Comparative Constitutional Law

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21. The structure and scope of constitutional rights

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The title and subject of this chapter is the structure and scope of constitutional rights. Because this is not (yet) a generally or widely recognized sub-field of comparative constitutional law, it is quite possible that some readers will find themselves scratching their heads wondering what exactly these words refer to. Indeed, the very term 'the structure of constitutional rights' might appear to be something of a contradiction for, as the organization and table of contents of this volume well illustrate, issues of 'constitutional structure' (Part III) are generally understood to be distinct and separate from issues of 'individual rights' (Part IV). The former cover such matters of institutional and inter-institutional design as separation of powers, federalism and judicial review, whereas the latter concern the direct constitutional relationship between the state and the individual. Even if, in Madisonian vein, we acknowledge that traditional issues of constitutional structure have important effects on this relationship, such as limiting the concentration of political power, these effects are indirect and distinct from the impact of rights.

So let me begin by doing what probably no other contributor to this book will need to do: explain the chapter title. The structure of constitutional rights may usefully be distinguished from their substance. The latter concerns the content and parameters of particular rights that exist in a given constitutional system. By contrast, the structure is the underlying framework – set of concepts, principles, doctrines and institutions – that applies to, organizes and characterizes constitutional rights analysis as a whole within that system (Gardbaum, 2008). Specifically, this chapter will discuss the following three major comparative structural issues concerning rights. First, is there a common general conception both of a constitutional right – what you have in virtue of having a right (Kumm, 2007) – and of limits on those rights among contemporary systems of constitutional law? Second, what is the comparative scope of constitutional rights? What types of law are governed by and subordinated to constitutional rights, and which governmental and non-governmental actors do they bind? Third, how and to what extent do contemporary constitutional systems recognize positive constitutional rights of various types as well as negative ones?

Although each of these three issues has been separately acknowledged and addressed to a greater or lesser degree in practice and scholarship, their commonality and connectedness as forming a distinct sub-field of constitutional rights jurisprudence has generally not. As a subject, the comparative structure of constitutional rights, of course, looks at these issues comparatively: to what extent do different constitutional systems converge on or share a similar or common framework for analyzing and adjudicating rights, whatever may be the individual differences in content. This chapter will conclude with a plea for recognizing the topic as a distinct sub-field within comparative constitutional rights jurisprudence.

1 CONCEPTIONS OF CONSTITUTIONAL RIGHTS AND THEIR LIMITS

For practical (if not necessarily for philosophical) purposes, the dominant general conception of a constitutional right among contemporary constitutional systems around the world – what an individual has by virtue of being able to claim protection of a constitutional right – is an important prima facie legal claim against (mostly) government infringement that can, nonetheless, be limited or overridden by certain conflicting public policy objectives. At least as it applies in the United States, this general conception has been referred to as constitutional rights as 'shields' (Schauer, 1993) in contrast to the peremptory or absolute conception of constitutional rights as 'trumps'. It also contrasts, although less starkly, with a third conception of constitutional rights as specifying exclusionary reasons for government action (Pildes, 1994, 1998).

Within this general conception, the weight of the presumption in favor of the constitutional rights claim varies somewhat from country to country and from right to right. It is sometimes claimed, for example, that the United States has a more 'categorical' conception of rights in this sense, not because rights are necessarily trumps but because of a greater general presumptive weight in favor of a constitutional right (Kumm and Ferreres Comella, 2005). This claim has, however, not gone undisputed (Gardbaum, 2008).

This general conception of a constitutional right is typically operationalized and adjudicated through a two-step process. The first step determines whether a constitutional right is implicated and has been infringed; that is, whether the prima facie claim has been established. The second step determines whether the infringement is nonetheless a justified one; that is, whether the government has rebutted this prima facie case by satisfying the constitutional criteria for limiting or overriding the right. This first step concerns the definition and scope – the interpretation – of a constitutional right; by contrast, the second step involves considering the strength and relevance of the government's conflicting public policy objective.

These two near-universal steps of constitutional rights analysis respectively employ two different types of limits on constitutional rights: internal and external limits. Internal limits on rights concern the definitional scope of a constitutional right and are part of the first-step process of determining whether a constitutional right is implicated in a given situation in the first place. Thus, for example, does the constitutional right to liberty, autonomy or free development of personality include the freedom to choose an abortion? Does freedom of expression include the right to expend money on political campaigns, to engage in 'hate speech' or defame public or private individuals? External limits, by contrast, are constitutionally permissible restrictions on rights that are implicated and do apply in a given situation. That is, they are part of the second-step process of specifying the circumstances in which the government can pursue a public policy objective even though doing so conflicts with and infringes a constitutional right. So, for example, where the constitutional right to liberty, autonomy or free development of personality is interpreted to include the right to choose abortion, the external limit issue is when, if ever, may conflicting public policy objectives asserted by the government limit or override that right? If freedom of expression is interpreted to include 'hate speech', when, if ever, may the government limit or override that right to protect its victims (Gardbaum, 2007)?

Although constitutional scholars have generally viewed these two types of limits as mutually exclusive conceptualizations and debated their respective merits – the internal versus

external theory of limits (Alexy, 2002), definitional versus ad hoc balancing (Nimmer, 1968; Butler, 2002) – the actual practice of constitutional rights jurisprudence tends not to treat them as alternatives by choosing one or the other but to employ both, to a greater or lesser degree, one in each of the two steps of analysis.

It is sometimes claimed that, exceptionally, the United States engages only in the first step of constitutional rights analysis and not the second; that is, courts in the United States treat constitutional rights claims exclusively – or almost exclusively – as issues of definition and scope and not also as issues of balancing rights against conflicting public policy objectives (see the South African Constitutional Court decision in *S v Makwanyane* (1995), at 435; Kumm and Ferreres Comella, 2005). This claim is a second and distinct version of the 'more categorical' conception of rights claim that we saw above and is made in large part because, unusually by comparative standards, the US Constitution contains very few express limits of either type on the constitutional rights it proclaims, but particularly few – if any – express *external* limits. Again, this claim has not gone undisputed, on the basis that such limits have long been judicially implied in the United States (Butler, 2002; Webber, 2003; Gardbaum, 2007, 2008; Dixon, 2009).

