

State Action, Social Welfare Rights, and the Judicial Role:
Some Comparative Observations

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I. State Action and Background Rules of Property and Contract

Consider the following cases: (1) A man employed by a private college informs his employer (in response to an inquiry) that he is a gay. The employer fires him. The former employee sues the college, claiming that the college's action violates the nation's constitutional requirement that everyone be treated equally. (2) A hearing-impaired person seeks medical care from a hospital, which indicates its willingness to provide the care on the condition that the patient provide, and pay for, a sign-language interpreter to assist in the delivery of the medical care. The patient sues the hospital, claiming that its refusal to provide service violate the constitutional norm of equality. (3) A group of farm laborers organizes itself and approaches the workers' employer, seeking to bargain collectively over wages, hours, and conditions of labor. The employer refuses to bargain. The union sues the employer, claiming that the refusal to bargain violates the workers' constitutionally protected right of association.

In each of these cases the plaintiffs seek to invoke constitutional norms against a non-governmental actor. Constitutional systems address their ability to do so through the doctrines of state action or horizontal effect: The plaintiff loses if the defendant is not a

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“state actor,” or if the constitutional system does not give constitutional guarantees direct horizontal effect.

Another way of describing the cases is this: In each the defendant has acted in a manner authorized by background rules of property and contract, rules which have not been modified by legislation applicable to the action the defendant took.² The college relies on the employment-at-will doctrine; the hospital and the farm owner rely on the rule of contract law that no one is required to make a contract on terms other than those to which he or she agrees. The plaintiff’s claim is therefore that the nation’s constitution necessarily alters those background rules. The state action/horizontal effect doctrine identifies the circumstances under which such claims are legally valid.

The Canadian Supreme Court’s initial foray into the state-action field involved the following facts: An employer locked out workers associated with a labor union.³ The employer operated a delivery business primarily in Ontario. It subcontracted for delivery services in British Columbia with another delivery business. The union wanted to picket the British Columbia business, and sought a declaration from the relevant labor board that the British Columbia business was an “ally” of the Ontario one. Such a declaration would have insulated the union from liability in tort for picketing at the British Columbia business. The labor board refused to make the requested declaration. The British Columbia business then obtained an injunction from a trial court against picketing, a

² For completeness, I should add that sometimes defendants invoke background rules of tort law. Analytically, the problems remain the same into whatever branch of law the background rules fall.

³ *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

remedy traditionally available to prevent the tort of inducing breach of contract. The union challenged the injunction as a violation of the right to freedom of expression guaranteed by the Charter of Rights.

The Canadian Supreme Court held that the Charter did not “apply to private litigation divorced completely from any connection with the Government.”⁴ It relied on a combination of textual and functional reasons. Section 32 of the Charter states that the Charter applies “to the Parliament and government of Canada” and “to the legislature and government of each province” in respect of “all matters within” their respective authority. The natural reading of this provision, according to the Supreme Court, is that “government” refers to the executive branch, not to the government “in its generic sense – meaning the whole of the governmental apparatus of the state”⁵ including the judiciary; if the latter were the meaning, the specific mention of “Parliament” and “the legislature” would be unnecessary. Functionally, “the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the Government.”⁶

So far, so good: The Charter does not apply to background rules of property and contract. That the tort of inducing a breach of contract might be in some tension with norms dealing with the right of association does not authorize the courts to find the tort, or an injunction aimed at preventing the tort, unconstitutional. Similarly, that the employment-at-will doctrine is in some tension with constitutional nondiscrimination norms does not authorize the courts to find a discriminatory firing to be a breach of

⁴ *Id.* at 593.

⁵ *Id.* at 598.

⁶ *Id.* at 593.

contract. All three plaintiffs described at the outset should lose, because they were arguing that the Charter directly shaped the background rules of contract and property.⁷

Now, consider some additional facts. In the gay rights case, the province in which the college was located had a human rights act that prohibited discrimination on the basis of race, religious beliefs, sex, marital status, age, ancestry, and place of origin. The act did not include sexual orientation as a protected category. In the medical care case, the government reimburses hospitals and other care providers for the costs of medically required services. The administrators of the reimbursement system decided, before the litigation arose, that sign-language interpretation was not a medically required service, and therefore decided not to reimburse hospitals and care providers for that service. In the farm workers' case, the applicable labor relations act initially had excluded farm laborers, then was amended to include farm laborers, thereby imposing an obligation on employers to bargain collectively with farm workers' unions. Later, the statute was again amended, this time to exclude farm laborers.

Do these facts change the state action/horizontal effect analysis? It is hard to see how they should if the Charter in fact does not apply to background rules of contract and

⁷ The Canadian Supreme Court expressly acknowledged that its holding on direct horizontal effect did not rule out the possibility that the Charter would have indirect horizontal effect by influencing the courts' development of the contours of the background rules in light of Charter norms. *See id.* at 603 (answering "in the affirmative" to "the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.").

property. The human rights act affects some, indeed many, of the college's background rights of property and contract – but not its right to make employment decisions on grounds not covered by the act. The medical reimbursement system shifts the cost of providing medically required care from the patient or the hospital to taxpayers generally, but it does not shift the cost of other services – newspaper delivery, for example, or services not found to be medically required – to the taxpayers. The hospital remains free to provide *those* services only to patients who are willing (and able) to pay for them. By repealing the inclusion of farm workers in the labor relations act, the legislature restored the status quo ante, in which employers had the ordinary common-law right to deal with employees on whatever terms the employer chose.

