Oregon court emphasized that as a common law court it is required to "observe constitutional principles

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25 The *Whiffen* court derived the right to solicit signatures from the free expression and assembly provisions of article I, sections 8 and 26 of the Oregon Constitution. *See Whiffen*, 773 P.2d at 1296 n.2. In addition, article IV, section 1 of the Oregon Constitution provides:

> (1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
>
> (2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
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> (b) An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.
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> (c) An initiative amendment to the Constitution may be proposed only by a petition signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.
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> (d) An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.
>
> (e) An initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon.

26 *See Whiffen*, 773 P.2d at 1296 (noting both parties' state constitutional arguments).

27 *See id.* at 1315, 1317–18 & 1317 n.22 (Carson, J., dissenting) (discussing whether the opening of a mall to the public or a court order prohibiting signature gathering constitutes state action).

28 *Id.* at 1297.

as much as a legislative or administrative body."[29] But in observing these principles, the Oregon court did not presume that it was obliged to ask whether state action is required as a predicate for constitutional enforcement, it did not determine whether a private land owner is the functional equivalent of a state actor, and it did not issue a constitutional ruling directly enforcing the Oregon Constitution's free speech and assembly requirements against the owner of the shopping mall. Instead, the *Whiffen* court treated the people's right to gather signatures to initiate lawmaking as a background norm that informs all laws in Oregon, whether public or private, constitutional or common law. The initiative process in this sense functions as an implicit dimension of all the state's laws: The commitment to popular democracy is a fundamental value that constitutes social and political life in the state.[30] A property owner's right to control his property is created and protected by common law, and the scope and content of the common law must account in some way for the state's commitment to the initiative process.

Notably, the state constitution did not control the result in *Whiffen*. It did not create a cause of action that the signature-gatherer could enforce against the mall owner. Rather, the state constitution provided the Oregon Supreme Court with grounds of decision that could be used to shape and give content to the private relation of two individuals as defined by the state's common law. The state constitution thus provided reasons for the court to act: It expanded the range of interests for the court to assess when it undertakes the traditional balancing approach of common law decisionmaking. The Oregon court saw an advantage in taking a common law approach rather than issuing a state constitutional decision. Making a common law decision would avoid entrenching a constitutional rule prematurely, it would allow the legislature time to consider the problem, and it would create space for the parties to develop rules of self-governance. In that spirit, the Oregon Supreme Court remanded the case to the trial court for consideration of reasonable time, place, and manner restrictions that were to take account of the public and private interests at stake.[31]

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[29] *Id.*

[30] I borrow the term "implicit dimension" from IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS (David Campbell, Hugh Collins & John Wightman eds., 2003), in which the author examines the implicit understandings of parties to contracts.

[31] *See Whiffen*, 773 P.2d at 1301–02. Following the court's remand, the property owner adopted time, place, and manner rules that limited petition gathering. Efforts to solicit signatures on a broader scale resulted in renewed litigation. In *Lloyd Corp. v. Whiffen*, 849

Whiffen is not an isolated example of a state court relying on common law as an "alternative" ground of decision in a case that implicates public norms. Through such actions as the public policy tort or the implied covenant of good faith, state courts have transported state constitutional values into areas of private life that are outside the reach of federal constitutional protection and usually are considered to be beyond constitutional influence of any sort.[32]

In this light, consider the public policy tort as a pathway for indirectly enforcing constitutional norms in a dispute that involves a private workplace. Imagine a female sales clerk who is employed at a relatively small company and is fired after reporting sexual harassment by her male boss. The employer will say that he is not a state actor and so the Federal Constitution does not apply. Let us assume that the state constitution likewise contains a state action requirement: Even if the employer fires the worker in retaliation for her reporting impermissible gender discrimination, the worker cannot invoke a constitutional remedy against a private infringer. Indeed, the employer will argue that under common law he has a right to fire the worker for no reason or for any reason and without having to give reasons—indeed, he will insist that the common law doctrine of at-will employment protects the worker's autonomy by granting her a symmetrical right to quit her job at any time.