As just suggested, both types of limits – internal and external – may be express or implied. Article 9(2) of the German Basic Law provides an example of an express internal limit on the right to freedom of association: 'Associations whose purpose or activities conflict with criminal statutes or that are directed against the constitutional order or the concept of international understanding are prohibited'. Article 13(2) of the Basic Law is an example of an express external limit (here on the right to inviolability of the home): 'Intrusions and restrictions [on the right] may otherwise [than specified in Article 13(2)] be made only to avert a public danger or a mortal danger to individuals, or, pursuant to statute, to prevent substantial danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of epidemics or to protect juveniles who are exposed to a moral danger.' The First Amendment to the US Constitution is an example of a constitutional right with both implied internal and external limits. Thus, neither what types of expression lie outside the right to 'free speech' in the first place nor the circumstances if any in which the government may justifiably limit what is within the right are expressed in the text, but the US Supreme Court has implied both. So it has generally held (1) that obscenity, 'fighting words' and expressions that amount to 'clear and present danger of imminent harm' are not protected at all and (2) that protected 'free speech' may be restricted where necessary for a compelling government interest.

Express external limits are of two types: either a single general statement of the external limits that apply to all constitutional rights (a general limitations clause) or different customized external limits that attach to specific rights, as in the example of Article 13(2) of the Basic Law above. Section 1 of the Canadian Charter of Rights and Freedoms contains a well-known general limitations clause that states: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Section 36(1) of the South African Constitution contains the following general limitations clause:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

the nature of the right;
the importance of the purpose of the limitation;
the nature and extent of the limitation;
the relation between the limitation and the purpose;
less restrictive means to achieve the purpose.

The second step of constitutional rights analysis and adjudication is typically and increasingly operationalized by application of the principle of proportionality. Having its origins in German administrative law, the proportionality principle began to be applied by the Federal Constitutional Court (FCC) a few years after it came into being, in the late 1950s, and has spread over the succeeding decades at rapid speed to many countries and constitutional regimes around the world, including Canada, Israel, South Africa, most European countries and the European Convention on Human Rights (Stone Sweet and Mathews, 2008).

The proportionality principle is nowhere expressly contained or referenced in the text of a constitution – section 36 of the South African Constitution and section 8 of Israel's Basic Law: Human Dignity and Liberty come the closest – but has been implied by courts as the proper methodology for applying textual limitations clauses. Strictly speaking, the proportionality principle determines whether the means employed by the government to promote its conflicting public policy objective are justified but – at least where they are not specified in relevant limitations clause (as, for example, in Article 13(2) of the Basic Law quoted above) – most countries also apply a prior or threshold test to this objective itself. That is, the justification of a rights limitation under second-step analysis typically involves both means and ends requirements. Thus, under its famous *Oakes* test, the Supreme Court of Canada (SCC) first asks whether the government objective in question is 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' and that 'it is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important'.

The proportionality principle is operationalized through a common three-prong test: (1) that the means used are suitable or rationally related to this objective; (2) that they are necessary or minimally impair the right; and (3) that the means used are proportionate; that is, they do not impose disproportionate burdens on the right relative to the objective. This last prong is often referred to as 'proportionality *stricto sensu*', and requires balancing the relative weight of the right and the limitation in the particular circumstances (Alexy, 2002). In this way, even though this same verbal test applies to limitations of all constitutional rights within a system, it does not necessarily involve a single presumption or presumptive weight attaching to all rights equally as the third prong may take into account the relative importance of different constitutional rights.

Although this three-prong content of the proportionality test is fairly uniform, there are at least two variations in how it is applied by courts in different countries. The first is that the courts of certain countries, such as Canada and Germany, employ a more formalized version in which the three prongs of the test are considered separately and in order; only if the previous prong is satisfied does the court move on to the next. By contrast, the South African Constitutional Court (SACC) and the European Court of Human Rights (ECtHR) tend to employ a more gestalt, or all-things-considered, version without breaking down the test into its component parts. The second variation is that the practice of several common law countries in particular reflects a certain unease with the third prong, sometimes by treating the

necessity/minimal impairment as the final stage of proportionality review, by formally omitting it from statements of the test, by conflating it with the necessity test or by rarely relying on it in practice (Rivers, 2006).

As is well known, the United States does not employ the proportionality test for its second-step analysis of determining whether limits on constitutional rights are justified. Rather, it employs the doctrinal framework of fixed tiers of review in which each right is protected by one of a handful of different standards of review – strict scrutiny, intermediate scrutiny, rational basis scrutiny, undue burden standard – imposing greater or lesser burdens of justification on the government. It is widely acknowledged, however, that this second-step methodology still requires US courts to 'balance' rights against conflicting government interests; indeed, the so-called 'anti-balancing critique' is far from limited to countries applying the proportionality principle (Habermas, 1996), but is well represented in US scholarly and judicial writings (Aleinikoff, 1987; Pildes, 1994; Rubenfeld, 2001; Scalia J., e.g. *Crawford v Washington*, 2004). Although it is thus uncontested that the United States employs neither the label nor the precise content of the proportionality test in constitutional rights adjudication, several scholars have argued that the differences between the two second-step methodologies are far smaller and less significant than often assumed or claimed (Jackson, 1999; Beatty, 2004; Law, 2005; Fallon, 2007) and, more generally, do not justify – along with other claimed differences mentioned above – ascribing to it an exceptional conceptualization of constitutional rights (Gardbaum, 2007, 2008).

As part of a sub-field of comparative constitutional law that largely doesn't yet exist, it is not surprising to find that the scholarship in this area is sporadic rather than comprehensive. Two areas in particular seem to be worthy of more attention in the future. First, the focus of study should expand beyond the core group of countries most commonly discussed and compared, not so much to discover different conceptions of rights but a wider range of applications in practice. Second, with a few recent exceptions (Beatty, 2004; Kumm, 2007; Gardbaum, 2007, 2010; Tsakyrakis, 2009; Webber, 2009), there is a relative absence of normative scholarship on proportionality and constitutional balancing, despite a large and growing literature on the conceptual (Alexy, 2002; Fallon, 1993), doctrinal (Emiliou, 1996), historical (Porat and Cohen-Eliya, 2010) and positive dimensions (Stone Sweet and Mathews, 2008) of the topic.