Yet, in all three cases the Canadian Supreme Court held that the Charter had been violated,⁸ or so I believe to be the best reading of the cases. The litigation structure of the cases the Court considered obscures the true holdings. In each real case the plaintiffs did not sue the employer or the hospital. Rather, they sued public officials, seeking declarations that the statutes excluding them from coverage violated the Charter. Yet, in agreeing with those claims, the Canadian Supreme Court *effectively* held that the Charter modified background rules of contract and property.⁹ The only thing the actual litigation

⁸ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (the gay rights case); *Eldridge v. British Columbia (Attorney General)*, 1997 Can. Sup. Ct. LEXIS 86 (the medical care case); *Dunmore v. Ontario (Attorney General)*, 2001 Can. Sup. Ct. LEXIS 94 (the farm workers case).

⁹ For the view that the litigation structure actually matters, see LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 255-56 (1985) (suggesting that litigants should often sue the

structure did, compared to the one I described at the outset, was to allow the Court to put aside questions of remedy and retroactivity.¹⁰

The state action/horizontal effect question is equivalent to asking whether, or under what circumstances, constitutional norms alter background rules of contract, tort, and property. The question arises because in many modern circumstances market outcomes – that is, those that result when people exercise the rights (and invoke the immunities) they have under the background rules of contract, tort, and property – seem to many as inconsistent with constitutional norms regarding the level and, particularly, the distribution of important goods.

government officials “who possess the power, by virtue of the state rules at issue, to put ‘private’ actors in a position to inflict injury”).

¹⁰ In my hypothetical litigation structure, the gay former employee sues for breach of contract, seeking damages or reinstatement; the employer defends, pointing out that no statute alters its background property and contract rights; the plaintiff points to the human right act, saying that the Charter *requires* that the act include sexual orientation as a protected category, and that the employer’s defense is overcome by the constitutionally obligatory human rights act. At that point the employer might contend that it is unfair to impose liability (particularly monetary liability) for violating a norm articulated by the courts only in the litigation itself. *Cf.* *Lugar v. Edmondson Oil*. Col. 457 U.S. 922, --- (1982) (Powell, J., dissenting) (arguing that holding “a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties” is “plainly unjust to the respondent.”).

II. State Action and the Activist State

I believe that the state action/horizontal effect question becomes particularly pressing with the rise of the activist state and the increasing commitment in a nation to social democratic norms. The classical liberal state dealt with concerns about the level and distribution of important goods primarily in private law, secondarily in public law. In private law, the background rules of contract, tort, and property incorporated sub-rules – sometimes understood as exceptions or qualifications – responsive to concerns about the level of goods that people obtained in market transactions.¹¹ These were the rules of force, fraud, nuisance, and the like. A distribution of goods that resulted from a seller's fraud on a buyer was normatively unacceptable within classical liberal legal theory, without regard to any supervening constitutional norms. But, of course, classical legal theory defined the sub-rules narrowly. Narrow definitions were needed, in the first instance, because broadly defined sub-rules would displace market outcomes across too wide a range to be acceptable to liberals. They were needed, in the second instance, to ensure that common-law judges would not impose pre-liberal norms regarding the acceptable level of goods by the device of finding fraud or coercion whenever the level or distribution of goods seemed to the judges unacceptable.

Two public law doctrines responded to concerns about the level and distribution of goods. Legislatures could modify background rules of contract, property, and tort by exercising a police power. That power was narrowly defined, like the sub-rules in private

¹¹ Here I draw on my knowledge of U.S. developments, although I am reasonably confident that other classical legal systems developed roughly similar solutions.

law, and for similar reasons.¹² The scope of the police power in classical legal theory can best be understood, I believe, as resulting from essentially prophylactic considerations: Courts agreed that legislatures might properly be concerned that courts in common-law litigation could not accurately identify all the occasions on which fraud, coercion, and the like actually occurred, and so allowed legislatures to exercise a police power targeted at fraud, coercion, and the like, but hitting somewhat more broadly than the courts themselves would.

In addition, courts developed a constitutional doctrine directly limiting *legislative* distribution of goods. Classical legal theory condemned as class legislation laws that *intentionally*, not incidentally, deprived people of the share of goods they could obtain on the market or, derivatively, through securing legislation within the scope of the police power. The U.S. Supreme Court's decision in *Romer v. Evans* can be understood as an application of classical legal theory to gay rights.¹³ The case's precise meaning is notoriously unclear, but at least one reasonable reading of the decision is that it holds a state-wide ban on legislation treating sexual orientation as a protected category unconstitutional because the ban was motivated by a simple desire to inflict harm.¹⁴

¹² Here I describe the police power in classical legal theory. The actual scope of the police power, as interpreted by U.S. courts through the nineteenth century, was significantly broader. *See generally* WILLIAM NOVAK, *THE PEOPLE'S WELFARE : LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

¹³ 517 U.S. 620 (1996).

¹⁴ *See id.* at --- (stating that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons

With classical legal theory's treatment of concerns about the level and distribution of important goods in hand, we can return to the Canadian cases. The activist state is defined by its concern about the level and distribution of important goods, so it is hardly surprising that the state action/horizontal effect question receives different answers in such states from those it received in the classical liberal state. In private law, a critique of formalism accompanied the rise of the activist state.¹⁵ That critique undermined the narrow definitions of the "exceptional" doctrines of fraud, coercion, and the like. A stylized account of the development is this: Courts began with the narrow definition of coercion, sharply distinguishing it from freedom. But, in some cases, the plaintiff's freedom seemed significantly constrained, although not as severely constrained as it had been in the cases initially defining coercion. The courts treated these new cases as involving coercion as well. At some point, it became clear that coercion, as the courts had defined it, was not a category sharply distinguished from freedom but simply a particular location on a continuum of varying degrees of freedom. The critique of formalism was that drawing a line anywhere along this continuum was an arbitrary choice, not guided by any defensible liberal theory of freedom and coercion. Once the ideas of fraud, coercion, and nuisance expanded in the activist state, the way was open for private law to accommodate concerns for the level and distribution of important goods by correcting market-based outcomes through the use of expansive versions of the classical sub-rules.

affected.”).