For at least the last half century, some state courts have adapted the judicially created at-will rule, and so reconfigured workplace relations, by looking to constitutional norms as a source of public policy when resolving tort actions filed against a private employer. An early decision recognized a public policy tort against an employer who fired a worker who was absent to do jury duty.[33] Preventing an

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P.2d 446 (Or. 1993), the court concluded that it could not "avoid a constitutional analysis," and held that:

> to prohibit the gathering of signatures on initiative petitions in the common areas of large shopping centers such as the Lloyd Center would "impinge on constitutional rights" conferred on the citizens of this state by the provisions of Article IV, section 1, of the Oregon Constitution. Such rights, however, are subject to reasonable time, place, and manner restrictions . . . .

849 P.2d 446, 448, 453 (Or. 1993), *overruled by* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 243 (Or. 2000) (holding that the state constitutional right to initiate laws does not confer the right to solicit signatures for initiative petitions on private property over the owner's objection).

32 *See* Hershkoff, *supra* note 24, at 156–62 (describing three techniques used by state courts to import constitutional values into private settings: "enforcing constitutional norms through existing common law causes of action, elaborating common law doctrines in the light of constitutional norms, and developing common law defenses informed by constitutional norms").

33 *E.g.*, Nees v. Hocks, 536 P.2d 512, 515 (Or. 1975).

employer from running his business in a way that interferes with the government's sound functioning could hardly be said to interfere with a liberty interest worth protecting. Asked to decide whether a worker can be fired for carrying out a civic duty, the court treated jury duty not only as an individual right, but also as a collective right—that is, a structural feature of the state constitution that is constitutive of a state's political life, informing all disputes that come within its orbit.

The state court's characterization of the jury right reflects another insight as well: Private conduct is not confined to a private sphere, but rather, in some settings, such conduct can spill over into public life and burden or interfere with collective well-being. Economists would call the public effects of private activity negative externalities, and in certain situations would recognize the need for regulation.[34] Constitutional law offers a potential mechanism for regulating these externalities if the state action requirement is lifted and the private actor is treated as a state actor. But constitutional law is a blunt instrument, and in many private settings it would seem intuitively wrong to apply a constitutional ban full throttle directly against an individual. The genius of the common law is that it allows the state court to redraw the boundaries of private relations to take appropriate account of these externalities, regulating them indirectly by using a balancing approach that is sensitive to context and detail.

II

So far I have tried to convince you that there is indeed a state judicial practice of indirectly enforcing state constitutional norms in private disputes through common law pathways. The practice differs from that of directly enforcing constitutional rights in disputes when state action is present or when the court lifts the state action barrier because of the assumed functional equivalence of the private actor and a government official. The practice also differs from that of policy creation by common law courts, as common law courts do when they look to changed circumstances, concepts of reasonableness, or contemporary social concerns that generate new expectations. The policy model of common law decisionmaking differs from the indirect-constitutional enforcement model, and the differences do matter both conceptually and in practical application. When courts engage in policymaking, they construct the contours of a private relation in light of the values that a judge thinks are important or that

[34] *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513 & n.13 (2011) (discussing negative externalities as a basis for regulation).

a legislature might assess, all things considered. When courts engage in the indirect enforcement of constitutional norms, they review the private dispute in light of a norm or value that underpins a state constitution, and the judge then includes that value in the common law balance even though the dispute involves only private actors. To the extent that the state constitutional provision forms part of the background understanding of all of the state's laws, the indirect-enforcement model insists—at a minimum—that the court take account of the public norm as interpretive material in shaping and giving content to the common law relation. Under this model, the common law court cannot ignore the state constitution or refuse to consider its normative content.

Thus, we might say that the practice of indirect constitutional enforcement affects judicial decisionmaking in three ways. First, it legitimates the court's interpretive process by locating what otherwise might be seen as free-floating preferences in the public values that the state constitution embraces. Second, it justifies the court's policymaking by providing grounds for decisions that are allied with these constitutionally expressed values. And third, it constrains the court's policymaking by requiring that its analysis include in the balance not only traditional interests such as contractual autonomy and ownership control but also constitutionally-derived interests such as expressive liberty or gender equality. The court may choose to give little or no weight to these constitutional provisions, but it will have to explain why. The theory of indirect constitutional enforcement constrains the courts from ignoring these provisions in common law decisions.