2 THE SCOPE OF CONSTITUTIONAL RIGHTS: VERTICAL AND HORIZONTAL EFFECT

A second fundamental structural issue concerning constitutional rights is their scope of application. Once we know who the subjects – or beneficiaries – of constitutional rights are in any given jurisdiction (typically either all citizens or all persons within it), an equally important but far more complex question arises about their objects: who and what is burdened or constrained by constitutional rights? Which individuals and what types of law do they bind? In particular, what is their reach into the 'private' sphere? Within comparative constitutional law this issue is generally known under the rubric of 'vertical' and 'horizontal effect'. These alternatives standardly refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations among private individuals (horizontal).

The traditional animating idea informing the vertical approach is the perceived desirability of a public-private division in the scope of constitutional rights, leaving civil society and the private sphere free from the uniform and compulsory regime of constitutional regulation. The well-known justifications for this division lie in the values of liberty, autonomy, privacy and market efficiency. A constitution's most critical and distinctive function, according to this general view, is to provide law for the lawmaker not for the citizen, thereby filling what would otherwise be a serious gap in the rule of law (Kay, 1993).

The arguments for adopting the opposite, horizontal approach express an almost equally well-known critique of the 'liberal' vertical position. First, to the extent the function of a constitution is seen as expressing a society's most fundamental and important values, they should be understood to apply to all its members. Second, at least in the contemporary context, constitutional rights and values may be threatened at least as much by extremely powerful private actors and institutions as by governmental ones, and the vertical approach automatically privileges the autonomy and privacy of such citizen-threateners over those of their victims. In this way, the autonomy of racists, sexists and hate-speakers is categorically preferred to that of those harmed or excluded by their actions, without any obvious justification in terms of an overall assessment of net gains and losses in autonomy. Moreover, since the vertical position does not *ipso facto* prevent private actors from being regulated by non-constitutional law, it is unclear why autonomy is especially or distinctively threatened by constitutional regulation (Chemerinsky, 1985; Fiss, 1986).

The analytical and practical complexity of the general issue of the scope of constitutional rights is, however, belied by this seemingly straightforward and simple bifurcation between vertical and horizontal effect. For, as only a little scratching beneath the surface soon reveals, the fact that under the vertical approach (where it applies) private individuals are not bound by constitutional rights in no way entails that constitutional rights do not govern their legal relations with one another (Horowitz, 1955), and thereby determine what they can lawfully be authorized to do and which of their interests, choices and actions may be protected by law. Rather, the traditional vertical position merely forecloses the most direct way in which a constitution might regulate private individuals, by imposing constitutional duties on them (Gardbaum, 2003).

Accordingly, in order to attain a richer understanding of the scope of constitutional rights in any given system and to appreciate the range of answers that exist in practice, it is necessary to supplement the most basic question of vertical or horizontal effect (are individuals as well as governmental actors bound by constitutional rights?) with the following three additional ones. First, even with respect to governmental actors, do constitutional rights bind all such actors or only some; and, if only some, which? In particular, do they bind the legislature and the courts? Second, do constitutional rights apply to private law (and, in common law jurisdictions, to common law) as well as public law? Third, do constitutional rights apply to litigation between private individuals?

There is a fairly wide array of answers to these supplementary questions in practice, with the consequence that the broader question of horizontal effect – the impact of constitutional rights on private individuals – is not a simple yes or no issue but rather a matter of degree. Even with respect to the basic question, those countries that adopt the direct horizontal position by subjecting private individuals to constitutional rights do so to differing degrees and in different ways. So, for example, in Ireland, the 'constitutional tort action' has been implied by the courts from a general textual duty on the state to protect and enforce the rights of indi-

viduals. By contrast, in South Africa, which has been a major focus of scholarly attention as an important case study in horizontal effect, direct horizontality is the express, if partial and complex, mandate of sections 8(2), 8(3) and 9(4) of the constitution (Michelman, 2008).[1]

Even though both the German Basic Law and the Canadian Charter have been determined not to impose constitutional duties on private individuals, in answer to the first supplementary question the SCC has held that Charter Rights do not bind the countries' courts (because section 32, the application clause, refers only to legislatures and 'government', with the latter meaning the executive branch only).[2] By contrast, the FCC has held that the rights in the Basic Law do bind the courts; indeed, the vast majority of successful constitutional complaints in Germany are against the lower courts. Under the *statutory* bills of rights enacted in the United Kingdom and both the Australian Capital Territory and state of Victoria, the rights are expressly stated not to bind the legislature, so as to maintain the essential core of parliamentary sovereignty – although the one enacted in New Zealand does – and in the United Kingdom and New Zealand, but not in the two Australian bills of rights, the rights also bind the courts.

On the second supplementary question, the issue of whether private law (and especially the Civil Code) is subject to the Basic Law and its constitutional rights in Germany was the cause of a major and prolonged debate before the FCC fixed its position in the landmark and influential *Lüth* decision of 1958.[3] The common law was held to be subject to Charter rights by the SCC in the case of *Dolphin Delivery* but, as we will see shortly, not as fully or equally as private statute law. In South Africa, the common law is subject to both 'direct' (under section 8) and 'indirect' (under section 39) application of the Bill of Rights (Michelman, 2008). Both Australian jurisdictions have excluded the common law from being subject to their statutory bills of rights, and this issue has not yet been definitively resolved in the UK.

Finally, on the third question, because the Charter applies neither to private individuals nor to the courts, the SCC also held in *Dolphin Delivery* that Charter rights do not apply to common law litigation between private individuals where the only official action is a court order.[4] By contrast, the major argument in the United Kingdom that the Human Rights Act does apply to such litigation stems from the inclusion of the courts among the 'public authorities' bound to act consistently with Convention rights. In South Africa, the Bill of Rights can apply directly to such suits, although it can also apply indirectly – by developing the common law in line with its 'spirit, purport and objects' (Michelman, 2008).