¹⁵ See generally MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976).

The public law of the activist, social democratic state expressed concern for the level and distribution of goods more directly. The activist state placed into question levels and distributions of important goods that seemed inconsistent with social democracy's guiding premises: If market transactions resulted in outcomes where people did not have "enough," according to prevailing social democratic norms, those outcomes certainly could be changed by legislation, and sometimes had to be changed pursuant to constitutional command.

The classic U.S. state action case of *Shelley v. Kraemer* illustrates the shift from the focus on intent in classical legal theory to a focus on outcomes in the activist state.¹⁶ The Supreme Court there held that a state court's injunction against the transfer of property from a white seller to an African American buyer, issued to enforce a covenant restricting such transfers, was unconstitutional state action, even though the state courts were enforcing a rule neutral as to race that called upon them to enforce all restrictive covenants that left open a sufficiently large market for land sales.¹⁷ What made *Shelley*

¹⁶ The U.S. Supreme Court recognized the connection between outcome-oriented analysis and social welfare rights in *Washington v. Davis*, 426 U.S. 229 (1976), which concluded its analysis rejecting the argument that laws that had a disproportionate adverse impact on racial minorities should for that reason alone be subject to extremely close judicial scrutiny by pointing out that outcome-oriented analysis "would raise serious questions about . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. . . ." *Id.* at ---.

¹⁷ For a more complete discussion, see Mark Tushnet, *Shelley v. Kraemer and Theories*

difficult for commentators was that the state courts there were enforcing a racially neutral rule, not one intentionally designed to disadvantage African Americans. The hard part of *Shelley* was not that state court enforcement of a common-law rule was state action, but that the rule it was enforcing was not one that classical legal theory would have condemned.¹⁸ *Shelley*'s holding on the merits makes sense only on a theory of equality that condemns some distributions of important goods like housing.¹⁹

of Equality, 33 N. Y. L. S. L. REV. 383 (1988). There I discuss the common, but erroneous, notion that the state courts were enforcing an underlying rule of law that was itself racially discriminatory. For a prominent statement of the error, see TRIBE, *supra* note ---, at 260 (describing the problem in *Shelley* as one involving a state's decision to enforce racially restrictive covenants "while generally regarding alienability restraints as anathema.").

¹⁸ I believe that something similar might be said about *Dolphin Delivery*: An injunction from a court is state action, but an injunction enforcing a common-law rule against inducing breaches of contract does not violate a constitutionally protected freedom of association or freedom of expression. Justice Beetz took this view of the case. *See Dolphin Delivery*, [1986] 2 S.C.R. at 56 (Beetz, J., concurring) (concluding that "on the evidence of this case, the picketing which has been enjoined would not have been a form of expression").

¹⁹ A related transformation in focus from intent to outcome appears in the Canadian gay rights case. The Court there had before it the argument that sexual orientation had been excluded from the provincial human rights act because of hostility to gays, but the Court found it "unnecessary to decide whether there is evidence of a discriminatory purpose."

The relation between an expansive state action/horizontal effect doctrine and the activist state can be seen throughout the Canadian cases. *Dolphin Delivery*, the Canadian Supreme Court's first state action case, distinguished an earlier lower court case in which a young woman brought proceedings in the local human rights commission against a private hockey association for excluding her from a boys' team.²⁰ The human rights commission refused to act. The applicable statute did ban gender-based discrimination, but it contained an express exception "where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex."²¹ The provincial supreme court held that the exclusion violated the Charter's equality guarantee. The Court in *Dolphin Delivery* approved that result. It described the case as "a law suit between private parties," but said that the hockey association had "acted on the authority of a statute," which "removed the case from the private sphere."²² Analytically this is hardly satisfying: The purported exclusion of the hockey association's discriminatory action could have been described as merely confirming the hockey association's pre-existing common-law rights of property and contract, which it exercised in excluding the complainant from the hockey team. The Supreme Court's intuition, though, is sensible enough in an active state, where – having entered a field – the state displaces the common law and converts all actions by private entities into actions authorized by the state.

Vriend, [1998] 1 S.C.R. at 547.

²⁰ Re: Blainey and Ontario Hockey Ass'n, 26 D.L.R. (4th) 728 (1986).

²¹ *Dolphin Delivery*, [1986] 2. S.C.R. at 601 (quoting the statute).

²² *Id.* at 602, 603.

The Canadian Supreme Court acknowledged this line of argument in the gay rights and medical care cases. The gay rights decision analyzed the problem as involving a legislative omission, or, equivalently, as involving the underinclusiveness of the human rights act.²³ Characterizing the problem as one of omission is misleading. The enacted human rights act did not “omit” sexual orientation; it simply left in place the pre-existing background rights of property and contract. Finding a statute unconstitutional because it is underinclusive means that the Charter sometimes imposes affirmative obligations on the government: Once the government enters a field, such as restricting the contract and property rights of private entities in the service of the Charter’s equality norms, it must occupy the entire field to the extent of those equality norms. The activist state, in turn, is defined by the fact that it *has* affirmative obligations. An expansive state action/horizontal effect doctrine allows the courts to collaborate with legislatures in defining the scope of those obligations.