The practice of according indirect effect to constitutional norms in private disputes could affect, and affect significantly, the shape and direction of common law doctrine. I think this could be an attractive development. Rather than presenting an example of why this might be so, let us consider a counterexample—what I view as a missed opportunity by a state court to rely on the common law when a private dispute implicates public concerns.

Think back to March 2003, shortly before our country's invasion of Iraq. The country was quite divided on the subject; there also were many demonstrations around the world raising questions about the President's policy and whether diplomacy and arms inspections were a viable alternative.[35] Steve Downs and his son Roger were two New

[35] *Compare, e.g.*, KENNETH M. POLLACK, THE THREATENING STORM: THE CASE FOR INVADING IRAQ (2002) (encouraging invasion), *with* THE RESEARCH UNIT FOR POLITICAL ECONOMY, BEHIND THE INVASION OF IRAQ (2003) (questioning the reasons

Yorkers who had questions about the invasion—and not just questions, they were opposed to our nation's going to war. Early in March, the father and son went to the Crossgates Mall, which is just outside Albany. Steve wore a T-shirt that said "Give Peace a Chance" on the back and "Peace on Earth" on the front. Roger's T-shirt read "Let Inspections Work" and "No War with Iraq."[36]

In what has become an American tradition, Steve and Roger went to the shopping mall and sat at a table in the food court. While there, something happened—something apparently loud and unpleasant—between Steve and Roger and two other customers. A mall security guard responded to the commotion and offered this solution: He asked Steve and Roger to remove their T-shirts or to leave the mall. Apparently, the son took off the shirt, but the father refused. One thing led to another, and the police were summoned; they arrested Steve for trespassing and put him in handcuffs. In the next few days, about 150 people showed up at the mall wearing "peace" T-shirts; they were not arrested and eventually the mall decided to drop the trespassing charges against Steve Downs.

But the mall's decision did not end the dispute. In what might be another American tradition, Steve sued the shopping mall for allegedly violating his constitutional right to free speech: He sued in state court under the New York Constitution. The New York Civil Liberties Union (NYCLU) represented Steve in that case and lost; at the end of 2010, the intermediate appeals court affirmed the dismissal of the complaint,[37] and the NYCLU website lists the *Downs* matter as closed.[38] The New York court rejected the constitutional claim for reasons that are highly relevant to understanding the importance of the common law as an alternative site for constitutional enforcement. The Appellate Division's explanation was simple and clear. The "constitutional guarantee of free speech," the court wrote, "protects against governmental infringement and, thus, restrictions regarding expression on private property—including malls—do not typically implicate the constitutional right to free speech."[39]

For support, the court said that it was following consistent federal case law on the subject—even though federal courts do not

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for the invasion).

36 *See* Carol DeMare, *He Kept His Shirt on—and Got Arrested*, TIMES UNION, Mar. 5, 2003, at B1 (reporting on the Crossgates Mall dispute).

37 Downs v. Town of Guilderland, 897 N.Y.S.2d 264, 268–69 (App. Div. 2010).

38 Downs v. Town of Guilderland et al. *(Defending Free Speech Rights in Public Areas of Shopping Malls)*, NYCLU, http://www.nyclu.org/case/downs-v-town-of-guilderland-et-al-defending-free-speech-rights-public-areas-of-shopping-mall (last visited Feb. 20, 2012).

39 *Downs*, 897 N.Y.S.2d at 266.

interpret state constitutions—and added that most state courts follow the federal approach, too.[40] We have seen that the New York court did not have to follow federal law; equally, the New York court did not have to follow the constitutional decisions of a sister state: It was not bound by the New Jersey decision that I earlier mentioned, *New Jersey Coalition Against War in the Middle East*. But the Crossgates Mall case could have been decided on common law grounds, taking account of state constitutional norms that protect both property rights and free speech rights. The New York Appellate Division may be correct that the New York Constitution is limited by a state action requirement.[41] However, the state action issue presents a separate question from whether the common law, informed by the state constitution, permits a mall owner to evict a customer for wearing politically expressive clothes.