Again, these different answers to the supplementary questions reflect different degrees of horizontality or practical burden of constitutional rights on private individuals even among countries that share the basic vertical position of imposing constitutional rights duties only on governmental actors. Some of the typical legal areas in which these practical burdens play out are defamation, invasion of privacy suits and employer-employee law.

The issue of horizontal effect has sparked great interest among comparative constitutional law scholars in recent years. The reasons are, I think, twofold. First, it has become of enormous practical importance in the wake of the spectacular burst of constitution-making that has taken place around the world since 1989. Along with such other basic choices concerning the structure of constitutional rights as whether to include positive as well as negative rights, constitution drafters have had to decide whether, how and to what extent private individuals are to be subject to new constitutional rights provisions. Second, the very range of situations with which these new constitutions have been designed to deal – from post-apartheid to post-communism – has challenged and stimulated scholars to think anew about

the nature and functions of constitutions. Are they merely law for the lawmakers or normative charters for reborn societies? Hobbesian social contracts between rulers and ruled, or Lockean ones among equal citizens? In this context, the issue of horizontal effect has been a central one, provoking fresh consideration of how constitutional law differs from other types and sources of law.

One of the major contributions that comparative constitutional law scholars have attempted to make to these real-world transformations has been to clarify the somewhat complex and confusing conceptual framework of the issue of horizontal effect and to develop a coherent and user-friendly menu of options so that informed choices can be made. This became necessary because, for the reasons suggested above, the original and straightforward bipolar distinction between vertical and horizontal effect proved too crude to explain the different ways in which constitutional rights can have an impact on private actors or to capture the most common types of current constitutional practices.

The principal scholarly achievement in this area has been the creation and refinement of a concept that describes an intermediate third position in between the polar positions of vertical and horizontal effect. Originating in the FCC's landmark *Lüth* decision, this concept is known in German as '*mittelbare Drittwirkung*' and more generally as 'indirect horizontal effect', as distinct from the 'direct' horizontal effect of the second polar position. In essence, this intermediate position is that although constitutional rights apply directly only to the government, they nonetheless have some degree of indirect application to private actors. More precisely, the distinction between direct and indirect horizontal effect is that between subjecting private *actors* to constitutional rights on the one hand (direct), and subjecting private *laws* to constitutional rights on the other (indirect) (Gardbaum, 2003; Tushnet, 2003; Cheadle, 2005). In other words, there are two different ways in which constitutional rights might regulate private actors, that is, have horizontal effect: (1) directly, by governing their conduct; or (2) indirectly, by governing the private laws that structure their legal relations with each other. This second, indirect method of regulation limits what private actors may lawfully be empowered to do and which of their interests, preferences and actions can be protected by law.

This distinction should put to rest a certain lingering confusion in the literature about what is 'indirect' in the concept of indirect horizontal effect. For it is sometimes assumed that indirect horizontal effect requires the indirect subjection of private law to constitutional rights in order to distinguish this position from direct horizontal effect. This assumption is incorrect. What is indirect is the effect of constitutional rights on private actors. Unlike the direct effect of constitutional rights resulting from the imposition of constitutional duties in the fully horizontal position, indirect horizontal effect is achieved via the impact of constitutional rights on the private law that individuals rely on and/or invoke in civil disputes. Now this impact on private law can, in turn, be either direct (where constitutional rights apply to it fully, equally and specifically) or indirect (where courts are required or empowered to take constitutional values into account in interpreting and developing its provisions). To distinguish these two, the former has been termed 'strong indirect horizontal effect' and the latter 'weak indirect horizontal effect' (Phillipson, 1999, Gardbaum 2003). But whichever of these two methods is used, it is the indirectness of the effect on private actors, not on private law, that defines the general position.

If there are two ways in which a constitution might regulate private actors – directly and indirectly – there is only one way to ensure that it will not regulate them at all, that is, have

no horizontal effect. This is to limit the scope of application of constitutional rights to public law, the law regulating the relations between individuals and the state. Once the concept of indirect horizontal effect enters the picture, it is insufficient to characterize verticality as subjecting only government to constitutional rights provisions – or as regulating laws and state conduct alone. While this characterization remains useful in anchoring and distinguishing the polar horizontal position, it does not distinguish a truly vertical position from indirect horizontal effect. This is because indirect horizontal effect is quite consistent with this restriction – only government has constitutional duties – yet it still permits significant impact on private individuals by subjecting private laws to constitutional rights scrutiny. For example, Canada and Germany each generally adhere to the traditional vertical approach that constitutional rights bind only the government and yet, in both countries, such rights have significant (indirect) impact on private actors. This traditional approach to verticality, in other words, radically undetermines the true scope of constitutional rights. It is too blunt – that is, consistent with too many relevantly distinct positions on the scope of constitutional rights – to be useful without further refinement. Hence, a better conception of the vertical position is one that distinguishes it from indirect horizontal effect by not permitting any horizontal effect at all. This conception – which might be termed 'strong vertical effect' – is that the scope of constitutional rights is limited to public law only (Gardbaum, 2003; Sommeregger, 2005).

The net result is that the generally understood spectrum of positions has been enlarged to add indirect horizontal effect as a new third position in between the traditional polar ones. In line with the suggestion in the previous paragraph, it has also been proposed that the spectrum of general positions can and should be further refined so that it is understood in the following fourfold way: (1) no horizontal effect at all (strong verticality), (2) weak indirect horizontal effect, (3) strong indirect horizontal effect and (4) direct horizontal effect (Gardbaum, 2003, 2006). Of course, for countries at the direct horizontal end of the spectrum, these are not necessarily mutually exclusive choices as they typically also adopt some form of indirect horizontal effect, as, for example, in Argentina.