A central passage in the medical care case makes the same point. According to the Court, hospitals “act as agents for the government” in providing medical services.²⁴ The Court continued, “The Legislature, *upon defining its objective as guaranteeing access to a range of medical services*, cannot evade its obligations under [the equality provision] to provide those services without discrimination by appointing hospitals to carry out *that objective*.”²⁵ The active state, having entered the field of subsidizing medical care, must do so fully; the legislature cannot define however it wants the “range”

²³ *Vriend* [1998] 1 S.C.R. at 529-34.

²⁴ *Eldridge*, 1997 Sup. Ct. Can. LEXIS at 70.

²⁵ *Ibid.* (emphasis added).

of services it is willing to provide within that field, but must instead secure judicial agreement on the range of services to be provided. Here too the activist state, through its legislature and courts, takes on affirmative obligations of providing services.

III. The Judicial Role in Light of the Equivalence of State Action/Horizontal Effect and Constitutionally Guaranteed Social Welfare Rights

The Canadian cases I have described make clear the connection between the state action/horizontal effect doctrine and social welfare rights. In each the question ultimately is, What goods must the legal system make available to people who cannot acquire them through market transactions? Once the legislature has displaced market provision of some medical services, which services must the government as a whole make sure are available? Once the legislature displaces background contract and property rules to require that employers bargain collectively with some workers, in the service of a constitutional interest in association, to which workers does that interest attach? And, who is entitled to invoke the background rules displacing market-based allocations resulting from fraud and coercion?

Social democracy affected private law by encouraging judges to develop the background rules of property, contract, and tort to respond to concerns about the level and distribution of important goods. It affected public law by encouraging judges to give constitutional norms horizontal effect. And, importantly, these two effects are in fact only one: The state action/horizontal effect doctrine is the doctrinal vehicle whereby background rules of property, contract, and tort are made subject to constitutional norms

dealing with the level and distribution of important goods.

Another way of putting the point is this: To ask whether the state action/horizontal effect doctrine should be expansive is to ask whether a nation's constitution guarantees social welfare rights – that is, whether the constitution mandates some level and distribution of important goods even if that level and distribution are not achieved through the operation of markets in which people invoke their background property and contract rights. But, the same results can be reached by adjusting the background rights themselves.²⁶

The equivalence of the state action/horizontal effect doctrine and the development of background rules of property, contract, and tort poses an important question about the judicial role. It is conventionally asserted that courts are ill-suited to implement social welfare rights.²⁷ For example, Cass Sunstein criticizes a constitutional provision

²⁶ Subject only to questions of remedy and retroactivity. *See* note --- *supra*.

²⁷ *See, e.g.*, Cass R. Sunstein, “Against Positive Rights,” in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed. 1996) (arguing against the inclusion of social welfare rights in nations making the transition from Communist rule to democratic governments with market economies). Professor Sunstein's recent praise of the treatment of constitutionally guaranteed social welfare rights by the South African Constitutional Court suggests that he has changed his views somewhat. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001) (asserting that the approach of that court in the *Grootboom* case described in more detail below, text accompanying notes --- *infra*, “stands as a powerful rejoinder to those who have contended that socioeconomic rights do not belong in a constitution.”).

guaranteeing a “right to an income conforming with the quantity and quality of work performed”:

This provision will have one of two consequences: (a) If the provision is to mean something, courts will have to oversee labor markets vary closely, to make sure that every bargain produces the right wage. We know enough to know that government is ill-equipped to undertake this task. Courts are in an even worse position to do so. And if courts are going to oversee the labor market, it will be impossible to have a labor market. (b) The relevant provisions will be ignored – treated as aspirations not subject to legal enforcement. This is a better outcome than (a), and courts in Eastern Europe should be encouraged to reach this conclusion. But it is hardly desirable to have a system in which many constitutional rights are ignored.²⁸

Of course, courts “oversee the labor market” through their development of background rules of property and contract. There can be no *distinctive* incapacity of courts that allows them to develop those background rules in an acceptable manner but makes them unable to develop social welfare rights – or, equivalently, unable to work out the contours of the state action/horizontal effect doctrine – equally acceptably. Put another way, we think we know that courts can develop background rules of property and contract acceptably; we know that courts *must* develop some doctrine of state action or

²⁸ Sunstein, “Against Positive Rights,” note --- *supra*, at 228. More generally, Professor Sunstein writes, “Courts lack the tools of a bureaucracy. They cannot create government programs. . . . It is, therefore, unrealistic to expect courts to enforce many positive rights.” *Id.* at 229.

horizontal effect; we may believe that courts cannot develop social welfare rights acceptably. The difficulty is that those three views are incompatible.

IV. Addressing the Trilemma

The incompatibility among the three propositions I have described can be resolved in several ways. The most obvious is to deny that courts can in fact develop the background rules in ways responsive to concerns about the level and distribution of important goods. This would be to return to classical legal theory, specifically in private law, by constitutionalizing the common law. The U.S. experience with classical legal theory suggests the difficulty of that course. The New York Court of Appeals once held that *legislation* altering the common law could be unconstitutional.²⁹ The case involved a workers' compensation statute and what the court took to be the common-law requirement that liability could ordinarily be predicated only on fault. The statute modified the common law either for reasons not encompassed within the government's police power, or by making a larger departure from the common law than the police power, understood as a defense against hard-to-detect occasions of fraud or coercion, could justify. The court's theory implied that *judicial* modification of the common law would also be unconstitutional, if the courts departed as substantially from the common law as the legislature had.

²⁹ *Ives v. South Buffalo R. Co.*, [cite] (1911) (invalidating New York's compulsory workers' compensation statute on the ground that the legislation substituted liability without fault for the common law requirement of fault).