III

To this point we have looked at the ways in which constitutionally protected civil rights and civil liberties—such as the right to trial by jury or the right to free speech—might affect the scope and direction of common law doctrine. Let me turn to another possible consequence of according indirect effect to state constitutional norms. This potential flows from the different substantive content of the Federal Constitution and state constitutions. The Federal Constitution often is said to be neutral with respect to substantive policy. It is a lean document—just 4400 words. It sets out the machinery of governance and a few individual rights. But it leaves to politics such questions as whether to provide health insurance, public schooling, or income support during old age. For this reason, the Federal Constitution conventionally is thought of as "a charter of negative rather than positive liberties."[42] By contrast,

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40 *Id.* at 268 ("New York has interpreted its constitution regarding this issue in a manner essentially consistent with the federal courts and the majority of state courts.").

41 But perhaps the New York Appellate Division is incorrect. *Compare* Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1173–74 (N.Y. 1978) (holding that statutory empowerment of a garage man to make an ex parte sale of another's car constituted state action), *with* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151–53 (1978) (holding that the sale by a warehouseman of goods entrusted to him by statute was not state action), Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974) (holding that the decision to cut off a customer's service by a regulated private utility company was not state action), *and* Montalvo v. Consol. Edison Co., Inc., 460 N.Y.S.2d 784, 789–90 (App. Div. 1983) (holding that a private utility company's denial of service to a customer and failure to promulgate regulations with due process safeguards did not constitute state action), *aff'd*, 462 N.E.2d 149 (N.Y. 1984).

42 Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

constitutions in every state include a range of social and economic provisions that are absent from the federal document.[43]

In this context, recall President Franklin Delano Roosevelt's famous Fireside Chat in which he proposed a Second Bill of Rights that would guarantee the right to a job, to a decent home, to adequate medical care, and to a good education.[44] These rights, according to President Roosevelt, would form the base of a new "economic constitutional order,"[45] unmoored from "the old and sacred possessive rights" of the common law.[46] We have a word for President Roosevelt's view of the common law—*Lochner*[47]—and it conjures the image of a common law that is a bulwark against change, a matrix that sustains and supports traditional patterns of inequity that have built up, slowly, over time. On this view, socioeconomic rights are essential to overcome the inertial, even regressive, force of a common law that protects property to the exclusion of other human interests. We tend to associate socioeconomic rights of this sort with constitutions adopted in the post–World War II period,[48] and the Federal Constitution has not yet been interpreted as embracing President Roosevelt's vision.[49] So it might surprise you that state constitutions as far back as the eighteenth century addressed collective public goods such as free public schools and public hospitals.[50] Of course, there are fifty state constitutions, and they

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43 *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1533–39 (2010) (identifying positive rights expressed in a number of state constitutions).

44 *See* Franklin D. Roosevelt, "Unless There Is Security Here at Home, There Cannot Be Lasting Peace in the World"—Message to the Congress on the State of the Union, 13 PUB. PAPERS 32, 41 (Jan. 11, 1944) (providing the texts delivered as both part of the State of the Union address and the Fireside Chat), *quoted in* HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR: THE AUTHORITATIVE ACLU GUIDE TO POOR PEOPLE'S RIGHTS, at xiv–xv (1997).

45 Franklin D. Roosevelt, "New Conditions Impose New Requirements Upon Government and Those Who Conduct Government," Campaign Address on Progressive Government at the Commonwealth Club, San Francisco, Calif., 1 PUB. PAPERS 752 (Sept. 23, 1932).

46 Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration, 3 PUB. PAPERS 292 (June 8, 1934).

47 Lochner v. New York, 198 U.S. 45 (1905) (holding that the freedom to contract is an implicit right in the Fourteenth Amendment).

48 *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 932–33 & nn.51–52 (2011) (collecting sources referring to the post–World War II paradigm).

49 *See* Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1247–48 (2007) (discussing the "doctrinal stability" of the presumed absence of socioeconomic rights from the Federal Constitution).

50 *See* Hershkoff, *supra* note 43, at 1533–46 (discussing state constitutional

differ one from the other. But some generalizations can be made about state constitutional socioeconomic provisions and how they might influence common law analysis. Over time they might even influence federal constitutional doctrine in significant ways.