A second strength of the comparative scholarship has been exploration of the connections between the structural issue of the scope of constitutional rights and the substantive issue of their content. Of course, the general argument that the structure of constitutional rights should be recognized as a distinct sub-field does not turn on a claim of being hermetically sealed and having no interaction with substance; to the contrary, part of its remit would be to explore the connections in both directions. Given that, as we have seen, indirect horizontal effect subjects (all or most) private law to constitutional rights scrutiny, in any country adopting this position – or, of course, direct horizontal effect – the actual or concrete consequences for private individuals turn wholly on the substance of those rights. So, for example, very broad substantive constitutional equality or free speech norms (such as incorporating disparate impact or incidental burdens on speech) would result in much traditional contract, property and tort law being unconstitutional or significantly altered to cohere with constitutional norms, and so have greater impact on individuals; narrower substantive norms (such as prohibiting only intentional government discrimination or content-specific speech regulation) would not (Tushnet, 2003; Gardbaum, 2003). Indeed, this connection has led Tushnet to argue that the threshold 'state action' issue is conceptually equivalent to the issue of constitutional social and economic rights: the more extensive a commitment to social and economic rights, the more easily courts will lower barriers of scope; the greater the resistance to such substantive rights, the more courts will employ verticality as a threshold defense technique (Tushnet,

2003). Similarly, scholars have explored the subtle connections between jurisdictional, institutional and procedural differences among certain highest courts – whether they are specialist constitutional or generalist courts, whether they have jurisdiction to interpret and apply private, common or state/provincial law – and the operation of indirect horizontal effect in those countries (Tushnet, 2003; Kumm and Ferreres Comella, 2005; Michelman, 2008).

One specific issue about which there has been a fair amount of disagreement – or at least somewhat contradictory understandings – in comparative constitutional scholarship is the actual position of the United States on horizontal effect. So, on the one hand, probably the dominant view is that the US's well-known 'state action doctrine' results in it rejecting or limiting indirect horizontal effect and so being closer to the vertical end of the spectrum than many other contemporary constitutional systems, including Germany and Canada (Hunt, 1998; Tushnet, 2003; Kumm and Ferreres Comella, 2005; Halmai, 2005). On the other hand, it has been claimed specifically that Canadian courts and the courts of other common law countries have taken a 'more cautious' approach than the US Supreme Court on the issue (Uitz, 2005; Saunders, 2005) and, more generally, that far from rejecting or limiting indirect horizontal effect, the US adheres to it in its *strong* form: that is, all law – including private law statutes and court-made common law at issue in private litigation – is fully, equally and directly subject to constitutional rights scrutiny (Gardbaum, 2003, 2006).

Despite this recent flowering of interesting and high quality comparative constitutional scholarship on the topic, which often compares favorably with purely domestic scholarship in the area, much remains to be done. Perhaps the two most important gaps to be filled are these. First, almost inevitably and like much other work in these still fairly early days of the revival of the discipline as a whole, the scholarship tends to be focused on a fairly small cluster of countries – here, mostly Germany, Canada, the US and South Africa. To some extent this is justified because, as with the case of the proportionality principle discussed in Section 1, the German approach has been enormously influential and adopted with or without modification in many other countries. And developments in South Africa, in this area and others, have been important in rethinking the functions and possibilities of constitutional law. Nonetheless, on this topic, apart from the standard or general concerns of skewed data points and representativeness, there is the more specific one that comparative scholarship has mostly ignored fascinating and original developments on direct horizontal effect in recent years in several Latin American countries – including Colombia, Argentina and the US territory of Puerto Rico – under the writs of *amparo* and *tutela* (Rivera-Perez, forthcoming). Indeed, these countries provide the best case studies of a position that has largely been treated as a theoretical option only in the literature. The second major gap is a comparative empirical assessment of the total impact of constitutional rights – or, more likely, of particular ones – on private actors resulting from a combination of all the relevant structural and substantive issues. These are: (1) which position on the refined vertical-horizontal spectrum a country takes; (2) the jurisdiction of its constitutional court or courts; (3) the content of its constitutional rights provisions; and (4) the existence of positive constitutional rights (for the explanation, see the next section).

3 NEGATIVE AND POSITIVE CONSTITUTIONAL RIGHTS

A third important topic concerning the comparative structure of constitutional rights is the

distinction between negative and positive constitutional rights that is manifested and institutionalized within and among different contemporary constitutions. Thus, some contain no or very few positive rights, others include both negative and positive constitutional rights and some constitutional courts give positive interpretations to certain seemingly negatively phrased rights but not others.

The basic conceptual distinction between negative and positive constitutional rights is well-known and straightforward. Negative constitutional rights – or what are commonly known as defensive rights (*Abwehrrechte*) in Germany – are rights not to have certain things done to you, typically (but not necessarily) by the government. In this sense, negative constitutional rights impose limits or duties of forbearance on (mostly) government action, on what governments can lawfully do. Thus, classic negative rights include the right not to be deprived of liberty or private property and not to be subject to cruel or inhumane punishment. By contrast, positive constitutional rights are rights to certain states of affairs; that is, they are constitutional entitlements. They impose affirmative obligations – rather than limits – or duties of action on (mostly) government actors. Classic positive rights include the right to vote, to protection from violence, to education and healthcare. Although, of course, this distinction does concern the content of constitutional rights, it also raises more general issues that are appropriately thought of as structural.

Analytically, this issue of negative and positive rights is distinct from that of horizontal effect considered in the previous section because it concerns the nature or type of the duties that constitutional rights impose on *whomever* they bind. Usually, as we have seen, this is only government actors (even under indirect horizontal effect), but where and to the extent that constitutional rights also bind private actors, they may, at least in theory, impose affirmative obligations on them (for example, to protect their neighbors from theft or violence). Despite this analytical distinction, in practice positive rights are an important source of indirect horizontal effect. This is because to the extent that constitutional rights require government to regulate private actors, private actors are indirectly affected by and subject to them (Gardbaum, 2003, 2006). Mark Tushnet has, in addition, argued that substantively the two are connected insofar as 'the more extensive a nation's commitment to social welfare values in its legislation, the readier that nation's courts will be to utilize an expansive doctrine of state action/indirect horizontal effect. The reason is simple. The state action doctrine is, at bottom, *about* social and economic rights' (Tushnet, 2003, 2008; emphasis in original).