The New York court's result did not survive. Perhaps it was analytically coherent, although there surely would have been difficulty in working out how much the courts could modify the common law before they crossed the line into constitutional violation. Even if a court might construct an analytically defensible account of limitations on the power to alter the common law, doing so would entail reverting to a world without an active, social democratic state. I think that such a possibility is too remote to be worth serious attention.³⁰

The trilemma matters most in nations with thin systems of social provision. As Professor Sunstein also suggests, nations with thicker social welfare systems might accommodate constitutional social welfare rights.³¹ But, as social provision becomes increasingly thick, the need for judicial enforcement of social welfare rights, or for the development of background rules to address concerns about the level and distribution of important goods, or for a worked-out state action doctrine diminishes. The trilemma may persist in theory, but the practical consequences of a system's inability to resolve it are small. Sweden and the Netherlands have quite substantial systems of social provision, and guarantee social welfare rights in their constitutions.³² Yet, both have extraordinarily narrow systems of judicial review. The constitution of the Netherlands provides

³⁰ For an argument to that effect, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (forthcoming, 2002).

³¹ Sunstein, *supra* note ---, at 226 (“[I]t is by no means clear that social and economic rights would be futile or harmful for [Western rather than Eastern European nations].”).

³² The guarantees of social welfare rights in the Dutch constitution are more substantial than those in the Swedish.

expressly that “[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts,”³³ although the courts will enforce treaty provisions that are directly applicable in domestic law, even in the face of contrary legislation.³⁴ Sweden’s courts have the power of judicial review, but they are instructed to “set aside” a statute “only if the fault is manifest.”³⁵ According to one overview, the Swedish highest courts had not found a statute unconstitutional at the time of publication in 1990.³⁶ The need for courts to grapple with the trilemma is substantially reduced in the presence of substantial systems of social provision developed by legislatures.

Putting nations with thick systems of social provision to one side, then, I want to consider several variants of judicial review that accept the proposition that the state action/horizontal effect doctrine, social welfare rights, and background rules of property and contract are equivalent. They are, in order, passive review, strong-form judicial review, weak-form judicial review, and what might be called superweak-form judicial

³³ Constitution of the Netherlands, art. 120, available at http://www.uni-wuerzburg.de/law/nl00000_.html.

³⁴ Constitution of the Netherlands, art. 94 (“Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.”).

³⁵ Constitution of Sweden, chap. 11, art. 14, available at http://www.uni-wuerzburg.de/law/sw00000_.html.

³⁶ Louis Favoreu, “Constitutional Review in Europe,” in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD --- (Louis Henkin & Albert J. Rosenthal eds. 1990).

review. In the end, I suggest skepticism about the possibility that any variant will resolve the trilemma in a satisfactory way.

A. Passive Review

Courts apply passive review when they employ a standard of irrationality or intentional discrimination to assess claims that the level or distribution of important goods is inconsistent with the constitution, or, equivalently, when they do not develop an expansive state action/horizontal effect doctrine. How, though, does passive review accommodate the judicial role in developing the background rules of property and contract? Here some considerations arising out of judicial structure may be significant. Suppose a constitutional court abjures enforcing social welfare rights and (necessarily, for consistency) construes the state action/horizontal effect doctrine narrowly. In a social democratic state, concern over the level and distribution of important goods does not disappear; it simply shifts to the courts having responsibility for developing the background rules of property and contract. Still, each court may maintain a coherent doctrinal structure if the courts are structurally separate, that is, if there is a constitutional court and what we can call ordinary courts.³⁷ I believe that the United States is the only advanced system with a structure that is completely effective in separating its constitutional court – the Supreme Court – from the courts responsible for developing the

³⁷ For an elaboration, see Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, I-CON (forthcoming, 2003).

background rules, that is, from the state courts.³⁸

Other constitutional systems do not maintain this insulation nearly as effectively. The Canadian Supreme Court, for example, has the power to develop the common law directly. Suppose that court had adhered rigidly to *Dolphin Delivery*, refusing to apply the Charter in ordinary private litigation where the parties relied on common-law rights and defenses. Still, the court could – and has – developed the common law in light of the norms it finds in the Charter.³⁹ The German Constitutional Court’s influential doctrine of indirect horizontal effect connects that court to Germany’s ordinary courts. Under the doctrine of indirect horizontal effect, the specialized constitutional court articulates constitutional norms and supervises the ordinary courts to determine whether those courts have adequately taken constitutional norms into account in their development of the background rules. Absent a strict separation between the constitutional court and the ordinary courts, passive review seems an unstable solution to the trilemma of state action/horizontal effect, social welfare rights, and the background rules: A court constrained by a narrow state action/horizontal effect doctrine will effectively enforce social welfare rights by developing the background rules itself or through its supervision of the ordinary courts.

³⁸ Of course the U.S. Supreme Court reviews decisions by state courts, but it must accept their determinations of what the background rules are.

³⁹ *See, e.g., Dagenais v. Canadian Broadcasting Co.*, [1994] 3 S.C.R. 835 (“reformulat[ing] the common law rule [regarding injunctions against publications that would adversely affect juries] . . . in a manner that reflects the principles of the Charter.”).