Let us remember that a state constitution is not simply a miniature version of the Federal Constitution—far from it. The shortest state constitution—that of Vermont—runs to 8295 words, while the longest state constitution—that of Alabama—runs to 357,157 words. State constitutions are long in part because they address social and economic concerns that simply are absent from the text of the Federal Constitution. Every state constitution refers to public education.[51] Some state constitutions regulate occupational safety and welfare payments, the right to join a union or not to join a union, child labor, and conditions in mines and other dangerous occupations.[52] It may be that state constitutions reflect interest-group politics run amok. But what should be clear is that state constitutions are in the thick of articulating policy, and these provisions are relevant to the policy-laden process of elaborating common law rules for contracts, torts, and property relations. Some state constitutional provisions (such as the right to join a union or not) explicitly run against private parties. Still other state constitutional provisions clarify that the common law is subject to the state constitution—reversing the view that the state constitution is subject to the common law.[53] For example, New York's earliest attempt to establish a program of workers' compensation was invalidated as an invasion of common law property rights.[54] Following the Court of Appeals' decision, the New York Constitution was amended to make clear that tax dollars could be used for this important public purpose.[55] A constitutional provision about workers' compensation might seem like statutory clutter. In fact, the provision was intended to constrain judicial discretion and to redefine the content of common law property rights which otherwise blocked the legislature from establishing social welfare programs.[56]

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socioeconomic provisions).

51 *See* Aaron Jay Saiger, *School Choice and States' Duty To Support "Public" Schools*, 48 B.C. L. REV. 909, 909 & n.1 (2007) (identifying state education constitutional provisions).

52 *See* Hershkoff, *supra* note 43, at 1536–38 (documenting state constitutional rights).

53 *Id.* at 1543–46.

54 *See* Ives v. S. Buff. Ry. Co., 94 N.E. 431 (N.Y. 1911), *discussed in* Hershkoff, *supra* note 43, at 1545.

55 N.Y. CONST. art. I, § 18.

56 John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 995 (2007).

A court engaged in common law decisionmaking will have to decide whether to take account of these distinct socioeconomic provisions, to resolve whether a particular norm is implicated in the case at hand, and to determine how much weight the provision deserves given the specific facts and circumstances. This is not an easy interpretive task, especially given the range of state constitutional socioeconomic provisions. Just to give you a taste, the Alabama Constitution addresses bingo, the promotion of catfish, dueling, and prostitution.[57] Acknowledging that the interpretive task is difficult, however, should not suggest that state courts are ill equipped for the task. As in any common law dispute, the state court will weigh the different interests that are at stake and try to balance them in the appropriate way.

We might anticipate that, in some cases, a court's recognition of a state constitutional socioeconomic norm will cause it to reshape and reorient common law doctrines in new and different directions. We can point to a trend of this sort among national courts abroad that engage in an interpretive practice similar to the one Judge Kaye ascribed to state common law judging. These foreign courts, in the Commonwealth and on the continent, refer to their practice as horizontality—the application of constitutional norms in disputes involving private actors and not the government. Some foreign courts, like state courts, indirectly apply constitutional norms when deciding private disputes, and they do so through the pathways of contract, tort, and property doctrine.[58]

My evidence of this practice comes from the results of a five-nation study in which I participated with an economist from the World Bank, a political scientist, and a team of international lawyers.[59] Our project was designed to study how national courts enforce social and economic rights directly against the government. In the course of our investigation, we found ourselves also studying how courts indirectly enforce social and economic rights in contract, tort, and property cases involving only private actors. Consider evidence of this practice from India. The India Supreme Court is well known for its public interest docket. But the effect of the Constitution of India is

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57 ALA. CONST. art. IV, §§ 86 (dueling), 93.01 (catfish); ALA. CONST. amend. CCCLXXXVI, *amended by* ALA. CONST. amend. DC (bingo in Jefferson County); ALA. CONST. amend. DCLXXXVIII (prostitution in Jefferson County).

58 *See* Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. L. REV. 455, 463–69 (2011).