Modern constitutions contain two main types of positive constitutional rights. The first is social and economic rights – or constitutional welfare rights – as, for example, the rights to education, healthcare, housing, minimum standard of living and work. The second is protective rights: constitutional rights to protection or security from the state against certain types of action by fellow-citizens, such as violence and theft. Constitutions may and do contain (1) both types of positive rights, (2) one type but not the other or (3) neither. This distinction between the two main types of positive rights serves as a reminder that not all positive rights are social and economic in nature and also that the converse is true: not all social and economic rights are positive rights. For example, such significant social and economic rights as the right to choose an occupation and the right to educate one's child privately – where recognized in a constitution – may (but need not) be exclusively negative in scope, requiring only governmental forbearance from prohibiting business entry and banning private schools. These examples also make clear that the positive or negative nature of a constitutional right cannot automatically be inferred from its general formulation as a right 'to' or 'not to be'.

There are many examples of positive social and economic rights in modern constitutions, although the number and extent of such rights varies enormously from region to region and also from country to country. Both this fact and the gap in truly comprehensive comparative scholarship on the issue make generalizations perilous and, often, over-broad. Nonetheless, two can be stated with a high degree of confidence. First, as 'second generation' rights, constitutional social and economic rights are primarily the product of one of the two great modern bursts of constitution-making, the first after 1945 and the second after 1989. Accordingly, the existence of at least express constitutional welfare rights is highly correlated with constitutions written (or amended) during one of these periods. The 1947 Italian and the 1996 South African constitutions are perhaps paradigmatic in this regard. Second, and notwithstanding this first point, overall the constitutions of the newly liberated countries of central and eastern Europe and South Africa, as well as other developing and formerly colonized nations, more consistently contain significant numbers of social and economic rights than other countries, including those in Western Europe (Gardbaum, 2008). The most common examples of positive social and economic constitutional rights are the rights to public education, to healthcare and to social security.

Whereas where granted, positive social and economic rights are typically expressly contained in a constitutional text, constitutional rights to protection are a little more evenly divided between text and judicial implication. So, for example, the constitutions of South Africa, Greece, Switzerland and Ireland contain express rights to state protection.[5] Elsewhere, protective duties have been implied by the judiciary from certain textual rights that seem on their face negative. Thus, the best-known and most important protective duties (*Schutzpflichten*) in Germany concern the right to life and freedom of expression. The FCC famously interpreted the former in the First Abortion Case to require the state to protect the lives of fetuses against such private actors as their mothers, presumptively through the criminal law.[6] The right to freedom of broadcasting was also interpreted by the FCC to require state regulation to ensure the protection of citizens' access to the full range of political opinions necessary for them to make informed decisions at elections.[7] Although admittedly an international court, the ECtHR has been particularly active in inferring protective duties from the seemingly negatively phrased civil and political rights contained in the European Convention. In a series of cases, it has ruled that both the right not to be subject to 'inhuman or degrading treatment' under Article 3 and the 'right to respect for ... private and family life' under Article 8 require states to enact laws effectively protecting children from sexual and other physical abuse by adults. It has also held that freedom of assembly under Article 11 requires positive action, including effective police protection, to ensure the right may be exercised.[8]

Unlike the case generally with negative constitutional rights, the practical impact of both types of positive constitutional rights is sometimes significantly reduced either by express statements in the constitution that some or all such rights are not judicially enforceable or by judicial practice to similar effect. Starting with social and economic rights, the constitutions of Ireland, India and Spain (in the latter case, apart from the right to education) expressly distinguish between rights proper and 'directive' or 'guiding principles' of social and economic policy that are intended to guide the legislature but are not cognizable by any court. Similarly, apart from the rights to primary education and to 'aid in distress', the Swiss Constitution contains a set of 'social goals' that is expressly declared to be non-justiciable. The Netherlands Constitution declares that '[i]t shall be the concern of the authorities' to

promote or secure certain social and economic *goals*, such as 'sufficient employment', 'the health of the population' and 'sufficient living accommodation', but it specifically grants '*rights*' only to a 'free choice of work' and to 'aid from the authorities for those unable to provide for themselves'. Moreover, Article 120 of the constitution expressly denies Dutch courts the power of judicial review at all, which prevents these two rights from being enforced against the legislature.

Even where judicially enforceable, constitutional courts have generally been cautious about the scope of their review of social and economic rights and have tended to grant legislatures wide discretion as to the means of fulfilling their affirmative obligation. Accordingly, a reasonableness test has been the norm. In South Africa, this reasonableness standard – relative to available resources – is actually contained in the text as defining the positive obligations of the state with respect to most of its social and economic rights, and the constitutional court has as a result rejected the proposition that such rights entitle individuals to be provided with 'a minimum core'. As is well known, however, in the important cases of *Grootboom* and *Treatment Action Campaign*, the SACC held that government policies in the areas of housing for the desperately needy and combating mother-to-child transmission of HIV were unreasonable and thus unconstitutional. Moreover, in the latter case, the SACC ordered the government to change its restrictive policy on access to the drug Nevirapine. Both the Japanese and Korean supreme courts have subjected textual rights to minimum living standards to highly deferential reasonableness tests under which government programs were upheld, although both acknowledged that government failure to act at all to promote the constitutional objective would amount to an unconstitutional abuse of discretion. The Italian Constitutional Court has also generally interpreted the many social and economic rights contained in the 1947 Constitution as imposing a reasonableness test on government policy in the relevant areas (Llorente, 1998). These differences have led Tushnet to classify social and economic rights into three types: (1) merely declaratory; (2) weak substantive rights and (3) strong substantive rights (Tushnet, 2008).

Similarly, the level of judicial scrutiny to which constitutional rights to protection are subject is typically lower – more deferential – than that afforded to negative rights within the same constitution. Accordingly, protective rights generally grant to governments greater discretion in doing what they must do than negative ones grant in what they cannot. As we saw in Section 1, constitutional rights are typically protected by a proportionality test under which the intensity of scrutiny varies, among other things, with the importance of the right in question. Even the relatively less important rights, though, are subject to the second, minimal impairment prong that provides additional protection above and beyond the first, rationality prong. Protective rights, however, are generally subject only to a form of reasonableness test, rather than the usual proportionality test. That is, courts typically ask only whether the state has reasonably fulfilled its positive duty, a usually lenient and deferential test that rarely results in findings of failure. The reasons for this more lenient test are the standard reasons for wariness about including positive rights in constitutions that we will briefly canvass in the next subsection: that in telling the elected branches of government what they must do, the judiciary lacks institutional expertise and assumes control of the public purse. In Germany, the FCC has not held that the government violated its protective duty with respect to the right to life and health in any case other than the two concerning abortion (Neuman, 1995).