B. Strong-Form Judicial Review

Professor Sunstein assumed judicial review would take a strong form. But, strong-form judicial review is probably as unstable as passive review, though for a different reason. Professor Sunstein's concern is not, I think, with judicial regulation of the labor market in the abstract; it is that courts lack the capacity to regulate the labor market, and (generalizing) other markets as well, to the degree of detail required by guarantees of social welfare rights.⁴⁰ The problem, I believe, is not that courts cannot at any particular time promulgate what would effectively be a code for the labor and other markets. It is, rather, that private actors and legislators can readily adjust their behavior and legal relations to avoid the obligations the judicially promulgated code places on them. The problem is perhaps more apparent with respect to background rights than with respect to social welfare rights, and was expressed most clearly in Robert Nozick's criticism of what he called *patterned* accounts of justice.⁴¹ Such accounts specify a just

⁴⁰ Cf. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 34-37 (4th ed., looseleaf ed. 1997) (expressing concern that an expansive horizontal-effect doctrine "would create an extensive new body of 'constitutional tort law', co-existing uneasily with the labour codes, family law, human rights codes and other bodies of law"). Professor Sunstein suggests that this degree of regulation is beyond the capacity of government as a whole. To that extent, however, Professor Sunstein's concern is with social democracy, not with judicial capacity specifically.

⁴¹ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA --- (197-).

level and distribution of important goods. According to Nozick, such accounts failed to appreciate the implications of the fact that markets are dynamic. A court might specify background rights at time-1 in a way that, at that time, produced the constitutionally required level and distribution of important goods, but market transactions, all conforming to the background rules, would inevitably change the level and distribution. In the area of public law, we can think of the full specification of a set of social welfare rights to the appropriate degree of detail as something like the tax code or regulation of campaign finance. We have enough experience to know that legislators and private actors will find ways to disrupt the social provision set out in the specification.

C. Weak-Form Judicial Review

Neither passive nor strong-form judicial review seem likely to offer stable solutions to the trilemma I have described. But, the conventional wisdom about the inability of courts to enforce social welfare rights (or, again equivalently, to administer an expansive state action/horizontal effect doctrine) arose at a time when the only options for constitutional courts seemed to be passive or strong-form review. A new form of judicial review has arisen in the past few decades, and its invention might alter our judgments about judicial capacity.

The new form of judicial review comes in several variants, but in each a judicial determination of what the constitution requires is explicitly not conclusive on other political actors, who can respond to the court's decision through ordinary politics.⁴² The

⁴² Two notes on weak-form judicial review. (1) Constitutional systems with strong-form

notwithstanding clause in Canada's Charter of Rights is one variant.⁴³ Under that provision, parliaments can specify that their enactments will take effect for a five-year period, notwithstanding their inconsistency with certain Charter guarantees. The notwithstanding clause makes it possible for legislatures to respond to judicial interpretations of the Charter by enacting legislation predicated on a different view of the

judicial review do allow political actors to respond by amending the constitution in response to a judicial decision with which the political actors disagree. Weak-form systems differ in that political actors can respond without invoking any supermajoritarian amendment procedures. It follows that a constitutional system in which constitutional amendment is easy, both in form and in practice, is, in my terms, a system with weak-form judicial review. (2) The Warren Court occasionally hinted that the U.S. Constitution authorized a particular type of weak-form judicial review, in which courts and legislatures could engage in a dialogue about what the Constitution required. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) (suggesting, on one interpretation, that Congress could identify constitutional rights that the Court had not); *Miranda v. Arizona*, 384 U.S. 436 (1966) (indicating that legislatures could substitute equally effective mechanisms for the warnings the Court developed). These were only hints, and more recent cases appear to reject the proposition that weak-form judicial review is compatible with basic understandings about the U.S. Constitution. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting the substantive interpretation of *Katzenbach v. Morgan's* description of congressional power); *Dickerson v. United States*, --- U.S. --- (2001) (invalidating the congressional response to *Miranda* as inadequate).

⁴³ Charter of Rights, § 33.

Charter's requirements. The possibility of the clause's invocation might give Canada a weak form of judicial review.⁴⁴

The British Human Rights Act (1998) provides a different model of weak-form judicial review.⁴⁵ The Act requires courts to interpret statutes to be consistent with the European Convention on Human Rights, if they can fairly do so. If such an interpretation is impossible, the Act directs courts to issue a statement that the statute is incompatible with the Convention, and authorizes government ministers to respond in a variety of ways, including modifying the statute on their own, introducing fast-track legislation to modify the statute, introducing such legislation in the ordinary course, or doing nothing. The New Zealand Bill of Rights creates an even weaker form of judicial review, simply imposing an obligation on courts to interpret legislation to be consistent with the Bill of Rights' provisions, but providing no remedy if parliament enacts a statute that clearly violates the Bill of Rights.⁴⁶

The *Grootboom* decision of South Africa's Constitutional Court provides yet another model for weak-form judicial review.⁴⁷ There a "group of people . . . lived in appalling conditions, [and] decided to move out and illegally occupied someone else's land. They were evicted and left homeless."⁴⁸ The government had designated the land

⁴⁴ *But see* text accompanying notes --- *infra* (expressing skepticism that Canada's form is truly weak-form).

⁴⁵ [cite]

⁴⁶ [cite]

⁴⁷ 11 B.C.L.R. 1169 (CC) (2000).

⁴⁸ *Id.*, ¶ 3.

they took over for subsidized low-cost housing. South Africa’s Constitutional Court held that the country’s constitutional guarantee of “access to adequate housing,” and its imposition on the state of a duty to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right,”⁴⁹ imposed a “minimum core obligation” to adopt a reasonable legislative program aimed at securing housing for all.⁵⁰ In particular, the Constitutional Court evaluated the government’s existing housing programs, using a standard of reasonableness, and held that the programs were not a reasonable method of implementing the constitutional guarantee because they did not have “a component catering for those in desperate need.”⁵¹ The government could provide this component by developing a program of constructing housing for the desperately needy itself, or by subsidizing the construction of such housing by private entrepreneurs, or by providing those in need with vouchers or other forms of “social assistance.”⁵²

Michael Dorf and Charles Sabel treat approaches like that taken in *Grootboom* as exemplifying a distinctive variant of weak-form judicial review, part of a group of legal

⁴⁹ Constitution of South Africa, §§ 26 (1), (2).