59 COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008) [hereinafter SOCIAL JUSTICE] (reporting results of study).

not confined to constitutional analysis or to government action. Rather, private law decisions involving only private parties also are influenced by constitutional norms, including socioeconomic norms that are assumed to run only against the government. For example, some Indian courts interpret contracts in the light of the Constitution of India's directive principle of socioeconomic justice. Thus, one court held that a contract of insurance must be interpreted in the light of "the constitutional animation and conscience of socio-economic justice adumbrated in the Constitution."[60] The specific issue concerned an insurance company's right to limit a class of coverage to salaried persons. The court acknowledged that the insurer has discretion in deciding how to run its company, but it emphasized that the company's discretion must be exercised in the light of a constitutional commitment to social security.[61] Transnational comparisons are difficult to make, and I do not wish to place too much predictive weight on foreign practice. But international examples are suggestive of the ways in which a state constitutional norm potentially could influence private disputes here in the United States.

IV

Every proposal for change has to answer the question of whether its adoption will cause more problems than it will cure. So in the time that remains, let us consider some of the problems that might result from extending the practice of indirect constitutional effect in the ways that I have described. Arguably, a significant problem stems from the danger of effectively eliminating state action as a condition for constitutional enforcement. Over the years many commentators have criticized the state action doctrine and called for its demise.[62] Yet the state action doctrine remains fixed in the federal constitutional landscape. Perhaps its persistence reflects inertia. Alternatively, the doctrine survives and even flourishes because it serves an important function: It prevents the government from overreaching into activities and into affairs that private individuals wish to keep private. Dismantling the boundary between private life and public life removes an important buffer zone against the

60 L.I.C. of India v. Consumer Educ. and Research Ctr., A.I.R. 1995 S.C. 1811, 1819 (India), *discussed in* Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, *in* SOCIAL JUSTICE, *supra* note 59, at 268, 290–91.

61 Hershkoff, *supra* note 60, at 291.

62 *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985) (identifying historical and moral problems with the state action doctrine).

government, potentially exposing individuals to the heavy hand of the state. Eliminating the state action doctrine could have the sorry effect of turning citizens into apparatchiks.

The practice of according indirect effect to constitutional norms through the common law is vulnerable to many of the criticisms that are mounted against lifting or relaxing the state action doctrine in the Article III courts: The practice could undermine democratic self-governance; the practice could produce uncertainty; and the practice could subvert personal autonomy. Whatever force these criticisms might have in the federal system, they have considerably less bite, I think, in the state context and when the site of enforcement is that of the common law, not constitutional law.[63] On the federal side, the costs of constitutional error are extremely high. U.S. Supreme Court Justices are protected by lifetime tenure, their decisions are national in scope, these decisions claim interpretive supremacy relative to the other branches, and these decisions potentially narrow democratic activity by preempting legislative, local, and popular authority. Once the Court announces its decision, it can be overturned only by constitutional amendment, and the federal amendment process favors the status quo by erecting tall barriers to change. We had to go through a Civil War before the Court's error in *Dred Scott* was undone through the amendment process.[64] On the state side, the costs of interpretive error are considerably diminished. In almost every state at least some judges lack life tenure and can be voted out of office. Their constitutional decisions are state-specific, and their common law decisions are similarly bounded. Moreover, state constitutions are amenable to change through a less arduous amendment process and in some states by initiative and referendum. The Alabama Constitution has gone through more than 800 amendments. State common law can be changed through legislative revision or simply through the next common law decision when a dispute between different parties arises in a somewhat altered context.[65]

Consider, as well, the concern that indirectly enforcing constitutional rights in private disputes will have the perverse effect

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63 For a discussion on the institutional differences between state and federal systems, see Hershkoff, *supra* note 11, at 1153–70.

64 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 418 (1856) (holding that members of "the African race, whether free or not," are not citizens and cannot invoke diversity jurisdiction), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

65 *See generally* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 247–81, 359–409 (2009) (discussing the relationship among state legislatures, state courts, and state constitutions).

of diluting rather than enhancing such rights. This concern may have traction when the U.S. Supreme Court is asked to extend constitutional protection despite the absence of state action. One can imagine a court's reluctance in applying the same constitutional remedy to a private actor as to a government official. Again, locating the decision in the common law elides this difficulty. To borrow language from Justice Souter, the common law traditionally has taken a nuanced approach and avoided an "all-or-nothing analysis."[66] Moreover, although in some situations a state may permissibly delete a provision from its state constitution or narrow a provision's scope through judicial decision, state constitutional norms can never be so diluted as to fall beneath the federal floor as determined by the U.S. Supreme Court.[67]

Similarly, the concern that indirectly enforcing constitutional rights will undermine democracy takes on a different cast in a state, rather than the federal, system. In the federal system, the conventional wisdom looks to Congress as the branch of government that best promotes self-governance and the development of policy. Whether state legislatures enjoy this comparative institutional advantage is an open question; in any event, common law rules derive from state court decisions, and there is no reason to think that state courts cannot revise these judicially created rules in the light of new constitutional understandings. Moreover, a common law decision does not foreclose democratic overruling, for the legislature remains free to change the court's substantive rule.