Apart from descriptive work on particular countries, and here South Africa and the former Soviet-bloc nations have been the major subjects, more general or structural scholarship on

negative and positive constitutional rights has mostly focused on the following two issues. First, certain scholars have called into question the conceptual distinction between negative and positive rights, and others, while accepting the distinction in theory, have argued that the difference between them in practice is far smaller than assumed. Second, there has been a robust debate on whether constitutions should contain positive rights and to what extent, if any, socio-economic rights guarantees in particular make much difference in practice. A third, perhaps slightly more parochial, issue and one that is generally less the occasion for argument than assumption is the following: how distinctive is the United States Constitution on this topic?

Although not the first to do so, Cass Sunstein has cast doubt on the general distinction between negative and positive constitutional rights by arguing (1) that 'most of the so-called negative rights require government assistance, not governmental abstinence', giving the examples of the creation and dependence of private property, freedom of contract and criminal procedure rights on law and courts, and (2) that '[a]ll constitutional rights [and not only positive ones] have budgetary implications; all constitutional rights cost money' (Sunstein, 2005). To the extent this is intended as an argument about the conceptual rather than the practical difference between the two, I think Sunstein succeeds in showing that it is possible for property and contract rights to mandate governmental assistance *as a matter of constitutional law* – by, for example, requiring the state to create and protect property and enforce contracts against private infringements; that is, the right to a system of private property – but I'm not sure he shows that it is inherent or necessary. A purely negative constitutional right to property is surely conceivable and might include only a right against government takings of private property (where it exists) without just compensation or government deprivation of property without due process, and freedom of contract only against arbitrary government regulation. That is, there are or may be distinct negative and positive constitutional rights concerning property and contract. Whether or not the United States or any other country has such extensive constitutional (as distinct from legislative or common law) rights to property and contract as to incorporate the positive side, the basic conceptual distinction between negative and positive constitutional rights appears to survive the challenge (Gardbaum, 2008).

This debate, of course, overlaps with the one in the international human rights arena concerning the concept of the 'generations' of rights, which includes – but is certainly not limited to – the issue of whether there is a valid distinction or inherent difference between the so-called 'first generation' of human rights (civil and political rights) and the 'second generation' (economic, social and cultural rights) (Alston, 2001; Daintith, 2004).

More specifically on practical differences between negative and positive rights, David Currie pointed out that the effect of common general constitutional anti-discrimination provisions, such as the US's equal protection clause, is to create 'conditional affirmative' duties of protection and provision of government services. '[I]f government undertakes to help A, it may have to help B as well.' Moreover, given the practical impossibility of abandoning certain protective laws (such as the criminalization of murder and theft) and government welfare programs, the effect of such anti-discrimination provisions will often be the same as if there were an absolute affirmative constitutional duty to enact the laws or program (Currie, 1986). Currie's point explains, for example, why in the United States, even absent a constitutional duty to protect the right to life of a fetus as exists in Germany, a finding that a fetus is a 'person' for constitutional purposes would probably entail in practice that the state must

protect its life along with the other persons it chooses to protect. Failure to do so would likely amount to unconstitutional discrimination.

A second area that has attracted a good deal of scholarly attention is the issue of whether or not constitutions in general – and particularly the new constitutions of countries seeking to make the transition from centralized to market economies in central and eastern Europe – should include social and economic rights. Most of the arguments, for and against, have focused on pragmatic or instrumental concerns rather than theoretical, moral or intrinsic ones. Arguments against such rights include that they either become meaningless promises and thereby threaten to undermine negative rights and the rule of law or are ruinously expensive for poorer countries (Sajó, 1996), and that they unduly interfere with the attempt to create market economies and hobble the creation of civil society (Sunstein, 1993). More generally, it has been argued that pragmatic understanding of the operation of government and particularly the judicial system dooms any hopes that the recognition of positive rights will improve the lives of the intended beneficiaries (Cross, 2001). One argument for such rights is that court decisions on social rights can bolster elected politicians' ability to stand up to international financial institutions preaching 'market fundamentalism' and thereby enhance public support for democracy (Scheppele, 2004). Another is that failure to include such rights would be viewed by the people as an attempt by the ruling elite to deprive citizens of their acquired rights and fatally undermine popular support for the new regime (Osiatynski, 1996).

Whether and how positive rights in general and social and economic rights in particular are justiciable and enforceable has always been a major part of this issue (Craven, 1999; Scheinin, 2001). Two developments in the past decade have enriched this aspect of the scholarly debate. First, the fact that the SACC first declared the final constitution's social and economic rights to be judicially enforceable and then the manner in which it enforced two of them in the *Grootboom* and *Treatment Action Campaign* cases mentioned above had a substantial impact on this issue, even persuading some academic commentators to partially change their minds (Sunstein, 2001). It has also provided fresh evidence and insights on the questions of whether and how social and economic constitutional rights make any real difference to the lives of the poor (Davis, 2008). Second, the recent establishment and growth of what has variously been termed 'weak-form judicial review' (Tushnet, 2002) and 'the new Commonwealth model of constitutionalism' (Gardbaum, 2001) has provided a new form of judicial review – in which the legislature has the legal power of the final word – that may be particularly appropriate for social and economic rights (Tushnet, 2004; Dixon, 2007).