⁵⁰ *Grootboom*, ¶ 30.

⁵¹ *Id.* at ¶ 63. This element could involve providing temporary shelter pending the completion of more adequate permanent housing. In addition, the Court said, “[t]he absence of this component may have been acceptable if the nationwide housing programme would result in affordable housing for most people within a reasonably short time.” *Id.* at ¶ 65.

⁵² *Id.* at ¶ 36.

techniques they call democratic experimentalism.⁵³ A democratic experimentalist court begins with a constitutional principle stated at a reasonably high level of abstraction, such as the South African provision purporting to guarantee access to adequate housing. It begins the experimentalist project by offering an incomplete specification of the principle's meaning in a particular context, such as the requirement that the government's housing programs specifically address the housing needs of those in desperate need. The Court then asks legislators and executive officials to develop and begin to implement plans that have a reasonable prospect of fulfilling the incompletely specified constitutional requirement. The next step involves examining the results of this experiment. Perhaps legislators and executive officials will be able to demonstrate that their programs are moving in the right direction. A democratic experimentalist court might respond by fleshing out the constitutional requirement a bit more, specifying in somewhat more detail what the government must do to fulfill its broad obligation to ensure access to adequate housing. Or, perhaps legislators and executive officials will be able to show that the task they initially set for themselves in response to the court's first decision could not be accomplished within a reasonable time, or with reasonable resources, and propose some modification in the constitutional standard. For example, they might have proposed to build permanent housing for those in desperate need, but, having discovered that land is unavailable at reasonable cost for such purposes, propose now to develop temporary shelters for those people. A democratic experimentalist court could revise its judgment about the constitution's requirements in light of experience.

⁵³ Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

Notably, that adjustment might be upward, imposing more requirements on the government, or downward, imposing fewer. The revisability of a court's constitutional judgments makes this a weak-form version of judicial review.

There is some reason to believe that weak-form judicial review is unstable institutionally. Canada's experience with the notwithstanding clause suggests, although not conclusively, that the clause has failed to create a distinctive form of judicial review, and that Canada has a rather robust form of judicial review, the notwithstanding clause notwithstanding.⁵⁴ The clause has rarely been invoked.⁵⁵ The reasons are complex. The clause was partly discredited by its use in the long-running conflict over Quebec's status within, or potentially outside, Canada. In addition, politicians seem unwilling to present themselves as attempting to "override" the Charter, rather than, as might have occurred, being willing to present themselves as offering reasonable interpretations of Charter rights that simply happen to differ from the interpretations the Supreme Court offers. As some early commentators predicted, the notwithstanding clause may have encouraged judges to act rather aggressively in developing Charter rights, by letting judges think that

⁵⁴ For an analysis of Canada's experience, cast as a review of a book defending Canada's system as weak-form, see Mark Tushnet, [Roach review], --- U. TOR. L. J. --- (forthcoming, 2002).

⁵⁵ Although less rarely than the conventional wisdom has it. For an analysis that in my view somewhat exaggerates the number of occasions on which legislatures have invoked the notwithstanding clause, see Tsvi Kahana, *The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter*, 44 CANAD. PUB. ADMIN. 255 (2001).

legislatures had the power to revise whatever the judges did.⁵⁶ Then, with the notwithstanding clause falling into desuetude, Canada was left with empowered courts exercising strong-form judicial review.

Experience with the British Human Rights Act is too thin to be instructive yet, although commentators have worried about whether courts will “distort” legislation in interpreting it to be compatible with the European Convention, and about whether ministers will be willing to do nothing in the face of a judicial declaration that a statute is incompatible with the Convention.⁵⁷ Even the extremely weak New Zealand Bill of Rights has been criticized as creating, in practice, a strong form of judicial review.⁵⁸

The conceptualization of democratic experimentalist judicial review is even more recent than that of other versions of weak-form review. But, to the extent that the model has been developed out of reflection on institutional reform litigation in the United States, there is reason to be skeptical as well. The difficulty is that democratic experimentalist review requires some degree of collaboration among courts, legislatures, and executive agencies, in a setting where the courts are attempting to change what the other actors have already decided to do. Those other actors made their decisions because of the

⁵⁶ [cite]

⁵⁷ For examples, see Jeffrey Goldsworthy, “Legislative Sovereignty and the Rule of Law,” in *SKEPTICAL ESSAYS ON HUMAN RIGHTS* 61 (Tom Campbell, K.D. Ewing, & Adam Tomkins eds., 2001); Tom Campbell, “Incorporation through Interpretation,” in *id.* at 79.

⁵⁸ See James Allan, “The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand,” in *id.* at 375.

incentives they had, which remain in place when the court adds another incentive to the mix.⁵⁹ The unsurprising result has been a reasonably high degree of resistance or evasion of the initial judicial intervention, even if that intervention seems to an observer relatively mild.⁶⁰

The courts' response in the face of resistance or evasion is likely to be different from its response to collaboration. The courts might move in quite contradictory directions. Faced with resistance or evasion, the courts might insist on a "plan that promises realistically to work, and promises realistically to work *now*," to quote from the U.S. Supreme Court opinion expressing the Court's displeasure with resistance to desegregation.⁶¹ In that direction lies a kind of micromanagement that seems likely to

⁵⁹ Another possibility is that these actors' incompetence generated the problem to which the democratic experimentalist court addressed itself. That incompetence may persist even after the court acts.