For similar reasons, concerns about indeterminacy are likewise overblown in the state setting when courts engage in common law decisionmaking. This objection points to the predictable difficulties that a court will face in identifying the values and norms that are candidates for indirect constitutional enforcement. A similar objection was raised in South Africa during its national discussions of whether to include socioeconomic provisions in the new constitution and the effect that open-ended provisions such as "dignity" would have on common law development.[68] Surely this objection proves too much, for the same concerns about predictability and consistency can be raised whenever a state court develops policy through common law decisions that apply to the immediate case.

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66 Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring).

67 *See supra* notes 25–32 and accompanying text (discussing *Whiffen* and later judicial interpretation of state constitution that narrowed its scope).

68 *See, e.g.*, 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, 3 (1992) (defending the inclusion of social rights in the South African Constitution).

Finally, allowing state courts to transport constitutional norms into areas that are understood as "private" may be criticized as subversive of personal autonomy. The autonomy objection assumes that it is difficult, even impossible, for a government to discern individual preferences, and therefore such decisions should be left to the individual actors best placed to reach them. A hands-off approach is defended as encouraging self-control, self-ownership, and voluntary exchange consistent with liberal democratic values. Again, if our concern is entrenching error, repair is much easier at the state level for reasons already underscored.

However, let us linger a bit longer on the autonomy objection, for it is of a different order than the others so far discussed. To my mind, it goes to the heart of the liberal project and to the importance of constitutional values; the objection raises fundamental questions about private life and its relation to collective goals. We have seen that state constitutions differ from the Federal Constitution; one difference is their concern with collective *material* well-being. Common law rules of contracts, torts, and property are allied with this concern; they constitute and inform economic and social relations; they shape our individual aspirations; and they constrain our private sense of possibility. They determine whether a family gets to keep the family farm when they cannot meet a mortgage payment, and whether a working Joe gets to keep working or at least to know why he has gotten the axe. These decisions contribute to the collective well-being of a state and its people and also contribute to individual autonomy in ways that the Federal Constitution has not yet recognized. State constitutions—in some states, in some provisions, in some contexts—offer state judges interpretive resources from which they may reconsider common law rules and reorient them in the light of socioeconomic commitments. Over time, new patterns of common law decisions might take shape and create new understandings that generate different expectations about the importance of material well-being to an autonomous life. New legal interests might emerge, and one day these interests might be understood as deserving of federal constitutional status or recognition as a matter of due process or equal protection.[69]

CONCLUSION

In drawing attention to state constitutions, and to the relation of private law to public values and ultimately to the relation of private

69 *See* Hershkoff, *supra* note 43, at 1530–31.

law to questions of social justice, this lecture has built on an intellectual tradition with deep roots at our law school. And so I return to Justice Brennan's Madison Lecture. That night back in 1986, Justice Brennan urged state judges to see state constitutions as a source of possibility—as a way to secure "[j]ustice, equal and practical . . . for all . . . who do not partake of the abundance of American life."[70] To achieve that goal, state courts may need to cross the boundary between the public and the private. They may need to protect the private life of public rights, and to consider carefully the relation of the common law to human dignity.

I cannot be certain that you agree with everything that I have said tonight, but I hope I have encouraged discussion of difficult and contested constitutional ideas. Thank you all for listening, and please join me again in thanking Herbert and Svetlana Wachtell for their generous support of our law school.

[70] Brennan, *supra* note 2, at 553 (quoting William J. Brennan, Jr., *Landmarks of Legal Liberty*, *in* THE FOURTEENTH AMENDMENT 1, 10 (Bernard Schwartz ed., 1970)) (internal quotation marks omitted).