A third issue is the distinctiveness of the United States on this issue. Is it distinctive, to what extent and in what precise regard? And if so, what is the explanation? The starting point is the observation, encapsulated in a well-known phrase from a lower court opinion, that the US Constitution is a 'charter of negative rather than positive liberties'. And the common implication is that this makes the United States exceptional by contemporary standards. Thus, it has occasionally been argued – but more often simply stated or assumed – that the US Constitution is highly exceptional in not creating any social and economic rights (Sunstein, 2005). Although undoubtedly reflecting the broad scholarly consensus within comparative constitutional law, this claim about the extent or degree of US exceptionalism has not, however, gone entirely unchallenged. Gardbaum has argued that (1) US constitutional culture cannot be assessed only from the federal perspective because many state constitutions in the United States contain some social and economic rights; (2) few other common law jurisdictions contain social and economic rights in their constitutions or bills of rights; and (3) even

among continental West European constitutions, the extent to which they contain such rights can and is easily exaggerated. In short, the US is not unique on this issue and, especially when compared to its 'peer' group of developed countries, not really that distinctive. Perhaps most importantly, the extent and existence of modern welfare states do not appear to be correlated in any obvious way to the presence, absence or scope of constitutional social and economic rights. Welfare states are overwhelmingly the products of ordinary legislative processes rather than constitutional mandates. Even with respect to protective duties, he argues that the US is less exceptional than often thought (Gardbaum, 2008).

Regardless of how distinctive its position really is, the standard explanations for the absence of constitutional social and economic rights in the United States are the age of its constitution, the relative difficulty of amending it, the traditional focus on 'hard', judicially enforceable rights and broader political/cultural exceptionalism that includes the near-unique absence of a strong socialist movement. Sunstein has recently shown the limitations of these conventional explanations and proposed a more plausible and original 'realist' one, focusing on the contingency of presidential election results and consequent judicial nominations at the critical moments when US courts might otherwise have done what was done elsewhere and reinterpreted existing constitutional provisions to include social and economic rights (Sunstein, 2005).

In terms of gaps or weaknesses in the scholarly literature in this area, the major one is perhaps the insufficient amount of truly comparative work on positive rights – as distinct from (1) either more abstract or heavily contextualized arguments for and against recognizing them, and (2) a focus on specific individual rights or countries. Fortunately, of course, there are exceptions (e.g. Daintith, 2004). But in the general absence of such work, this tends to be an area in which assumptions and overgeneralizations are too often repeated rather than analyzed or questioned.

4 CONCLUSION

The fact that this chapter has discussed three important, general structural issues concerning constitutional rights with only very limited reference to their substance or content illustrates that the two topics are – though hardly entirely unconnected – distinct, and strongly suggests they should be recognized as forming a unified and separate sub-field within comparative constitutional rights jurisprudence. For one thing, this will permit more focused study on the interactions between the two.

Another reason is the sheer importance of constitutional rights in modern constitutionalism. Of course, it is possible to have both constitutionalism without a codified constitution and a constitution without having constitutional rights – as the original body of the US Constitution and the existing Australian Constitution mostly illustrate. However, protection of fundamental or human rights has been the central driving force behind the tremendous growth of constitutionalism and judicial review around the world since the end of World War II, so that the greater analytical and scholarly tools that would come from sub-dividing comparative constitutional rights jurisprudence into its two components of structure and content would appear to be a promising prospect.

As part of this greater refinement, it will also encourage (1) examination of the extent to which structural positions operate as axiomatic, foundational or threshold principles shaping and constraining the substance of rights and (2) independent consideration of the extent to

which structure and substance may be more or less similar or different among constitutional systems. If, for example, it turns out that the structure of constitutional rights tends to be more similar than their content across constitutional systems, this will be an interesting and important finding calling for explanation and resulting in a deepening of our understanding of constitutional rights as a whole.

Indeed, the two parts of constitutional rights jurisprudence may well be subject to somewhat different influences. Thus, structural similarities or convergences among constitutional systems may perhaps be best explained as a form of practical near-necessity within the dominant form of liberal-democratic constitutionalism that embraces constitutionalized rights (as distinct, that is, from the increasingly marginal form that does not). So, for example, once rights have been constitutionalized, the claims of conflicting public policy objectives create strong pressures to affirm a general conception of rights as shields rather than trumps with a two-stage process of analysis. Once a constitution – including a bill of rights – is granted supreme law status and so uniquely provides law for the lawmaker, there is a certain force to the claim that it should govern all law, private as well as public, but not otherwise directly regulate individual citizens. And once a bill of rights is being framed or subsequently interpreted, there are pragmatic reasons for focusing on more traditional civil and political rights and leaving the existence or extent of positive social and economic rights to legislative decision. After all, unlike conventional tyranny-of-the majority reasons for endorsing the former, those who benefit from social and economic entitlements typically form the electoral majority so that there is no prima facie reason to distrust the democratic process in this area.

By contrast, substantive differences in constitutional rights within the general parameters set by these structural principles may be best explained by a combination of contextual factors, including differences in political and legal culture, expressive values and the age and content of constitutional text. That is, these factors of divergence may tend to play out here rather than at the level of structure.

In sum, greater focus on the structure of constitutional rights and greater recognition of the division between structure and substance promise to open up exciting and important new possibilities within comparative constitutional scholarship, and from here to practice.

NOTES

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1. Irish Constitution, Art. 40.3.1 (1937); see e.g. *Meskell v Coras Iompair Eireann*, [1973] IR 121. 'A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right'. South African Constitution, section 8(2). Section 9(4) imposes a duty on private individuals not to discriminate against others on the same comprehensive set of grounds applicable to the state.
2. *Retail, Wholesale & Dep't Store Union v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.
3. BVerfGE 7, 198 (1958).
4. At the same time, the SCC stated in *Dolphin Delivery* that Charter rights are not entirely irrelevant to such private litigation. Rather, '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' [1986] 2 SCR, at 605. The distinction between the direct application of Charter *rights* and the general influence of Charter *values* in private, common law litigation has been maintained by the SCC ever since, and it elaborated on the practical significance of the distinction in *Hill v Toronto*, [1995] 2 SCR 1130. Arguably, however, more recent cases in which courts have modified the common law in line with Charter values, such as *Grant v Torstar Corp.*, [2009] SCC 61 (creating new defence in common law defamation actions of 'reasonable communication on matters of public interest'), have rendered the distinction a very fine one in practice.

5. See e.g. South African Constitution, section 12(1): 'Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources'.
6. BVerfGE 39, 1 (1975).
7. BVerfGE 12, 205 (1961).
8. *X and Y v The Netherlands*, 91 ECtHR (ser. A) (1985); *Plattform 'Ärtze für das Leben'*, 139 ECtHR (ser. A) (1988).

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