⁶⁰ Professor Sabel has argued that the conditions for the emergence of democratic experimentalist programs might be precisely conditions in which all actors have incentives to collaborate. Those conditions are that all actors agree that a problem is so pressing that something needs to be done, and agree as well that all previous efforts to solve the problem have failed. Charles Sabel, "How Experimentalism Can be Democratic and Constitutional," prepared for presentation at the Conference on Democratic Experimentalism, Georgetown University Law Center, Nov. 13, 2001 (manuscript on file with author).

⁶¹ *Green v. New Kent County School Board*, 391 U.S. 430, --- (1968).

enhance legislative and executive resentment of judicial intervention.⁶² Alternatively, in the face of resistance and evasion, the courts might declare victory and abandon the field without the government's operation having changed in any substantial way.⁶³

The reasons for skepticism about the stability of weak-form judicial review are clear enough. The incentives on judges to convert weak-form review into strong-form review are obvious: The latter gives them more power than the former. They may be able to accomplish the conversion successfully because of the ideological valence of the phrase *protecting human rights*. Here the language used in Canada is significant. The notwithstanding clause is routinely referred to as creating a power to override Charter rights. But, as suggested above, what politician wants to be in a position of overriding rights?

D. Superweak-Form Review

⁶² The adoption of the Prison Litigation Reform Act in the United States illustrates what can happen when legislators come to believe that courts have engaged in inappropriate micromanagement. Courts in prison litigation had sometimes required prison systems to conform to quite detailed regulations of their housing and health care systems, believing that without such prophylactic requirements, the chances were too great that the prisons would revert to conditions that violated the Eighth Amendment's ban on cruel and unusual punishment. The Act limits the power of federal courts to require prison systems to adopt standards for the treatment of prisoners that do more than eliminate identified violations of the Eighth Amendment..

⁶³ For a discussion of this possibility, see [Reed].

Professor Sunstein notes the possibility that some constitutional rights “will be . . . treated as aspirations not subject to legal enforcement,” and thinks it “hardly desirable to have a system in which many constitutional rights are ignored.”⁶⁴ Yet, to say that constitutional provisions are not legally enforceable but express aspirations is not to say that they necessarily will be ignored. The constitutions of Ireland and India set social welfare rights apart from other constitutional rights in sections that identify social welfare rights as “directive principles of public policy.”⁶⁵ These principles are not legally enforceable. Rather, they encourage legislatures to enact statutes consistent with the principles, that is, to move in the direction of social democracy to the extent politically and economically feasible. Unlike weak-form judicial review, however, these provisions do not even indirectly authorize the courts to treat the directive principles as legally

⁶⁴ Sunstein, “Against Positive Rights,” *supra* note ---, at 228.

⁶⁵ See Constitution of Ireland, chap. 13, available at http://www.uni-wuerzburg.de/law/ei00000_.html; Constitution of India, Part IV, available at http://www.uni-wuerzburg.de/law/in00000_.html. Art. 45, § 1 of the Irish Constitution provides: “The principles of social policy set forth in this article are intended for the general guidance of Parliament. The application of those principles in the making of laws shall be the care of Parliament exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.” Art. 37 of the Indian Constitution provides: “The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

enforceable.

The directive principles might be taken to provide guidance in interpreting statutes. The interpretive role directive principles can play in court gives them some characteristics of judicial review, but in an even weaker form than under the Human Rights Act. But, once the principles have such a role, the trilemma recurs. The constitutions state that the courts may not directly enforce the directive principles, and therefore may not directly elaborate constitutionally guaranteed social welfare rights. But, in suggesting that the courts give the directive principles an interpretive role, the constitutions encourage the courts to develop the background rules of law in a way that is analytically equivalent to directing them to elaborate social welfare rights. Even superweak-form judicial review appears to be an unstable solution to the trilemma.

E. Conclusion

The foregoing quick survey of the judicial role under social democracy suggests that there are only a few truly stable institutional arrangements for social democracy. A sharp separation between the constitutional court and the ordinary courts, coupled with passive or weak-form judicial review, makes it possible for the constitutional court to avoid elaborating social welfare rights by adopting the view that the constitution has no horizontal effect. The constitutional court under this arrangement has no power to develop the background rules of law, so it cannot transfer the constitution's concern for social welfare rights to the arena where those background rules can be developed. Alternatively, a thick system of legislatively developed social provision coupled with

passive or weak-form judicial review eliminates much of the pressure on courts to elaborate social welfare rights. I think it possible though unlikely that thin systems of legislatively developed social provision coupled with democratic experimentalist weak-form judicial review might also be stable, but only if legislatures and executive bodies respond to experimentalist initiatives in a collaborative frame of mind or if courts are able to sustain their experimentalism in the face of evasion or resistance. I doubt whether either of the latter conditions is likely to be satisfied often enough.

V. Conclusion

In sum, the constitutional law of a thin social democratic nation is likely to be awkward in the absence of structural arrangements that separate constitutional adjudication from developing the background rules of property and contract. Any position the constitutional court takes on the scope of the state action/horizontal effect doctrine will cause it difficulties: The courts will become caught up in the perhaps impossible task of working out the set of entitlements people should have in a thicker social democracy, or they will be forced to enforce obviously arbitrary lines between what they treat as state action and what they do not.⁶⁶ I offer no normative recommendations in conclusion, but observe only that we are likely to live with thin

⁶⁶ For a more extended analysis of the problem of arbitrariness in the context of Canadian constitutional law, see Mark Tushnet, “Digging Out From Under *Dolphin Delivery*,” prepared for presentation at The Charter at Twenty Conference, York University, Toronto, Canada, April 13, 2002.

social democratic systems for quite a long time and that, as a result, the state action/horizontal effect issue will be with us for a long time as well.